TEXAS SUPREME COURT UPDATE

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State Bar of Texas
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ADVANCED PERSONAL INJURY LAW COURSE
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CHAPTER 1

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BIOGRAPHICAL INFORMATION

PROFESSIONAL ACTIVITIES

Board Certified:	Personal Injury Trial Law (1992; re-certified 2002)
Course Director:	State Bar of Texas: Advanced Personal Injury Law Course, 2011
Planning Committees:	State Bar of Texas: Handling Your First Auto Collision Case, 2014 State Bar of Texas: Advanced Personal Injury Law Course, 2014 State Bar of Texas: Evidence and Discovery Course, 2014 State Bar of Texas: Evidence and Discovery Course, 2013 State Bar of Texas: Advanced Personal Injury Law Course, 2012 State Bar of Texas: Prosecuting or Defending a Trucking or Auto Accident Case 2010, 2008, and 2007
Standing Committees:	Member, Court Rules Committee: State Bar of Texas Past-Chair, Federal Practice Committee: Houston Bar Association
Texas Super Lawyers:	Selected 2013, 2012
Court Admissions:	United States Fifth Circuit Court of Appeals United States District Court: All Texas Districts
Commissioner:	Police Officers' Civil Service Commission, City of Houston (2006 – 2009)

PUBLICATIONS AND PRESENTATIONS

Supreme Court Update
State Bar of Texas: Advanced Evidence and Discovery Course, 2014
Real Estate and the Law—Plaintiff's Perspective
Jones Graduate School of Business, Rice University, 2014
Supreme Court Update
State Bar of Texas: Advanced Evidence and Discovery Course, 2013
Liability Issues for Rescue Organizations
Houston Bar Association: Animal Law Section, 2013
Experts, Daubert, and the Texas Supreme Court
State Bar of Texas: Prosecuting or Defending a Trucking or Auto Accident Case, 2013
Getting the Charge Right & Charge Error Preservation
University of Texas, Page Keeton Civil Litigation Conference, 2013
Getting the Charge Right & Charge Error Preservation
State Bar of Texas: Advanced Civil Appellate Practice Course, 2013
Getting the Charge Right
State Bar of Texas: Webinar, 2013
Presenting and Defending a Trucking Case
State Bar of Texas: Webinar, 2013
Jury Charge: Demonstration of a Charge Conference
State Bar of Texas: Advanced Civil Trial Course, 2013
Real Estate and the Law—Plaintiff's Perspective
Jones Graduate School of Business, Rice University, 2013

Civil Liability Exposure for the Nonprofit
Houston Bar Association: Animal Law Section, 2012
Supreme Court Update
State Bar of Texas: Advanced Personal Injury Law Course, 2012
Legal Risk: Real Estate and the Law—Plaintiff's Perspective
Management 660: Jones Graduate School of Business, Rice University, 2012
Liability Issues and Civil / Criminal Exposure
Houston Bar Association: Animal Law Section, 2011
Supreme Court Update
State Bar of Texas: Advanced Personal Injury Law Course, 2011
Supreme Court Update
Houston Bar Association: Litigation Section, 2010
Supreme Court Update
State Bar of Texas: Prosecuting or Defending a Trucking or Auto Accident Case, 2010
Supreme Court Update—Procedure
State Bar of Texas: Prosecuting or Defending a Trucking or Auto Accident Case, 2008
Supreme Court Update—Procedure
State Bar of Texas: Prosecuting or Defending a Trucking or Auto Accident Case, 2007
Earning, Collecting & Keeping Attorney's Fees
Harris County Criminal Lawyers' Association, 2007
DWI in the Twenty-First Century—Prosecution View
Houston Bar Association, 2003
Procedure Update—State
South Texas College of Law: Advanced Civil Trial Law, 1995
Procedure Update—State
South Texas College of Law: Advanced Civil Trial Law, 1994

EDUCATION

University of Texas, School of Law; J.D. (1980)
University of Texas at Austin; B.A., with Honors (1977)

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Attorney: 2012-present

Hon. Lawrence "Larry" Weiman, 80th District Court, Harris County, Texas

Law Clerk/Briefing Attorney: 2011-2012

Hon. Ann Marie Calabria, North Carolina Court of Appeals

Intern/Law Clerk: 2008-2010

PROFESSIONAL ACTIVITIES

Admitted: State Bar of Texas, 2010

United States District Court, Southern District of Texas, 2013

Memberships: Texas Trial Lawyers Association, Houston Trial Lawyers Association,

Houston Bar Association

PUBLICATIONS AND PRESENTATIONS

Supreme Court Update
State Bar of Texas: Advanced Evidence and Discovery Course, 2014
(with Jay Jackson)

Liability Issues for Rescue Organizations
Houston Bar Association: Animal Law Section, 2013
(with Jay Jackson)

Experts, Daubert, and the Texas Supreme Court
State Bar of Texas: Prosecuting or Defending a Trucking or Auto Accident Case, 2013
(with Jay Jackson)

EDUCATION

Campbell University, School of Law; J.D., *cum laude* (2010)

North Carolina State University, B.A. (2002)

Brian *Manny* *Jay* *Sandra*

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TEXAS SUPREME COURT UPDATE

I. INTRODUCTION

It is an honor and privilege to present the "Texas Supreme Court Update" to the State Bar of Texas' *Advanced Personal Injury Law Course 2014*.

A. Abstract

This article provides you with analysis of every opinion issued by the Texas Supreme Court from January 1, 2013, up to the submission date of this paper on June 5, 2014. This includes, for instance, substantive law, discovery, pleadings, and evidentiary points.

B. Form

1. Quotations and Italics.

In each section, cases are listed from latest to earliest. To preserve space, footnotes and most internal citations have been omitted; a few were retained to provide precision or controlling references. Also, within quotations, the paragraph structure from the original opinion has occasionally been eliminated. Further, to promote clarity, in some instances I have quoted passages in a sequence different from how they appear in the opinions. Additionally, sometimes quoted material has included quotations of quotations: in that event, I have used double quotation marks initially, followed by single quotation marks, but I have provided no further indication of embedded quotations. Finally, all italics are original.

2. Citations.

Standard citations of the cases were given when the information was available. However, at the time this paper was submitted, volume and page numbers in the Southwestern Reporter for many of the opinions had not yet been assigned.

C. Acknowledgements

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II. ATTORNEYS' ISSUES

A. Attorney's Fees

1. *Kennedy Hodges, L.L.P. v. Gobellan*, S.W.3d (Tex. 2014)(5/16/14)

Attorney left law firm and took some clients. Firm sued attorney, but arbitration was not provided in the employment agreement, and firm did not seek it. Firm sued clients and did seek arbitration as permitted by the retainer agreement. The Supreme Court ruled that firm did not waive its right to arbitration with clients by litigating its claim with associate.

2. *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, ___ S.W.3d ___ (Tex. 2014)(5/9/14)

In a dispute about whether plaintiff accepted defendant's settlement offer, the Supreme Court ruled that the plaintiff's attempted acceptance had not altered the material terms of the offer. Moreover, the common law, not Rule 167 or Ch. 42, governs the breach of contract claim on the settlement because the suit does not seek to recover litigation costs.

Texas' public policy favors settlements, and "chapter 42 and rule 167 encourage such settlements." "When applicable, chapter 42 and rule 167 provide a method by which parties in certain cases who make certain offers to settle certain claims can recover

certain litigation costs.…" A "non-conforming offer 'cannot be the basis for awarding litigation costs under'" under the rule. Chapter 42 and Rule 167 do not "govern here" since the issue is not attorney's fees but breach of contract, so plaintiff "was required to prove a valid 'acceptance' under contract law.…"

3. *Long v. Griffin*, ___ S.W.3d ___ (Tex. 2014)(4/25/14)

After lengthy oil and gas litigation involving an "assignment" and a declaratory judgment claim, plaintiffs partially prevailed and the trial court awarded fees based upon an attorney's affidavit. Fees were requested under both the "lodestar" method and under a contingency fee theory. Ruling that the evidence for the fees was "legally insufficient," the Supreme Court reversed and remanded. A "party choosing the lodestar method of proving attorney's fees must provide evidence of the time expended on specific tasks to enable the fact finder to meaningfully review the fee application. Here, the … generally stated the categories of tasks performed, but the application failed to include … the requisite specificity."

The affidavit indicated two lawyers had spent 644 hours, their hourly rates, and that services for theories upon which they prevailed were "inextricably intertwined" with other litigation services. But, there "no evidence of the time expended on particular tasks."

The "assignment issued included a claim for breach of an agreement, for which … attorney's fees are recoverable under … Chapter 38, subject to additional limitations." There was also a declaratory judgment claim, "which allows trial courts to 'award costs and reasonable and necessary attorney's fees as are equitable and just.'"

The attorneys here "used the lodestar method by relating the hours worked for each of the two attorneys multiplied by their hourly rates for a total fee." Generalities about time spent are insufficient. "Sufficient evidence includes, at a minimum, evidence 'of the services performed, who performed them and at what hourly rate, when they were performed, and how much time the work required.'"

In this case, there was no evidence of "time spent on specific tasks." "[W]ithout any evidence of the time spent on specific tasks, the trial court had insufficient information to meaningfully review the fee request.… [C]ontemporaneous evidence may not exist. But the attorneys may reconstruct their work to provide the trial court with sufficient information.…"

The affidavit also claimed a contingency fee was "reasonable and customary." "Even if supporting evidence is not required for the contingency fee method of proof (as it is for the lodestar method), the contingency fee method cannot support the trial court's fee award here because the final judgment awarded no monetary relief except for attorney's fees."

4. *Long v. Castle Texas Production Limited Partnership*, 426 S.W.3d 73 (Tex. 2014)(3/28/14)

This opinion generally addresses the date from which postjudment interest runs.

There can be a remand "for recalculation of attorney's fees when evidence of work performed existed but was insufficient to support the amount awarded in the judgment."

5. *Tedder v. Gardner Aldrich, LLP*, 421 S.W.3d 651 (Tex. 2013)(5/17/13) ("corrected opinion" was issued 12/13/13)

Corrected opinion: footnote 2 changed. *See Tedder*, below, at 5/17/13.

6. *Tucker v. Thomas*, 419 S.W.3d 292 (Tex. 2013)(12/13/13)

After a hearing to modify child custody (but not to enforce a payment obligation), court awarded mother her attorney's fees "as additional child support." The Supreme Court ruled that, "in the absence of express statutory authority, a trial court does not have discretion to characterize attorney's fees awarded in nonenforcement modification suits as necessaries or as additional child support."

"A trial court's authority to award attorney's fees in civil cases may not be inferred; rather, the Legislature must provide authorization through the express terms of the statute.…" "Texas has long adhered to the American Rule with respect to awards of attorney's fees, which prohibits the recovery of attorney's fees from an opposing party in legal proceedings unless authorized by statute or contract.… [The] Family Code provides a comprehensive scheme authorizing a trial court to award attorney's fees pursuant to both a general statute and specific statutes. The Legislature also provides specific mechanisms for the enforcement attorney's fees awards in SAPCRs.… [In] the absence of express statutory authority, a trial court may not award attorney's fees recoverable by a party in a non-enforcement modification suit as necessaries or additional child support."

"Numerous sections in the Family Code authorize a trial court to award attorney's fees in a SAPCR.… In addition, the Legislature has enacted specific provisions that control awards of attorney's fees in certain types of cases.… In enforcement suits, section 157.167 generally requires a trial court to award reasonable attorney's fees if it finds that a respondent either failed to make child support payments or failed to comply with the terms of an order providing for possession of or access to a child."

The "Legislature has given trial courts discretion to characterize attorney's fees awarded to an amicus attorney or attorney ad litem under section 107.023 as 'necessaries for the benefit of the child.'"

"In enforcement proceedings, the Legislature expressly provided for mandatory awards of attorney's fees and specific means for enforcing those awards." However, except for frivolous or harassing motions to modify, "no provision in Chapter 156 authorizes an award of attorney's fees in modification suits.… In light of this absence of express authorization, we conclude that the Legislature did not intend to provide trial courts with discretion to assess attorney's fees awarded to a party in Chapter 156 modification suits as additional child support. Moreover, neither our precedent nor the plain language of section 151.001(c) supports the court of appeals' conclusion that attorney's fees in non-enforcement modification suits may be characterized as necessaries, enforceable by contempt."

"[E]xcept in the context of enforcement proceedings, no provision in Title 5 expressly provides a trial court with discretion to enforce an award of attorney's fees by the same means available for the enforcement of child support, including contempt." "In light of the Family Code's detailed scheme concerning awards of attorney's fees in SAPCRs, we believe it is significant that the Family Code is silent as to whether a trial court may characterize attorney's fees as additional child support in non-enforcement modification suits."

"[T]his Court has never held that attorney's fees incurred by a parent in a non-enforcement modification suit are necessaries under the common law doctrine of necessaries or its embodiment in section 151.001(c)."

7. *Coinmach Corp. f/k/a Solon Automated Services, Inc. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909 (Tex. 2013)(11/22/13) ("corrected opinion" was issued 2/14/14)

Owner of complex sought attorney's fees against a holdover tenant by filing a declaratory judgment. "[W]hen 'the trespass-to-try-title statute governs the parties' substantive claims … , [the plaintiff] may not proceed alternatively under the Declaratory Judgments Act to recover their attorney's fees.'"

8. *City of Laredo v. Montano*, 414 S.W.3d 731 (Tex. 2013)(10/25/13)

Property owner successfully resisted condemnation by demonstrating it was not for an authorized public use. The trial court awarded property owner his attorney's fees. Property owner had three attorneys, two of whose fees the city challenged on appeal. The lead trial attorney testified about the categories of work he performed, but did not quantify the time. The Supreme Court, reversed because his fees were not properly proven. The other's fees, however, were upheld.

Attorney's fees for showing that a proposed condemnation was not for an authorized public use are provided "under Texas Property Code § 21.019(c)."

The trial attorney's testimony touched upon factors "relevant to the determination of a reasonable attorney's fee." *See* Rule 1.04 of the Rules of Professional Conduct. For instance, he testified the case was novel and complicated, he turned away business, he achieved success, and his fee was a small value of the property at stake. He estimated he spent 6 hours per week for 226 weeks on the case, but did not produce bills or documentation.

Under a different statute, the Court said the "lodestar" method must be used. It "required consideration of the time spent, the reasonable value of that time, and whether the time was reasonable and necessary." Testimony "in generalities about tasks performed in a case that did not provide … a meaningful review of whether the tasks and hours were reasonable and necessary was an insufficient basis for a lodestar calculation." "[H]ours not properly billed to one's client are also not properly billed to one's adversary under a fee-shifting statute."

The lodestar method is not limited to "time records or billing statements," and the attorney could testify about the details. But Court "encouraged attorneys … to keep contemporaneous records of their time as they would for their own client."

Here, the statute "does not require that attorney's fees be determined under a lodestar method." But the record provides no "clue" how the trial attorney come up with his time estimate. His testimony "is not evidence of a reasonable attorney's fee." This was not enough. "[C]alculation requires certain basic proof, including itemizing specific tasks, the time required for those tasks, and the rate charged by the person performing the work."§

The other attorney kept detailed time records of her task, and testified what she had billed and been paid up through trial. She used a billing system, and she testified about her trial time, which was not yet billed. This "involves contemporaneous events and discrete tasks—the trial and associated preparation for each succeeding day. Moreover, it is a task the opponent witnessed at least in part, having also participated in the trial." Thus, her bills were affirmed.

9. *City of Lorena v. BMTP Holdings, L.P.*, 409 S.W.3d 634 (Tex. 2013)(8/30/13)

"Under the Declaratory Judgment Act, a 'court may award costs and reasonable and necessary attorney's fees as are equitable and just.' The decision of whether to award attorney's fees is within the discretion of the trial court, but the question of whether attorney's fees are equitable and just is a question of law."

10. *Dynegy, Inc. v. Yates*, 422 S.W.3d 638 (Tex. 2013)(8/30/13)

Dynegy orally agreed to pay for the criminal defense attorney for its officer. When attorney sued for the balance after the trial, it alleged the statute of frauds. The Supreme Court ruled the agreement was unenforceable.

Here, Dynegy established the suretyship provision of the statute of frauds, so the burden shifted to the attorney.

"The main purpose doctrine required Yates to prove: (1) Dynegy intended to create primary responsibility in itself to pay the debt; (2) there was consideration for the promise; and (3) the consideration given for the promise was primarily for Dynegy's own use and benefit—that is, the benefit it received was Dynegy's main purpose for making the promise."

11. *Morton v. Nguyen*, 412 S.W.3d 506 (Tex. 2013)(8/23/13)

In a contract for deed, the seller failed to comply with disclosure requirements. Though that entitled the buyers to rescind, the Court held that the buyers must restore the rent. The buyers "are not entitled to either attorney's fees or mental anguish damages because no claims supporting the awards survived the court of appeals' judgment.… Because no remaining cause of action supports an award of attorney's fees, the court of appeals should have also reversed the award of attorney's fees.…"

12. *Psychiatric Solutions, Inc. v. Palit*, 414 S.W.3d 724 (Tex. 2013)(8/23/13)

Psychiatric nurse at hospital was injured restraining a patient and sued his employer. He sued his employer, but failed to file an expert report, which was required. Since the hospital "requested its attorney's fees and costs in the trial court pursuant to section 74.351(b)(1) of the TMLA," the case was remanded to dismiss the plaintiff's claim and consider the attorney's fees request.

13. *In re Nalle Plastics Family Limited Partnership*, 406 S.W.3d 168 (Tex. 2013)(5/17/13)

Attorneys sued a partnership successfully for its past fees, and were also awarded fees incurred in the prosecution of this suit. The Supreme Court ruled that the partnership's supersedeas bond did not need to include an amount for the "attorney's fees incurred in the prosecution or defense of the claim."

Under House Bill 4, "To suspend enforcement of a money judgment pending appeal, a judgment debtor must post security equaling the sum of compensatory damages awarded in the judgment, interest for the estimated duration of the appeal, and costs awarded in the judgment." "The amendment also capped security at the lesser of fifty percent of the judgment debtor's net worth, or $25 million. A trial court must reduce the amount of security if a judgment debtor shows he is likely to suffer substantial economic harm—a less onerous burden than the previous standard.…"

"Chapter 52 does not define 'compensatory damages.' According to Black's Law Dictionary, the term means 'damages sufficient in amount to indemnify the injured person for the loss suffered.'" "The phrase's ordinary meaning, our precedent, and the relevant statutes, however, confirm that [attorney's fees] are not [compensatory damages]." "Courts have long distinguished attorney's fees from damages." Footnote 4: "'Attorney's fees are ordinarily not recoverable, therefore, *as* actual damages in and of themselves' … [and] are not economic damages.…"

Lawsuits "'cannot be maintained solely for the attorney's fees; a client must gain something *before* attorney's fees can be awarded.'"

"'Costs,' when used in legal proceedings, refer not just to any expense, but to those paid to courts or their officers—and costs generally do not include attorney's fees. As we have recognized for decades, 'the term 'costs' is generally understood [to mean] the fees or compensation fixed by law collectible by the officers of court, witnesses, and such like items, and does not ordinarily include attorney's fees which are recoverable only by virtue of contract or statute.'"

14. *Tedder v. Gardner Aldrich, LLP*, 421 S.W.3d 651 (Tex. 2013)(5/17/13) ("corrected opinion" was issued 12/13/13)

In divorce proceeding, wife's attorney's firm intervened and filed a sworn account to recover its fees. Wife and husband agreed that wife only would pay fees; later wife filed for bankruptcy. Firm appealed seeking to require husband to pay fees, arguing that husband failed to controvert firm's sworn account, and that husband was liable because fees were "necessaries." The Supreme Court ruled that the husband was a stranger to the sworn account, so he was not required to file a controverting affidavit, and that "legal services provided to one spouse in a divorce proceeding are [not] necessaries for which the other spouse is statutorily liable to pay the attorney."

The firm said its bill was a suit on account "supported by affidavit and not denied under oath." Rule 185 provides it such is prima facie evidence, and cannot be denied unless denied under oath. "But Rule 185 contemplates that the defendant has personal knowledge of the basis of the claim.…"

"When it appears from the plaintiff's account itself that the defendant was a stranger to the account, the defendant need not file a sworn denial to contest liability.… Rule 185 does not require a party to swear to what he does not and cannot know." Thus, husband did not have to deny firm's "claim under oath in order to contest his liability for its fees."

A "spouse's necessaries are things like food, clothing, and habitation … and we have squarely rejected the view that a spouse's legal fees in a divorce proceeding fall into this category."

Here the parties agreed the husband was not required to pay wife's attorney. Footnote 29: "Section 106.002 of the Family Code authorizes a trial court in a suit affecting the parent-child relationship to 'render judgment for reasonable attorney's fees and expenses and order the judgment and postjudgment interest to be paid directly to an attorney.…'" The Court did not determine if "legal services can be considered necessaries for a child."

B. Attorney Ad Litem and Guardian Ad Litem

1. *Tucker v. Thomas*, 419 S.W.3d 292 (Tex. 2013)(12/13/13)

After a hearing to modify child custody (but not to enforce a payment obligation), court awarded mother her attorney's fees "as additional child support." The Supreme Court ruled that, "in the absence of express statutory authority, a trial court does not have discretion to characterize attorney's fees awarded in nonenforcement modification suits as necessaries or as additional child support."

The "Legislature has given trial courts discretion to characterize attorney's fees awarded to an amicus attorney or attorney ad litem under section 107.023 as 'necessaries for the benefit of the child.'"

2. *Ford Motor Company v. Stewart*, 390 S.W.3d 294 (Tex. 2013)(1/25/13)

In personal injury and death case, mother brought suit as next friend of child, but not individually. The Supreme Court ruled that, since there was no conflict of interest for the mother, the trial court should not have appointed a guardian ad litem, and he cannot be paid beyond the time to initially determine if a conflict exists.

Rule 173.3(a) provides "that the trial court 'may appoint a guardian ad litem on the motion of any party or on its own initiative.'"

"Because the trial court should have removed the guardian ad litem after it became clear that the next friend did not have interests adverse to the minor, the guardian ad litem's services were no longer necessary under Rule 173 of the Texas Rules of Civil Procedure."

"Texas Rule of Civil Procedure 173 governs … a guardian ad litem. The trial court must appoint a guardian ad litem … when there appears to be a conflict of interest between the minor and next friend. Once appointed, the guardian ad litem has a limited role in the litigation and may be compensated only for certain types of activities. The guardian ad litem's initial role is to 'determine and advise the court whether a party's next friend . . . has an interest adverse to the party.' The trial court should remove the guardian ad litem when the evidence presented fails to confirm that a conflict of interest exists. Rule 173 authorizes the trial court to award an ad litem a reasonable fee for necessary services performed. The trial court has no discretion to award a guardian ad litem compensation for services rendered after it has become clear that no conflict of interest exists.… We review the amount a guardian ad litem is awarded as compensation for an abuse of discretion, which occurs when the trial court rules (1) arbitrarily, unreasonably, or without regard to guiding legal principles, or (2) without supporting evidence."

"We hold that a parent's obligation to provide her child with medical care, standing alone, does not create a conflict of interest within the confines of Rule 173."

C. Right to Attorney

1. *The Finance Commission of Texas v. Norwood*, 418 S.W.3d 566 (Tex. 2013)(6/21/13) ("supplemental opinion" was issued 1/24/14)

Supplemental opinion addressing closing locations for home equity loans.

A breach of fiduciary duty suit against an attorney-in-fact "may be a hollow remedy and certainly cannot recover a home properly pledged as collateral. In any event, '[w]hether so stringent a restriction [as limiting the locations where a home equity loan can be closed and, we think, a power of attorney executed] is good policy is not an issue for the Commissions or this Court to consider.' Whether the constitutional provision's intended protection is worth the hardship or could be more fairly or effectively provided by some other method is a matter that must be left to the framers and ratifiers of the Constitution."

D. Costs of Defense, Retention of Counsel, Indemnity

No cases to report.

E. Attorney-Client Privilege

No cases to report.

F. Attorneys' Liability

1. *The Finance Commission of Texas v. Norwood*, 418 S.W.3d 566 (Tex. 2013)(6/21/13) ("supplemental opinion" was issued 1/24/14)

Supplemental opinion addressing closing locations for home equity loans.

A breach of fiduciary duty suit against an attorney-in-fact "may be a hollow remedy and certainly cannot recover a home properly pledged as collateral. In any event, '[w]hether so stringent a restriction [as limiting the locations where a home equity loan can be closed and, we think, a power of attorney executed] is good policy is not an issue for the Commissions or this Court to consider.' Whether the constitutional provision's intended protection is worth the hardship or

could be more fairly or effectively provided by some other method is a matter that must be left to the framers and ratifiers of the Constitution."

2. *Dugger v. Arredondo*, 408 S.W.3d 825 (Tex. 2013)(8/30/13)

"Because the client's conduct, and not the attorney's, is the sole cause of any injury resulting from conviction, the plaintiff cannot satisfy the causation element of a legal malpractice claim absent exoneration."

3. *Elizondo v. Krist*, 415 S.W.3d 259 (Tex. 2013)(8/30/13)

In a legal malpractice suit, plaintiff, who had settled the claims of himself and his wife against BP, argued he should have gotten much more money. In their response to a motion for summary judgment, plaintiffs offered an affidavit from a lawyer with great familiarity with the BP litigation. But he did not compare this settlement with others. Consequently, the Supreme Court ruled that the plaintiffs' expert failed to raise a fact issue on damages, and upheld a summary judgment for the lawyers.

In "a legal-malpractice case damages consist of 'the amount of damages recoverable and collectible . . . if the suit had been properly prosecuted.'" Damages are "the difference between the result obtained and the case's 'true value,' defined as the recovery that would have been obtained 'following a trial' in which the client had 'reasonably competent, malpractice-free' counsel."

"[I]n a legal-malpractice case, … even where an attorney-expert was qualified to give expert testimony, his affidavit 'cannot simply say, 'Take my word for it, I know: the settlements were fair and reasonable.'' Conversely, … an attorney-expert, however well qualified, cannot defeat summary judgment if there are fatal gaps in his analysis that leave the court to take his word that the settlement was inadequate."

"Under Evidence Rule 703, experts may base their testimony on facts or data that are 'of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.' That test is met when, in a mass tort litigation involving thousands of similar claimants and arising out of the same event, the expert measures the 'true' settlement value of a particular case by persuasively comparing all the circumstances of the case to the settlements obtained in other cases with similar circumstances arising from the event."

"Here, where the same defendant settled thousands of cases, and indeed made the business decision to settle all cases and not try any to a verdict, … an expert can[] base his opinion of malpractice damages on a comparison of what similarly situated plaintiffs obtained.…"

Here, the expert "considered the facts relevant to the case," but "fail[ed] to offer specifics on why the value of the case was $2–3 million as opposed to the $50,000 received in settlement." It was thus conclusory and had a fatal analytical gap. An "analysis of settlements of cases with … circumstances similar to the Elizondo case *might* be sufficient to raise a fact issue as to the inadequacy of the settlement, but [the expert] did not undertake to compare the Elizondo settlement with other actual settlements obtained in the BP litigation."

"To the extent the Attorneys contended as an initial discovery response that they and others could not disclose information regarding other settlements for contractual reasons, we believe they argued within the bounds of zealous advocacy in contending that the information should not be disclosed even if it might be helpful to the Elizondos."

Here, even if the clients themselves offered "some evidence of actual damages, this does not mean they raised a material issue of fact as to *malpractice* damages."

Proof of the value of this case in comparison with other settlements "requires expert testimony." Likewise, "proof of attorney malpractice requires expert testimony, because establishing such negligence requires knowledge beyond that of most laypersons. The same is true of proof of damages under a theory that a settlement was inadequate."

Finally, wife failed to prove her claim survived the release signed by her husband.

G. Attorney Ethics, Disqualification, Ineffectiveness

No cases to report.

H. Authority of Attorney

No cases to report.

I. Attorney Testimony

No cases to report.

III. LAW OF THE CASE

A. Constitutional Law (State and Federal)

1. *In the Interest of A.B. and H.B., Children*, ___ S.W.3d ___ (Tex. 2014)(5/16/14)

Suit to terminate parental rights. The Supreme Court ruled that appellate courts are not required to "detail the evidence … when affirming the jury's decision" to terminate parental rights.

Under the Constitution, "[t]he authority to conduct a factual sufficiency review lies exclusively with the courts of appeals. Because proper application of the standard involves a legal question, this Court may review a court of appeals' factual sufficiency analysis to ensure the court of appeals adhered to the correct legal standard. Nevertheless, this Court must

refrain from transforming such authority into a guise for conducting its own independent review of the facts."

"A factual sufficiency review pits two fundamental tenets of the Texas court system against one another: the right to trial by jury and the court of appeals' exclusive jurisdiction over questions of fact. And, in the context of parental termination cases, a third interest must also be accounted for—that is, parents' fundamental right to make decisions concerning 'the care, the custody, and control of their children.'" In "*In re C.H.*, we articulated a factual sufficiency standard to strike an appropriate balance between these competing principles."

"Because the termination of parental rights implicates fundamental interests, a higher standard of proof—clear and convincing evidence—is required at trial. Given this… , a heightened standard of appellate review in parental termination cases is similarly warranted."

"[W]hile parental rights are of a constitutional magnitude, they are not absolute. Consequently, … the court of appeals must nevertheless still provide due deference to the decisions of the factfinder, who, having full opportunity to observe witness testimony first-hand, is the sole arbiter when assessing the credibility and demeanor of witnesses."

2. *Sims v. Carrington Mortgage Services*, ___ S.W.3d ___ (Tex. 2014)(5/16/14)

Borrowers restructured their home equity loans. Responding to certified questions from the Fifth Circuit, the Supreme Court ruled that, "as long as the original note is not satisfied and replaced, and there is no additional extension of credit, as we define it, the restructuring is valid and need not meet the constitutional requirements for a new [home equity] loan."

"[H]ome equity loans are subject to the requirements of" the Texas Constitution. Footnote 6: "'Texas became the last state in the nation to permit home-equity loans when constitutional amendments voted on by referendum took effect in 1997.'"

"To provide guidance to lenders, the Finance Commission and the Credit Union Commission have been authorized by the Constitution and by statute to interpret these provisions, subject to judicial review, and the Commissions have done so in Chapter 153 of the Texas Administrative Code." "'A lender's compliance with an agency interpretation of Section 50, even a wrong interpretation, is compliance with Section 50 itself.'" But the commissions "'can do no more than interpret the constitutional text, just as a court would.'"

Here, past-due amounts on the note were capitalized as principal. The terms "loan modification" and "refinancing" are not defined in Section 50. The commissions draw such a distinction, though the Constitution does not mention them: the key "is an 'extension of credit.'" This phrase is undefined, but "[c]redit is simply the ability to assume a debt repayable over time, and an extension of credit affords the right to do so in a particular situation." "The extension of credit for purposes of Section 50(a)(6) consists not merely of the creation of a principal debt but includes all the terms of the loan transaction. Terms requiring the borrower to pay taxes, insurance premiums, and other such expenses when due protect the lender's security and are as much a part of the extension of credit as terms requiring timely payments of principal and interest." Because the borrower was already obligated to pay the past-due amount under the original agreement, it is not a new extension of credit. Restructuring "a loan does not involve a new extension of credit so long as the borrower's note is not satisfied or replaced and no new money is extended.… The test should be whether the secured obligations are those incurred under the terms of the original loan."

"Lenders have two options other than foreclosing on loans in default: further forbearance and forgiveness."

The "restructuring of a home equity loan that … involves capitalization of past-due amounts owed under the terms of the initial loan and a lowering of the interest rate and the amount of installment payments, but does not involve the satisfaction or replacement of the original note, an advancement of new funds, or an increase in the obligations created by the original note, is not a new extension of credit that must meet the requirements of Section 50."

"Is the capitalization of past-due interest, taxes, insurance premiums, and fees an 'advance of additional funds' under the Commissions' interpretations of Section 50? No, if those amounts were among the obligations assumed by the borrower under the terms of the original loan." Nor is it a new extension of credit.

"Must a restructuring like the [borrowers'] comply with Section 50(a)(6)? No, because it does not involve a new extension of credit.…"

Footnote 28: Nothing "in Section 50 suggests that a loan's compliance is to be determined at any time other than when it is made."

3. Waste Management of Texas, Inc. v. Texas Disposal Systems Landfill, Inc., ___ S.W.3d ___ (Tex. 2014)(5/9/14)

One waste management company sued another for libel after it spread lies about the former's environmental standards. The Supreme Court ruled that 1) a "for-profit corporation may recover for injury to its reputation," 2) "[s]uch recovery is a non-economic injury for purposes of the statutory cap on exemplary damages," and 3) here, the evidence was legally

insufficient for "reputation damages," but it was sufficient for "remediation costs and thereby exemplary damages."

Free speech is "an enumerated right enshrined in both the Texas and Federal constitutions. But … [it] does not insulate defamation." Footnote 4: "Texas Bill of Rights itself acknowledges that free speech is not inviolate. 'Every person shall be at liberty to speak, write or publish his opinions on any subject, *being responsible for the abuse of that privilege . . . .*' Several Texas statutes likewise limit speech."

Against a media defendant, "unless the plaintiff shows actual malice (*i.e.*, knowledge of falsity or reckless disregard for the truth), the First Amendment prohibits awards of presumed and punitive damages for defamatory statements.… [This has been applied to private plaintiffs.] … [It is an open] question of whether presumed or punitive damages are constitutional when there is actual malice and presumably no proof of actual harm." *Cf.* Footnote 90.

"A statement is published with actual malice if it is made with 'knowledge of, or reckless disregard for, the falsity' of the statement. Such statements are not constitutionally protected."

In defamation cases, the "damages issue is one of constitutional dimension." State law "may set a lesser standard of culpability than actual malice for holding a media defendant liable for defamation of a private plaintiff." However, the plaintiff may only recover damages for "'actual injury.'" There is appellate review because actual damages cannot "be a disguised disapproval of the defendant."

4. *Sawyer, et al. v. E.I. du Pont de Nemours and Company*, ___ S.W.3d ___ (Tex. 2014)(4/25/14)

Certified question from Fifth Circuit regarding an employment dispute. Footnote 1: Pursuant to the Texas Constitution, "'The Supreme Court and the court of criminal appeals have jurisdiction to answer questions of state law certified from a federal appellate court.'"

5. *The Finance Commission of Texas v. Norwood*, 418 S.W.3d 566 (Tex. 2013)(6/21/13) ("supplemental opinion" was issued 1/24/14)

Supplemental opinion addressing computation of interest and closing locations for home equity loans.

The "Texas Constitution caps 'fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service' a home equity loan, not including 'any interest', at 3% of principal. In this case, we hold that 'interest' as used in this provision does not mean compensation for the use, forbearance, or detention of money, as in the usury context, but 'the amount determined by multiplying the loan principal by the interest rate.' This definition provides the protection to borrowers the provision is intended to afford."

"[P]er per diem interest is still interest, though prepaid; it is calculated by applying a rate to principal over a period of time. Legitimate discount points to lower the loan interest rate, in effect, substitute for interest. We also agree … that true discount points are not fees 'necessary to originate, evaluate, maintain, record, insure, or service' but are an option available to the borrower and thus not subject to the 3% cap."

"Section 50(a)(6)(N) [of the Constitution], which provides that a loan may be 'closed only at the office of the lender, an attorney at law, or a title company', precludes a borrower from closing the loan through an attorney-in-fact under a power of attorney not itself executed at one of the three prescribed locations."

"[C]losing is the occurrence that consummates the transaction. But a power of attorney must be part of the closing to show the attorney-in-fact's authority to act. … [W]e think that the provision requires a formality to the closing that prevents coercive practices. … To allow the borrower to sign a power of attorney at the kitchen table raises the … concern [of coercion]. Requiring an attorney-in-fact to sign all loan documents in an office does nothing to sober the borrower's decision, which is the purpose of the constitutional provision."

A breach of fiduciary duty suit against an attorney-in-fact "may be a hollow remedy and certainly cannot recover a home properly pledged as collateral. In any event, '[w]hether so stringent a restriction [as limiting the locations where a home equity loan can be closed and, we think, a power of attorney executed] is good policy is not an issue for the Commissions or this Court to consider.' Whether the constitutional provision's intended protection is worth the hardship or could be more fairly or effectively provided by some other method is a matter that must be left to the framers and ratifiers of the Constitution."

6. *Tucker v. Thomas*, 419 S.W.3d 292 (Tex. 2013)(12/13/13)

Custody case in which the Supreme Court overturned the award of attorney's fees. Footnote 4: "*Compare* TEX. CONST. art. I, § 18 ('No person shall ever be imprisoned for debt.'), *with In re Henry*, … ('[T]he obligation to support a child is viewed as a legal duty and not as a debt.')."

7. *City of Lorena v. BMTP Holdings, L.P.*, 409 S.W.3d 634 (Tex. 2013)(8/30/13)

Footnote 5: "municipalities may use police powers when necessary to safeguard the public safety and welfare." Footnote 10: "in certain circumstances a municipality commits no taking when it validly exercises its police power to protect the public safety and welfare."

A "regulatory taking occurs when the government has unreasonably interfered with a claimant's use and

enjoyment of its property." "The United States Supreme Court has identified three key factors to guide our analysis: (1) the economic impact on the claimant; (2) the extent of interference with the claimant's investment-backed expectations; and (3) the character of the government's action."

"The ultimate determination of whether an ordinance constitutes a compensable taking is a question of law, but 'we depend on the district court to resolve disputed facts regarding the extent of the governmental intrusion on the property.' Thus, we must determine whether any disputed issues of fact exist.…"

8. *Moncrief Oil International, Inc. v. OAO Gazprom*, 414 S.W.3d 142 (Tex. 2013)(8/30/13)

Plaintiff, a Texas-based company, entered contracts regarding development of a Russian gas field. Plaintiff later provided confidential trade secrets about its Texas facility and marketing plan. Defendants used the information with an entity the plaintiff wanted to work with, which then terminated a proposed venture with plaintiff. When plaintiff sued defendants, defendants asserted a lack of personal jurisdiction. The Supreme Court found that there were sufficient contacts for in personem jurisdiction on a trade secrets claim, but not a tortious interference claim.

"Although allegations that a tort was committed in Texas satisfy our long-arm statute, such allegations do not necessarily satisfy the U.S. Constitution."

"Asserting personal jurisdiction comports with due process when (1) the nonresident defendant has minimum contacts with the forum state, and (2) asserting jurisdiction complies with traditional notions of fair play and substantial justice. A defendant establishes minimum contacts with a forum when it 'purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.'"

9. *Masterson et al. v. The Dioceses of Northwest Texas, et al.*, 422 S.W.3d 594 (Tex. 2013)(8/30/13)

Local church split from national organization over doctrinal differences. The issue "is what happens to the property when a majority of the membership of a local church votes to withdraw from the larger religious body of which it has been a part." The title to realty was held by a Texas non-profit corporation associated with the local church. The Supreme Court ruled that, of two constitutionally permissible approaches, "the neutral principles methodology should be applied.…" [*See, The Episcopal Diocese* decision, below.]

The two constitutionally permissible methodologies are the "deference" method and the "neutral principals of law" method. The latter "better conforms to Texas courts' constitutional duty to decide disputes within their jurisdiction while still respecting limitations the First Amendment places on that jurisdiction. Under the neutral principles methodology, courts decide non-ecclesiastical issues such as property ownership based on the same neutral principles of law applicable to other entities … , while deferring to religious entities' decisions on ecclesiastical and church polity questions."

A "court has no authority to decide a dispute unless it has jurisdiction to do so…. [Additionally,] Texas courts are bound by the Texas Constitution to decide disputes over which they have jurisdiction, and absent a lawful directive otherwise they cannot delegate or cede their judicial prerogative to another entity."

The First Amendment "'severely circumscribes the role that civil courts may play in resolving church property disputes,' by prohibiting civil courts from inquiring into matters concerning ''theological controversy, church discipline, ecclesiastical government, or the conformity of the members of a church to the standard of morals required of them.'"

Under the "deference" method, a court "defers to and enforces the decision of the highest authority of the ecclesiastical body to which the matter has been carried." This is required "where ecclesiastical questions are at issue; as to such questions, deference is compulsory because courts lack jurisdiction to decide ecclesiastical questions. But when the question to be decided is not ecclesiastical, courts are not deprived of jurisdiction by the First Amendment and they may apply" the "neutral principals" method.

"Under the neutral principles methodology, ownership of disputed property is determined by applying generally applicable law and legal principles. That application will usually include considering evidence such as deeds to the properties, terms of the local church charter (including articles of incorporation and bylaws, if any), and relevant provisions of governing documents of the general church." A state's presumptive use of majority rule is permissible.

The "opinion of a court without jurisdiction is advisory.… [The] Texas Constitution does not authorize courts to make advisory decisions or issue advisory opinions.… 'Under article II, section 1 of the Texas Constitution, courts have no jurisdiction to issue advisory opinions.'"

"Civil courts are constitutionally required to accept as binding the decision of the highest authority of a hierarchical religious organization to which a dispute regarding internal government has been submitted."

"[W]hether and how a corporation's directors or those entitled to control its affairs can change its articles of incorporation and bylaws are secular, not ecclesiastical, matters." An "external entity [is not] empowered to amend [the bylaws] absent specific,

lawful provision in the corporate documents. 'The power to alter, amend, or repeal the by-laws or to adopt new by-laws shall be vested in the members . . . .')."

"Good Shepherd was incorporated pursuant to secular Texas corporation law and Texas law dictates how the corporation can be operated, including how and when corporate articles and bylaws can be amended and the effect of the amendments."

10. *The Episcopal Diocese of Fort Worth v. The Episcopal Church*, ___ S.W.3d ___ (Tex. 2013)(8/30/13)

Local Episcopal church wanted to separate from the national organization. An "'appeal may be taken directly to the supreme court from an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state.'" Though not explicit here, it inhered in the trial court's order. It is the "effect" of the order that is determinative. "The trial court substantively ruled that because the First Amendment to the United States Constitution deprived it of jurisdiction to apply Texas nonprofit corporation statutes, applying them to determine the parties' rights would violate Constitutional provisions."

"Texas courts should use only the neutral principles methodology.…" Whether the "application of the neutral principles approach is unconstitutional depends on how it is applied.… Because neutral principles have yet to be applied in this case, we cannot determine the constitutionality of their application."

11. *City of Houston v. Bates*, 406 S.W.3d 539 (Tex. 2013)(6/28/13)

In a pay dispute between retired firemen and a home rule city, the Supreme Court had to construe statutory terms and city ordinance provisions.

"Home-rule cities, like the City of Houston, derive their powers from the Texas Constitution." "'An ordinance of a home-rule city that attempts to regulate a subject matter preempted by a state statute is unenforceable to the extent it conflicts with the state statute.' If a reasonable construction giving effect to both the state statute and the ordinance can be reached, then a city ordinance will not be held to have been preempted by the state statute."

12. *Neely v. Wilson*, 418 S.W.3d 52 (Tex. 2013)(6/28/13) (*see* "corrected opinion" issued 1/31/14)

Neurosurgeon sued reporter and station after it aired a broadcast that implied he was disciplined for taking drugs and performing surgery while taking them. Reversing a summary judgment for the defendants, the Supreme Court ruled that "a person of ordinary intelligence could conclude that the gist of the broadcast was that [doctor] was disciplined for operating on patients while using dangerous drugs and controlled substances. [Doctor] raised a genuine issue of material fact as to the truth or falsity of that gist…. We further conclude: (1) there are fact issues on whether part of the broadcast is protected by the judicial/official proceedings or fair comment privileges; (2) [doctor] was not a limited purpose public figure; (3) [doctor] raised a fact issue as to [TV station's] negligence; and (4) [doctor's] professional association may maintain a cause of action for defamation."

Defamation suits "implicate[] the competing constitutional rights to seek redress for reputational torts and the constitutional rights to free speech and press."

"We have held that the constitutional concerns over defamation … do not affect these summary judgment standards of review."

"Unlike the federal Constitution, the Texas Constitution twice [art. I §§ 8, 13] expressly guarantees the right to bring suit for reputational torts." "The right to recover for defamation, however, is not the only constitutional concern at stake. Of significant import are the constitutional rights to free speech and a free press."

The "dissent prematurely cuts off [the doctor's] right to a trial on this reputational tort. Our constitution assures that the 'right of trial by jury shall remain inviolate.' Additionally, the Texas Constitution's free speech clause guarantees the right to bring reputational torts: 'Every person shall be at liberty to speak, write or publish his opinions on any subject, *being responsible for the abuse of that privilege*.…" Likewise, the open courts provision guarantees the right to bring reputational torts: 'All courts shall be open, and every person for an injury done him, in his lands, goods, person or *reputation*, shall have remedy by due course of law.'" Though the Texas "free speech" right may be broader than its federal counterpart, "'*that broader protection, if any, cannot come at the expense of a defamation claimant's right to redress*.… [T]he Texas Constitution expressly protects the bringing of reputational torts.'"

The "United States Supreme Court has only discussed the truth defense as a creature of state common law and not the First Amendment."

13. *The Finance Commission of Texas v. Norwood*, 418 S.W.3d 566 (Tex. 2013)(6/21/13) ("supplemental opinion" was issued 1/24/14)

Voters amended the constitution to allow home equity loans, and then in 2003 amended it again to allow the Legislature to delegate to an agency the power to interpret certain sections. In this suit, homeowners challenged certain rulings by two commissions authorized by the Legislature to create a safe harbor. The Supreme Court ruled that "agency

interpretations made under this authority are [not] beyond judicial review," and that certain rulings by the agencies were unconstitutional.

"The separation of the powers of government into three distinct, rival branches — legislative, executive, and judicial — is 'the absolutely central guarantee of a just Government.' Checks and balances among the branches protect the individual.'" "The principle of separation of powers is foundational for federal and state governments in this country and firmly embedded in our nation's history. The Texas Constitution mandates: 'The powers of the Government of the State of Texas shall be divided into three distinct departments.…'" The power to interpret the constitution is "unquestionably" allocated by the constitution "to the Judiciary." Footnote 6: "'The final authority to determine adherence to the Constitution resides with the Judiciary.'"

"'As a rule, court decisions apply retrospectively.…'"

The homestead has been protected from forced sale by the Texas Constitution. An amendment allowed home equity loans. Its "lengthy, elaborate, detailed provisions … were included in Article XVI, Section 50 and made nonseverable." "Loan terms and conditions, notices to borrowers, and all applicable regulations were set out in Section 50 itself." Desiring a safe harbor, in "2003 the Legislature proposed, and the people adopted, Section 50(u), which states: The legislature may by statute delegate one or more state agencies the power to interpret" parts of Section 50. The commissioners on the commissions to whom the Legislature delegated the power were appointed by the Governor.

The commissions' interpretation of "interest" was unconstitutional, as well as allowing closing by mail, but not the presumption of receipt of notice.

"The purpose of Section 50(u) … was to remove market uncertainty.… Judicial review of the Commissions' interpretations does not impair Section 50(u)'s purpose … , but rather, assures that the interpretations adhere to … constitutional provisions. To read Section 50(u) as giving the Commissions interpretative authority that is absolute and unreviewable … would defeat the purpose of constitutionalizing home equity lending procedures in the first place: to shield them from political pressures…." Footnote 66: "'[I]n construing a constitutional provision, 66 this Court has always given effect to the intention of the framers and ratifiers of the provision.'"

"'The requirement in this State that a plaintiff have standing to assert a claim derives from the Texas Constitution's separation of powers among the departments of government, which denies the judiciary authority to decide issues in the abstract, and from the Open Courts provision, which provides court access only to a 'person for an injury done him'.'"

This Court does not defer to a court of appeals' interpretation of the Constitution but reviews it, as all matters of law, *de novo*. Indeed, the courts of appeals do not even defer to each other's constitutional interpretations." The "power to interpret the constitutional text is unrelated to an agency's expertise in an industry, or to its regulatory power.…"

"'In construing the Constitution, as in construing statutes, the fundamental guiding rule is to give effect to the intent of the makers and adopters of the provision in question. We presume the language of the Constitution was carefully selected, and we interpret words as they are generally understood. We rely heavily on the literal text. However, we may consider such matters as the history of the legislation, the conditions and spirit of the times, the prevailing sentiments of the people, the evils intended to be remedied, and the good to be accomplished.'"

"Closing a loan is a process.… [Under the constitution, executing] the required consent or a power of attorney are part of the closing process and must occur only at one of the locations allowed by the constitutional provision."

The commissions' interpretation providing a rebuttable presumption of receipt of mail "does not impair the constitutional requirement; it merely relieves a lender of proving receipt unless receipt is challenged."

14. *In the Interest of E.C.R., Child*, 402 S.W.3d 239 (Tex. 2013)(6/14/13)

Termination of parental rights. The state must "overcome significant burdens before removing a child from his parent. These … are essential to protect the parent's fundamental liberty interest in the companionship, care, custody, and management of her children. But … 'it is also essential that emotional and physical interests of the child not be sacrificed merely to preserve that right.'"

Mother "also challenged the factual sufficiency of the evidence supporting the best interest finding, a question that the court of appeals must decide. *See* TEX. CONST. art. V, § 6(a)."

15. *Hancock v. Variyam*, 400 S.W.3d 59 (Tex. 2013)(5/17/13)

Physician sued colleague who circulated a letter accusing him a lack of veracity. The Supreme Court ruled this did not constitute defamation *per se*. Accordingly, he had to prove actual damages in order to recover punitive damages, and here his mental anguish proof was insufficient.

"'[S]tate remedies for defamatory falsehood [must] reach no farther than is necessary to protect the legitimate interest involved. It is necessary to restrict defamation plaintiffs who do not prove knowledge of

falsity or reckless disregard for the truth to compensation for actual injury. . . . [A]ll awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.'"

"But if more than nominal damages are awarded, recovery of exemplary damages are appropriately within the guarantees of the First Amendment if the plaintiff proves by clear and convincing evidence that the defendant published the defamatory statement with actual malice."

Footnote 13: "TEX. CONST. art. I, §§ 8 ('Every person shall be at liberty to speak, write or publish 13 his opinions on any subject, being responsible for the abuse of that privilege."), 13 ('All courts shall be open, and every person for an injury done him, in his lands, goods, person *or reputation*, shall have remedy by due course of law.'…)."

16. *Texas Department of Transportation v. A.P.I. Pipe and Supply*, LLC, 397 S.W.3d 162 (Tex. 2013)(4/5/13)

Inverse condemnation suit asserting a "takings" case by a subsequent purchaser for value. The Supreme Court ruled it did not have own the tract.

"A trial court lacks jurisdiction and should grant a plea to the jurisdiction where a plaintiff 'cannot establish a viable takings claim.' … '[T]o recover under the constitutional takings clause, one must first demonstrate an ownership interest in the property taken.'"

17. *TracFone Wireless, Inc. v. Commission on State Emergency Communications*, 397 S.W.3d 173 (Tex. 2013)(4/5/13)

Dispute about whether a tax statute enacted in 1997 or a later one, effective in 2010, applied to prepaid cell phones. The Supreme Court ruled that the later one governed.

If both the old and new statutes applied, "that would result in impermissible double taxation that offends the Equal and Uniform Clause" of the Texas Constitution. Though no "provision explicitly discusses double taxation … we have assumed and sometimes held that double taxation is forbidden." The reason "is not so much that two taxes are assessed; the problem is that the double-tax burden is imposed on some taxpayers but not on others. This unequal imposition is what offends common constitutional requirements of uniformity." "At least where non-property taxes are concerned, the Equal and Uniform Clause generally only prohibits unequal or multiform taxes that are imposed on members of the same class of taxpayers."

18. *El Dorado Land Company, L.P. v. City of McKinney*, 395 S.W.3d 798 (Tex. 2013)(3/29/13)

Seller sold land to city with deed restriction that it be a park; if the city decided not to use it as a park, seller reserved "option" under the deed to repurchase the property at a specified price. Later, when city built a library on land without offering it back to seller, seller sued for inverse condemnation. The Supreme Court ruled that "the reversionary interest here is a compensable property interest" under the constitution's "takings" clause.

"When private property is taken for a public purpose, our constitution requires that the government compensate the owner. A condemnation proceeding is the formal process by which that compensation is determined. But when the government takes private property without paying for it, the owner must bring suit for inverse condemnation."

"A statutory waiver of immunity is unnecessary for a takings claim because the Texas Constitution waives 'governmental immunity for the taking, damaging or destruction of property for public use.'"

"[A] future interest in real property is compensable under the Takings Clause." "The Restatement makes no distinction between gifts and sales, and it is not apparent why the compensable nature of a future interest should rest on donative intent rather than the donor's intent to retain a contingent future interest in the property conveyed."

19. *In re the Office of the Attorney General*, 422 S.W.3d 623 (Tex. 2013)(3/8/13)

Criminal contempt proceeding based upon ex-husband's failure to pay child support. The Supreme Court ruled that, to purge himself of contempt according to statute, he had to be "current" with all child support as of the date of the hearing.

"A contempt order is void if it is beyond the power of the court or violates due process." Here, notice to the respondent was provided by the original order as well as the statute. A finding of contempt is based upon the allegations of the failure to timely pay child support in the pleadings; the availability of a defense "purging" the contempt by paying all child support up to the hearing did not require notice through pleadings.

20. *Kopplow Development, Inc. v. The City of San Antonio*, 399 S.W.3d 532 (Tex. 2013)(3/8/13)

Commercial property owner sued city for inverse condemnation when city would not issue permit unless owner provided more landfill.

"One … [purpose of] government is to protect private property rights. The Texas Constitution … require[es] takings to be for public use, with the government paying the landowner just compensation.… When only part of a tract is taken,

Texas law assures just compensation by entitling the landowner to the value of the part taken as well as the damage to the owner's remaining property."

21. *Southern Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676 (Tex. 2013)(2/15/13)

Suit over denial by city of permit for concrete plant. The Supreme Court ruled that the city's ordinance was preempted by state statute.

The constitution provides that "['N]o . . . ordinance . . . shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State.'"

B. Statutory Construction

1. *McAllen Hospitals, LLP v. State Farm Mutual Insurance Company of Texas*, S.W.3d (Tex. 2014)(5/16/14)

Hospital sued insurer after injured victims of car wreck cashed settlement checks from insurer that were made out to both them and hospital, without discharging proper hospital lien. An issue was whether the Hospital Lien Statute created a cause of action for hospital to sue insurer. It is of questionable propriety to create a cause of action not provided by the statute. "'A court may not judicially amend a statute and add words that are not implicitly contained in the language of the statute.'"

2. *Colorado, et al. v. Tyco Valves & Controls, L.P.*, S.W.3d ___ (Tex. 2014)(3/28/14)

Defendant offered employees cash and a severance if they remained with a business unit that was being sold and were not offered positions with the purchaser. Some plaintiffs had signed a written agreement; others alleged an oral agreement. The Supreme Court ruled "that ERISA preempts the employees' breach-of-contract claims…"

"Section 514(a) of ERISA preempts 'any and all State laws insofar as they may now or hereafter relate to any employee benefit plan' covered by ERISA. ERISA's expansive preemption provisions are intended to ensure exclusive federal regulation of employee benefit plans. Accordingly, ERISA's preemption provision has been broadly construed."

The "United States Supreme Court construed the phrase 'relates to' as carrying its ordinary meaning of having 'a connection with or reference to' an employee benefit plan The Supreme Court noted, however, that if the state action affects a benefit plan 'in too tenuous, remote,or peripheral a manner,' the impermissible connection to ERISA does not exist."

3. *Crosstex Energy Services, L.P. v. Pro Plus, Inc.*, S.W.3d (Tex. 2014)(3/28/14)

Interlocutory appeal of an order denying a motion to dismiss and granting an extension to file a certificate of merit under Ch. 150.

"We review statutory construction de novo."

"If the statute is clear and unambiguous, we must read the language according to its common meaning 'without resort to rules of construction or extrinsic aids.' We rely on this plain meaning as an expression of legislative intent unless a different meaning is supplied or is apparent from the context, or the plain meaning leads to absurd results. Words and phrases 'shall be read in context and construed according to the rules of grammar and common usage.' We presume the Legislature chose statutory language deliberately and purposefully. We must not interpret the statute 'in a manner that renders any part of the statute meaningless or superfluous.'"

Here, the third sentence of § 150.002(c) could, or could not, apply only when plaintiff complied with the first sentence. Because "the statute [is] capable of multiple interpretations … we apply our rules of construction to discern legislative intent." The meaning of words "cannot be determined in isolation but must be drawn from the context.…" Here, the Court interprets the third sentence is dependent upon the first.

"In determining whether the Legislature intended the certificate of merit to be mandatory, 'we consider the plain meaning of the words used, as well as the entire act, its nature and object, and the consequences that would follow from each construction.' The Code Construction Act makes clear that the use of 'shall' normally imposes a mandatory requirement.… Thus, section 150.002(a) imposes a mandatory duty."

"We resist classifying a provision as jurisdictional absent clear legislative intent to that effect." When determining whether a statutory requirement is jurisdictional, the Court "may consider: (1) the plain meaning of the statute; (2) 'the presence or absence of specific consequences for noncompliance'; (3) the purpose of the statute; and (4) 'the consequences that result from each possible interpretation.'" Here, the statute does not claim the certificate of merit is jurisdictional. Moreover, "[m]andatory dismissal language does not" mean the statute is jurisdictional. This statute does not declare its purpose. But, "the implications of alternate interpretations" factor indicates the statute is not jurisdictional. If a certificate of merit were jurisdictional, the omission of one could be attacked "in perpetuity." Thus, it is not.

4. *Bioderm Skin Care, LLC v. Sok*, 426 S.W.3d 753 (Tex. 2014)(3/28/14)

Suit for personal injuries resulting from laser hair removal. The Supreme Court ruled that the rebuttable presumption that the claim was a health care liability

claim applies, and therefore an expert report was required.

"Whether [plaintiff's] claim is a health care liability claim is a question of law we review de novo. When construing a statute, we give it the effect the Legislature intended. The best expression of the Legislature's intent is the plain meaning of the statute's text. More particularly, the broad language of the Medical Liability Act evinces legislative intent for the statute to have expansive application. In determining whether [plaintiff's] claim is a health care liability claim, we focus on the underlying nature of the cause of action and are not bound by the pleadings."

A later statute, which therefore does not govern, defines laser hair removal as health care. "[B]ecause [plaintiff] filed suit before this state law took effect, it is inapplicable to her claim."

5. *Kia Motors Corporation v. Ruiz*, S.W.3d (Tex. 2014)(3/28/14)

Products liability case based upon the failure of an air bag to deploy due to its circuitry. Reversing a judgment for the plaintiffs, the Supreme Court ruled that § 82.008 of the CP & RC did not create a presumption of nonliability here because, although FMVSS 208 is a federal safety standard, defendant did not show it governed the risk that caused the harm.

"We review questions of statutory construction de novo. Our fundamental objective in interpreting a statute is 'to determine and give effect to the Legislature's intent.' 'The plain language of a statute is the surest guide to the Legislature's intent.'"

"Interpreting section 82.008 to apply only to federal design standards impermissibly adds language and alters the statute's plain meaning. Moreover, such an interpretation would deter manufacturers from creating new and better designs to improve safety."

6. *Long v. Castle Texas Production Limited Partnership*, 426 S.W.3d 73 (Tex. 2014)(3/28/14)

This opinion generally addresses the date from which postjudment interest runs.

"We must interpret statutes … to give them effect.… '[C]ourts are to avoid interpreting a statute in such a way that renders provisions meaningless.'"

7. *Texas Coast Utilities Coalition v. Railroad Commission of Texas*, 423 S.W.3d 355 (Tex. 2014)(1/17/14)

Certain cities and governmental entities objected when a gas utility sought a rate increase that included automatic adjustments in subsequent years. Here, the utility included a COSA clause, which provided for future automatic adjustments. The Supreme Court, analyzing the term "rate," rejected the coalition's claim that the Commission was not granted authority to include such a clause because it would deprive the municipalities of their original jurisdiction. "We conclude the COSA clause constitutes a 'rate'…." "'A word's meaning cannot be determined in isolation, but must be drawn from the context in which it is used.'"

8. *Tucker v. Thomas*, 419 S.W.3d 292 (Tex. 2013)(12/13/13)

"Because this is an issue of law involving statutory construction, we review it de novo. Our primary objective when construing statutes is to give effect to the Legislature's intent. We must ascertain this intent by looking to the entire act."

"In light of the Family Code's detailed scheme concerning awards of attorney's fees in SAPCRs, we believe it is significant that the Family Code is silent as to whether a trial court may characterize attorney's fees as additional child support in non-enforcement modification suits."

9. *City of Houston v. Rhule*, 417 S.W.3d 440 (Tex. 2013)(11/22/13)

The Supreme Court ruled that a fireman who sued the city for violating a settlement agreement reached in a worker's compensation claim failed to exhaust his administrative remedies, and thus dismissed the suit. "Exclusive jurisdiction is a question of statutory interpretation.… The statute in effect at the time of injury controls."

10. *In re Stephanie Lee*, 411 S.W.3d 445 (Tex. 2013)(9/27/13)

In a custody dispute, the Supreme Court granted mandamus to enforce a mediated settlement, without regard to an analysis of the child's best interest, in conformity with the Family Code.

"'We review questions of statutory construction de novo.' Our fundamental objective in interpreting a statute is 'to determine and give effect to the Legislature's intent.' In turn, '[t]he plain language of a statute is the surest guide to the Legislature's intent.' 'We take the Legislature at its word, and the truest measure of what it intended is what it enacted.' '[U]nambiguous text equals determinative text,' and ''[a]t this point, the judge's inquiry is at an end.'"

"It is inappropriate to resort to rules of construction or extratextual information to construe a statute when its language is clear and unambiguous. 'This text-based approach requires us to study the language of the specific section at issue, as well as the statute as a whole.' When construing the statute as a whole, we are mindful that '[i]f a general provision conflicts with a special or local provision, the provisions shall be construed, if possible, so that effect is given to both.' However, in the event that any such conflict is irreconcilable, the more specific provision will generally prevail. Further, in the event of an

irreconcilable conflict between two statutes, generally 'the statute latest in date of enactment prevails.'"

"[C]ourts must give effect to all words in a statute without treating any statutory language as mere surplusage."

To the extent section 153.0071 conflicts with the general Family Code provision safeguarding a child's best interest, "section 153.0071 prevails." "The use of the word "notwithstanding" indicates that the Legislature intended section 153.0071 to be controlling." Second, its specific language "trumps section 153.002's more general mandate." Finally, it is the more recent statutory enactment.

11. *Nathan v. Whittington*, 408 S.W.3d 870 (Tex. 2013)(8/30/13)

Plaintiff filed suit within limitations in Nevada to collect a judgment, adding a defendant on a fraudulent transfer theory under the Uniform Fraudulent Transfer Act (UFTA). The suit against the added defendant was dismissed for want of personal jurisdiction. Plaintiff filed a new suit filed in Texas less than 60 days later. Defendant pleaded it violated the UFTA's statute of repose. The Supreme Court agreed, holding that the "suspension statute [§ 16.064(a) of the CP&RC] does not apply to a statute of repose…."

"To resolve this case, we must construe both TUFTA's section 24.010 and section 16.064(a) of the Civil Practice & Remedies Code. We also review issues of statutory construction de novo. Our objective is to give effect to the Legislature's intent, and we do that by applying the statutes' words according to their plain and common meaning unless a contrary intention is apparent from the statutes' context."

Because the UFTA is "a uniform act, … its provisions must 'be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.'" "In the absence of any uniformity among the other states, we have also considered the comments of the National Conference of Commissioners on Uniform State Laws, which promulgated the model UFTA."

"The whole point of layering a statute of repose over the statute of limitations is to 'fix an outer limit beyond which no action can be maintained.'" Though this might eliminate a meritorious claim, the "task of balancing these equities belongs to the Legislature, not to this Court."

12. *City of Lorena v. BMTP Holdings, L.P.*, 409 S.W.3d 634 (Tex. 2013)(8/30/13)

"Our goal in interpreting any statute is to 'ascertain and give effect to the Legislature's intent as expressed by the language of the statute.' To determine that intent, we look first to the 'plain and common meaning of the statute's words.' We examine statutes as a whole to contextually give meaning to every provision. 'Municipal ordinances must conform to the limitations imposed by the superior statutes, and only where the ordinance is consistent with them, and each of them, will it be enforced.'"

A "moratorium enacted to prevent a shortage of essential public facilities that affects approved development conflicts with the controlling statute and is invalid."

The "Legislature's use of the disjunctive word 'or' is significant when interpreting statutes.… [By using it,] the Legislature indicated that these distinct aspects are brought within the singular scope of the term 'development.'" [Internal quotes added for clarity.]

The "Legislature can accomplish the same goal with different language.…"

"We construe statutes to provide consistent meaning to the same word used throughout a statute."

A "regulatory taking occurs when the government has unreasonably interfered with a claimant's use and enjoyment of its property."

13. *Dugger v. Arredondo*, 408 S.W.3d 825 (Tex. 2013)(8/30/13)

After doing drugs and drinking with defendant, plaintiff's son died. Defendant raised the common law defense called the wrongful acts doctrine. The Supreme Court ruled that "the Legislature's adoption of the proportionate responsibility scheme in Chapter 33 … evidenced its clear intention that a plaintiff's illegal conduct not falling within a statutorily-recognized affirmative defense [*i.e.*, 93.001] be apportioned rather than barring recovery completely," thus over ruling the common law wrongful acts doctrine.

The "Legislature's enactment of Chapter 33's proportionate responsibility scheme and section 93.001 are dispositive in this case. '[S]tatutes can modify common law rules, but before we construe one to do so, we must look carefully to be sure that was what the Legislature intended.' In construing statutes, our goal is to give effect to the intent expressed by the language in the statute."

"Chapter 33 controls over the [common law] unlawful acts doctrine in the wrongful death context." "When the Legislature intends an exception to Chapter 33's broad scheme, it creates specific exceptions for matters that are outside the scope of proportionate responsibility."

"Chapter 33 [is] applicable to a cause of action under Chapter 2 against an alcoholic beverage provider."

Section "93.001 … provid[es] an affirmative defense to civil actions brought by convicted criminals seeking to recover damages for injuries arising out of their felonious acts."

"In considering these competing interpretations, we presume the Legislature enacts a statute with knowledge of existing law." Section 93.001 was enacted when Ch. 33 was amended and permitted recovery if the claimant's damages were less than 50%. Thus, the "Legislature intended the statutory affirmative defense to resurrect only a small portion of the unlawful acts doctrine, providing a complete bar to recovery only in the certain limited circumstances articulated by subsections 93.001(a)(1) and (2)."

"'The Legislature determines public policy through the statutes it passes.' … To hold that the unlawful acts doctrine applies broadly in the tort context despite the plain language of Chapter 33 and the legislative policy expressed in section 93.001 would render section 93.001 meaningless."

14. *Liberty Mutual Insurance Company v. Adcock*, 412 S.W.3d 492 (Tex. 2013)(8/30/13)

Firefighter received an award of lifetime benefits under worker's compensation. The issue was whether the claim could be reopened years later. The Supreme Court said it could not.

"A fundamental constraint on the courts' role in statutory interpretation is that the Legislature enacts the laws of the state and the courts must find their intent in that language and not elsewhere. Under the guise of agency deference, an agency asks us to judicially engraft into the Texas Workers' Compensation Act a statutory procedure to re-open determinations of eligibility for permanent lifetime income benefits—a procedure the Legislature deliberately removed in 1989. The Legislature's choice is clear, and it is not our province to override that determination." "In light of the Act's comprehensive nature, we decline to judicially engraft into it a procedure the Legislature deliberately removed."

"'Enforcing the law as written is a court's safest refuge in matters of statutory construction, and we should always refrain from rewriting text that lawmakers chose . . . .' We review issues of statutory construction *de novo*, and our primary objective in construing a statute is to ascertain and give effect to the Legislature's intent. The plain meaning of the text, given the context of the statute as a whole, provides the best expression of legislative intent."

The "plain language of the statute indicates the LIB [life income benefits] determination is permanent and offers no procedure to reopen it."

LIBs "'are paid until the death of the employee for' loss of one foot at or above the ankle and one hand at or above the wrist." This manifests legislative intent that they not be reopened. "When the Legislature expresses its intent regarding a subject in one setting, but, as here, remains silent on that subject in another, we generally abide by the rule that such silence is intentional."

"'[L]egislative intent emanates from the Act as a whole.'"

There exists a "'well-established principle that' administrative agencies 'may exercise only those powers that the Legislature confers upon [them] in *clear and express language*, and cannot erect and exercise what really amounts to a new or additional power for the purpose of administrative expediency.'" Here, "the Act mandates that the carrier make payments until the employee's death because the Division determined Adcock is eligible for permanent LIBs."

15. *Zanchi v. Lane*, 408 S.W.3d 373 (Tex. 2013)(8/30/13)

In medical malpractice case, plaintiff served defendant with an expert report prior to when he was served with citation, partly because defendant was evading service. The Supreme Court ruled that sufficed, because the defendant was a "party."

"Matters of statutory construction are legal questions that we review de novo. 'The aim of statutory construction is to determine and give effect to the Legislature's intent, which is generally reflected in the statute's plain language.' A word's meaning cannot be determined in isolation, but must be drawn from the context in which it is used." In "the context of the TMLA, the term 'party' means one named in a lawsuit.…" "We must presume that the Legislature was aware of our construction of the term in enacting the TMLA."

"Beginning the period for serving an expert report on the date of filing [suit] suggests that a 'party' on which to serve the report exists on the date of filing." This interpretation is supported by the purpose of the statute. In "'section 74.351, the Legislature struck a careful balance between eradicating frivolous claims and preserving meritorious ones.'"

"Rule 106 by its terms applies solely to service of citation. If the Legislature had intended to require a claimant to serve an expert report in accordance with Rule 106, it clearly knew how to do so."

16. *Texas Adjutant General's Office v. Ngakoue*, 408 S.W.3d 350 (Tex. 2013)(8/30/13)

Plaintiff sued governmental employee who was acting in the course of his employment when he caused a car wreck. After plaintiff amended to add the governmental employer, it sought to have suit dismissed. The Supreme Court ruled that the plaintiff could assert a suit against the governmental unit.

"When interpreting a statute, our goal is to ascertain the Legislature's intent. The best guide to that determination is usually the plain language of the statute. But we must view the statute as a whole, and '[w]e must endeavor to read the statute contextually, giving effect to every word, clause, and sentence.' We

may consider the 'object sought to be obtained' by the statute as well as the 'consequences of a particular construction.'"

The TTCA "favors the expedient dismissal of governmental employees when suit should have been brought against the government.… Thus, when … [interpreting the TTCA], we must favor a construction that most clearly leads to the early dismissal of a suit against an employee when the suit arises from an employee's conduct that was within the scope of employment and could be brought against the government under the TTCA."

The defendant argued that consent to be sued "may only be found in statutory waivers of immunity found outside the TTCA itself. We disagree."

17. *Psychiatric Solutions, Inc. v. Palit*, 414 S.W.3d 724 (Tex. 2013)(8/23/13)

Psychiatric nurse at hospital was injured restraining a patient and sued his employer.

The term "safety" is "not defined in the TMLA.… Because 'safety' is not defined, it is construed 'according to its common meaning as being secure from danger, harm or loss.'"

18. *In re Michael Blair*, 408 S.W.3d 843 (Tex. 2013)(8/23/13)

Prisoner was wrongfully convicted and incarcerated for murder. But, he was incarcerated for a conviction that occurred beforehand, so the Supreme Court ruled he was not entitled to compensation.

"[C]ourts will not interpret statutes to work absurd results. But … it is certainly not absurd to pay reparation for the wrong done while [the prisoner] is still incarcerated."

Footnote 25: "'We . . . interpret statutes to avoid an absurd result.' 'A provision may be either disregarded or judicially corrected as an error (when the correction is textually simple) if failing to do so would result in a disposition that no reasonable person could approve.'"

Here, the critical phrase "is convicted" could refer to the event of adjudication of a conviction, or the status of having been convicted. "The statutory text thus admits of two linguistically reasonable interpretations, but the consequences of one, conditioning compensation on the date conviction is adjudicated, are, we think, plainly unreasonable." "'We . . . presume that the Legislature intended a just and reasonable result by enacting [a] statute.'" Accordingly, the Court chose the latter.

There is no statutory limit to how often a person can apply for benefits. "Even if a claimant does not apply to cure a problem in the denial of compensation, we are not convinced that the failure precludes judicial review. The Act's procedures should not be applied to trick unwary applicants out of the compensation they are due."

19. *Lennar Corporation v. Markel American Insurance Company*, 413 S.W.3d 750 (Tex. 2013)(8/23/13)

Footnote 35: "'Generally, the State's public policy is reflected in its statutes.'"

20. *State of Texas v. $1,760.00 in United States Currency, et al.*, 406 S.W.3d 177 (Tex. 2013)(6/28/13)

After executing a search warrant, the state seized and sought to forfeit currency and "eight-liners." An exception to the definition of gambling device excluded those which exclusively awarded noncash prizes and "novelties." Because, here, "the eight-liners awarded tickets that could be redeemed for non-immediate rights of replay, … [the Supreme Court ruled that constitutes] an intangible reward precluding application of the statutory exclusion."

"The issue is one of statutory construction, which we review de novo. Our primary objective when interpreting a statute is to give effect to the Legislature's intent. Legislative intent is best expressed by the plain meaning of the text unless the plain meaning leads to absurd results or a different meaning is supplied by legislative definition or is apparent from the context."

One issue was what constitutes a "novelty," an undefined term. "Undefined terms in a statute are typically given their ordinary meaning. However, we will not give an undefined term a meaning that is out of harmony or inconsistent with other terms in the statute." There is a "traditional canon of construction [called] *noscitur a sociis*—or 'it is known by its associates'—[meaning] to construe the last term within a series.… [W]hen an undefined term has multiple common meanings, the definition most consistent within the context of the statute's scheme applies.… 'It is a fundamental principle of statutory construction and indeed of language itself that words' meanings cannot be determined in isolation but must be drawn from the context in which they are used.'" Here, though "novelty" could mean a "new event," the "context … indicates that the Legislature intended 'novelty' to mean other types of tangible articles similar to 'noncash merchandise prizes' and 'toys'…."

21. *City of Houston v. Bates*, 406 S.W.3d 539 (Tex. 2013)(6/28/13)

In a pay dispute between retired firemen and the city, the Supreme Court had to construe the terms "leave" and "salary."

"We review issues of statutory interpretation de novo. Our primary objective when interpreting a statute is to give effect to the Legislature's intent. We

begin with the statute's text and the presumption that the Legislature intended what it enacted. Legislative intent is best expressed by the plain meaning of the text unless the plain meaning leads to absurd results or a different meaning is supplied by legislative definition or is apparent from the context. When the text of the statute is clear and unambiguous, we apply the statute's words according to their plain and common meaning unless a contrary intention is apparent from the statute's context."

The term "leave" was not defined in the statute. After noting the dictionary definition, the Court wrote, "Whereas we are typically inclined to apply a term's common meaning, a contrary intention is apparent from the statute's context." That context included a list of six items preceding the phrase that "would have been for naught." Therefore, the Court ruled "leave" meant "paid leave." "When general words follow specific, enumerated categories, we limit the general words' application to the same kind or class of categories as those expressly mentioned. This statutory construction aid, known as *ejusdem generis*, requires us to construe words no more broadly than the Legislature intended." Footnote 2: "words cannot be construed separately from the context in which they are used."

The Legislature had not included forms of paid leave in the category. "We must presume, however, that the Legislature's inclusion of only forms of paid leave and its omission of forms of unpaid leave … were purposeful.… [It has been presumed] that the omission of a phrase contained within similar statutes had a purpose."

"We construe the Legislature's change from 'salary' … to 'base salary,' … as indicative of the Legislature's clarification of the prior law and not as a substantive change."

22. CHCA Woman's Hospital, L.P. d/b/a The Woman's Hospital of Texas v. Lidji, 403 S.W.3d 228 (Tex. 2013)(6/21/13)

In a birth injury case, parents filed medical malpractice suit, but dismissed before 120 days without having filed an expert report. Immediately upon refiling, they served their expert report on the defendant. The Supreme Court ruled the expert report requirement deadline was tolled during the nonsuit.

The statute neither expressly authorizes nor prohibits tolling the expert report requirement upon a nonsuit. So, this case turns on statutory construction.

"Matters of statutory construction are legal questions that we review de novo. The aim of statutory construction is to determine and give effect to the Legislature's intent, … which is generally reflected in the statute's plain language.… We analyze statutory language in context, considering the specific section at issue as well as the statute as a whole."

The purposes of the statute include reducing excessive health care claims while not "unduly" restricting a claimant's rights. The "'threshold [expert] report requirement [is] a substantive hurdle for frivolous medical liability suits before litigation gets underway.'"

"Tolling the expert-report period both protects a claimant's absolute right to nonsuit and is consistent with the statute's overall structure." Footnote 7: "Although the TMLA controls '[i]n the event of a conflict between [the TMLA] and another law,' … we conclude the TMLA is properly construed as consistent with the procedural right to nonsuit."

23. *The Finance Commission of Texas v. Norwood*, 418 S.W.3d 566 (Tex. 2013)(6/21/13) ("supplemental opinion" was issued 1/24/14)

"'Construction of a statute by the administrative agency charged with its enforcement is entitled to serious consideration, so long as the construction is reasonable and does not contradict the plain language of the statute.'"

24. *In the Interest of E.C.R., Child*, 402 S.W.3d 239 (Tex. 2013)(6/14/13)

Termination of parental rights under chapter 262 of the Family Code.

Footnote 6: "'Includes' and 'including' are terms of enlargement and not of limitation or exclusive enumeration, and use of the terms does not create a presumption that components not expressed are excluded.'"

"Although chapter 261's 'abuse' and 'neglect' definitions do not govern in chapter 262, they surely inform the terms' meanings. ('Whenever a legislature has used a word in a statute in one sense and with one meaning, and subsequently uses the same word in legislating on the same subject-matter, it will be understood as using it in the same sense, unless there be something in the context or the nature of things to indicate that it intended a different meaning thereby.')."

25. *Susan Combs v. Health Care Services Corporation*, 401 S.W.3d 623 (Tex. 2013)(6/7/13)

Government contractor sought a tax refund under the "Tax Code's sale-for-resale exemption." Rejecting the Comptroller's arguments in part, the Supreme Court ruled it applied to two of three contested categories.

"[W]e read unambiguous statutes as they are written, not as they make the most policy sense. If a statute is worded clearly, we must honor its plain language, unless that interpretation would lead to absurd results."

The exemption does not inquire into the "*primary* purpose of the sale." Footnote 8: "'in the area of tax

law, like other areas of economic regulation, a plain-meaning determination should not disregard the economic realities underlying the transactions in issue,'…. However, … if the statute does 'not impose, either explicitly or implicitly,' the 'extra-statutory requirement' urged by the Comptroller, 'we decline to engraft one—revising the statute under the guise of interpreting it.'"

An "'agency's interpretation of a statute it is charged with enforcing is entitled to 'serious consideration,' so long as the construction is reasonable and does not conflict with the statute's language. . . . In our 'serious consideration' inquiry, we will generally uphold an agency's interpretation of a statute it is charged by the Legislature with enforcing, so long as the construction is reasonable and does not contradict the plain language of the statute. . . . [T]his deference is tempered by several considerations: [the statute must be ambiguous, the agency interpretation must be the result of formal procedures, and the interpretation must be reasonable].'" An "'agency's opinion cannot change plain language.'" Also, "agency interpretations cannot contradict statutory text."

"We recognize that statutes, framed in general terms, can often work peculiar outcomes, including over- or under-inclusiveness, but such minor deviations do not detract from the statute's clear import. If an as-written statute leads to patently nonsensical results, the 'absurdity doctrine' comes into play, but the bar for reworking the words our Legislature passed into law is high, and should be.… [M]ere oddity does not equal absurdity."

26. *Phillips v. Bramlett*, 407 S.W.3d 229 (Tex. 2013)(6/7/13)

Medical malpractice case had been remanded by the Supreme Court to the trial court. The Supreme Court ruled postjudgment interest accrued from the time of the original judgment.

We "presume that when the Legislature enacted section 304.005 in 1999, it was aware of our interpretations of the word 'judgment' in the predecessor statute.…" "'Language in a statute is presumed to have been selected and used with care, and every word or phrase in a statute is presumed to have been intentionally used with a meaning and a purpose."

27. *In re Nalle Plastics Family Limited Partnership*, 406 S.W.3d 168 (Tex. 2013)(5/17/13)

Attorneys sued a partnership successfully for its past fees, and were also awarded fees incurred in the prosecution of this suit. The Supreme Court ruled that the partnership's supersedeas bond did not need to include an amount for the "attorney's fees incurred in the prosecution or defense of the claim."

It is "clear that neither costs nor interest qualify as compensatory damages. Otherwise, there would be no need to list those amounts separately in the supersedeas bond statute."

"'Statutory terms should be interpreted consistently in every part of an act.'"

"'Terms that are not otherwise defined are typically given their ordinary meaning.'"

28. *Rachal v. Reitz*, 403 S.W.3d 840 (Tex. 2013)(5/3/13)

Suit against successor trustee by beneficiary. Trust had an arbitration provision, which the Supreme Court enforced under the TAA.

"Our primary goal in construing a statute is to give effect to the Legislature's intent. We defer to the plain meaning of a statute as the best indication of the Legislature's intent unless a different meaning is apparent from the context of the statute or the plain meaning would yield absurd results. Moreover, we determine legislative intent from the entire act, not merely from isolated portions."

The TAA included the term "agreement" and elsewhere the term "contract." Thus, the "legislative intent [was] to enforce arbitration provisions in *agreements*. If the Legislature intended to only enforce arbitration provisions within a *contract*, it could have said so." [Italics added.] "Because the TAA does not define agreement, we must look to its generally accepted definition. Black's Law Dictionary defines an agreement as 'a manifestation of mutual assent by two or more persons.'" "Agreement" is broader and less technical than "contract."

29. *Christus Health Gulf Coast v. Aetna, Inc*., 397 S.W.3d 651 (Tex. 2013)(4/19/13)

HMO entered an agreement with another entity to serve as its delegated network. That entity had agreements with health care providers, but they did not have a direct agreement with the HMO itself. When the entity became insolvent and failed to pay the providers, they sued the HMO. Under Texas' Prompt Pay Statute. The Supreme Court ruled that statue "forecloses such a suit: Providers must have contractual privity with the HMO directly, not merely with its delegated network."

The Prompt Pay Statute "entitles … providers to swift payment of undisputed healthcare claims." However, there must be privity between the provider and the defendant. "The statute's clear HMO-provider requirement is made clearer still by an amendment to the Prompt Pay Statute, which, while inapplicable here (as it postdates these contracts), gives the Commissioner of Insurance the discretionary power to order an HMO to pay providers when its delegated network cannot, thus suggesting only regulatory intervention, not private litigation, is available."

"This is a pure statutory-construction case…. We review such questions de novo 8 and, as we recently explained, begin (and often end) with the Legislature's chosen language:
[T]he truest manifestation of what lawmakers intended is what they enacted. This voted-on language is what constitutes the law, and when a statute's words are unambiguous and yield but one interpretation, 'the judge's inquiry is at an end.'
"We must take the Legislature at its word, respect its policy choices, and resist revising a statute under the guise of interpreting it." "We decline to impose judicially a legal or financial obligation that was not imposed legislatively."

The "Prompt Pay Statute contemplates contractual privity between HMO s and providers." The statute requires payment "'*in accordance with the contract*'" and here there "were no contracts between" the HMO and the providers. The statute's penalty provision likewise requires a "direct HMO-provider contract." "The existence of contractual liability between [the HMO] and [the delegated network] is immaterial to whether Aetna has statutory liability under the Prompt Pay Statute." "Any alleged violation of the Insurance Code or breach of the contract between [the HMO] and [the delegated network] is a separate legal dispute, and not one governed by the Prompt Pay Statute." Plus, contract terms requiring the HMO to abide by all statutory requirements do not enlarge the duties under the statute. Further, the fact that the HMO monitored the delegated network does not justify "eschewing the statute's explicit requirement for HMO-provider privity."

A subsequent amendment to the statute "provides *administrative* relief in situations like this, but it nowhere grants providers a *private* action against HMOs" "As the Legislature is presumed to know its previous enactments, we read statutes not in a vacuum but contextually, and … [there] would be no need for the Legislature to impose such a duty on HMOs … if the pre-2001 statute already imposed that duty.…"

"[T]here is recourse today against HMOs whose delegated networks misstep, but it belongs to the Insurance Commissioner, not to providers."

30. *Texas Department of Transportation v. A.P.I. Pipe and Supply, LLC*, 397 S.W.3d 162 (Tex. 2013)(4/5/13)

Inverse condemnation suit in which buyer claimed it was an innocent purchaser for value. "Section 13.001 [of the Property Code] defines the elements of innocent-purchaser status for *all* cases, and courts may not disregard or rewrite the statute when they believe straight-up application would be inequitable."

31. TracFone Wireless, Inc. v. Commission on State Emergency Communications, 397 S.W.3d 173 (Tex. 2013)(4/5/13)

Tax statute enacted in 1997 imposed a 50¢/month fee on cell phone usage; statute effective in 2010 imposed a flat 2% fee on prepaid cell phones. The Supreme Court ruled that the 1997 statute did not impose a fee on prepaid wireless usage, only the 2010 law did. "The two e911 statutes are either ambiguous, meaning they must be construed narrowly in favor of the taxpayer, or they are unambiguous, meaning prepaid customers are impermissibly double-taxed."

Footnote 3: "[T]he Legislature's decision to label a charge a 'fee' rather than a 'tax' is not binding on this Court.… A charge is a fee rather than a tax when the primary purpose of the fee is to support a regulatory regime governing those who pay the fee.… Funding an e911 system is a revenue-raising purpose, even though the revenue is put into a special fund for e911 services rather than the general revenue. 'Because money is fungible,' the determination of whether something is a fee or a tax 'is not controlled by whether the assessments go into a special fund or into the State's general revenue.'"

The 1997 law appears to apply. "Section 771.0711 doubtless intended to tax all wireless service that then existed, and certainly an old statute can encompass new technologies if the statutory text is worded broadly enough.…" But, it was passed before the advent of prepaid service, and "the mandatory mechanics of the pre-2010 statute seem nearly impossible to apply coherently to prepaid service." Those provisions "are no less mandatory" than the statutory language which appears to include prepaid service in the 1997 law.

If both the old and new statutes applied, "that would result in impermissible double taxation" under the Texas Constitution. The "problem is that the double-tax burden is imposed on some taxpayers but not on others." "At least where non-property taxes are concerned, the Equal and Uniform Clause generally only prohibits unequal or multiform taxes that are imposed on members of the same class of taxpayers."

"[C]ourts sometimes defer to agencies' statutory interpretations, but only when a statute is ambiguous.… Agency deference has no place when statutes are unambiguous … meaning we will not credit a contrary agency interpretation that departs from the clear meaning of the statutory language."

The 2010 law "would be utterly meaningless if it did not apply, meaning we must construe [the 1997 statute] as inapplicable." Footnote 40: "In enacting a statute, it is presumed that . . . the entire statute is intended to be effective.…"

"Several cardinal … principles dictate strictness in tax matters: (1) tax authorities cannot collect something that the law has not actually imposed; (2)

imprecise statutes must be interpreted 'most strongly against the government, and in favor of the citizen'; and (3) we will not extend the reach of an ambiguous tax by implication, nor permit tax collectors to stretch the scope of taxation beyond its clear bounds."

32. *City of Round Rock, Texas v. Rodriguez*, 399 S.W.3d 130 (Tex. 2013)(4/5/13)

Municipal fire fighter wanted union representation when employer was investigating his use of sick leave. The Supreme Court ruled that the Labor Code does not confer that right for public employees.

"Statutory construction is a question of law, and review is conducted de novo. Our ultimate purpose when construing a statute is to discover the Legislature's intent. We examine the statute's text, as it provides the best indication of legislative intent."

"When a statute is clear and unambiguous, we do not resort to extrinsic aides such as legislative history to interpret the statute.… In construing a statute, however, we presume that the Legislature acted with knowledge of the background law and with reference to it." It "'would be a usurpation of our powers to add language to a law where the [L]egislature has refrained.'"

Section 101.001 is entitled "Right to Organize." But "'title of [a statute] carries no weight, as a heading does not limit or expand the meaning of a statute.'"

"Although we look to federal statutes and case law when a Texas statute and federal statute are 'animated in their common history, language, and purpose,' key differences between the NLRA and the state statutes here compel a different result.…" Here, the word "'protect' serves as a limitation on the type of union or organization" public employees can form.

In 38 years since the U.S. Supreme Court decided *Weingarten*, "the Texas Legislature has declined to enact similar legislation."

33. *In re the Office of the Attorney General*, 422 S.W.3d 623 (Tex. 2013)(3/8/13)

Criminal contempt proceeding based upon ex-husband's failure to pay child support. The Supreme Court ruled that, to purge himself of contempt according to statute, he had to be "current" with all child support as of the date of the hearing.

The Court's holding fits the "plain language" of the statute.

"Legislative intent is best revealed in legislative language: 'Where text is clear, text is determinative.' We take the Legislature at its word, and the truest measure of what it intended is what it enacted. This text-based approach requires us to study the language of the specific section at issue, as well as the statute as a whole. We must endeavor to read the statute contextually, giving effect to every word, clause, and sentence. Because the statute itself is what constitutes the law, we have held that unambiguous text equals determinative text (barring an absurd result). At this point, 'the judge's inquiry is at an end.…'" Footnote 6: the Court will avoid an interpretation that would render a section "meaningless." "('[W]e read the statute as a whole and interpret it to give effect to every part.')."

34. *Susan Combs, Comptroller v. Roark Amusement & Vending, L.P.*, 422 S.W.3d 632 (Tex. 2013)(3/8/13)

Tax case in which owner of "claw" type amusement game argued the toys in the game were not subject to taxation under the "sale-for-resale" exemption.

"When construing a statute, our chief objective is effectuating the Legislature's intent, and ordinarily, the truest manifestation of what lawmakers intended is what they enacted. This voted-on language is what constitutes the law, and when a statute's words are unambiguous … , 'the judge's inquiry is at an end.' We give such statutes their plain meaning without resort to rules of construction or extrinsic aids. On the other hand, '[i]f a statute is vague or ambiguous, we defer to the agency's interpretation unless it is plainly erroneous or inconsistent with the language of the statute.'"

"If a term is expressly defined by statute we must follow that definition." Footnote 11: "'Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.'"

An "item exempt from taxation may nevertheless be included in the universe of taxable items."

Under the tax law, "like other areas of economic regulation, a plain meaning determination should not disregard the economic realities underlying the transactions in issue."

Here, the plain meaning of the statutes "qualifies [defendant] for a sales-tax exemption" for the toys in the machines.

The law does not require that a customer win each time the game is played. "The wording of the statute and the economic realities of the transaction do not require [an] 'everyone's a winner' result."

35. The University of Texas Southwestern Medical Center at Dallas v. Gentilello, 398 S.W.3d 680 (Tex. 2013)(2/22/13)

Whistleblower case. Professor of surgery reported "lax supervision of trauma residents" to supervisor who oversaw internal compliance. In addition, medical school had written policy protecting those who report violation from harassment. The Supreme Court ruled the professor failed to report the violation to an appropriate authority under the Whistleblower Act.

"Since the Legislature defined when 'report is made to an appropriate law enforcement authority,' we

must use that statutory definition." "This is a legislatively-mandated legal classification, one tightly drawn, and we cannot judicially loosen it."

36. *Texas A&M University—Kingsville v. Moreno*, 399 S.W.3d 128 (Tex. 2013)(2/22/13)

Whistleblower case. The "Act's restrictive definition of 'appropriate law enforcement authority' … is 'tightly drawn,' … and centers on [reports to] law enforcement, not law compliance" personnel. Thus, a reported violation to the university president was not sufficient, since he could not enforce the law with respect to third persons.

37. *Southern Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676 (Tex. 2013)(2/15/13)

Suit over denial by city of permit for concrete plant. The Supreme Court ruled that the city's ordinance was preempted by state statute.

The constitution provides that "['N]o …ordinance … shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State.'"

Houston is a home-rule city. "Home-rule cities have the full power of self-government and look to the Legislature, not for grants of power, but only for limitations on their powers." Therefore, if "'the Legislature decides to preempt a subject matter normally within a home-rule city's broad powers, it must do so with 'unmistakable clarity.'"

The permit issued by TCEQ was an authorization. "Texas law … defines permit to mean 'an *authorization* by a license, certificate, registration, or other form that is required by law or state agency rules to engage in a particular business.'"

38. *Lexington Insurance Company v. Daybreak Express, Inc.*, 393 S.W.3d 242 (Tex. 2013)(1/25/13); original opinion issued 8/31/12

Insurer for one common carrier sued another common carrier for breach of a settlement agreement to pay for cargo damage, and after limitations expired, added a claim for the cargo damage itself. The Supreme Court held the new claim related back to the first, so it was not barred by limitations. (This is a reissued opinion from the earlier one of 8/31/12, blow, and remands the case.)

"'Transaction or occurrence' is a [fundamental] concept.…" The term "'[t]ransaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship.'"

C. Administrative Law, Administrative Agencies, and Procedure

1. *Texas Coast Utilities Coalition v. Railroad Commission of Texas*, 423 S.W.3d 355 (Tex. 2014)(1/17/14)

Certain cities and governmental entities objected when a gas utility sought a rate increase that included automatic adjustments in subsequent years. The Supreme Court ruled that "the Railroad Commission of Texas had authority to adopt a gas utility rate schedule that provided for automatic annual adjustments based on increases or decreases in the utility's cost of service."

"Although the Texas Constitution specifically mentions the Railroad Commission, … it does not create the agency but instead merely authorizes the Legislature to do so. … [T]he Legislature has established the Commission.… As a statutorily created body, the Commission has no inherent authority, and instead has only the authority that the Legislature confers upon it." That "includes the powers that a statute expressly grants (express authority) and also the powers 'reasonably necessary to carry out the express responsibilities given to it by the Legislature' (implied authority). But 'reasonably necessary' does not mean merely 'expedient.' The Commission 'may not … exercise what is effectively a new power, or a power contradictory to the statute,' even if it 'is expedient for administrative purposes.'"

GURA granted to the Commission authority to ensure compliance of gas utilities. "[U]nder GURA, the utility's rate is typically based on costs incurred during the year prior to the rate case."

"[M]unicipalities have exclusive original jurisdiction over the rates and services of gas utilities that distribute gas within their municipal boundaries, … while the Commission has exclusive original jurisdiction over rates and services in areas that are … outside of municipal boundaries.…" But, rate orders from municipalities may be appealed to the Commission.

Here, the utility included a COSA clause, which provided for future automatic adjustments. The Court, analyzing the term "rate," rejected the coalition's claim that the Commission was not granted authority to include such a clause because it would deprive the municipalities of their original jurisdiction.

"[B]oth the Commission and the COSA must still comply with all of GURA's procedural, substantive, and jurisdictional mandates."

Footnote 24: "This Court has previously recognized the Commission's discretion in dealing with 'regulatory lag' when acting within the authority the Legislature has delegated to it."

2. *Texas Commission on Environmental Quality v. City of Waco*, 413 S.W.3d 409 (Tex.

2013)(8/23/13) ("corrected opinion" was issued 11/22/13) (*see* original opinion below for analysis)

Change on p. 24: "Although the APA defines 'contested case' and sets the procedural framework, the agency's enabling act here sets out whether rights are to be determined after an opportunity for adjudicative hearing, and agency rules may decide whether that opportunity may include a contested case hearing."

3. *City of Houston v. Rhule*, 417 S.W.3d 440 (Tex. 2013)(11/22/13)

In a settlement agreement of a worker's compensation claim fireman brought against self-insured city, city agreed to pay future medical bills. When city quit paying many years later, fireman sued city, without presenting his claim first to the Division of Workers' Compensation. The Supreme Court ruled that he failed to exhaust his administrative remedies and dismissed the suit.

"Administrative agencies may exercise only powers conferred upon them by 'clear and express statutory language.' When the Legislature grants an administrative agency sole authority to make an initial determination in a dispute, agency jurisdiction is exclusive. A party then must exhaust its administrative remedies before seeking recourse through judicial review.… The intent is never to deprive a party of legal rights; rather, it aims to ensure an orderly procedure to enforce those rights. Absent exhaustion of administrative remedies, a trial court must dismiss the case."

"Exclusive jurisdiction is a question of statutory interpretation, and thus we must consider the operative statute and whether it grants the Division the sole authority for initial resolution of disputes arising out of a settlement agreement. The statute in effect at the time of injury controls." Here, the statute in effect "compels a party to a settlement agreement to first bring disputes to the Division." Since the fireman did not present this claim to the Division, "[t]his divests the trial court of jurisdiction."

4. Texas Commission on Environmental Quality v. Bosque River Coalition, 413 S.W.3d 403 (Tex. 2013)(9/20/13)

A dairy farmer applied to amend his water-quality permit to increase his herd. This is a companion case to *TCEQ v. City of Waco* (8/23/13, below), where the Supreme Court ruled TCEQ "did not abuse its discretion in denying a contested case hearing to an interested party, who claimed a right to such a hearing under the Texas Water Code," and further "that a party's status as an affected person was not determinative of the right to a contested case hearing because the statute expressly exempted the proposed amendment from contested case procedures." Here, likewise "the interested party … was not entitled to a contested case hearing.…"

"A concentrated animal feed operation or 'CAFO' is an animal feeding operation in which confined poultry or livestock are housed and fed in numbers that exceed a threshold set by rule. CAFOs are regulated by the Commission to protect surface water by restricting any flow of waste or wastewater from their premises.…"

"Section 26.028(c) of [the Water Code] generally extends the right to a public hearing in a permit application proceeding to a commissioner, the commission's executive director, or an 'affected person'…. Exempted … are certain applications to renew or amend existing permits that do not seek either to increase the quantity of waste discharged or change materially the place or pattern of discharge and that maintain the quality of the waste to be discharged." Thus, a renewal or amendment that is not major does not require a public hearing. That hearing would be a "'a contested case hearing under the Texas Administrative Procedure Act.'" "Agency rules define a major amendment as 'an amendment that changes a substantive term, provision, requirement, or a limiting parameter of a permit.'" So, "a contested case hearing is generally not available for minor amendments."

"The proposed amended permit does not seek to significantly increase or materially change the authorized discharge of waste. Neither does the Coalition argue any other factor to foreclose the Commission's discretion to consider the amended application at a regular meeting rather than after a contested case hearing. The Commission therefore did not abuse its discretion in denying the Coalition's request for a contested case hearing.…"

5. *Canutillo Independent School District v. Farran*, 409 S.W.3d 653 (Tex. 2013)(8/30/13)

In this Whistleblower case, plaintiff's contract stated he could only be fired for cause. "School district employees … generally must exhaust administrative remedies by bringing an appeal to the Commissioner." The Whistleblower Act's procedures "do not require exhaustion [of remedies] with the Commissioner.…" Here, regarding plaintiff's "breach of contract cause of action, he failed to exhaust administrative remedies."

6. *Liberty Mutual Insurance Company v. Adcock*, 412 S.W.3d 492 (Tex. 2013)(8/30/13)

Firefighter received an award of lifetime benefits under worker's compensation. The issue was whether the claim could be reopened years later. The Supreme Court said it could not.

"Under the guise of agency deference, an agency asks us to judicially engraft into the Texas Workers' Compensation Act a statutory procedure to re-open determinations of eligibility for permanent

lifetime income benefits—a procedure the Legislature deliberately removed in 1989. The Legislature's choice is clear, and it is not our province to override that determination."

"Although we have held that when the Legislature expressly confers a power on an agency, it also impliedly intends that the agency have whatever powers are reasonably necessary to fulfill its express functions or duties,' an agency has no authority to 'exercise what is effectively a new power, or a power contradictory to the statute, on the theory such a [] power is expedient for administrative purposes.'"

There exists a "'well-established principle that' administrative agencies 'may exercise only those powers that the Legislature confers upon [them] in *clear and express language*, and cannot erect and exercise what really amounts to a new or additional power for the purpose of administrative expediency.'" Here, "the Act mandates that the carrier make payments until the employee's death because the Division determined Adcock is eligible for permanent LIBs."

7. *City of Lorena v. BMTP Holdings, L.P.*, 409 S.W.3d 634 (Tex. 2013)(8/30/13)

Administrative "'bodies only have the powers conferred on them by clear and express statutory language or implied powers that are reasonably necessary to carry out the Legislature's intent.' If the Legislature grants an administrative body sole authority to make a determination in a dispute, the municipality has exclusive jurisdiction over the dispute and 'a party must exhaust all administrative remedies before seeking judicial review of the decision.'" But here, there was no such grant of authority.

A "regulatory taking occurs when the government has unreasonably interfered with a claimant's use and enjoyment of its property."

8. *Texas Commission on Environmental Quality v. City of Waco*, 413 S.W.3d 409 (Tex. 2013)(8/23/13) ("corrected opinion" was issued 11/22/13)

In this companion case to *TCEQ v. Bosque River Coalition* (9/20/13), the city complained that a permit amendment allowing more cows for an upstream dairy farm would damage Lake Waco, and it requested a contested case hearing on the permit application. As the Supreme Court explained in *Bosque River Coalition*, "In [*City of Waco*], we concluded that the Texas Commission on Environmental Quality did not abuse its discretion in denying a contested case hearing to an interested party, who claimed a right to such a hearing under the Texas Water Code.… In *City of Waco*, this Court concluded that a party's status as an affected person was not determinative of the right to a contested case hearing because the statute expressly exempted the proposed amendment from contested case procedures."

"In Texas, the TCEQ has the primary authority to establish surface water quality standards, which it implements, in part, in its permitting actions." "Anyone may publicly comment on a pending water-quality permit, but only those commentators who are also 'affected persons' may obtain a public hearing." "When a [feed operation] applies for a permit, interested parties may object to the proposed permit during a comment period. These parties may also seek to intervene and request a public hearing on the proposed permit. But before granting a contested case hearing—a trial-like proceeding with attendant expense and delay—a threshold determination must be made as to whether the party is an 'affected person' with standing to request such a hearing."

An "affected person" is one with a "personal justiciable interest," differing from a common public interest. The Commission has drafted a rule which defines further an "affected person."

The "Commission is required to give public notice of a permit application and, when requested by a commissioner, the executive director, or 'any affected person,' hold a 'public hearing' on the application. Exempt from the 'public hearing' requirement, however, are applications to amend or renew a water-quality permit" that do not materially increase or change the discharge. "In the permit application context, the Code indicates that a public hearing means a contested case hearing under the Texas Administrative Procedure Act."

The issue is whether the city had a right to intervene in the permit process. "Although the [Administrative Procedure Act] defines 'contested case' and sets the procedural framework, it does not independently provide a right to a contested case hearing."

An affected person must file a written request for a hearing, to which other identified parties can respond. "The Commission then 'evaluates' the request and must grant it if it is made by an 'affected person' and is (1) timely filed, (2) 'is pursuant to a right to hearing authorized by law,' (3) complies with the form and content requirements of rule section 55.201, and (4) 'raises disputed issues of fact that were raised during the [public] comment period.…'"

"Major" and "minor" permit amendments are defined. A contested case hearing is not available for a minor amendment, and is not required, but can be granted, for a major amendment.

It is relevant to the Commission's discretion to grant a public hearing if the "proposed amended permit … purports to provide greater protection for water quality.…"

The permit application "amounts to an affidavit" because it is verified, and has expert reports attached.

Here, the Commission had before it evidence of the impact of the permit amendment. Considering that, it determined that the phosphorous runoff would be reduced. And, no right to a contested case hearing exists for a permit amendment under certain circumstances. "Thus, a person affected by a proposed water-quality permit has the right to request a hearing … , but the Commission has discretion to deny the request when the proposed permit is an amendment or renewal and (1) the applicant is not applying to significantly increase the discharge of waste or materially change the pattern or place of discharge, (2) the authorization under the permit will maintain or improve the quality of the discharge, (3) when required, the Commission has given notice, the opportunity for a public meeting, and considered and responded to all timely public comments, and (4) applicant's compliance history raises no additional concerns." Therefore, the amended permit did not so materially change the discharge that the Commission lost its discretion to deny a contested case hearing.

9. *In re Michael Blair*, 408 S.W.3d 843 (Tex. 2013)(8/23/13)

Prisoner was wrongfully convicted and incarcerated for murder. But, he was incarcerated for a conviction that occurred beforehand, so the Supreme Court ruled he was not entitled to compensation.

There is no statutory limit to how often a person can apply for benefits. "Even if a claimant does not apply to cure a problem in the denial of compensation, we are not convinced that the failure precludes judicial review. The Act's procedures should not be applied to trick unwary applicants out of the compensation they are due." "We do not regard the [administrative] burden of denying an application for the reasons previously given to be oppressive, but if it should become so, and repeat applications cannot be enjoined, the Legislature may wish to consider an appropriate remedy."

10. *The Finance Commission of Texas v. Norwood*, 418 S.W.3d 566 (Tex. 2013)(6/21/13) ("supplemental opinion" was issued 1/24/14)

Voters amended the constitution to allow home equity loans, and then in 2003 amended it again to allow the Legislature to delegate to an agency the power to interpret certain sections. In this suit, homeowners challenged certain rulings by two commissions authorized by the Legislature to create a safe harbor. The Supreme Court ruled that "agency interpretations made under this authority are [not] beyond judicial review," and that certain rulings by the agencies were unconstitutional.

Generally, a citizen cannot sue to force the government to comply with the law, but this "*varies with the claims made*." Here there was standing because of the safe harbor provision. "Were this injury insufficient to confer standing to challenge the Commissions' interpretations, their authority to interpret Section 50 would be final and absolute, not merely shared with the Judiciary. But the principle of standing exists to protect the separation of powers, not to defeat it." Footnote 83: "The Commissions' authority to interpret Section 50 is subject … to the Administrative Procedure Act, which permits judicial review of a rule adopted by a state agency 'if it is alleged that the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of the plaintiff.' The Homeowners' pleadings track this language and thus allege the injury required by the Act for judicial review."

"'Construction of a statute by the administrative agency charged with its enforcement is entitled to serious consideration, so long as the construction is reasonable and does not contradict the plain language of the statute.' … This Court does not defer to a court of appeals' interpretation of the Constitution but reviews it, as all matters of law, *de novo*. Indeed, the courts of appeals do not even defer to each other's constitutional interpretations."

The "power to interpret the constitutional text is unrelated to an agency's expertise in an industry, or to its regulatory power.…"

The fatal flaw with the commissions' interpretation of "interest" is that it was tied to the Legislature's definition, which it could change.

11. *Susan Combs v. Health Care Services Corporation*, 401 S.W.3d 623 (Tex. 2013)(6/7/13)

Government contractor sought a tax refund under the "Tax Code's sale-for-resale exemption." Rejecting the Comptroller's arguments in part, the Supreme Court ruled it applied to two of three contested categories.

The exemption does not inquire into the "*primary* purpose of the sale." Footnote 8: "'in the area of tax law, like other areas of economic regulation, a plain-meaning determination should not disregard the economic realities underlying the transactions in issue,'…. However, … if the statute does 'not impose, either explicitly or implicitly,' the 'extra-statutory requirement' urged by the Comptroller, 'we decline to engraft one—revising the statute under the guise of interpreting it.'"

An "'agency's interpretation of a statute it is charged with enforcing is entitled to 'serious consideration,' so long as the construction is reasonable and does not conflict with the statute's language. . . . In our 'serious consideration' inquiry, we will generally uphold an agency's interpretation of a statute it is charged by the Legislature with enforcing, so long as the construction is reasonable and does not

contradict the plain language of the statute. . . . [T]his deference is tempered by several considerations: [the statute must be ambiguous, the agency interpretation must be the result of formal procedures, and the interpretation must be reasonable].'"

An "'agency's opinion cannot change plain language.'" Also, "agency interpretations cannot contradict statutory text."

12. El Paso County Hospital District v. Texas Health and Human Services Commission, 400 S.W.3d 72 (Tex. 2013)(5/17/13)

Suit by hospitals challenging the commission's cut-off date for data collection used in Medicaid reimbursement rates. On an earlier appeal, the Supreme Court ruled the date was an invalid rule. However, that opinion "did not purport to reopen past rate determinations or closed administrative proceedings."

There is a "guiding principle of deference to an agency's interpretation of its own rules unless plainly erroneous or inconsistent with the rule's text." "We agree that our prior opinion and judgment did not create a remedy for the hospitals' past reimbursement claims." "We did not decide whether the hospitals could reopen past agency proceedings or obtain relief for past years. Nor did we expressly order the agency to recalculate these hospitals' rates.…"

13. *Christus Health Gulf Coast v. Aetna, Inc*., 397 S.W.3d 651 (Tex. 2013)(4/19/13)

Suit brought by health care providers against an HMO under the Prompt Payment Statute. The Prompt Pay Statute "entitles … providers to swift payment of undisputed healthcare claims." However, there must be privity between the provider and the defendant. "The statute's clear HMO-provider requirement is made clearer still by an amendment to the Prompt Pay Statute, which, while inapplicable here (as it postdates these contracts), gives the Commissioner of Insurance the discretionary power to order an HMO to pay providers when its delegated network cannot, thus suggesting only regulatory intervention, not private litigation, is available."

The subsequent amendment to the statute "provides *administrative* relief in situations like this, but it nowhere grants providers a *private* action against HMOs" With these subsequent amendments, the "Legislature enhanced the Insurance Commissioner's regulatory role over HMOs …. [T]here is recourse today against HMOs whose delegated networks misstep, but it belongs to the Insurance Commissioner, not to providers."

14. *TracFone Wireless, Inc. v. Commission on State Emergency Communications*, 397 S.W.3d 173 (Tex. 2013)(4/5/13)

Dispute about whether a tax statute enacted in 1997 or a later one, effective in 2010, applied to prepaid cell phones. The Supreme Court ruled that the later one governed.

"[C]ourts sometimes defer to agencies' statutory interpretations, but only when a statute is ambiguous.… Agency deference has no place when statutes are unambiguous … meaning we will not credit a contrary agency interpretation that departs from the clear meaning of the statutory language."

"[D]eference to the regulations or interpretations of an agency charged with enforcing a tax has its place—for example when … weighing competing interpretations of the amount owed. However, agency deference does not displace strict construction when the dispute is not over how much tax is due but, more fundamentally, whether the tax applies at all." And, an agency's "interpretation must be reasonable."

"We have even applied [a pro-taxpayer] presumption in reviewing a formal administrative adjudication that found against a taxpayer."

15. *City of Round Rock, Texas v. Rodriguez*, 399 S.W.3d 130 (Tex. 2013)(4/5/13)

Municipal fire fighter wanted union representation when employer was investigating his use of sick leave. The Supreme Court ruled that the Labor Code does not confer that right for public employees.

The U.S. Supreme Court ruled that "NLRB permissibly construed Section 7 to confer the representation right, noting that the NLRB's construction may not be required by the statute's text." But, since the NLRB is charged with adapting the NLRA, its construction of the act is subject to only "'limited judicial review.'"

16. *Susan Combs, Comptroller v. Roark Amusement & Vending, L.P*., 422 S.W.3d 632 (Tex. 2013)(3/8/13)

Tax case in which owner of "claw" type amusement game argued the toys in the game were not subject to taxation under the "sale-for-resale" exemption.

"We give [unambiguous] statutes their plain meaning without resort to rules of construction or extrinsic aids. On the other hand, '[i]f a statute is vague or ambiguous, we defer to the agency's interpretation unless it is plainly erroneous or inconsistent with the language of the statute.'"

The Comptroller urged that its rules required each player to win, though the taxpayer disputed that. "Regardless of which Comptroller Rule applies, the Comptroller cannot through rulemaking impose taxes that are not due under the Tax Code; the question of

statutory construction presented in this case ultimately is one left to the courts."

D. Governmental Branches, Powers, Officials, Duties, and Elections

1. *Texas Coast Utilities Coalition v. Railroad Commission of Texas*, 423 S.W.3d 355 (Tex. 2014)(1/17/14)

Certain cities and governmental entities objected when a gas utility sought a rate increase that included automatic adjustments in subsequent years. Here, the utility included a COSA clause, which provided for future automatic adjustments. The Supreme Court, analyzing the term "rate," rejected the coalition's claim that the Commission was not granted authority to include such a clause because it would deprive the municipalities of their original jurisdiction.

Footnote 4: "Generally, the term 'municipality' includes towns and villages as well as cities … [a]lthough not every 'municipality' is a 'city.…'"

"[M]unicipalities have exclusive original jurisdiction over the rates and services of gas utilities that distribute gas within their municipal boundaries, … while the Commission has exclusive original jurisdiction over rates and services in areas that are … outside of municipal boundaries.…" But, rate orders from municipalities may be appealed to the Commission.

Here, the utility included a COSA clause, which provided for future automatic adjustments. The Court rejected the coalition's claim that the Commission was not granted authority to include such a clause because it would deprive the municipalities of their original jurisdiction.

2. *Nathan v. Whittington*, 408 S.W.3d 870 (Tex. 2013)(8/30/13)

"The whole point of layering a statute of repose over the statute of limitations is to 'fix an outer limit beyond which no action can be maintained.'" Though this might eliminate a meritorious claim, the "task of balancing these equities belongs to the Legislature, not to this Court."

3. *Liberty Mutual Insurance Company v. Adcock*, 412 S.W.3d 492 (Tex. 2013)(8/30/13)

"A fundamental constraint on the courts' role in statutory interpretation is that the Legislature enacts the laws of the state and the courts must find their intent in that language and not elsewhere." Here, the "Legislature's choice is clear, and it is not our province to override that determination." "'Enforcing the law as written is a court's safest refuge in matters of statutory construction, and we should always refrain from rewriting text that lawmakers chose . . . .'"

4. *City of Lorena v. BMTP Holdings, L.P.*, 409 S.W.3d 634 (Tex. 2013)(8/30/13)

"'Municipal ordinances must conform to the limitations imposed by the superior statutes, and only where the ordinance is consistent with them, and each of them, will it be enforced.'"

Footnote 5: "municipalities may use police powers when necessary to safeguard the public safety and welfare." Footnote 10: "in certain circumstances a municipality commits no taking when it validly exercises its police power to protect the public safety and welfare."

A "regulatory taking occurs when the government has unreasonably interfered with a claimant's use and enjoyment of its property." "The United States Supreme Court has identified three key factors to guide our analysis: (1) the economic impact on the claimant; (2) the extent of interference with the claimant's investment-backed expectations; and (3) the character of the government's action."

5. *Masterson et al. v. The Dioceses of Northwest Texas, et al.*, 422 S.W.3d 594 (Tex. 2013)(8/30/13)

Local church split from national organization over doctrinal differences. The issue "is what happens to the property."

A "court has no authority to decide a dispute unless it has jurisdiction to do so…. [Additionally,] Texas courts are bound by the Texas Constitution to decide disputes over which they have jurisdiction, and absent a lawful directive otherwise they cannot delegate or cede their judicial prerogative to another entity."

6. *In re Michael Blair*, 408 S.W.3d 843 (Tex. 2013)(8/23/13)

Prisoner was wrongfully convicted and incarcerated for murder. But, he was incarcerated for a conviction that occurred beforehand, so the Supreme Court ruled he was not entitled to compensation.

There is no statutory limit to how often a person can apply for benefits, and the Court declined to impose one. "We do not regard the [administrative] burden of denying an application for the reasons previously given to be oppressive, but if it should become so, and repeat applications cannot be enjoined, the Legislature may wish to consider an appropriate remedy."

7. *City of Houston v. Bates*, 406 S.W.3d 539 (Tex. 2013)(6/28/13)

In a pay dispute between retired firemen and a home rule city, the Supreme Court had to construe statutory terms and city ordinance provisions.

"Home-rule cities, like the City of Houston, derive their powers from the Texas Constitution." "'An

ordinance of a home-rule city that attempts to regulate a subject matter preempted by a state statute is unenforceable to the extent it conflicts with the state statute.' If a reasonable construction giving effect to both the state statute and the ordinance can be reached, then a city ordinance will not be held to have been preempted by the state statute."

"We construe the Legislature's change from 'salary' … to 'base salary,' … as indicative of the Legislature's clarification of the prior law and not as a substantive change." "[U]nder our construction of 'salary' as used in [the statute], the statutory scheme preempts the City from excluding those components [of pay] when calculating termination pay."

8. *The Finance Commission of Texas v. Norwood*, 418 S.W.3d 566 (Tex. 2013)(6/21/13) ("supplemental opinion" was issued 1/24/14)

Voters amended the constitution to allow home equity loans, and then in 2003 amended it again to allow the Legislature to delegate to an agency the power to interpret certain sections. In this suit, homeowners challenged certain rulings by two commissions authorized by the Legislature to create a safe harbor. The Supreme Court ruled that "agency interpretations made under this authority are [not] beyond judicial review," and that certain rulings by the agencies were unconstitutional.

"The separation of the powers of government into three distinct, rival branches — legislative, executive, and judicial — is 'the absolutely central guarantee of a just Government.' Checks and balances among the branches protect the individual.'" "The principle of separation of powers is foundational for federal and state governments in this country and firmly embedded in our nation's history. The Texas Constitution mandates: 'The powers of the Government of the State of Texas shall be divided into three distinct departments.…'" The power to interpret the constitution is "unquestionably" allocated by the constitution "to the Judiciary." Footnote 6: "'The final authority to determine adherence to the Constitution resides with the Judiciary.'"

""As a rule, court decisions apply retrospectively.…""

The homestead has been protected from forced sale by the Texas Constitution. An amendment allowed home equity loans. Its "lengthy, elaborate, detailed provisions … were included in Article XVI, Section 50 and made nonseverable." "Loan terms and conditions, notices to borrowers, and all applicable regulations were set out in Section 50 itself." Desiring a safe harbor, in "2003 the Legislature proposed, and the people adopted, Section 50(u), which states: The legislature may by statute delegate one or more state agencies the power to interpret" parts of Section 50. The commissioners on the commissions to whom the Legislature delegated the power were appointed by the Governor.

"The purpose of Section 50(u) … was to remove market uncertainty.… Judicial review of the Commissions' interpretations does not impair Section 50(u)'s purpose … , but rather, assures that the interpretations adhere to … constitutional provisions. To read Section 50(u) as giving the Commissions interpretative authority that is absolute and unreviewable … would defeat the purpose of constitutionalizing home equity lending procedures in the first place: to shield them from political pressures…."

The homeowners had standing to challenge the commissions' rulings. "Because standing is required for subject-matter jurisdiction, it can be — and if in doubt, must be — raised by a court on its own at any time." "Standing and other concepts of justiciability have been 'developed to identify appropriate occasions for judicial action' and thus maintain the proper separation of governmental powers."

"'The requirement in this State that a plaintiff have standing to assert a claim derives from the Texas Constitution's separation of powers among the departments of government, which denies the judiciary authority to decide issues in the abstract, and from the Open Courts provision, which provides court access only to a 'person for an injury done him'.'"

Generally, a citizen cannot sue to force the government to comply with the law, but this "*varies with the claims made*." Here there was standing because of the safe harbor provision. "Were this injury insufficient to confer standing to challenge the Commissions' interpretations, their authority to interpret Section 50 would be final and absolute, not merely shared with the Judiciary. But the principle of standing exists to protect the separation of powers, not to defeat it."

The fatal flaw with the commissions' interpretation of "interest" is that it was tied to the Legislature's definition, which it could change.

9. *City of Bellaire v. Johnson*, 400 S.W.3d 922 (Tex. 2013)(6/7/13)

Worker who was employed through a staffing agency and assigned to a city was barred by the exclusive remedy of the workers' compensation law from suing the city after he was injured. The "City was required by Section 504.011 to provide workers' compensation coverage to its employees, defined by Section 504.001(2)(A) to include 'a person in [its] service . . . who has been employed as provided by law.'" The "State, in adopting the Tort Claims Act and workers' compensation coverage for state employees, retained its immunity and provided its employees an alternative remedy through workers' compensation coverage.…"

10. *Christus Health Gulf Coast v. Aetna, Inc.*, 397 S.W.3d 651 (Tex. 2013)(4/19/13)

Suit brought by health care providers against an HMO under the Prompt Payment Statute. The Legislature did not provide a cause of action by the providers against an HMO unless they had privity of contract with it. "Barring a constitutional violation, … it is the Legislature's prerogative to allocate risk among medical service providers, HMOs, and delegated networks."

"We must take the Legislature at its word, respect its policy choices, and resist revising a statute under the guise of interpreting it." "We decline to impose judicially a legal or financial obligation that was not imposed legislatively."

11. *Strickland v. Medlen*, 397 S.W.3d 184 (Tex. 2013)(4/5/13)

Plaintiffs' dog escaped his yard, was picked up, and taken to a municipal animal shelter. A worker mistakenly placed the dog on a list allowing him to be killed before plaintiffs returned with the cash necessary to pay the fees to get him out. The Supreme Court ruled that "a bereaved dog owner [may not] recover emotion-based damages for the loss." The dog is "personal property, thus disallowing non-economic damages." Courts are not well suited to fashion a new theory of recover, so any further remedy must come from the Legislature.

"[A]llowing loss-of-companionship suits raises wide-reaching public-policy implications that legislators are better suited to calibrate.… [There are] two legal policy concerns: (1) the anomaly of elevating 'man's best friend' over multiple valuable human relationships; and (2) the open-ended nature of such liability." The "issue is not whether the Court *can* draw lines, but whether it *should*." "We could impose damages limits, but such fine-tuning is more a legislative function than a judicial one." "The judiciary, however, while well suited to adjudicate individual disputes, is an imperfect forum to examine the myriad policy trade-offs at stake here." This is "best left to our 181-member Legislature." "Amid competing policy interests, including the inherent subjectivity (and inflatability) of emotion-based damages, lawmakers are best positioned to decide if such a potentially costly expansion of tort law is in the State's best interest, and if so, to structure an appropriate remedy."

12. *City of Round Rock, Texas v. Rodriguez*, 399 S.W.3d 130 (Tex. 2013)(4/5/13)

Municipal fire fighter wanted union representation when employer was investigating his use of sick leave. The Supreme Court ruled that the Labor Code does not confer that right for public employees.

"[L]abor policy and regulation is determined exclusively by the Texas Legislature.…" "The Legislature grants and denies rights to unionized public-sector employees by specific enactment." The Legislature must determine if public employees are entitled to union representation during investigations. "'It is the Legislature's prerogative to enact statutes; it is the judiciary's responsibility to interpret those statutes according to the language the Legislature used . . . .'" It "'would be a usurpation of our powers to add language to a law where the [L]egislature has refrained.'"

13. *In re the Office of the Attorney General*, 422 S.W.3d 623 (Tex. 2013)(3/8/13)

Criminal contempt proceeding based upon ex-husband's failure to pay child support. The Supreme Court ruled that, to purge himself of contempt according to statute, he had to be "current" with all child support as of the date of the hearing.

Footnote 1: "Chapter 231 of the Family Code designates the Office of the Attorney General as the agency responsible for implementing federal Title IV-D requirements regarding child support. TEX. FAM. CODE § 231.001.… Chapter 203 provides for the creation of domestic relations offices to collect, monitor, and enforce child support in their respective jurisdictions.… Under the terms of the agreement between the [Tarrant] County Domestic Relations Office and the Attorney General's Office, the Domestic Relations Office provides trial court Title IV-D services, while the Attorney General handles both trial court and appellate matters."

"Contempt is an inherent power of the court."

14. *Kopplow Development, Inc. v. The City of San Antonio*, 399 S.W.3d 532 (Tex. 2013)(3/8/13)

Commercial property owner sued city for inverse condemnation when city would not issue permit unless owner provided more landfill.

"One … [purpose of] government is to protect private property rights. The Texas Constitution … require[es] takings to be for public use, with the government paying the landowner just compensation.… When only part of a tract is taken, Texas law assures just compensation by entitling the landowner to the value of the part taken as well as the damage to the owner's remaining property."

15. *Southern Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676 (Tex. 2013)(2/15/13)

Suit over denial by city of permit for concrete plant. The Supreme Court ruled that the city's ordinance was preempted by state statute.

Houston is a home-rule city. "Home-rule cities have the full power of self-government and look to the Legislature, not for grants of power, but only for

limitations on their powers." Therefore, if "'the Legislature decides to preempt a subject matter normally within a home-rule city's broad powers, it must do so with 'unmistakable clarity.'"

E. Choice of Law; Stare Decisis

No cases to report.

F. Governmental Liability and Sovereign Immunity

1. *Crosstex Energy Services, L.P. v. Pro Plus, Inc.*, S.W.3d (Tex. 2014)(3/28/14)

Footnote 3: In Whistleblower cases, "the facts necessary to allege a violation under section 554.002 [are] *jurisdictional* because they [are] indispensable to the jurisdictional question of the waiver of sovereign immunity in section 554.0035."

2. *Ysleta Independent School District v. Franco*, 417 S.W.3d 443 (Tex. 2013)(12/13/13)

In this Whistleblower case, a principal at a preschool reported to his supervisor, and possibly other school officials, his concern about asbestos and that the district was violating federal law. Though he requested a transfer, he was later indefinitely suspended by the district. The Supreme Court ruled that governmental immunity was not waived because principal did not report the violation of the law to the correct officials.

The whistleblower must prove he had a good faith believe he reported the situation to an appropriate law-enforcement authority. A "report of alleged violations of law is jurisdictionally insufficient if made to someone charged only with internal compliance." That person would not have "'law-enforcement authority' status." "[R]eporting to school officials not charged with enforcing laws outside the district falls short of what the Act requires." So, here, the principal "has failed to show an objective, good-faith belief that the ISD qualifies as an 'appropriate law-enforcement authority' under the Act."

3. *Dallas Metrocare Services v. Juarez*, 420 S.W.3d 39 (Tex. 2013)(11/22/13)

Patient of governmental mental health care facility was injured when a whiteboard fell and hit him. The facility filed a plea to the jurisdiction. The Supreme Court ruled that the court of appeals should consider the facility's jurisdictional arguments, even if not presented to the trial court, and secondly that "the patient's alleged injuries were not caused by the 'use' of the whiteboard" as required by the Tort Claims Act.

"'A governmental unit in the state is liable for . . . personal injury . . . so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.'"

The facility first argued on appeal that the whiteboard was not a "condition" of property on appeal. However, "because immunity from suit implicates a court's jurisdiction, … [it was error not] to consider the … hospital's new immunity arguments on appeal," notwithstanding section 51.0145(a) of the TEX.CIV.PRAC.&REM.CODE. An "appellate court must consider all of a defendant's immunity arguments, whether the governmental entity raised other jurisdictional arguments in the trial court or none at all."

The Tort Claims Act "'waives immunity for claims based upon the 'use' of tangible personal property only when the governmental unit itself uses the property.' That is, 'a hospital does not 'use' tangible personal property . . . within the meaning of section 101.021(2) by merely providing, furnishing, or allowing a patient access to it.' Therefore, the hospital in *Rusk* did not 'use' a plastic bag with which a patient committed suicide." Here, the defendant "did not 'use' the whiteboard merely by making it available for use."

4. *Canutillo Independent School District v. Farran*, 409 S.W.3d 653 (Tex. 2013)(8/30/13)

While plaintiff was employed by the school district, he reported several improprieties to district officials and the school board. Some were displeased, he came under negative scrutiny, and the district began the process of terminating him. During that time, he reported one item to the FBI. After he was fired, he filed this Whistleblower suit. The Supreme Court ruled, however, that he had failed to report the matters to the appropriate authorities, and that he had failed to exhaust his administrative remedies on his breach of contract claim.

Plaintiff failed to prove an objective, good-faith belief he reported the improprieties to officials who "had authority 'to enforce, investigate, or prosecute violations of law against third parties outside of the entity itself' or had 'authority to promulgate regulations governing the conduct of such third parties.'" His "complaints to the school board, superintendents, and internal auditor were not good-faith complaints of a violation of law to a 'law enforcement authority' under the Whistleblower Act.… [T]hese officials [did not have] authority to enforce the allegedly violated laws outside of the institution itself, against third parties generally." They only "were responsible for internal compliance.…"

Further, with respect to the report to the FBI, plaintiff did not establish causation. "To establish a Whistleblower Act claim, the plaintiff must show that his report to a law enforcement authority caused him to suffer the complained-of adverse personnel action. 'To show causation, a public employee must demonstrate that *after* he or she reported a violation of the law in good faith to an appropriate law enforcement authority,

the employee suffered discriminatory conduct by his or her employer that would not have occurred when it did if the employee had not reported the illegal conduct.'… To prevail on a theory that the FBI report caused his termination, [plaintiff] would have to show that, but for that report, the school district would have changed its mind and retained him."

"[W]hen parties submit evidence at [the] plea to the jurisdiction stage, review of the evidence generally mirrors the summary judgment standard.… 'An appellate court reviewing a summary judgment must consider whether reasonable and fair-minded jurors could differ in their conclusions in light of all the evidence presented.'"

5. *Texas Adjutant General's Office v. Ngakoue*, 408 S.W.3d 350 (Tex. 2013)(8/30/13)

Plaintiff sued governmental employee who was acting in the course of his employment when he caused a car wreck. After plaintiff amended to add the governmental employer, it sought to have suit dismissed. The Supreme Court ruled that the plaintiff could assert a suit against the governmental unit.

The Texas Tort Claims Act "encourages, and in effect mandates, plaintiffs to pursue lawsuits against governmental units rather than their employees when the suit is based on the employee's conduct within the scope of employment. Section 101.106, in part, bars a suit against a governmental unit absent the unit's consent after a plaintiff sues the unit's employee regarding the same subject matter. However, it also provides that when an employee is sued for acts conducted within the general scope of employment, and suit could have been brought under the TTCA, then the suit is considered to have been filed against the governmental unit, not the employee. Accordingly, … the plaintiff who brings such a suit against an employee is not barred from asserting a claim against the governmental employer. Further, while the Legislature has set out a procedure for the dismissal of a suit against an employee who was acting within the scope of employment, this procedure is immaterial to whether suit may be maintained against the proper defendant—the government. In this case, … suit against the governmental unit should proceed because the plaintiff … amend[ed] his pleadings to assert a TTCA claim against the government."

"'[N]o state can be sued in her own courts without her consent, and then only in the manner indicated by that consent.' … [L]awsuits against the state 'hamper governmental functions by requiring tax resources to be used for defending lawsuits and paying judgments….' Accordingly, the doctrine of sovereign immunity 'bars suits against the state and its entities' unless the state consents by waiving immunity. '[T]he manner in which the government conveys its consent to suit is through the Constitution and state laws.' Thus, ''it is the Legislature's sole province to waive or abrogate sovereign immunity.'' Because any legislative waiver of immunity must be undertaken 'by clear and unambiguous language,' statutory waivers of immunity are to be construed narrowly."

The "TTCA provides a limited waiver of immunity for certain tort claims … [such as when] the injury claimed 'arises from the operation or use of a motor-driven vehicle.'"

The TTCA "favors the expedient dismissal of governmental employees when suit should have been brought against the government." It removes "a plaintiff's ability 'to plead alternatively that the governmental unit is liable because its employee acted within the scope of his or her authority but, if not, that the employee acted independently and is individually liable.' Thus, when … [interpreting the TTCA], we must favor a construction that most clearly leads to the early dismissal of a suit against an employee when the suit arises from an employee's conduct that was within the scope of employment and could be brought against the government under the TTCA."

The defendant argued that consent to be sued "may only be found in statutory waivers of immunity found outside the TTCA itself. We disagree."

"We have recognized that 'a suit against a state official is merely 'another way of pleading an action against the entity of which [the official] is an agent.'' Thus, '[a] suit against a state official in his official capacity 'is *not* a suit against the official personally, for the real party in interest is the entity.''" It seeks to impose liability on the governmental unit. Thus, "a suit against a government employee acting within the scope of employment that could have been brought under the TTCA … is considered to have been brought against the governmental unit, *not* the employee." Footnote 5: "claims brought against the government pursuant to statutory waivers of immunity that exist apart from the TTCA are not 'brought under' the TTCA."

Suit "against an employee in his official capacity is *not* a suit against the employee.… A governmental employer may be substituted for the employee under subsection (f) after limitations has run because there is 'no change in the real party in interest.'"

Footnote 8: "[P]ublic employees generally may 'assert official immunity 'from suit arising from the performance of their (1) discretionary duties in (2) good faith as long as they are (3) acting within the scope of their authority.''"

"[S]ubsection (f) simply provides a procedure by which an employee who is considered to have been sued only in his official capacity will be dismissed from the suit." It "does not bar subsequent suit against the government."

When the government files a motion to dismiss the employee, it "effectively confirms the employee was acting within the scope of employment and that

the government, not the employee, is the proper party." "If the plaintiff fails to substitute the government, and the employee was sued in his official capacity only, then the case must be dismissed."

An alternative view forces a plaintiff, at the outset, to choose. "However, a plaintiff may not be able to obtain the information necessary to make such a decision within such a short time frame, and an erroneous decision, in the dissent's view, would mean that suit is forever barred.… [I]t would be illogical for the election-of-remedies provisions to prohibit the very suits the TTCA authorizes."

6. *Dugger v. Arredondo*, 408 S.W.3d 825 (Tex. 2013)(8/30/13)

An "injured passenger in a fleeing vehicle could maintain a suit for unreasonable chase because officers owed a duty of reasonable care."

7. *Dallas County v. Logan*, 407 S.W.3d 745 (Tex. 2013)(8/23/13)

County filed interlocutory appeal after trial court denied its plea to the jurisdiction in a Whistleblower case. The Supreme Court ruled that the appellate court should consider arguments for immunity even if they were not previously raised in the trial court.

"Section 51.014(a)(8) of the Texas Civil Practice and Remedies Code permits an interlocutory appeal of an order denying a plea to the jurisdiction by a governmental unit."

"[S]ection 51.014(a) does not preclude an appellate court from having to consider immunity grounds first asserted on interlocutory appeal."

8. *University of Houston v. Barth*, 403 S.W.3d 851 (Tex. 2013)(6/14/13)

Professor reported violations of school policies and state law to the chief financial officer, general counsel, and later to the internal auditor and associate provost. He received a poor rating, affecting his pay, was denied travel funds, and his symposium was cancelled. He filed a Whistleblower suit. The Supreme Court ruled sovereign immunity was not waived. "Because there is no evidence that the … Regents enacted the … rules pursuant to authority granted to it in the Texas Education Code, we hold that the rules do not fall within the definition of 'law' under the Whistleblower Act. Moreover, there is no evidence that Barth had an objectively reasonable belief that his reports of the alleged violations of state civil and criminal law were made to an 'appropriate law enforcement authority.'"

"The issue is one of subject-matter jurisdiction, which we review de novo."

"A violation [under the Whistleblower Act] 'occurs when a governmental entity retaliates against a public employee for making a good-faith report of a violation of law to an appropriate law enforcement authority.'" Under the act, "law" is "a state or federal statute, an ordinance of a local governmental entity, or 'a rule adopted under a statute or ordinance.'" "A rule is only a 'law' under the Whistleblower Act, however, if the rule is 'adopted under a statute.'" Here, the evidence did not show the policies were properly adopted.

"The good-faith inquiry under the Whistleblower Act has both subjective and objective components, which require that Barth 'must have believed he was reporting conduct that constituted a violation of law and his belief must have been reasonable based on his training and experience.'" He satisfied the subjective prong, but not the objective one.

"[N]one of Barth's reports were made to an appropriate law enforcement authority under the Act." "An appropriate law enforcement authority is a part of a state entity that the employee in good faith believes is authorized (1) to regulate under or to enforce the allegedly violated law, or (2) to investigate or prosecute a violation of criminal law.… '[P]urely internal reports untethered to the Act's undeniable focus on law enforcement—those who either make the law or pursue those who break the law—fall short.'" The agency to whom the report is made "'must have authority to enforce, investigate, or prosecute violations of law against third parties outside of the entity itself, or it must have authority to promulgate regulations governing the conduct of such third parties.'" Barth had to have an "objective good-faith belief that he was reporting violations of law" to an appropriate agency. An internal complaint to one investigating internal compliance "is jurisdictionally insufficient.…"

9. *City of Bellaire v. Johnson*, 400 S.W.3d 922 (Tex. 2013)(6/7/13)

Worker who was employed through a staffing agency and assigned to a city was barred by the exclusive remedy of the workers' compensation law from suing the city after he was injured.

"'The absence of subject-matter jurisdiction may be raised by a plea to the jurisdiction, as well as by other procedural vehicles, such as a motion for summary judgment.'"

"The City's immunity from Johnson's suit would be waived by the Texas Tort Claims Act … (waiving immunity from suit for injury from the operation of a motor-driven vehicle), but for the exclusive-remedy bar provided by the Texas Workers' Compensation Act … (motor vehicle waiver applies only if the government employee operating the vehicle could be personally liable to the claimant according to Texas law). Thus, if the bar applies, immunity was not waived."

The "State, in adopting the Tort Claims Act and workers' compensation coverage for state employees, retained its immunity and provided its employees an alternative remedy through workers' compensation coverage.…"

"'If a suit is filed under this chapter [CP&RC 101] against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit.'"

10. *Strickland v. Medlen*, 397 S.W.3d 184 (Tex. 2013)(4/5/13)

Plaintiffs' dog escaped his yard, was picked up, and taken to a municipal animal shelter. A city worker mistakenly placed the dog on a list allowing him to be killed before plaintiffs returned with the cash necessary to pay the fees to get him out. The Supreme Court ruled that "a bereaved dog owner [may not] recover emotion-based damages for the loss."

Footnote 17: "Though … [employee] was acting within the scope of her governmental employment, she did not move for dismissal under section 101.106(f) of the Texas Tort Claims Act … to which she would have been entitled.… Dismissal under section 101.106(f) is not automatic; [employee] was required to file a motion. ('Substitution of the [governmental body] as the defendant was not automatic; [plaintiff] was required to file a motion.')"

11. *Texas Department of Transportation v. A.P.I. Pipe and Supply, LLC*, 397 S.W.3d 162 (Tex. 2013)(4/5/13)

Inverse condemnation suit which turned on whether government had title to a parcel after an original condemnation judgment in 2003 that awarded it a "right-of-way" was revised by a nunc pro tunc judgment in 2004 that purported to render the 2003 judgment void and render only an "easement."

"Whether a court has jurisdiction is a matter of law we decide de novo. Evidence can be introduced and considered at the plea to the jurisdiction stage if needed to determine jurisdiction." The "trial court was correct to consider the 2003 and 2004 Judgments as extrinsic, undisputed evidence."

"A trial court lacks jurisdiction and should grant a plea to the jurisdiction where a plaintiff 'cannot establish a viable takings claim.' … '[T]o recover under the constitutional takings clause, one must first demonstrate an ownership interest in the property taken.'"

Purchaser of land asserted that the government, which participated in a nunc pro tunc judgment pursuant to which it bought the land, claimed government should be estopped from subsequently objecting to the judgment. But the Court ruled that "equitable estoppel … [was] inapplicable against the government in this case."

"For estoppel to apply against the government, two requirements must exist: (1) 'the circumstances [must] clearly demand [estoppel's] application to prevent manifest injustice,' *and* (2) no governmental function can be impaired. Neither requirement exists here." Footnote 36: "*Super Wash* … explain[s] the significance of the only two cases where we have applied estoppel against the government"

Estoppel has been applied "to prevent manifest injustice if, 'officials acted deliberately to induce a party to act in a way that benefitted the [government].'" Here, there was only "mistaken acquiescence."

Moreover, "that the fact that a governmental error was 'discoverable' militates against applying estoppel."

Finally, estoppel would impair planning a drainage ditch, which is "a governmental function."

12. *El Dorado Land Company, L.P. v. City of McKinney*, 395 S.W.3d 798 (Tex. 2013)(3/29/13)

Inverse condemnation case. Footnote 1: "'[T]here is but one route to the courthouse for breach-of-contract claims against the State, and that route is through the Legislature.'" Footnote 2: "The Legislature has waived a municipality's immunity to suit for contract claims involving goods and service."

"A statutory waiver of immunity is unnecessary for a takings claim because the Texas Constitution waives 'governmental immunity for the taking, damaging or destruction of property for public use.'"

13. *The University of Texas Southwestern Medical Center at Dallas v. Gentilello*, 398 S.W.3d 680 (Tex. 2013)(2/22/13)

Whistleblower case. Professor of surgery reported "lax supervision of trauma residents" to supervisor who oversaw internal compliance. In addition, medical school had written policy protecting those who report violation from harassment. The Supreme Court ruled the professor failed to report the violation to an appropriate authority, and therefore the school's plea to the jurisdiction should have been sustained. "Under our Act, the jurisdictional evidence must show more than a supervisor charged with internal compliance or anti-retaliation language in a policy manual urging employees to report violations internally."

"The Texas Whistleblower Act bars retaliation against a public employee who reports his employer's or co-worker's 'violation of law' to an 'appropriate law enforcement authority'—defined as someone the employee 'in good faith believes' can 'regulate under or enforce' the law allegedly violated or 'investigate or prosecute a violation of criminal law.'" Reporting a

violation to a supervisor who has power only to "ensur[e] internal compliance" is inadequate.

"For a plaintiff to satisfy the Act's good-faith belief provision, the plaintiff must reasonably believe the reported-to authority possesses what the statute requires: the power to (1) regulate under or enforce the laws purportedly violated, or (2) investigate or prosecute suspected criminal wrongdoing."

"Since the Legislature defined when 'report is made to an appropriate law enforcement authority,' we must use that statutory definition."

Good faith reporting of a violation "has both objective and subjective elements." "[T]he employee's belief must be objectively reasonable." In this regard, the employee's "belief can only satisfy the good-faith requirement 'if a reasonably prudent employee in similar circumstances' would have thought so."

The "'Whistleblower Act's limited definition of a law enforcement authority does not include an entity whose power is not shown to extend beyond its ability to comply with a law by acting or refusing to act or by preventing a violation of law.'" The "power to urge compliance or purge noncompliance" is insufficient.

"[A]n appropriate law-enforcement authority must be actually responsible for regulating under or enforcing the law allegedly violated." "As a legal matter, only the United States Secretary of Health and Human Services (HHS Secretary) can 'regulate under' or 'enforce' Medicare/Medicaid rules."

For an authority to be appropriate, "it must have authority to enforce, investigate, or prosecute violations of law against third parties outside of the entity itself, or it must have authority to promulgate regulations governing the conduct of such third parties."

"Federal and other state whistleblower laws explicitly protect purely internal reports to supervisors; Texas law does not." Therefore, "lodging an internal complaint to an authority whom one understands to be only charged with internal compliance, even including investigating and punishing noncompliance, is jurisdictionally insufficient.…" Likewise, it is not enough "that UTSW recited anti-retaliation principles in an internal policy manual." "The specific powers listed in section 554.002(b) are outward-looking. They do not encompass internal supervisors.…" "This is a legislatively-mandated legal classification, one tightly drawn, and we cannot judicially loosen it."

14. *Texas A&M University—Kingsville v. Moreno*, 399 S.W.3d 128 (Tex. 2013)(2/22/13)

Whistleblower case. Employee reported to university president that her boss, comptroller of school, wrongly paid in-state tuition for his daughter. Following *Gentilello*, the Supreme Court ruled that this "internal report [fell] short of what the Act requires: a good-faith report of a violation of law to an 'appropriate law enforcement authority.'" It thus granted the university's plea to the jurisdiction.

The "Act's restrictive definition of 'appropriate law enforcement authority' … is 'tightly drawn,' … and centers on [reports to] law enforcement, not law compliance" personnel.

Though the president had authority "within the university to compel compliance," he did not have external authority. "A supervisor is not an appropriate law-enforcement authority where the supervisor lacks authority 'to enforce the law allegedly violated … against third parties generally.'" The Texas Act "does not protect purely internal reports."

15. *Rodriguez-Escobar v. Goss*, 392 S.W.3d 109 (Tex. 2012)(2/1/13)

Footnote 1: ""Official immunity is an affirmative defense.""

G. Agents and Agency; Vicarious Liability

1. *City of Bellaire v. Johnson*, 400 S.W.3d 922 (Tex. 2013)(6/7/13)

Worker who was employed through a staffing agency and assigned to a city was barred by the exclusive remedy of the workers' compensation law from suing the city after he was injured.

The "City controlled the details of Johnson's work and thus, that Johnson was its employee..… 'The test to determine whether a worker is an employee rather than an independent contractor is whether the employer has the right to control the progress, details, and methods of operations of the work.'"

H. Contract Law and Contract Construction

1. *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, ___ S.W.3d ___ (Tex. 2014)(5/9/14)

In a commercial dispute, defendant tendered an offer of settlement of all claims which were or could be asserted; plaintiff attempted to accept defendant's offer as to all claims. The Supreme Court ruled that, in a summary judgment to enforce the settlement, the "plaintiff presented uncontroverted evidence that it accepted the material terms of the defendant's offer." The common law, not Rule 167 or Ch. 42, governs the breach of contract claim on the settlement.

In the motion for summary judgment, the Court reviews the letter and email sent by plaintiff. "If they constitute evidence of acceptance, they were uncontroverted evidence because [defendant] did not present any evidence to … create a fact issue on the acceptance element.… [Otherwise,] plaintiff did not satisfy its burden of proof.…"

Chapter 42 and Rule 167 do not "govern here" since the issue is not attorney's fees awardable under them, but breach of contract; so plaintiff "was required to prove a valid 'acceptance' under contract law.…"

Texas' policy supports "freedom of contract," and it "prohibit[s] us from binding parties to contracts to which they never agreed."

An "acceptance may not change or qualify the material terms of the offer, and an attempt to do so results in a counteroffer rather than acceptance.… [A]n immaterial variation between the offer and acceptance will not prevent the formation of an enforceable agreement." Materiality is generally "determined on a contract-by-contract basis, in light of the circumstances of the contract.… In construing a contract, a court's primary concern is to ascertain the intentions of the parties as expressed in the instrument."

Under the record here, "the variation in language between [defendant's] offer and [plaintiff's] acceptance is not material and did not convert [plaintiff's] acceptance into a counteroffer." Defendant's offer contained internal inconsistencies. A letter and email sent by plaintiff were "prima facie evidence" of an intent to accept. And, there were no claims other than those asserted. Moreover, "the record provides no basis to find that [plaintiff] could pursue those claims in any post-settlement action. Generally, once parties settle a lawsuit and a judgment is entered, res judicata bars the parties from subsequently pursuing any claims arising out of the subject matter of the lawsuit that they could have brought in the previous suit."

The shifting burden in a summary judgment is important because, if plaintiff's purported acceptance contained a material divergence of terms, its letter and email would constitute "no evidence" to support a summary judgment. And if they had been ambiguous, they would have created a fact issue. But, since here they showed a clear intent to settle, the "burden shifted to [defendant] to produce evidence raising an issue of fact." And defendant did not challenge "acceptance" until after the summary judgment.

2. *Gotham Insurance Company v. Warren E&P, Inc.*, ___ S.W.3d ___ (Tex. 2014)(3/21/14)

Oil well blew out and burned. The carrier paid the insured on the resulting claim based upon insured's representation that it owned 100% working interest. When later information indicated the insured's interest may have been less, the carrier sued for reimbursement under equity and breach of contract. The opinion addresses "the proper role of equity claims when a contractual provision addresses the matter in dispute." The Supreme Court followed *Fortis*, which "held that an insurer is limited to contractual claims when the policy addresses the matter.… Here, this policy contains several clauses addressing misrepresentations, reporting, salvage and recoveries, subrogation, and due diligence. Thus, because the insurance contract addresses the insured's conduct, we hold that the insurer cannot rely on its equity claims."

Insured was only covered to "the extent of its working interest in the well." Though the carrier may not proceed in equity, the policy does not "conclusively preclude[]" carrier's recovery.

Under *Matagorda County*, "an insurer may not seek reimbursement from the insured in equity for settlement funds paid in the absence of a contractual right to do so." Footnote 6: "*Frank's Casing* … declined to recognize an exception to the rule we announced in *Matagorda*."

The evidence did not conclusively establish that the insured "suffered no loss." It agreed to "evenly share in the aggregate drilling profits and losses.…"

Fortis "held that '[w]here a valid contract prescribes particular remedies or imposes particular obligations, equity generally must yield unless the contract violates positive law or offends public policy.' … Without referencing the 'made whole' doctrine, Fortis Benefits' insurance policy granted it the right to recover through subrogation against third parties or seek reimbursement from the insured." Since "equity follows the law," it "generally must yield" to the contract. *Fortis* held "that neither contractual subrogation nor reimbursement clauses violate public policy." Footnote 13: "The Legislature recently specified (with respect to contractual subrogation clauses in certain health insurance policies) the recovery insurers may obtain from a settlement between the insured and the responsible third party that caused the injury."

Footnote 9: A "party opposing [a] claim for unjust enrichment [must] secure findings 'that an express contract exists that covers the subject matter of the dispute;' [also, there is a] general rule that one may recover in quantum meruit only when there is no express contract."

The carrier is limited to the contract "unless the contractual provisions … violate positive law or offend public policy.… [There exists a] strong public policy to preserve freedom of contract. Further, the public policy of the State is reflected in its statutes. Thus, we will enforce the parties' bargain unless it contravenes some positive statute."

Footnote 11: The insured's "misrepresentations concerning its working interest could, among other remedies, operate to render the policy void. If [carrier] prevails on this theory and elects to void the policy, its equity claims might operate to secure a return of the [money] it paid under the claim. Thus, it is premature to dismiss [carrier's] equity claims.…"

Footnote 15: "Regarding whether the representation was fraudulent, this is an inquiry typically left to the jury as it often involves proof of intent by circumstantial evidence."

The carrier cannot pursue funds from other entities related to the well. The carrier paid the funds to

the insured, and the policy addresses the "return of payments that benefitted others."

The carrier did not waive its contract claim. A "party may raise an independent ground for obtaining the same relief awarded in the judgment as an issue on appeal rather than pursuing a cross-appeal." Carrier "has sought the same monetary relief (a return of payments …) under both its equity and contract claims. Because [carrier] has raised on appeal its contract claim as an independent ground for the relief awarded in the trial court's judgment, it has not waived its contract claim." Footnote 18: "That [carrier] omitted its contractual subrogation claim in its live pleading does not alter the fact that the contract addresses the matter of subrogation."

"A reimbursement clause may operate to allow an insurer to recover payments previously made even if the insured did not breach the policy.… But the absence of a reimbursement clause does not necessarily foreclose an insurer's ability to recover if the insured has breached the policy." Carrier must prove breach, and that "the breach proximately caused its damages.…"

Here, summary judgment for the carrier could not "be supported on the ground that [insured] suffered no loss."

3. *FPL Energy, LLC v. TXU Portfolio Management Company*, 426 S.W.3d 59 (Tex. 2014)(3/21/14 [*n.b.*, opinion is dated 3/21/13, but was released on 3/21/14])

Suit over contract to provide electricity for distribution. The Supreme Court ruled that plaintiff utility "owed no contractual duty to provide transmission capacity. However, … the liquidated damages provisions … are unenforceable as a penalty." "If we can give a clear and definite legal meaning to a contract, it is not ambiguous as a matter of law. An ambiguous contract, however, has a doubtful or uncertain meaning or is reasonably susceptible to multiple interpretations; we will not find ambiguity simply because the parties disagree over a contract's meaning. Our primary concern in contract interpretation is to 'ascertain the true intentions of the parties as expressed in the instrument.' We consider the entire writing to harmonize and effectuate all provisions such that none are rendered meaningless. Further, we 'construe contracts from a utilitarian standpoint bearing in mind the particular business activity sought to be served.'"

Though the parties did not challenge a lower court finding that a contract provision is unambiguous, the Court "may, nonetheless, declare a contract ambiguous.… [However, the provision here,] … when construed in light of the entire contracts, has a definite legal meaning and, thus, is unambiguous."

In "contract interpretation, a more specific provision will control over a general statement." In addition, "[w]e cannot interpret a contract to ignore clearly defined terms.…" Also, here, the location within the agreement of the provision in question "reinforces" the Court's decision.

Under the contract, if the power generating company "could not deliver electricity because of congestion, [it] bore the risk and, thus, must bear the consequences." Here, reading two relevant contract provisions together, defendant, the power generating company, "must make all interconnection arrangements so that electricity can reach the Delivery Point, and [plaintiff] must ensure that facilities exist beyond the Delivery Point to allow for delivery to consumers."

Grid congestion in this case was "beyond both parties' control." The contract allocates "the risk the risk of curtailment and congestion to [defendant] by clearly establishing that such events affect contract obligations only in certain instances not found here." "'Freedom of contract allows parties to bargain for mutually agreeable terms and allocate risks as they see fit.'" And, despite the speed of electricity, parties can "conceptualize its location for the purpose" of energy contracts. "Although ERCOT made final curtailment decisions, that does not mean that neither party bore the risk in the event of congestion.…"

The liquidated damages "provisions are unambiguous because we may discern a definite legal meaning by construing the provisions in light of each contract as a whole." Here, they apply only to Renewable Energy Credits. They received differential treatment in the agreement and regulatory scheme. The "liquidated damages clauses compensate for REC deficiencies and leave common law remedies available for electricity deficiencies."

"[S]ophisticated parties have broad latitude in defining the terms of their business relationship.… [C]ourts should uphold contracts 'negotiated at arm's length by 'knowledgeable and sophisticated business players' represented by 'highly competent and able legal counsel''…. We must construe contracts by the language contained in the document, with a mind to Texas's strong public policy favoring preservation of the freedom to contract.… Therefore, the lack of reference [in the agreement] to electricity or energy in the liquidated damages provisions is critical." The "omission was intentional and deliberate." Courts "'will not rewrite agreements to insert provisions parties could have included or to imply restraints for which they have not bargained.'"

"Limiting the liquidated damages provisions to their plain language also has the benefit of advancing stability in the renewable energy marketplace, including the vital role of RECs. Under the legislative scheme, RECs and energy are 'unbundled.'"

Here, liquidated damages are unenforceable. "The basic principle underlying contract damages is compensation for losses sustained and no more; thus, we will not enforce punitive contractual damages provisions.… [T]wo indispensable findings a court must make to enforce contractual damages provisions [are]: (1) 'the harm caused by the breach is incapable or difficult of estimation,' and (2) 'the amount of liquidated damages called for is a reasonable forecast of just compensation.' We evaluate both prongs of this test from the perspective of the parties at the time of contracting.… [A] liquidated damages provision may be unreasonable 'because the actual damages incurred were much less than the amount contracted for.' A defendant making this assertion may be required to prove the amount of actual damages before a court can classify such a provision as an unenforceable penalty. While … [there may be] factual issues first, ultimately the enforceability of a liquidated damages provision presents a question of law.…"

In this case, "damages for RECs were difficult to estimate at the time of contracting." The Court views "the reasonableness of the [damages] forecast from the time of contracting"

Courts "will not be bound by the language of the parties," including inclusion of liquidated damages in a penalty section.

Here, there is a "chasm between the liquidated damages provisions as written and the result of the provisions under the … judgment." A "Deficiency Rate" did not "tie the damages to market value.…" This created "an unacceptable disparity." A "liquidated damages provision may be unreasonable in light of actual damages. The burden of proving unreasonableness falls to [defendant].… [Here, defendant] has met its burden."

"*Phillips* did not create a broad power to retroactively invalidate liquidated damages provisions that appear reasonable as written.… But when there is an unbridgeable discrepancy between liquidated damages provisions as written and the unfortunate reality in application, we cannot enforce such provisions.… When the liquidated damages provisions operate with no rational relationship to actual damages, thus rendering the provisions unreasonable in light of actual damages, they are unenforceable."

4. *In re Mark Fisher*, ___ S.W.3d ___ (Tex. 2014)(2/28/14)

Venue case; defendants sought to enforce forum selection clauses in the operative agreements. Here, liability "for failure to pay him on the Note must be determined by reference to those agreements. And when an injury is to the subject matter of a contract, the action is ordinarily '*on the contract*.'"

"Our primary goal in construing this contractual language is to determine the parties' intent as reflected by the language they used." Here, the parties intended that they would "submit to the jurisdiction of the state or federal courts in Tarrant County *and* that they will not file suit 'arising out of or relating to this Agreement' anywhere else." When "the phrase 'non-exclusive jurisdiction' is in a forum selection clause that also includes language reflecting intent that the venue choice is mandatory, the non-exclusive language does not necessarily control over the mandatory language."

5. *Ewing Construction Company v. Amerisure Insurance Company*, 420 S.W.3d 30 (Tex. 2014)(1/17/14)

Insurance coverage dispute arising from suit against building contractor. The issue concerned the "assumed liability" exclusion in the policy.

"[W]e … determined in *Gilbert* that 'assumption of liability' means that the insured has assumed [by contract] a liability for damages that exceeds the liability it would have under general law. Otherwise, the words 'assumption of liability' are meaningless and are surplusage." … 'Reading the phrase to apply to all liabilities sounding in contract renders the term 'assumption' superfluous.' … And interpretations of contracts as a whole are favored so that none of the language in them is rendered surplusage."

"We have defined 'good and workmanlike' as 'that quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work.'" The "'common law duty to perform with care and skill accompanies every contract.…'"

6. *Coinmach Corp. f/k/a Solon Automated Services, Inc. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909 (Tex. 2013)(11/22/13) ("corrected opinion" was issued 2/14/14)

Owner of complex purchased in foreclosure sued a holdover tenant alleging inter alia a breach of contract. But, the foreclosure terminated the lease, so the tenant became a tenant at sufferance, and no agreement with the new owner existed. Thus, tenant "could not be liable for breach of any lease."

7. *Canutillo Independent School District v. Farran*, 409 S.W.3d 653 (Tex. 2013)(8/30/13)

In this Whistleblower case, plaintiff's contract stated he could only be fired for cause. "School district employees … generally must exhaust administrative remedies by bringing an appeal to the Commissioner." The Whistleblower Act's procedures "do not require exhaustion [of remedies] with the Commissioner.…" Here, regarding plaintiff's "breach of contract cause of action, he failed to exhaust administrative remedies."

8. *Dynegy, Inc. v. Yates*, 422 S.W.3d 638 (Tex. 2013)(8/30/13)

Dynegy orally agreed to pay for the criminal defense attorney for its officer. When attorney sued for the balance after the trial, it alleged the statute of frauds. The Supreme Court ruled the agreement was unenforceable.

"The statute of frauds generally renders a contract that falls within its purview unenforceable." "The statute of frauds' suretyship provision provides that an oral promise 'by one person to answer for the debt, default, or miscarriage of another person' is generally unenforceable.… [T]his provision bars the current suit because both the fraudulent inducement and breach of contract claims against it are based on an oral promise … to pay the attorney's fees incurred by one of Dynegy's former officers." The "suretyship provision applies regardless of 'whether [the debt was] already incurred or to be incurred in the future.'"

The "'Statute of Frauds bars a fraud claim to the extent the plaintiff seeks to recover as damages the benefit of a bargain that cannot otherwise be enforced because it fails to comply with the Statute of Frauds.'"

"The party pleading the statute of frauds bears the initial burden of establishing its applicability.… Once that party meets its initial burden, the burden shifts to the opposing party to establish an exception that would take the verbal contract out of the statute of frauds. One recognized exception to the statute of frauds' suretyship provision is the main purpose doctrine. The party seeking to avoid the statute of frauds must plead, prove, and secure findings as to an exception or risk waiver under Rule 279.…"

"Whether a contract comes within the statute of frauds is a question of law, which we review de novo."

A "plaintiff relying on a primary obligor theory under the main purpose doctrine must plead and establish facts to take a verbal contract out of the statute of frauds."

Here, Dynegy established the suretyship provision of the statute of fruads, so the burden shifted to the attorney.

"The main purpose doctrine required Yates to prove: (1) Dynegy intended to create primary responsibility in itself to pay the debt; (2) there was consideration for the promise; and (3) the consideration given for the promise was primarily for Dynegy's own use and benefit—that is, the benefit it received was Dynegy's main purpose for making the promise."

The "question of intent to be primarily responsible for the debt is a question for the finder of fact, taking into account all the facts and circumstances of the case."

Here, "the burden was on Yates to secure favorable findings on the main purpose doctrine. Yates's failure to do so constituted a waiver of the issue under Rule 279.…"

9. *McCalla v. Baker's Campground*, 416 S.W.3d 416 (Tex. 2013)(8/23/13)

Lessees who had an option to purchase land sued landowners. They entered a settlement agreement with landowners that contemplated a future agreement. The Supreme Court ruled that "a settlement agreement that includes all the terms necessary for the contract's enforcement is an enforceable contract as a matter of law, even if some of its terms seem to imply that the parties contemplate forming an additional contract in the future."

"Assuming arguendo that the settlement agreement was an agreement to enter into a future contract, the court of appeals erred in finding that the settlement agreement's enforceablity was a question of fact rather than a question of law. Agreements to enter into future contracts are enforceable if they contain all material terms." The "reason agreements to enter into future contracts are often unenforceable is that courts have no way to determine what terms would have been agreed to after negotiation. This concern is not present when the agreement to enter into a future contract already contains all the material terms of the future contract."

"The material terms of a contract are determined on a case-by-case basis.… [Here, if] a court was trying to enforce the settlement agreement, it could find all the terms necessary for its enforcement." So "the settlement agreement was an enforceable contract as a matter of law."

10. *Morton v. Nguyen*, 412 S.W.3d 506 (Tex. 2013)(8/23/13)

In a contract for deed, the seller failed to comply with disclosure requirements. Though that entitled the buyers to rescind, the Court held that the buyers must restore the rent. "A seller's failure to comply with Subchapter D's requirements entitles a buyer to 'cancel and rescind' a contract for deed and 'receive a full refund of all payments made to the seller.…' We hold that Subchapter D's cancellation-and-rescission remedy contemplates mutual restitution of benefits among the parties. Thus, we conclude that the buyers here must restore to the seller supplemental enrichment in the form of rent for the buyers' interim occupation of the property upon cancellation and rescission of the contract for deed."

Under the DTPA, "section 17.50's restoration remedy contemplates mutual restitution," as here. "Like the DTPA's restoration remedy, Subchapter D's cancellation-and-rescission remedy is not intended to be punitive.…" Otherwise, there would be a "windfall."

Here, "we … hold that notice and restitution or a tender of restitution are not prerequisites to the cancellation-and rescission remedy under Subchapter D, as long as the affirmative relief to the buyer can be reduced by (or made subject to) the buyer's reciprocal obligation of restitution." The "buyer [must] restore to the seller the value of the buyer's occupation of the property."

The buyers "are not entitled to either attorney's fees or mental anguish damages because no claims supporting the awards survived the court of appeals' judgment."

11. *Lennar Corporation v. Markel American Insurance Company*, 413 S.W.3d 750 (Tex. 2013)(8/23/13)

Insurance contract dispute. Carrier alleged builder violated policy because it performed voluntary remediation of construction defects.

In the UIM context, the insured was required to obtain consent to settle with the tortfeasor. But, "prejudice is required by principles of contract law. Generally, one party's breach does not excuse the other's performance unless the breach is material. One factor in determining materiality is 'the extent to which the nonbreaching party will be deprived of the benefit that it could have reasonably anticipated from full performance.'"

12. *Rachal v. Reitz*, 403 S.W.3d 840 (Tex. 2013)(5/3/13)

Suit against successor trustee by beneficiary. Trust had an arbitration provision, which the Supreme Court enforced under the TAA.

The "TAA does not require a formal contract but rather only an agreement to arbitrate future disputes." "Because the TAA does not define agreement, we must look to its generally accepted definition. Black's Law Dictionary defines an agreement as 'a manifestation of mutual assent by two or more persons.'" "Agreement" is broader and less technical than "contract."

An agreement "must be supported by mutual assent." Footnote 4: "[W]e have previously discussed arbitration agreements under contract principles."

"Typically, a party manifests its assent by signing an agreement.… But we have also found assent by nonsignatories to arbitration provisions when a party has obtained or is seeking substantial benefits under an agreement under the doctrine of direct benefits estoppel." Footnote 5: "[t]here are at least six theories in contract and agency law that may bind nonsignatories to arbitration agreements: (1) incorporation by reference; (2) assumption; (3) agency; (4) alter ego; (5) equitable estoppel; and (6) third-party beneficiary. Direct benefits estoppel … is a type of equitable estoppel."

A "'litigant who sues based on a contract subjects him or herself to the contract's terms'" like "the obligation to arbitrate disputes."

"We have generally applied direct benefits estoppel when there is an underlying contract the claimant did not sign, but we have never held a formal contract is required for direct benefits estoppel to apply. Indeed, … we likened direct benefits estoppel to the defensive theory of promissory estoppel. '[T]he promissory-estoppel doctrine presumes no contract exists.'"

13. *Christus Health Gulf Coast v. Aetna, Inc*., 397 S.W.3d 651 (Tex. 2013)(4/19/13)

HMO entered an agreement with another entity to serve as its delegated network. That entity had agreements with health care providers, but they did not have a direct agreement with the HMO itself. When the entity became insolvent and failed to pay the providers, they sued the HMO. Under Texas' Prompt Pay Statute. The Supreme Court ruled that statue "forecloses such a suit: Providers must have contractual privity with the HMO directly, not merely with its delegated network."

The "Prompt Pay Statute contemplates contractual privity between HMOs and providers." The statute requires payment "'*in accordance with the contract*'" and here there "were no contracts between" the HMO and the providers. The statute's penalty provision likewise requires a "direct HMO-provider contract." "The existence of contractual liability between [the hmo] and [the delegated network] is immaterial to whether Aetna has statutory liability under the Prompt Pay Statute." "Any alleged violation of the Insurance Code or breach of the contract between [the HMO] and [the delegated network] is a separate legal dispute, and not one governed by the Prompt Pay Statute." Plus, contract terms requiring the HMO to abide by all statutory requirements do not enlarge the duties under the statute.

14. *Reeder v. Wood County Energy, LLC*, 395 S.W.3d 789 (Tex. 2012)(8/31/12); new opinion issued 3/29/13

The Supreme Court issued a new judgment in this oil and gas suit that allows attorney's fees. For further discussion of the issues, see below for a treatment of the earlier opinion, issued on 8/31/12.

15. *Gonzales v. Southwest Olshan Foundation Repair Company, LLC*, 400 S.W.3d 52 (Tex. 2013)(3/29/13)

Homeowner retained company to repair foundation. Its contract said it would perform job in a good and workmanlike manner. The warranty was contained in a separate document that was incorporated by reference. There were subsequent problems extending over years. One crewmember said it was the

"worst" job he had seen; later engineers sent out by company, though, said it was proper. Regarding the contract term, the Supreme Court ruled that "parties cannot disclaim but can supersede the implied warranty [from *Melody Home*] for good and workmanlike repair of tangible goods or property if the parties' agreement specifically describes the manner, performance, or quality of the services," as it did here.

"We [have] defined good and workmanlike as 'that quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work.'"

The "implied warranty of good workmanship 'attaches to a new home sale'" if the parties do not specify the performance. This implied warranty under *Melody Home* is a "'gap-filler' warranty."

Footnote 3: "'[A] warranty for repair services [is] not breached until further repairs [are] refused.'"

Here, the "express warranty superseded the implied warranty of good and workmanlike repair, and the jury's finding that Olshan did not breach the express warranty precludes liability on Gonzales's warranty claims."

I. Insurance Law, Insurance Contracts, *Stowers*, Subrogation, Indemnity, Bad Faith

1. *Gotham Insurance Company v. Warren E&P, Inc*., ___ S.W.3d ___ (Tex. 2014)(3/21/14)

Oil well blew out and burned. The carrier paid the insured on the resulting claim based upon insured's representation that it owned 100% working interest. When later information indicated the insured's interest may have been less, the carrier sued for reimbursement under equity and breach of contract. The opinion addresses "the proper role of equity claims when a contractual provision addresses the matter in dispute." The Supreme Court followed *Fortis*, which "held that an insurer is limited to contractual claims when the policy addresses the matter.… Here, this policy contains several clauses addressing misrepresentations, reporting, salvage and recoveries, subrogation, and due diligence. Thus, because the insurance contract addresses the insured's conduct, we hold that the insurer cannot rely on its equity claims."

Insured was only covered "the extent of its working interest in the well." Though the carrier may not proceed in equity, the policy does not "conclusively preclude[]" carrier's recovery.

Under *Matagorda County*, "an insurer may not seek reimbursement from the insured in equity for settlement funds paid in the absence of a contractual right to do so." Footnote 6: "*Frank's Casing* … declined to recognize an exception to the rule we announced in *Matagorda*."

The evidence did not conclusively establish that the insured "suffered no loss." It agreed to "evenly share in the aggregate drilling profits and losses.…"

Fortis "held that '[w]here a valid contract prescribes particular remedies or imposes particular obligations, equity generally must yield unless the contract violates positive law or offends public policy.' … Without referencing the 'made whole' doctrine, Fortis Benefits' insurance policy granted it the right to recover through subrogation against third parties or seek reimbursement from the insured." Since "equity follows the law," it "generally must yield" to the contract. *Fortis* held "that neither contractual subrogation nor reimbursement clauses violate public policy." Footnote 13: "The Legislature recently specified (with respect to contractual subrogation clauses in certain health insurance policies) the recovery insurers may obtain from a settlement between the insured and the responsible third party that caused the injury."

Footnote 9: A "party opposing [a] claim for unjust enrichment [must] secure findings 'that an express contract exists that covers the subject matter of the dispute;' [also, there is a] general rule that one may recover in quantum meruit only when there is no express contract."

The carrier is limited to the contract "unless the contractual provisions … violate positive law or offend public policy.… [There exists a] strong public policy to preserve freedom of contract. Further, the public policy of the State is reflected in its statutes. Thus, we will enforce the parties' bargain unless it contravenes some positive statute."

"Section 705.003 of the Texas Insurance Code renders invalid insurance clauses that make policies void or voidable due to misrepresentations in proofs of loss unless it is shown at trial that the misrepresentation: (1) was fraudulently made; (2) misrepresented a fact material to the insurer's liability under the policy; and (3) misled the insurer into waiving or losing a valid defense to the policy.… [P]ublic policy allows misrepresentation clauses to render insurance policies void or voidable only for fraudulent, material misrepresentations that mislead insurers into waiving or losing defenses." Footnote 11: The insured's "misrepresentations concerning its working interest could, among other remedies, operate to render the policy void. If [carrier] prevails on this theory and elects to void the policy, its equity claims might operate to secure a return of the [money] it paid under the claim. Thus, it is premature to dismiss [carrier's] equity claims.…"

Footnote 15: "Regarding whether the representation was fraudulent, this is an inquiry typically left to the jury as it often involves proof of intent by circumstantial evidence."

The carrier cannot pursue funds from other entities related to the well. The carrier paid the funds to the insured, and the policy addresses the "return of payments that benefitted others."

The carrier did not waive its contract claim. A "party may raise an independent ground for obtaining the same relief awarded in the judgment as an issue on appeal rather than pursuing a cross-appeal." Carrier "has sought the same monetary relief (a return of payments …) under both its equity and contract claims. Because [carrier] has raised on appeal its contract claim as an independent ground for the relief awarded in the trial court's judgment, it has not waived its contract claim." Footnote 18: "That [carrier] omitted its contractual subrogation claim in its live pleading does not alter the fact that the contract addresses the matter of subrogation."

"A reimbursement clause may operate to allow an insurer to recover payments previously made even if the insured did not breach the policy.… But the absence of a reimbursement clause does not necessarily foreclose an insurer's ability to recover if the insured has breached the policy." Carrier must prove breach, and that "the breach proximately caused its damages.…"

Here, summary judgment for the carrier could not "be supported on the ground that [insured] suffered no loss."

2. *Ewing Construction Company v. Amerisure Insurance Company*, 420 S.W.3d 30 (Tex. 2014)(1/17/14)

Certified question from the Fifth Circuit. Insured contracted to build tennis courts for school district. District then sued when courts flaked, crumbled, and cracked, alleging theories of contract and negligence. A coverage dispute with the insured's CGL carrier then developed, focusing upon an exclusion for "assumed liability." The Supreme Court ruled that that "a general contractor who agrees to perform its construction work in a good and workmanlike manner, without more, does not enlarge its duty to exercise ordinary care in fulfilling its contract, thus it does not 'assume liability' for damages arising out of its defective work so as to trigger the Contractual Liability Exclusion."

An "insuring agreement grants the insured broad coverage, which is then narrowed by the policy's exclusions that operate to restrict and shape the coverage otherwise afforded by the insuring agreement."

"Under its CGL policy, Amerisure assumed two duties, subject to the policy terms, limitations, and exclusions: (1) the duty to defend suits seeking damages from Ewing for an event potentially covered by the policy, and (2) the duty to indemnify Ewing by paying covered claims and judgments against it. We have characterized these two duties as 'distinct and separate' in that one may exist without the other."

Regarding the duty to defendant, "Texas courts follow the eight corners rule in determining an insurer's duty to defend. Under that rule, courts look to the facts alleged within the four corners of the pleadings, measure them against the language within the four corners of the insurance policy, and determine if the facts alleged present a matter that could potentially be covered by the insurance policy. The factual allegations are considered without regard to their truth or falsity and all doubts regarding the duty to defend are resolved in the insured's favor. … [C]ourts look to the factual allegations showing the origin of the damages claimed, not to the legal theories or conclusions alleged."

"The insured has the initial burden to establish coverage under the policy. If it does so, then to avoid liability the insurer must prove one of the policy's exclusions applies. If the insurer proves that an exclusion applies, the burden shifts back to the insured to establish that an exception to the exclusion restores coverage."

The Court extensively reviewed the earlier holding in *Gilbert*. There, the insured argued that assuming liability referred to assuming "*another's* liability." The Court had disagreed, because that term could easily have been added to the policy. "Gilbert did not contractually assume liability for damages within the meaning of the policy exclusion unless the liability for damages it contractually assumed was greater than the liability it would have had under general law–in Gilbert's case, negligence." In that case, Gilbert's liability was only under the contract, and the exclusion applied because its liability exceeded what it would have had under the "general law."

Here, the insured's "express agreement to perform the construction in a good and workmanlike manner did not enlarge its obligations and was not an 'assumption of liability' within the meaning of the policy's contractual liability exclusion." The "exclusion means what it says: it excludes liability for damages the insured assumes by contract unless the exceptions bring the claim back into coverage. But we also determined in *Gilbert* that 'assumption of liability' means that the insured has assumed a liability for damages that exceeds the liability it would have under general law. Otherwise, the words 'assumption of liability' are meaningless and are surplusage." … 'Reading the phrase to apply to all liabilities sounding in contract renders the term 'assumption' superfluous.'"

The carrier argued that this ruling would turn the CGL policy into a performance bond. Allegations "'of unintended construction defects may constitute an 'accident' or 'occurrence' under the CGL policy and that allegations of damage to or loss of use of the home

itself may also constitute 'property damage' sufficient to trigger the duty to defend under a CGL policy.' … In *Lamar Homes*, we said a breach of contract can constitute an occurrence that causes property damage, thus bringing some breach of contract claims within the general grant of coverage for purposes of determining a duty to defend.'" "Because the policy contains exclusions that may apply to exclude coverage in a case for breach of contract due to faulty workmanship, our answer to the first certified question [that the "assumed liability" exclusion does not apply] is not inconsistent with the view that CGL policies are not performance bonds."

3. *Lennar Corporation v. Markel American Insurance Company*, 413 S.W.3d 750 (Tex. 2013)(8/23/13)

Builder had used an EIFS (external insulation and finish system) that caused many, but not all, homes it built to "suffer serious water damage." In its attempt to voluntarily discover and remedy the problem, it had to remove structures even on homes that had not been damaged. Its insurer claimed builder should have waited for the buyers to sue. Insurer claimed builder needed prior consent to remediation, but the jury failed to find this prejudiced insurer. The Supreme Court ruled builder was covered, and that insurer had to pay costs to determine if water damage had occurred. It further ruled coverage extended to damages that began before and continued after policy period.

The policy prohibited the builder from "voluntarily" making payments. But, even though insurer did not consent, "this provision does not excuse [carrier's] liability under the policy unless it was prejudiced by the settlements."

In the UIM context, the insured was required to obtain consent to settle with the tortfeasor. But, "prejudice is required by principles of contract law. Generally, one party's breach does not excuse the other's performance unless the breach is material. One factor in determining materiality is 'the extent to which the nonbreaching party will be deprived of the benefit that it could have reasonably anticipated from full performance.' … Thus, we concluded, the insureds' breach by settling without the insurer's consent was not material, the insurer was not prejudiced, and coverage was not excused."

Here, jury could have considered that, had builder not remediated, the damages could have been worse.

"Absent prejudice to [carrier], [builder's] settlements with homeowners establish both its legal liability for the property damages and the basis for determining the amount of loss."

Regarding the costs of discovering the water damage, "[w]e have noted that the phrase, 'because of', used in determining a covered loss under a commercial general liability policy, 'is susceptible to a broad definition.' … Under no reasonable construction of the phrase can the cost of finding EIFS property damage in order to repair it not be considered to be 'because of' the damage."

In addition, all of the home for which remediation costs were incurred "sustained some damage during the policy period." The policy "expressly includes damage from a continuous exposure.…" So, "the policy covered [builder's] total remediation costs."

Carrier could not limit the award to its pro rata share with other carriers. It is left up to insurers "who share responsibility for a loss to allocate it among themselves according to their subrogation rights."

4. *Phillips v. Bramlett*, 407 S.W.3d 229 (Tex. 2013)(6/7/13)

Medical malpractice case had been remanded by the Supreme Court to the trial court. The original judgment contained recitals that related to an anticipated *Stowers* case.

Footnote 5: "A party who seeks to hold a liability insurer liable for rejecting a settlement offer under the *Stowers* doctrine must prove, among other things, that an ordinarily prudent insurer would have accepted the offer, considering the likelihood and degree of the insured's potential exposure to an excess judgment."

Comments in the judgment pertaining to a later *Stowers* claim "are recitals and not part of the judgment's decretal language. They are not material to the ultimate disposition of the case, and they do not represent jury findings." To the extent they were sought for a "subsequent *Stowers* claim against Phillips's liability insurer, [plaintiffs] have failed to explain to us how that could be or why they would be entitled to obtain such recitals in a case to which Phillips's liability insurer was not a party."

J. Suit on an Acccount

1. *Tedder v. Gardner Aldrich, LLP*, 421 S.W.3d 651 (Tex. 2013)(5/17/13) ("corrected opinion" was issued 12/13/13)

Corrected opinion: footnote 2 changed. *See Tedder*, below, at 5/17/13.

2. *Tedder v. Gardner Aldrich, LLP*, 421 S.W.3d 651 (Tex. 2013)(5/17/13) ("corrected opinion" was issued 12/13/13)

In divorce proceeding, wife's attorney's firm intervened and filed a sworn account to recover its fees. Firm argued that husband failed to controvert firm's sworn account, and that husband was liable because fees were "necessaries." The Supreme Court ruled that the husband was a stranger to the sworn account, so he was not required to file a controverting affidavit, and that "legal services provided to one spouse in a divorce proceeding are [not] necessaries for

which the other spouse is statutorily liable to pay the attorney."

The firm said its bill was a suit on account "supported by affidavit and not denied under oath." Rule 185 provides it such is prima facie evidence, and cannot be denied unless denied under oath. "But Rule 185 contemplates that the defendant has personal knowledge of the basis of the claim.…"

"'The law does not permit, much less encourage, guesswork in swearing; and to require a defendant to swear that a transaction between a plaintiff and a third person … either did or did not occur … before he will be permitted to controvert the *ex parte* affidavit of his adversary, would be to encourage swearing without knowledge.…"

"When it appears from the plaintiff's account itself that the defendant was a stranger to the account, the defendant need not file a sworn denial to contest liability.… Rule 185 does not require a party to swear to what he does not and cannot know." Thus, husband did not have to deny firm's "claim under oath in order to contest his liability for its fees."

K. Secured Transactions

No cases to report.

L. Equitable Remedies, Defenses, Injunctions (Equitable Bill of Review is at IV(N))

1. *Gotham Insurance Company v. Warren E&P, Inc*., ___ S.W.3d ___ (Tex. 2014)(3/21/14)

Oil well blew out and burned. The carrier paid the insured on the resulting claim based upon insured's representation that it owned 100% working interest. When later information indicated the insured's interest may have been less, the carrier sued for reimbursement under equity and breach of contract. The opinion addresses "the proper role of equity claims when a contractual provision addresses the matter in dispute." The Supreme Court followed *Fortis*, which "held that an insurer is limited to contractual claims when the policy addresses the matter.… Here, this policy contains several clauses addressing misrepresentations, reporting, salvage and recoveries, subrogation, and due diligence. Thus, because the insurance contract addresses the insured's conduct, we hold that the insurer cannot rely on its equity claims."

Insured was only covered "the extent of its working interest in the well." Though the carrier may not proceed in equity, the policy does not "conclusively preclude[]" carrier's recovery.

Under *Matagorda County*, "an insurer may not seek reimbursement from the insured in equity for settlement funds paid in the absence of a contractual right to do so." Footnote 6: "*Frank's Casing* … declined to recognize an exception to the rule we announced in *Matagorda*."

Fortis "held that '[w]here a valid contract prescribes particular remedies or imposes particular obligations, equity generally must yield unless the contract violates positive law or offends public policy.' … Without referencing the 'made whole' doctrine, Fortis Benefits' insurance policy granted it the right to recover through subrogation against third parties or seek reimbursement from the insured." Since "equity follows the law," it "generally must yield" to the contract. *Fortis* held "that neither contractual subrogation nor reimbursement clauses violate public policy."

Footnote 9: A "party opposing [a] claim for unjust enrichment [must] secure findings 'that an express contract exists that covers the subject matter of the dispute;' [also, there is a] general rule that one may recover in quantum meruit only when there is no express contract."

The carrier is limited to the contract "unless the contractual provisions … violate positive law or offend public policy.… [There exists a] strong public policy to preserve freedom of contract. Further, the public policy of the State is reflected in its statutes. Thus, we will enforce the parties' bargain unless it contravenes some positive statute."

Footnote 11: The insured's "misrepresentations concerning its working interest could, among other remedies, operate to render the policy void. If [carrier] prevails on this theory and elects to void the policy, its equity claims might operate to secure a return of the [money] it paid under the claim. Thus, it is premature to dismiss [carrier's] equity claims.…"

The carrier cannot pursue funds from other entities related to the well. The carrier paid the funds to the insured, and the policy addresses the "return of payments that benefitted others."

Footnote 18: "That [carrier] omitted its contractual subrogation claim in its live pleading does not alter the fact that the contract addresses the matter of subrogation."

2. *Morton v. Nguyen*, 412 S.W.3d 506 (Tex. 2013)(8/23/13)

In a contract for deed, the seller failed to comply with disclosure requirements. Though that entitled the buyers to rescind, the Court held that the buyers must restore the rent. "A seller's failure to comply with Subchapter D's requirements entitles a buyer to 'cancel and rescind' a contract for deed and 'receive a full refund of all payments made to the seller.…' We hold that Subchapter D's cancellation-and-rescission remedy contemplates mutual restitution of benefits among the parties. Thus, we conclude that the buyers here must restore to the seller supplemental enrichment in the form of rent for the buyers' interim occupation of the property upon cancellation and rescission of the contract for deed."

"[R]escission is the common name for the composite remedy of rescission and restitution.… '[R]escission' is '[a] party's unilateral unmaking of a contract for a legally sufficient reason . . . generally available as a remedy . . . and is accompanied by restitution of any partial performance, thus restoring the parties to their precontractual positions'). It … requires each party to 'restore[] property received from the other,' or in other words, mutual restitution.… [W]e conclude that the Legislature intended Subchapter D's cancellation-and-rescission remedy to also contemplate the common law element of mutual restitution." (Footnote 1: The "liquidated damages provisions in sections 5.077 and 5.079 of Subchapter D are indeed punitive.… Yet this fact does not compel a conclusion that *all* of Subchapter D's remedies were intended to be punitive.)

Here, "we … hold that notice and restitution or a tender of restitution are not prerequisites to the cancellation-and rescission remedy under Subchapter D, as long as the affirmative relief to the buyer can be reduced by (or made subject to) the buyer's reciprocal obligation of restitution." The "buyer [must] restore to the seller the value of the buyer's occupation of the property."

3. *Office of the Attorney General v. Scholer*, 403 S.W.3d 859 (Tex. 2013)(6/28/13)

Child support case. Father and mother agreed to cease his child support if he relinquished rights to child. Though he signed the papers, mother's attorney never filed them. Years later, when the AG sought back child support, father pleaded estoppel. But the Supreme Court ruled that "estoppel is not a defense to a child support enforcement proceeding."

"Estoppel, an equitable defense, 'arises where by fault of one, another has been induced to change his position for the worse.' The doctrine operates 'to prevent injustice and protect those who have been misled.'"

In child support cases, because "courts are prohibited from making additional adjustments, affirmative defenses that are not included in the statute, like estoppel, are also prohibited because they would require courts to make discretionary determinations."

4. *Rachal v. Reitz*, 403 S.W.3d 840 (Tex. 2013)(5/3/13)

Suit against successor trustee by beneficiary of trust which contained an arbitration provision. The Supreme Court ruled that the "TAA requires enforcement of written agreements to arbitrate, and an agreement requires mutual assent, which … may be manifested through the doctrine of direct benefits estoppel. Thus, the beneficiary's acceptance of the benefits of the trust and suit to enforce its terms constituted the assent required to form an enforceable agreement to arbitrate under the TAA."

Footnote 5: "[t]here are at least six theories in contract and agency law that may bind nonsignatories to arbitration agreements: (1) incorporation by reference; (2) assumption; (3) agency; (4) alter ego; (5) equitable estoppel; and (6) third-party beneficiary. Direct benefits estoppel, … is a type of equitable estoppel."

"In accepting the benefits of the trust and suing to enforce … [it], [son's] conduct indicated acceptance of the terms and validity of the trust." His claim the arbitration provision is invalid is thus barred by "direct benefits estoppel."

"We have generally applied direct benefits estoppel when there is an underlying contract the claimant did not sign, but we have never held a formal contract is required for direct benefits estoppel to apply. Indeed, … we likened direct benefits estoppel to the defensive theory of promissory estoppel. '[T]he promissory-estoppel doctrine presumes no contract exists.'"

The "doctrine of direct benefits estoppel will not provide the mutual assent necessary to compel arbitration in all circumstances. One who does not accept benefits under a trust and contests its validity could not be compelled to arbitrate the trust dispute.…"

5. *Texas Department of Transportation v. A.P.I. Pipe and Supply, LLC*, 397 S.W.3d 162 (Tex. 2013)(4/5/13)

Inverse condemnation suit which turned on whether government had title to a parcel after an original condemnation judgment in 2003 that awarded it a "right-of-way" was revised by a nunc pro tunc judgment in 2004 that purported to render the 2003 judgment void and render only an "easement." The subsequent purchaser asserted the government should be estopped to challenge the 2004 judgment, which it apparently approved. The Supreme Court ruled that in part that "equitable estoppel is inapplicable against the government in this case."

Purchaser of land asserted that the government, which participated in a nunc pro tunc judgment pursuant to which it bought the land, claimed government should be estopped from subsequently objecting to the judgment. But the Court ruled that "equitable estoppel … [was] inapplicable against the government in this case."

"For estoppel to apply against the government, two requirements must exist: (1) 'the circumstances [must] clearly demand [estoppel's] application to prevent manifest injustice,' *and* (2) no governmental function can be impaired. Neither requirement exists here." Footnote 36: "*Super Wash* … explain[s] the significance of the only two cases where we have

applied estoppel against the government"

Estoppel has been applied "to prevent manifest injustice if, 'officials acted deliberately to induce a party to act in a way that benefitted the [government].'" Here, there was only "mistaken acquiescence."

Moreover, "that the fact that a governmental error was 'discoverable' militates against applying estoppel."

Finally, estoppel would impair planning a drainage ditch, which is "a governmental function."

M. Wrongful Death and Survival Actions

1. *Dugger v. Arredondo*, 408 S.W.3d 825 (Tex. 2013)(8/30/13)

After doing drugs and drinking with defendant, plaintiff's son died. Defendant raised the common law defense called the wrongful acts doctrine. The Supreme Court ruled that "the Legislature's adoption of the proportionate responsibility scheme in Chapter 33 … evidenced its clear intention that a plaintiff's illegal conduct not falling within a statutorily-recognized affirmative defense [*i.e.*, 93.001] be apportioned rather than barring recovery completely," thus over ruling the common law wrongful acts doctrine.

In wrongful death cases, a "'person is liable for damages arising from an injury that causes an individual's death if the injury was caused by the person's or his agent's or servant's wrongful act, neglect, carelessness, unskillfulness, or default.' Parents may bring a wrongful death action on behalf of their deceased children."

In a wrongful death case, any "defenses that would be available against the decedent if he or she were alive may be asserted against his or her estate."

"*Thomas v. Uzoka*, … permit[s] a decedent's wife to recover despite the decedent's failure to wear a seatbelt[]."

Because "Chapter 33 applies to wrongful death Claims … a defendant may assert any defense against the claimant that he might have asserted against the decedent, if the decedent were alive.… [In] Texas comparative negligence precluded recovery in a wrongful death case [when] the decedent's negligence was greater than the tortfeasor's. [It is recognized that] proportionate responsibility applies to wrongful death cases."

The "common law unlawful acts doctrine is [not] available as an affirmative defense under the proportionate responsibility framework.… The language of [Ch. 33] indicates the Legislature's desire to compare responsibility for injuries rather than bar recovery, even if the claimant was partly at fault or violated some legal standard.… Chapter 33 controls over the unlawful acts doctrine in the wrongful death context."

Section "93.001 … provid[es] an affirmative defense to civil actions brought by convicted criminals seeking to recover damages for injuries arising out of their felonious acts." However, the text "limits the affirmative defense to cases in which both (1) the plaintiff was finally convicted, and (2) the felony was the sole cause of the damages." Also, "subsection 93.001(a)(2) limits the affirmative defense to instances in which the plaintiff was committing or attempting suicide." Here, the decedent was never convicted.

The "common law unlawful acts doctrine is not available as an affirmative defense in personal injury and wrongful death cases. Like other common law assumption-of-the-risk defenses, it was abrogated by Chapter 33's proportionate responsibility scheme. Unless the requirements of the affirmative defense in section 93.001 are satisfied, a plaintiff's share of responsibility for his or her injuries should be compared against the defendant's."

N. Torts and Causes of Action Generally

1. *McAllen Hospitals, LLP v. State Farm Mutual Insurance Company of Texas*, S.W.3d (Tex. 2014)(5/16/14)

Hospital sued insurer after injured victims of car wreck cashed settlement checks from insurer that were made out to both them and hospital, without discharging proper hospital lien. An issue was whether the Hospital Lien Statute created a cause of action for hospital to sue insurer.

"The Hospital Lien Statute does not expressly create a cause of action against third parties to enforce a lien." But, the statute invalidates a release if the hospital is not paid. "As a result, the patient's cause of action, previously settled, is revived, and the hospital retains its lien on that cause of action." It is of questionable propriety to create a cause of action not provided by the statute. "'A court may not judicially amend a statute and add words that are not implicitly contained in the language of the statute.'"

2. *Waste Management of Texas, Inc. v. Texas Disposal Systems Landfill, Inc.*, S.W.3d (Tex. 2014)(5/9/14)

In this commercial defamation case, part of the Supreme Court's ruling was that recovery for defamation is a non-economic injury for purposes of the statutory cap on exemplary damages. The amount of punitive damages had to be recalculated, along with prejudgment and post-judgment interest, after the Court found legally insufficient evidence to support damages to reputation.

Actual damages include "general damages" (non-economic) and "special damages" (economic). In personal injury cases, there are three basic "'elements of recovery. (1) Time losses. The plaintiff can recover loss or [sic] wages or the value of any lost time or

earning capacity where injuries prevent work. (2) Expenses incurred by reason of the injury … [like] medical expenses…. (3) Pain and suffering … , including emotional distress and consciousness of loss.'" The first two are pecuniary, the third is not. Mental anguish like reputation damages are "non-economic damages."

3. *Lennar Corporation v. Markel American Insurance Company*, 413 S.W.3d 750 (Tex. 2013)(8/23/13)

Footnote 16: Regarding construction defects, "TEX. PROP. CODE § 27.005 'This chapter does not create a cause of action . . . .'"

4. *Nall v. Plunkett*, 404 S.W.3d 552 (Tex. 2013)(6/28/13)

After a party-goer was injured by another guest who was intoxicated, the trial court granted summary judgment for the defense on a negligent-undertaking theory. It was upheld by the Supreme Court.

"The critical inquiry concerning the duty element of a negligent-undertaking theory is whether a defendant acted in a way that requires the imposition of a duty where one otherwise would not exist.… [A] jury submission for a negligence claim predicated on a negligent-undertaking theory requires a broad-form negligence question accompanied by instructions detailing the essential elements of an undertaking claim.… [T]he broad-form submission for a typical negligence claim and a negligent-undertaking claim is the same, except that an undertaking claim requires the trial court to instruct the jury that a defendant is negligent only if: (1) the defendant undertook to perform services that it knew or should have known were necessary for the plaintiff's protection; (2) the defendant failed to exercise reasonable care in performing those services; and either (a) the plaintiff relied upon the defendant's performance, or (b) the defendant's performance increased the plaintiff's risk of harm."

Here, the Nalls' summary judgment motion made "a two-part argument that addressed the absence of a duty in both the social host context and the undertaking context." "We hold that the Nalls' summary judgment motion specifically addressed the negligent-undertaking claim by arguing that *Graff* forecloses the assumption of any duty (i.e., an undertaking) by a social host."

5. *Strickland v. Medlen*, 397 S.W.3d 184 (Tex. 2013)(4/5/13)

Plaintiffs' dog escaped his yard, was picked up, and taken to a municipal animal shelter. A worker mistakenly placed the dog on a list allowing him to be killed before plaintiffs returned with the cash necessary to pay the fees to get him out. The Supreme Court ruled that "a bereaved dog owner [may not] recover emotion-based damages for the loss." The dog is "personal property, thus disallowing non-economic damages." Courts are not well suited to provide a new theory of recovery, so any further remedy must come from the Legislature.

"'Tort law . . . cannot remedy every wrong.'"

The law "label[s] [pets] as 'property' for purposes of tort-law recovery."

For "irreplaceable family heirlooms … damages may factor in 'the feelings of the owner for such property.'" But, the default "rule for destroyed non-heirloom property lacking market or replacement value [is] 'the actual worth or value of the articles to the owner . . . excluding any fanciful or sentimental considerations.'"

"[M]ental-anguish damages are [not] recoverable for the negligent destruction of personal property.… [M]ental anguish is a form of personal-injury damage, unrecoverable in an ordinary property-damage case."

"Loss of companionship … is fundamentally a form of *personal-injury* damage, not property damage. It is a component of loss of consortium, including the loss of 'love, affection, protection, emotional support, services, companionship, care, and society.' Loss-of-consortium damages are available only for a few especially close family relationships." "[W]e have 'narrowly cabined' [them] to two building-block human relationships: husband-wife3 and parent-child." Plaintiffs cannot seek such damages "if other close relatives (or friends) were negligently killed: siblings, step-children, grandparents, dear friends, and others."

"[W]ith heirlooms, the value is sentimental; with [the wrongful death of] people, the value is emotional."

Footnote 50: Quoting the Restatement: "'[R]ecovery for *intentionally* inflicted emotional harm is not barred when the defendant's method of inflicting harm is by means of causing harm to property, including an animal.'"

"'When recognizing a new cause of action and the accompanying expansion of duty, we must perform something akin to a cost-benefit analysis to assure that this expansion of liability is justified.'"

"[A]llowing loss-of-companionship suits raises wide-reaching public-policy implications that legislators are better suited to calibrate. … [There are] two legal policy concerns: (1) the anomaly of elevating 'man's best friend' over multiple valuable human relationships; and (2) the open-ended nature of such liability." The "issue is not whether the Court *can* draw lines, but whether it *should*." "We could impose damages limits, but such fine-tuning is more a legislative function than a judicial one." "Our tort system cannot countenance liability so imprecise, unbounded, and manipulable." "The judiciary, however, while well suited to adjudicate individual disputes, is an imperfect forum to examine the myriad

policy trade-offs at stake here." This is "best left to our 181-member Legislature."

"Amid competing policy interests, including the inherent subjectivity (and inflatability) of emotion-based damages, lawmakers are best positioned to decide if such a potentially costly expansion of tort law is in the State's best interest, and if so, to structure an appropriate remedy."

6. *Rodriguez-Escobar v. Goss*, 392 S.W.3d 109 (Tex. 2012)(2/1/13)

Medical malpractice case concerning patient's suicide three days after release. The Supreme Court found no proximate causation. "'The elements of a negligence cause of action are the existence of a legal duty, a breach of that duty, and damages proximately caused by the breach.'"

O. Negligence and Duty

1. *Dugger v. Arredondo*, 408 S.W.3d 825 (Tex. 2013)(8/30/13)

After doing drugs and drinking with defendant, plaintiff's son died. Defendant raised the common law defense called the wrongful acts doctrine. The Supreme Court ruled that "the Legislature's adoption of the proportionate responsibility scheme in Chapter 33 … evidenced its clear intention that a plaintiff's illegal conduct not falling within a statutorily-recognized affirmative defense [*i.e.*, 93.001] be apportioned rather than barring recovery completely," thus over ruling the common law wrongful acts doctrine.

Footnote 1: If "'a party negligently creates a dangerous situation it then becomes his duty to do something about it to prevent injury to others if it reasonably appears or should appear to him that others in the exercise of their lawful rights may be injured thereby.'"

An "injured passenger in a fleeing vehicle could maintain a suit for unreasonable chase because officers owed a duty of reasonable care."

2. *Rodriguez-Escobar v. Goss*, 392 S.W.3d 109 (Tex. 2012)(2/1/13)

Medical malpractice case concerning patient's suicide three days after release. The Supreme Court found no proximate causation. "'The elements of a negligence cause of action are the existence of a legal duty, a breach of that duty, and damages proximately caused by the breach.'"

3. *CTL/Thompson Texas, LLC v. Starwood Homeowner's Association*, 390 S.W.3d 299 (Tex. 2013)(1/25/13)

Homeowner's association sued engineering firm and attached a report to the petition. The firm filed an interlocutory appeal challenging the trial court's denial of its motion to dismiss, and while it was pending, the association took a nonsuit. The Supreme Court ruled that the "nonsuit did not moot CTL's appeal."

"Section 150.002 … requires that in actions for damages arising from the provision of professional services by a licensed or registered architect, engineer, or surveyor, the plaintiff must file an affidavit attesting to the claim's merit." Failing to file a proper affidavit may result in a dismissal with prejudice. An interlocutory appeal is permitted by § 150.002(f).

"Section 150.002(e) dismissal is a sanction … to deter meritless claims and bring them quickly to an end." Section 150.002(e) provides no guidance on whether a dismissal should be with prejudice.

P. Fiduciary Duty

No cases to report.

Q. Motor Vehicles

1. *Dugger v. Arredondo*, 408 S.W.3d 825 (Tex. 2013)(8/30/13)

"[A]n individual who voluntarily became intoxicated and was injured while driving his car may recover against the establishment that served him the alcohol.… Chapter 33 [is] applicable to a cause of action under Chapter 2 against an alcoholic beverage provider."

An "injured passenger in a fleeing vehicle could maintain a suit for unreasonable chase because officers owed a duty of reasonable care."

R. Premises Liability

1. *Dugger v. Arredondo*, 408 S.W.3d 825 (Tex. 2013)(8/30/13)

The "Legislature's adoption of the proportionate responsibility scheme in Chapter 33 … evidenced its clear intention that a plaintiff's illegal conduct not falling within a statutorily-recognized affirmative defense [*i.e.*, 93.001] be apportioned rather than barring recovery completely," thus over ruling the common law wrongful acts doctrine.

"Proportionate responsibility abrogated former common law doctrines that barred a plaintiff's recovery because of the plaintiff's conduct—like assumption of the risk, imminent peril, and last clear chance—in favor of submission of a question on proportionate responsibility."

S. Realty, Personal Property, Construction, Condemnation, Oil and Gas

1. *Sims v. Carrington Mortgage Services*, ___ S.W.3d ___ (Tex. 2014)(5/16/14)

Borrowers restructured their home equity loans. Responding to certified questions from the Fifth Circuit, the Supreme Court ruled that, "as long as the original note is not satisfied and replaced, and there is no additional extension of credit, as we define it, the

restructuring is valid and need not meet the constitutional requirements for a new [home equity] loan."

"[H]ome equity loans are subject to the requirements of" the Texas Constitution. Footnote 6: "'Texas became the last state in the nation to permit home-equity loans when constitutional amendments voted on by referendum took effect in 1997.'"

"To provide guidance to lenders, the Finance Commission and the Credit Union Commission have been authorized by the Constitution and by statute to interpret these provisions, subject to judicial review, and the Commissions have done so in Chapter 153 of the Texas Administrative Code." "'A lender's compliance with an agency interpretation of Section 50, even a wrong interpretation, is compliance with Section 50 itself.'" But the commissions "'can do no more than interpret the constitutional text, just as a court would.'"

Here, past-due amounts on the note were capitalized as principal. The terms "loan modification" and "refinancing" are not defined in Section 50. The commissions draw such a distinction, though the Constitution does not mention them: the key "is an 'extension of credit.'" This phrase is undefined, but "[c]redit is simply the ability to assume a debt repayable over time, and an extension of credit affords the right to do so in a particular situation." "The extension of credit for purposes of Section 50(a)(6) consists not merely of the creation of a principal debt but includes all the terms of the loan transaction. Terms requiring the borrower to pay taxes, insurance premiums, and other such expenses when due protect the lender's security and are as much a part of the extension of credit as terms requiring timely payments of principal and interest." Because the borrower was already obligated to pay the past-due amount under the original agreement, it is not a new extension of credit. Restructuring "a loan does not involve a new extension of credit so long as the borrower's note is not satisfied or replaced and no new money is extended.… The test should be whether the secured obligations are those incurred under the terms of the original loan."

"Lenders have two options other than foreclosing on loans in default: further forbearance and forgiveness."

The "restructuring of a home equity loan that … involves capitalization of past-due amounts owed under the terms of the initial loan and a lowering of the interest rate and the amount of installment payments, but does not involve the satisfaction or replacement of the original note, an advancement of new funds, or an increase in the obligations created by the original note, is not a new extension of credit that must meet the requirements of Section 50."

"Is the capitalization of past-due interest, taxes, insurance premiums, and fees an 'advance of additional funds' under the Commissions' interpretations of Section 50? No, if those amounts were among the obligations assumed by the borrower under the terms of the original loan." Nor is it a new extension of credit.

"Must a restructuring like the [borrowers'] comply with Section 50(a)(6)? No, because it does not involve a new extension of credit.…"

Footnote 28: Nothing "in Section 50 suggests that a loan's compliance is to be determined at any time other than when it is made." Footnote 29: "TEX. FIN.CODE § 301.002(a)(14)(A) … [defines an] 'Open-end account'."

2. *McAllen Hospitals, LLP v. State Farm Mutual Insurance Company of Texas*, S.W.3d (Tex. 2014)(5/16/14)

Hospital sued insurer after injured victims of car wreck cashed settlement checks from insurer that were made out to both them and hospital, without discharging proper hospital lien. Using principals of commercial paper under the UCC, the Supreme Court ruled that the hospital had not been "paid" by delivery of a settlement check to the claimant: "(1) payment of a check to one nonalternative copayee without the endorsement of the other does not constitute payment to a 'holder' and thus does not discharge the drawer of either his liability on the instrument or the underlying obligation, (2) the … patients' releases of their causes of action against [negligent driver] were [in]valid … , and (3) the Hospital's liens on those causes of action therefore remain intact." The Court did not determine if the hospital has a cause of action against the insurer because the issue was not properly preserved.

A hospital may file a lien on a cause of action under Ch. 55 of the Property Code, "provided that the patient is admitted to the hospital within seventy-two hours of the accident." The hospital "must comply with statutory notice and recording requirements to secure its lien." "If the hospital's charges secured by a proper lien are not 'paid' within the meaning of the statute, any release of the patient's cause of action is invalid." So, to have a valid release, one of three conditions of § 55.007(a) must be met.

Insurer's "delivery of the drafts to [claimant's] constitutes constructive delivery of the drafts to the other copayee, the Hospital." But, "when a draft is issued to nonalternative copayees, one copayee acting alone is not entitled to enforce, and thus may not discharge, the instrument." If it is payable to all, it can only be enforced by all. A "forged endorsement by nonalternative copayee [does] not discharge drawer's obligation to other copayee."

Footnote 3: "Under the UCC, 'payor bank' means a bank that is the drawee of a draft. A 'drawee' is a person ordered in the draft to make payment."

Hospital possibly could have sued the bank. But its failure to do so did not affect insurer's obligations. Footnote 5: "A drawee that makes payment 'for a person not entitled to enforce the instrument or receive payment' may be liable in conversion." Footnote 6: A "drawee may not charge its customer's account on an instrument that is not properly authorized."

3. *Crosstex Energy Services, L.P. v. Pro Plus, Inc.*, S.W.3d (Tex. 2014)(3/28/14)

Gas transmitting company sued engineers after the failure of a gasket in a pumping station they designed caused a serious fire. When defendant moved to dismiss because plaintiff did not file a "certificate of merit" under Ch. 150, trial court denied it and granted plaintiff an extension. After determining that both it and the court of appeals had jurisdiction, the Supreme Court ruled that "(1) [plaintiff] did not file suit within ten days of the running of limitations and thus cannot claim protection from the good cause extension in section 150.002(c); (2) [since the certificate of merit requirement is not jurisdictional,] a defendant may, through its conduct, waive the right to seek dismissal under section 150.002(e); and (3) [here, defendant's] conduct did not constitute waiver."

"The certificate of merit statute applies to actions for damages arising out of 'the provision of professional services by a licensed or registered professional.…' A plaintiff 'shall' file an affidavit of a qualified third party in the same profession; the affidavit must substantiate the plaintiff's claim on each theory of recovery. Failure to file this … 'certificate of merit' results in dismissal … [which] may be with or without prejudice."

Section 150.002(f) provides that an interlocutory appeal may be taken from an order granting or denying a dismissal. The Court compared this case to an interlocutory appeal in a medical malpractice case related to an expert report. Though both statutes authorize dismissal for failure to timely provide a report, unlike Ch. 74, the "certificate of merit statute does not address the appealability of extensions of time; therefore, such interlocutory appeals, presumably are not permissible.…" In medical malpractice, "when the denial of a motion to dismiss and the grant of an extension are inseparable … , courts of appeals have no jurisdiction to review the motion to dismiss." But when they are not inseparable, such as when no expert report is filed, the court of appeals can review the order. The statutory mechanism for granting an extension for the report is irrelevant if an extension could not cure the defect. Here, because plaintiff had no statutory basis for an extension, the court of appeals had jurisdiction to rule upon "the motion to dismiss without entanglement in the appeal of the granted extension."

Here, the third sentence of § 150.002(c) could, or could not, apply only when plaintiff complied with the first sentence. Because "the statute [is] capable of multiple interpretations … we apply our rules of construction to discern legislative intent." The meaning of words "cannot be determined in isolation but must be drawn from the context.…" Here, the Court interprets the third sentence is dependent upon the first. "We hold that the 'good cause' exception in subsection (c) does not stand alone, but rather is contingent upon a plaintiff: (1) filing within ten days of the expiration of the limitations period; and (2) alleging that such time constraints prevented the preparation of an affidavit. A plaintiff satisfying these requirements 'shall' receive an extension of thirty days; upon motion, a trial court may, for good cause, extend this thirty-day period as justice requires. A plaintiff who files suit outside the ten-day window … cannot claim protection of the good cause exception."

Section "150.002 imposes a mandatory, but nonjurisdictional, filing requirement. Thus, we hold that a defendant may waive its right to seek dismissal under the statute."

In this case, defendant's conduct in participating in discovery, filing pleadings, agreeing to a continuance, and entering a Rule 11 agreement did not constitute a waiver of the certificate of merit requirement.

"If a defect in the pleadings is incurable by amendment, a special exception is unnecessary." Here, defendant was not required to specially except "the lack of a certificate of merit."

"[T]he docket control order in this case made no mention of the separate certificate of merit requirements under section 150.002. Because *McDaniel* limits the purview of the docket control order … , and the Rule 11 agreement merely provided dates for the order, the Rule 11 agreement did not operate to postpone the filing requirement."

4. *Long v. Castle Texas Production Limited Partnership*, 426 S.W.3d 73 (Tex. 2014)(3/28/14)

Suit between investors and oil and gas operator. The opinion generally addresses the date from which postjudment interest runs.

Footnote 8: The "joint operating agreement between [the parties] … is contract interest under the Finance Code."

5. *Gotham Insurance Company v. Warren E&P, Inc.*, S.W.3d (Tex. 2014)(3/21/14)

Suit by carrier to recover payment of a claim after oil well blew out and burned.

Footnote 5: "In this context, a turnkey contract is a contract by which an entity agrees to drill a well for a fixed price."

"The Texas Railroad Commission, which regulates oil and gas drilling and production in Texas, promulgated Rule 36 to address blowout prevention equipment to be used in drilling hydrogen sulfide wells."

6. *Coinmach Corp. f/k/a Solon Automated Services, Inc. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909 (Tex. 2013)(11/22/13) ("corrected opinion" was issued 2/14/14)

Corrected opinion: footnote 7 changed. *See Coinmach*, below, at 11/22/13.

Footnote 7: "Typically, the landlord could not recover both reasonable rent and lost profits because 'recovery … is limited to the amount necessary to place the plaintiff in the position it would have been in but for the trespass.' Lost profits are measured by deducting operating expenses from gross earnings, resulting in net profits. Reasonable rent—i.e., the value of the use of the property—is calculated as part of the **gross earnings**, and thus is already included in the net profit calculation. To allow the plaintiff to recover both reasonable rent and lost profits would, in most cases, constitute a double recovery. In a residential lease—where there is no business or for-profit endeavor—lost profits would constitute the profits normally associated with reasonable rent." (Emphasis added to show change from prior opinion.)

7. *The Finance Commission of Texas v. Norwood*, 418 S.W.3d 566 (Tex. 2013)(6/21/13) ("supplemental opinion" was issued 1/24/14)

Supplemental opinion addressing computation of interest and closing locations for home equity loans.

The "Texas Constitution caps 'fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service' a home equity loan, not including 'any interest', at 3% of principal. In this case, we hold that 'interest' as used in this provision does not mean compensation for the use, forbearance, or detention of money, as in the usury context, but 'the amount determined by multiplying the loan principal by the interest rate.' This definition provides the protection to borrowers the provision is intended to afford."

"[P]er per diem interest is still interest, though prepaid; it is calculated by applying a rate to principal over a period of time. Legitimate discount points to lower the loan interest rate, in effect, substitute for interest. We also agree … that true discount points are not fees 'necessary to originate, evaluate, maintain, record, insure, or service' but are an option available to the borrower and thus not subject to the 3% cap."

"Section 50(a)(6)(N) [of the Constitution], which provides that a loan may be 'closed only at the office of the lender, an attorney at law, or a title company', precludes a borrower from closing the loan through an attorney-in-fact under a power of attorney not itself executed at one of the three prescribed locations."

"[C]losing is the occurrence that consummates the transaction. But a power of attorney must be part of the closing to show the attorney-in-fact's authority to act. … [W]e think that the provision requires a formality to the closing that prevents coercive practices. The concern is that a borrower may be persuaded to sign papers around his kitchen table collateralizing his homestead when he would have second thoughts in a lender's, lawyer's, or title company's office. To allow the borrower to sign a power of attorney at the kitchen table raises the same concern. Requiring an attorney-in-fact to sign all loan documents in an office does nothing to sober the borrower's decision, which is the purpose of the constitutional provision."

A breach of fiduciary duty suit against an attorney-in-fact "may be a hollow remedy and certainly cannot recover a home properly pledged as collateral. In any event, '[w]hether so stringent a restriction [as limiting the locations where a home equity loan can be closed and, we think, a power of attorney executed] is good policy is not an issue for the Commissions or this Court to consider.' Whether the constitutional provision's intended protection is worth the hardship or could be more fairly or effectively provided by some other method is a matter that must be left to the framers and ratifiers of the Constitution."

8. *Ewing Construction Company v. Amerisure Insurance Company*, 420 S.W.3d 30 (Tex. 2014)(1/17/14)

Insurance coverage dispute arising from suit against building contractor. "We have defined 'good and workmanlike' as 'that quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work.'" The "'common law duty to perform with care and skill accompanies every contract.…'"

9. *Galveston Central Appraisal District v. TRQ Captain's Landing*, 423 S.W.3d 374 (Tex. 2014)(1/17/14)

A Community Housing Development Organization (CHDO) is designed to provide low income housing, and receives certain ad valorem tax advantages. The Supreme Court previously "held in *AHF-Arbors* that equitable title [rather than legal title] is sufficient" for the tax exemption. Here, the Court ruled that "the CHDO's application for an exemption was timely" because the entity "application [was] made within thirty days of the date it acquired equitable title to the apartments…."

Texas Tax Code § 11.182 provides a tax exemption for a CHDO.

"Generally, eligibility for an exemption is determined as of January 1 of the year in which the exemption is sought, and a person must apply for the exemption before May 1 of that year." But, § 11.436(a) allows an application within 30 days after an entity "acquires the property." Here, that includes equitable title.

10. *Texas Commission on Environmental Quality v. City of Waco*, 413 S.W.3d 409 (Tex. 2013)(8/23/13) ("corrected opinion" was issued 11/22/13) (*see* original opinion below for analysis)

Change on p. 24: "Although the APA defines 'contested case' and sets the procedural framework, the agency's enabling act here sets out whether rights are to be determined after an opportunity for adjudicative hearing, and agency rules may decide whether that opportunity may include a contested case hearing."

11. *Coinmach Corp. f/k/a Solon Automated Services, Inc. v. Aspenwood Apartment Corp*., 417 S.W.3d 909 (Tex. 2013)(11/22/13) ("corrected opinion" was issued 2/14/14)

Lease of tenant who supplied washing machines to apartment complex was subordinate to loan on complex. Mortgage on complex was foreclosed, and new owner bought property out of foreclosure. After that, the tenant held over and thus became a "tenant at sufferance." The Supreme Court ruled that the foreclosure terminated the lease. It further held that: "(1) a tenant at sufferance cannot be liable for breach of the previously-terminated lease agreement; (2) a tenant at sufferance is a trespasser and can be liable in tort (although the extent of liability depends on the nature of the trespass), including, in this case, tortious interference with prospective business relations; and (3) the tenant in this case cannot be liable under the DTPA because the property owner was not a consumer.… [The Court further held] that (4) the property owner in this case cannot recover under" the declaratory judgments act in order to obtain attorney's fees.

"Generally, a valid foreclosure of an owner's interest in property terminates any agreement through which the owner has leased the property to another. This is particularly true when … the lease agreement is expressly subordinate to a mortgage or deed of trust affecting the leased premises.… [W]hen an owner defaults on a mortgage and the property is sold at foreclosure, the purchaser takes the property free of any leases subordinate to the deed of trust being foreclosed upon.'"

"A tenant who continues to occupy leased premises after expiration or termination of its lease is a 'holdover tenant.' The status and rights of a holdover tenant, however, differ depending on whether the tenant becomes a 'tenant at will' or a 'tenant at sufferance.'"

"A tenant at will is a holdover tenant who 'holds possession with the landlord's consent but without fixed terms (as to duration or rent).' Because tenants at will remain in possession with their landlords' consent, their possession is lawful, but it is for no fixed term, and the landlords can put them out of possession at any time. By contrast, a tenant at sufferance is '[a] tenant who has been in lawful possession of property and wrongfully remains as a holdover after the tenant's interest has expired.'" The key is consent. "With the owner's consent, the holdover tenant becomes a tenant at will; without it, a tenant at sufferance."

"A lease agreement may provide that its terms continue to apply to a holdover tenant." But when it does not, "the parties' conduct will determine whether the holdover tenant becomes a tenant at will or a tenant at sufferance.… If the tenant remains in possession and continues to pay rent, and the landlord, having knowledge of the tenant's possession, continues to accept the rent without objection to the continued possession, the tenant is a tenant at will, and the terms of the prior lease will continue to govern the new arrangement absent an agreement to the contrary." Without consent of the landlord, a "tenant 'who remains in possession of the premises after termination of the lease occupies 'wrongfully' and is said to have a tenancy at sufferance.'"

Here, the foreclosure terminated the lease, so the tenant became a tenant at sufferance, and no agreement with the new owner existed. Thus, tenant "could not be liable for breach of any lease."

At "tenant at sufferance [is] a 'trespasser' who occupies the premises 'wrongfully.'" Under the Texas Property Code, "chapter 22 governs trespass to try title suits to determine 'title …' and chapter 24 governs [forcible entry and detainer] actions to determine … possession.…" Forcible entry and detainer suits only determine possession. Foreclose transfers title, but does not put new owner in possession. "'To remove a tenant by sufferance, the new owner must file a forcible detainer suit.'" Here, tenant can be liable for trespass. A forcible entry and detainer suit "'does not bar a suit for trespass, damages, waste, rent, or mesne profits.'" Footnote 3: a "final judgment of a county court in an eviction suit may not be appealed on the issue of possession unless the premises are used only for residential purposes." Footnote 5: "a determination of fact or law in a proceeding in a lower trial court, including a justice of the peace court, is not res judicata or basis for estoppel by judgment in a district court proceeding."

Forcible entry and detainer suits have certain procedures. They "do not grant to tenants at sufferance

any legal interests in or possessory rights to the … [a]lthough the landlord must comply with the statute's procedural requirements to evict the tenant at sufferance.…" Further, a forcible entry and detainer suit does not bar a suit for either "trespass or for wrongful eviction."

When an owner fails to follow the procedure of a forcible entry and detainer suit, the tenant can maintain possession. "But the tenant will generally be liable for reasonable rent for the period the tenant remains in possession, and for any additional damages the tenant may cause to the property."

"'The commission of a trespass does not necessarily mean the actor will be liable for damages.'… [A] trespasser's liability for damages depends on the nature of the trespass and the nature of the harm:
'Every unauthorized entry upon land is a trespass even if no damage is done. However, to determine what damages, if any, are recoverable for a trespass, the type of conduct or nature of an activity that causes the entry must be identified. While a trespass is a trespass, different recoveries are available, depending on whether the trespass was committed intentionally, negligently, accidentally, or by an abnormally dangerous activity.'"

"'One who invades or trespasses upon the property rights of another, while acting in the good faith and honest belief that he had the lawful and legal right to do so is regarded as an innocent trespasser and liable only for the actual damages sustained.'… '[T]he measure of damages in a trespass case is the sum necessary to make the victim whole, no more, no less.'… [That] generally includes the cost to repair any damage to the property, loss of use of the property, and loss of any expected profits from the use of the property."

The "damages available in a trespass to try title suit include lost rents and profits, damages for use and occupation of the premises, and damages for any special injury to the property." "In addition to the reasonable rents, a tenant at sufferance, like any other trespasser, could also be liable for any special injury to the property." Footnote 7: "Typically, the landlord could not recover both reasonable rent and lost profits because 'recovery … is limited to the amount necessary to place the plaintiff in the position it would have been in but for the trespass.' Lost profits are measured by deducting operating expenses from gross earnings, resulting in net profits. Reasonable rent—i.e., the value of the use of the property—is calculated as part of the operating expenses, and thus is already included in the net profit calculation. To allow the plaintiff to recover both reasonable rent and lost profits would, in most cases, constitute a double recovery. In a residential lease—where there is no business or for-profit endeavor—lost profits would constitute the profits normally associated with reasonable rent."

Tenants "who knowingly and intentionally trespass, or who do so maliciously, may be liable for additional forms of damages." This includes mental distress, which "'may be recovered, as a separate and independent element, *when caused by a deliberate and willful trespass* in which *actual damage* to plaintiff's property is sustained.'"

"[E]xemplary damages exemplary damages are recoverable only when 'the harm … results from: (1) fraud; (2) malice; or (3) gross negligence.'"

When an owner fails to follow the procedure of a forcible entry and detainer suit, the tenant can maintain possession. "But the tenant will generally be liable for reasonable rent for the period the tenant remains in possession, and for any additional damages the tenant may cause to the property."

Here, as a trespasser, tenant "is liable for the reasonable rent and for any other damage it may have caused to the property. Its liability for any additional damages will depend on whether its trespass was willful, intentional, or malicious."

"Here, the trespass is an independently tortious or wrongful act that could support a claim for tortious interference with prospective business relations." In this case, owner must show trespass and "it must also prove that [tenant's] conduct actually interfered with a reasonably probable contract. Owner has neither pled nor proven a 'continually available' prospective contract.…"

Owner sought attorney's fees by filing a declaratory judgment. "[W]hen 'the trespass-to-try-title statute governs the parties' substantive claims … , [the plaintiff] may not proceed alternatively under the Declaratory Judgments Act to recover their attorney's fees.'" Instead, "chapter 22 of the Texas Property Code govern[s] the resolution of disputes involving legal interests in real property."

12. *City of Laredo v. Montano*, 414 S.W.3d 731 (Tex. 2013)(10/25/13)

Property owner successfully resisted condemnation by demonstrating it was not for an authorized public use. Attorney's fees for that are provided "under Texas Property Code § 21.019(c)."

13. *Texas Commission on Environmental Quality v. Bosque River Coalition*, 413 S.W.3d 403 (Tex. 2013)(9/20/13)

A dairy farmer applied to amend his water-quality permit to increase his herd. The Supreme Court ruled TCEQ could deny other parties a contested case hearing. (This is a companion case to *TECQ v. City of Waco*, 8/23/13, below.)

"A concentrated animal feed operation or 'CAFO' is an animal feeding operation in which confined

poultry or livestock are housed and fed in numbers that exceed a threshold set by rule. CAFO s are regulated by the Commission to protect surface water by restricting any flow of waste or wastewater from their premises.… The Commission does not ordinarily permit CAFOs to discharge waste into surface water directly, but discharges may nevertheless be allowed whenever a rainfall event, either chronic or catastrophic, causes an overflow from a properly designed and operated facility. CAFO wastes have traditionally been managed by beneficial reuse through land application as fertilizers and composts."

"Section 26.028(c) of [the Water Code] generally extends the right to a public hearing in a permit application proceeding to a commissioner, the commission's executive director, or an 'affected person'…. Exempted … are certain applications to renew or amend existing permits that do not seek either to increase the quantity of waste discharged or change materially the place or pattern of discharge and that maintain the quality of the waste to be discharged." Thus, a renewal or amendment that is not major does not require a public hearing. That hearing would be a "'a contested case hearing under the Texas Administrative Procedure Act.'" "Agency rules define a major amendment as 'an amendment that changes a substantive term, provision, requirement, or a limiting parameter of a permit.'" So, "a contested case hearing is generally not available for minor amendments."

14. *City of Lorena v. BMTP Holdings, L.P.*, 409 S.W.3d 634 (Tex. 2013)(8/30/13)

Developer had obtained a permit when city declared a moratorium due to insufficient sewage capacity. After the city extended the moratorium repeatedly, developer sought a declaratory judgment and asserted a takings case. The Supreme Court held "that the moratorium cannot apply to the [developer's lots] because the municipality approved the property for subdivision before it enacted the moratorium…. [W]ith respect to the inverse condemnation claim, the trial court must resolve factual disputes pertaining to the extent of the government's interference with the owner's use and enjoyment of its property before the merits of the takings claim are judicially addressed."

Under Ch. 212, cities can "enact temporary moratoria" on development to prevent a shortage of "essential public facilities." However, they must provide "summary of evidence showing that [a moratorium] is limited to property that has not been approved for development."

A "moratorium enacted to prevent a shortage of essential public facilities that affects approved development conflicts with the controlling statute and is invalid."

A "regulatory taking occurs when the government has unreasonably interfered with a claimant's use and enjoyment of its property." "The United States Supreme Court has identified three key factors to guide our analysis: (1) the economic impact on the claimant; (2) the extent of interference with the claimant's investment-backed expectations; and (3) the character of the government's action."

"Because any one of … three regulatory takings theories could potentially support [the developer's] inverse condemnation claim, the City must have conclusively disproven all three theories for the trial court's grant of summary judgment to be proper."

Footnote 5: "municipalities may use police powers when necessary to safeguard the public safety and welfare." Footnote 10: "in certain circumstances a municipality commits no taking when it validly exercises its police power to protect the public safety and welfare."

"The ultimate determination of whether an ordinance constitutes a compensable taking is a question of law, but 'we depend on the district court to resolve disputed facts regarding the extent of the governmental intrusion on the property.' Thus, we must determine whether any disputed issues of fact exist.…"

"[W]hen a property owner testifies as to the value of his property, '[e]vidence of price paid, nearby sales, tax valuations, appraisals, online resources, and any other relevant factors may be offered to support the claim.'"

15. *Masterson et al. v. The Dioceses of Northwest Texas, et al.*, 422 S.W.3d 594 (Tex. 2013)(8/30/13)

Local church split from national organization over doctrinal differences. The issue "is what happens to the property when a majority of the membership of a local church votes to withdraw from the larger religious body of which it has been a part." The title to realty was held by a Texas non-profit corporation associated with the local church. The Supreme Court ruled that, of two constitutionally permissible approaches, "the neutral principles methodology should be applied.…"

"Courts do not have jurisdiction to decide questions of an ecclesiastical or inherently religious nature, so as to those questions they must defer to decisions of appropriate ecclesiastical decision makers.… [But,] [p]roperly exercising jurisdiction requires courts to apply neutral principles of law to non-ecclesiastical issues involving religious entities in the same manner as they apply those principles to other entities and issues. Thus, courts are to apply neutral principles of law to issues such as land titles, trusts, and corporate formation, governance, and dissolution, even when religious entities are involved."

"A religious organization may choose to organize as a domestic non-profit organization and acquire, own, hold, mortgage, and dispose of or invest its funds

in property for the use and benefit of and in trust for a higher or other organization."

16. *The Episcopal Diocese of Fort Worth v. The Episcopal Church*, S.W.3d _(Tex. 2013)(8/30/13)

Local Episcopal church wanted to separate from the national organization. The issue was "what methodology is to be used when Texas courts decide which faction is entitled to a religious organization's property following a split or schism? In *Masterson* [see above] we held that the methodology referred to as 'neutral principles of law' must be used."

The national organization asserted the local church held properties in trust for it. "'Even if the [church law] could be read to imply the trust was irrevocable, that is not good enough under Texas law. [Texas Property Code § 112.051] requires *express* terms making it irrevocable.'"

17. *Morton v. Nguyen*, 412 S.W.3d 506 (Tex. 2013)(8/23/13)

In a contract for deed, the seller failed to comply with disclosure requirements. Though that entitled the buyers to rescind, the Court held that the buyers must restore the rent. "A seller's failure to comply with Subchapter D's requirements entitles a buyer to 'cancel and rescind' a contract for deed and 'receive a full refund of all payments made to the seller.…' We hold that Subchapter D's cancellation-and-rescission remedy contemplates mutual restitution of benefits among the parties. Thus, we conclude that the buyers here must restore to the seller supplemental enrichment in the form of rent for the buyers' interim occupation of the property upon cancellation and rescission of the contract for deed."

"Texas Property Code imposes various conditions and disclosure requirements on sellers entering into contracts for deed—also known as 'executory contracts for the conveyance of real property.'"

"A contract for deed … is a financing arrangement that allows the seller to maintain title to the property until the buyer has paid for the property in full. Under Subchapter D, real estate transactions involving contracts for deed require the seller to make certain disclosures and provide certain notices. Various sections in Subchapter D entitle a buyer to 'cancel and rescind" the contract for deed and 'receive a full refund of all payments made to the seller' if the seller fails to comply with the disclosure and notice requirements."

Here, the common law principle of mutual restitution is included in the rescission remedy. "[W]e conclude that the Legislature intended Subchapter D's cancellation-and-rescission remedy to also contemplate the common law element of mutual restitution." "Subchapter D's cancellation-and-rescission remedy is not intended to be punitive.…" (Footnote 1: The "liquidated damages provisions in sections 5.077 and 5.079 of Subchapter D are indeed punitive.… Yet this fact does not compel a conclusion that *all* of Subchapter D's remedies were intended to be punitive.) Otherwise, there would be a "windfall." So, the "buyer [must] restore to the seller the value of the buyer's occupation of the property."

The buyers "are not entitled to either attorney's fees or mental anguish damages because no claims supporting the awards survived the court of appeals' judgment." Footnote 3: We "are not convinced that mental anguish damages are recoverable for the Property Code violations found by the trial court in this case."

18. *Texas Commission on Environmental Quality v. City of Waco*, 413 S.W.3d 409 (Tex. 2013)(8/23/13) ("corrected opinion" was issued 11/22/13)

In this companion case to *TCEQ v. Bosque River Coalition* (9/20/13, above), the city complained that a permit amendment allowing more cows for an upstream dairy farm would damage Lake Waco, and it requested a contested case hearing on the permit application. As the Supreme Court explained in *Bosque River Coalition*, "In [*City of Waco*], we concluded that the Texas Commission on Environmental Quality did not abuse its discretion in denying a contested case hearing to an interested party, who claimed a right to such a hearing under the Texas Water Code.… In *City of Waco*, this Court concluded that a party's status as an affected person was not determinative of the right to a contested case hearing because the statute expressly exempted the proposed amendment from contested case procedures."

"In Texas, the TCEQ has the primary authority to establish surface water quality standards, which it implements, in part, in its permitting actions." "Anyone may publicly comment on a pending water-quality permit, but only those commentators who are also 'affected persons' may obtain a public hearing." "When a [feed operation] applies for a permit, interested parties may object to the proposed permit during a comment period. These parties may also seek to intervene and request a public hearing on the proposed permit. But before granting a contested case hearing—a trial-like proceeding with attendant expense and delay—a threshold determination must be made as to whether the party is an 'affected person' with standing to request such a hearing."

19. *Lennar Corporation v. Markel American Insurance Company*, 413 S.W.3d 750 (Tex. 2013)(8/23/13)

Footnote 16: Regarding construction defects, "TEX. PROP. CODE § 27.005 'This chapter does not create a cause of action . . . .'"

20. *State of Texas v. $1,760.00 in United States Currency, et al.*, 406 S.W.3d 177 (Tex. 2013)(6/28/13)

After executing a search warrant, the state seized and sought to forfeit currency and "eight-liners." An exception to the definition of gambling device excluded those which exclusively awarded noncash prizes and "novelties." Because, here, "the eight-liners awarded tickets that could be redeemed for non-immediate rights of replay, … [the Supreme Court ruled that constitutes] an intangible reward precluding application of the statutory exclusion."

A "reward of a non-immediate right of replay prevents the statutory exclusion from applying.…" Here, the machines issued tickets for store merchandise or "non-immediate rights of replay." The exclusion did not apply in *Hardy* when the machines "awarded players tickets that were exchangeable for either gift certificates redeemable at local retailers or cash to play other machines.…" Nor did it apply to "eight-liners that dispense tickets redeemable for cash, even when the cash can be used only for additional play.…"

One issue was what constitutes a "novelty," an undefined term. Here, though "novelty" could mean a "new event," the "context … indicates that the Legislature intended 'novelty' to mean other types of tangible articles similar to 'noncash merchandise prizes' and 'toys'…."

21. *Phillips Petroleum Company v. Yarbrough, consolidated with In re ConocoPhillips Company*, 405 S.W.3d 70 (Tex. 2013)(6/21/13)

Appeal of certification of a class in a case involving royalty payments. "A duty to market is implied in leases that base royalty calculations on the price received by the lessee for the gas. A lessee may breach its implied covenant to market regardless of whether the lessee complies with the lease's express provisions; indeed, the purpose of an implied covenant claim is to protect a lessor from the lessee's negligence or self-dealing that would result in unfairly low royalties under the express provisions." But, "there is no implied covenant when the lease expressly covers the subject matter of the implied covenant." "While a lessee's duty to market certainly can affect the royalty it owes under a proceeds-based lease, this duty is not properly pigeonholed solely as a provision 'for payment of royalty.'" The "absence of an express covenant to market … does not automatically impose an implied covenant to market in those leases.…"

The "specific concerns that led us to [previously] decertify Subclasses 1 and 3 do not appear to be present with respect to the implied-covenant claim."

22. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244 (Tex. 2013)(6/21/13)

Surface owner sued oil and gas lessee claiming its operations "did not accommodate his existing cattle operation." He contended the gas well interfered with his cattle "roundup." Affirming a summary judgment for the lessee, the Supreme Court ruled owner "failed to raise a material fact issue as to whether [lessee] failed to accommodate his use."

"A party possessing the dominant mineral estate has the right to go onto the surface of the land to extract the minerals, as well as those incidental rights reasonably necessary for the extraction … [which] include the right to use as much of the surface as is reasonably necessary to extract … the minerals. If the mineral owner or lessee has only one method for developing and producing the minerals, that method may be used regardless of whether it precludes or substantially impairs an existing use of the servient surface estate. On the other hand, '[i]f the mineral owner has reasonable alternative uses of the surface, one of which permits the surface owner to continue to use the surface in the manner intended … and one of which would preclude that use by the surface owner, the mineral owner *must* use the alternative that allows continued use of the surface by the surface owner.'"

The "surface owner has the burden to prove that (1) the lessee's use completely precludes or substantially impairs the existing use, and (2) there is no reasonable alternative method available to the surface owner by which the existing use can be continued. If the surface owner carries that burden, he must further prove that given the particular circumstances, there are alternative reasonable, customary, and industry-accepted methods available to the lessee which will allow recovery of the minerals and also allow the surface owner to continue the existing use." Regarding accommodation, "a surface owner's burden to prove that his existing use cannot be maintained by some reasonable alternative method is not met by evidence that the alternative method is merely more inconvenient or less economically beneficial than the existing method.… Rather, the surface owner has the burden to prove that the inconvenience or financial burden of continuing the existing use by the alternative method is so great as to make the alternative method unreasonable."

An issue is whether there were alternatives for any agricultural use by the surface owner, or for a cattle operation. Here, it was the cattle use that "must be considered in balancing his rights with those of" the mineral lessee. Here, surface owner failed to prove when he could not move his pens. "Evidence that the mineral lessee's operations result in inconvenience and some unquantified amount of additional expense to the surface owner does not rise to the level of evidence

that the surface owner has no reasonable alternative method to maintain the existing use."

23. *The Finance Commission of Texas v. Norwood*, 418 S.W.3d 566 (Tex. 2013)(6/21/13) ("supplemental opinion" was issued 1/24/14)

Voters amended the constitution to allow home equity loans, and then in 2003 amended it again to allow the Legislature to delegate to an agency the power to interpret certain sections. In this suit, homeowners challenged certain rulings by two commissions authorized by the Legislature to create a safe harbor. The Supreme Court ruled that "agency interpretations made under this authority are [not] beyond judicial review," and that certain rulings by the agencies were unconstitutional.

The homestead has been protected from forced sale by the Texas Constitution. An amendment allowed home equity loans. Its "lengthy, elaborate, detailed provisions … were included in Article XVI, Section 50 and made nonseverable." "Loan terms and conditions, notices to borrowers, and all applicable regulations were set out in Section 50 itself." Desiring a safe harbor, in "2003 the Legislature proposed, and the people adopted, Section 50(u), which states: The legislature may by statute delegate one or more state agencies the power to interpret" parts of Section 50. The commissioners on the commissions to whom the Legislature delegated the power were appointed by the Governor.

The commissions' interpretation of "interest" was unconstitutional, as well as allowing closing by mail, but not the presumption of receipt of notice.

The fatal flaw with the commissions' interpretation of "interest" is that it was tied to the Legislature's definition, which it could change. Instead, "interest" is "the amount determined by multiplying the loan principal by the interest rate."

"Closing a loan is a process.… [Under the constitution, executing] the required consent or a power of attorney are part of the closing process and must occur only at one of the locations allowed by the constitutional provision."

The commissions' interpretation providing a rebuttable presumption of receipt of mail "does not impair the constitutional requirement; it merely relieves a lender of proving receipt unless receipt is challenged."

24. *Strickland v. Medlen*, 397 S.W.3d 184 (Tex. 2013)(4/5/13)

Plaintiffs' dog escaped his yard, was picked up, and taken to a municipal animal shelter. A worker mistakenly placed the dog on a list allowing him to be killed before plaintiffs returned with the cash necessary to pay the fees to get him out. The Supreme Court ruled that "a bereaved dog owner [may not] recover emotion-based damages for the loss." The dog is "personal property, thus disallowing non-economic damages." "[R]ecovery in pet-death cases is … limited to loss of value, not loss of relationship."

The law "label[s] [pets] as 'property' for purposes of tort-law recovery." The rule for damages of a dog has "two elements: (1) 'market value, if the dog has any,' or (2) 'some special or pecuniary value to the owner, that may be ascertained by reference to the usefulness and services of the dog.'" The "special or pecuniary value" refers not to the emotional bond, but to "the dog's usefulness and services." It is "not emotional and subjective; rather it is commercial and objective."

Footnote 58: The "actual value" of the pet "*can* include a range of other factors: purchase price, reasonable replacement costs (including investments such as immunizations, neutering, training), breeding potential (if any), special training, any particular economic utility, veterinary expenses related to the negligent injury, and so on."

For "irreplaceable family heirlooms … damages may factor in 'the feelings of the owner for such property.'" "An owner's fondness for a one-of-a-kind, family heirloom is sentimental, existing at the time a keepsake is acquired and based not on the item's attributes but rather on the nostalgia it evokes.…" ("[W]ith heirlooms, the value is sentimental; with [the wrongful death of] people, the value is emotional.") But, the default "rule for destroyed non-heirloom property lacking market or replacement value [is] 'the actual worth or value of the articles to the owner . . . excluding any fanciful or sentimental considerations.'" "[P]ermitting sentiment-based damages for destroyed heirloom property portends nothing resembling the vast public-policy impact of allowing such damages in animal-tort cases."

"[M]ental-anguish damages are [not] recoverable for the negligent destruction of personal property.… [M]ental anguish is a form of personal-injury damage, unrecoverable in an ordinary property-damage case."

Footnote 50: Quoting the Restatement: "'[R]ecovery for *intentionally* inflicted emotional harm is not barred when the defendant's method of inflicting harm is by means of causing harm to property, including an animal.'"

25. *Texas Department of Transportation v. A.P.I. Pipe and Supply, LLC*, 397 S.W.3d 162 (Tex. 2013)(4/5/13)

Inverse condemnation suit which turned on whether government had title to a parcel after an original condemnation judgment in 2003 that awarded it a "right-of-way" was revised by a nunc pro tunc judgment in 2004 that purported to render the 2003 judgment void and grant only an "easement." The Supreme Court ruled that the "void 2004 Judgment

cannot supersede the valid 2003 Judgment; API is statutorily ineligible for 'innocent purchaser' status; and equitable estoppel is inapplicable against the government in this case."

Footnote 1: "TEX. PROP. CODE § 21.061 … provid[es] that if no party objects to the findings of the special commissioners, the trial court 'shall adopt the commissioners' findings as the judgment of the court.'"

"A trial court lacks jurisdiction and should grant a plea to the jurisdiction where a plaintiff 'cannot establish a viable takings claim.' … '[T]o recover under the constitutional takings clause, one must first demonstrate an ownership interest in the property taken.'"

Because this was a condemnation suit, "the trial court in this case was by law required to adopt the award of the special commissioners, who in turn granted the fee-simple title the City sought.…" Plus, there was no timely objection to the award of the special commissioners. "Therefore, the trial court could 'only perform its ministerial function and render judgment based upon the commissioner's award.'" "Conversely, the 2004 Judgment exceeded the scope of this 'ministerial function' by shrinking the interest awarded by the special commissioners from a fee simple to an easement."

The 2003 judgment awarded fee simple ownership. The 2004 judgment was void, and thus "did not convey anything to anyone." Therefore, API, as purchaser, could not buy from the prior owner (who held the property at the time of the 2003 condemnation), because the prior did not own the parcel.

API was not a "good-faith purchaser for value." That "doctrine does not protect a purchaser whose chain of title includes a void deed." The "statute protects purchasers from *unrecorded* property conveyances.… But one cannot be 'innocent' of a *recorded* judgment." Here, API knew of the "recorded 2003 Judgment." Moreover, "[e]arlier instruments in a chain of title can[not] be rendered meaningless by later instruments that are contradictory." A "purchaser is deemed to have notice of all recorded instruments, not just the most recent one."

"Section 13.001 [of the Property Code] defines the elements of innocent-purchaser status for *all* cases, and courts may not disregard or rewrite the statute when they believe straight-up application would be inequitable." By statute, a "purchaser with notice of an adverse interest cannot claim innocent-purchaser status."

26. *Reeder v. Wood County Energy, LLC*, 395 S.W.3d 789 (Tex. 2012)(8/31/12); new opinion issued 3/29/13

The Supreme Court issued a new judgment in this oil and gas suit that allows attorney's fees. For further discussion of the issues, see below for a treatment of the earlier opinion, issued on 8/31/12.

27. *El Dorado Land Company, L.P. v. City of McKinney*, 395 S.W.3d 798 (Tex. 2013)(3/29/13)

Seller sold land to city with deed restriction that it be a park; if the city decided not to use it as a park, seller reserved "option" under the deed to repurchase the property at a specified price. Later, when city built a library on land without offering it back to seller, seller sued for inverse condemnation. The Supreme Court ruled that "the reversionary interest here is a compensable property interest" under the constitution's "takings" clause.

"Historically, the law divided future interests into five types: (1) remainders, (2) executor interests, (3) reversions, (4) possibilities of reverter, and (5) rights of entry. Remainders and executory interests are future interests created in persons other than the grantor. Reversions, possibilities of reverter, and rights of entry are interests that remain with the grantor.… [F]uture interests that remain with the grantor are reversionary interests7 and may be viewed 'as claims to property that the grantor never gave away.' The latest Restatement dispenses with the historical parsing of future interests, recognizing only reversions and remainders."

"Under Texas law, the possibility of reverter and the right of reentry are both freely assignable like other property interests." Further, "a future interest in real property is compensable under the Takings Clause." "The Restatement makes no distinction between gifts and sales, and it is not apparent why the compensable nature of a future interest should rest on donative intent rather than the donor's intent to retain a contingent future interest in the property conveyed."

"When private property is taken for a public purpose, our constitution requires that the government compensate the owner. A condemnation proceeding is the formal process by which that compensation is determined. But when the government takes private property without paying for it, the owner must bring suit for inverse condemnation."

The "procedural distinctions between condemnation and inverse condemnation cases are generally immaterial … [and] although the actions differ based on who initiates, rules of evidence and measure of damages to property are 'substantially similar' in both kinds of cases."

Here, the "deed did not create a possibility of reverter." Footnote 6: "A possibility of reverter is … a future interest retained by a grantor that conveys a

determinable fee; 'it is the grantor's right to fee ownership in the real property reverting to him if the condition terminating the determinable fee occurs.'"

"A right of reentry is a 'future interest created in the transferor that [may] become possessory upon the termination of a fee simple subject to a condition subsequent.'"

In this case, seller's "possessory interest was contingent on the property's use." Upon a violation of the deed restriction, seller "retained the right to terminate the City's estate," effectively a "power of termination." The deed conveyed a "defeasible estate," and the seller's power to terminate has been equated "to an estate or interest in land." Thus, seller retained a "reversionary interest."

Here, "the deed restriction and option created in [seller] a right of reentry, which is a reversionary interest, albeit of a different type than the possibility of reverter." "That a right of reentry requires its holder to make an election does not make it any less a property right."

"A statutory waiver of immunity is unnecessary for a takings claim because the Texas Constitution waives 'governmental immunity for the taking, damaging or destruction of property for public use.'"

In the *Leeco* case, the "possibility of reverter was a protected property interest," valued by the "imminence of possession." "[N]ominal damages would be inappropriate if the defeasible event was reasonably certain to occur in the near future or had already occurred."

28. *Gonzales v. Southwest Olshan Foundation Repair Company, LLC*, 400 S.W.3d 52 (Tex. 2013)(3/29/13)

Homeowner retained company to repair foundation. Its contract said it would perform job in a good and workmanlike manner. There were subsequent problems extending over years. One crewmember said it was the "worst" job he had seen; later engineers sent out by company, though, said it was proper. Regarding the contract term, the Supreme Court ruled that "parties cannot disclaim but can supersede the implied warranty [from *Melody Home*] for good and workmanlike repair of tangible goods or property if the parties' agreement specifically describes the manner, performance, or quality of the services," as it did here.

"We [have] defined good and workmanlike as 'that quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work.'"

The "implied warranty of good workmanship 'attaches to a new home sale'" if the parties do not specify the performance. This implied warranty under *Melody Home* is a "'gap-filler' warranty."

29. *Kopplow Development, Inc. v. The City of San Antonio*, 399 S.W.3d 532 (Tex. 2013)(3/8/13)

Commercial landowner sued city for reverse condemnation because it made changes to neighboring property that raised the flood level after previously issuing permits, and after landowner had provided fill to meet the prior flood level. With the new level, the landowner could not develop the tract as permitted. The "landowner's landowner's claim is for the present inability to develop the property as previously approved unless the property is filled, [and] we hold the claim is not premature."

The landowner had obtained a "vested rights permit [which] insulates pending development from most future ordinance changes. But certain floodplain regulation changes apply retroactively even against vested rights holders." Footnote 3: "vested rights do not apply against 'regulations to prevent imminent destruction of property or injury to persons from flooding that are effective only within a flood plain established by a federal flood control program and enacted to prevent the flooding of buildings intended for public occupancy.'"

The "right to own private property [has been described] as 'fundamental, natural, inherent, inalienable, not derived from the legislature and as preexisting even constitutions.' One … [purpose of] government is to protect private property rights. The Texas Constitution … require[es] takings to be for public use, with the government paying the landowner just compensation.… The United States Supreme Court has stated that … [compensation] for takings for public use is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' When only part of a tract is taken, Texas law assures just compensation by entitling the landowner to the value of the part taken as well as the damage to the owner's remaining property."

"Takings may be categorized as either statutory (if the government compensates the owner for the taking) or inverse (if the owner must file suit because the government took, damaged, or destroyed the property without paying compensation)."

"[M]ere negligence that eventually contributes to property damage will not qualify as a taking, primarily because the public would bear the burden of paying for damage for which it receives no benefit." The "'requisite intent is present when a governmental entity knows that a specific act is causing identifiable harm or knows that the harm is substantially certain to result.' With flood water impacts, recurrence is a probative factor in assessing intent.…" "Here, we need not look to evidence of the frequency of flooding to deduce the government's intent: the City knew the project would inundate part of [landowner's] property before it ever

began construction, prompting the City to seek a drainage easement from [landowner].

The city argued plaintiff did not plead inverse condemnation. "Texas is a notice pleading jurisdiction.…" Here, the city knew landowner "was pleading an inverse condemnation claim."

The city asserted that the landowner's claim was not ripe. In flooding cases, courts of appeals have held that "a future loss of property [does] not give rise to a present takings case." While that type claim may be premature, here landowner's "claim is about development, not flooding." And, the record showed that the landowner "sought to develop its property pursuant to the previously approved plat and that the City would require [it] to fill its property … [further to] develop it. [Accordingly,] … we are able to determine whether the municipality will approve the use the landowner seeks." "Even if the [landowner's] property never actually floods, the property is nonetheless undevelopable unless filled.…" "[O]n "facts, a lack of ripeness does not bar [landowner's] inverse condemnation claim."

"A proximate cause question is properly submitted in a partial statutory takings case where the parties dispute whether the use of the part taken damaged the remainder. Moreover, causation is still relevant in an inverse condemnation claim: owners of inversely condemned property cannot recover damages the government did not cause.… But while causation in a partial statutory taking focuses on whether the use of the part taken damaged the remainder, causation in an inverse condemnation focuses on the extent of the government's restriction on the property."

The "damages the jury awarded are proper for [landowner's] inverse condemnation claim. The damages the jury found for the easement … and the remainder of [landowner's] property … are recoverable under the inverse condemnation claim."

Landowner proposed a single jury question. "[B]road form condemnation charges should ask the difference in value of the property before and after the taking." But the court submitted jury separate questions for the easement and the damage of the property. "It was not harmful error under our Rules and precedent to charge the jury here separately as to the damages for the easement under the statutory takings claim and the remainder of the property under the inverse condemnation claim because the ultimate result was the same."

30. *Riemer v. The State of Texas*, 392 S.W.3d 635 (Tex. 2013)(2/22/13)

Some landowners along a river sought to certify a class in order to assert a takings case against the state regarding the location of the river's banks and therefore the mineral rights under the river bed. "Because the State owns the riverbeds and the minerals underneath the riverbeds in Texas, the boundary of the riverbed is critical in determining the rights of the State, riparian mineral interest owners, and riparian surface owners."

31. *Southern Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676 (Tex. 2013)(2/15/13)

Suit over denial by city of permit for concrete plant. "The TCAA provides that '[a]n ordinance enacted by a municipality . . . may not make unlawful a condition or act approved or authorized under [the TCAA] or the [C]ommission's rules or orders.' Because the [city's] Ordinance makes it unlawful to build a concrete-crushing facility at a location that was specifically authorized under the Commission's orders by virtue of the permit, we hold that the Ordinance is preempted."

The "TCAA and Commission rules prohibit the operation of a concrete-crushing facility within 1,320 feet of any school and other enumerated land uses, measured from the nearest points of the buildings in question."

32. *CTL/Thompson Texas, LLC v. Starwood Homeowner's Association*, 390 S.W.3d 299 (Tex. 2013)(1/25/13)

Homeowner's association sued engineering firm and attached a report to the petition. The firm filed an interlocutory appeal challenging the trial court's denial of its motion to dismiss, and while it was pending, the association took a nonsuit. The Supreme Court ruled that the "nonsuit did not moot CTL's appeal."

"Section 150.002 … requires that in actions for damages arising from the provision of professional services by a licensed or registered architect, engineer, or surveyor, the plaintiff must file an affidavit attesting to the claim's merit." Failing to file a proper affidavit may result in a dismissal with prejudice. An interlocutory appeal is permitted by § 150.002(f).

"Section 150.002(e) dismissal is a sanction … to deter meritless claims and bring them quickly to an end." Section 150.002(e) provides no guidance on whether a dismissal should be with prejudice.

33. State of Texas v. Ninety Thousand Two Hundred Thirty-Five Dollars and No Cents, 390 S.W.3d 289 (Tex. 2013)(1/25/13)

State filed forfeiture action against both the money found in a vehicle during a traffic stop and the vehicle itself. Defendant filed a traditional motion for summary judgment; the state offered no evidence in response. The Supreme Court ruled that the defendant's affidavit did not conclusively prove that the officers did not have a reasonable belief that the property had a substantial connection to illegal activity.

"'Contraband' is property of any nature used in the commission of various enumerated crimes.… Contraband is subject to seizure and forfeiture by the State. Civil rules of pleading apply in forfeiture proceedings. Forfeiture proceedings are tried in the same manner as other civil cases, and the State has the burden to prove by a preponderance of the evidence that the property in question is subject to forfeiture. The State also has the burden to show probable cause existed for seizure of the property. Probable cause, in the context of civil forfeiture, is 'a reasonable belief that 'a substantial connection exists between the property to be forfeited and the criminal activity defined by the statute.'"

In a summary judgment, "[o]nly if Bueno conclusively proved that none of the officers had such a belief would the burden shift to the State to respond and raise a material fact question about whether they did." Here, his affidavit did not.

34. *Brannan v. State of Texas*, 390 S.W.3d 301 (Tex. 2013)(1/25/13)

"Storms on Surfside Beach … have moved the vegetation line landward of petitioners' houses." The city refused to allow owners to rebuild houses, and the state asserted they now encroached upon a public easement. Owner sued under "taking" theory. The Supreme Court remanded to consider this case in light of *Severance v. Patterson*, which held "that 'avulsive events such as storms and hurricanes that drastically alter pre-existing littoral boundaries do not have the effect of allowing a public use easement to migrate onto previously unencumbered property'."

T. Business Organizations

1. *Waste Management of Texas, Inc. v. Texas Disposal Systems Landfill, Inc.*, S.W.3d (Tex. 2014)(5/9/14)

One waste management company sued another for libel after it spread lies about the former's environmental standards. Among other things, the Supreme Court ruled that a "for-profit corporation may recover for injury to its reputation," but that, here, the evidence was legally insufficient for "reputation damages," though it was sufficient for "remediation costs and thereby exemplary damages." The amount of punitive damages had to be recalculated, along with prejudgment and post-judgment interest.

"[C]orporations , like people, have reputations and may recover for" defamation. Footnote 17: A corporation may recover if "the matter tends to prejudice it in the conduct of its business or to deter others from dealing with it." Footnote 35: only a "corporation," and not a "business," may sue for defamation. The action for defamation is of the "'owner of the business and not of the business itself.'" Such damages are for an "individual, partnership or a corporation."

"To recover for business disparagement 'a plaintiff must establish that (1) the defendant published false and disparaging information about it, (2) with malice, (3) without privilege, (4) that resulted in *special damages* to the plaintiff.' … [O]ne difference [from defamation] is that one claim seeks to protect reputation interests and the other seeks to protect economic interests against pecuniary loss."

2. *Masterson et al. v. The Dioceses of Northwest Texas, et al.*, 422 S.W.3d 594 (Tex. 2013)(8/30/13)

Local church split from national organization over doctrinal differences. The issue "is what happens to the property when a majority of the membership of a local church votes to withdraw from the larger religious body of which it has been a part." The title to realty was held by a Texas non-profit corporation associated with the local church. The Supreme Court ruled that, of two constitutionally permissible approaches, "the neutral principles methodology should be applied.…"

"Courts do not have jurisdiction to decide questions of an ecclesiastical or inherently religious nature, so as to those questions they must defer to decisions of appropriate ecclesiastical decision makers.… [But,] [p]roperly exercising jurisdiction requires courts to apply neutral principles of law to non-ecclesiastical issues involving religious entities in the same manner as they apply those principles to other entities and issues. Thus, courts are to apply neutral principles of law to issues such as land titles, trusts, and corporate formation, governance, and dissolution, even when religious entities are involved."

"A religious organization may choose to organize as a domestic non-profit organization and acquire, own, hold, mortgage, and dispose of or invest its funds in property for the use and benefit of and in trust for a higher or other organization."

"[W]hether and how a corporation's directors or those entitled to control its affairs can change its articles of incorporation and bylaws are secular, not ecclesiastical, matters." An "external entity [is not] empowered to amend [the bylaws] absent specific, lawful provision in the corporate documents. 'The power to alter, amend, or repeal the by-laws or to adopt new by-laws shall be vested in the members . . . .')." "Good Shepherd was incorporated pursuant to secular Texas corporation law and Texas law dictates how the corporation can be operated, including how and when corporate articles and bylaws can be amended and the effect of the amendments."

3. *The Episcopal Diocese of Fort Worth v. The Episcopal Church*, S.W.3d (Tex. 2013)(8/30/13)

Local Episcopal church wanted to separate from the national organization. Neither side was entitled to summary judgment.

The "determination of who is or can be a member in good standing of TEC or a diocese is an ecclesiastical decision, the decisions by [church leaders] and the 2009 convention do not necessarily determine whether the earlier actions of the corporate trustees were invalid under Texas law. The corporation was incorporated pursuant to Texas corporation law and that law dictates how the corporation can be operated, including determining the terms of office of corporate directors, the circumstances under which articles and bylaws can be amended, and the effect of the amendments."

4. *Neely v. Wilson*, 418 S.W.3d 52 (Tex. 2013)(6/28/13) (*see* "corrected opinion" issued 1/31/14)

"[P]rofessional associations can[] maintain defamation claims." Likewise, "corporations may sue to recover damages resulting from defamation." "The Legislature has endowed professional associations with many of the same privileges that corporations enjoy. Indeed, the Business Organizations Code specifies that, '[e]xcept as provided by Title 7, a professional association has the same powers, privileges, duties, restrictions, and liabilities as a for-profit corporation.'"

U. Wills, Estates, Probate, and Trusts

1. *Masterson et al. v. The Dioceses of Northwest Texas, et al.*, 422 S.W.3d 594 (Tex. 2013)(8/30/13)

Local church split from national organization over doctrinal differences. The issue "is what happens to the property."

Title to the real property was in the locally-controlled corporation. There was no express trust in favor of the national organization, so the "corporation owns the property." The church law "simply does not contain language making the trust *expressly* irrevocable. 'A settlor may revoke the trust unless it is irrevocable by the express terms of the instrument creating it or of an instrument modifying it.' Even if the [church law] could be read to *imply* the trust was irrevocable, that is not good enough under Texas law. The Texas statute requires *express* terms making it irrevocable."

2. *The Episcopal Diocese of Fort Worth v. The Episcopal Church*, S.W.3d (Tex. 2013)(8/30/13)

Local Episcopal church wanted to separate from the national organization. Neither side was entitled to summary judgment. The national organization asserted the local church held properties in trust for it. "'Even if the [church law] could be read to imply the trust was irrevocable, that is not good enough under Texas law. [Texas Property Code § 112.051] requires *express* terms making it irrevocable.'"

3. *Rachal v. Reitz*, 403 S.W.3d 840 (Tex. 2013)(5/3/13)

Father created *inter vivos* trust for children that contained an arbitration clause. After he died, son sued lawyer who drafted trust and became successor trustee claiming he misappropriated assets and seeking an accounting. The Supreme Court ruled that the arbitration provision was "enforceable against the beneficiary for two reasons. First, the settlor determines the conditions attached to her gifts, and we enforce trust restrictions on the basis of the settlor's intent.… Second, the TAA requires enforcement of written agreements to arbitrate, and an agreement requires mutual assent, which we have previously concluded may be manifested through the doctrine of direct benefits estoppel. Thus, the beneficiary's acceptance of the benefits of the trust and suit to enforce its terms constituted the assent required to form an enforceable agreement to arbitrate under the TAA."

"Texas courts endeavor to enforce trusts according to the settlor's intent, which we divine from the four corners of unambiguous trusts.… We enforce the settlor's intent as expressed in an unambiguous trust over the objections of beneficiaries that disagree with a trust's terms."

"A beneficiary may disclaim an interest in a trust.… And a beneficiary is also free to challenge the validity of a trust: conduct that is incompatible with the idea that she has consented to the instrument." But, "a beneficiary who attempts to enforce rights that would not exist without the trust manifests her assent to the trust's arbitration clause."

The "doctrine of direct benefits estoppel will not provide the mutual assent necessary to compel arbitration in all circumstances. One who does not accept benefits under a trust and contests its validity could not be compelled to arbitrate the trust dispute.…"

"Here, the settlor unequivocally stated his requirement that all disputes be arbitrated.… Because this language is unambiguous, we must enforce the settlor's intent and compel arbitration if the arbitration provision is valid and the underlying dispute is within the provision's scope."

V. Conversion, Cargo, and Bailment

1. *McAllen Hospitals, LLP v. State Farm Mutual Insurance Company of Texas*, S.W.3d (Tex. 2014)(5/16/14)

Hospital sued insurer after injured victims of car wreck cashed settlement checks from insurer that were

made out to both them and hospital, without discharging proper hospital lien.

Hospital possibly could have sued the bank. But its failure to do so did not affect insurer's obligations. Footnote 5: "A drawee that makes payment 'for a person not entitled to enforce the instrument or receive payment' may be liable in conversion." Footnote 6: A "drawee may not charge its customer's account on an instrument that is not properly authorized."

Insurer's "delivery of the drafts to [claimant's] constitutes constructive delivery of the drafts to the other copayee, the Hospital." But, "when a draft is issued to nonalternative copayees, one copayee acting alone is not entitled to enforce, and thus may not discharge, the instrument." If it is payable to all, it can only be enforced by all. A "forged endorsement by nonalternative copayee [does] not discharge drawer's obligation to other copayee."

2. *Lexington Insurance Company v. Daybreak Express, Inc.*, 393 S.W.3d 242 (Tex. 2013)(1/25/13); original opinion issued 8/31/12

Insurer for one common carrier sued another common carrier for breach of a settlement agreement to pay for cargo damage, and after limitations expired, added a claim for the cargo damage itself, governed by federal law. The Supreme Court held the new claim related back to the first, so it was not barred by limitations, even though interstate cargo claims are preempted by the Carmack Amendment. (This is a reissued opinion from the one of 8/31/12, below, and remands the case.)

"An interstate carrier's responsibility for goods it transports is governed by the Carmack Amendment," which supersedes all state law.

"Preemption assures uniform, predictable standards of responsibility for common carriers in transactions involving interstate shipments."

W. Products Liability

1. *Kia Motors Corporation v. Ruiz*, S.W.3d (Tex. 2014)(3/28/14)

Products liability case based upon the failure of an air bag to deploy due to its circuitry. Reversing a judgment for the plaintiffs, the Supreme ruled that: 1) § 82.008 of the CP & RC did not create a presumption of nonliability here because, although FMVSS 208 is a federal safety standard, defendant did not show it governed the risk that caused the harm; 2) legally sufficient evidence supported the jury's finding of a negligent design; and 3) admission of a chart containing warranty claims, many of which were dissimilar, constituted harmful error.

Section 82.008 "establishes a rebuttable presumption that a manufacturer is not liable on a design-defect theory for a claimant's injuries if the product complies with certain applicable federal safety standards." "The impetus for enacting section 82.008 was a finding that manufacturers and sellers were being held liable in products liability cases even though the products at issue complied with all applicable federal safety standards.… [Thus,] manufacturer is entitled to a presumption of nonliability for its product's design if the manufacturer establishes that (1) the product complied with mandatory federal safety standards … , (2) the standards … were applicable … at the time of manufacture, and (3) the standards … governed the product risk that allegedly caused the harm." A plaintiff "may rebut this presumption by establishing that 'the mandatory federal safety standards or regulations applicable to the product were inadequate to protect the public from unreasonable risks of injury or damage.'"

The FMVSS, prescribed by federal law, preclude sale of a noncompliant vehicle. FMVSS 208 requires airbags. It "requires that the product's design comply with the pertinent standards, not that the particular unit at issue comply." If "particular FMVSS does not specify a design, whatever design the manufacturer does choose must nevertheless comply with that standard. Interpreting section 82.008 to apply only to federal design standards impermissibly adds language and alters the statute's plain meaning. Moreover, such an interpretation would deter manufacturers from creating new and better designs to improve safety." So, § 82.008 means the design must comply rather than "that the safety standard must mandate a particular design." The airbag of the vehicle in question complied.

Yet, here, the safety standard of FMVSS 208 did not govern the circuitry issue. The "plain language of section 82.008 requires that a safety regulation govern product risk, not a particular product defect." Here, the standard governed the force of airbag deployment, and therefore it "presumes air bag deployment." It does not address failure to deploy. So, "FMVSS 208 does not 'govern[] the product risk that allegedly caused the harm' in this case."

Defendant "did not object to this portion of the jury charge [that addressed a design defect and safer alternative design], and we therefore analyze the evidence in light of the charge as given."

"'Texas law does not generally recognize a product failure standing alone as proof of a product defect.'" But, one expert "testified alternative designs were safer as well as technologically and economically feasible at the time the [vehicle] was designed, as they were in production in other vehicles." Moreover, there did not exist "an analytical gap between the data and the opinion." And, "we have held that an expert should exclude 'other plausible causes' presented by the evidence." Accordingly, here, "we decline to reverse

the jury's findings based on a failure to rule out a manufacturing defect."

"To be successful on a defective-product claim, a plaintiff must identify 'a specific defect . . . by competent evidence.' … Here, plaintiffs identified certain [electrical] aspects of the design … as the 'specific defect' … [that caused the failure]. For the code-56 warranty claims reflected on the spreadsheet to be relevant and admissible, then, some indication must exist that the [electrical aspects] contributed to … [the] other incidents."

"[E]vidence of other incidents involving a product may be relevant in a products-liability case if the incidents 'occurred under reasonably similar (though not necessarily identical) conditions.' … [The] relevance of other incidents 'depends upon the purpose for offering them.'"

The trial court admitted a chart containing other code-56 warranty claims. A "trial court's evidentiary rulings are reviewed for an abuse of discretion." Even if "the code-56 warranty claims are not hearsay, they must still be relevant to be admissible."

Here, "some, but not all, of the code-56 claims described in the spreadsheet are sufficiently similar to be relevant," but most were not.

"The reasonable-similarity requirement does not disappear simply because other incidents are being offered to show notice rather than negligence."

The unrelated claims were inadmissible and defendant did not waive error. Moreover, the Court ruled that "the erroneously admitted spreadsheet probably caused the rendition of an improper judgment."

X. Medical Malpractice

1. *Rio Grande Valley Vein Clinic, P.A. v. Guerrero*, S.W.3d (Tex. 2014)(4/25/14)

Following *Bioderm* (see below), the Supreme Court ruled that laser hair removal is covered by Chapter 74 and an expert report is required.

A "claim for improper laser hair removal is a health care liability claim because expert health care testimony was necessary to prove or refute the claim.…" "[E]xpert health care testimony was needed because federal regulations restrict the laser to supervised use in a medical practice.…"

A "health care liability claim must satisfy three elements:

(1) a physician or health care provider must be a defendant;

(2) the claim or claims at issue must concern treatment, lack of treatment, or a departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care; and

(3) the defendant's act or omission complained of must proximately cause the injury to the claimant."

Here, plaintiff did not overcome the "'rebuttable presumption that a patient's claims against a physician … based on facts implicating the defendant's conduct during the patient's care' are health care liability claims."

Moreover, although plaintiff may have been treated by a nurse, "a physician-patient relationship can exist even in circumstances in which the physician deals indirectly with the patient." Moreover, the Act defines the professional association as a "physician."

2. *Crosstex Energy Services, L.P. v. Pro Plus, Inc.*, _ S.W.3d (Tex. 2014)(3/28/14)

Interlocutory appeal of an order denying a motion to dismiss and granting an extension to file a certificate of merit under Ch. 150. The Supreme Court compared it to Ch. 74.

Chapter 74 "requires the plaintiff … to serve expert reports identifying the basis for liability against each health care provider. Failure to serve the report mandates dismissal, … but if a deficient report is timely served, a trial court may grant a thirty-day extension. Section 51.014(a)(9) … expressly *authorizes* interlocutory appeals from dismissals pursuant to section 74.351(b), but also expressly *bars* interlocutory appeals from a grant of extension of time under section 74.351(c)."

In medical malpractice, "when the denial of a motion to dismiss and the grant of an extension are inseparable … , courts of appeals have no jurisdiction to review the motion to dismiss." But when they are not inseparable, such as when no expert report is filed, the court of appeals can review the order. The statutory mechanism for granting an extension for the report is irrelevant if an extension could not cure the defect.

"*Jernigan* clearly implies that the expert report requirement is not jurisdictional."

In a medical malpractice case, an "agreed order dealing with expert report deadlines does not impact the separate section 74.351 requirement *unless* it is specifically mentioned in the agreed order."

3. *Bioderm Skin Care, LLC v. Sok*, 426 S.W.3d 753 (Tex. 2014)(3/28/14)

Suit for personal injuries resulting from laser hair removal. The Supreme Court ruled that the rebuttable presumption that the claim was a health care liability claim applies. Since the plaintiff's claim required expert testimony, the presumption was not rebutted. Therefore, plaintiff was required to file an expert report. Since plaintiff did not, and defendant had requested its attorney's fees, the case was remanded for fees and costs.

There is as "a rebuttable presumption that claims against … health care providers based on facts implicating the defendant's conduct during the patient's care … are health care liability claims."

The "laser used by the defendants … may only be purchased by a licensed medical practitioner for supervised use in her medical practice. Testimony concerning whether its operation departed from accepted standards of health care must therefore come from a licensed physician."

"Interlocutory orders denying all or part of the relief sought in a motion to dismiss pursuant to the Medical Liability Act are appealable. We may consider an interlocutory appeal when the court of appeals' decision conflicts with a previous decision of another court of appeals or this Court on an issue of law material to the disposition of the case," as occurs here.

"Whether [plaintiff's] claim is a health care liability claim is a question of law we review de novo. When construing a statute, we give it the effect the Legislature intended. The best expression of the Legislature's intent is the plain meaning of the statute's text. More particularly, the broad language of the Medical Liability Act evinces legislative intent for the statute to have expansive application. In determining whether [plaintiff's] claim is a health care liability claim, we focus on the underlying nature of the cause of action and are not bound by the pleadings."

The "statutory definition [of a health care liability claim] contains three elements:
(1) a physician or health care provider must be a defendant;
(2) the claim … must concern treatment … or a departure from accepted standards of … , health care, or safety or professional or administrative services directly related to health care; and
(3) the defendant's act … complained of must proximately cause the [claimant's] injury…."

Here, one defendant was a physician, and the clinic was an "affiliate of a physician," which is "'person who, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with a specified person.…' [Further,] control [is] 'the possession of the power to direct the management and policies of the person' through ownership." Footnote 9: the "'fact that a physician does not deal directly with a patient does not necessarily preclude the existence of a physician-patient relationship.'"

In this case, the service involved health care as defined by § 74.001(a)(10). In addition, if "'expert medical or health care testimony is necessary to prove or refute the merits of the claim against a physician or health care provider, the claim is a health care liability claim.'" Only if not "should a court … consider the totality of the circumstances, as a claim may still be a health care liability claim despite that ' … expert testimony may not be necessary to support a verdict.'"

In *Texas West Oaks*, since the claim "concerned the appropriate standards of care owed to employees of a mental health hospital and whether those standards were breached, we held the plaintiff could not establish those elements without expert testimony in the health care field."

In addition, expert testimony is necessary when the claim "involves the use of a medical device." And, "expert testimony does not necessarily have to be proffered by a licensed physician to constitute expert health care testimony." But, "[a]llowing a technician who could not legally acquire or supervise use of the device to testify that a physician's use of the device violated accepted standards" is not permitted. Instead, the "expert must be licensed in the area of health care related to the claim, practice in the same field as the defendant, and have knowledge of accepted standards of care."

A later statute, which therefore does not govern, defines laser hair removal as health care.

4. *Long v. Castle Texas Production Limited Partnership*, 426 S.W.3d 73 (Tex. 2014)(3/28/14)

This opinion generally addresses the date from which postjudment interest runs.

"[S]tatutory limits such as the one on health care liability claims may prohibit recovery that includes prejudgment interest, but we have never held that postjudgment interest is subject to that limitation." Footnote 7: "[P]rejudgment interest is subject to the limitation on recovery found in the statutory predecessor to the Medical Liability Act."

5. *Zanchi v. Lane*, 408 S.W.3d 373 (Tex. 2013)(8/30/13)

In medical malpractice case, plaintiff served defendant with an expert report prior to when he was served with citation, partly because defendant was evading service. The Supreme Court held that a "health care provider against whom an HCLC is asserted is a 'party' who may be served with an expert report regardless of whether he has been served with process. We further hold that an expert report need not be 'served' in compliance with … Rule 106 that apply specifically to service of citation."

Chapter 74 required serving an expert report on a "party" within 120 days of filing suit. "Strict compliance with that provision is mandatory." Otherwise, the suit shall be dismissed. Footnote 2: "section 74.351(a) was recently amended to change the expert-report deadline to run from the date on which the defendant's answer is filed.… [U]nder the amended statute, a claimant asserting a health care liability claim will never be required to serve an expert report before the defendant is served with process, waives service, or otherwise appears in the lawsuit"

In "the context of the TMLA, the term 'party' means one named in a lawsuit and that service of the expert report on [defendant] before he was served with

process satisfied the TMLA's expert-report requirement."

"Beginning the period for serving an expert report on the date of filing [suit] suggests that a 'party' on which to serve the report exists on the date of filing." This interpretation is supported by the purpose of the statute. In "'section 74.351, the Legislature struck a careful balance between eradicating frivolous claims and preserving meritorious ones.'"

Defendant's "twenty-one-day period for objecting to the report did not begin to run until he was served with process."

Plaintiff was not required to serve the report in compliance with Rule 106. "Rule 106 by its terms applies solely to service of citation."

6. *Psychiatric Solutions, Inc. v. Palit*, 414 S.W.3d 724 (Tex. 2013)(8/23/13)

Psychiatric nurse at hospital was injured restraining a patient and sued his employer. He did not file an expert report. Following *Texas West Oaks Hospital*, the Supreme Court ruled that the case presented a health care liability claim, so a report was necessary.

In *Texas West Oaks*, "we held that a mental health professional employee's claims against his employer, a mental health hospital, alleging inadequate security and training were health care liability claims.…" Here, "the employee's claim that the employer provided improper security of a psychiatric patient and inadequate safety for the employee" was a health care liability claim.

A "claimant is 'a person . . . seeking or who has sought recovery of damages in a health care liability claim.'" The "change from 'patient' to 'claimant' in … 2003 … includes an employee of a health care provider.…"

"When a claimant asserts an HCLC, the claimant must comply with the TMLA's requirements, one of which is to serve an expert report within 120 days of filing suit." An expert report is "required by section 74.351 of the TMLA."

A health care liability claim "has three basic elements:

(1) a … health care provider must be a defendant;

(2) the claim … must concern treatment, lack of treatment, or a departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care; and

(3) the defendant's act or omission complained of must proximately cause the injury…."

"Importantly, '… health care claims must involve a patient-physician relationship,' and claims involving employee supervision of a patient at a mental health care facility can still qualify as a health care claim because the patient's presence at the facility is due to their patient-physician relationship."

"Texas mental health statutes and regulations require that inpatient mental health facilities ''provide adequate medical and psychiatric care and treatment to every patient in accordance with the *highest standards accepted in medical practice*.…''"

The term "safety" is "not defined in the TMLA.… Because 'safety' is not defined, it is construed 'according to its common meaning as being secure from danger, harm or loss.'"

If "'expert medical or health care testimony is necessary to prove or refute the merits of a claim against a physician or health care provider, the claim is a health care liability claim.'"

Here, the hospital "requested its attorney's fees and costs in the trial court pursuant to section 74.351(b)(1) of the TMLA." Accordingly, the case was remanded to dismiss the plaintiff's claim and consider the attorney's fees request.

7. *PM Management-Trinity NC, LLC d/b/a Trinity Care Center v. Kumets*, 404 S.W.3d 550 (Tex. 2013)(6/28/13)

Plaintiff's family sued nursing home for retaliation when it discharged her after her family made complaints. The Supreme Court ruled that, since "this retaliation claim was based on the same factual allegations on which one of the plaintiffs' HCLCs was based," it was governed by Chapter 74. And since plaintiffs did not file an adequate expert report, the case should be dismissed.

The plaintiffs "asserted the retaliation claim under the Texas Health & Safety Code, which creates a statutory cause of action against a nursing facility that retaliates or discriminates against a resident or family member who makes a complaint or files a grievance concerning the facility. *See* TEX. HEALTH & SAFETY CODE § 260A.015(a)."

"[C]laims that are based on the same facts as HCLCs are themselves HCLCs and must be dismissed absent a sufficient expert report." Here, plaintiffs did not challenge that "other claims were HCLCs.…" The retaliation claim here "is based on the same factual allegations." "We do not decide in this case that a claim for retaliation or discrimination under the Health & Safety Code is always an HCLC.…"

The "TMLA does not allow parties to circumvent its procedural requirements by claim-splitting or by any form of artful pleading."

8. *CHCA Woman's Hospital, L.P. d/b/a The Woman's Hospital of Texas v. Lidji*, 403 S.W.3d 228 (Tex. 2013)(6/21/13)

In a birth injury case, parents filed medical malpractice suit, but dismissed before 120 days without having filed an expert report. Immediately upon refiling, they served their expert report on the defendant. The Supreme Court held "that, when a

claimant nonsuits a claim governed by the TMLA before the expiration of the statutory deadline to serve an expert report and subsequently refiles the claim against the same defendant, the expert-report period is tolled between the date nonsuit was taken and the date the new lawsuit is filed."

Before the latest amendments, a "claimant [was] generally required to serve an expert report on each physician or health care provider against whom such a claim is asserted no later than 120 days after the original petition is filed. Failure to do so results in dismissal of the claim with prejudice and an award of attorney's fees.…"

Footnote 1: here the suit was timely refiled: "subject to a ten-year statute of repose, minors under the age of 12 shall have until their 14th birthday to file, or have filed on their behalf, a health care liability claim."

In medical malpractice cases, "an interlocutory appeal [is allowed] from an order denying" a motion to dismiss for failure to file a timely report. "However, the court of appeals' judgment in an interlocutory appeal is generally final, and we lack jurisdiction over such cases unless a specific exception applies." One exception is when courts of appeals hold differently from one another on a question of law. Here, there is a conflict among the courts of appeals. "Accordingly, we have jurisdiction over CHCA's petition for review under sections 22.001(a)(2) and 22.225(c) of the Texas Government Code."

The statute neither expressly authorizes nor prohibits tolling the expert report requirement upon a nonsuit. So, this case turns on statutory construction.
The purposes of the statute include reducing excessive health care claims while not "unduly" restricting a claimant's rights. The "Legislature's directive that the civil justice system repel weak claims stands alongside its insistence that malpractice be penalized." The "'threshold [expert] report requirement [is] a substantive hurdle for frivolous medical liability suits before litigation gets underway.'"

A "defendant's failure to timely answer after proper service of citation tolled the statutory period to serve the expert report until the defendant made an appearance."

"[P]arties have 'an absolute right to nonsuit their own claims for relief at any time during the litigation until they have introduced all evidence other than rebuttal evidence at trial.' However, a voluntary nonsuit does not interrupt the running of the statute of limitations.… [C]onstruing the expert-report requirement to prohibit tolling in the event of a nonsuit would interfere with [plaintiffs'] absolute right to nonsuit the claims in the First Suit and … such legislative intent is not reflected in the statute's plain language." "Tolling the expert-report period both protects a claimant's absolute right to nonsuit and is consistent with the statute's overall structure," which contemplates a suit being on file. A rule requiring service upon a defendant in the absence of a pending suit raised a "host of procedural complications." Footnote 7: "Although the TMLA controls '[i]n the event of a conflict between [the TMLA] and another law,' … we conclude the TMLA is properly construed as consistent with the procedural right to nonsuit."

This ruling "encourages plaintiffs to voluntarily nonsuit claims that appear to lack merit early in the litigation process, without being penalized for doing so in the event additional investigation strengthens those claims."

9. *Phillips v. Bramlett*, 407 S.W.3d 229 (Tex. 2013)(6/7/13)

Medical malpractice case had been remanded by the Supreme Court to the trial court. Postjudment interest should have run from the time of the original judgment.

"Previously, we have held that prejudgment interest is included among the damages that are capped by former article 4590i. We have never held that postjudgment interest is subject to the damages cap."

10. *TTHR Limited Partnership d/b/a Presbyterian Hospital of Denton v. Moreno*, 401 S.W.3d 41 (Tex. 2013)(4/5/13)

Medical malpractice case stemming from injury caused during birth of a twin. Following *Certified EMS*, the Supreme Court ruled that the combination of expert reports was sufficient to address the vicarious liability of the hospital based upon the negligence of two doctors. "[B]ecause the trial court did not abuse its discretion in finding Moreno's reports adequate as to her theory that Presbyterian is vicariously liable for the doctors' actions, her suit against Presbyterian—including her claims that the hospital has direct liability and vicarious liability for actions of the nurses—may proceed."

Medical malpractice claimants "must serve each defendant with an expert report … or face dismissal of their claims." *Certified EMS* held "that an expert report satisfying the requirements of the TMLA as to a defendant, even if it addresses only one theory of liability alleged against that defendant, is sufficient for the entire suit to proceed against the defendant." The "TMLA requires a claimant to timely file an adequate expert report as to each defendant in a health care liability claim, but it does not require an expert report as to each liability theory alleged against that defendant."

Section 74.351(a) requires "service of an expert report not later than the 120th day after a health care liability claim is filed." Section 74.351(I) authorizes "fulfilling the expert report requirements by serving multiple reports." Section 74.351(c) provides "that if

'elements of the report are found deficient, the court may grant one thirty-day extension to the claimant in order to cure the deficiency.'"

The review of a trial court determination that an expert report in a medical malpractice case is adequate is "under the abuse of discretion standard. So is ours.…"

"A valid expert report under the TMLA must provide: (1) a fair summary of the applicable standards of care; (2) the manner in which the physician or health care provider failed to meet those standards; and (3) the causal relationship between that failure and the harm alleged. … [Here, the expert's] report set out applicable standards of care for doctors treating a patient with conditions similar to those with which [the mother] presented."

11. *The University of Texas Southwestern Medical Center at Dallas v. Gentilello*, 398 S.W.3d 680 (Tex. 2013)(2/22/13)

Whistleblower case. "As a legal matter, only the United States Secretary of Health and Human Services (HHS Secretary) can 'regulate under' or 'enforce' Medicare/Medicaid rules."

12. *Certified EMS, Inc. v. Potts*, 392 S.W.3d 625 (Tex. 2013)(2/15/13)

In medical malpractice case, patient alleged she was sexually assaulted, pleadings direct and vicarious theories. The defendant objected to her expert reports because they did not address both. The Supreme Court ruled that "an expert report that adequately addresses at least one pleaded liability theory satisfies the statutory requirements, and the trial court must not dismiss in such a case." In addition, "when a health care liability claim involves a vicarious liability theory, either alone or in combination with other theories, an expert report that meets the statutory standards as to the employee is sufficient to implicate the employer's conduct under the vicarious theory."

The "Texas Medical Liability Act … required [patient] to serve each defendant with an expert report.…" Section 51.014(a)(9) allows an "interlocutory appeal of an order denying relief sought by motion [to dismiss] under section 74.351(b) in certain circumstances."

The Court is not persuaded that "if a plaintiff's allegations include both direct and vicarious liability claims, the report is deficient if it does not cover both."

"A valid expert report has three elements: it must fairly summarize the applicable standard of care; it must explain how a physician or health care provider failed to meet that standard; and it must establish the causal relationship between the failure and the harm alleged. A report that satisfies these requirements, even if as to one theory only, entitles the claimant to proceed with a suit against the physician or health care provider." This comports "with the Legislature's intent." The "Legislature sought to reduce 'the excessive frequency and severity of . . . claims,' but to 'do so in a manner that will not unduly restrict a claimant's rights any more than necessary to deal with the crisis.'" The purpose is "'to deter frivolous claims, not to dispose of claims regardless of their merits.'"

"The report serves two functions," namely to inform the defendant of the conduct called into question, and to allow the trial court to determine "that the claims have merit."

"It may be difficult or impossible for a claimant to know every viable liability theory within 120 days of filing suit.… It strictly limits discovery until expert reports have been provided, and we have held that the statute's plain language prohibits presuit depositions authorized under Rule 202.… Discovery can reveal facts supporting additional liability theories, and the Act does not prohibit a claimant from amending her petition accordingly."

Scoresby applies a "'lenient standard' to a plaintiff's right to cure a deficient report.…"

"The … petitions inform a defendant of the claims against it and limit what a plaintiff may argue at trial."

13. *Rodriguez-Escobar v. Goss*, 392 S.W.3d 109 (Tex. 2012)(2/1/13)

Doctor discharged psychiatric patient who, three days later, killed herself. The jury found against the doctor, but the Supreme Court reversed and rendered, "Because there is no evidence that [patient's] involuntary hospitalization by [the doctor] probably would have prevented her death, the evidence is legally insufficient to support the finding that his negligence proximately caused her death."

A "peace officer may initiate emergency detention proceedings without first obtaining a warrant." Also, "a patient, voluntarily admitted, must be discharged within four hours of a written request unless a physician has reasonable cause to believe the patient requires emergency detention." And, "an adult may obtain a Detention Warrant by filing a proper application."

A malpractice suit requires proof of proximate causation. "Proximate cause has two components: (1) foreseeability and (2) cause-in-fact. For a negligent act or omission to have been a cause-in-fact of the harm, the act or omission must have been a substantial factor in bringing about the harm, and absent the act or omission—*i.e.*, but for the act or omission—the harm would not have occurred. A physician's failure to hospitalize a person who later commits suicide is a proximate cause of the suicide only if the suicide probably would not have occurred if the decedent had been hospitalized. In addition, an actor's negligence 'may be too attenuated from the resulting injuries to

the plaintiff to be a substantial factor in bringing about the harm.'"

"[E]vidence that [patient's] depression was to some degree treatable or that [plaintiff's] expert thought [she] would not have been able to shoot herself while hospitalized is not evidence that hospitalization would have made her suicide unlikely after she was released."

Y. Employers' Liability, Labor Law, Whistleblower Act, Job-Related Injuries, Workers' Comp., and Jones Act

1. *Sawyer, et al. v. E.I. du Pont de Nemours and Company*, ___ S.W.3d ___ (Tex. 2014)(4/25/14)

Certified question from Fifth Circuit. Some employees of defendant covered by a collective bargaining agreement, and others who were not, agreed to transfer to defendant's unit that was spun off to a subsidiary, which was then, contrary to defendant's assurances, sold. After they were laid off, the employees sued for fraud. The Supreme Court ruled that, "while an employee can sue an employer for fraud in some situations," here "at-will employees and employees subject to a collective bargaining agreement can[not] sue their corporate employer for fraudulently inducing them to move to a wholly owned subsidiary."

"'[A]bsent a specific agreement … , employment may be terminated by the employer or the employee at will, for good cause, bad cause, or no cause at all.' The Legislature has created a few narrow exceptions, prohibiting, for example, discharge based on certain forms of discrimination or in retaliation for engaging in certain protected conduct. But Texas courts have created only one: prohibiting an employee from being discharged for refusing to perform an illegal act." Footnote 9: Legislative prohibitions on discharge include "serving in the state military forces, … opposing a discriminatory practice; filing a charge or complaint; or participating in an investigation, proceeding, or hearing[;] … being a member or nonmember of a union[], … filing a workers' compensation claim[]; … performing jury service[]; and … being subject to an order or writ of withholding from wages for child support."

The Court has "refused to recognize common-law whistleblower liability," has "refused to impose on employers a duty to exercise ordinary care in investigating employee misconduct … [and has] refused to impose a duty of good faith and fair dealing on employers" because these would alter "at-will employment."

Courts of appeals have recognized that "a fraud claim cannot be based on illusory promises of continued at-will employment."

An employee can sue under fraud for "[r]ecovery of expenses incurred in reliance on a fraudulent promise of prospective employment … because neither the injury nor the recovery depends on continued employment."

"'At-will employment does not preclude employers and employees from forming subsequent contracts, 'so long as neither party relies on continued employment as consideration for the contract.'' An employer and employee may agree, for example, to arbitrate their disputes, or for reasonable restrictions on post-discharge competition, as long as other consideration is given. But if the employer or employee can avoid performance of a promise by exercising a right to terminate the at-will relationship, … the promise is illusory and cannot support an enforceable agreement."

"To recover for fraud, one must prove justifiable reliance on a material misrepresentation. A representation dependent on continued at-will employment cannot be material because employment can terminate at any time. Nor can one justifiably rely on the continuation of employment that can be terminated at will.… No one can claim recovery of damages for the loss of an employment relationship he had no right to continue." An "at-will employee cannot bring an action for fraud that is dependent on continued employment."

"An employer and employee may modify their at-will relationship by agreement, but … the parties [must] be definite in expressing their intent.… '[The] employer must unequivocally indicate a definite intent to be bound not to terminate the employee except under clearly specified circumstances."

Here, the employees covered by the collective bargaining agreement could only be discharged for "just cause." This "modified the Employees' at-will employment relationship." And the agreement provided a remedy for violating that term. But, here, if their "termination was fraudulently induced, it was tantamount to discharge" without "just cause." But, to "allow a fraud action when the Employees had a contractual remedy would not only be unnecessary, it would defeat the parties' bargain."

2. *Colorado, et al. v. Tyco Valves & Controls, L.P.*, S.W.3d (Tex. 2014)(3/28/14)

Defendant offered employees cash and a severance if they remained with a business unit that was being sold and were not offered positions with the purchaser. Some plaintiffs had signed a written agreement; others alleged an oral agreement. The Supreme Court ruled "that ERISA preempts the employees' breach-of-contract claims…"

"ERISA preemption is an affirmative defense on which [defendant] bore the burden of proof at trial.… ERISA preemption is an affirmative defense 'where ERISA's preemptive effect would result only in a change of the applicable law' and would not subject the claim to exclusive federal jurisdiction.… [S]tate

and federal courts [have] concurrent jurisdiction over actions by a beneficiary to recover benefits due under the terms of a covered plan or to enforce rights under the plan."

"ERISA is a comprehensive scheme enacted to promote employees' interests in their benefit plans. The statute establishes various pension-plan requirements and mandates uniform standards for both pension and welfare-benefit plans. ERISA does not itself mandate any particular set of benefits, but rather sets standards governing reporting, disclosure, and fiduciary responsibility for ERISA-governed plans."

"Section 514(a) of ERISA preempts 'any and all State laws insofar as they may now or hereafter relate to any employee benefit plan' covered by ERISA. ERISA's expansive preemption provisions are intended to ensure exclusive federal regulation of employee benefit plans. Accordingly, ERISA's preemption provision has been broadly construed. State laws that are subject to preemption include not just statutes, but also common-law causes of action like [employees'] breach-of-contract claims."

The "United States Supreme Court construed the phrase 'relates to' as carrying its ordinary meaning of having 'a connection with or reference to' an employee benefit plan. The Supreme Court noted, however, that if the state action affects a benefit plan 'in too tenuous, remote, or peripheral a manner,' the impermissible connection to ERISA does not exist." For instance, a one-time payment did not invoke ERISA's concern of an "ongoing administrative program."

"'ERISA … preempts state common law causes of action that reference or pertain to an ERISA plan.…' Further, if alleged promises made to employees 'were simply an attempt to amend [an] existing plan, then it follows that they were based on that plan.'" Here, defendant's employee testified a schedule was "intended to replace the ERISA Plan's schedule."

Promises to those who had not signed the agreement "were simply promises to pay severance pursuant to an improperly amended ERISA Plan."

Moreover, the severance provision may only be analyzed with reference to the so-called standard severance.

Further, the severance provision may only be analyzed with reference to the so-called standard severance. The "employees' entitlement to benefits under the [retention agreements], and the damages claimed, could not be fully evaluated without considering the ERISA-governed plan that was expressly referenced in the [retention agreements]. Further, the benefits originated from the same source."

3. *Crosstex Energy Services, L.P. v. Pro Plus, Inc.*, S.W.3d (Tex. 2014)(3/28/14)

Footnote 3: In Whistleblower cases, "the facts necessary to allege a violation under section 554.002 [are] *jurisdictional* because they [are] indispensable to the jurisdictional question of the waiver of sovereign immunity in section 554.0035."

4. *Ysleta Independent School District v. Franco*, 417 S.W.3d 443 (Tex. 2013)(12/13/13)

In this Whistleblower case, a principal at a preschool reported to his supervisor, and possibly other school officials, his concern about asbestos and that the district was violating federal law. Though he requested a transfer, he was later indefinitely suspended by the district. The Supreme Court ruled that governmental immunity was not waived because principal did not report the violation of the law to the correct officials.

The whistleblower must prove he had a good faith believe he reported the situation to an appropriate law-enforcement authority. A "report of alleged violations of law is jurisdictionally insufficient if made to someone charged only with internal compliance." That person would not have "'law-enforcement authority' status." "[R]eporting to school officials not charged with enforcing laws outside the district falls short of what the Act requires." So, here, the principal "has failed to show an objective, good-faith belief that the ISD qualifies as an 'appropriate law-enforcement authority' under the Act."

5. *City of Houston v. Rhule*, 417 S.W.3d 440 (Tex. 2013)(11/22/13)

In a settlement agreement of a worker's compensation claim fireman brought against self-insured city, city agreed to pay future medical bills. When city quit paying many years later, fireman sued city, without presenting his claim first to the Division of Workers' Compensation. The Supreme Court ruled that he failed to exhaust his administrative remedies and dismissed the suit.

"Exclusive jurisdiction is a question of statutory interpretation, and thus we must consider the operative statute and whether it grants the Division the sole authority for initial resolution of disputes arising out of a settlement agreement. The statute in effect at the time of injury controls." Here, the statute in effect "compels a party to a settlement agreement to first bring disputes to the Division." Since the fireman did not present this claim to the Division, "[t]his divests the trial court of jurisdiction."

6. *Canutillo Independent School District v. Farran*, 409 S.W.3d 653 (Tex. 2013)(8/30/13)

While plaintiff was employed by the school district, he reported several improprieties to district officials and the school board. Some were displeased,

he came under negative scrutiny, and the district began the process of terminating him. During that time, he reported one item to the FBI. After he was fired, he filed this Whistleblower suit. The Supreme Court ruled, however, that he had failed to report the matters to the appropriate authorities, and that he had failed to exhaust his administrative remedies on his breach of contract claim.

Plaintiff failed to prove an objective, good-faith belief he reported the improprieties to officials who "had authority 'to enforce, investigate, or prosecute violations of law against third parties outside of the entity itself' or had 'authority to promulgate regulations governing the conduct of such third parties.'" His "complaints to the school board, superintendents, and internal auditor were not good-faith complaints of a violation of law to a 'law enforcement authority' under the Whistleblower Act.… [T]hese officials [did not have] authority to enforce the allegedly violated laws outside of the institution itself, against third parties generally." They only "were responsible for internal compliance.…"

Further, with respect to the report to the FBI, plaintiff did not establish causation. "To establish a Whistleblower Act claim, the plaintiff must show that his report to a law enforcement authority caused him to suffer the complained-of adverse personnel action. 'To show causation, a public employee must demonstrate that *after* he or she reported a violation of the law in good faith to an appropriate law enforcement authority, the employee suffered discriminatory conduct by his or her employer that would not have occurred when it did if the employee had not reported the illegal conduct.'… To prevail on a theory that the FBI report caused his termination, [plaintiff] would have to show that, but for that report, the school district would have changed its mind and retained him."

"[W]hen parties submit evidence at [the] plea to the jurisdiction stage, review of the evidence generally mirrors the summary judgment standard.… 'An appellate court reviewing a summary judgment must consider whether reasonable and fair-minded jurors could differ in their conclusions in light of all the evidence presented.'"

Plaintiff's contract stated he could only be fired for cause. "School district employees … generally must exhaust administrative remedies by bringing an appeal to the Commissioner." The Whistleblower Act's procedures "do not require exhaustion [of remedies] with the Commissioner.…" Here, regarding plaintiff's "breach of contract cause of action, he failed to exhaust administrative remedies."

7. *Liberty Mutual Insurance Company v. Adcock*, 412 S.W.3d 492 (Tex. 2013)(8/30/13)

Firefighter received an award of lifetime benefits under worker's compensation. The issue was whether the claim could be reopened years later. The Supreme Court said it could not.

"Under the guise of agency deference, an agency asks us to judicially engraft into the Texas Workers' Compensation Act a statutory procedure to re-open determinations of eligibility for permanent lifetime income benefits—a procedure the Legislature deliberately removed in 1989. The Legislature's choice is clear, and it is not our province to override that determination." "In light of the Act's comprehensive nature, we decline to judicially engraft into it a procedure the Legislature deliberately removed."

The "plain language of the statute indicates the LIB [life income benefits] determination is permanent and offers no procedure to reopen it."

LIBs "'are paid until the death of the employee for' loss of one foot at or above the ankle and one hand at or above the wrist." This manifests legislative intent that they not be reopened. By contrast, "[t]emporary benefits are only paid as long as certain conditions … continue to exist.…" "With respect to temporary benefits, the Act lays out specific procedures to re-open benefits determinations."

"'Disability' means the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage.'"

"While temporary benefits require continuous monitoring to determine whether the employee has achieved the statutory level of improvement, permanent benefits require no such monitoring." For death benefits, "[o]nce eligible, benefits continue until the occurrence of some specific event, whether it be death, remarriage, or attaining a certain age." "LIBs, like DIBs may be paid through an annuity."

"'[L]egislative intent [of workers' compensation] emanates from the Act as a whole.'"

Here, "the Act mandates that the carrier make payments until the employee's death because the Division determined Adcock is eligible for permanent LIBs."

8. *Psychiatric Solutions, Inc. v. Palit*, 414 S.W.3d 724 (Tex. 2013)(8/23/13)

Psychiatric nurse at hospital was injured restraining a patient and sued his employer. He did not file an expert report. Following *Texas West Oaks Hospital*, the Supreme Court ruled that the case presented a health care liability claim, so a report was necessary.

9. *Dallas County v. Logan*, 407 S.W.3d 745 (Tex. 2013)(8/23/13)

County filed interlocutory appeal after trial court denied its plea to the jurisdiction in a Whistleblower case. The Supreme Court ruled that the appellate court should consider arguments for immunity even if they were not previously raised in the trial court.

"Section 51.014(a)(8) of the Texas Civil Practice and Remedies Code permits an interlocutory appeal of an order denying a plea to the jurisdiction by a governmental unit."

10. *City of Houston v. Bates*, 406 S.W.3d 539 (Tex. 2013)(6/28/13)

In a pay dispute between retired firemen and the city, the issues related to calculating "termination pay." The Supreme Court, construing the terms "leave" and "salary," ruled the city "was not required to count each debit day's final 8-hour shift when computing the hours [firemen] were required to work during a 72-day work cycle for purposes of overtime compensation because they were on *unpaid* leave," but it "affirm[ed] the portion of the trial court's judgment awarding the retired fire fighters damages for additional termination pay for accrued but unused sick and vacation leave."

The term "leave" was not defined in the statute. After noting the dictionary definition, the Court wrote, "Whereas we are typically inclined to apply a term's common meaning, a contrary intention is apparent from the statute's context." That context included a list of six items preceding the phrase that "would have been for naught." Therefore, the Court ruled "leave" meant "paid leave."

"We construe the Legislature's change from 'salary' … to 'base salary,' … as indicative of the Legislature's clarification of the prior law and not as a substantive change."

"[U]nder our construction of 'salary' as used in [the statute], the statutory scheme preempts the City from excluding those components [of pay] when calculating termination pay."

11. *University of Houston v. Barth*, 403 S.W.3d 851 (Tex. 2013)(6/14/13)

Professor reported violations of school policies and state law to the chief financial officer, general counsel, and later to the internal auditor and associate provost. He received a poor rating, affecting his pay, was denied travel funds, and his symposium was cancelled. He filed a Whistleblower suit. The Supreme Court ruled sovereign immunity was not waived. "Because there is no evidence that the … Regents enacted the … rules pursuant to authority granted to it in the Texas Education Code, we hold that the rules do not fall within the definition of 'law' under the Whistleblower Act. Moreover, there is no evidence that Barth had an objectively reasonable belief that his reports of the alleged violations of state civil and criminal law were made to an 'appropriate law enforcement authority.'"

"The issue is one of subject-matter jurisdiction, which we review de novo."

"A violation [under the Whistleblower Act] 'occurs when a governmental entity retaliates against a public employee for making a good-faith report of a violation of law to an appropriate law enforcement authority.'" Under the act, "law" is "a state or federal statute, an ordinance of a local governmental entity, or 'a rule adopted under a statute or ordinance.'" "A rule is only a 'law' under the Whistleblower Act, however, if the rule is 'adopted under a statute.'" Here, the evidence did not show the policies were properly adopted.

"The good-faith inquiry under the Whistleblower Act has both subjective and objective components, which require that Barth 'must have believed he was reporting conduct that constituted a violation of law and his belief must have been reasonable based on his training and experience.'" He satisfied the subjective prong, but not the objective one.

"[N]one of Barth's reports were made to an appropriate law enforcement authority under the Act." "An appropriate law enforcement authority is a part of a state entity that the employee in good faith believes is authorized (1) to regulate under or to enforce the allegedly violated law, or (2) to investigate or prosecute a violation of criminal law.… '[P]urely internal reports untethered to the Act's undeniable focus on law enforcement—those who either make the law or pursue those who break the law—fall short.'" The agency to whom the report is made "'must have authority to enforce, investigate, or prosecute violations of law against third parties outside of the entity itself, or it must have authority to promulgate regulations governing the conduct of such third parties.'" Barth had to have an "objective good-faith belief that he was reporting violations of law" to an appropriate agency. An internal complaint to one investigating internal compliance "is jurisdictionally insufficient.…"

12. *City of Bellaire v. Johnson*, 400 S.W.3d 922 (Tex. 2013)(6/7/13)

Worker who was employed through a staffing agency and assigned to a city was barred by the exclusive remedy of the workers' compensation law from suing the city after he was injured. Following *Port Elevator*, the Supreme Court ruled, "An employee cannot argue that his subscriber-employer has done what the law prohibits; rather, the employee is covered as a matter of law, and any dispute by the carrier over whether it agreed to provide such coverage under the policy's terms is with the employer." "As a matter of law, the City provided Johnson workers' compensation coverage, and therefore his exclusive remedy was the compensation benefits to which he was entitled."

The "'[r]ecovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance.'" An employee cannot argue "he was not covered under … his employer's workers' compensation insurance

policy." The law prevents "'an employer from splitting its workforce by choosing coverage for some employees but not coverage for all.'" Footnote 2: there are three exceptions to the prohibition of split workforces: "if the employer makes different elections for separate and distinct businesses; if the employer excludes a sole proprietor, partner, or corporate executive officer, as permitted by statute … ; and if the employer leases employees under the Staff Leasing Services Act…. Other exceptions could apply to governmental entities under their respective workers' compensation statutes."

The "City was required by Section 504.011 to provide workers' compensation coverage to its employees, defined by Section 504.001(2)(A) to include 'a person in [its] service . . . who has been employed as provided by law.'"

The "City controlled the details of Johnson's work and thus, that Johnson was its employee.… 'The test to determine whether a worker is an employee rather than an independent contractor is whether the employer has the right to control the progress, details, and methods of operations of the work.'"

"The City's immunity from Johnson's suit would be waived by the Texas Tort Claims Act … (waiving immunity from suit for injury from the operation of a motor-driven vehicle), but for the exclusive-remedy bar provided by the Texas Workers' Compensation Act.…"

Worker claimed he was not a paid employee of the city. "Section 504 [provides] … 'A person is not an employee and is not entitled to compensation . . . if the person . . . is paid . . . on a basis other than by the hour, day, week, month, or year . . . .'" But, here, the worker "was paid by the City *through* Magnum [the staffing agency].…"

13. <u>*City of Round Rock, Texas v. Rodriguez*, 399 S.W.3d 130 (Tex. 2013)(4/5/13)</u>

Municipal fire fighter wanted union representation when employer was investigating his use of sick leave. Private and federal employees are entitled to such representation, but Texas public sector employees are not. "[S]ection 101.001 of the Labor Code does not confer on public-sector employees in Texas the right to union representation at an investigatory interview that the employee reasonably believes might result in disciplinary action."

"As the Texas Legislature had done with the 1899 right-to-organize statute, the United States Congress enacted legislation in 1914 to exempt labor unions from antitrust laws."

"The right to union representation in an investigatory interview derives from the United States Supreme Court's decision in *NLRB v. Weingarten*.…" The Court ruled that "NLRB permissibly construed Section 7 to confer the representation right, noting that the NLRB's construction may not be required by the statute's text." But, since the NLRB is charged with adapting the NLRA, its construction of the act is subject to only "'limited judicial review.'"

Section 101.001 is entitled "Right to Organize." But "'title of [a statute] carries no weight, as a heading does not limit or expand the meaning of a statute.' While the statute is broad, we do not read it as conferring, by its plain language, the specific right to have a union representative present at an investigatory interview.…" Facially, it only confers the right to organize trade unions, not what they can do. "[S]ection 101.002 then … allow[s] employees to influence other employees to enter, refuse, or quit employment."

"[S]ection 101.052 of the Labor Code protects the 'right to work.'" This "'protect[s] *employees in the exercise of the right* of free choice of joining or not joining a union.'"

"[L]abor policy and regulation is determined exclusively by the Texas Legislature.…" "The Legislature grants and denies rights to unionized public-sector employees by specific enactment." Chapter 617, dealing with public employees, "disarm[s] public-sector unions of rights usually enjoyed in the private sector, such as striking and collective bargaining," though they can present grievances. But it "does not confer the right to union representation during investigatory interviews." Here, the word "'protect' serves as a limitation on the type of union or organization" public employees can form. The Legislature must determine if public employees are entitled to union representation during investigations.

"Although we look to federal statutes and case law when a Texas statute and federal statute are 'animated in their common history, language, and purpose,' key differences between the NLRA and the state statutes here compel a different result.…" In 38 years since the U.S. Supreme Court decided *Weingarten*, "the Texas Legislature has declined to enact similar legislation."

"Section 7 confers four rights that union members can invoke for their protection: (1) 'self-organization'; (2) 'form, join, or assist labor organizations'; (3) 'bargain collectively through representatives of their own choosing'; and (4) "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.'"

14. <u>*The University of Texas Southwestern Medical Center at Dallas v. Gentilello*, 398 S.W.3d 680 (Tex. 2013)(2/22/13)</u>

Whistleblower case. Professor of surgery reported "lax supervision of trauma residents" to supervisor who oversaw internal compliance. In addition, medical school had written policy protecting those who report violation from harassment. The Supreme Court ruled the professor failed to report the violation to an

appropriate authority, and therefore the school's plea to the jurisdiction should have been sustained. "Under our Act, the jurisdictional evidence must show more than a supervisor charged with internal compliance or anti-retaliation language in a policy manual urging employees to report violations internally."

"The Texas Whistleblower Act bars retaliation against a public employee who reports his employer's or co-worker's 'violation of law' to an 'appropriate law enforcement authority'—defined as someone the employee 'in good faith believes' can 'regulate under or enforce' the law allegedly violated or 'investigate or prosecute a violation of criminal law.'" Reporting a violation to a supervisor who has power only to "ensur[e] internal compliance" is inadequate.

"For a plaintiff to satisfy the Act's good-faith belief provision, the plaintiff must reasonably believe the reported-to authority possesses what the statute requires: the power to (1) regulate under or enforce the laws purportedly violated, or (2) investigate or prosecute suspected criminal wrongdoing."

"Since the Legislature defined when 'report is made to an appropriate law enforcement authority,' we must use that statutory definition."

Good faith reporting of a violation "has both objective and subjective elements." "[T]he employee's belief must be objectively reasonable." In this regard, the employee's "belief can only satisfy the good-faith requirement 'if a reasonably prudent employee in similar circumstances' would have thought so."

The "'Whistleblower Act's limited definition of a law enforcement authority does not include an entity whose power is not shown to extend beyond its ability to comply with a law by acting or refusing to act or by preventing a violation of law.'" The "power to urge compliance or purge noncompliance" is insufficient.

"[A]n appropriate law-enforcement authority must be actually responsible for regulating under or enforcing the law allegedly violated." "As a legal matter, only the United States Secretary of Health and Human Services (HHS Secretary) can 'regulate under' or 'enforce' Medicare/Medicaid rules."

For an authority to be appropriate, "it must have authority to enforce, investigate, or prosecute violations of law against third parties outside of the entity itself, or it must have authority to promulgate regulations governing the conduct of such third parties."

"Federal and other state whistleblower laws explicitly protect purely internal reports to supervisors; Texas law does not." Therefore, "lodging an internal complaint to an authority whom one understands to be only charged with internal compliance, even including investigating and punishing noncompliance, is jurisdictionally insufficient.…" Likewise, it is not enough "that UTSW recited anti-retaliation principles in an internal policy manual." "The specific powers listed in section 554.002(b) are outward-looking. They do not encompass internal supervisors.…" "This is a legislatively-mandated legal classification, one tightly drawn, and we cannot judicially loosen it."

15. *Texas A&M University—Kingsville v. Moreno*, 399 S.W.3d 128 (Tex. 2013)(2/22/13)

Whistleblower case. Employee reported to university president that her boss, comptroller of school, wrongly paid in-state tuition for his daughter. Following *Gentilello*, the Supreme Court ruled that this "internal report [fell] short of what the Act requires: a good-faith report of a violation of law to an 'appropriate law enforcement authority.'" It thus granted the university's plea to the jurisdiction.

The "Act's restrictive definition of 'appropriate law enforcement authority' … is 'tightly drawn,' … and centers on [reports to] law enforcement, not law compliance" personnel.

Though the president had authority "within the university to compel compliance," he did not have external authority. "A supervisor is not an appropriate law-enforcement authority where the supervisor lacks authority 'to enforce the law allegedly violated … against third parties generally.'" The Texas Act "does not protect purely internal reports."

Z. Dram Shop

1. *Dugger v. Arredondo*, 408 S.W.3d 825 (Tex. 2013)(8/30/13)

"[T]hose who voluntarily put themselves in dangerous situations are not necessarily barred from recovering from other negligent individuals.… [A]n individual who voluntarily became intoxicated and was injured while driving his car may recover against the establishment that served him the alcohol.… Chapter 33 [is] applicable to a cause of action under Chapter 2 against an alcoholic beverage provider."

2. *Nall v. Plunkett*, 404 S.W.3d 552 (Tex. 2013)(6/28/13)

Plunkett attended Nall's New Year's Eve party at his parent's house. Allegedly knowing that alcohol would be served, the parents required everyone present after midnight to spend the night. Plunkett was severely injured when an intoxicated guest tried to leave after midnight when the parents had gone to bed. Plunkett sued alleging negligent undertaking and premises liability, and the trial court granted summary judgment for the Nalls on the former. The key issue was whether the Nalls' motion for summary judgment addressed the negligent-undertaking theory. The Supreme Court held that "the Nalls' summary judgment motion specifically addressed the negligent-undertaking claim by arguing that our decision in *Graff v. Beard* … forecloses the assumption of any duty by a social host under the facts of this case. Because

Plunkett did not argue that summary judgment was improper on the merits, we do not reach any substantive issues related to the summary judgment."

"[U]nder Texas law, a [social] host has no duty to prevent a guest who will be driving from becoming intoxicated or to prevent an intoxicated guest from driving."

"We hold that the Nalls' summary judgment motion specifically addressed the negligent-undertaking claim by arguing that *Graff* forecloses the assumption of any duty (i.e., an undertaking) by a social host."

AA. Securities Law and Investments

No cases to report.

BB. Negligent Misrepresentation

No cases to report.

CC. Fraud

1. *Sawyer, et al. v. E.I. du Pont de Nemours and Company*, ___ S.W.3d ___ (Tex. 2014)(4/25/14)

Certified question from Fifth Circuit. Some employees of defendant covered by a collective bargaining agreement, and others who were not, agreed to transfer to defendant's unit that was spun off to a subsidiary, which was then, contrary to defendant's assurances, sold. After they were laid off, the employees sued for fraud. The Supreme Court ruled that, "while an employee can sue an employer for fraud in some situations," here "at-will employees and employees subject to a collective bargaining agreement can[not] sue their corporate employer for fraudulently inducing them to move to a wholly owned subsidiary."

"To recover for fraud, one must prove justifiable reliance on a material misrepresentation. A representation dependent on continued at-will employment cannot be material because employment can terminate at any time. Nor can one justifiably rely on the continuation of employment that can be terminated at will.… No one can claim recovery of damages for the loss of an employment relationship he had no right to continue."

But, an employee can sue under fraud for "[r]ecovery of expenses incurred in reliance on a fraudulent promise of prospective employment … because neither the injury nor the recovery depends on continued employment."

An "at-will employee cannot bring an action for fraud that is dependent on continued employment."

Here, the employees covered by the collective bargaining agreement could only be discharged for "just cause." This "modified the Employees' at-will employment relationship." And the agreement provided a remedy for violating that term. But, here, if their "termination was fraudulently induced, it was tantamount to discharge" without "just cause." But, to "allow a fraud action when the Employees had a contractual remedy would not only be unnecessary, it would defeat the parties' bargain."

DD. Conspiracy

No cases to report.

EE. Tortious Interference

1. *Coinmach Corp. f/k/a Solon Automated Services, Inc. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909 (Tex. 2013)(11/22/13) ("corrected opinion" was issued 2/14/14)

Lease of tenant who supplied washing machines to apartment complex was subordinate to loan on complex. Mortgage on complex was foreclosed, and new owner bought property out of foreclosure. After that, the tenant held over and thus became a "tenant at sufferance." The Supreme Court ruled that the tenant at sufferance is a trespasser and can be liable in tort, including, in this case, tortious interference with prospective business relations.

"Texas law protects prospective contracts and business relations from tortious interference. To prevail on a claim for tortious interference with prospective business relations, the plaintiff must establish that (1) there was a reasonable probability that the plaintiff would have entered into a business relationship with a third party; (2) the defendant either acted with a conscious desire to prevent the relationship from occurring or knew the interference was certain or substantially certain to occur as a result of the conduct; (3) the defendant's conduct was independently tortious or unlawful; (4) the interference proximately caused the plaintiff injury; and (5) the plaintiff suffered actual damage or loss as a result." "Here, the trespass is an independently tortious or wrongful act that could support a claim for tortious interference with prospective business relations."

A "suit for tortious interference is subject to two-year statute of limitations."

Here, owner must show trespass and "it must also prove that [tenant's] conduct actually interfered with a reasonably probable contract. Owner has neither pled nor proven a 'continually available' prospective contract.…"

FF. Bad Faith

No cases to report.

GG. Assault and Battery

No cases to report.

HH. Intentional Infliction of Emotional Distress

No cases to report.

II. Libel, Slander, Defamation

1. *Waste Management of Texas, Inc. v. Texas Disposal Systems Landfill, Inc*., ___ S.W.3d ___ (Tex. 2014)(5/9/14)

One waste management company sued another for libel after it spread lies about the former's environmental standards. The Supreme Court ruled that 1) a "for-profit corporation may recover for injury to its reputation," 2) "[s]uch recovery is a non-economic injury for purposes of the statutory cap on exemplary damages," and 3) here, the evidence was legally insufficient for "reputation damages," but it was sufficient for "remediation costs and thereby exemplary damages." The amount of punitive damages had to be recalculated, along with prejudgment and post-judgment interest.

Libel is "defamation in written form" and slander is "defamation in spoken form." Footnote 7: "Defamation per se (on its face) requires no proof of actual monetary damages, while defamation per quod … does require such proof."

Free speech is "an enumerated right enshrined in both the Texas and Federal constitutions. But … [it] does not insulate defamation." Footnote 4: "Texas Bill of Rights itself acknowledges that free speech is not inviolate. 'Every person shall be at liberty to speak, write or publish his opinions on any subject, *being responsible for the abuse of that privilege* . . . .' Several Texas statutes likewise limit speech."

"[C]orporations , like people, have reputations and may recover for" defamation. Footnote 17: A corporation may recover if "the matter tends to prejudice it in the conduct of its business or to deter others from dealing with it." Footnote 35: only a "corporation," and not a "business," may sue for defamation. The action for defamation is of the "'owner of the business and not of the business itself.'" Such damages are for an "individual, partnership or a corporation."

Injury to reputation is not a pecuniary loss. "Non-pecuniary harm includes damages awarded for bodily harm or emotional distress.… [T]hese … do not require certainty of actual monetized loss. Instead, they are measured by an amount that 'a reasonable person could possibly estimate as fair compensation.' Conversely, damages for pecuniary harm do require proof of pecuniary loss for either harm to property, harm to earning capacity, or the creation of liabilities."

Under the Restatement, defamation is a "kind of personal injury" to be categorized as a non-economic loss.

Mental anguish like reputation damages are "non-economic damages."

In a "defamation case a plaintiff may recover for both general and special damages."

"To recover for business disparagement 'a plaintiff must establish that (1) the defendant published false and disparaging information about it, (2) with malice, (3) without privilege, (4) that resulted in *special damages* to the plaintiff.' … [O]ne difference [from defamation] is that one claim seeks to protect reputation interests and the other seeks to protect economic interests against pecuniary loss. That is, a plaintiff seeking damages for business disparagement must prove special damages resulting from the harm.…"

Against a media defendant, "unless the plaintiff shows actual malice (*i.e.*, knowledge of falsity or reckless disregard for the truth), the First Amendment prohibits awards of presumed and punitive damages for defamatory statements.… [This has been applied to private plaintiffs.] … [It is an open] question of whether presumed or punitive damages are constitutional when there is actual malice and presumably no proof of actual harm." *Cf.* Footnote 90.

"A statement is published with actual malice if it is made with 'knowledge of, or reckless disregard for, the falsity' of the statement. [This is disjunctive; *see* Footnote 99.] Such statements are not constitutionally protected." Here, there was proof of malice.

In defamation cases, the "damages issue is one of constitutional dimension." State law "may set a lesser standard of culpability than actual malice for holding a media defendant liable for defamation of a private plaintiff." However, the plaintiff may only recover damages for "'actual injury.'" There is appellate review because actual damages cannot "be a disguised disapproval of the defendant."

Even though "noneconomic damages cannot … be determined with mathematical precision and … juries must 'have some latitude in awarding such damages,' … [they] are not immune from no-evidence review on appeal." Juries cannot simply pick a number. Here, there was no evidence of lost profits corresponding to loss of reputation.

But, the evidence included "271 pages of invoices, expenses, time spent on curative work, supplies, mileage, etc. This … provide[s] some evidence of the remediation costs."

Here, because there was actual malice and proof of remediation costs, plaintiff could recover punitive damages.

2. *In re Mark Fisher*, S.W.3d _(Tex. 2014)(2/28/14)

Venue case. Plaintiff sold his company to a limited partnership, and became a limited partner, in a series of agreements that called for venue in Tarrant County. Asserting he was defamed, and that the business was bankrupted by mismanagement, he filed suit in Wise County against the principals of the buyer. The Supreme Court ruled that the "trial court abused its discretion by failing to enforce the mandatory forum selection clauses" in the agreements.

Though "a corporate entity may maintain a suit for libel," here, the plaintiff alleged he was personally libeled, and therefore had "standing to bring [those] claims."

Plaintiff claimed suit in Wise County (where plaintiff resided) was proper for a defamation suit under § 15.017. "Venue may be proper in multiple counties under mandatory venue rules, and the plaintiff is generally afforded the right to choose venue when suit is filed." But because this suit arose from a major transaction which is governed by § 15.020, which applies "notwithstanding" other venue provisions, "the Legislature intended for it [§ 15.020] to control over other mandatory venue provisions."

3. *Neely v. Wilson*, 418 S.W.3d 52 (Tex. 2013)(6/28/13) (*see* "corrected opinion" issued 1/31/14)

Neurosurgeon sued reporter and station after it aired a broadcast that implied he was disciplined for taking drugs and performing surgery while taking them. Reversing a summary judgment for the defendants, the Supreme Court ruled that "a person of ordinary intelligence could conclude that the gist of the broadcast was that [doctor] was disciplined for operating on patients while using dangerous drugs and controlled substances. [Doctor] raised a genuine issue of material fact as to the truth or falsity of that gist…. We further conclude: (1) there are fact issues on whether part of the broadcast is protected by the judicial/official proceedings or fair comment privileges; (2) [doctor] was not a limited purpose public figure; (3) [doctor] raised a fact issue as to [TV station's] negligence; and (4) [doctor's] professional association may maintain a cause of action for defamation."

Defamation suits "implicate[] the competing constitutional rights to seek redress for reputational torts and the constitutional rights to free speech and press."

Even in a defamation suit, "we adhere to our well-settled summary judgment standards."

"Truth is a defense to all defamation suits. Additionally, the Legislature has provided other specific defenses for media defendants, such as the official/judicial proceedings privilege, the fair comment privilege, and the due care provision.… [T]here is no defamation liability if the gist of the broadcast is substantially true." There is no rule "that a media defendant's reporting of third-party allegations is substantially true if it accurately reports the allegations—even if the allegations themselves are false." Footnote 3: we "leave open the question of whether a broadcast whose gist is merely that allegations were made is substantially true if the allegations were accurately repeated."

"The common law has long allowed a person to recover for damage to her reputation occasioned by the publication of false and defamatory statements." "Unlike the federal Constitution, the Texas Constitution twice [art. I §§ 8, 13] expressly guarantees the right to bring suit for reputational torts." "The right to recover for defamation, however, is not the only constitutional concern at stake. Of significant import are the constitutional rights to free speech and a free press."

"The tort of defamation includes libel and slander. Libel occurs when the defamatory statements are in writing. Slander occurs when the statements are spoken. The broadcast of defamatory statements read from a script is libel, not slander. Libel 'tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation.…'"

Public officials, "public figures and limited purpose public figures must also prove actual malice, and … states may set their own level of fault for private plaintiffs.… [W]e have chosen a negligence standard for a private figure seeking defamation damages from a media defendant." Footnote 8: "actual malice requires proof by clear and convincing evidence."

To "recover defamation damages in Texas, a plaintiff must prove the media defendant: (1) published a statement; (2) that defamed the plaintiff; (3) while either acting with actual malice (if the plaintiff was a public official or public figure) or negligence (if the plaintiff was a private individual) regarding the truth of the statement." However, "one cannot recover mental anguish damages for defamation of a deceased individual."

"[O]ne is liable for republishing the defamatory statement of another." Truth is a defense, and "defendants [must] prove the publication was substantially true." "[S]tatements that are not verifiable as false cannot form the basis of a defamation claim." There is also "a judicial proceedings privilege … for parties, witnesses, lawyers, judges, and jurors." "And a qualified privilege exists under the common law when a statement is made in good faith and the author, recipient, a third person, or one of their family members has an interest that is sufficiently affected by the statement."

Regarding media defendants, "the burden of proving the truth defense [has been shifted] to require the plaintiff to prove the defamatory statements were false when the statements were made by a media defendant over a public concern." There is also an "official/judicial proceedings privilege, which shields periodical publications from republication liability for fair, true, and impartial accounts of judicial, executive, legislative, and other official proceedings." In addition,

there is a "fair comment privilege, shielding periodical publications from republication liability for reasonable and fair comment on or criticism of official acts of public officials or other public concerns." (Footnote 13: the Legislature established these protections for media defendants, including them in Chapter 73 of the Civil Practice and Remedies Code.) "Notably, the Legislature has also added the due care provision for broadcasters, shielding
them from liability unless the plaintiff proves the broadcaster failed to exercise due care to prevent publication of a defamatory statement." And, recently, the "Legislature passed the Defamation Mitigation Act, which requires defamation plaintiffs to request a correction, clarification, or retraction from the publisher of a defamatory statement within the limitations period for the defamation claim. Under this provision, a defamation plaintiff may only recover exemplary damages if she serves the request for a correction, clarification, or retraction within 90 days of receiving knowledge of the publication."

Truth is the primary issue here. The "substantial truth doctrine" provides that "if a broadcast taken as a whole is more damaging to the plaintiff's reputation than a truthful broadcast would have been, the broadcast is not substantially true and is actionable." This is based upon the "'reasonable person's perception of the entirety of a publication and not merely individual statements.'" The standard is "gist" of the story in the "mind of the average listener." Details can err and yet the gist be true; likewise, "a broadcast 'can convey a false and defamatory meaning by omitting or juxtaposing facts, even though all the story's individual statements considered in isolation were literally true or non-defamatory.'" When the evidence is disputed, it is "determined by the finder of fact." Footnote 19: "We have previously stated that an introduction can be especially misleading."

A "government investigation that finds allegations to be true is one of many methods of proving substantial truth."

"To prevail at summary judgment on the truth defense, [the TV station] must conclusively prove that [the] gist is substantially true." Footnote 21: "When a private figure sues a media defendant over defamatory statements that are of public concern, the plaintiff has the burden of proving falsity."

Here, the doctor's evidence raised a fact issue regarding truth.

"[T]rial is a public event," and the "Legislature codified the judicial proceedings privilege and expanded it to other official proceedings.… [P]ublications are privileged if they are 'a fair, true,
and impartial account of' judicial or other proceedings to administer the law." "But the privilege only extends to statements that: (1) are substantially true and impartial reports of the proceedings, and (2) are identifiable by the ordinary reader as statements that were made in the proceeding."

The plaintiff can rebut the privilege. "The judicial/official proceedings privilege 'does not extend to the republication of a matter if it is proved that the matter was republished with actual malice after it had ceased to be of public concern.' Actual malice means the defendant made the statement ''with knowledge that it was false or with reckless disregard of whether it was true or not;'' and reckless disregard means ''the defendant in fact entertained serious doubts as to the truth of his publication.''" Inclusion of "disclaiming information" negated actual malice, here. So, this privilege shielded some statements in the broadcast.

The fair comment privilege applies an official act of a public official or matter of public concern. A "comment based on a substantially true statement of fact can qualify as a fair comment. But if a comment is based upon a substantially false statement of fact the defendant asserts or conveys as true, the comment is not protected by the fair comment privilege." Here, there is a fact issue on truth.

Public and limited purpose public figures must prove malice. The doctor in this case was not a limited public figure. "Public figure status is a question of law for the court. We use a three-part test … [for] a limited purpose public figure:
(1) the controversy at issue must be public both in the sense that people are discussing it and people other than the immediate participants in the controversy are likely to feel the impact of its resolution;
(2) the plaintiff must have more than a trivial or tangential role in the controversy; and
(3) the alleged defamation must be germane to the plaintiff's participation in the controversy."
"'[T]hose charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.'" The Supreme Court has not issued a ruling where "a person involuntarily became a limited-purpose public figure."

"For the purposes of defamation liability, a broadcaster is negligent if she knew or should have known a defamatory statement was false."

"[P]rofessional associations can[] maintain defamation claims." Likewise, "corporations may sue to recover damages resulting from defamation." So, here, the doctor's "PA" can maintain a libel suit. Footnote 27: "recovery by the association and its members for the same particular injury is a precluded double recovery. 'There can be but one recovery for one injury, and the fact that . . . there may be more than one theory of liability[] does not modify this rule.'"

The "dissent prematurely cuts off [the doctor's] right to a trial on this reputational tort. Our constitution assures that the 'right of trial by jury shall remain inviolate.' Additionally, the Texas Constitution's free speech clause guarantees the right to bring reputational

torts: 'Every person shall be at liberty to speak, write or publish his opinions on any subject, *being responsible for the abuse of that privilege*.…" Likewise, the open courts provision guarantees the right to bring reputational torts: 'All courts shall be open, and every person for an injury done him, in his lands, goods, person or *reputation*, shall have remedy by due course of law.'" Though the Texas "free speech" right may be broader than its federal counterpart, "'*that broader protection, if any, cannot come at the expense of a defamation claimant's right to redress*.… [T]he Texas Constitution expressly protects the bringing of reputational torts.'"

Reports "about government investigations under the official/judicial proceedings privilege … [are protected] if they are fair, true, and impartial accounts of such proceedings."

The "United States Supreme Court has only discussed the truth defense as a creature of state common law and not the First Amendment."

4. *Hancock v. Variyam*, 400 S.W.3d 59 (Tex. 2013)(5/17/13)

Physician sued colleague who circulated a letter accusing him a lack of veracity. The Supreme Court ruled this did not constitute defamation *per se*. Accordingly, he had to prove actual damages in order to recover punitive damages, and here his mental anguish proof was insufficient.

"Defamation is generally defined as the invasion of a person's interest in her reputation and good name. Defamation is delineated into defamation *per se* and *per quod* [i.e., defamation other than *per se*]. Historically, defamation *per se* has involved statements that are so obviously hurtful to a plaintiff's reputation that the jury may presume general damages, including for loss of reputation and mental anguish. A statement that injures a person in her office, profession, or occupation is typically classified as defamatory *per se*." "Actual or compensatory damages are intended to compensate a plaintiff for the injury she incurred and include general damages (which are non-economic damages such as for loss of reputation or mental anguish) and special damages (which are economic damages such as for lost income)." Footnote 4: "General damages are noneconomic in nature, such as for loss of reputation and mental anguish, while special damages are economic in nature, such as for lost income.…"

"While a defamatory statement is one that tends to injure a person's reputation, such a statement is defamatory *per se* if it injures a person in her office, profession, or occupation. The common law deems such statements so hurtful that the jury may presume general damages (such as for mental anguish and loss of reputation).… Because the statements [here] did not ascribe the lack of a necessary skill that is peculiar or unique to the profession of being a physician, we hold that they did not defame the physician *per se*. Thus, … the physician was required to prove actual damages. We further conclude there is no evidence of mental anguish because evidence of some sleeplessness and anxiety—but evidence of no disruption in patient care or interaction with colleagues who read the defamatory letter—does not rise to the level of a substantial disruption in daily routine or a high degree of mental pain and distress. Likewise, there is no evidence of loss of reputation because there is no indication that any recipient of the defamatory letter believed its statements. Lastly, because the physician did not establish actual damages, he cannot recover exemplary damages."

"'[S]tate remedies for defamatory falsehood [must] reach no farther than is necessary to protect the legitimate interest involved. It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. . . . [A]ll awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.'" "But if more than nominal damages are awarded, recovery of exemplary damages are appropriately within the guarantees of the First Amendment if the plaintiff proves by clear and convincing evidence that the defendant published the defamatory statement with actual malice."

There "are three types of damages that may be at issue in defamation *per se* proceedings: (1) nominal damages; (2) actual or compensatory damages; and (3) exemplary damages. If a statement is defamatory but not defamatory *per se*, only the latter two categories of damages are potentially recoverable. Nominal damages 'are a trivial sum of money awarded to a litigant who has established a cause of action but has not established that he is entitled to compensatory damages.' In defamation *per se* cases, nominal damages are awarded when 'there is no proof that serious harm has resulted from the defendant's attack upon the plaintiff's character and reputation' or 'when they are the only damages claimed, and the action is brought for the purpose of vindicating the plaintiff's character by a verdict of a jury.…'"

"Awards of presumed actual damages are subject to appellate review for evidentiary support. And the plaintiff must always prove special damages in order to recover them." "The court must first determine whether a statement is reasonably capable of a defamatory meaning from the perspective of an ordinary reader in light of the surrounding circumstances. If the statement is not reasonably capable of a defamatory meaning, the statement is not defamatory as a matter of law and the claim fails. Likewise, the determination of whether a statement is

defamatory *per se* is first an inquiry for the court. If the court determines that an ordinary reader could only view the statement as defamatory and further concludes that the statement is defamatory *per se*, it should so instruct the jury.…"

Footnote 13: "TEX. CONST. art. I, §§ 8 ('Every person shall be at liberty to speak, write or publish 13 his opinions on any subject, being responsible for the abuse of that privilege."), 13 ('All courts shall be open, and every person for an injury done him, in his lands, goods, person *or reputation*, shall have remedy by due course of law.'…)."

JJ. Engineers and Licensed or Registered Professionals

1. *Crosstex Energy Services, L.P. v. Pro Plus, Inc.*, S.W.3d (Tex. 2014)(3/28/14)

Gas transmitting company sued engineers after the failure of a gasket in a pumping station they designed caused a serious fire. When defendant moved to dismiss because plaintiff did not file a "certificate of merit" under Ch. 150, trial court denied it and granted plaintiff an extension. After determining that both it and the court of appeals had jurisdiction, the Supreme Court ruled that "(1) [plaintiff] did not file suit within ten days of the running of limitations and thus cannot claim protection from the good cause extension in section 150.002(c); (2) [since the certificate of merit requirement is not jurisdictional,] a defendant may, through its conduct, waive the right to seek dismissal under section 150.002(e); and (3) [here, defendant's] conduct did not constitute waiver."

"The certificate of merit statute applies to actions for damages arising out of 'the provision of professional services by a licensed or registered professional.…' A plaintiff 'shall' file an affidavit of a qualified third party in the same profession; the affidavit must substantiate the plaintiff's claim on each theory of recovery. Failure to file this … 'certificate of merit' results in dismissal … [which] may be with or without prejudice."

Section 150.002(f) provides that an interlocutory appeal may be taken from an order granting or denying a dismissal. The Court compared this case to an interlocutory appeal in a medical malpractice case related to an expert report. Though both statutes authorize dismissal for failure to timely provide a report, unlike Ch. 74, the "certificate of merit statute does not address the appealability of extensions of time; therefore, such interlocutory appeals, presumably are not permissible.…" In medical malpractice, "when the denial of a motion to dismiss and the grant of an extension are inseparable … , courts of appeals have no jurisdiction to review the motion to dismiss." But when they are not inseparable, such as when no expert report is filed, the court of appeals can review the order. The statutory mechanism for granting an extension for the report is irrelevant if an extension could not cure the defect. Here, because plaintiff had no statutory basis for an extension, the court of appeals had jurisdiction to rule upon "the motion to dismiss without entanglement in the appeal of the granted extension."

Here, the third sentence of § 150.002(c) could, or could not, apply only when plaintiff complied with the first sentence. Because "the statute [is] capable of multiple interpretations … we apply our rules of construction to discern legislative intent." The meaning of words "cannot be determined in isolation but must be drawn from the context.…" Here, the Court interprets the third sentence is dependent upon the first. "We hold that the 'good cause' exception in subsection (c) does not stand alone, but rather is contingent upon a plaintiff: (1) filing within ten days of the expiration of the limitations period; and (2) alleging that such time constraints prevented the preparation of an affidavit. A plaintiff satisfying these requirements 'shall' receive an extension of thirty days; upon motion, a trial court may, for good cause, extend this thirty-day period as justice requires. A plaintiff who files suit outside the ten-day window … cannot claim protection of the good cause exception."

Section "150.002 imposes a mandatory, but nonjurisdictional, filing requirement. Thus, we hold that a defendant may waive its right to seek dismissal under the statute."

In this case, defendant's conduct in participating in discovery, filing pleadings, agreeing to a continuance, and entering a Rule 11 agreement did not constitute a waiver of the certificate of merit requirement.

"If a defect in the pleadings is incurable by amendment, a special exception is unnecessary." Here, defendant was not required to specially except "the lack of a certificate of merit."

"[T]he docket control order in this case made no mention of the separate certificate of merit requirements under section 150.002. Because *McDaniel* limits the purview of the docket control order … , and the Rule 11 agreement merely provided dates for the order, the Rule 11 agreement did not operate to postpone the filing requirement."

KK. Consumer Law and DTPA

1. *Ewing Construction Company v. Amerisure Insurance Company*, 420 S.W.3d 30 (Tex. 2014)(1/17/14)

Insurance coverage dispute arising from suit against building contractor. "We have defined 'good and workmanlike' as 'that quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such

work.'" The "'common law duty to perform with care and skill accompanies every contract.…'"

2. *Coinmach Corp. f/k/a Solon Automated Services, Inc. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909 (Tex. 2013)(11/22/13) ("corrected opinion" was issued 2/14/14)

Lease of tenant who supplied washing machines to apartment complex was subordinate to loan on complex. Mortgage on complex was foreclosed, and new owner bought property out of foreclosure. After that, the tenant held over and thus becoming a "tenant at sufferance." The Supreme Court ruled the tenant in this case cannot be liable under the DTPA because the property owner was not a consumer.

"A 'consumer' under the DTPA is one who 'seeks or acquires by purchase or lease, any goods or services.' The parties agree that a party's status as a consumer is typically a question of law for the courts to decide." Here, tenant provided laundry room services to owner's residential tenants. "A party is not a consumer when it merely arranges for a service to be provided to its customers, even if the party indirectly benefits from the provision of that service."

3. *Morton v. Nguyen*, 412 S.W.3d 506 (Tex. 2013)(8/23/13)

In a contract for deed, the seller failed to comply with disclosure requirements. Though that entitled the buyers to rescind, the Court held that the buyers must restore the rent. "A seller's failure to comply with Subchapter D's requirements entitles a buyer to 'cancel and rescind' a contract for deed and 'receive a full refund of all payments made to the seller.…' We hold that Subchapter D's cancellation-and-rescission remedy contemplates mutual restitution of benefits among the parties. Thus, we conclude that the buyers here must restore to the seller supplemental enrichment in the form of rent for the buyers' interim occupation of the property upon cancellation and rescission of the contract for deed."

Under the DTPA, "section 17.50's restoration remedy contemplates mutual restitution," as here. "Like the DTPA's restoration remedy, Subchapter D's cancellation-and-rescission remedy is not intended to be punitive.…" Otherwise, there would be a "windfall."

Here, "we … hold that notice and restitution or a tender of restitution are not prerequisites to the cancellation-and rescission remedy under Subchapter D, as long as the affirmative relief to the buyer can be reduced by (or made subject to) the buyer's reciprocal obligation of restitution." The "buyer [must] restore to the seller the value of the buyer's occupation of the property."

The buyers "are not entitled to either attorney's fees or mental anguish damages because no claims supporting the awards survived the court of appeals' judgment."

4. *Gonzales v. Southwest Olshan Foundation Repair Company, LLC*, 400 S.W.3d 52 (Tex. 2013)(3/29/13)

Homeowner retained company to repair foundation. Its contract said it would perform job in a good and workmanlike manner. There were subsequent problems extending over years. One crewmember said it was the "worst" job he had seen; later engineers sent out by company, though, said it was proper. Regarding the contract term, the Supreme Court ruled that "parties cannot disclaim but can supersede the implied warranty [from *Melody Home*] for good and workmanlike repair of tangible goods or property if the parties' agreement specifically describes the manner, performance, or quality of the services," as it did here. Further, limitations barred homeowner's DTPA claim; even though the discovery rule applies, the common law fraudulent concealment doctrine is superseded by the DTPA's 180-rule.

"We [have] defined good and workmanlike as 'that quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work.'"

The "implied warranty of good workmanship 'attaches to a new home sale'" if the parties do not specify the performance. This implied warranty under *Melody Home* is a "'gap-filler' warranty."

Footnote 3: "'[A] warranty for repair services [is] not breached until further repairs [are] refused.'"

Here, the "express warranty superseded the implied warranty of good and workmanlike repair, and the jury's finding that Olshan did not breach the express warranty precludes liability on Gonzales's warranty claims."

The DTPA provides a statute of limitations of two years after the deceptive act, or when it was or should have been discovered. "In essence, the Legislature codified the discovery rule for DTPA claims." Furthermore, "'[once] a claimant learns of a wrongful injury, the statute of limitations begins to run even if the claimant does not yet know 'the specific cause of the injury; the party responsible for it; the full extent of it; or the chances of avoiding it.'" Here, when the employee said it was the "worst job," homeowner bought a camera for him to document the damage. Thus, limitations began to run because "she knew of the injury."

"The doctrine of fraudulent concealment tolls limitations 'because a person cannot be permitted to avoid liability for his actions by deceitfully concealing wrongdoing until limitations has run.' The DTPA

establishes a 180-day limit on tolling for fraudulent concealment." The Court will not rewrite the statute.

LL. Banking, Commercial Paper, and Lender Liability

1. *Sims v. Carrington Mortgage Services*, ___ S.W.3d ___ (Tex. 2014)(5/16/14)

Borrowers restructured their home equity loans. Responding to certified questions from the Fifth Circuit, the Supreme Court ruled that, "as long as the original note is not satisfied and replaced, and there is no additional extension of credit, as we define it, the restructuring is valid and need not meet the constitutional requirements for a new [home equity] loan."

"[H]ome equity loans are subject to the requirements of" the Texas Constitution. Footnote 6: "'Texas became the last state in the nation to permit home-equity loans when constitutional amendments voted on by referendum took effect in 1997.'"

"To provide guidance to lenders, the Finance Commission and the Credit Union Commission have been authorized by the Constitution and by statute to interpret these provisions, subject to judicial review, and the Commissions have done so in Chapter 153 of the Texas Administrative Code." "'A lender's compliance with an agency interpretation of Section 50, even a wrong interpretation, is compliance with Section 50 itself.'" But the commissions "'can do no more than interpret the constitutional text, just as a court would.'"

Here, past-due amounts on the note were capitalized as principal. The terms "loan modification" and "refinancing" are not defined in Section 50. The commissions draw such a distinction, though the Constitution does not mention them: the key "is an 'extension of credit.'" This phrase is undefined, but "[c]redit is simply the ability to assume a debt repayable over time, and an extension of credit affords the right to do so in a particular situation." "The extension of credit for purposes of Section 50(a)(6) consists not merely of the creation of a principal debt but includes all the terms of the loan transaction. Terms requiring the borrower to pay taxes, insurance premiums, and other such expenses when due protect the lender's security and are as much a part of the extension of credit as terms requiring timely payments of principal and interest." Because the borrower was already obligated to pay the past-due amount under the original agreement, it is not a new extension of credit. Restructuring "a loan does not involve a new extension of credit so long as the borrower's note is not satisfied or replaced and no new money is extended.… The test should be whether the secured obligations are those incurred under the terms of the original loan."

"Lenders have two options other than foreclosing on loans in default: further forbearance and forgiveness."

The "restructuring of a home equity loan that … involves capitalization of past-due amounts owed under the terms of the initial loan and a lowering of the interest rate and the amount of installment payments, but does not involve the satisfaction or replacement of the original note, an advancement of new funds, or an increase in the obligations created by the original note, is not a new extension of credit that must meet the requirements of Section 50."

"Is the capitalization of past-due interest, taxes, insurance premiums, and fees an 'advance of additional funds' under the Commissions' interpretations of Section 50? No, if those amounts were among the obligations assumed by the borrower under the terms of the original loan." Nor is it a new extension of credit.

"Must a restructuring like the [borrowers'] comply with Section 50(a)(6)? No, because it does not involve a new extension of credit.…"

Footnote 28: Nothing "in Section 50 suggests that a loan's compliance is to be determined at any time other than when it is made." Footnote 29: "TEX. FIN.CODE § 301.002(a)(14)(A) … [defines an] 'Open-end account'."

2. *McAllen Hospitals, LLP v. State Farm Mutual Insurance Company of Texas*, ___ S.W.3d ___ (Tex. 2014)(5/16/14)

Hospital sued insurer after injured victims of car wreck cashed settlement checks from insurer that were made out to both them and hospital, without discharging proper hospital lien. Using principals of commercial paper under the UCC, the Supreme Court ruled that the hospital had not been "paid" by delivery of a settlement check to the claimant: "(1) payment of a check to one nonalternative copayee without the endorsement of the other does not constitute payment to a 'holder' and thus does not discharge the drawer of either his liability on the instrument or the underlying obligation, (2) the … patients' releases of their causes of action against [negligent driver] were [in]valid … , and (3) the Hospital's liens on those causes of action therefore remain intact."

Insurer's "delivery of the drafts to [claimant's] constitutes constructive delivery of the drafts to the other copayee, the Hospital." But, "when a draft is issued to nonalternative copayees, one copayee acting alone is not entitled to enforce, and thus may not discharge, the instrument." If it is payable to all, it can only be enforced by all. A "forged endorsement by nonalternative copayee [does] not discharge drawer's obligation to other copayee."

Footnote 3: "Under the UCC, 'payor bank' means a bank that is the drawee of a draft. A 'drawee' is a person ordered in the draft to make payment."

Hospital possibly could have sued the bank. But its failure to do so did not affect insurer's obligations. Footnote 5: "A drawee that makes payment 'for a person not entitled to enforce the instrument or receive payment' may be liable in conversion." Footnote 6: A "drawee may not charge its customer's account on an instrument that is not properly authorized."

3. *The Finance Commission of Texas v. Norwood*, 418 S.W.3d 566 (Tex. 2013)(6/21/13) ("supplemental opinion" was issued 1/24/14)

Supplemental opinion addressing computation of interest and closing locations for home equity loans.

The "Texas Constitution caps 'fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service' a home equity loan, not including 'any interest', at 3% of principal. In this case, we hold that 'interest' as used in this provision does not mean compensation for the use, forbearance, or detention of money, as in the usury context, but 'the amount determined by multiplying the loan principal by the interest rate.' This definition provides the protection to borrowers the provision is intended to afford."

"[P]er per diem interest is still interest, though prepaid; it is calculated by applying a rate to principal over a period of time. Legitimate discount points to lower the loan interest rate, in effect, substitute for interest. We also agree … that true discount points are not fees 'necessary to originate, evaluate, maintain, record, insure, or service' but are an option available to the borrower and thus not subject to the 3% cap."

"Section 50(a)(6)(N) [of the Constitution], which provides that a loan may be 'closed only at the office of the lender, an attorney at law, or a title company', precludes a borrower from closing the loan through an attorney-in-fact under a power of attorney not itself executed at one of the three prescribed locations."

"[C]losing is the occurrence that consummates the transaction. But a power of attorney must be part of the closing to show the attorney-in-fact's authority to act. … [W]e think that the provision requires a formality to the closing that prevents coercive practices. The concern is that a borrower may be persuaded to sign papers around his kitchen table collateralizing his homestead when he would have second thoughts in a lender's, lawyer's, or title company's office. To allow the borrower to sign a power of attorney at the kitchen table raises the same concern. Requiring an attorney-in-fact to sign all loan documents in an office does nothing to sober the borrower's decision, which is the purpose of the constitutional provision."

A breach of fiduciary duty suit against an attorney-in-fact "may be a hollow remedy and certainly cannot recover a home properly pledged as collateral. In any event, '[w]hether so stringent a restriction [as limiting the locations where a home equity loan can be closed and, we think, a power of attorney executed] is good policy is not an issue for the Commissions or this Court to consider.' Whether the constitutional provision's intended protection is worth the hardship or could be more fairly or effectively provided by some other method is a matter that must be left to the framers and ratifiers of the Constitution."

4. *The Finance Commission of Texas v. Norwood*, 418 S.W.3d 566 (Tex. 2013)(6/21/13) ("supplemental opinion" was issued 1/24/14)

Voters amended the constitution to allow home equity loans, and then in 2003 amended it again to allow the Legislature to delegate to an agency the power to interpret certain sections. In this suit, homeowners challenged certain rulings by two commissions authorized by the Legislature to create a safe harbor. The Supreme Court ruled that "agency interpretations made under this authority are [not] beyond judicial review," and that certain rulings by the agencies were unconstitutional.

The homestead has been protected from forced sale by the Texas Constitution. An amendment allowed home equity loans. Its "lengthy, elaborate, detailed provisions … were included in Article XVI, Section 50 and made nonseverable." "Loan terms and conditions, notices to borrowers, and all applicable regulations were set out in Section 50 itself." Desiring a safe harbor, in "2003 the Legislature proposed, and the people adopted, Section 50(u), which states: The legislature may by statute delegate one or more state agencies the power to interpret" parts of Section 50. The commissioners on the commissions to whom the Legislature delegated the power were appointed by the Governor.

The commissions' interpretation of "interest" was unconstitutional, as well as allowing closing by mail, but not the presumption of receipt of notice.

The fatal flaw with the commissions' interpretation of "interest" is that it was tied to the Legislature's definition, which it could change. Instead, "interest" is "the amount determined by multiplying the loan principal by the interest rate."

"Closing a loan is a process.… [Under the constitution, executing] the required consent or a power of attorney are part of the closing process and must occur only at one of the locations allowed by the constitutional provision."

The commissions' interpretation providing a rebuttable presumption of receipt of mail "does not impair the constitutional requirement; it merely relieves a lender of proving receipt unless receipt is challenged."

MM. Family Law, Juveniles, Indigents

1. *In the Interest of A.B. and H.B., Children*, S.W.3d ___ (Tex. 2014)(5/16/14)

Suit to terminate parental rights. The Supreme Court ruled that appellate courts are not required to "detail the evidence … when affirming the jury's decision" to terminate parental rights.

"In parental termination cases, our courts of appeals are required to engage in an exacting review of the entire record to determine if the evidence is factually sufficient to support the termination of parental rights. And to ensure the jury's findings receive due deference, if the court of appeals reverses the factfinder's decision, it must detail the relevant evidence in its opinion and clearly state why the evidence is insufficient to support the termination finding by clear and convincing evidence."

This "appeal only requires us to decide whether the court of appeals, in affirming the termination, adhered to the proper standard for conducting a factual sufficiency review. Because the court of appeals' opinion and the record demonstrate the court of appeals considered the record in its entirety—as a proper factual sufficiency review requires—we affirm."

"A factual sufficiency review pits two fundamental tenets of the Texas court system against one another: the right to trial by jury and the court of appeals' exclusive jurisdiction over questions of fact. And, in the context of parental termination cases, a third interest must also be accounted for—that is, parents' fundamental right to make decisions concerning 'the care, the custody, and control of their children.'" In "*In re C.H.*, we articulated a factual sufficiency standard to strike an appropriate balance between these competing principles."

"Because the termination of parental rights implicates fundamental interests, a higher standard of proof—clear and convincing evidence—is required at trial. Given this… , a heightened standard of appellate review in parental termination cases is similarly warranted. Specifically, a proper factual sufficiency review requires the court of appeals to determine whether 'the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the State's allegations.' 'If, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient.' And in making this determination, the reviewing court must undertake 'an exacting review of the entire record with a healthy regard for the constitutional interests at stake.'"

"[W]hile parental rights are of a constitutional magnitude, they are not absolute. Consequently, … the court of appeals must nevertheless still provide due deference to the decisions of the factfinder, who, having full opportunity to observe witness testimony first-hand, is the sole arbiter when assessing the credibility and demeanor of witnesses."

The Court has "established one exception to the general rule that appellate courts need not 'detail the evidence' when affirming a jury finding: exemplary damages."

"The purpose of terminating parental rights … is not to punish parents or deter their 'bad' conduct, but rather to protect the interests of the child. Unlike exemplary damages awards, which leave much to the jury's discretion, the Family Code provides a detailed statutory framework to guide the jury in making its termination findings."

In a suit to terminate parental rights under § 161.001 of the Family Code, "the petitioner is required to establish one or more of the acts or omissions enumerated under subdivision (1) of the statute, and must also prove that termination is in the best interest of the child. Proof under each subsection must be satisfied by clear and convincing evidence; termination may not be based solely on the best interest of the child as determined by the trier of fact. Thus, termination proceedings require juries to make specific findings of fact, and the Family Code provides the contours to limit unnecessary discretion."

"But for the State's fundamental interest in the welfare of the child, termination would not be proper."

Here, the court of appeals considered all of the evidence.

2. *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, ___ S.W.3d ___ (Tex. 2014)(5/9/14)

Dispute about whether plaintiff accepted defendant's settlement offer. Footnote 4: the Family Code provides for mediated settlement agreements; when the requirements are met, "'a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11….'"

3. *In the Interest of K.N.D.*, 424 S.W.3d 8 (Tex. 2014)(1/17/14)

Mother was prostitute, and her roommate, who was her pimp, caused her to fall down while she was pregnant. She had also relinquished parental rights to a prior child, and had mental health issues. The trial court terminated mother's rights to child for "abuse or neglect" of the child under Chapter 262 of the Family Code. The Supreme Court ruled that, in "light of our recent decision in *In re E.C.R.*," "we hold that K.N.D. was removed for abuse or neglect" under Chapter 262.

"Following the initial removal of a child, a court may order termination of the parent-child relationship if the court finds by clear and convincing evidence that the parent has: 'failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child.…'" When determining whether there has been "abuse or neglect" of the child for the purposes of Chapter 262, "a reviewing court may examine a parent's history with other children as a factor of the risks or threats of the environment.…"

4. *Tedder v. Gardner Aldrich, LLP*, 421 S.W.3d 651 (Tex. 2013)(5/17/13) ("corrected opinion" was issued 12/13/13)

Corrected opinion: footnote 2 changed. *See Tedder*, below, at 5/17/13.

5. *Tucker v. Thomas*, 419 S.W.3d 292 (Tex. 2013)(12/13/13)

After a hearing to modify child custody (but not to enforce a payment obligation), court awarded mother her attorney's fees "as additional child support." The Supreme Court ruled that, "in the absence of express statutory authority, a trial court does not have discretion to characterize attorney's fees awarded in nonenforcement modification suits as necessaries or as additional child support."

"In enforcement proceedings, the Legislature expressly provided for mandatory awards of attorney's fees and specific means for enforcing those awards." However, except for frivolous or harassing motions to modify, "no provision in Chapter 156 authorizes an award of attorney's fees in modification suits.… In light of this absence of express authorization, we conclude that the Legislature did not intend to provide trial courts with discretion to assess attorney's fees awarded to a party in Chapter 156 modification suits as additional child support. Moreover, neither our precedent nor the plain language of section 151.001(c) supports the court of appeals' conclusion that attorney's fees in non-enforcement modification suits may be characterized as necessaries, enforceable by contempt."

"[S]ection 157.166 of the Family Code authorizes a trial court to enforce a child support obligation through use of its contempt powers, which includes the possibility of confinement. Footnote 4: "*Compare* TEX. CONST. art. I, § 18 ('No person shall ever be imprisoned for debt.'), *with In re Henry*, … ('[T]he obligation to support a child is viewed as a legal duty and not as a debt.')."

"Numerous sections in the Family Code authorize a trial court to award attorney's fees in a SAPCR.… In addition, the Legislature has enacted specific provisions that control awards of attorney's fees in certain types of cases.… In enforcement suits, section 157.167 generally requires a trial court to award reasonable attorney's fees if it finds that a respondent either failed to make child support payments or failed to comply with the terms of an order providing for possession of or access to a child."

The "Legislature has given trial courts discretion to characterize attorney's fees awarded to an amicus attorney or attorney ad litem under section 107.023 as 'necessaries for the benefit of the child.'"

Sometimes the fees are characterized as a debt; other times, additional child support.

"[E]xcept in the context of enforcement proceedings, no provision in Title 5 expressly provides a trial court with discretion to enforce an award of attorney's fees by the same means available for the enforcement of child support, including contempt." "In light of the Family Code's detailed scheme concerning awards of attorney's fees in SAPCRs, we believe it is significant that the Family Code is silent as to whether a trial court may characterize attorney's fees as additional child support in non-enforcement modification suits."

"'Each spouse has the duty to support his or her children . . . . A spouse who fails to discharge a duty of support is liable to any person who provides necessaries to those to whom support is owed.' … [T]his Court has never held that attorney's fees incurred by a parent in a non-enforcement modification suit are necessaries under the common law doctrine of necessaries or its embodiment in section 151.001(c)."

6. *In re Stephanie Lee*, 411 S.W.3d 445 (Tex. 2013)(9/27/13)

Husband and wife entered a mediated settlement agreement. Husband later changed his mind and asserted, before judgment was rendered, that it was not in the best interest of the children. Trial court agreed and did not enter judgment. The Supreme Court granted mandamus: "a trial court may not deny a motion to enter judgment on a properly executed MSA on" grounds of the best interest of the children.

Generally, the Family Code mandates "that '[t]he best interest of the child shall always be the primary consideration of the court.…" Footnote 11: "a best interest inquiry is much broader than an evaluation of whether the child's physical or emotional welfare is in jeopardy." Footnote 22: nine factors to determine the child's best interest "are: (1) the desires of the child; (2) the emotional and physical needs of the child now and in the future; (3) the emotional and physical danger to the child now and in the future; (4) the parental abilities of the individuals seeking custody; (5) the programs available to assist these individuals to promote the best interest of the child;(6) the plans for the child by these individuals or by the agency seeking custody; (7) the stability of the home or proposed placement; (8) the acts or omissions of the parent

which may indicate that the existing parent-child relationship is not a proper one; and (9) any excuse for the acts or omissions of the parent."

"Encouragement of mediation as an alternative form of dispute resolution is critically important to the emotional and psychological well-being of children involved in high-conflict custody disputes.… It is 'the policy of this state to encourage the peaceable resolution of disputes, *with special consideration given to disputes involving the parent-child relationship*.…"

The "Legislature has clearly directed that, subject to a very narrow exception involving family violence, denial of a motion to enter judgment on an MSA based on a best interest determination, where that MSA meets the statutory requirements" is not a tool to safeguard children's welfare.

Footnote 7: "Mandamus relief is available to remedy a trial court's erroneous refusal to enter judgment on an MSA."

"Subsection (d) provides that an MSA is binding on the parties if it is signed by each party and by the parties' attorneys who are present at the mediation and states prominently and in emphasized type that it is not subject to revocation." A narrow exception "allow[s] a court to decline to enter judgment on even a statutorily compliant MSA if a party to the agreement was a victim of family violence, the violence impaired the party's ability to make decisions, *and* the agreement is not in the best interest of the child." Unless these conditions are met, the trial court cannot substitute its judgment for the mediated agreement of the parties. "Allowing a court to decline to enter judgment on a valid MSA on best interest grounds without family violence findings would impermissibly render the family violence language in subsection (e-1) superfluous."

After an arbitration, the law explicitly allows the trial court to consider the best interest of the child. "This distinction between arbitration and mediation makes sense because the two processes are very different. Mediation encourages parents to work together to settle their child-related disputes, and shields the child from many of the adverse effects of traditional litigation. On the other hand, arbitration simply moves the fight from the courtroom to the arbitration room."

"[S]ection 153.0071(e) reflects the Legislature's determination that it is appropriate for parents to determine what is best for their children within the context of the parents' collaborative effort to reach and properly execute an MSA." To the extent this conflicts with the general provision safeguarding a child's best interest, "section 153.0071 prevails." "The use of the word "notwithstanding" indicates that the Legislature intended section 153.0071 to be controlling." Second, its specific language "trumps section 153.002's more general mandate." Finally, it is the more recent statutory enactment.

Though "courts can never stand idly by while children are placed in situations that threaten their health and safety," refusing to enter an MSA is not one of the proper methods. For instance Footnote 13: "'In a suit, the court may make a temporary order, including the modification of a prior temporary order, for the safety and welfare of the child . . . .'"

Mediation has inherent safeguards. "Under Texas law, '[m]ediation is a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them.' To qualify for appointment [as a mediator] by the court… , a person must meet certain requirements for training in alternative dispute resolution techniques. To qualify for appointment 'in a dispute relating to the parent-child relationship,' the person must complete additional training 'in the fields of family dynamics, child development, and family law.'"

Footnote 17: when "entering judgment on an MSA, trial courts may include '[t]erms necessary to effectuate and implement the parties' agreement' so long as they do not substantively alter it."

7. *Office of the Attorney General v. Scholer*, 403 S.W.3d 859 (Tex. 2013)(6/28/13)

Child support case. Father and mother agreed to cease his child support if he relinquished rights to child. Though he signed the papers, mother's attorney never filed them. Years later, when the AG sought back child support, father pleaded estoppel. But the Supreme Court ruled that "estoppel is not a defense to a child support enforcement proceeding."

"Each parent owes an obligation to provide child support." "The Family Code characterizes child support as a duty rather than a debt." "[C]ourt-ordered child support reflects a parent's duty to his child, not a debt to his former spouse. Except as provided by statute, the other parent's conduct cannot eliminate that duty."

The "Uniform Interstate Family Support Act (UIFSA), which allows Texas courts to enforce support orders issued by other states.…" The "Social Security Act requires each state to designate an agency to enforce child support orders," which in Texas is the AG. "Among its powers is the ability to seek a court order to withhold income from a child support obligor's disposable earnings." An "'application for or the receipt of financial assistance … constitutes an assignment'" to the AG of support rights.

There is only one defense to motions to enforce child support: "that the obligee voluntarily relinquished possession and control of the child to the obligor and the obligor provided actual support to the child." Footnote 5: the obligor may also plead "plead that he

could not provide the amount of support ordered, did not possess property that could be sold to raise the required funds, tried unsuccessfully to borrow the funds, and knew of no other source from which the money could be legally obtained."

In child support cases, "'the court shall confirm the amount of arrearages and render one cumulative money judgment.'" The "'court may not reduce or modify the amount of child support arrearages,' but such arrearages 'may be subject to a counterclaim or offset.…'" "Because courts are prohibited from making additional adjustments, affirmative defenses that are not included in the statute, like estoppel, are also prohibited because they would require courts to make discretionary determinations." Footnote 11: "the statute prohibits a trial court's independent judgment or discretion in determining arrearages, instead envisioning that a judge will 'act[] as a mere scrivener.'" The "assertion of the defense would compromise the welfare of a child who is at the mercy of his parents' choices." The "parents' actions, either collectively or alone, cannot affect the support duty, except as provided by statute." "Courts may not condition the payment of child support on whether one parent allows the other to have access to the child." "If he is displeased with access, he may ask the court to modify or enforce the visitation order, or to hold the custodial parent in contempt for violating it." But, "he may not rely 12 on the other parent's actions to extinguish his support duty."

8. *In the Interest of E.C.R., Child*, 402 S.W.3d 239 (Tex. 2013)(6/14/13)

Termination of parental rights. The parent's rights can be terminated "if the child has been in the State's custody for at least nine months, and the State proves, by clear and convincing evidence, that the parent failed to comply with a court order that specified what she had to do to get her child back. The provision applies, however, only if the child was removed from the parent … for 'abuse or neglect of the child.'" The Supreme Court ruled that this includes the risk of harm, and that "the parent's abuse or neglect of another child is relevant to that determination." Here, it was demonstrated that the parent had not complied with court ordered requirements.

The state must "overcome significant burdens before removing a child from his parent. These … are essential to protect the parent's fundamental liberty interest in the companionship, care, custody, and management of her children. But … 'it is also essential that emotional and physical interests of the child not be sacrificed merely to preserve that right.'"

"The Department, a law enforcement officer, or a juvenile probation officer may take possession of a child without a temporary restraining order if the child faces an immediate danger to his physical health or safety; has been a victim of sexual abuse; is in the possession of someone who is using a controlled substance, if it poses an immediate danger to the child's physical health or safety; or is in the possession of someone who has permitted him to remain on premises used for methamphetamine manufacture." "Within fourteen days after the Department has taken possession of the child, the trial court must hold a full adversary hearing.… Continued removal is warranted only if the child faces a continuing danger to his physical health or safety." Reviewing continuing "danger to his physical health or safety, … the court may consider whether the child's household includes a person who has: '(1) abused or neglected another child in a manner that caused serious injury to or the death of the other child; or (2) sexually abused another child.'"

"[S]ubsection O requires proof of abuse or neglect," and those terms can "include risk."

"Although chapter 261's 'abuse' and 'neglect' definitions do not govern in chapter 262, they surely inform the terms' meanings."

Footnote 8: "'Because temporary orders in a suit affecting a parent-child relationship are not subject to interlocutory appeal under the family code, mandamus review is appropriate.'"

Reasons "supporting termination under subsection O also support the trial court's best interest finding." Footnote 9: "These [best interest] factors include: (1) the child's desires; (2) the child's present and future emotional and physical needs; (3) any present or future emotional and physical danger to the child; (4) the parental abilities of the individuals seeking custody; (5) the programs available to assist the individuals seeking custody to promote the child's best interest; (6) the plans for the child by the individuals or agency seeking custody; (7) the stability of the home or proposed placement; (8) the parent's acts or omissions which may indicate that the existing parent-child relationship is improper; and(9) any excuse for the parent's acts or omissions."

9. *In the Matter of L.D.C., a Child*, 400 S.W.3d 572 (Tex. 2013)(5/24/13)

After a street party, a juvenile who fired a rifle in the air and towards a police officer (behind whom were houses) was charged with attempted capital murder, aggravated assault on a police officer, and deadly conduct. After the juvenile did not object to a disjunctive jury instruction for one charge, the Supreme Court ruled the trial court did not commit "reversible error by submitting elements of an offense to the jury disjunctively, allowing for a nonunanimous verdict."

In juvenile cases, jury verdicts must be unanimous. "In criminal cases, in which the jury verdict must also be unanimous, 'when a single crime can be committed in various ways, jurors need not

agree upon the mode of commission.'" "While the jury did not have to agree on how an offense was committed, it had to agree 'on the same act for a conviction', not 'mere[ly] . . . on a violation of a statute'."

Since there was no objection, "the question then became whether the error was reversible when it was not preserved. The Family Code provides that in juvenile justice cases, '[t]he requirements governing an appeal are as in civil cases generally.' In civil cases, unobjected-to charge error is not reversible unless it is fundamental, which occurs only 'in those rare instances in which the record shows the court lacked jurisdiction or that the public interest is directly and adversely affected as that interest is declared in the statutes or the Constitution of Texas.' Fundamental error is reversible if it 'probably caused the rendition of an improper judgment [or] probably prevented the appellant from properly presenting the case to the court of appeals.' But we have stated that 'a juvenile proceeding is not purely a civil matter. It is quasicriminal, and . . . general rules requiring preservation in the trial court . . . cannot be applied across the board in juvenile proceedings.' In criminal cases, unobjected-to charge error is reversible if it was 'egregious and created such harm that his trial was not fair or impartial', considering essentially every aspect of the case."

"[W]e will not base reversible error on the possibility that a juror might act irrationally, which a correct instruction cannot prevent. Under the civil standard of review, error in the trial court's disjunctive submission of deadly conduct did not probably cause an improper judgment or probably prevent a proper presentation of L.D.C.'s appeal. Under the criminal standard of review, the error was not egregious, and '[i]t is . . . highly likely that the jury's verdicts . . . were, in fact, unanimous.'" Any error was not harmful.

10. *Tedder v. Gardner Aldrich, LLP*, 421 S.W.3d 651 (Tex. 2013)(5/17/13) ("corrected opinion" was issued 12/13/13)

In divorce proceeding, wife's attorney's firm intervened and filed a sworn account to recover its fees. Wife and husband agreed that wife only would pay fees; later wife filed for bankruptcy. Firm appealed seeking to require husband to pay fees, arguing that husband failed to controvert firm's sworn account, and that husband was liable because fees were "necessaries." The Supreme Court ruled that the husband was a stranger to the sworn account, so he was not required to file a controverting affidavit, and that "legal services provided to one spouse in a divorce proceeding are [not] necessaries for which the other spouse is statutorily liable to pay the attorney."

The firm contended the fees were "necessaries," for which husband was liable under TEX. FAM. CODE § 2.501.

There is an "'erroneous supposition that all 'community debts' are equally shared by the spouses..… [Other than] necessaries, debt incurred by only one spouse does not affect the other spouse at all except that it makes the nonobligated spouse's share of community property liable for payment if the property sought for payment is subject to the sole or joint management of the spouse who incurs the debt'" Marriage "'itself does not create joint and several liability.'"

A spouse's liability for debts of the other spouse "is determined by statute." TEX. FAM. CODE § 3.201 makes one liable for the other's debts only when he acts as the other's agent or the "debt [is] for necessaries.…" Under § 2.501, each spouse has a duty to support the other, and if he fails, is liable to one who supplies necessaries. "Thus, one spouse is not liable for the other's debt unless the other incurred it as the one's agent or the one failed to support the other and the debt is for necessaries"

A "spouse's necessaries are things like food, clothing, and habitation … and we have squarely rejected the view that a spouse's legal fees in a divorce proceeding fall into this category."

Footnote 21: Here, wife's "legal fees might have been paid from community property … [but § 3.202(c)] does not impose liability on" husband. Here the parties agreed the husband was not required to pay wife's attorney. Footnote 29: "Section 106.002 of the Family Code authorizes a trial court in a suit affecting the parent-child relationship to 'render judgment for reasonable attorney's fees and expenses and order the judgment and postjudgment interest to be paid directly to an attorney.…'" The Court did not determine if "legal services can be considered necessaries for a child."

11. *Granado v. Meza*, 398 S.W.3d 193 (Tex. 2013)(4/19/13)

In this child support case, the trial court found $500 in arrearages based upon a clerical error in an Attorney General's record indicating that the support obligation ended 12 years earlier than it actually did, and another entry in an AG statement record indicating it may not include payments made to local registries. But the father testified he only paid through the AG. The Supreme Court affirmed the finding of arrearages, but reversed the amount, saying "a trial court's determination of child-support arrearages must be set aside if there is no evidence to support it."

A "determination of arrearages must be set aside if no evidence supports it." "The clerical error is no evidence of arrearages because the OAG could not modify this child-support obligation. And because the

obligor testified that he only paid the OAG, the Payment Record's disclaimer that it might not include payments to local registries is no evidence of arrearages."

"TEX. FAM. CODE § 234.009(b) [] 'The record of child support payments maintained by the state disbursement unit is the official record of a payment received directly by that unit.'" But, here, the case "conclusively establishes the child-support obligation did not terminate until [child] reached the age of 18."

Family Code Section 157.323(c) requires the court to "render judgment against the obligor for the amount due, plus costs and reasonable attorney's fees" if arrearages are owed. Further, Section 158.309 provides for "income withholding."

Here, there was evidence of arrearages, but "no evidence" of the amount. The "OAG clerical error cannot serve as a basis for modifying the child-support obligation."

12. *In the Interest of J.M. and Z.M., Minor Children*, 396 S.W.3d 528 (Tex. 2013)(3/15/13)

After family court terminated the parent-child relationship, counsel for parent filed a pleading combining a motion for new trial with a notice of appeal. The Supreme Court ruled this was sufficient. "Because the combined filing was titled a notice of appeal and expressed the party's intent to appeal to the court of appeals, we conclude the document was a bona fide attempt to invoke appellate jurisdiction."

"The Legislature has given precedence to appeals involving the termination of the parent-child relationship … and made such appeals subject to … accelerated appeals. In an accelerated appeal, the appellant must file a notice of appeal within 20 days after the trial court signs its judgment or order. A party generally perfects its appeal by filing a written notice of appeal with the trial court clerk, TEX. R. APP. P. 25.1(a), but if (as here) a notice of appeal is prematurely filed, it is 'deemed filed on the day of, but after, the event that begins the period for perfecting the appeal.' Filing a notice of appeal invokes the court of appeal's jurisdiction over the parties to the trial court's judgment or order."

A "'timely filed document, even if defective, invokes the court of appeals' jurisdiction.'" In addition, "'the court of appeals, on appellant's motion, must allow the appellant an opportunity to amend or refile the instrument required by law or our Rules to perfect the appeal.'"

"Nothing … prevents a party from combining a notice of appeal with a motion for new trial (or filing both the motion and notice simultaneously)." "Moreover, giving effect to the notice of appeal portion does not render the motion for new trial portion meaningless: the trial court retained plenary power over the case to grant or deny the motion for new trial."

Here, appellant expressed "a bona fide attempt to invoke appellate jurisdiction."

13. *In re the Office of the Attorney General*, 422 S.W.3d 623 (Tex. 2013)(3/8/13)

After ex-husband was ordered to pay child support, he made partial payments some months, and no payment another month. The Domestic Relations Office filed a motion to enforce the order, alleging six violations of the child support order. Before the hearing, he paid the amounts pleaded, but was in arrears for the months after the motion was filed but before the hearing. The Supreme Court ruled he had failed to meet the terms of a statute allowing him to purge his contempt by becoming current in his obligations, and upheld the trial court's order holding him in contempt.

"'The court may not find a respondent in contempt of court for failure to pay child support if the respondent appears at the hearing with . . . evidence . . . showing that the respondent is current in the payment of child support as ordered by the court.'" Though the finding of contempt is based upon the violations alleged in the motion, the Supreme Court interpreted this "purging" provision to mean "current" for the child support owed by the date of the hearing, not the date the enforcement motion was filed.

Footnote 1: "Chapter 231 of the Family Code designates the Office of the Attorney General as the agency responsible for implementing federal Title IV-D requirements regarding child support. TEX. FAM. CODE § 231.001.… Chapter 203 provides for the creation of domestic relations offices to collect, monitor, and enforce child support in their respective jurisdictions.… Under the terms of the agreement between the [Tarrant] County Domestic Relations Office and the Attorney General's Office, the Domestic Relations Office provides trial court Title IV-D services, while the Attorney General handles both trial court and appellate matters."

"Child support collection is serious business; so much so that the federal government has enacted legislation requiring states to abide by certain mandates to help struggling parents obtain child support in order to receive federal funding."

"One of the primary tools [for] child support enforcement … is the contempt power of the court.… Contempt is an inherent power of the court… and chapter 157 of the Family Code provides the statutory framework for utilizing this power as a mechanism to enforce child support.…"

"Upon finding an obligor in contempt, the trial court may … impose a sentence that is either civil or criminal, or both.… Civil contempt is prospective, involving measures to encourage a contemnor to pay

child support arrearages, while criminal contempt is punitive, usually imposing jail time for past failures to pay.… [There is] a third option: a court may find an obligor in contempt and impose a jail sentence, but suspend commitment and place the obligor on community supervision.… [This] (1) encourages obligors to pay to avoid serving their jail sentences, and (2) … enable[es] them to work and avoid further arrearages…. Significantly, utilization of this tool is dependent upon a finding of contempt."

"A contempt order is void if it is beyond the power of the court or violates due process."

Section 157.162(d) allows the "obligor to escape a valid finding of contempt.…" Footnote 5: A purging provision "allows an obligor to purge himself or herself of the consequences of conduct that would otherwise be subject to a finding of contempt.…" This provides an incentive "to pay back-due arrearages."

The Court's holding fits the "plain language" of the statute.

"[S]pecific violations of a court order must be pled to support a contempt finding. However, the purging provision does not affect the basis of the contempt finding; rather, it provides a basis for escaping an otherwise valid finding of contempt. We therefore disagree that the purging provision implicates notice requirements." The motion must "the amount owed, the amount paid, and the amount of arrearages. If contempt is requested, the motion must also include 'the portion of the order allegedly violated and, for each date of alleged contempt, the amount due and the amount paid, if any.' Thus, a respondent may be found in contempt only for violations that are specifically pled.…"

The respondent is entitled to notice. But "[t]he purging provision at issue is akin to an affirmative defense.…" Footnote 10: "[I]t is analogous to an affirmative defense in that it precludes a contempt finding notwithstanding a proven violation of a prior order and places the burden of proof on the respondent to show that it applies. *See* BLACK'S LAW DICTIONARY 482 (9th ed. 2009) (defining an affirmative defense as '[a] defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true,' and noting that '[t]he defendant bears the burden of proving an affirmative defense')."

Footnote 9: A "criminal contempt conviction requires … 'violation' of 'a reasonably specific order.'" Footnote 11: "[B]ecause 'contempt proceedings are quasi-criminal in nature,' such proceedings 'should conform as nearly as practicable to those in criminal cases.'"

"In the context of criminal proceedings, a charging instrument like an indictment must 'charge[] the commission of the offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is meant, and with that degree of certainty that will give the defendant notice of the particular *offense with which he is charged*.'" But, "there is no requirement that a charging instrument provide notice of the affirmative defenses that may be available to a criminal defendant. Similarly, the notice to which respondents in contempt proceedings are entitled extends only to the violations for which they may be found in contempt.…" Notice is provided by the original order and the statute.

NN. Prisoners' Cases and Criminal Law

1. *In re Michael Blair*, 408 S.W.3d 843 (Tex. 2013)(8/23/13)

Prisoner was wrongfully convicted and incarcerated for murder. But, he was incarcerated for a conviction that occurred beforehand, so the Supreme Court ruled he was not entitled to compensation.

"The Tim Cole Act entitles a person who has been wrongfully imprisoned to compensation from the State, but payments terminate 'if, after the date the person becomes eligible for compensation . . . , the person is convicted of a crime punishable as a felony.' The issue in this case is whether the Act requires payments to a felon who remains incarcerated for a conviction that occurred before he became eligible for compensation. We conclude it does not.…"

The Act was adopted in 1965, substantially revised in 2001, the annual compensation was raised in 2007, and again in 2009, at which time "the cause of action for damages was abolished."

"The Act … requires compensation to be paid even if the wrongfully convicted person cannot rejoin society because he is dead.… [C]riminal justice officials have a responsibility for helping wrongfully convicted inmates return to society that is independent of the compensation required by the Act."

When a parolee's parole is revoked due to a wrongful conviction, he is entitled to compensation.

"[C]ourts will not interpret statutes to work absurd results. But … it is certainly not absurd to pay reparation for the wrong done while [the prisoner] is still incarcerated."

Here, the critical phrase "is convicted" could refer to the event of adjudication of a conviction, or the status of having been convicted. "The statutory text thus admits of two linguistically reasonable interpretations, but the consequences of one, conditioning compensation on the date conviction is adjudicated, are, we think, plainly unreasonable." Accordingly, the Court chose the latter. The "statute denies compensation payments for wrongful imprisonment to a claimant who, during the time he would receive them, is convicted of a felony, regardless of when the conviction was adjudicated,

whether before or after he became eligible for compensation."

There is no statutory limit to how often a person can apply for benefits. "Even if a claimant does not apply to cure a problem in the denial of compensation, we are not convinced that the failure precludes judicial review. The Act's procedures should not be applied to trick unwary applicants out of the compensation they are due."

2. *In the Matter of L.D.C., a Child*, 400 S.W.3d 572 (Tex. 2013)(5/24/13)

After a street party, a juvenile who fired a rifle in the air and towards a police officer (behind whom were houses) was charged with attempted capital murder, aggravated assault on a police officer, and deadly conduct. After the juvenile did not object to a disjunctive jury instruction for one charge, the Supreme Court ruled the trial court did not commit "reversible error by submitting elements of an offense to the jury disjunctively, allowing for a nonunanimous verdict."

In juvenile cases, jury verdicts must be unanimous. "In criminal cases, in which the jury verdict must also be unanimous, 'when a single crime can be committed in various ways, jurors need not agree upon the mode of commission.'" "While the jury did not have to agree on how an offense was committed, it had to agree 'on the same act for a conviction', not 'mere[ly] . . . on a violation of a statute'."

Since there was no objection, "the question then became whether the error was reversible when it was not preserved.… [I]n juvenile justice cases, '[t]he requirements governing an appeal are as in civil cases generally.' In civil cases, unobjected-to charge error is not reversible unless it is fundamental, which occurs only 'in those rare instances in which the record shows the court lacked jurisdiction or that the public interest is directly and adversely affected as that interest is declared in the statutes or the Constitution of Texas.' Fundamental error is reversible if it 'probably caused the rendition of an improper judgment [or] probably prevented the appellant from properly presenting the case to the court of appeals.' But we have stated that 'a juvenile proceeding is not purely a civil matter. It is quasicriminal, and . . . general rules requiring preservation in the trial court . . . cannot be applied across the board in juvenile proceedings.' In criminal cases, unobjected-to charge error is reversible if it was 'egregious and created such harm that his trial was not fair or impartial', considering essentially every aspect of the case."

"[W]e will not base reversible error on the possibility that a juror might act irrationally, which a correct instruction cannot prevent. Under the civil standard of review, error in the trial court's disjunctive submission of deadly conduct did not probably cause an improper judgment or probably prevent a proper presentation of L.D.C.'s appeal. Under the criminal standard of review, the error was not egregious, and '[i]t is . . . highly likely that the jury's verdicts . . . were, in fact, unanimous.'" Any error was not harmful.

3. *Strickland v. Medlen*, 397 S.W.3d 184 (Tex. 2013)(4/5/13)

Plaintiffs' dog escaped his yard, was picked up, and taken to a municipal animal shelter. A city worker mistakenly placed the dog on a list allowing him to be killed before plaintiffs returned with the cash necessary to pay the fees to get him out. The Supreme Court disallowed non-economic damages for property like a pet, but noted that "Texas law forbids animal cruelty generally (both civilly and criminally), and bans dog fighting and unlawful restraints of dogs specifically—because animals, though property, are unique."

4. *In re the Office of the Attorney General*, 422 S.W.3d 623 (Tex. 2013)(3/8/13)

Criminal contempt proceeding based upon ex-husband's failure to pay child support.

Footnote 9: A "criminal contempt conviction requires … 'violation' of 'a reasonably specific order.'" Footnote 11: "[B]ecause 'contempt proceedings are quasi-criminal in nature,' such proceedings 'should conform as nearly as practicable to those in criminal cases.'"

"In the context of criminal proceedings, a charging instrument like an indictment must 'charge[] the commission of the offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is meant, and with that degree of certainty that will give the defendant notice of the particular *offense with which he is charged*.'" But, "there is no requirement that a charging instrument provide notice of the affirmative defenses that may be available to a criminal defendant."

5. *State of Texas v. Ninety Thousand Two Hundred Thirty-Five Dollars and No Cents*, 390 S.W.3d 289 (Tex. 2013)(1/25/13)

State filed forfeiture action against both the money found in a vehicle during a traffic stop and the vehicle itself. Defendant filed a motion for summary judgment. The Supreme Court ruled that the defendant's affidavit did not conclusively prove that the officers did not have a reasonable belief that the property had a substantial connection to illegal activity.

"'Contraband' is property of any nature used in the commission of various enumerated crimes.… Contraband is subject to seizure and forfeiture by the State.… The State … has the burden to show probable cause existed for seizure of the property. Probable

cause, in the context of civil forfeiture, is 'a reasonable belief that 'a substantial connection exists between the property to be forfeited and the criminal activity defined by the statute.'"

OO. Liability for Animals

1. *Strickland v. Medlen*, 397 S.W.3d 184 (Tex. 2013)(4/5/13)

Plaintiffs' dog escaped his yard, was picked up, and taken to a municipal animal shelter. A worker mistakenly placed the dog on a list allowing him to be killed before plaintiffs returned with the cash necessary to pay the fees to get him out. The Supreme Court ruled that "a bereaved dog owner [may not] recover emotion-based damages for the loss." The dog is "personal property, thus disallowing non-economic damages." "[R]ecovery in pet-death cases is … limited to loss of value, not loss of relationship." "Where a dog's market value is unascertainable, the correct damages measure is the dog's 'special or pecuniary value' (that is, its actual value)—the economic value derived from its 'usefulness and services,' not value drawn from companionship or other non-commercial considerations."

The law "label[s] [pets] as 'property' for purposes of tort-law recovery." The rule for damages of a dog has "two elements: (1) 'market value, if the dog has any,' or (2) 'some special or pecuniary value to the owner, that may be ascertained by reference to the usefulness and services of the dog.'" The "special or pecuniary value" refers not to the emotional bond, but to "the dog's usefulness and services." It is "not emotional and subjective; rather it is commercial and objective."

Footnote 58: The "actual value" of the pet "*can* include a range of other factors: purchase price, reasonable replacement costs (including investments such as immunizations, neutering, training), breeding potential (if any), special training, any particular economic utility, veterinary expenses related to the negligent injury, and so on."

The "'the emotional attachments a person establishes with each pet cannot be shoehorned into keepsake-like sentimentality for litigation purposes.'… [P]ermitting sentiment-based damages for destroyed heirloom property portends nothing resembling the vast public-policy impact of allowing such damages in animal-tort cases."

"[A]llowing loss-of-companionship suits raises wide-reaching public-policy implications that legislators are better suited to calibrate. … [There are] two legal policy concerns: (1) the anomaly of elevating 'man's best friend' over multiple valuable human relationships; and (2) the open-ended nature of such liability."

"Amid competing policy interests, including the inherent subjectivity (and inflatability) of emotion-based damages, lawmakers are best positioned to decide if such a potentially costly expansion of tort law is in the State's best interest, and if so, to structure an appropriate remedy."

"Texas law forbids animal cruelty generally (both civilly and criminally), and bans dog fighting and unlawful restraints of dogs specifically—because animals, though property, are unique."

Footnote 50: Quoting the Restatement: "'[R]ecovery for *intentionally* inflicted emotional harm is not barred when the defendant's method of inflicting harm is by means of causing harm to property, including an animal.'"

PP. Taxes

1. *Galveston Central Appraisal District v. TRQ Captain's Landing*, 423 S.W.3d 374 (Tex. 2014)(1/17/14)

A Community Housing Development Organization (CHDO) is designed to provide low income housing, and receives certain ad valorem tax advantages. The Supreme Court previously "held in *AHF-Arbors* that equitable title [rather than legal title] is sufficient" for the tax exemption. Here, the Court ruled that "the CHDO's application for an exemption was timely" because the entity "application [was] made within thirty days of the date it acquired equitable title to the apartments…."

Texas Tax Code § 11.182 provides a tax exemption for a CHDO.

"Generally, eligibility for an exemption is determined as of January 1 of the year in which the exemption is sought, and a person must apply for the exemption before May 1 of that year." But, § 11.436(a) allows an application within 30 days after an entity "acquires the property." Here, that includes equitable title.

2. *Susan Combs v. Health Care Services Corporation*, 401 S.W.3d 623 (Tex. 2013)(6/7/13)

Government contractor sought a tax refund under the "Tax Code's sale-for-resale exemption, which grants purchasers of taxable goods and services a sales-tax exemption if they resell the items (since the ultimate purchaser will pay any tax due)." The Supreme Court held "that the exemption applies to the tangible personal property and taxable services, but not to the leases of tangible personal property.…" In addition, "the requirement that a taxpayer who claims a refund show he has not collected the tax from someone else does not also require the taxpayer to show he has not been reimbursed for the tax."

The Court addressed three categories of transactions. First, "Tangible Personal Property. The exemption applies even when, as here, the resale consists of bare title transfer of tangible personal property that is consumed by the taxpayer to perform

nontaxable services." Second, "Taxable Services. Sale-for-resale of a taxable service can occur, as here, by directing that the service be performed for another party in return for consideration from that party." Third, "Leases of Tangible Personal Property. These fall outside the sale-for-resale exemption, as they are not resold unless they are re-leased or transferred in some other way to another purchaser."

"Title transfer for consideration is one type of 'sale.'" The exemption does not inquire into the "*primary* purpose of the sale." Footnote 8: "'in the area of tax law, like other areas of economic regulation, a plain-meaning determination should not disregard the economic realities underlying the transactions in issue,'…. However, … if the statute does 'not impose, either explicitly or implicitly,' the 'extra-statutory requirement' urged by the Comptroller, 'we decline to engraft one—revising the statute under the guise of interpreting it.'"

In "the sales tax context, tax is collected by a seller adding the sales tax to an initial sales price and then charging that amount to the buyer as part of the new sales price." "Money is plainly and inarguably fungible.…"

3. *TracFone Wireless, Inc. v. Commission on State Emergency Communications*, 397 S.W.3d 173 (Tex. 2013)(4/5/13)

Tax statute enacted in 1997 imposed a 50¢/month fee on cell phone usage; statute effective in 2010 imposed a flat 2% fee on prepaid cell phones. The Supreme Court ruled that the 1997 statute did not impose a fee on prepaid wireless usage, only the 2010 law did. "The two e911 statutes are either ambiguous, meaning they must be construed narrowly in favor of the taxpayer, or they are unambiguous, meaning prepaid customers are impermissibly double-taxed."

"Chapter 771 of the Health and Safety Code governs the e911 fee.…"

Footnote 3: "[T]he parties themselves treat the so-called 'fees' as taxes. We therefore do the same. After all, the Legislature's decision to label a charge a 'fee' rather than a 'tax' is not binding on this Court.… A charge is a fee rather than a tax when the primary purpose of the fee is to support a regulatory regime governing those who pay the fee.… Funding an e911 system is a revenue-raising purpose, even though the revenue is put into a special fund for e911 services rather than the general revenue. 'Because money is fungible,' the determination of whether something is a fee or a tax 'is not controlled by whether the assessments go into a special fund or into the State's general revenue.'"

"Several cardinal … principles dictate strictness in tax matters: (1) tax authorities cannot collect something that the law has not actually imposed; (2) imprecise statutes must be interpreted 'most strongly against the government, and in favor of the citizen'; and (3) we will not extend the reach of an ambiguous tax by implication, nor permit tax collectors to stretch the scope of taxation beyond its clear bounds."

The 1997 law appears to apply. "Section 771.0711 doubtless intended to tax all wireless service that then existed, and certainly an old statute can encompass new technologies if the statutory text is worded broadly enough.…" But, it was passed before the advent of prepaid service, and "the mandatory mechanics of the pre-2010 statute seem nearly impossible to apply coherently to prepaid service." Those provisions "are no less mandatory" than the statutory language which appears to include prepaid service in the 1997 law. Footnote 15: The section was later amended to exclude prepaid service.

If both the old and new statutes applied, "that would result in impermissible double taxation that offends the Equal and Uniform Clause" of the Texas Constitution.

The 2010 law "would be utterly meaningless if it did not apply, meaning we must construe [the 1997 statute] as inapplicable." Footnote 40: "In enacting a statute, it is presumed that . . . the entire statute is intended to be effective.…"

There is "an ancient pro-taxpayer presumption: The reach of an ambiguous tax statute must be construed 'strictly against the taxing authority and liberally for the taxpayer.'" There must be "notice of what tax is due and how it must be paid *before* imposing the obligation." Since taxes are "confiscatory and carr[y] steep noncompliance penalties, … policymakers must … instruct taxpayers how they are expected to comply." "We have even applied this presumption in reviewing a formal administrative adjudication that found against a taxpayer."

"[D]eference to the regulations or interpretations of an agency charged with enforcing a tax has its place—for example when … weighing competing interpretations of the amount owed. However, agency deference does not displace strict construction when the dispute is not over how much tax is due but, more fundamentally, whether the tax applies at all." And, an agency's "interpretation must be reasonable."

4. *Susan Combs, Comptroller v. Roark Amusement & Vending, L.P.*, 422 S.W.3d 632 (Tex. 2013)(3/8/13)

Amusement company which owned and operated "claw" type machines in which players attempted to grasp and win a toy, challenged the taxability of the purchase by it of the toys. The Supreme Court agreed that "the toys were exempt from sales tax under the Tax Code's sale-for-resale exemption."

The code generally imposes a tax on "'each sale of a taxable item.'" This includes personalty and

services, such as "amusement." It also expressly treats coin-operated machines.

Here, the plain meaning of the statutes "qualifies [defendant] for a sales-tax exemption" for the toys in the machines. They are "subject to the sale-for-resale exemption" because they are personalty acquired for the purpose of transfer, and are "indispensable" to the game.

An "item exempt from taxation may nevertheless be included in the universe of taxable items."

Under the tax law, "like other areas of economic regulation, a plain meaning determination should not disregard the economic realities underlying the transactions in issue."

Here, all toys that were not damaged or stolen were transferred to customers, and the law does not require that a customer win each time the game is played. "The wording of the statute and the economic realities of the transaction do not require [an] 'everyone's a winner' result."

The Comptroller urged that its rules required each player to win, though the taxpayer disputed that. "Regardless of which Comptroller Rule applies, the Comptroller cannot through rulemaking impose taxes that are not due under the Tax Code; the question of statutory construction presented in this case ultimately is one left to the courts."

QQ. Religious Organizations and Religious Issues

1. *Masterson et al. v. The Dioceses of Northwest Texas, et al.*, 422 S.W.3d 594 (Tex. 2013)(8/30/13)

Local church split from national organization over doctrinal differences. The issue "is what happens to the property when a majority of the membership of a local church votes to withdraw from the larger religious body of which it has been a part." The title to realty was held by a Texas non-profit corporation associated with the local church. The Supreme Court ruled that, of two constitutionally permissible approaches, "the neutral principles methodology should be applied.…" [*See, The Episcopal Diocese* decision, below.]

The two constitutionally permissible methodologies are the "deference" method and the "neutral principals of law" method. The latter "better conforms to Texas courts' constitutional duty to decide disputes within their jurisdiction while still respecting limitations the First Amendment places on that jurisdiction. Under the neutral principles methodology, courts decide non-ecclesiastical issues such as property ownership based on the same neutral principles of law applicable to other entities … while deferring to religious entities' decisions on ecclesiastical and church polity questions."

The First Amendment "'severely circumscribes the role that civil courts may play in resolving church property disputes,' by prohibiting civil courts from inquiring into matters concerning ''theological controversy, church discipline, ecclesiastical government, or the conformity of the members of a church to the standard of morals required of them.'"

Under the "deference" method, a court "defers to and enforces the decision of the highest authority of the ecclesiastical body to which the matter has been carried." This is required "where ecclesiastical questions are at issue; as to such questions, deference is compulsory because courts lack jurisdiction to decide ecclesiastical questions. But when the question to be decided is not ecclesiastical, courts are not deprived of jurisdiction by the First Amendment and they may apply" the "neutral principals" method.

"Under the neutral principles methodology, ownership of disputed property is determined by applying generally applicable law and legal principles. That application will usually include considering evidence such as deeds to the properties, terms of the local church charter (including articles of incorporation and bylaws, if any), and relevant provisions of governing documents of the general church." A state's presumptive use of majority rule is permissible.

"Courts do not have jurisdiction to decide questions of an ecclesiastical or inherently religious nature, so as to those questions they must defer to decisions of appropriate ecclesiastical decision makers.… [But,] [p]roperly exercising jurisdiction requires courts to apply neutral principles of law to non-ecclesiastical issues involving religious entities in the same manner as they apply those principles to other entities and issues. Thus, courts are to apply neutral principles of law to issues such as land titles, trusts, and corporate formation, governance, and dissolution, even when religious entities are involved."

"Civil courts are constitutionally required to accept as binding the decision of the highest authority of a hierarchical religious organization to which a dispute regarding internal government has been submitted."

"A religious organization may choose to organize as a domestic non-profit organization and acquire, own, hold, mortgage, and dispose of or invest its funds in property for the use and benefit of and in trust for a higher or other organization."

"[W]hether and how a corporation's directors or those entitled to control its affairs can change its articles of incorporation and bylaws are secular, not ecclesiastical, matters." An "external entity [is not] empowered to amend [the bylaws] absent specific, lawful provision in the corporate documents. 'The power to alter, amend, or repeal the by-laws or to adopt new by-laws shall be vested in the members . . . .')." "Good Shepherd was incorporated pursuant to secular Texas corporation law and Texas law dictates how the corporation can be operated, including how and when

corporate articles and bylaws can be amended and the effect of the amendments."

In addition, title to the real property was in the locally-controlled corporation. There was no express trust in favor of the national organization, so the "corporation owns the property." The church law "simply does not contain language making the trust *expressly* irrevocable. 'A settlor may revoke the trust unless it is irrevocable by the express terms of the instrument creating it or of an instrument modifying it.'. Even if the [church law] could be read to *imply* the trust was irrevocable, that is not good enough under Texas law. The Texas statute requires *express* terms making it irrevocable."

2. *The Episcopal Diocese of Fort Worth v. The Episcopal Church*, S.W.3d (Tex. 2013)(8/30/13)

Local Episcopal church wanted to separate from the national organization. The issue was "what methodology is to be used when Texas courts decide which faction is entitled to a religious organization's property following a split or schism? In *Masterson* [see above] we held that the methodology referred to as 'neutral principles of law' must be used."

There are two approaches. The "deference approach to church property disputes utilize neutral principles of law to determine where the religious organization has placed authority to make decisions about church property. Once a court has made this determination, it defers to and enforces the decision of the religious authority if the dispute has been decided within that authority structure. But courts applying the neutral principles methodology defer to religious entities' decisions on ecclesiastical and church polity issues such as who may be members of the entities and whether to remove a bishop or pastor, while they decide non-ecclesiastical issues such as property ownership and whether trusts exist based on the same neutral principles of secular law that apply to other entities."

Whether the "application of the neutral principles approach is unconstitutional depends on how it is applied.… Because neutral principles have yet to be applied in this case, we cannot determine the constitutionality of their application."

The "four [neutral principals] referenced in *Jones* [are]: (1) governing documents of the general church, (2) governing documents of the local church entities, (3) deeds, and (4) state statutes governing church property." The trial court is not limited to these illustrative principles.

The "determination of who is or can be a member in good standing of TEC or a diocese is an ecclesiastical decision, the decisions by [church leaders] and the 2009 convention do not necessarily determine whether the earlier actions of the corporate trustees were invalid under Texas law. The corporation was incorporated pursuant to Texas corporation law and that law dictates how the corporation can be operated, including determining the terms of office of corporate directors, the circumstances under which articles and bylaws can be amended, and the effect of the amendments."

The national organization asserted the local church held properties in trust for it. "'Even if the [church law] could be read to imply the trust was irrevocable, that is not good enough under Texas law. [Texas Property Code § 112.051] requires *express* terms making it irrevocable.'"

RR. Utilities

1. *FPL Energy, LLC v. TXU Portfolio Management Company*, 426 S.W.3d 59 (Tex. 2014)(3/21/14 [*n.b.*, opinion is dated 3/21/13, but was released on 3/21/14])

Suit over contract to provide electricity for distribution. The Supreme Court ruled that plaintiff utility "owed no contractual duty to provide transmission capacity. However, … the liquidated damages provisions … are unenforceable as a penalty."

"In Texas, the electric industry consists of three main components: power generation, power transmission, and power distribution. Electric producers own and operate generating facilities. The Electric Reliability Council of Texas, Inc. (ERCOT), with few exceptions, manages the transmission of electricity through an interconnected network—or grid—of transmission lines. Finally, retail electric providers distribute electricity directly to consumers."

A Renewable Energy Credit "reflects one megawatt hour (MWh) 'of renewable energy that is physically metered and verified in Texas.' Electric producers thus simultaneously create both electricity from renewable sources and the corresponding RECs, yet producers may choose to sell the two separately. The REC trading program allows electric providers unable to satisfy the minimum renewable energy requirements to purchase and hold RECs 'in lieu of capacity from renewable energy technologies.'"

"When the grid lacks capacity to transmit all energy produced in an area, ERCOT issues curtailment orders instructing certain facilities to cease production."

"Transmission systems are owned and operated by transmission service providers.… [Plaintiff], as a power marketer, cannot own transmission systems."

Here, reading two relevant contract provisions together, defendant, the power generating company, "must make all interconnection arrangements so that electricity can reach the Delivery Point, and [plaintiff] must ensure that facilities exist beyond the Delivery Point to allow for delivery to consumers."

Grid congestion in this case was "beyond both parties' control." The contract allocates "the risk the risk of curtailment and congestion to [defendant] by clearly establishing that such events affect contract obligations only in certain instances not found here." And, despite the speed of electricity, parties can "conceptualize its location for the purpose" of energy contracts. "Although ERCOT made final curtailment decisions, that does not mean that neither party bore the risk in the event of congestion.…"

In this case, the "liquidated damages clauses compensate for REC deficiencies and leave common law remedies available for electricity deficiencies." "Limiting the liquidated damages provisions to their plain language also has the benefit of advancing stability in the renewable energy marketplace, including the vital role of RECs. Under the legislative scheme, RECs and energy are 'unbundled.' Electric providers may either generate their own renewable energy or purchase RECs on the open market. … We are loath to interfere with a functioning market when the language of the contracts does not so require."

2. *Texas Coast Utilities Coalition v. Railroad Commission of Texas*, 423 S.W.3d 355 (Tex. 2014)(1/17/14)

Certain cities and governmental entities objected when a gas utility sought a rate increase that included automatic adjustments in subsequent years. The Supreme Court ruled that "the Railroad Commission of Texas had authority to adopt a gas utility rate schedule that provided for automatic annual adjustments based on increases or decreases in the utility's cost of service."

Footnote 1: a "gas utility" is a person or entity that transmits "natural gas for compensation.…"

Texas has a comprehensive regulation of gas utilities through GURA, and they are monopolies. GURA is a substitute for competition, and should be liberally construed. GURA granted to the Commission authority to ensure compliance of gas utilities.

GURA provides "specific procedures that a gas utility must follow before it can increase its rate," and the burden is on the utility. It also provides "substantive requirements" for a utility's rates.

Here, the utility included a COSA clause, which provided for future automatic adjustments. The Court, analyzing the term "rate," rejected the coalition's claim that the Commission was not granted authority to include such a clause because it would deprive the municipalities of their original jurisdiction. "We conclude the COSA clause constitutes a 'rate' under subsection (B)…." Footnote 20: it is construed as a "practice" under subsection (B).

"[B]oth the Commission and the COSA must still comply with all of GURA's procedural, substantive, and jurisdictional mandates." Footnote 24: "This Court has previously recognized the Commission's discretion in dealing with 'regulatory lag' when acting within the authority the Legislature has delegated to it."

IV. FILING SUIT

A. Texas Rules of Civil Procedure

1. *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, S.W.3d (Tex. 2014)(5/9/14)

Dispute about whether plaintiff accepted a settlement offer from defendant. Defendant had tendered its settlement offer under "rule 167, which authorizes a party to recover certain litigation costs if the party made, and the party's opponent rejected, a settlement offer that was significantly more favorable than the judgment obtained at trial." A "non-conforming offer 'cannot be the basis for awarding litigation costs under'" under the rule. Defendant also invoked Ch. 42.

Footnote 8: Chapter 42 only applies to claims for "'monetary relief,'" and under Rule 167 an offer "'must not include non-monetary claims.'"

Rule 167 and Ch. 42 do not govern the issue of acceptance because, under them, the issue is attorney's fees. Here, the common law of contracts governs the purported offer and acceptance.

Footnote 4: the Family Code provides for mediated settlement agreements; when the requirements are met, "'a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11….'"

2. *In re Health Care Unlimited, Inc.*, S.W.3d (Tex. 2014)(4/25/14)

During jury deliberations, a representative of a corporate defendant communicated with a juror. The trial court granted a new trial, but the Supreme Court ruled that this was an abuse of discretion, holding that "there was no evidence that the communications probably caused injury."

The trial court initially had not held a hearing. The "Texas Rules of Civil Procedure require that 'the court shall hear evidence [of alleged juror misconduct] from the jury or others in open court,' *see* TEX. R.CIV. P. 327(a)."

"To warrant a new trial based on jury misconduct, the movant must establish that (1) the misconduct occurred, (2) it was material, and (3) it probably caused injury. TEX. R.CIV. P. 327(a).… The complaining party has the burden to prove all three elements before a new trial can be granted. Whether misconduct occurred and caused injury are questions of fact for the trial court."

Rule 327 protects the "integrity of the verdict" by "giving due consideration to the right to a jury trial in an effort to best protect the trial process." "Under Rule 327, protecting the trial process in the jury misconduct context requires a finding of misconduct, materiality,

and probable injury, not merely that there was an appearance of impropriety from which harm could be presumed."

3. *In re Ford Motor Company*, ___ S.W.3d ___ (Tex. 2014)(3/28/14)

In a park-to-reverse products liability case, plaintiff wanted to depose the employers of defendants' two retained experts to discover financial connections with defendants. But, the Supreme Court ruled that, on the facts of the case, the rules "do not permit such discovery."

"Rule 192.3(e) sets forth the scope of information that parties may discover about a testifying expert, which includes 'any bias of the witness.'" Rule 195 limits "testifying-expert discovery to that acquired through disclosures, expert reports, and oral depositions of expert witnesses," with a goal of "minimizing 'undue expense.'" "We adopted Rule 195—establishing disclosures, expert reports, and oral depositions as the permissible methods for expert discovery—after we decided *Walker* [*v. Packer*]."

Here, plaintiff's "fishing expedition, seeking sensitive [business and financial] information covering twelve years, is just the type of overbroad discovery the rules are intended to prevent."

4. *Crosstex Energy Services, L.P. v. Pro Plus, Inc.*, S.W.3d (Tex. 2014)(3/28/14)

"The Texas Rules of Civil Procedure encourage liberal discovery practices."

"Rule 90 deems any defect, omission, or fault in a pleading waived unless specifically pointed out by exception."

5. *Long v. Castle Texas Production Limited Partnership*, 426 S.W.3d 73 (Tex. 2014)(3/28/14)

This opinion generally addresses the date from which postjudment interest runs.

"We must interpret … rules of procedure to give them effect.…"

TEX.R.CIV.P. 301 provides that "'[o]nly one one final judgment shall be rendered in any cause except where it is otherwise specially provided by law.'"

Under TEX.R.CIV.P. 41, "a court may sever and proceed separately with a claim against a party and may sever different grounds of recovery before submission to the trier of fact." Footnote 15: A "claim is properly severable if: '(1) the controversy involves more than one cause of action, (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted, and (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues.' Avoiding prejudice, doing justice, and increasing convenience are the controlling reasons to sever."

TEX.R.CIV.P. 270 "provides that a court may permit additional evidence to be offered at any time when it clearly appears necessary to the due administration of justice, except that 'in a jury case no evidence on a controversial matter shall be received after the verdict of the jury.'" However, this does not apply when an appellate court remands for further proceedings.

6. *Tedder v. Gardner Aldrich, LLP*, 421 S.W.3d 651 (Tex. 2013)(5/17/13) ("corrected opinion" was issued 12/13/13)

Corrected opinion: footnote 2 changed. *See Tedder*, below, at 5/17/13.

7. *Zanchi v. Lane*, 408 S.W.3d 373 (Tex. 2013)(8/30/13)

In medical malpractice case, plaintiff served defendant with an expert report prior to when he was served with citation, partly because defendant was evading service. The Supreme Court ruled that sufficed, because the defendant was a "party."

The "pleading rules in the Texas Rules of Civil Procedure refer to those named in petitions as 'parties,' supporting a conclusion that service of process is not a prerequisite to that designation. TEX. R. CIV. P. 79 (requiring that a petition list the 'parties')."

"Rule 106 by its terms applies solely to service of citation."

Footnote 4: "Rule 21a of the Texas Rules of Civil Procedure authorizes service by one of four methods of delivery: (1) in person, by agent, or by courier receipted delivery; (2) by certified or registered mail to the party's last known address; (3) by telephonic document transfer to the recipient's current telecopier number; or (4) by such other manner as the court in its discretion may direct."

8. *Dynegy, Inc. v. Yates*, 422 S.W.3d 638 (Tex. 2013)(8/30/13)

"The party seeking to avoid the statute of frauds must plead, prove, and secure findings as to an exception or risk waiver under Rule 279…." Here, "the burden was on Yates to secure favorable findings on the main purpose doctrine. Yates's failure to do so constituted a waiver of the issue under Rule 279.…"

9. *CHCA Woman's Hospital, L.P. d/b/a The Woman's Hospital of Texas v. Lidji*, 403 S.W.3d 228 (Tex. 2013)(6/21/13)

In a birth injury case, parents filed medical malpractice suit, but dismissed before 120 days without having filed an expert report. Immediately upon refiling, they served their expert report on the defendant. The Supreme Court ruled the expert report requirement deadline was tolled during the nonsuit.

"[P]arties have 'an absolute right to nonsuit their own claims for relief at any time during the litigation until they have introduced all evidence other than rebuttal evidence at trial.' TEX. R. CIV. P. 162."

10. *Phillips Petroleum Company v. Yarbrough*, consolidated with *In re ConocoPhillips Company*, 405 S.W.3d 70 (Tex. 2013)(6/21/13)

Appeal of certification of a class in a case involving royalty payments. Compliance "with Rule 42 must be demonstrated; it cannot merely be presumed."

11. *In re Nalle Plastics Family Limited Partnership*, 406 S.W.3d 168 (Tex. 2013)(5/17/13)

"Our procedural rules permit a successful litigant to 'recover of his adversary all costs incurred therein, except where otherwise provided.' TEX. R. CIV. P. 131."

12. *Tedder v. Gardner Aldrich, LLP*, 421 S.W.3d 651 (Tex. 2013)(5/17/13) ("corrected opinion" was issued 12/13/13)

In divorce proceeding, wife's attorney's firm intervened and filed a sworn account to recover its fees. The Supreme Court ruled the intervention was not proper, but that the parties had not moved to strike it. The Supreme Court further ruled that the husband was a stranger to the sworn account, so he was not required to file a controverting affidavit.

Footnote 2: "A person may intervene in an action if (1) he could have brought the action himself, or it could have been brought against him; (2) 'the intervention will not complicate the case by an excessive multiplication of the issues'; and (3) 'intervention is almost essential to effectively protect the intervenor's interest.'" Here, the firm "did not meet the first requirement … [and] probably did not meet the second … [as well as]…. But Rule 60 of the Texas Rules of Civil Procedure provides that '[a]ny party may intervene by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party', and neither Michael nor Stacy moved to strike the intervention."

The firm said its bill was a suit on account "supported by affidavit and not denied under oath." Rule 185 provides it such is prima facie evidence, and cannot be denied unless denied under oath. "But Rule 185 contemplates that the defendant has personal knowledge of the basis of the claim.…"

"'The law does not permit, much less encourage, guesswork in swearing; and to require a defendant to swear that a transaction between a plaintiff and a third person … either did or did not occur … before he will be permitted to controvert the *ex parte* affidavit of his adversary, would be to encourage swearing without knowledge.…'"

"When it appears from the plaintiff's account itself that the defendant was a stranger to the account, the defendant need not file a sworn denial to contest liability.… Rule 185 does not require a party to swear to what he does not and cannot know." Thus, husband did not have to deny firm's "claim under oath in order to contest his liability for its fees."

13. *Kopplow Development, Inc. v. The City of San Antonio*, 399 S.W.3d 532 (Tex. 2013)(3/8/13)

Commercial property owner sued city for inverse condemnation when city would not issue permit unless owner provided more landfill.

A "party waive[s] a pleading defect issue by failing to specially except." "The City … specially excepted to the inverse condemnation claim, TEX. R. CIV. P. 90, but it failed to obtain a ruling…."

14. *Riemer v. The State of Texas*, 392 S.W.3d 635 (Tex. 2013)(2/22/13)

Interlocutory appeal of denial of class certification. "This Court has jurisdiction to review an interlocutory order refusing to certify a class in a suit brought under Rule 42."

"Because Rule 42 is patterned after Federal Rule of Civil Procedure 23, federal decisions and authorities interpreting current federal class action requirements are instructive. There is no right to litigate a claim as a class action under Rule 42."

"A trial court must apply a rigorous analysis to determine whether Rule 42's certification requirements have been satisfied."

15. *Ford Motor Company v. Stewart*, 390 S.W.3d 294 (Tex. 2013)(1/25/13)

In personal injury and death case, mother brought suit as next friend of child, but not individually. The Supreme Court ruled that, since there was no conflict of interest for the mother, the trial court should not have appointed a guardian ad litem, and he cannot be paid beyond the time to initially determine if a conflict exists.

"Texas Rule of Civil Procedure 173 governs … a guardian ad litem." Rule 173.3(a) provides "that the trial court 'may appoint a guardian ad litem on the motion of any party or on its own initiative.'"

"We hold that a parent's obligation to provide her child with medical care, standing alone, does not create a conflict of interest within the confines of Rule 173."

"Rule 173 authorizes the trial court to award an ad litem a reasonable fee for necessary services performed."

16. *State of Texas v. Ninety Thousand Two Hundred Thirty-Five Dollars and No Cents*, 390 S.W.3d 289 (Tex. 2013)(1/25/13)

Forfeiture case. "Civil rules of pleading apply in forfeiture proceedings. Forfeiture proceedings are tried in the same manner as other civil cases.…"

B. Jurisdiction (Other than Sovereign Immunity, located at III(F))

1. *Crosstex Energy Services, L.P. v. Pro Plus, Inc.*, S.W.3d (Tex. 2014)(3/28/14)

Interlocutory appeal of an order denying a motion to dismiss and granting an extension to file a certificate of merit under Ch. 150. The Supreme Court ruled that the certificate of merit is not a jurisdictional requirement.

"Parties may not waive jurisdictional statutory duties. But mandatory statutory duties are not necessarily jurisdictional. A party may waive a mandatory, non-jurisdictional requirement by failing to object timely. We resist classifying a provision as jurisdictional absent clear legislative intent to that effect."

When determining whether a statutory requirement is jurisdictional, the Court "may consider: (1) the plain meaning of the statute; (2) 'the presence or absence of specific consequences for noncompliance'; (3) the purpose of the statute; and (4) 'the consequences that result from each possible interpretation.'" Here, the statute does not claim the certificate of merit is jurisdictional. Moreover, "[m]andatory dismissal language does not" mean the statute is jurisdictional. This statute does not declare its purpose. But, "the implications of alternate interpretations" factor indicates the statute is not jurisdictional. If a certificate of merit were jurisdictional, the omission of one could be attacked "in perpetuity." This was not the Legislature's intent. Section "150.002 imposes a mandatory, but nonjurisdictional, filing requirement. Thus, we hold that a defendant may waive its right to seek dismissal under the statute."

"*Jernigan* clearly implies that the expert report requirement is not jurisdictional" in medical malpractice cases, unlike Whistleblower cases, where the facts supporting a violation are indispensable to the waiver of sovereign immunity.

2. *In re Mark Fisher*, S.W.3d (Tex. 2014)(2/28/14)

Venue case. Plaintiff sold his company to a limited partnership, and became a limited partner, in a series of agreements that called for venue in Tarrant County. Asserting he was defamed, and that the business was bankrupted by mismanagement, he filed suit in Wise County against the principals of the buyer. The Supreme Court overruled defendants' jurisdictional arguments, but granted mandamus "to enforce the mandatory forum selection clauses" in the agreements.

If "a court does not have jurisdiction, its opinion addressing any issues other than jurisdiction is advisory."

"When a plea to the jurisdiction is based on the pleadings, the pleadings are to be construed liberally in favor of the plaintiff.… [Here, plaintiff's] allegations do not affirmatively negate his having been 'personally aggrieved.' Thus, given his allegations, … Relators [did not show they] are entitled to mandamus relief" on their jurisdiction argument.

Defendants claimed that the corporations' bankruptcies should have prevented plaintiff's suit because he should have sued the bankruptcy debtors, not them personally. "Whether those claims should have been brought against another party (Nighthawk) is not a question of jurisdiction requiring dismissal, but is a question of liability."

The agreements contained provisions that addressed jurisdiction and venue, using both mandatory and permissive terminology. The "permissive language applies to consent to jurisdiction, but the mandatory language applies to require venue." "Objections to personal jurisdiction may be waived, so a litigant may consent to the personal jurisdiction of a court through a variety of legal arrangements." This obviates the need to analyze the parties' contacts with the forum. A "permissive forum selection clause is one under which the parties consent to the jurisdiction of a particular forum but do not require suit to be filed there."

3. *City of Houston v. Rhule*, 417 S.W.3d 440 (Tex. 2013)(11/22/13)

In a settlement agreement of a worker's compensation claim fireman brought against self-insured city, city agreed to pay future medical bills. When city quit paying many years later, fireman sued city, without presenting his claim first to the Division of Workers' Compensation. The Supreme Court ruled that he failed to exhaust his administrative remedies and dismissed the suit for lack of jurisdiction.

"Subject matter jurisdiction is 'essential to a court's power to decide a case.' A court acting without such power commits fundamental error that we may review for the first time on appeal. Not only may a reviewing court assess jurisdiction for the first time on appeal, but all courts bear the affirmative obligation 'to ascertain that subject matter jurisdiction exists regardless of whether the parties have questioned it.' A judgment rendered without subject matter jurisdiction cannot be considered final. Subject matter jurisdiction presents a question of law we review de novo."

"Administrative agencies may exercise only powers conferred upon them by 'clear and express statutory language.' When the Legislature grants an

administrative agency sole authority to make an initial determination in a dispute, agency jurisdiction is exclusive. A party then must exhaust its administrative remedies before seeking recourse through judicial review.… Absent exhaustion of administrative remedies, a trial court must dismiss the case."

"Exclusive jurisdiction is a question of statutory interpretation.… The statute in effect at the time of injury controls." Here, the statute in effect "compels a party to a settlement agreement to first bring disputes to the Division." Since the fireman did not present this claim to the Division, "[t]his divests the trial court of jurisdiction."

4. *Canutillo Independent School District v. Farran*, 409 S.W.3d 653 (Tex. 2013)(8/30/13)

In this Whistleblower case, the school district filed a plea to the jurisdiction. "[W]hen parties submit evidence at [the] plea to the jurisdiction stage, review of the evidence generally mirrors the summary judgment standard.… 'An appellate court reviewing a summary judgment must consider whether reasonable and fair-minded jurors could differ in their conclusions in light of all the evidence presented.'"

5. *Zanchi v. Lane*, 408 S.W.3d 373 (Tex. 2013)(8/30/13)

"If service is invalid, it is 'of no effect' and cannot establish the trial court's jurisdiction over a party." A "party must be served, accept or waive service, or otherwise appear before judgment may be rendered against him."

6. *Moncrief Oil International, Inc. v. OAO Gazprom*, 414 S.W.3d 142 (Tex. 2013)(8/30/13)

Plaintiff, a Texas-based company, entered contracts regarding development of a Russian gas field. Plaintiff later provided confidential trade secrets about its Texas facility and marketing plan. Defendants used the information with an entity the plaintiff wanted to work with, which then terminated a proposed venture with plaintiff. When plaintiff sued defendants, defendants asserted a lack of personal jurisdiction. The Supreme Court found that there were sufficient contacts for in personem jurisdiction on a trade secrets claim, but not a tortious interference claim, and that there was no error in denying addition discovery on the jurisdictional issue.

"[T]he business contacts needed for specific personal jurisdiction over a nonresident defendant 'are generally a matter of physical fact, while tort liability (especially misrepresentation cases) turns on what the parties thought, said, or intended.'" While "what the parties thought, said, or intended is generally irrelevant to their jurisdictional contacts … [r]egardless of the defendants' subjective intent, their Texas contacts are sufficient to confer specific jurisdiction over the defendants as to the trade secrets claim." "But the tortious interference claims either arise from a meeting in California (which cannot support jurisdiction in Texas) or the formation of a competing enterprise in Texas by an entity not subject to jurisdiction in this proceeding."

"Texas courts may exercise personal jurisdiction over a nonresident if '(1) the Texas long-arm statute authorizes the exercise of jurisdiction, and (2) the exercise of jurisdiction is consistent with federal and state constitutional due-process guarantees.' Under the Texas long-arm statute, the plaintiff bears the initial burden of pleading allegations sufficient to confer jurisdiction. The long-arm statute allows the exercise of personal jurisdiction over a nonresident defendant who 'commits a tort in whole or in part in this state.' Although allegations that a tort was committed in Texas satisfy our long-arm statute, such allegations do not necessarily satisfy the U.S. Constitution."

"When the initial burden is met, the burden shifts to the defendant to negate all potential bases for personal jurisdiction the plaintiff pled."

"Asserting personal jurisdiction comports with due process when (1) the nonresident defendant has minimum contacts with the forum state, and (2) asserting jurisdiction complies with traditional notions of fair play and substantial justice. A defendant establishes minimum contacts with a forum when it 'purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.'"

"A nonresident's contacts can give rise to general or specific personal jurisdiction. Continuous and systematic contacts with a state give rise to general jurisdiction, while specific jurisdiction exists when the cause of action arises from or is related to purposeful activities in the state."

"When … the trial court does not issue findings of fact and conclusions of law, we imply all relevant facts necessary to support the judgment that are supported by evidence." Specific jurisdiction is reviewed on a "claim-by-claim basis." Plaintiff "'must establish specific jurisdiction for each claim.'" But, "a court need not assess contacts on a claim-by-claim basis if all claims arise from the same forum contacts."

"When determining whether a nonresident purposefully availed itself of the privilege of conducting activities in Texas, we consider three factors:

First, only the defendant's contacts with the forum are relevant, not the unilateral activity of another party or a third person. Second, the contacts relied upon must be purposeful rather than random, fortuitous, or attenuated.… Finally, the defendant must seek some benefit, advantage or profit by availing itself of the jurisdiction."

Unilateral activity by "another person cannot create jurisdiction. Physical presence is not required" but may enhance the assertion of jurisdiction.

The forum "'has a significant interest in redressing injuries that actually occur within the State.'"

Here, defendants "intended to, and did, come to Texas for two meetings, at which they accepted alleged trade secrets.…" Further, they "sought out Texas and the benefits and protections of its laws."

Considering "fair play and substantial justice," the following factors are considered:
"(1) the burden on the defendant; (2) the interests of the forum in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the international judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several nations in furthering fundamental substantive social policies."
Jurisdiction here did not offend notions of "fair play and substantial justice," especially since the alleged tort occurred in Texas.

By contrast, "the tortious interference claims do not arise from the Texas meetings or their receipt of the information from" plaintiff. "Specific jurisdiction exists only if the alleged liability arises out of or is related to the defendant's activity within the forum." "[B]ut-for causation alone is insufficient."

"[I]mputing jurisdictional contacts to another entity requires assessing 'the amount of the subsidiary's stock owned by the parent corporation, the existence of separate headquarters, the observance of corporate formalities, and the degree of the parent's control over the general policy and administration of the subsidiary.'"

It was not error to deny further depositions on jurisdiction. Plaintiff failed to "demonstrate[] what additional jurisdictional facts the depositions would provide.…"

7. *Masterson et al. v. The Dioceses of Northwest Texas, et al.*, 422 S.W.3d 594 (Tex. 2013)(8/30/13)

Local church split from national organization over doctrinal differences. The issue "is what happens to the property."

A "court has no authority to decide a dispute unless it has jurisdiction to do so…. [Additionally,] Texas courts are bound by the Texas Constitution to decide disputes over which they have jurisdiction, and absent a lawful directive otherwise they cannot delegate or cede their judicial prerogative to another entity."

Under the "deference" method, a court "defers to and enforces the decision of the highest authority of the ecclesiastical body to which the matter has been carried." This is required "where ecclesiastical questions are at issue; as to such questions, deference is compulsory because courts lack jurisdiction to decide ecclesiastical questions. But when the question to be decided is not ecclesiastical, courts are not deprived of jurisdiction by the First Amendment and they may apply" the "neutral principals" method.

The "opinion of a court without jurisdiction is advisory.… [The] Texas Constitution does not authorize courts to make advisory decisions or issue advisory opinions.… 'Under article II, section 1 of the Texas Constitution, courts have no jurisdiction to issue advisory opinions.'"

"Courts do not have jurisdiction to decide questions of an ecclesiastical or inherently religious nature, so as to those questions they must defer to decisions of appropriate ecclesiastical decision makers.… [But,] [p]roperly exercising jurisdiction requires courts to apply neutral principles of law to non-ecclesiastical issues involving religious entities in the same manner as they apply those principles to other entities and issues. Thus, courts are to apply neutral principles of law to issues such as land titles, trusts, and corporate formation, governance, and dissolution, even when religious entities are involved."

"Civil courts are constitutionally required to accept as binding the decision of the highest authority of a hierarchical religious organization to which a dispute regarding internal government has been submitted."

8. *University of Houston v. Barth*, 403 S.W.3d 851 (Tex. 2013)(6/14/13)

"The issue is one of subject-matter jurisdiction, which we review de novo."

"[J]udicial notice [can be taken] of facts outside the record to aid a determination of jurisdiction."

9. The Finance Commission of Texas v. Norwood, 418 S.W.3d 566 (Tex. 2013)(6/21/13) ("supplemental opinion" was issued 1/24/14)

Voters amended the constitution to allow home equity loans, and then in 2003 amended it again to allow the Legislature to delegate to an agency the power to interpret certain sections. In this suit, homeowners challenged certain rulings by two commissions authorized by the Legislature to create a safe harbor. The Supreme Court ruled that it had jurisdiction to review the matter and that the homeowners had standing.

"'Without jurisdiction the court cannot proceed at all in any cause; it may not assume jurisdiction for the purpose of deciding the merits of the case.'"

The homeowners had standing to challenge the commissions' rulings. "Because standing is required for subject-matter jurisdiction, it can be — and if in doubt, must be — raised by a court on its own at any time." "Standing and other concepts of justiciability

have been 'developed to identify appropriate occasions for judicial action' and thus maintain the proper separation of governmental powers."

"'A court has no jurisdiction over a claim made by a plaintiff without standing to assert it. For standing, a plaintiff must be personally aggrieved; his alleged injury must be concrete and particularized, actual or imminent, not hypothetical.'"

10. *Phillips v. Bramlett*, 407 S.W.3d 229 (Tex. 2013)(6/7/13)

Medical malpractice case had been remanded by the Supreme Court to the trial court. The trial court had "vacated" part of the original judgment, and had computed interest from the date of the judgment entered after the remand. The Supreme Court ruled that "the court of appeals had jurisdiction to review the trial court's remand judgment.…"

"[Our] mandate and judgment limited the trial court's authority on remand, such limits are not 'jurisdictional' in the true sense of that word." "When an appellate court … remands the case to the trial court, … the trial court is authorized to take all actions that are necessary to give full effect to the appellate court's judgment and mandate.… [It has] no authority to take any action that is inconsistent with or beyond the scope of that which is necessary to give full effect to the appellate court's judgment and mandate." "Jurisdiction" refers "to the trial court's constitutional or statutory power to conduct the necessary proceedings or to enter a judgment.…" "[W]e have reversed, rather than vacated, remand judgments that failed to comport with an appellate court's mandate."

"Jurisdiction" refers "to the trial court's constitutional or statutory power to conduct the necessary proceedings or to enter a judgment.…"

"[Our] mandate and judgment [in this case] limited the trial court's authority on remand, such limits are not 'jurisdictional' in the true sense of that word." "When an appellate court … remands the case to the trial court, … the trial court is authorized to take all actions that are necessary to give full effect to the appellate court's judgment and mandate.…"

A trial court lacks "jurisdiction to hear a nonparty's motion for relief from a final judgment after the expiration of the trial court's plenary power.…"

11. *City of Bellaire v. Johnson*, 400 S.W.3d 922 (Tex. 2013)(6/7/13)

Worker who was employed through a staffing agency and assigned to a city was barred by the exclusive remedy of the workers' compensation law from suing the city after he was injured. "'The absence of subject-matter jurisdiction may be raised by a plea to the jurisdiction, as well as by other procedural vehicles, such as a motion for summary judgment.'"

12. *Christus Health Gulf Coast v. Aetna, Inc.*, 397 S.W.3d 651 (Tex. 2013)(4/19/13)

Suit brought by health care providers against an HMO under the Prompt Payment Statute. In a prior ruling in this case, "we held that determining Aetna's responsibility for unpaid hospital bills was within the trial court's jurisdiction."

13. *Texas Department of Transportation v. A.P.I. Pipe and Supply, LLC*, 397 S.W.3d 162 (Tex. 2013)(4/5/13)

Inverse condemnation suit which turned on whether government had title to a parcel after an original condemnation judgment in 2003 that awarded it a "right-of-way" was revised by a nunc pro tunc judgment in 2004 that purported to render the 2003 judgment void and grant only an "easement." The Supreme Court ruled that the "void 2004 Judgment cannot supersede the valid 2003 Judgment.…"

"Whether a court has jurisdiction is a matter of law we decide de novo. Evidence can be introduced and considered at the plea to the jurisdiction stage if needed to determine jurisdiction." The "trial court was correct to consider the 2003 and 2004 Judgments as extrinsic, undisputed evidence."

"A trial court lacks jurisdiction and should grant a plea to the jurisdiction where a plaintiff 'cannot establish a viable takings claim.' … '[T]o recover under the constitutional takings clause, one must first demonstrate an ownership interest in the property taken.'"

The trial court's plenary power "usually lasts 30 days."

14. *In the Interest of J.M. and Z.M., Minor Children*, 396 S.W.3d 528 (Tex. 2013)(3/15/13)

After family court terminated the parent-child relationship, counsel for parent filed a pleading combining a motion for new trial with a notice of appeal. The Supreme Court ruled this was sufficient.

"Nothing … prevents a party from combining a notice of appeal with a motion for new trial (or filing both the motion and notice simultaneously)." "Moreover, giving effect to the notice of appeal portion does not render the motion for new trial portion meaningless: the trial court retained plenary power over the case to grant or deny the motion for new trial." "'The trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within thirty days after the judgment is signed.'"

Here, appellant expressed "a bona fide attempt to invoke appellate jurisdiction."

15. *State of Texas v. Ninety Thousand Two Hundred Thirty-Five Dollars and No Cents*, 390 S.W.3d 289 (Tex. 2013)(1/25/13)

Forfeiture case in which defendant filed a motion for summary judgment on three grounds. The Supreme Court reversed on the second ground and remanded.

Regarding an un-appealed ground concerning whether the trial court had jurisdiction, the Supreme Court observed that it "may not address the merits of a case absent jurisdiction," though here it agreed with the analysis of the court of appeals.

C. Venue, Forum Selection Clauses, and Forum Non Conveniens

1. *In re Mark Fisher*, ___ S.W.3d ___ (Tex. 2014)(2/28/14)

Venue case. Plaintiff sold his company to a limited partnership, and became a limited partner, in a series of agreements that called for venue in Tarrant County. Asserting he was defamed, and that the business was bankrupted by mismanagement, he filed suit in Wise County against the principals of the buyer. The Supreme Court ruled that the "trial court abused its discretion by failing to enforce the mandatory forum selection clauses" in the agreements.

"Forum selection clauses are presumptively valid. Allowing a lawsuit to proceed in a forum other than that for which the parties contracted promotes forum shopping with its attendant judicial inefficiency, waste of judicial resources, delays of adjudication of the merits, and skewing of settlement dynamics. Accordingly, mandamus is available if a trial court improperly refuses to enforce a forum selection clause. Further, mandamus relief is specifically authorized to enforce a statutory mandatory venue provision."

Section 15.020 provides mandatory venue for suits arising from a "'major transaction,' which is defined as a transaction evidenced by a written agreement and which involves $1 million or more.…" The transaction here was a "major transaction." An issue was whether the cause of action arose from the transaction. The Court used "a common-sense examination of the substance of the claims to determine whether the statute applies." Here, a promissory note was provided deferred compensation to plaintiff, which he alleged had been compromised by defendants. Thus, plaintiff "in substance is seeking to recover the $6.5 million owed to him under the Note.…" A "forum selection clause applie[s] to a claim that would have no basis but for the agreement containing the clause." So, plaintiff's claims arose from the major transaction, even though the events occurred after it was entered; also "section 15.020 does not require that an action arise out of a specific agreement" if it arises from "a major *transaction*."

Here, liability "for failure to pay him on the Note must be determined by reference to those agreements. And when an injury is to the subject matter of a contract, the action is ordinarily '*on the contract*.'"

The agreements contained provisions that addressed jurisdiction and venue, using both mandatory and permissive terminology. The "permissive language applies to consent to jurisdiction, but the mandatory language applies to require venue." Here, the parties intended that they would "submit to the jurisdiction of the state or federal courts in Tarrant County *and* that they will not file suit 'arising out of or relating to this Agreement' anywhere else." When "the phrase 'non-exclusive jurisdiction' is in a forum selection clause that also includes language reflecting intent that the venue choice is mandatory, the non-exclusive language does not necessarily control over the mandatory language."

Plaintiff claimed suit in Wise County (where plaintiff resided) was proper for a defamation suit under § 15.017. "Venue may be proper in multiple counties under mandatory venue rules, and the plaintiff is generally afforded the right to choose venue when suit is filed." But because this suit arose from a major transaction which is governed by § 15.020, which applies "notwithstanding" other venue provisions, "the Legislature intended for it [§ 15.020] to control over other mandatory venue provisions."

In addition, if "'the plaintiff's chosen venue rests on a *permissive* venue statute and the defendant files a meritorious motion to transfer based on a *mandatory* venue provision, the trial court must grant the motion.'"

Because plaintiff's "benefit of the bargain" theory arose from a major transaction, all of plaintiff's claims had to be transferred pursuant to § 15.004.

Other agreements contained different venue provisions, but they did not apply to the claims in this case.

2. *Ford Motor Company v. Stewart*, 390 S.W.3d 294 (Tex. 2013)(1/25/13)

Personal injury and death case. "TEX. R. JUD. ADMIN. 11 [] provid[es] for the assignment of a pretrial judge in cases that involve material questions of fact and law in common with another case pending in another court in another county." Here, the Supreme Court ruled that, since there was no conflict of interest for the mother acting as next friend, the assigned court should not have appointed a guardian ad litem, and the ad litem cannot be paid beyond the time to initially determine if a conflict exists.

D. Parties and Standing

1. *In re Mark Fisher*, ___ S.W.3d ___ (Tex. 2014)(2/28/14)

Venue case. Plaintiff sold his company to a limited partnership, and became a limited partner, in a series of agreements that called for venue in Tarrant

County. Asserting he was defamed, and that the business was bankrupted by mismanagement, he filed suit in Wise County against the principals of the buyer. The Supreme Court overruled the defendants' argument that plaintiff did not have standing to assert the causes of action brought in the suit.

"When a plea to the jurisdiction is based on the pleadings, the pleadings are to be construed liberally in favor of the plaintiff.… [Here, plaintiff's] allegations do not affirmatively negate his having been 'personally aggrieved.'" Thus, he had standing to bring a claim based upon a $1M contribution to a limited partnership.

Though "a corporate entity may maintain a suit for libel," here, the plaintiff alleged he was personally libeled, and therefore had "standing to bring [those] claims."

2. *Zanchi v. Lane*, 408 S.W.3d 373 (Tex. 2013)(8/30/13)

In medical malpractice case, plaintiff served defendant with an expert report prior to when he was served with citation, partly because defendant was evading service. The Supreme Court ruled that sufficed, because the defendant was a "party."

In "the context of the TMLA, the term 'party' means one named in a lawsuit and that service of the expert report on [defendant] before he was served with process satisfied the TMLA's expert-report requirement." "[O]ne can be a 'party' to a legal proceeding even though he is not served with process." A "person can be a 'party' to a lawsuit even though, not having been served with process, the person has no duty to participate in, and may not be bound by, the proceedings." A "party must be served, accept or waive service, or otherwise appear before judgment may be rendered against him." "'While diligence is required from properly served parties or those who have appeared, . . . those not properly served have no duty to act, diligently or otherwise.'"

"Recognizing a person named in a filed pleading as a 'party' is consistent with dictionary definitions of the term as well as the Texas Rules of Civil Procedure.… Further, the pleading rules in the Texas Rules of Civil Procedure refer to those named in petitions as 'parties,' supporting a conclusion that service of process is not a prerequisite to that designation. TEX. R. CIV. P. 79 (requiring that a petition list the 'parties')."

3. *Dugger v. Arredondo*, 408 S.W.3d 825 (Tex. 2013)(8/30/13)

In wrongful death cases, a "'person is liable for damages arising from an injury that causes an individual's death if the injury was caused by the person's or his agent's or servant's wrongful act, neglect, carelessness, unskillfulness, or default.' Parents may bring a wrongful death action on behalf of their deceased children."

4. *Neely v. Wilson*, 418 S.W.3d 52 (Tex. 2013)(6/28/13) (*see* "corrected opinion" issued 1/31/14)

"[P]rofessional associations can[] maintain defamation claims." Likewise, "corporations may sue to recover damages resulting from defamation."

5. *The Finance Commission of Texas v. Norwood*, 418 S.W.3d 566 (Tex. 2013)(6/21/13) ("supplemental opinion" was issued 1/24/14)

Voters amended the constitution to allow home equity loans, and then in 2003 amended it again to allow the Legislature to delegate to an agency the power to interpret certain sections. In this suit, homeowners challenged certain rulings by two commissions authorized by the Legislature to create a safe harbor. The Supreme Court ruled that the homeowners had standing.

"Because standing is required for subject-matter jurisdiction, it can be — and if in doubt, must be — raised by a court on its own at any time." "Standing and other concepts of justiciability have been 'developed to identify appropriate occasions for judicial action' and thus maintain the proper separation of governmental powers."

"'The requirement in this State that a plaintiff have standing to assert a claim derives from the Texas Constitution's separation of powers among the departments of government, which denies the judiciary authority to decide issues in the abstract, and from the Open Courts provision, which provides court access only to a 'person for an injury done him'. A court has no jurisdiction over a claim made by a plaintiff without standing to assert it. For standing, a plaintiff must be personally aggrieved; his alleged injury must be concrete and particularized, actual or imminent, not hypothetical.'"

Generally, a citizen cannot sue to force the government to comply with the law, but this "*varies with the claims made*." Here there was standing because of the safe harbor provision. "Were this injury insufficient to confer standing to challenge the Commissions' interpretations, their authority to interpret Section 50 would be final and absolute, not merely shared with the Judiciary. But the principle of standing exists to protect the separation of powers, not to defeat it."

E. Assignments

No cases to report.

F. Presuit Depositions: Rule 202

1. Certified EMS, Inc. v. Potts, 392 S.W.3d 625 (Tex. 2013)(2/15/13)

Medical malpractice case. The TMLA "strictly limits discovery until expert reports have been provided, and we have held that the statute's plain language prohibits presuit depositions authorized under Rule 202."

G. Initiating Suit

No cases to report.

H. Temporary Restraining Order / Temporary Injunctions

No cases to report.

I. Service of Process and Default Judgment

1. *Zanchi v. Lane*, 408 S.W.3d 373 (Tex. 2013)(8/30/13)

In medical malpractice case, plaintiff served defendant with an expert report prior to when he was served with citation, partly because defendant was evading service. The Supreme Court ruled that sufficed, because the defendant was a "party" since he was named in the suit.

In "the context of the TMLA, the term 'party' means one named in a lawsuit and that service of the expert report on [defendant] before he was served with process satisfied the TMLA's expert-report requirement." "[O]ne can be a 'party' to a legal proceeding even though he is not served with process." *Cf.*, "If service is invalid, it is 'of no effect' and cannot establish the trial court's jurisdiction over a party." A "person can be a 'party' to a lawsuit even though, not having been served with process, the person has no duty to participate in, and may not be bound by, the proceedings." A "party must be served, accept or waive service, or otherwise appear before judgment may be rendered against him." "'While diligence is required from properly served parties or those who have appeared, . . . those not properly served have no duty to act, diligently or otherwise.'"

Further, the pleading rules in the Texas Rules of Civil Procedure refer to those named in petitions as 'parties,' supporting a conclusion that service of process is not a prerequisite to that designation. TEX. R. CIV. P. 79 (requiring that a petition list the 'parties')."

"Rule 106 by its terms applies solely to service of citation."

J. Collateral Attack

No cases to report.

K. Intervention

1. *Tedder v. Gardner Aldrich, LLP*, 421 S.W.3d 651 (Tex. 2013)(5/17/13) ("corrected opinion" was issued 12/13/13)

Corrected opinion: footnote 2 changed. *See Tedder*, below, at 5/17/13.

2. *Tedder v. Gardner Aldrich, LLP*, 421 S.W.3d 651 (Tex. 2013)(5/17/13) ("corrected opinion" was issued 12/13/13)

In divorce proceeding, wife's attorney's firm intervened and filed a sworn account to recover its fees. The Supreme Court ruled the intervention was not proper, but that the parties had not moved to strike it.

Footnote 2: "A person may intervene in an action if (1) he could have brought the action himself, or it could have been brought against him; (2) 'the intervention will not complicate the case by an excessive multiplication of the issues'; and (3) 'intervention is almost essential to effectively protect the intervenor's interest.'" Here, the firm "did not meet the first requirement … [and] probably did not meet the second … [as well as]…. But Rule 60 of the Texas Rules of Civil Procedure provides that '[a]ny party may intervene by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party', and neither Michael nor Stacy moved to strike the intervention."

L. Class Actions

1. *Phillips Petroleum Company v. Yarbrough, consolidated with In re ConocoPhillips Company*, 405 S.W.3d 70 (Tex. 2013)(6/21/13)

After prior appeal, one of several putative subclasses was certified. Due to an amended pleading that changed the fundamental nature of the subclass by adding an "implied covenant" claim, the Supreme Court ruled the subclass had to be subjected to rigorous analysis, that another interlocutory appeal was proper because of the addition of a claim, and that the trial court must consider the effect of res judicata when the class representative proposes to abandon a claim.

"Certification is conducted 'on a claim-by-claim, rather than holistic, basis' in order 'to preserve the efficiencies of the class action device without sacrificing the procedural protections it affords to unnamed class members.'"

The "specific concerns that led us to [previously] decertify Subclasses 1 and 3 do not appear to be present with respect to the implied-covenant claim."

Class actions are "'subject to the same preclusion rules as other procedural forms of Litigation' and that class members are therefore barred from asserting in subsequent litigation claims that arose from the same transaction or subject matter as the class claims and either could have been or were litigated in the prior suit."

A trial court can modify a class, and "modifications of certification orders, such as those modifying the size of a class or a class definition, are [generally] not appealable." But, if the order modifies the "fundamental nature" of the class, it is appealable.

There is a question here about typicality. "A class representative's claim must be 'typical of the claims or defenses of the Class.' 'A claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory."

So, here, the propriety of certification must be reevaluated due to the new claim.

The trial court must "conduct a rigorous analysis regarding the effect of res judicata.…" This is part of the determination of "'commonality, typicality, superiority, adequacy of representation, and predominance.'" A decision to "pursue some claims" and abandon others is a relevant factor "because certification may unfairly force members to choose between class membership and giving up viable claims…"

The trial court's order is reviewed for abuse of discretion. A "trial court thus abused its discretion by failing to conduct the 'rigorous analysis' we have emphasized is required in certifying a class." Compliance "with Rule 42 must be demonstrated; it cannot merely be presumed."

An interlocutory appeal is permitted from an order certifying or refusing to certify a class, and the Supreme Court has jurisdiction to review it. This is a "narrow exception to the general rule that only final judgments and orders are appealable." "A trial court's order changes the fundamental nature of a class, and is therefore subject to interlocutory appeal … if it modifies the class in such a way as to raise significant concerns about whether certification remains proper."

2. *Riemer v. The State of Texas*, 392 S.W.3d 635 (Tex. 2013)(2/22/13)

Some landowners along a river sought to certify a class in order to assert a takings case against the state regarding the location of the river's banks and therefore the mineral rights under the river bed. The Supreme Court ruled that, though some proposed class members had settled and some were on the opposite bank, these potential conflicts did not "prevent[] the landowners from … satisfying Rule 42(a)(4)'s adequacy-of-representation prerequisite."

"This Court has jurisdiction to review an interlocutory order refusing to certify a class in a suit brought under Rule 42. We review a class certification order for abuse of discretion.…"

"A class action is an extraordinary procedural device designed to promote judicial economy by allowing claims that lend themselves to collective treatment to be tried together in a single proceeding.… Because Rule 42 is patterned after Federal Rule of Civil Procedure 23, federal decisions and authorities interpreting current federal class action requirements are instructive. There is no right to litigate a claim as a class action under Rule 42."

"Rule 42 establishes four initial prerequisites to class certification: numerosity, commonality, typicality, and adequacy of representation. In addition … , a proposed class action must satisfy at least one of the three subdivisions of Rule 42(b). A trial court must apply a rigorous analysis to determine whether Rule 42's certification requirements have been satisfied."

"Rule 42(a)(4)'s adequacy-of-representation prerequisite requires the proponent of class certification to establish that the class representative will fairly and adequately protect the interests of the class. 'The class representative has the burden of proving adequacy.'"

"The existence of minor conflicts standing alone … will not prevent a class representative from adequately representing a class. For a conflict of interest to prevent class certification under Rule 42(a)(4), the conflict must be fundamental and go to the heart of the litigation.… A conflict that is merely speculative or hypothetical will not defeat the adequacy-of-representation requirement."

Here, the settling landowners were within the class definition. But, "Rule 42 does not require that all members agree on the propriety of the action in order to certify the class." In fact, they could opt out. In addition, the putative class members did not intend to invalidate the settlement agreements. So, relief obtained in the case would not prevent the settling landowners from honoring their agreements.

Though there was a potential conflict between landowners on opposite sides of the river, "this risk is too speculative." It questionably assumes that the location of one river bank depends upon the other.

Also, though the family of one potential class representative had disputes with him, if they "disagree with the propriety of the litigation, the class representative, or the class representative's counsel, they may utilize Rule 42's procedures for opting out of the class."

M. Declaratory Judgment

1. *Long v. Griffin*, ___ S.W.3d ___ (Tex. 2014)(4/25/14)

After lengthy litigation involving an "assignment" and a declaratory judgment claim, the trial court awarded fees based upon an attorney's affidavit. Ruling that the evidence for the fees was "legally insufficient," the Supreme Court reversed and remanded.

Plaintiffs asserted a declaratory judgment claim, "which allows trial courts to 'award costs and

reasonable and necessary attorney's fees as are equitable and just.'"

2. *Coinmach Corp. f/k/a Solon Automated Services, Inc. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909 (Tex. 2013)(11/22/13) ("corrected opinion" was issued 2/14/14)

Owner of complex sought attorney's fees against a holdover tenant by filing a declaratory judgment. "[W]hen 'the trespass-to-try-title statute governs the parties' substantive claims … , [the plaintiff] may not proceed alternatively under the Declaratory Judgments Act to recover their attorney's fees.'"

3. *City of Lorena v. BMTP Holdings, L.P.*, 409 S.W.3d 634 (Tex. 2013)(8/30/13)

Developer had obtained a permit when city declared a moratorium due to insufficient sewage capacity. After the city extended the moratorium repeatedly, developer sought a declaratory judgment and asserted a takings case. The Supreme Court held "that the moratorium cannot apply to the [developer's lots] because the municipality approved the property for subdivision before it enacted the moratorium…."

At the time of developer's "pleading, only the November 2008 moratorium was in effect. Accordingly, any declaration must be in regard to [that] moratorium."

"Under the Declaratory Judgment Act, a 'court may award costs and reasonable and necessary attorney's fees as are equitable and just.' The decision of whether to award attorney's fees is within the discretion of the trial court, but the question of whether attorney's fees are equitable and just is a question of law."

N. Bill of Review

No cases to report.

O. Quo Warranto

No cases to report.

V. DEFENSIVE ISSUES

A. Special Appearance

1. *Moncrief Oil International, Inc. v. OAO Gazprom*, 414 S.W.3d 142 (Tex. 2013)(8/30/13)

Plaintiff, a Texas-based company, entered contracts regarding development of a Russian gas field. Plaintiff later provided confidential trade secrets about its Texas facility and marketing plan. Defendants used the information with an entity the plaintiff wanted to work with, which then terminated a proposed venture with plaintiff. When plaintiff sued defendants, defendants asserted a lack of personal jurisdiction. The Supreme Court found that there were sufficient contacts for in personem jurisdiction on a trade secrets claim, but not a tortious interference claim, and that there was no error in denying addition discovery on the jurisdictional issue.

"[T]he business contacts needed for specific personal jurisdiction over a nonresident defendant 'are generally a matter of physical fact, while tort liability (especially misrepresentation cases) turns on what the parties thought, said, or intended.'" While "what the parties thought, said, or intended is generally irrelevant to their jurisdictional contacts … [r]egardless of the defendants' subjective intent, their Texas contacts are sufficient to confer specific jurisdiction over the defendants as to the trade secrets claim." "But the tortious interference claims either arise from a meeting in California (which cannot support jurisdiction in Texas) or the formation of a competing enterprise in Texas by an entity not subject to jurisdiction in this proceeding."

"Texas courts may exercise personal jurisdiction over a nonresident if '(1) the Texas long-arm statute authorizes the exercise of jurisdiction, and (2) the exercise of jurisdiction is consistent with federal and state constitutional due-process guarantees.' Under the Texas long-arm statute, the plaintiff bears the initial burden of pleading allegations sufficient to confer jurisdiction. The long-arm statute allows the exercise of personal jurisdiction over a nonresident defendant who 'commits a tort in whole or in part in this state.' Although allegations that a tort was committed in Texas satisfy our long-arm statute, such allegations do not necessarily satisfy the U.S. Constitution."

"When the initial burden is met, the burden shifts to the defendant to negate all potential bases for personal jurisdiction the plaintiff pled."

"Asserting personal jurisdiction comports with due process when (1) the nonresident defendant has minimum contacts with the forum state, and (2) asserting jurisdiction complies with traditional notions of fair play and substantial justice. A defendant establishes minimum contacts with a forum when it 'purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.'"

"A nonresident's contacts can give rise to general or specific personal jurisdiction. Continuous and systematic contacts with a state give rise to general jurisdiction, while specific jurisdiction exists when the cause of action arises from or is related to purposeful activities in the state."

"When … the trial court does not issue findings of fact and conclusions of law, we imply all relevant facts necessary to support the judgment that are supported by evidence." Specific jurisdiction is reviewed on a "claim-by-claim basis." Plaintiff "'must establish specific jurisdiction for each claim.'" But, "a court need not assess contacts on a claim-by-claim basis if all claims arise from the same forum contacts."

"When determining whether a nonresident purposefully availed itself of the privilege of conducting activities in Texas, we consider three factors:
First, only the defendant's contacts with the forum are relevant, not the unilateral activity of another party or a third person.
Second, the contacts relied upon must be purposeful rather than random, fortuitous, or attenuated.…
Finally, the defendant must seek some benefit, advantage or profit by availing itself of the jurisdiction."
Unilateral activity by "another person cannot create jurisdiction. Physical presence is not required" but may enhance the assertion of jurisdiction.

The forum "'has a significant interest in redressing injuries that actually occur within the State.'"

Here, defendants "intended to, and did, come to Texas for two meetings, at which they accepted alleged trade secrets.…" Further, they "sought out Texas and the benefits and protections of its laws."

Considering "fair play and substantial justice," the following factors are considered: "(1) the burden on the defendant; (2) the interests of the forum in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the international judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several nations in furthering fundamental substantive social policies." Jurisdiction here did not offend notions of "fair play and substantial justice," especially since the alleged tort occurred in Texas.

By contrast, "the tortious interference claims do not arise from the Texas meetings or their receipt of the information from" plaintiff. "Specific jurisdiction exists only if the alleged liability arises out of or is related to the defendant's activity within the forum." "[B]ut-for causation alone is insufficient."

"[I]mputing jurisdictional contacts to another entity requires assessing 'the amount of the subsidiary's stock owned by the parent corporation, the existence of separate headquarters, the observance of corporate formalities, and the degree of the parent's control over the general policy and administration of the subsidiary.'"

It was not error to deny further depositions on jurisdiction. Plaintiff failed to "demonstrate[] what additional jurisdictional facts the depositions would provide.…"

B. Answer

1. <u>*Tedder v. Gardner Aldrich, LLP*, 421 S.W.3d 651 (Tex. 2013)(5/17/13) ("corrected opinion" was issued 12/13/13)</u>

   Corrected opinion: footnote 2 changed. *See Tedder*, below, at 5/17/13.

2. <u>*Tedder v. Gardner Aldrich, LLP*, 421 S.W.3d 651 (Tex. 2013)(5/17/13) ("corrected opinion" was issued 12/13/13)</u>

   In divorce proceeding, wife's attorney's firm intervened and filed a sworn account to recover its fees. Firm argued that husband failed to controvert firm's sworn account, and that husband was liable because fees were "necessaries." The Supreme Court ruled that the husband was a stranger to the sworn account, so he was not required to file a controverting affidavit, and that "legal services provided to one spouse in a divorce proceeding are [not] necessaries for which the other spouse is statutorily liable to pay the attorney."

   The firm said its bill was a suit on account "supported by affidavit and not denied under oath." Rule 185 provides it such is prima facie evidence, and cannot be denied unless denied under oath. "But Rule 185 contemplates that the defendant has personal knowledge of the basis of the claim.…"

   "'The law does not permit, much less encourage, guesswork in swearing; and to require a defendant to swear that a transaction between a plaintiff and a third person … either did or did not occur … before he will be permitted to controvert the *ex parte* affidavit of his adversary, would be to encourage swearing without knowledge.…"

   "When it appears from the plaintiff's account itself that the defendant was a stranger to the account, the defendant need not file a sworn denial to contest liability.… Rule 185 does not require a party to swear to what he does not and cannot know." Thus, husband did not have to deny firm's "claim under oath in order to contest his liability for its fees."

C. Special Exceptions

1. <u>*Crosstex Energy Services, L.P. v. Pro Plus, Inc.*, S.W.3d (Tex. 2014)(3/28/14)</u>

   "Rule 90 deems any defect, omission, or fault in a pleading waived unless specifically pointed out by exception. However, failure to file a certificate of merit with the original petition cannot be cured by amendment. If a defect in the pleadings is incurable by amendment, a special exception is unnecessary." Here, defendant was not required to specially except "the lack of a certificate of merit."

2. <u>*Kopplow Development, Inc. v. The City of San Antonio*, 399 S.W.3d 532 (Tex. 2013)(3/8/13)</u>

   Commercial property owner sued city for inverse condemnation when city would not issue permit unless owner provided more landfill.

   A "party waive[s] a pleading defect issue by failing to specially except." "The City … specially

excepted to the inverse condemnation claim, TEX. R. CIV. P. 90, but it failed to obtain a ruling…."

D. Arbitration and Alternative Dispute Resolution

1. *Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC*, S.W.3d (Tex. 2014)(5/23/14)

Buyer and seller of a power plant arbitrated a dispute about indemnification. After seller lost, it challenged the disclosure provided by buyer of the connections between buyer's law firm and the arbitrator nominated by buyer. Affirming a vacatur of the award, the Supreme Court ruled that the arbitrator had a duty to disclose additional information concerning his business relationship with buyer's law firm, that the failure itself "constitute[ed] evident partiality," and that seller had not waived its right to complain. The law "requires vacating an award if an arbitrator fails to disclose facts which might, to an objective observer, create a reasonable impression of the arbitrator's partiality, but information that is trivial will not rise to this level and need not be disclosed."

The trial court's finding of a failure to disclose information by the arbitrator "is supported by some evidence and" the Court reviews "de novo whether that undisclosed information demonstrates [the arbitrator's] evident partiality."

"Evident partiality of an arbitrator is a ground for vacating an arbitration award under both the Federal Arbitration Act and the Texas Arbitration Act.… [A] neutral arbitrator is evidently partial if she fails to disclose facts that might, to an objective observer, create a reasonable impression of her partiality. And … a party does not waive an evident partiality challenge if it proceeds to arbitrate without knowledge of the undisclosed facts."

In this case, "all three arbitrators were required to be neutral, which follows the current default protocol in arbitration." Moreover, this was a "baseball arbitration," meaning that "each party would submit a proposed settlement and the panel was bound to select one of the two proposals."

Here, there was partial disclosure of the arbitrator's ties to the buyer's attorneys. The undisclosed facts, however, revealed a greater connection of the arbitrator with business dealings that involved the buyer's law firm. The "failure to disclose this additional information might yield a reasonable impression of the arbitrator's partiality to an objective observer." "[E]ven the slightest pecuniary interest in an arbitration could be grounds to set aside the award.…. '[A]bitrators [must] disclose to the parties any dealings that might create an impression of possible bias.'" While "an arbitrator need not disclose relationships or connections that are trivial, the conscientious arbitrator should err in favor of disclosure." Footnote 16: "Whether undisclosed information in a partial disclosure situation is trivial should involve comparing the undisclosed information to the disclosed information."

Because "inherent in the arbitration process are two principles that are often in tension: expertise and impartiality," prior "previous business dealings with a party … should not disqualify the arbitrator per se.…" But they must be disclosed. "'[E]vident partiality is established from the *nondisclosure itself*, regardless of whether the nondisclosed information necessarily establishes partiality or bias. Whether the undisclosed information actually establishes partiality or bias is a matter 'better left to the parties.'" "A party need not prove actual bias to demonstrate evident partiality."

A "party may waive such a challenge by proceeding to arbitrate based on information it knows." But, seller "did not waive a conflict it was unaware of." "To hold otherwise 'would put a premium on concealment.…'" Nevertheless, the undisclosed information must "be more than trivial.…"

2. *Kennedy Hodges, L.L.P. v. Gobellan*, S.W.3d (Tex. 2014)(5/16/14)

Attorney left law firm and took some clients. Firm sued attorney, but arbitration was not provided in the employment agreement, and firm did not seek it. Firm sued clients and did seek arbitration as permitted by the retainer agreement. The Supreme Court ruled that firm did not waive its right to arbitration with clients by litigating its claim with associate.

"A party waives its right to arbitration by substantially invoking the judicial process to the other party's detriment or prejudice. Proving waiver is a high hurdle due to the strong presumption against waiver of arbitration."

The "firm could not arbitrate its dispute with the former associate because it had no arbitration agreement with him. Because the firm's litigation with the former associate neither prejudiced the former clients nor substantially invoked the litigation process with them," it was permitted to enforce arbitration against the clients.

The relevant facts were undisputed; thus, the issue of whether the firm "waived its right to arbitrate is a question of law we review de novo."

"A party waives the right to arbitrate 'by substantially invoking the judicial process to the other party's detriment or prejudice.' The strong presumption against waiver of arbitration renders this hurdle a high bar. We decide waiver on a case-by-case basis by assessing the totality of the circumstances. We have considered such factors as (1) when the movant knew of the arbitration clause; (2) how much discovery was conducted; (3) who initiated the discovery; (4) whether the discovery related to the merits rather than arbitrability or standing; (5) how much of the discovery would be useful in arbitration; and (6) whether the movant sought judgment on the merits.

Further, the substantial invocation of the litigation process must also have prejudiced the opposing party. In this context, prejudice is 'inherent unfairness in terms of delay, expense, or damage to a party's legal position that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue.'"

One of "the prime benefits of arbitration [is] an expedient and cost-effective dispute resolution process." Moreover, the party asserting waiver is the opponent in the litigation.

A "party who litigated one claim with an opponent did not substantially invoke the litigation process for a related yet distinct claim against another party with whom it had an arbitration agreement." The firm's litigation with the associate did not invoke the litigation process with the clients, since they were not parties to the suit.

In a suit against the clients, the firm did not substantially invoke the litigation process. It filed pleadings and sought a no-answer default. In another decision, "seeking initial discovery, taking four depositions, and moving for dismissal did not substantially invoke the litigation process." In a second case involving the firm, it conducted no discovery; it merely intervened and moved to compel discovery.

Therefore, suing the attorney, and filing limited pleadings against the clients "did not substantially invoke the litigation process against the [clients] or prejudice them." It did not waive its right to arbitrate.

3. *Sawyer, et al. v. E.I. du Pont de Nemours and Company*, ___ S.W.3d ___ (Tex. 2014)(4/25/14)

Certified question from Fifth Circuit regarding an employment dispute. "'At-will employment does not preclude employers and employees from forming subsequent contracts, 'so long as neither party relies on continued employment as consideration for the contract.'' An employer and employee may agree, for example, to arbitrate their disputes, … as long as other consideration is given. But if the employer or employee can avoid performance of a promise by exercising a right to terminate the at-will relationship, … the promise is illusory and cannot support an enforceable agreement."

4. *In re Mark Fisher*, ___ S.W.3d ___ (Tex. 2014)(2/28/14)

Venue case. Plaintiff sold his company to a limited partnership, and became a limited partner, in a series of agreements that called for venue in Tarrant County. Asserting he was defamed, and that the business was bankrupted by mismanagement, he filed suit in Wise County against the principals of the buyer. The Supreme Court ruled that the "trial court abused its discretion by failing to enforce the mandatory forum selection clauses" in the agreements.

Plaintiff "cites *Carr v. Main Carr Development, LLC*, 337 S.W.3d 489, 498 (Tex. App.—Dallas 2011, pet. denied), in which the court held that a non-signatory cannot be compelled to arbitrate when his claims merely 'touch matters' covered by a contract containing an arbitration clause, yet the claims do not actually rely on the contractual terms. *Id.* In that case the court of appeals explained that claims must be brought on a contract if liability must be determined by reference to the contract, and the determination of whether a party seeks the benefit of a contract turns on the substance of the claim." But, here, the plaintiff's claims did more than merely "touch matters" in the agreements.

5. *In re Stephanie Lee*, 411 S.W.3d 445 (Tex. 2013)(9/27/13)

Husband and wife entered a mediated settlement agreement. Husband later changed his mind and asserted, before judgment was rendered, that it was not in the best interest of the children. Trial court agreed and did not enter judgment. The Supreme Court granted mandamus: "a trial court may not deny a motion to enter judgment on a properly executed MSA on" grounds of the best interest of the children.

"Encouragement of mediation as an alternative form of dispute resolution is critically important to the emotional and psychological well-being of children involved in high-conflict custody disputes.… It is 'the policy of this state to encourage the peaceable resolution of disputes, *with special consideration given to disputes involving the parent-child relationship*.…"

The "Legislature has clearly directed that, subject to a very narrow exception involving family violence, denial of a motion to enter judgment on an MSA based on a best interest determination, where that MSA meets the statutory requirements" is not a tool to safeguard children's welfare.

Footnote 7: "Mandamus relief is available to remedy a trial court's erroneous refusal to enter judgment on an MSA."

"Subsection (d) provides that an MSA is binding on the parties if it is signed by each party and by the parties' attorneys who are present at the mediation and states prominently and in emphasized type that it is not subject to revocation." A narrow exception "allow[s] a court to decline to enter judgment on even a statutorily compliant MSA if a party to the agreement was a victim of family violence, the violence impaired the party's ability to make decisions, *and* the agreement is not in the best interest of the child." Unless these conditions are met, the trial court cannot substitute its judgment for the mediated agreement of the parties.

After an arbitration, the law explicitly allows the trial court to consider the best interest of the child. "This distinction between arbitration and mediation makes sense because the two processes are very

different. Mediation encourages parents to work together to settle their child-related disputes, and shields the child from many of the adverse effects of traditional litigation. On the other hand, arbitration simply moves the fight from the courtroom to the arbitration room."

"[S]ection 153.0071(e) reflects the Legislature's determination that it is appropriate for parents to determine what is best for their children within the context of the parents' collaborative effort to reach and properly execute an MSA."

Though "courts can never stand idly by while children are placed in situations that threaten their health and safety," refusing to enter an MSA is not one of the proper methods.

Mediation has inherent safeguards. "Under Texas law, '[m]ediation is a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them.' To qualify for appointment [as a mediator] by the court… , a person must meet certain requirements for training in alternative dispute resolution techniques. To qualify for appointment 'in a dispute relating to the parent-child relationship,' the person must complete additional training 'in the fields of family dynamics, child development, and family law.'"

Footnote 17: when "entering judgment on an MSA, trial courts may include '[t]erms necessary to effectuate and implement the parties' agreement' so long as they do not substantively alter it."

6. *Rachal v. Reitz*, 403 S.W.3d 840 (Tex. 2013)(5/3/13)

Father created *inter vivos* trust for children that contained an arbitration clause. After he died, son sued lawyer who drafted trust and became successor trustee claiming he misappropriated assets and seeking an accounting. The Supreme Court ruled that the arbitration provision was "enforceable against the beneficiary for two reasons. First, the settlor determines the conditions attached to her gifts, and we enforce trust restrictions on the basis of the settlor's intent.… Second, the TAA requires enforcement of written agreements to arbitrate, and an agreement requires mutual assent, which we have previously concluded may be manifested through the doctrine of direct benefits estoppel. Thus, the beneficiary's acceptance of the benefits of the trust and suit to enforce its terms constituted the assent required to form an enforceable agreement to arbitrate under the TAA."

"Federal and state policies favor arbitration for its efficient method of resolving disputes, and arbitration has become a mainstay of the dispute resolution process."

"As a threshold matter, a party seeking to compel arbitration must establish the existence of a valid arbitration agreement and the existence of a dispute within the scope of the agreement." "[W]e resolve doubts as to the agreement's scope in favor of arbitration." "When determining whether claims fall within the scope of the arbitration agreement, we look to the factual allegations, not the legal claims."

"Here, the settlor unequivocally stated his requirement that all disputes be arbitrated.… Because this language is unambiguous, we must enforce the settlor's intent and compel arbitration if the arbitration provision is valid and the underlying dispute is within the provision's scope."

"We review de novo whether an arbitration agreement is enforceable.… [W]e defer to the trial court's factual determinations that are supported by evidence but review the trial court's legal determinations de novo."

The "TAA does not require a formal contract but rather only an agreement to arbitrate future disputes." "The TAA provides that a 'written *agreement* to arbitrate is valid and enforceable if the *agreement* is to arbitrate a controversy that: (1) exists at the time of the *agreement*; or (2) arises between the parties after the date of the *agreement*.… [A] 'party may revoke the agreement only on a ground that exists at law or in equity for the revocation of a *contract*.'" Thus, the "legislative intent [was] to enforce arbitration provisions in agreements. If the Legislature intended to only enforce arbitration provisions within a contract, it could have said so." "Because the TAA does not define agreement, we must look to its generally accepted definition. Black's Law Dictionary defines an agreement as 'a manifestation of mutual assent by two or more persons.'" "Agreement" is broader and less technical than "contract."

An agreement "must be supported by mutual assent." Footnote 4: "[W]e have previously discussed arbitration agreements under contract principles."

"Typically, a party manifests its assent by signing an agreement..… But we have also found assent by nonsignatories to arbitration provisions when a party has obtained or is seeking substantial benefits under an agreement under the doctrine of direct benefits estoppel." Footnote 5: "[t]here are at least six theories in contract and agency law that may bind nonsignatories to arbitration agreements: (1) incorporation by reference; (2) assumption; (3) agency; (4) alter ego; (5) equitable estoppel; and (6) third-party beneficiary. Direct benefits estoppel … is a type of equitable estoppel."

A "'litigant who sues based on a contract subjects him or herself to the contract's terms'" like "the obligation to arbitrate disputes." If "the claims are based on the agreement, they must be arbitrated, but if

the claims can stand independently of the agreement, they may be litigated."

A beneficiary can opt out of a trust. But, "a beneficiary who attempts to enforce rights that would not exist without the trust manifests her assent to the trust's arbitration clause." Here, son "sought the benefits granted to him under the trust and sued to enforce the provisions of the trust…. In accepting the benefits of the trust and suing to enforce … [it], [son's] conduct indicated acceptance of the terms and validity of the trust." His claim the arbitration provision is invalid is thus barred by "direct benefits estoppel."

"We have generally applied direct benefits estoppel when there is an underlying contract the claimant did not sign, but we have never held a formal contract is required for direct benefits estoppel to apply. Indeed, … we likened direct benefits estoppel to the defensive theory of promissory estoppel. '[T]he promissory-estoppel doctrine presumes no contract exists.'"

The "doctrine of direct benefits estoppel will not provide the mutual assent necessary to compel arbitration in all circumstances. One who does not accept benefits under a trust and contests its validity could not be compelled to arbitrate the trust dispute.…"

7. *Richmont Holdings, Inc. v. Superior Recharge Systems, L.L.C.*, 392 S.W.3d 633 (Tex. 2013)(1/25/13)

Plaintiff sold his company's assets to defendant, and signed a separate employment agreement with defendant. Only the asset sale agreement included an arbitration provision. Defendant later fired plaintiff, and he filed suit. Though the trial court agreed with plaintiff that defendant had waived its right to arbitrate, on interlocutory appeal the court of appeals held that the arbitration clause did not apply to the employment agreement. The Supreme Court remanded, since plaintiff conceded "that the underlying dispute involves both the asset purchase and employment agreements."

The interlocutory appeal was authorized by the "order denying a motion to compel arbitration under the Texas General Arbitration Act."

"We have held that a ''court has no discretion but to compel arbitration and stay its own proceedings'' when a claim falls within the scope of a valid arbitration agreement and there are no defenses to its enforcement." The case was remanded to "consider the waiver defense."

E. Ripeness and Mootness

1. *City of Lorena v. BMTP Holdings, L.P.*, 409 S.W.3d 634 (Tex. 2013)(8/30/13)

The city argued the developer's claim that the city improperly imposed a moratorium on development was not ripe because of its application and appeal procedures. But, the Court ruled "the process does not give rise to a mandatory requirement and, as structured, would nonetheless be futile." The Legislature had not granted the city sole authority to decide a dispute.

2. *Kopplow Development, Inc. v. The City of San Antonio*, 399 S.W.3d 532 (Tex. 2013)(3/8/13)

Commercial property owner sued city for inverse condemnation when city would not issue permit unless owner provided more landfill.

The city asserted that the landowner's claim was not ripe. In flooding cases, courts of appeals have held that "a future loss of property [does] not give rise to a present takings case." While that type claim may be premature, here landowner's "claim is about development, not flooding." And, the record showed that the landowner "sought to develop its property pursuant to the previously approved plat and that the City would require [it] to fill its property … [further to] develop it. [Accordingly,] … we are able to determine whether the municipality will approve the use the landowner seeks." "Even if the [landowner's] property never actually floods, the property is nonetheless undevelopable unless filled.…" "[O]n "facts, a lack of ripeness does not bar [landowner's] inverse condemnation claim."

3. *CTL/Thompson Texas, LLC v. Starwood Homeowner's Association*, 390 S.W.3d 299 (Tex. 2013)(1/25/13)

Homeowner's association sued engineering firm and attached a report to the petition. The firm filed an interlocutory appeal challenging the trial court's denial of its motion to dismiss, and while it was pending, the association took a nonsuit. The Supreme Court ruled that the "nonsuit did not moot CTL's appeal."

A. Affirmative Defenses

1. Affirmative Defenses Generally

a. *Colorado, et al. v. Tyco Valves & Controls, L.P.*, ___ S.W.3d ___ (Tex. 2014)(3/28/14)

Defendant offered employees cash and severance if they remained with a business unit that was being sold and were not offered positions with the purchaser. Some plaintiffs had signed a written agreement; others alleged an oral agreement. The Supreme Court ruled "that ERISA preempts the employees' breach-of-contract claims…"

"ERISA preemption is an affirmative defense on which [defendant] bore the burden of proof at trial.… ERISA preemption is an affirmative defense 'where ERISA's preemptive effect would result only in a change of the applicable law' and would not subject the claim to exclusive federal jurisdiction.…"

b. *Dugger v. Arredondo*, 408 S.W.3d 825 (Tex. 2013)(8/30/13)

After doing drugs and drinking with defendant, plaintiff's son died. Defendant raised the common law defense called the wrongful acts doctrine. The Supreme Court ruled that "the Legislature's adoption of the proportionate responsibility scheme in Chapter 33 … evidenced its clear intention that a plaintiff's illegal conduct not falling within a statutorily-recognized affirmative defense [*i.e.*, 93.001] be apportioned rather than barring recovery completely," thus over ruling the common law wrongful acts doctrine.

In a wrongful death case, any "defenses that would be available against the decedent if he or she were alive may be asserted against his or her estate."

"*Thomas v. Uzoka*, … permit[s] a decedent's wife to recover despite the decedent's failure to wear a seatbelt[]."

"The proportionate responsibility scheme [of Ch. 33] applies to 'any cause of action based on tort in which a defendant, settling person, or responsible third party is found responsible for a percentage of the harm for which relief is sought.'"

Because "Chapter 33 applies to wrongful death Claims … a defendant may assert any defense against the claimant that he might have asserted against the decedent, if the decedent were alive.… [In] Texas comparative negligence precluded recovery in a wrongful death case [when] the decedent's negligence was greater than the tortfeasor's. [It is recognized that] proportionate responsibility applies to wrongful death cases."

"The language of [Ch. 33] indicates the Legislature's desire to compare responsibility for injuries rather than bar recovery, even if the claimant was partly at fault or violated some legal standard.… Chapter 33 controls over the unlawful acts doctrine in the wrongful death context."

"Proportionate responsibility abrogated former common law doctrines that barred a plaintiff's recovery because of the plaintiff's conduct—like assumption of the risk, imminent peril, and last clear chance—in favor of submission of a question on proportionate responsibility. When the Legislature intends an exception to Chapter 33's broad scheme, it creates specific exceptions for matters that are outside the scope of proportionate responsibility. In the context of criminal actions, … the Legislature … remov[ed] certain criminal acts performed in concert with another person from the proportionate responsibility scheme and instead impos[ed] joint and several liability."

"[T]hose who voluntarily put themselves in dangerous situations are not necessarily barred from recovering from other negligent individuals.… [A]n individual who voluntarily became intoxicated and was injured while driving his car may recover against the establishment that served him the alcohol."

Section "93.001 … provid[es] an affirmative defense to civil actions brought by convicted criminals seeking to recover damages for injuries arising out of their felonious acts." However, the text "limits the affirmative defense to cases in which both (1) the plaintiff was finally convicted, and (2) the felony was the sole cause of the damages." Also, "subsection 93.001(a)(2) limits the affirmative defense to instances in which the plaintiff was committing or attempting suicide." Here, the decedent was never convicted.

Section 93.001 was enacted when Ch. 33 was amended and permitted recovery if the claimant's damages were less than 50%. "In light of Chapter 33's abrogation of common law defenses that provide a complete bar to plaintiff's recovery—including the unlawful acts doctrine—we interpret subsection 93.001(c) as an indication that the Legislature intended the statutory affirmative defense to resurrect only a small portion of the unlawful acts doctrine, providing a complete bar to recovery only in the certain limited circumstances articulated by subsections 93.001(a)(1) and (2)."

The "common law unlawful acts doctrine is not available as an affirmative defense in personal injury and wrongful death cases. Like other common law assumption-of-the-risk defenses, it was abrogated by Chapter 33's proportionate responsibility scheme. Unless the requirements of the affirmative defense in section 93.001 are satisfied, a plaintiff's share of responsibility for his or her injuries should be compared against the defendant's."

c. *Dynegy, Inc. v. Yates*, 422 S.W.3d 638 (Tex. 2013)(8/30/13)

Dynegy orally agreed to pay for the criminal defense attorney for its officer. When attorney sued for the balance after the trial, it alleged the statute of frauds. The Supreme Court ruled the agreement was unenforceable.

"The party pleading the statute of frauds bears the initial burden of establishing its applicability.… [Likewise,] the party pleading statute of limitations has the initial burden of proof[]."

The "discovery rule, as a defense to the statute of limitations, is a plea in confession and avoidance that is waived if not pled."

d. *In re the Office of the Attorney General*, 422 S.W.3d 623 (Tex. 2013)(3/8/13)

Criminal contempt proceeding based upon ex-husband's failure to pay child support. The Supreme Court ruled that, to purge himself of contempt according to statute, he had to be "current" with all child support as of the date of the hearing.

"The purging provision at issue is akin to an affirmative defense.…" Footnote 10: "[I]t is analogous to an affirmative defense in that it precludes a contempt finding notwithstanding a proven violation of a prior order and places the burden of proof on the respondent to show that it applies. *See* BLACK'S LAW DICTIONARY 482 (9th ed. 2009) (defining an affirmative defense as '[a] defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true,' and noting that '[t]he defendant bears the burden of proving an affirmative defense')."

e. *Rodriguez-Escobar v. Goss*, 392 S.W.3d 109 (Tex. 2012)(2/1/13)

Footnote 1: ""Official immunity is an affirmative defense.""

2. Pleading Affirmative Defenses

a. *Dynegy, Inc. v. Yates*, 422 S.W.3d 638 (Tex. 2013)(8/30/13)

Dynegy orally agreed to pay for the criminal defense attorney for its officer. When attorney sued for the balance after the trial, it alleged the statute of frauds. The Supreme Court ruled the agreement was unenforceable.

"The party seeking to avoid the statute of frauds must plead, prove, and secure findings as to an exception or risk waiver under Rule 279…." The "discovery rule, as a defense to the statute of limitations, is a plea in confession and avoidance that is waived if not pled."

3. Contributory Negligence and Comparative Fault

a. *Dugger v. Arredondo*, 408 S.W.3d 825 (Tex. 2013)(8/30/13)

After doing drugs and drinking with defendant, plaintiff's son died. Defendant raised the common law defense called the wrongful acts doctrine. Under it, "a plaintiff cannot recover damages if it can be shown that, at the time of injury, the plaintiff was engaged in an illegal act that contributed to the injury." The Supreme Court ruled that "the Legislature's adoption of the proportionate responsibility scheme in Chapter 33 … evidenced its clear intention that a plaintiff's illegal conduct not falling within a statutorily-recognized affirmative defense [*i.e.*, 93.001] be apportioned rather than barring recovery completely," thus over ruling the common law wrongful acts doctrine.

In a wrongful death case, any "defenses that would be available against the decedent if he or she were alive may be asserted against his or her estate."

The "Legislature's enactment of Chapter 33's proportionate responsibility scheme and section 93.001 are dispositive in this case.

"*Thomas v. Uzoka*, … permit[s] a decedent's wife to recover despite the decedent's failure to wear a seatbelt[]."

"The proportionate responsibility scheme [of Ch. 33] applies to 'any cause of action based on tort in which a defendant, settling person, or responsible third party is found responsible for a percentage of the harm for which relief is sought.'"

Because "Chapter 33 applies to wrongful death Claims … a defendant may assert any defense against the claimant that he might have asserted against the decedent, if the decedent were alive.… [In] Texas comparative negligence precluded recovery in a wrongful death case [when] the decedent's negligence was greater than the tortfeasor's. [It is recognized that] proportionate responsibility applies to wrongful death cases."

The "common law unlawful acts doctrine is [not] available as an affirmative defense under the proportionate responsibility framework.… The language of [Ch. 33] indicates the Legislature's desire to compare responsibility for injuries rather than bar recovery, even if the claimant was partly at fault or violated some legal standard.… Chapter 33 controls over the unlawful acts doctrine in the wrongful death context."

"Proportionate responsibility abrogated former common law doctrines that barred a plaintiff's recovery because of the plaintiff's conduct—like assumption of the risk, imminent peril, and last clear chance—in favor of submission of a question on proportionate responsibility. When the Legislature intends an exception to Chapter 33's broad scheme, it creates specific exceptions for matters that are outside the scope of proportionate responsibility. In the context of criminal actions, … the Legislature … remov[ed] certain criminal acts performed in concert with another person from the proportionate responsibility scheme and instead impos[ed] joint and several liability."

"[T]hose who voluntarily put themselves in dangerous situations are not necessarily barred from recovering from other negligent individuals.… [A]n individual who voluntarily became intoxicated and was injured while driving his car may recover against the establishment that served him the alcohol."

Section "93.001 … provid[es] an affirmative defense to civil actions brought by convicted criminals seeking to recover damages for injuries arising out of their felonious acts." However, the text "limits the affirmative defense to cases in which both (1) the plaintiff was finally convicted, and (2) the felony was the sole cause of the damages." Also, "subsection 93.001(a)(2) limits the affirmative defense to instances

in which the plaintiff was committing or attempting suicide." Here, the decedent was never convicted.

Section 93.001 was enacted when Ch. 33 was amended and permitted recovery if the claimant's damages were less than 50%. "In light of Chapter 33's abrogation of common law defenses that provide a complete bar to plaintiff's recovery—including the unlawful acts doctrine—we interpret subsection 93.001(c) as an indication that the Legislature intended the statutory affirmative defense to resurrect only a small portion of the unlawful acts doctrine, providing a complete bar to recovery only in the certain limited circumstances articulated by subsections 93.001(a)(1) and (2)."

The "common law unlawful acts doctrine is not available as an affirmative defense in personal injury and wrongful death cases. Like other common law assumption-of-the-risk defenses, it was abrogated by Chapter 33's proportionate responsibility scheme. Unless the requirements of the affirmative defense in section 93.001 are satisfied, a plaintiff's share of responsibility for his or her injuries should be compared against the defendant's."

4. Statute of Limitations and Statute of Repose

a. *Coinmach Corp. f/k/a Solon Automated Services, Inc. v. Aspenwood Apartment Corp*., 417 S.W.3d 909 (Tex. 2013)(11/22/13) ("corrected opinion" was issued 2/14/14)

A "suit for tortious interference is subject to two-year statute of limitations."

b. *Nathan v. Whittington*, 408 S.W.3d 870 (Tex. 2013)(8/30/13)

Plaintiff filed suit within limitations in Nevada to collect a judgment, adding a defendant on a fraudulent transfer theory under the Uniform Fraudulent Transfer Act (UFTA). The suit against the added defendant was dismissed for want of personal jurisdiction. Plaintiff filed a new suit filed in Texas less than 60 days later. Defendant pleaded it violated the UFTA's statute of repose. The Supreme Court agreed, holding that the "suspension statute [§ 16.064(a) of the CP&RC] does not apply to a statute of repose…."

Under § 16.064(a), "the Legislature has suspended the running of a 'statute of limitations' for sixty days, if a trial court dismisses a claim for lack of jurisdiction." Though could refer to statutes of limitations and repose, under another statute (§ 33.04(e)) the Court held § 16.064(a) only applied to limitations, not repose. "'[A]pplication of the revival statute … effectively renders the period of repose indefinite, a consequence clearly incompatible with the purpose for such statutes.…'" "The whole point of layering a statute of repose over the statute of limitations is to 'fix an outer limit beyond which no action can be maintained.'" Though this might eliminate a meritorious claim, the "task of balancing these equities belongs to the Legislature, not to this Court."

UFTA § 24.010 is a statute of repose, not a statute of limitations, "because it substantively 'extinguishes' the cause of action." "'[W]hile statutes of limitations operate procedurally to bar the enforcement of a right, a statute of repose takes away the right altogether, creating a substantive right to be free of liability after a specified time.' … Statutes of repose are of an 'absolute nature,' and their 'key purpose . . . is to eliminate uncertainties under the related statute of limitations and to create a final deadline for filing suit that is not subject to any exceptions, except perhaps those clear exceptions in the statute itself.' Unlike statutes of limitations, which are intended primarily to encourage diligence on the part of plaintiffs, statutes of repose may serve other purposes and may run from some event other than when the cause of action accrued."

c. *Texas Adjutant General's Office v. Ngakoue*, 408 S.W.3d 350 (Tex. 2013)(8/30/13)

Plaintiff sued governmental employee who was acting in the course of his employment when he caused a car wreck. After plaintiff amended to add the governmental employer, it sought to have suit dismissed. The Supreme Court ruled that the plaintiff could assert a suit against the governmental unit.

Suit "against an employee in his official capacity is *not* a suit against the employee.… A governmental employer may be substituted for the employee under subsection (f) after limitations has run because there is 'no change in the real party in interest.'"

d. *Dynegy, Inc. v. Yates*, 422 S.W.3d 638 (Tex. 2013)(8/30/13)

The "party pleading statute of limitations has the initial burden of proof[]." The "discovery rule, as a defense to the statute of limitations, is a plea in confession and avoidance that is waived if not pled."

e. *CHCA Woman's Hospital, L.P. d/b/a The Woman's Hospital of Texas v. Lidji*, 403 S.W.3d 228 (Tex. 2013)(6/21/13)

In a birth injury case, parents filed medical malpractice suit, but dismissed before 120 days without having filed an expert report. Immediately upon refiling, they served their expert report on the defendant. The Supreme Court ruled the expert report requirement deadline was tolled during the nonsuit.

Footnote 1: here the suit was timely refiled: "subject to a ten-year statute of repose, minors under the age of 12 shall have until their 14th birthday to file, or have filed on their behalf, a health care liability claim."

Though parties have a right to take a nonsuit, "a voluntary nonsuit does not interrupt the running of the statute of limitations."

f. *Gonzales v. Southwest Olshan Foundation Repair Company, LLC*, 400 S.W.3d 52 (Tex. 2013)(3/29/13)

DTPA suit alleging poor foundation repair. The court ruled that the implied warranty under Melody Home of good and workmanlike quality was superseded by the parties' contract, and that error on this point was preserved. Regarding limitations, the Court held that the statute codifies the discovery rule, as well as fraudulent concealment, though the latter is limited to 180 days. Here, the limitations began to run when an employee said it was the "worst job" he had seen, even though the company sent out an engineer later who said the foundation was performing properly.

Footnote 3: "'[A] warranty for repair services [is] not breached until further repairs [are] refused.'"

The DTPA provides a statute of limitations of two years after the deceptive act, or when it was or should have been discovered. "In essence, the Legislature codified the discovery rule for DTPA claims." Furthermore, "'[once] a claimant learns of a wrongful injury, the statute of limitations begins to run even if the claimant does not yet know 'the specific cause of the injury; the party responsible for it; the full extent of it; or the chances of avoiding it.'" Here, when the employee said it was the "worst job," homeowner bought a camera for him to document the damage. Thus, limitations began to run because "she knew of the injury."

"The doctrine of fraudulent concealment tolls limitations 'because a person cannot be permitted to avoid liability for his actions by deceitfully concealing wrongdoing until limitations has run.' The DTPA establishes a 180-day limit on tolling for fraudulent concealment." The Court will not rewrite the statute.

g. *Lexington Insurance Company v. Daybreak Express, Inc.*, 393 S.W.3d 242 (Tex. 2013)(1/25/13); original opinion issued 8/31/12

Insurer for one common carrier sued another common carrier for breach of a settlement agreement to pay for cargo damage, and after limitations expired, added a claim for the cargo damage itself. The Supreme Court held the new claim related back to the first, so it was not barred by limitations. (This is a reissued opinion from the earlier one of 8/31/12, below, and remands the case.)

The relation-back doctrine removes a limitations defense for an amended pleading which adds a liability or defense theory unless "'the amendment … is wholly based on a new, distinct, or different transaction or occurrence.'" "Relation back allows an untimely claim not wholly based on a different transaction than a timely claim."

"'Transaction or occurrence' is a [fundamental] concept…." The term "'[t]ransaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship.'" Courts consider "whether the opposing party has been put on notice." Here, "cargo-damage claim and the breach-of-settlement claim both arose out of the same occurrence," so defendant had "fair notice."

5. Laches

No cases to report.

6. Res Judicata and Collateral Estoppel

a. Amedisys, Inc. v. Kingwood Home Health Care, LLC, ___ S.W.3d ___ (Tex. 2014)(5/9/14)

Dispute about whether plaintiff accepted defendant's settlement offer. "[T]he record provides no basis to find that [plaintiff] could pursue those claims [the claims plaintiff 'could have' asserted] in any post-settlement action. Generally, once parties settle a lawsuit and a judgment is entered, res judicata bars the parties from subsequently pursuing any claims arising out of the subject matter of the lawsuit that they could have brought in the previous suit." Footnote 7: "Texas law affords final judgments res judicata effect even during the pendency of an appeal."

b. Coinmach Corp. f/k/a Solon Automated Services, Inc. v. Aspenwood Apartment Corp., 417 S.W.3d 909 (Tex. 2013)(11/22/13) ("corrected opinion" was issued 2/14/14)

Footnote 5: "a determination of fact or law in a proceeding in a lower trial court, including a justice of the peace court, is not res judicata or basis for estoppel by judgment in a district court proceeding."

c. Phillips Petroleum Company v. Yarbrough, consolidated with *In re ConocoPhillips Company*, 405 S.W.3d 70 (Tex. 2013)(6/21/13)

After prior appeal, one of several putative subclasses was certified. Due to an amended pleading that changed the fundamental nature of the subclass by adding an "implied covenant" claim, the Supreme Court ruled that the trial court must consider the effect of res judicata when the class representative proposes to abandon a claim.

Class actions are "'subject to the same preclusion rules as other procedural forms of Litigation' and that class members are therefore barred from asserting in subsequent litigation claims that arose from the same transaction or subject matter as the class claims and either could have been or were litigated in the prior

suit." Thus, the trial court must "conduct a rigorous analysis regarding the effect of res judicata" when determining if a class can be certified.

7. Offset
No cases to report.

8. Statute of Frauds
No cases to report.

9. Estoppel

a. Coinmach Corp. f/k/a Solon Automated Services, Inc. v. Aspenwood Apartment Corp., 417 S.W.3d 909 (Tex. 2013)(11/22/13) ("corrected opinion" was issued 2/14/14)

Footnote 5: "a determination of fact or law in a proceeding in a lower trial court, including a justice of the peace court, is not res judicata or basis for estoppel by judgment in a district court proceeding."

b. Office of the Attorney General v. Scholer, 403 S.W.3d 859 (Tex. 2013)(6/28/13)

Child support case. Father and mother agreed to cease his child support if he relinquished rights to child. Though he signed the papers, mother's attorney never filed them. Years later, when the AG sought back child support, father pleaded estoppel. But the Supreme Court ruled that "estoppel is not a defense to a child support enforcement proceeding."

"Estoppel, an equitable defense, 'arises where by fault of one, another has been induced to change his position for the worse.' The doctrine operates 'to prevent injustice and protect those who have been misled.'"

In child support cases, because "courts are prohibited from making additional adjustments, affirmative defenses that are not included in the statute, like estoppel, are also prohibited because they would require courts to make discretionary determinations."

c. Rachal v. Reitz, 403 S.W.3d 840 (Tex. 2013)(5/3/13)

Suit against successor trustee by beneficiary of trust which contained an arbitration provision. The Supreme Court ruled that the "TAA requires enforcement of written agreements to arbitrate, and an agreement requires mutual assent, which … may be manifested through the doctrine of direct benefits estoppel. Thus, the beneficiary's acceptance of the benefits of the trust and suit to enforce its terms constituted the assent required to form an enforceable agreement to arbitrate under the TAA."

Footnote 5: "[t]here are at least six theories in contract and agency law that may bind nonsignatories to arbitration agreements: (1) incorporation by reference; (2) assumption; (3) agency; (4) alter ego; (5) equitable estoppel; and (6) third-party beneficiary. Direct benefits estoppel, … is a type of equitable estoppel."

"In accepting the benefits of the trust and suing to enforce … [it], [son's] conduct indicated acceptance of the terms and validity of the trust." His claim the arbitration provision is invalid is thus barred by "direct benefits estoppel."

"We have generally applied direct benefits estoppel when there is an underlying contract the claimant did not sign, but we have never held a formal contract is required for direct benefits estoppel to apply. Indeed, … we likened direct benefits estoppel to the defensive theory of promissory estoppel. '[T]he promissory-estoppel doctrine presumes no contract exists.'"

The "doctrine of direct benefits estoppel will not provide the mutual assent necessary to compel arbitration in all circumstances. One who does not accept benefits under a trust and contests its validity could not be compelled to arbitrate the trust dispute.…"

d. Texas Department of Transportation v. A.P.I. Pipe and Supply, LLC, 397 S.W.3d 162 (Tex. 2013)(4/5/13)

Inverse condemnation suit which turned on whether government had title to a parcel after an original condemnation judgment in 2003 that awarded it a "right-of-way" was revised by a nunc pro tunc judgment in 2004 that purported to render the 2003 judgment void and render only an "easement." The subsequent purchaser asserted the government should be estopped to challenge the 2004 judgment, which it apparently approved. The Supreme Court ruled that in part that "equitable estoppel is inapplicable against the government in this case."

Purchaser of land asserted that the government, which participated in a nunc pro tunc judgment pursuant to which it bought the land, claimed government should be estopped from subsequently objecting to the judgment. But the Court ruled that "equitable estoppel … [was] inapplicable against the government in this case."

"For estoppel to apply against the government, two requirements must exist: (1) 'the circumstances [must] clearly demand [estoppel's] application to prevent manifest injustice,' *and* (2) no governmental function can be impaired. Neither requirement exists here." Footnote 36: "*Super Wash* … explain[s] the significance of the only two cases where we have applied estoppel against the government"

Estoppel has been applied "to prevent manifest injustice if, 'officials acted deliberately to induce a party to act in a way that benefitted the [government].'" Here, there was only "mistaken acquiescence."

Moreover, "that the fact that a governmental error was 'discoverable' militates against applying estoppel."

Finally, estoppel would impair planning a drainage ditch, which is "a governmental function."

10. New and Independent Cause

No cases to report.

11. Preemption

a. Colorado, et al. v. Tyco Valves & Controls, L.P., ___ S.W.3d ___ (Tex. 2014)(3/28/14)

Defendant offered employees cash and a severance if they remained with a business unit that was being sold and were not offered positions with the purchaser. Some plaintiffs had signed a written agreement; others alleged an oral agreement. The Supreme Court ruled "that ERISA preempts the employees' breach-of-contract claims…"

"ERISA preemption is an affirmative defense on which [defendant] bore the burden of proof at trial.… ERISA preemption is an affirmative defense 'where ERISA's preemptive effect would result only in a change of the applicable law' and would not subject the claim to exclusive federal jurisdiction.… [S]tate and federal courts [have] concurrent jurisdiction over actions by a beneficiary to recover benefits due under the terms of a covered plan or to enforce rights under the plan."

"ERISA is a comprehensive scheme enacted to promote employees' interests in their benefit plans. The statute establishes various pension-plan requirements and mandates uniform standards for both pension and welfare-benefit plans. ERISA does not itself mandate any particular set of benefits, but rather sets standards governing reporting, disclosure, and fiduciary responsibility for ERISA-governed plans."

"Section 514(a) of ERISA preempts 'any and all State laws insofar as they may now or hereafter relate to any employee benefit plan' covered by ERISA. ERISA's expansive preemption provisions are intended to ensure exclusive federal regulation of employee benefit plans. Accordingly, ERISA's preemption provision has been broadly construed. State laws that are subject to preemption include not just statutes, but also common-law causes of action like [employees']breach-of-contract claims."

The "United States Supreme Court construed the phrase 'relates to' as carrying its ordinary meaning of having 'a connection with or reference to' an employee benefit plan. The Supreme Court noted, however, that if the state action affects a benefit plan 'in too tenuous, remote, or peripheral a manner,' the impermissible connection to ERISA does not exist." For instance, a one-time payment did not invoke ERISA's concern of an "ongoing administrative program."

"'ERISA … preempts state common law causes of action that reference or pertain to an ERISA plan.…' Further, if alleged promises made to employees 'were simply an attempt to amend [an] existing plan, then it follows that they were based on that plan.'" Here, defendant's employee testified a schedule was "intended to replace the ERISA Plan's schedule."

Promises to those who had not signed the agreement "were simply promises to pay severance pursuant to an improperly amended ERISA Plan."

Moreover, the severance provision may only be analyzed with reference to the so-called standard severance. The "employees' entitlement to benefits under the [retention agreements], and the damages claimed, could not be fully evaluated without considering the ERISA-governed plan that was expressly referenced in the [retention agreements]. Further, the benefits originated from the same source."

b. City of Houston v. Bates, 406 S.W.3d 539 (Tex. 2013)(6/28/13)

In a pay dispute between retired firemen and a home rule city, the Supreme Court had to construe the terms "leave" and "salary."

"'An ordinance of a home-rule city that attempts to regulate a subject matter preempted by a state statute is unenforceable to the extent it conflicts with the state statute.' If a reasonable construction giving effect to both the state statute and the ordinance can be reached, then a city ordinance will not be held to have been preempted by the state statute."

"We construe the Legislature's change from 'salary' … to 'base salary,' … as indicative of the Legislature's clarification of the prior law and not as a substantive change." So, "under our construction of 'salary' as used in [the statute], the statutory scheme preempts the City from excluding those components [of pay] when calculating termination pay."

c. In re the Office of the Attorney General, 422 S.W.3d 623 (Tex. 2013)(3/8/13)

Criminal contempt proceeding based upon ex-husband's failure to pay child support. The Supreme Court ruled that, to purge himself of contempt according to statute, he had to be "current" with all child support as of the date of the hearing.

"Child support collection is serious business; so much so that the federal government has enacted legislation requiring states to abide by certain mandates to help struggling parents obtain child support in order to receive federal funding."

d. Southern Crushed Concrete, LLC v. City of Houston, 398 S.W.3d 676 (Tex. 2013)(2/15/13)

Suit over denial by city of permit for concrete plant. "The TCAA provides that '[a]n ordinance enacted by a municipality . . . may not make unlawful a condition or act approved or authorized under [the TCAA] or the [C]ommission's rules or orders.' Because the [city's] Ordinance makes it unlawful to build a concrete-crushing facility at a location that was specifically authorized under the Commission's orders by virtue of the permit, we hold that the Ordinance is preempted."

If "'the Legislature decides to preempt a subject matter normally within a home-rule city's broad powers, it must do so with 'unmistakable clarity.'" That was done here.

e. *Lexington Insurance Company v. Daybreak Express, Inc.*, 393 S.W.3d 242 (Tex. 2013)(1/25/13); original opinion issued 8/31/12

Insurer for one common carrier sued another common carrier for breach of a settlement agreement to pay for cargo damage, and after limitations expired, added a claim for the cargo damage itself, governed by federal law. The Supreme Court held the new claim related back to the first, so it was not barred by limitations, even though interstate cargo claims are preempted by the Carmack Amendment. (This is a reissued opinion from the earlier one of 8/31/12, below, and remands the case.)

"An interstate carrier's responsibility for goods it transports is governed by the Carmack Amendment," which supersedes all state law.

"Preemption assures uniform, predictable standards of responsibility for common carriers in transactions involving interstate shipments."

12. Waiver

a. Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC, ___ S.W.3d ___ (Tex. 2014)(5/23/14)

After an arbitration, losing party learned that the disclosure of an arbitrator's business connections with law firm representing winning party was incomplete. Affirming a vacatur of the award, the Supreme Court ruled that the arbitrator had a duty to disclose additional information concerning his business relationship with buyer's law firm, that the failure itself "constitute[ed] evident partiality," and that seller had not waived its right to complain.

In a challenge to an arbitration award, a "party does not waive an evident partiality challenge [to an arbitrator] if it proceeds to arbitrate without knowledge of the undisclosed facts."

A "party may waive such a challenge by proceeding to arbitrate based on information it knows." But, seller "did not waive a conflict it was unaware of." "To hold otherwise 'would put a premium on concealment.…'" Nevertheless, the undisclosed information must "be more than trivial.…"

b. Crosstex Energy Services, L.P. v. Pro Plus, Inc., ___ S.W.3d ___ (Tex. 2014)(3/28/14)

Interlocutory appeal of an order denying a motion to dismiss and granting an extension to file a certificate of merit under Ch. 150. The Supreme Court ruled defendant had not waived the plaintiff's requirement to file a certificate of merit.

Waiver is "'an intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right.' Parties may not waive jurisdictional statutory duties. But mandatory statutory duties are not necessarily jurisdictional. A party may waive a mandatory, non-jurisdictional requirement by failing to object timely. We resist classifying a provision as jurisdictional absent clear legislative intent to that effect." Here, "section 150.002 imposes a mandatory, but nonjurisdictional, filing requirement. Thus, we hold that a defendant may waive its right to seek dismissal under the statute."

"Waiver is primarily a function of intent. To find waiver through conduct, such intent 'must be clearly demonstrated by the surrounding facts and circumstances.' We will not find waiver where a person 'says or does nothing inconsistent with an intent to rely upon such right.' Generally, waiver presents a question of fact, but 'when the facts and circumstances are admitted or clearly established, the question becomes one of law.'"

"[S]ubstantial invocation of the litigation process may amount to waiver." But, in this case, defendant's conduct in participating in discovery, filing pleadings, agreeing to a continuance, and entering a Rule 11 agreement did not constitute waiver. "Quite simply, '[a]ttempting to learn more about the case in which one is a party [through discovery] does not demonstrate an intent to waive the right to move for dismissal.'"

B. Responsible Third Parties

1. *Dugger v. Arredondo*, 408 S.W.3d 825 (Tex. 2013)(8/30/13)

The "Legislature's adoption of the proportionate responsibility scheme in Chapter 33 … evidenced its clear intention that a plaintiff's illegal conduct not falling within a statutorily-recognized affirmative defense [*i.e.*, 93.001] be apportioned rather than barring recovery completely," thus over ruling the common law wrongful acts doctrine.

"The proportionate responsibility scheme [of Ch. 33] applies to 'any cause of action based on tort in which a defendant, settling person, or responsible third party is found responsible for a percentage of the harm for which relief is sought.'"

C. Counterclaims

No cases to report.

D. Election of Remedies

1. *Texas Adjutant General's Office v. Ngakoue*, 408 S.W.3d 350 (Tex. 2013)(8/30/13)

Plaintiff sued governmental employee who was acting in the course of his employment when he caused a car wreck. After plaintiff amended to add the governmental employer, it sought to have suit dismissed. Notwithstanding the Tort Claims Act's election of remedies provisions, the Supreme Court ruled that the plaintiff could assert a suit against the governmental unit.

VI. PRETRIAL PROCEDURE

A. Pleadings

1. *In re Mark Fisher*, ___ S.W.3d ___ (Tex. 2014)(2/28/14)

Venue case in which defendants also challenged jurisdiction. "When a plea to the jurisdiction is based on the pleadings, the pleadings are to be construed liberally in favor of the plaintiff. … [Here, plaintiff's] allegations do not affirmatively negate his having been 'personally aggrieved.'"

2. *Zanchi v. Lane*, 408 S.W.3d 373 (Tex. 2013)(8/30/13)

The "pleading rules in the Texas Rules of Civil Procedure refer to those named in petitions as 'parties,' supporting a conclusion that service of process is not a prerequisite to that designation. TEX. R. CIV. P. 79 (requiring that a petition list the 'parties')."

Footnote 4: "Rule 21a of the Texas Rules of Civil Procedure authorizes service by one of four methods of delivery: (1) in person, by agent, or by courier receipted delivery; (2) by certified or registered mail to the party's last known address; (3) by telephonic document transfer to the recipient's current telecopier number; or (4) by such other manner as the court in its discretion may direct."

3. *Texas Adjutant General's Office v. Ngakoue*, 408 S.W.3d 350 (Tex. 2013)(8/30/13)

Plaintiff sued governmental employee who was acting in the course of his employment when he caused a car wreck. After plaintiff amended to add the governmental employer, it sought to have suit dismissed. The Supreme Court ruled that the plaintiff could assert a suit against the governmental unit.

The TTCA "favors the expedient dismissal of governmental employees when suit should have been brought against the government." It removes "a plaintiff's ability 'to plead alternatively that the governmental unit is liable because its employee acted within the scope of his or her authority but, if not, that the employee acted independently and is individually liable.'"

4. *Dynegy, Inc. v. Yates*, 422 S.W.3d 638 (Tex. 2013)(8/30/13)

Dynegy orally agreed to pay for the criminal defense attorney for its officer. When attorney sued for the balance after the trial, it alleged the statute of frauds. The Supreme Court ruled the agreement was unenforceable.

"The party seeking to avoid the statute of frauds must plead, prove, and secure findings as to an exception or risk waiver under Rule 279…." The "discovery rule, as a defense to the statute of limitations, is a plea in confession and avoidance that is waived if not pled."

A "plaintiff relying on a primary obligor theory under the main purpose doctrine must plead and establish facts to take a verbal contract out of the statute of frauds."

5. *In re the Office of the Attorney General*, 422 S.W.3d 623 (Tex. 2013)(3/8/13)

Criminal contempt proceeding based upon ex-husband's failure to pay child support. The Supreme Court ruled that, to purge himself of contempt according to statute, he had to be "current" with all child support as of the date of the hearing.

"[S]pecific violations of a court order must be pled to support a contempt finding. However, the purging provision does not affect the basis of the contempt finding; rather, it provides a basis for escaping an otherwise valid finding of contempt. We therefore disagree that the purging provision implicates notice requirements." The motion must "the amount owed, the amount paid, and the amount of arrearages. If contempt is requested, the motion must also include 'the portion of the order allegedly violated and, for each date of alleged contempt, the amount due and the amount paid, if any.' Thus, a respondent may be found in contempt only for violations that are specifically pled.…"

6. *Kopplow Development, Inc. v. The City of San Antonio*, 399 S.W.3d 532 (Tex. 2013)(3/8/13)

Commercial property owner sued city for inverse condemnation when city would not issue permit unless owner provided more landfill.

The city argued plaintiff did not plead inverse condemnation. "Texas is a notice pleading jurisdiction, and a 'petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim. The purpose of this rule is to give the opposing party information sufficient to enable him to prepare a defense.'" Here, the city knew landowner "was pleading an inverse condemnation claim."

A "party waive[s] a pleading defect issue by failing to specially except." "The City … specially excepted to the inverse condemnation claim, TEX. R. CIV. P. 90, but it failed to obtain a ruling…."

7. *Certified EMS, Inc. v. Potts*, 392 S.W.3d 625 (Tex. 2013)(2/15/13)

Medical malpractice case. "The … petitions inform a defendant of the claims against it and limit what a plaintiff may argue at trial."

8. *State of Texas v. Ninety Thousand Two Hundred Thirty-Five Dollars and No Cents*, 390 S.W.3d 289 (Tex. 2013)(1/25/13)

Forfeiture case. "Civil rules of pleading apply in forfeiture proceedings."

B. Discovery

1. *In re Ford Motor Company*, ___ S.W.3d ___ (Tex. 2014)(3/28/14)

In a park-to-reverse products liability case, plaintiff wanted to depose the employers of defendants' two retained experts to discover financial connections with defendants. But, the Supreme Court ruled that, on the facts of the case, the rules "do not permit such discovery."

"Rule 192.3(e) sets forth the scope of information that parties may discover about a testifying expert, which includes 'any bias of the witness.'" Rule 195 limits "testifying-expert discovery to that acquired through disclosures, expert reports, and oral depositions of expert witnesses," with a goal of "minimizing 'undue expense.'"

Here, plaintiff's "fishing expedition, seeking sensitive [business and financial] information covering twelve years, is just the type of overbroad discovery the rules are intended to prevent."

The Court does "not unduly inhibit discovery of an expert's potential bias." But, "discovery into the extent of an expert's bias is not without limits." And, the "most probative information" comes from the expert himself. Both, here, conceded they testify overwhelmingly for defendants. So, in this case, unlike in *Walker v. Packer*, "neither expert's credibility has been impugned in this case." And plaintiff offered no other justification for the depositions.

2. *Crosstex Energy Services, L.P. v. Pro Plus, Inc.*, S.W.3d (Tex. 2014)(3/28/14)

"The Texas Rules of Civil Procedure encourage liberal discovery practices. The discovery process streamlines the insatiable quest for information … full discovery promotes fair resolution of disputes and noting that this Court 'has vigorously sought to ensure that lawsuits are 'decided by what the facts reveal, not by what facts are concealed.…'' Information may sustain a case, or it may lead to the end of litigation, but in either case it is the lifeblood of the process. ('Discovery is thus the linchpin of the search for truth…')." Conducting discovery "does not demonstrate an intent to waive the right to move for dismissal."

3. *Elizondo v. Krist*, 415 S.W.3d 259 (Tex. 2013)(8/30/13)

In a legal malpractice suit arising from a mass tort, attorneys objected to producing evidence of other settlements. "To the extent the Attorneys contended as an initial discovery response that they and others could not disclose information regarding other settlements for contractual reasons, we believe they argued within the bounds of zealous advocacy in contending that the information should not be disclosed even if it might be helpful to the Elizondos."

4. *Certified EMS, Inc. v. Potts*, 392 S.W.3d 625 (Tex. 2013)(2/15/13)

Medical malpractice case. The TMLA "strictly limits discovery until expert reports have been provided, and we have held that the statute's plain language prohibits presuit depositions authorized under Rule 202."

C. Affidavits

1. *Tedder v. Gardner Aldrich, LLP*, 421 S.W.3d 651 (Tex. 2013)(5/17/13) ("corrected opinion" was issued 12/13/13)

Corrected opinion: footnote 2 changed. *See Tedder*, below, at 5/17/13.

2. *Tedder v. Gardner Aldrich, LLP*, 421 S.W.3d 651 (Tex. 2013)(5/17/13) ("corrected opinion" was issued 12/13/13)

In divorce proceeding, wife's attorney's firm intervened and filed a sworn account to recover its fees. The Supreme Court ruled that the husband was a stranger to the sworn account, so he was not required to file a controverting affidavit.

"'The law does not permit, much less encourage, guesswork in swearing; and to require a defendant to swear that a transaction between a plaintiff and a third person … either did or did not occur … before he will be permitted to controvert the *ex parte* affidavit of his adversary, would be to encourage swearing without knowledge.…"

When it appears from the plaintiff's account itself that the defendant was a stranger to the account, the defendant need not file a sworn denial to contest liability.… Rule 185 does not require a party to swear to what he does not and cannot know." Thus, husband did not have to deny firm's "claim under oath in order to contest his liability for its fees."

3. *State of Texas v. Ninety Thousand Two Hundred Thirty-Five Dollars and No Cents*, 390 S.W.3d 289 (Tex. 2013)(1/25/13)

Forfeiture case. The defendant filed a motion for summary judgment. In a summary judgment motion, "[o]nly if Bueno conclusively proved that none of the officers had such a belief [of a substantial connection between the property and a crime] would the burden shift to the State to respond and raise a material fact question about whether they did." Here, his affidavit "was insufficient to support summary judgment.…" Even if it could, "the affidavit wholly fails to address whether the officers had a reasonable belief that the property had or would have a substantial connection with illegal activity.…" It "certainly does not conclusively prove that none of them did."

D. Rule 11 Agreements

1. *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, S.W.3d (Tex. 2014)(5/9/14)

Dispute about whether plaintiff accepted defendant's settlement offer. Footnote 4: the Family Code provides for mediated settlement agreements; when the requirements are met, "'a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11….'"

2. *Crosstex Energy Services, L.P. v. Pro Plus, Inc.*, S.W.3d (Tex. 2014)(3/28/14)

In a medical malpractice case, an "agreed order dealing with expert report deadlines does not impact the separate section 74.351 requirement *unless* it is specifically mentioned in the agreed order. Likewise, the docket control order in this [Ch. 150] case made no mention of the separate certificate of merit requirements under section 150.002. Because *McDaniel* limits the purview of the docket control order … , and the Rule 11 agreement merely provided dates for the order, the Rule 11 agreement did not operate to postpone the filing requirement."

3. *McCalla v. Baker's Campground*, 416 S.W.3d 416 (Tex. 2013)(8/23/13)

Lessees who had an option to purchase land sued landowners. They entered a settlement agreement with landowners that contemplated a future agreement. The Supreme Court ruled that "a settlement agreement that includes all the terms necessary for the contract's enforcement is an enforceable contract as a matter of law, even if some of its terms seem to imply that the parties contemplate forming an additional contract in the future."

"Assuming arguendo that the settlement agreement was an agreement to enter into a future contract, the court of appeals erred in finding that the settlement agreement's enforceablity was a question of fact rather than a question of law. Agreements to enter into future contracts are enforceable if they contain all material terms." Here, it contained all material terms, so "the settlement agreement was an enforceable contract as a matter of law."

E. Court Orders; Docket Control Orders

1. *Crosstex Energy Services, L.P. v. Pro Plus, Inc.*, S.W.3d (Tex. 2014)(3/28/14)

In *McDaniel*, "this Court narrowly read the scope of a docket control order on the designation of experts.… Because *McDaniel* limits the purview of the docket control order … , and the Rule 11 agreement [here] merely provided dates for the order, the Rule 11 agreement did not operate to postpone the filing requirement."

2. *Ford Motor Company v. Stewart*, 390 S.W.3d 294 (Tex. 2013)(1/25/13)

Personal injury and death case. "TEX. R. JUD. ADMIN. 11 [] provid[es] for the assignment of a pretrial judge in cases that involve material questions of fact and law in common with another case pending in another court in another county." Here, the Supreme Court ruled that, since there was no conflict of interest for the mother acting as next friend, the assigned court should not have appointed a guardian ad litem, and the ad litem cannot be paid beyond the time to initially determine if a conflict exists.

F. Summary Judgment

1. *McAllen Hospitals, LLP v. State Farm Mutual Insurance Company of Texas*, S.W.3d (Tex. 2014)(5/16/14)

Hospital sued insurer after injured victims of car wreck cashed settlement checks from insurer that were made out to both them and hospital, without discharging proper hospital lien. An issue was whether the Hospital Lien Statute created a cause of action for hospital to sue insurer.

Resolving the issue of whether the Hospital Lien Statute creates a cause of action "would be improper, as it was not raised in the trial court as a ground for summary judgment and was not briefed in the court of appeals or in this Court, and therefore has not been preserved for our review.… [A]a summary judgment may be affirmed 'if any of the theories presented to the trial court and preserved for appellate review are meritorious'…. [Short mention on oral argument] was insufficient to preserve for our review a ground that was not raised in [insurer's] summary judgment motion.… [A] summary judgment may not be affirmed on grounds not set out in the motion for summary judgment.…"

2. *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, S.W.3d (Tex. 2014)(5/9/14)

Dispute about whether plaintiff had accepted defendant's settlement offer. The Supreme Court ruled that, in a summary judgment to enforce the settlement, the "plaintiff presented uncontroverted evidence that it accepted the material terms of the defendant's offer."

Plaintiff, as movant, "had the burden to submit sufficient evidence that established on its face that 'there is no genuine issue as to any material fact" and that it is "entitled to judgment as a matter of law.' When a movant meets that burden of establishing each element of the claim or defense on which it seeks summary judgment, the burden then shifts to the non-movant to disprove or raise an issue of fact as to at least one of those elements.… But if the movant does not satisfy its initial burden, the burden does not shift and the non-movant need not respond or present any evidence … because 'summary judgments must stand or fall on their own merits, and the non-movant's failure to … respond cannot supply by default the summary judgment proof necessary to establish the movant's right' to judgment." "Thus, a non-movant who fails to raise any issues in response to a summary judgment motion may still challenge, on appeal, 'the legal sufficiency of the grounds presented by the movant.'"

In the motion for summary judgment, the Court reviews the letter and email sent by plaintiff. "If they constitute evidence of acceptance, they were uncontroverted evidence because [defendant] did not present any evidence to … create a fact issue on the acceptance element.… [Otherwise,] plaintiff did not satisfy its burden of proof.…"

The shifting burden in a summary judgment is important because, if plaintiff's purported acceptance contained a material divergence of terms, its letter and email would constitute "no evidence" to support a summary judgment. And if they had been ambiguous, they would have created a fact issue. But, since here they showed a clear intent to settle, the "burden shifted to [defendant] to produce evidence raising an issue of fact." And defendant did not challenge "acceptance" until after the summary judgment.

3. *Long v. Castle Texas Production Limited Partnership*, 426 S.W.3d 73 (Tex. 2014)(3/28/14)

This opinion generally addresses the date from which postjudment interest runs.

A "partial summary judgment that grants relief on only one of several claims will not accrue postjudgment interest on the rendered claim until a final judgment resolves all issues among all parties."

4. *Gotham Insurance Company v. Warren E&P, Inc.*, S.W.3d (Tex. 2014)(3/21/14)

Suit by carrier to recover payment of a claim after oil well blew out and burned. "Because the court of appeals affirmed summary judgment in favor of [insured], we must examine the entire record in the light most favorable to [insured], indulging every reasonable inference and resolving any doubts in [insured's] favor. If there is a genuine issue of material fact, summary judgment is inappropriate." Here, summary judgment for the carrier could not "be supported on the ground that [insured] suffered no loss."

5. *Nathan v. Whittington*, 408 S.W.3d 870 (Tex. 2013)(8/30/13)

"We review the trial court's summary judgment de novo."

6. *Canutillo Independent School District v. Farran*, 409 S.W.3d 653 (Tex. 2013)(8/30/13)

In this Whistleblower case, the school district filed a plea to the jurisdiction. "[W]hen parties submit evidence at [the] plea to the jurisdiction stage, review of the evidence generally mirrors the summary judgment standard.… 'An appellate court reviewing a summary judgment must consider whether reasonable and fair-minded jurors could differ in their conclusions in light of all the evidence presented.'"

7. *Elizondo v. Krist*, 415 S.W.3d 259 (Tex. 2013)(8/30/13)

In a legal malpractice suit, plaintiff, who had settled the claims of himself and his wife against BP, argued he should have gotten much more money. In their response to a motion for summary judgment, plaintiffs offered an affidavit from a lawyer with great familiarity with the BP litigation. But he did not compare this settlement with others. Consequently, the Supreme Court ruled that the plaintiffs' expert failed to raise a fact issue on damages, and upheld a summary judgment for the lawyers.

"Summary judgment was warranted for the Attorneys if, after adequate time for discovery, they demonstrated that the Elizondos had failed to offer competent summary judgment evidence raising a genuine issue of material fact as to damages."

"'A conclusory statement of an expert witness is insufficient to create a question of fact to defeat summary judgment.' … [I]n a legal-malpractice case, … even where an attorney-expert was qualified to give expert testimony, his affidavit 'cannot simply say, 'Take my word for it, I know: the settlements were fair and reasonable.'' Conversely, … an attorney-expert, however well qualified, cannot defeat summary judgment if there are fatal gaps in his analysis that leave the court to take his word that the settlement was

inadequate." An "analysis of settlements of cases with … circumstances similar to the Elizondo case *might* be sufficient to raise a fact issue as to the inadequacy of the settlement, but [the expert] did not undertake to compare the Elizondo settlement with other actual settlements obtained in the BP litigation."

"Elizondos did not ask the trial court to defer ruling on the summary judgment motions until they could obtain … evidence of other settlements." Footnote 27: "'When a party contends that it has not had an adequate opportunity for discovery before a summary judgment hearing, it must file either an affidavit explaining the need for further discovery or a verified motion for continuance.'"

Here, even if the clients themselves offered "some evidence of actual damages, this does not mean they raised a material issue of fact as to *malpractice* damages."

Footnote 36: "'An appellate court reviewing a summary judgment must consider whether reasonable and fair-minded jurors could differ in their conclusions in light of all the evidence presented.'"

8. *City of Lorena v. BMTP Holdings, L.P.*, 409 S.W.3d 634 (Tex. 2013)(8/30/13)

"Because any one of … three regulatory takings theories could potentially support [the developer's] inverse condemnation claim, the City must have conclusively disproven all three theories for the trial court's grant of summary judgment to be proper."

"We review the trial court's grant of summary judgment *de novo*. The ultimate determination of whether an ordinance constitutes a compensable taking is a question of law, but 'we depend on the district court to resolve disputed facts regarding the extent of the governmental intrusion on the property.' Thus, we must determine whether any disputed issues of fact exist.…"

"In the summary judgment context, we review the record 'in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion.'"

9. *Masterson et al. v. The Dioceses of Northwest Texas, et al.*, 422 S.W.3d 594 (Tex. 2013)(8/30/13)

Local church split from national organization over doctrinal differences. The issue "is what happens to the property."

"We review the trial court's grant of summary judgment de novo. To prevail on their motion, the [movant] must have proved that, as a matter of law, they were entitled to judgment on the issues they pleaded and set out in their motion for summary judgment." Here, the movant did not plead the proper ground (called "neutral principles"). "'Summary judgments … may only be granted upon grounds expressly asserted in the summary judgment motion."

10. *The Episcopal Diocese of Fort Worth v. The Episcopal Church*, ___ S.W.3d ___ (Tex. 2013)(8/30/13)

Local Episcopal church wanted to separate from the national organization. Neither side was entitled to summary judgment. When "both parties move for summary judgment and the trial court grants one motion and denies the other, appellate courts consider the summary-judgment evidence, determine all questions presented, and render the judgment the trial court should have rendered."

11. *Nall v. Plunkett*, 404 S.W.3d 552 (Tex. 2013)(6/28/13)

Plunkett attended Nall's New Year's Eve party at his parent's house. Allegedly knowing that alcohol would be served, the parents required everyone present after midnight to spend the night. Plunkett was severely injured when an intoxicated guest tried to leave after midnight when the parents had gone to bed. Plunkett sued alleging negligent undertaking and premises liability, and the trial court granted summary judgment for the Nalls on the former. The key issue was whether the Nalls' motion for summary judgment addressed the negligent-undertaking theory. The Supreme Court held that "the Nalls' summary judgment motion specifically addressed the negligent-undertaking claim by arguing that our decision in *Graff v. Beard* … forecloses the assumption of any duty by a social host under the facts of this case. Because Plunkett did not argue that summary judgment was improper on the merits, we do not reach any substantive issues related to the summary judgment."

"We review a grant of summary judgment de novo. In a summary judgment motion … , a movant 'shall state the specific grounds therefor,' and a defendant who conclusively negates at least one of the essential elements of a cause of action is entitled to summary judgment. A trial court cannot grant summary judgment on grounds that were not presented.… 'Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal.'"

"'A non-movant must present its objections to a summary judgment motion expressly by written answer or other written response to the motion in the trial court or that objection is waived.'[] However, even when a non-movant fails to except, the court of appeals cannot 'read between the lines' or infer from the pleadings any grounds for granting the summary judgment other than those grounds expressly set forth before the trial court."

"We construe the Nalls' motion … as specifically moving for summary judgment on the duty element of

Plunkett's negligence claim, making a two-part argument that addressed the absence of a duty in both the social host context and the undertaking context. First, the Nalls correctly pointed out that, under Texas law, a host has no duty to prevent a guest who will be driving from becoming intoxicated or to prevent an intoxicated guest from driving."

"We hold that the Nalls' summary judgment motion specifically addressed the negligent-undertaking claim by arguing that *Graff* forecloses the assumption of any duty (i.e., an undertaking) by a social host."

The Court did not address whether the Nalls were entitled to judgment on the merits.

12. *Neely v. Wilson*, 418 S.W.3d 52 (Tex. 2013)(6/28/13) (*see* "corrected opinion" issued 1/31/14)

Doctor sued reporter and TV station for defamation, and the Supreme Court reversed a summary judgment for defendants.

Even in a defamation suit, "we adhere to our well-settled summary judgment standards."

"We review a trial court's grant of summary judgment de novo. The party moving for summary judgment bears the burden of proof. Though these burdens vary for traditional and no-evidence motions, the summary judgment motion here was a hybrid motion.…"

"A fact issue exists if there is more than a scintilla of probative evidence. We must review the summary judgment record 'in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion.' 'In reviewing a summary judgment, we consider all grounds presented to the trial court and preserved on appeal in the interest of judicial economy.' We have held that the constitutional concerns over defamation … do not affect these summary judgment standards of review."

"To prevail at summary judgment on the truth defense, [the TV station] must conclusively prove that [the] gist is substantially true."

Footnote 22: "Uncontroverted summary judgment evidence from an interested witness is only sufficient to raise a fact issue, unless the evidence is clear, direct, positive, can be readily controverted, and there are no circumstances tending to impeach or discredit the testimony."

At "summary judgment, '[w]e must review the record 'in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts againstthe motion.'" A "trial court at summary judgment [must] give the nonmovant 'the benefit of every reasonable inference which properly can be drawn in favor of his position' and that if 'a mere ground of inference' supports the motion, it will not be granted."

13. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244 (Tex. 2013)(6/21/13)

Surface owner sued oil and gas lessee claiming its operations "did not accommodate his existing cattle operation." He contended the gas well interfered with his cattle "roundup." Affirming a summary judgment for the lessee, the Supreme Court ruled owner "failed to raise a material fact issue as to whether [lessee] failed to accommodate his use."

"We review the granting of a motion for summary judgment de novo. When the trial court does not specify the grounds for its ruling, a summary judgment must be affirmed if any of the grounds on which judgment is sought are meritorious." "When both parties move for summary judgment and the trial court grants one motion and denies the other, we review all the summary judgment evidence, determine all issues presented, and render the judgment the trial court should have."

Owner challenged whether lessee adequately segregated it traditional and no-evidence motions for summary judgment. "XTO labeled its motion as a combined traditional and no-evidence motion, and as long as a motion clearly sets forth its grounds and otherwise meets the requirements of a no-evidence summary judgment motion, … it is sufficient.… When a party moves for summary judgment on both traditional and no-evidence grounds … , we first address the no-evidence grounds … because if the non-movant fails to produce legally sufficient evidence to meet his burden as to the no-evidence motion, there is no need to analyze … the traditional motion. No-evidence summary judgments are reviewed under the same legal sufficiency standard as directed verdicts. Under that standard, evidence is considered in the light most favorable to the nonmovant, crediting evidence a reasonable jury could credit and disregarding contrary evidence and inferences unless a reasonable jury could not. The nonmovant has the burden to produce summary judgment evidence raising a genuine issue of material fact as to each challenged element of its cause of action."

"A no evidence challenge will be sustained when '(a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact.'"

14. *City of Bellaire v. Johnson*, 400 S.W.3d 922 (Tex. 2013)(6/7/13)

Worker who was employed through a staffing agency and assigned to a city was barred by the

exclusive remedy of the workers' compensation law from suing the city after he was injured.

"'The absence of subject-matter jurisdiction may be raised by a plea to the jurisdiction, as well as by other procedural vehicles, such as a motion for summary judgment.'"

15. *Southern Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676 (Tex. 2013)(2/15/13)

"When both parties move for summary judgment and the trial court grants one motion and denies the other, as here, we review both sides' summary judgment evidence and render the judgment the trial court should have rendered."

16. *State of Texas v. Ninety Thousand Two Hundred Thirty-Five Dollars and No Cents*, 390 S.W.3d 289 (Tex. 2013)(1/25/13)

State filed forfeiture action against both the money found in a vehicle during a traffic stop and the vehicle itself. Defendant filed a traditional motion for summary judgment; the state offered no evidence in response. The Supreme Court ruled that the defendant's affidavit did not conclusively prove that the officers did not have a reasonable belief that the property had a substantial connection to illegal activity.

"We review a grant of summary judgment *de novo*. When the trial court does not specify the grounds for its ruling, a summary judgment will be affirmed if any of the grounds advanced by the motion are meritorious. A party moving for traditional summary judgment has the burden to prove that there is no genuine issue of material fact and it is entitled to judgment as a matter of law. The nonmovant has no burden to respond to or present evidence regarding the motion until the movant has carried its burden to conclusively establish the cause of action or defense on which its motion is based."

In a summary judgment, "[o]nly if Bueno conclusively proved that none of the officers had such a belief would the burden shift to the State to respond and raise a material fact question about whether they did." Here, his affidavit did not.

Here, defendant's affidavit "was insufficient to support summary judgment.…" Even if it could, "the affidavit wholly fails to address whether the officers had a reasonable belief that the property had or would have a substantial connection with illegal activity.…" It "certainly does not conclusively prove that none of them did."

G. Sanctions and Contempt

1. *In re the Office of the Attorney General*, 422 S.W.3d 623 (Tex. 2013)(3/8/13)

Criminal contempt proceeding based upon ex-husband's failure to pay child support. The Supreme Court ruled that, to purge himself of contempt according to statute, he had to be "current" with all child support as of the date of the hearing.

"One of the primary tools [for] child support enforcement … is the contempt power of the court.… Contempt is an inherent power of the court… and chapter 157 of the Family Code provides the statutory framework for utilizing this power as a mechanism to enforce child support.…"

"Upon finding an obligor in contempt, the trial court may … impose a sentence that is either civil or criminal, or both.… Civil contempt is prospective, involving measures to encourage a contemnor to pay child support arrearages, while criminal contempt is punitive, usually imposing jail time for past failures to pay.… [There is] a third option: a court may find an obligor in contempt and impose a jail sentence, but suspend commitment and place the obligor on community supervision.… [This] (1) encourages obligors to pay to avoid serving their jail sentences, and (2) … enable[es] them to work and avoid further arrearages…. Significantly, utilization of this tool is dependent upon a finding of contempt."

"A contempt order is void if it is beyond the power of the court or violates due process."

Section 157.162(d) allows the "obligor to escape a valid finding of contempt.…" Footnote 5: A purging provision "allows an obligor to purge himself or herself of the consequences of conduct that would otherwise be subject to a finding of contempt.…"

"[S]pecific violations of a court order must be pled to support a contempt finding. However, the purging provision does not affect the basis of the contempt finding; rather, it provides a basis for escaping an otherwise valid finding of contempt. We therefore disagree that the purging provision implicates notice requirements." The motion must "the amount owed, the amount paid, and the amount of arrearages. If contempt is requested, the motion must also include 'the portion of the order allegedly violated and, for each date of alleged contempt, the amount due and the amount paid, if any.' Thus, a respondent may be found in contempt only for violations that are specifically pled.…"

The respondent is entitled to notice. But "[t]he purging provision at issue is akin to an affirmative defense.…" Footnote 10: "[I]t is analogous to an affirmative defense in that it precludes a contempt finding notwithstanding a proven violation of a prior order and places the burden of proof on the respondent to show that it applies. *See* BLACK'S LAW DICTIONARY 482 (9th ed. 2009) (defining an affirmative defense as '[a] defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true,' and noting that '[t]he defendant bears the burden of proving an affirmative defense')."

Footnote 9: A "criminal contempt conviction requires … 'violation' of 'a reasonably specific order.'" Footnote 11: "[B]ecause 'contempt proceedings are quasi-criminal in nature,' such proceedings 'should conform as nearly as practicable to those in criminal cases.'"

"In the context of criminal proceedings, a charging instrument like an indictment must 'charge[] the commission of the offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is meant, and with that degree of certainty that will give the defendant notice of the particular *offense with which he is charged*.'" But, "there is no requirement that a charging instrument provide notice of the affirmative defenses that may be available to a criminal defendant. Similarly, the notice to which respondents in contempt proceedings are entitled extends only to the violations for which they may be found in contempt.…"

2. *CTL/Thompson Texas, LLC v. Starwood Homeowner's Association*, 390 S.W.3d 299 (Tex. 2013)(1/25/13)

Homeowner's association sued engineering firm and attached a report to the petition. The firm filed an interlocutory appeal challenging the trial court's denial of its motion to dismiss, and while it was pending, the association took a nonsuit. The Supreme Court ruled that the "nonsuit did not moot CTL's appeal."

"A plaintiff has an absolute right to nonsuit a claim before resting its case-in-chief, but a nonsuit 'shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief,' … such as a counterclaim, or a cross-claim. A motion for sanctions is a claim for affirmative relief that survives nonsuit if the nonsuit would defeat the purpose of sanctions.… [A] sanction for filing a frivolous lawsuit does survive nonsuit.…"

"Section 150.002(e) dismissal is a sanction … to deter meritless claims and bring them quickly to an end." Section 150.002(e) provides no guidance on whether a dismissal should be with prejudice.

H. Abatement

No cases to report.

I. Bankruptcy

1. *In re Mark Fisher*, S.W.3d (Tex. 2014)(2/28/14)

Venue case. Plaintiff sold his company to a limited partnership, and became a limited partner, in a series of agreements that called for venue in Tarrant County. Asserting he was defamed, and that the business was bankrupted by mismanagement, he filed suit in Wise County against the principals of the buyer. The Supreme Court ruled that the plaintiff's suit was not barred by the automatic stay in the bankruptcy court, but that venue must be transferred.

Defendants claimed that the corporations' bankruptcies should have prevented plaintiff's suit because he should have sued the bankruptcy debtors, not them personally. "Whether those claims should have been brought against another party (Nighthawk) is not a question of jurisdiction requiring dismissal, but is a question of liability."

"Nighthawk is not a defendant in the Wise County suit and the automatic bankruptcy stay does not extend to non-debtors.… [T]he bankruptcy stay does not extend 'to separate legal entities such as corporate affiliates, partners in debtor partnerships or to codefendants in pending litigation.'"

J. Severance

1. *Long v. Castle Texas Production Limited Partnership*, 426 S.W.3d 73 (Tex. 2014)(3/28/14)

This opinion generally addresses the date from which postjudment interest runs.

Under TEX.R.CIV.P. 41, "a court may sever and proceed separately with a claim against a party and may sever different grounds of recovery before submission to the trier of fact." Footnote 15: A "claim is properly severable if: '(1) the controversy involves more than one cause of action, (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted, and (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues.' Avoiding prejudice, doing justice, and increasing convenience are the controlling reasons to sever."

2. *Brighton v. Koss*, 415 S.W.3d 864 (Tex. 2013)(8/23/13)

The court of appeals severed "Brighton's appeal from Koss's, thereby making its order dismissing Brighton's appeal a final judgment. *See* TEX. R. APP. P. 53.1 (requiring a final judgment as predicate for a petition for review in the Supreme Court)."

K. Nonsuit

1. *CHCA Woman's Hospital, L.P. d/b/a The Woman's Hospital of Texas v. Lidji*, 403 S.W.3d 228 (Tex. 2013)(6/21/13)

In a birth injury case, parents filed medical malpractice suit, but dismissed before 120 days without having filed an expert report. Immediately upon refiling, they served their expert report on the defendant. The Supreme Court ruled the expert report requirement deadline was tolled during the nonsuit.

"[P]arties have 'an absolute right to nonsuit their own claims for relief at any time during the litigation until they have introduced all evidence other than rebuttal evidence at trial.' However, a voluntary nonsuit does not interrupt the running of the statute of limitations.… [C]onstruing the expert-report

requirement to prohibit tolling in the event of a nonsuit would interfere with [plaintiffs'] absolute right to nonsuit the claims in the First Suit and … such legislative intent is not reflected in the statute's plain language."

2. *CTL/Thompson Texas, LLC v. Starwood Homeowner's Association*, 390 S.W.3d 299 (Tex. 2013)(1/25/13)

Homeowner's association sued engineering firm and attached a report to the petition. The firm filed an interlocutory appeal challenging the trial court's denial of its motion to dismiss, and while it was pending, the association took a nonsuit. The Supreme Court ruled that the "nonsuit did not moot CTL's appeal."

"A plaintiff has an absolute right to nonsuit a claim before resting its case-in-chief, but a nonsuit 'shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief,' … such as a counterclaim, or a cross-claim. A motion for sanctions is a claim for affirmative relief that survives nonsuit if the nonsuit would defeat the purpose of sanctions.… [A] sanction for filing a frivolous lawsuit does survive nonsuit.…"

"Section 150.002(e) dismissal is a sanction … to deter meritless claims and bring them quickly to an end." Section 150.002(e) provides no guidance on whether a dismissal should be with prejudice.

L. Recusal

1. *In re Melissa Blevins*, S.W.3d (Tex. 2013)(11/1/13)

In this child custody case, foster mother sought a writ of mandamus directing a judge to set aside his order. However, he recused himself. The Supreme Court abated the proceedings and directed the new judge to consider the challenged order.

"[B]ecause the trial judge who signed the order has recused from the case, we abate the proceedings in this Court. We direct the trial judge now presiding over the case to consider the matters underlying the challenged order and determine whether the challenged order should remain in effect, be modified, or be set aside, and to render its own order accordingly. The trial judge is not limited to considering only evidence on which the order was based."

When the judge who issued an order challenged on appeal has recused, the "appellate[] court should either deny the petition for mandamus … or abate the proceedings pending consideration of the challenged order by the new trial judge.…"

M. Motion to Show Authority

No cases to report.

N. Settlements

1. *McAllen Hospitals, LLP v. State Farm Mutual Insurance Company of Texas*, _S.W.3d _(Tex. 2014)(5/16/14)

Hospital sued insurer after injured victims of car wreck cashed settlement checks from insurer that were made out to both them and hospital, without discharging proper hospital lien. Using principals of commercial paper under the UCC, the Supreme Court ruled that the hospital had not been "paid" by delivery of a settlement check to the claimant: "(1) payment of a check to one nonalternative copayee without the endorsement of the other does not constitute payment to a 'holder' and thus does not discharge the drawer of either his liability on the instrument or the underlying obligation, (2) the … patients' releases of their causes of action against [negligent driver] were [in]valid … , and (3) the Hospital's liens on those causes of action therefore remain intact." The Court did not determine if the hospital has a cause of action against the insurer because the issue was not properly preserved.

A hospital may file a lien on a cause of action under Ch. 55 of the Property Code, "provided that the patient is admitted to the hospital within seventy-two hours of the accident." The hospital "must comply with statutory notice and recording requirements to secure its lien." "If the hospital's charges secured by a proper lien are not 'paid' within the meaning of the statute, any release of the patient's cause of action is invalid." So, to have a valid release, one of three conditions of § 55.007(a) must be met.

Insurer's "delivery of the drafts to [claimant's] constitutes constructive delivery of the drafts to the other copayee, the Hospital." But, "when a draft is issued to nonalternative copayees, one copayee acting alone is not entitled to enforce, and thus may not discharge, the instrument." If it is payable to all, it can only be enforced by all. A "forged endorsement by nonalternative copayee [does] not discharge drawer's obligation to other copayee."

Hospital possibly could have sued the bank. But its failure to do so did not affect insurer's obligations.

2. *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, _S.W.3d (Tex. 2014)(5/9/14)

In a commercial dispute, defendant tendered an offer of settlement of all claims which were or could be asserted; plaintiff attempted to accept defendant's offer as to all claims. The Supreme Court ruled that, in a summary judgment to enforce the settlement, the "plaintiff presented uncontroverted evidence that it accepted the material terms of the defendant's offer." The common law, not Rule 167 or Ch. 42, governs the breach of contract claim on the settlement.

Defendant tendered its settlement offer under "rule 167, which authorizes a party to recover certain litigation costs if the party made, and the party's

opponent rejected, a settlement offer that was significantly more favorable than the judgment obtained at trial." Defendant also invoked Ch. 42 of the CP & RC.

In the motion for summary judgment, the Court reviews the letter and email sent by plaintiff. "If they constitute evidence of acceptance, they were uncontroverted evidence because [defendant] did not present any evidence to … create a fact issue on the acceptance element.… [Otherwise,] plaintiff did not satisfy its burden of proof.…"

Texas' public policy favors settlements, and "chapter 42 and rule 167 encourage such settlements." (Footnote 4: the Family Code further provides for mediated settlement agreements; when the requirements are met, "'a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11….'") "When applicable, chapter 42 and rule 167 provide a method by which parties in certain cases who make certain offers to settle certain claims can recover certain litigation costs.…" A "non-conforming offer 'cannot be the basis for awarding litigation costs under'" under the rule. (Footnote 8: Chapter 42 only applies to claims for "'monetary relief,'" and under Rule 167 an offer "'must not include non-monetary claims.'") Chapter 42 and Rule 167 do not "govern here" since the issue is not attorney's fees but breach of contract, so plaintiff "was required to prove a valid 'acceptance' under contract law.…"

Texas' policy supports "freedom of contract," and it "prohibit[s] us from binding parties to contracts to which they never agreed."

An "acceptance may not change or qualify the material terms of the offer, and an attempt to do so results in a counteroffer rather than acceptance.… [A]n immaterial variation between the offer and acceptance will not prevent the formation of an enforceable agreement." Materiality is generally "determined on a contract-by-contract basis, in light of the circumstances of the contract.… In construing a contract, a court's primary concern is to ascertain the intentions of the parties as expressed in the instrument."

Under the record here, "the variation in language between [defendant's] offer and [plaintiff's] acceptance is not material and did not convert [plaintiff's] acceptance into a counteroffer." Defendant's offer contained internal inconsistencies. A letter and email sent by plaintiff were "prima facie evidence" of an intent to accept. And, there were no claims other than those asserted. Moreover, "the record provides no basis to find that [plaintiff] could pursue those claims in any post-settlement action. Generally, once parties settle a lawsuit and a judgment is entered, res judicata bars the parties from subsequently pursuing any claims arising out of the subject matter of the lawsuit that they could have brought in the previous suit."

The shifting burden in a summary judgment is important because, if plaintiff's purported acceptance contained a material divergence of terms, its letter and email would constitute "no evidence" to support a summary judgment. And if they had been ambiguous, they would have created a fact issue. But, since here they showed a clear intent to settle, the "burden shifted to [defendant] to produce evidence raising an issue of fact." And defendant did not challenge "acceptance" until after the summary judgment.

3. *Gotham Insurance Company v. Warren E&P, Inc*., S.W.3d (Tex. 2014)(3/21/14)

Suit by carrier to recover payment of a claim after oil well blew out and burned. Fortis "held that '[w]here a valid contract prescribes particular remedies or imposes particular obligations, equity generally must yield unless the contract violates positive law or offends public policy.' … Without referencing the 'made whole' doctrine, Fortis Benefits' insurance policy granted it the right to recover through subrogation against third parties or seek reimbursement from the insured."

Footnote 13: "The Legislature recently specified (with respect to contractual subrogation clauses in certain health insurance policies) the recovery insurers may obtain from a settlement between the insured and the responsible third party that caused the injury."

4. *McCalla v. Baker's Campground*, 416 S.W.3d 416 (Tex. 2013)(8/23/13)

Lessees who had an option to purchase land sued landowners. They entered a settlement agreement with landowners that contemplated a future agreement. The Supreme Court ruled that "a settlement agreement that includes all the terms necessary for the contract's enforcement is an enforceable contract as a matter of law, even if some of its terms seem to imply that the parties contemplate forming an additional contract in the future."

"Assuming arguendo that the settlement agreement was an agreement to enter into a future contract, the court of appeals erred in finding that the settlement agreement's enforceablity was a question of fact rather than a question of law. Agreements to enter into future contracts are enforceable if they contain all material terms." Here, it contained all material terms, so "the settlement agreement was an enforceable contract as a matter of law."

O. Continuance

No cases to report.

VII. TRIAL

A. Right to Jury

1. *In the Interest of A.B. and H.B., Children*, ___ S.W.3d ___ (Tex. 2014)(5/16/14)

Suit to terminate parental rights. "In parental termination cases, … to ensure the jury's findings receive due deference, if the court of appeals reverses the factfinder's decision [to terminate parental rights], it must detail the relevant evidence in its opinion and clearly state why the evidence is insufficient to support the termination finding by clear and convincing evidence."

For "preponderance cases … 'a court of appeals must detail the evidence … and clearly state why the jury's finding is factually insufficient when reversing a jury verdict, but need not do so when affirming a jury verdict.'" But, the Court has "established one exception to the general rule that appellate courts need not 'detail the evidence' when affirming a jury finding: exemplary damages."

2. *Gotham Insurance Company v. Warren E&P, Inc.*, ___ S.W.3d ___ (Tex. 2014)(3/21/14)

Suit by carrier to recover payment of a claim after oil well blew out and burned. Footnote 15: "Regarding whether the representation was fraudulent, this is an inquiry typically left to the jury as it often involves proof of intent by circumstantial evidence."

3. *In re Toyota Motor Sales, U.S.A., Inc.*, 407 S.W.3d 746 (Tex. 2013)(8/30/13)

Trial court granted new trial after it believed that defendant violated the motion in limine. Footnote 9: A detailed order granting a new trial is necessary to "safeguard parties' right to a jury trial."

B. Trial Setting; Notice

No cases to report.

C. Voir Dire

1. *In re Whataburger Restaurants*, L.P., ___ S.W.3d (Tex. 2014)(4/25/14)

After a 10-2 defense verdict in a premises liability case, the trial court granted a new trial because one juror failed during voir dire to reveal she had been a defendant before. The Supreme Court granted mandamus, ruling the trial court had abused its discretion because there was no evidence the "nondisclosure probably caused injury."

"[A]n appellate court may conduct a merits-based mandamus review of a trial court's articulated reasons for granting a new trial."

"'To warrant a new trial for jury misconduct, the movant must establish (1) that the misconduct occurred, (2) it was material, and (3) probably caused injury.'"

Here, there was "no evidence" of probable injury. Footnote 1: A "juror's failure to disclose information that establishes that the juror is legally disqualified from serving on the jury is per se material.… *See* TEX. GOV'T CODE § 62.105 (listing bases for legal disqualification of jurors). When [as here] the nondisclosure is not per se material, courts must determine the materiality in light of the context as reflected in the record."

A "trial court 'may' grant a new trial based on juror misconduct if 'it reasonably appears from the evidence both on the hearing of the motion and the trial of the case and from the record as a whole that injury probably resulted to the complaining party.' … [But,] there is no showing of a probable injury when the evidence is such that, even without the misconduct, the jury would in all probability have rendered the same verdict…."

Here, the plaintiff's attorney claimed he would have questioned her about the prior suits and stricken her. But, what "would have" happened is "speculative and conclusory" without evidence. In fact, here he had not questioned other veniremen with prior lawsuits, and one was among the 10 jurors joining in the verdict.

D. Motion in Limine

1. *In re Toyota Motor Sales, U.S.A., Inc.*, 407 S.W.3d 746 (Tex. 2013)(8/30/13)

Trial court granted new trial after it believed that defendant violated the motion in limine. After inadvertently introducing the questionable evidence, the plaintiff failed to preserve error,

A motion in limine "order alone does not preserve error…. '[T]o preserve error as to an improper question asked in contravention of a sustained motion in limine, a timely objection is necessary.'" When "the party that requested the limine order *itself* introduces the evidence into the record, and then fails to immediately object, ask for a curative or limiting instruction or, alternatively, move for mistrial, the party waives any subsequent alleged error on the point."

A new trial as a sanction for defendant's violation of a motion in limine "presupposes sanctionable conduct, and we have just held that Toyota's statements during closing argument were appropriate" because the evidence was admitted without proper objection or motion to strike.

E. Burden of Proof

1. *In the Interest of A.B. and H.B., Children*, S.W.3d (Tex. 2014)(5/16/14)

Suit to terminate parental rights. The Supreme Court ruled that appellate courts are not required to "detail the evidence … when affirming the jury's decision" to terminate parental rights.

"Because the termination of parental rights implicates fundamental interests, a higher standard of

proof—clear and convincing evidence—is required at trial.… [A] proper factual sufficiency review requires the court of appeals to determine whether 'the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the State's allegations.' 'If, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient.'"

"In both exemplary damages and parental termination cases, the standard of proof at trial is heightened—the plaintiff (or in the case of parental termination, the State) must prove the claim by clear and convincing evidence."

2. *In re Health Care Unlimited, Inc.*, S.W.3d _ (Tex. 2014)(4/25/14)

During jury deliberations, a representative of a corporate defendant communicated with a juror. The trial court granted a new trial, but the Supreme Court ruled that this was an abuse of discretion, holding that "there was no evidence that the communications probably caused injury."

"To warrant a new trial based on jury misconduct, the movant must establish that (1) the misconduct occurred, (2) it was material, and (3) it probably caused injury. TEX. R.CIV. P. 327(a).… The complaining party has the burden to prove all three elements before a new trial can be granted. Whether misconduct occurred and caused injury are questions of fact for the trial court."

3. *Colorado, et al. v. Tyco Valves & Controls, L.P.*, S.W.3d (Tex. 2014)(3/28/14)

Defendant offered employees cash and a severance if they remained with a business unit that was being sold and were not offered positions with the purchaser. Some plaintiffs had signed a written agreement; others alleged an oral agreement. The Supreme Court ruled "that ERISA preempts the employees' breach-of-contract claims…"

"ERISA preemption is an affirmative defense on which [defendant] bore the burden of proof at trial.… ERISA preemption is an affirmative defense 'where ERISA's preemptive effect would result only in a change of the applicable law' and would not subject the claim to exclusive federal jurisdiction.…"

4. *FPL Energy, LLC v. TXU Portfolio Management Company*, 426 S.W.3d 59 (Tex. 2014)(3/21/14 [*n.b.*, opinion is dated 3/21/13, but was released on 3/21/14])

Suit over contract to provide electricity for distribution. The Supreme Court ruled that plaintiff utility "owed no contractual duty to provide transmission capacity. However, … the liquidated damages provisions … are unenforceable as a penalty."

A "liquidated damages provision may be unreasonable in light of actual damages. The burden of proving unreasonableness falls to [defendant].… [Here, defendant] has met its burden."

5. *Ewing Construction Company v. Amerisure Insurance Company*, 420 S.W.3d 30 (Tex. 2014)(1/17/14)

Insurance coverage dispute arising from suit against building contractor. "The insured has the initial burden to establish coverage under the policy. If it does so, then to avoid liability the insurer must prove one of the policy's exclusions applies. If the insurer proves that an exclusion applies, the burden shifts back to the insured to establish that an exception to the exclusion restores coverage."

6. *Liberty Mutual Insurance Company v. Adcock*, 412 S.W.3d 492 (Tex. 2013)(8/30/13)

"[C]ommon law and statutory claims, and their procedures for recovering future damages, have long been a cornerstone of our court system. The question is not whether future damages are absolutely knowable but whether the plaintiff proved such damages within a reasonable degree of certainty."

7. *Moncrief Oil International, Inc. v. OAO Gazprom*, 414 S.W.3d 142 (Tex. 2013)(8/30/13)

Appeal from a finding of personal jurisdiction for one claim, but not another. "Under the Texas long-arm statute, the plaintiff bears the initial burden of pleading allegations sufficient to confer jurisdiction.… When the initial burden is met, the burden shifts to the defendant to negate all potential bases for personal jurisdiction the plaintiff pled."

8. *Dynegy, Inc. v. Yates*, 422 S.W.3d 638 (Tex. 2013)(8/30/13)

Dynegy orally agreed to pay for the criminal defense attorney for its officer. When attorney sued for the balance after the trial, it alleged the statute of frauds. The Supreme Court ruled the agreement was unenforceable.

"The party pleading the statute of frauds bears the initial burden of establishing its applicability.… [Likewise,] the party pleading statute of limitations has the initial burden of proof[]. Once that party meets its initial burden, the burden shifts to the opposing party to establish an exception that would take the verbal contract out of the statute of frauds.

A "plaintiff relying on a primary obligor theory under the main purpose doctrine must plead and establish facts to take a verbal contract out of the statute of frauds."

Here, Dynegy established the suretyship provision of the statute of frauds, so the burden shifted to the attorney.

"The main purpose doctrine required Yates to prove: (1) Dynegy intended to create primary responsibility in itself to pay the debt; (2) there was consideration for the promise; and (3) the consideration given for the promise was primarily for Dynegy's own use and benefit—that is, the benefit it received was Dynegy's main purpose for making the promise."

The "question of intent to be primarily responsible for the debt is a question for the finder of fact, taking into account all the facts and circumstances of the case."

Here, "the burden was on Yates to secure favorable findings on the main purpose doctrine. Yates's failure to do so constituted a waiver of the issue under Rule 279.…"

9. *Neely v. Wilson*, 418 S.W.3d 52 (Tex. 2013)(6/28/13) (*see* "corrected opinion" issued 1/31/14)

Doctor sued reporter and TV station for defamation, and the Supreme Court reversed a summary judgment for defendants.

Regarding media defendants, "the burden of proving the truth defense [has been shifted] to require the plaintiff to prove the defamatory statements were false when the statements were made by a media defendant over a public concern."

10. *Merriman v. XTO Energy, Inc*., 407 S.W.3d 244 (Tex. 2013)(6/21/13)

Surface owner sued oil and gas lessee claiming its operations "did not accommodate his existing cattle operation." He contended the gas well interfered with his cattle "roundup." Affirming a summary judgment for the lessee, the Supreme Court ruled owner "failed to raise a material fact issue as to whether [lessee] failed to accommodate his use."

The "surface owner has the burden to prove that (1) the lessee's use completely precludes or substantially impairs the existing use, and (2) there is no reasonable alternative method available to the surface owner by which the existing use can be continued. If the surface owner carries that burden, he must further prove that given the particular circumstances, there are alternative reasonable, customary, and industry-accepted methods available to the lessee which will allow recovery of the minerals and also allow the surface owner to continue the existing use." Regarding accommodation, "a surface owner's burden to prove that his existing use cannot be maintained by some reasonable alternative method is not met by evidence that the alternative method is merely more inconvenient or less economically beneficial than the existing method.… Rather, the surface owner has the burden to prove that the inconvenience or financial burden of continuing the existing use by the alternative method is so great as to make the alternative method unreasonable."

11. *Riemer v. The State of Texas*, 392 S.W.3d 635 (Tex. 2013)(2/22/13)

Interlocutory appeal of denial of class certification. "Rule 42(a)(4)'s adequacy-of-representation prerequisite requires the proponent of class certification to establish that the class representative will fairly and adequately protect the interests of the class. 'The class representative has the burden of proving adequacy.'"

12. *State of Texas v. Ninety Thousand Two Hundred Thirty-Five Dollars and No Cents*, 390 S.W.3d 289 (Tex. 2013)(1/25/13)

Forfeiture case. "[T]he State has the burden to prove by a preponderance of the evidence that the property in question is subject to forfeiture. The State also has the burden to show probable cause existed for seizure of the property."

F. Evidence

1. *Waste Management of Texas, Inc. v. Texas Disposal Systems Landfill, Inc*., S.W.3d (Tex. 2014)(5/9/14)

One waste management company sued another for libel after it spread lies about the former's environmental standards. Among other holdings, the Supreme Court ruled that the evidence was legally insufficient for "reputation damages," but it was sufficient for "remediation costs and thereby exemplary damages."

"Non-pecuniary harm includes damages awarded for bodily harm or emotional distress.… [T]hese … do not require certainty of actual monetized loss. Instead, they are measured by an amount that 'a reasonable person could possibly estimate as fair compensation.' Conversely, damages for pecuniary harm do require proof of pecuniary loss for either harm to property, harm to earning capacity, or the creation of liabilities."

"To recover for business disparagement 'a plaintiff must' … prove special damages."

"A statement is published with actual malice if it is made with 'knowledge of, or reckless disregard for, the falsity' of the statement. Such statements are not constitutionally protected."

Footnote 97: "We review a trial court's exclusion of evidence for abuse of discretion. The trial court determined that the evidence was expert-opinion evidence not subject to the public record exception of the hearsay rule.… Because the trial court … had limited knowledge of the qualifications of the authors of the opinion testimony, … we cannot say that it abused its discretion by excluding the evidence. Even

assuming … error, it was harmless because the testimony excluded was in some form effectively obtained from other sources. [Defendant] thus does not show that the exclusion of evidence probably resulted in the rendition of an improper judgment."

2. *Kia Motors Corporation v. Ruiz*, S.W.3d (Tex. 2014)(3/28/14)

Products liability case based upon the failure of an air bag to deploy due to its circuitry. Reversing a judgment for the plaintiffs, the Supreme ruled that legally sufficient evidence supported the jury's finding of a negligent design, but that the admission of a chart containing warranty claims, many of which were dissimilar, constituted harmful error.

"A legal-sufficiency challenge will be sustained if the record reveals that evidence offered to prove a vital fact is no more than a scintilla. Evidence does not exceed a scintilla if it is ''so weak as to do no more than create a mere surmise or suspicion'' that the fact exists. Our ultimate objective in conducting a no-evidence review is to determine 'whether the evidence at trial would enable reasonable and fair-minded jurors to reach the verdict.' Thus, … we 'credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not.'"

Defendant "did not object to this portion of the jury charge [that addressed a design defect and safer alternative design], and we therefore analyze the evidence in light of the charge as given."

"'Texas law does not generally recognize a product failure standing alone as proof of a product defect.'" But, one expert "testified alternative designs were safer as well as technologically and economically feasible at the time the [vehicle] was designed, as they were in production in other vehicles." Moreover, there did not exist "an analytical gap between the data and the opinion." And, "we have held that an expert should exclude 'other plausible causes' presented by the evidence." Accordingly, here, "we decline to reverse the jury's findings based on a failure to rule out a manufacturing defect."

"To be successful on a defective-product claim, a plaintiff must identify 'a specific defect . . . by competent evidence.' … Here, plaintiffs identified certain [electrical] aspects of the design … as the 'specific defect' … [that caused the failure]. For the code-56 warranty claims reflected on the spreadsheet to be relevant and admissible, then, some indication must exist that the [electrical aspects] contributed to … [the] other incidents."

"[E]vidence of other incidents involving a product may be relevant in a products-liability case if the incidents 'occurred under reasonably similar (though not necessarily identical) conditions.' … [The] relevance of other incidents 'depends upon the purpose for offering them.'"

The trial court admitted a chart containing other warranty claims. A "trial court's evidentiary rulings are reviewed for an abuse of discretion."

Defendant did not waive error by failing to request a limiting instruction. A "limiting instruction, … must be requested to preserve error '[w]hen evidence . . . is admissible as to one party or for one purpose but not admissible as to another party or for another purpose.' A limiting instruction does not provide a mechanism for the admission of a document that contains both admissible evidence and inadmissible, unredacted evidence.… [S]uch an instruction does not allow for admission of evidence that is otherwise inadmissible for any purpose."

Even if "the code-56 warranty claims are not hearsay, they must still be relevant to be admissible."

"Under Rule 103 of the Texas Rules of Evidence, a party preserves error in the admission of evidence if 'a timely objection or motion to strike appears of record, stating the specific ground of objection.' The rule clarifies that '[w]hen the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections.' Under Rule 103(a), [defendant] was not required to object to the plaintiffs' counsel's questioning [a defense witness] about the spreadsheet to preserve error."

Defendant preserved error because it objected repeatedly to the admission of the other claims; moreover, the oral testimony about them "was not independent of the spreadsheet, but was based directly on the information contained in it."

Here, "some, but not all, of the code-56 claims described in the spreadsheet are sufficiently similar to be relevant," but most were not.

"The reasonable-similarity requirement does not disappear simply because other incidents are being offered to show notice rather than negligence."

The unrelated claims were inadmissible and defendant did not waive error. Error admitting evidence "is reversible 'only if the error probably (though not necessarily) resulted in an improper judgment.' In analyzing whether the trial court's error was harmful, '[w]e review the entire record, and require the complaining party to demonstrate that the judgment turns on the particular evidence admitted.'" The Court ruled that "the erroneously admitted spreadsheet probably caused the rendition of an improper judgment."

3. *Gotham Insurance Company v. Warren E&P, Inc.*, S.W.3d (Tex. 2014)(3/21/14)

Suit by carrier to recover payment of a claim after oil well blew out and burned. Footnote 15: "Regarding whether the representation was fraudulent, this is an

inquiry typically left to the jury as it often involves proof of intent by circumstantial evidence."

4. *City of Lorena v. BMTP Holdings, L.P.*, 409 S.W.3d 634 (Tex. 2013)(8/30/13)

"[W]hen a property owner testifies as to the value of his property, '[e]vidence of price paid, nearby sales, tax valuations, appraisals, online resources, and any other relevant factors may be offered to support the claim.'"

5. *In re Toyota Motor Sales, U.S.A., Inc.*, 407 S.W.3d 746 (Tex. 2013)(8/30/13)

Trial court granted new trial after it believed that defendant violated the motion in limine. After inadvertently introducing the questionable evidence, the plaintiff failed to preserve error, and the defendant could use it in closing argument.

A motion in limine prohibited the defense from eliciting an opinion from a police officer about seat belt usage. The requesting attorney inadvertently violated the limine by requesting to introduce evidence under the rule of optional completeness.

A motion in limine "order alone does not preserve error…. '[T]o preserve error as to an improper question asked in contravention of a sustained motion in limine, a timely objection is necessary.'" When "the party that requested the limine order *itself* introduces the evidence into the record, and then fails to immediately object, ask for a curative or limiting instruction or, alternatively, move for mistrial, the party waives any subsequent alleged error on the point."

Optional completeness: "'When part of a[] . . . recorded statement is given in evidence by one party, the whole on the same subject may be inquired into by the other, and any other . . . recorded statement which is necessary to make it fully understood or to explain the same may also be given in evidence.'"

"Once the evidence was in the record—without objection or a request that it be stricken or that the jury be instructed to disregard—it was in for all purposes and a proper subject of closing argument." Objection for the first time "during closing argument was too late."

6. *University of Houston v. Barth*, 403 S.W.3d 851 (Tex. 2013)(6/14/13)

"[J]udicial notice [can be taken] of facts outside the record to aid a determination of jurisdiction."

7. *Hancock v. Variyam*, 400 S.W.3d 59 (Tex. 2013)(5/17/13)

Physician sued colleague who circulated a letter accusing him a lack of veracity. The Supreme Court ruled this did not constitute defamation *per se*. Accordingly, he had to prove actual damages in order to recover punitive damages, and here his mental anguish proof was insufficient.

"We further conclude there is no evidence of mental anguish because evidence of some sleeplessness and anxiety—but evidence of no disruption in patient care or interaction with colleagues who read the defamatory letter—does not rise to the level of a substantial disruption in daily routine or a high degree of mental pain and distress."

"'[A]ll awards [for defamation] must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.'"

"There must be both evidence of the existence of compensable mental anguish and evidence to justify the amount awarded. Mental anguish is only compensable if it causes a 'substantial disruption in . . . daily routine' or 'a high degree of mental pain and distress.' 'Even when an occurrence is of the type for which mental anguish damages are recoverable, evidence of the nature, duration, and severity of the mental anguish is required.'"

The "equal inference rule … provides that a jury may not reasonably infer an ultimate fact from 'meager circumstantial evidence which could give rise to any number of inferences, none more probable than another.'"

8. *Granado v. Meza*, 398 S.W.3d 193 (Tex. 2013)(4/19/13)

In this child support case, the trial court found $500 in arrearages based upon a clerical error in an Attorney General's record indicating that the support obligation ended 12 years earlier than it actually did, and another entry in an AG statement record indicating it may not include payments made to local registries. But the father testified he only paid through the AG. The Supreme Court affirmed the finding of arrearages, but reversed the amount, saying "a trial court's determination of child-support arrearages must be set aside if there is no evidence to support it."

A "determination of arrearages must be set aside if no evidence supports it." "The clerical error is no evidence of arrearages…. And … the Payment Record's disclaimer that it might not include payments to local registries is no evidence of arrearages."

G. Expert Witnesses and Expert Testimony

1. *Rio Grande Valley Vein Clinic, P.A. v. Guerrero*, S.W.3d (Tex. 2014)(4/25/14)

Following *Bioderm*, the Supreme Court ruled that laser hair removal is covered by Chapter 74 and an expert report is required. A "claim for improper laser hair removal is a health care liability claim because expert health care testimony was necessary to prove or refute the claim.…" "[E]xpert health care testimony

was needed because federal regulations restrict the laser to supervised use in a medical practice.…"

2. *Bioderm Skin Care, LLC v. Sok*, 426 S.W.3d 753 (Tex. 2014)(3/28/14)

Suit for personal injuries resulting from laser hair removal. The Supreme Court ruled that the rebuttable presumption that the claim was a health care liability claim applies, and therefore an expert report was required.

The "laser used by the defendants … may only be purchased by a licensed medical practitioner for supervised use in her medical practice. Testimony concerning whether its operation departed from accepted standards of health care must therefore come from a licensed physician."

If "'expert medical or health care testimony is necessary to prove or refute the merits of the claim against a physician or health care provider, the claim is a health care liability claim.'" Only if not "should a court … consider the totality of the circumstances, as a claim may still be a health care liability claim despite that ' … expert testimony may not be necessary to support a verdict.'"

In *Texas West Oaks*, since the claim "concerned the appropriate standards of care owed to employees of a mental health hospital and whether those standards were breached, we held the plaintiff could not establish those elements without expert testimony in the health care field."

In addition, expert testimony is necessary when the claim "involves the use of a medical device." Moreover, expert testimony is necessary when the claim "involves the use of a medical device." Also, the device could only be bought by a physician and required "extensive training and experience." "This extensive training compels the conclusion that expert health care testimony is needed to prove or refute [plaintiff's] claim.…" And, "expert testimony does not necessarily have to be proffered by a licensed physician to constitute expert health care testimony." But, "[a]llowing a technician who could not legally acquire or supervise use of the device to testify that a physician's use of the device violated accepted standards" is not permitted. Instead, the "expert must be licensed in the area of health care related to the claim, practice in the same field as the defendant, and have knowledge of accepted standards of care."

3. *In re Ford Motor Company*, S.W.3d (Tex. 2014)(3/28/14)

In a park-to-reverse products liability case, plaintiff wanted to depose the employers of defendants' two retained experts to discover financial connections with defendants. But, the Supreme Court ruled that, on the facts of the case, the rules "do not permit such discovery."

"Rule 192.3(e) sets forth the scope of information that parties may discover about a testifying expert, which includes 'any bias of the witness.'" Rule 195 limits "testifying-expert discovery to that acquired through disclosures, expert reports, and oral depositions of expert witnesses," with a goal of "minimizing 'undue expense.'"

Here, plaintiff's "fishing expedition, seeking sensitive [business and financial] information covering twelve years, is just the type of overbroad discovery the rules are intended to prevent."

The Court does "not unduly inhibit discovery of an expert's potential bias." But, "discovery into the extent of an expert's bias is not without limits." And, the "most probative information" comes from the expert himself. Both, here, conceded they testify overwhelmingly for defendants. So, in this case, unlike in *Walker v. Packer*, "neither expert's credibility has been impugned in this case." And plaintiff offered no other justification for the depositions.

4. *Kia Motors Corporation v. Ruiz*, S.W.3d (Tex. 2014)(3/28/14)

Products liability case based upon the failure of an air bag to deploy due to its circuitry.

"'Texas law does not generally recognize a product failure standing alone as proof of a product defect.'" But, one expert "testified alternative designs were safer as well as technologically and economically feasible at the time the [vehicle] was designed, as they were in production in other vehicles." Moreover, there did not exist "an analytical gap between the data and the opinion." And, "we have held that an expert should exclude 'other plausible causes' presented by the evidence." Accordingly, here, "we decline to reverse the jury's findings based on a failure to rule out a manufacturing defect."

5. *Elizondo v. Krist*, 415 S.W.3d 259 (Tex. 2013)(8/30/13)

In a legal malpractice suit, plaintiff, who had settled the claims of himself and his wife against BP, argued he should have gotten much more money. In their response to a motion for summary judgment, plaintiffs offered an affidavit from a lawyer with great familiarity with the BP litigation. But he did not compare this settlement with others. Consequently, the Supreme Court ruled that the plaintiffs' expert failed to raise a fact issue on damages, and upheld a summary judgment for the lawyers.

"'Bare, baseless opinions will not support a judgment even if there is no objection to their admission in evidence,' and we have 'often held that such conclusory testimony cannot support a judgment.' 'A conclusory statement of an expert witness is insufficient to create a question of fact to defeat summary judgment.' Further, 'a claim will not stand or

fall on the mere *ipse dixit* of a credentialed witness.' Expert testimony fails if there is 'simply too great an analytical gap between the data and the opinion proffered.' … [I]n a legal-malpractice case, … even where an attorney-expert was qualified to give expert testimony, his affidavit 'cannot simply say, 'Take my word for it, I know: the settlements were fair and reasonable.'' Conversely, … an attorney-expert, however well qualified, cannot defeat summary judgment if there are fatal gaps in his analysis that leave the court to take his word that the settlement was inadequate."

"Under Evidence Rule 703, experts may base their testimony on facts or data that are 'of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.' That test is met when, in a mass tort litigation involving thousands of similar claimants and arising out of the same event, the expert measures the 'true' settlement value of a particular case by persuasively comparing all the circumstances of the case to the settlements obtained in other cases with similar circumstances arising from the event." "Here, where the same defendant settled thousands of cases, and indeed made the business decision to settle all cases and not try any to a verdict, … an expert can[] base his opinion of malpractice damages on a comparison of what similarly situated plaintiffs obtained.…"

Here, the expert "considered the facts relevant to the case," but "fail[ed] to offer specifics on why the value of the case was $2–3 million as opposed to the $50,000 received in settlement." It was thus conclusory and had a fatal analytical gap. An "analysis of settlements of cases with … circumstances similar to the Elizondo case *might* be sufficient to raise a fact issue as to the inadequacy of the settlement, but [the expert] did not undertake to compare the Elizondo settlement with other actual settlements obtained in the BP litigation."

Proof of the value of this case in comparison with other settlements "requires expert testimony." Likewise, "proof of attorney malpractice requires expert testimony, because establishing such negligence requires knowledge beyond that of most laypersons. The same is true of proof of damages under a theory that a settlement was inadequate."

H. Causation, Proximate Cause, Producing Cause

1. *Canutillo Independent School District v. Farran*, 409 S.W.3d 653 (Tex. 2013)(8/30/13)

In this Whistleblower case, plaintiff complained about school district improprieties to the FBI after the district's efforts to fire him had commenced. The Supreme Court ruled there was legally insufficient evidence of causation.

"To establish a Whistleblower Act claim, the plaintiff must show that his report to a law enforcement authority caused him to suffer the complained-of adverse personnel action. 'To show causation, a public employee must demonstrate that *after* he or she reported a violation of the law in good faith to an appropriate law enforcement authority, the employee suffered discriminatory conduct by his or her employer that would not have occurred when it did if the employee had not reported the illegal conduct.'… To prevail on a theory that the FBI report caused his termination, [plaintiff] would have to show that, but for that report, the school district would have changed its mind and retained him."

2. *Dugger v. Arredondo*, 408 S.W.3d 825 (Tex. 2013)(8/30/13)

"Because the client's conduct, and not the attorney's, is the sole cause of any injury resulting from conviction, the plaintiff cannot satisfy the causation element of a legal malpractice claim absent exoneration."

3. *Kopplow Development, Inc. v. The City of San Antonio*, 399 S.W.3d 532 (Tex. 2013)(3/8/13)

Commercial property owner sued city for inverse condemnation when city would not issue permit unless owner provided more landfill.

"A proximate cause question is properly submitted in a partial statutory takings case where the parties dispute whether the use of the part taken damaged the remainder. Moreover, causation is still relevant in an inverse condemnation claim: owners of inversely condemned property cannot recover damages the government did not cause.… But while causation in a partial statutory taking focuses on whether the use of the part taken damaged the remainder, causation in an inverse condemnation focuses on the extent of the government's restriction on the property."

4. *Rodriguez-Escobar v. Goss*, 392 S.W.3d 109 (Tex. 2012)(2/1/13)

Medical malpractice case concerning patient's suicide three days after release. The Supreme Court found no proximate causation.

"Proximate cause has two components: (1) foreseeability and (2) cause-in-fact. For a negligent act or omission to have been a cause-in-fact of the harm, the act or omission must have been a substantial factor in bringing about the harm, and absent the act or omission—*i.e.*, but for the act or omission—the harm would not have occurred. A physician's failure to hospitalize a person who later commits suicide is a proximate cause of the suicide only if the suicide probably would not have occurred if the decedent had been hospitalized. In addition, an actor's negligence 'may be too attenuated from the resulting injuries to the plaintiff to be a substantial factor in bringing about the harm.'"

"[E]vidence that [patient's] depression was to some degree treatable or that [plaintiff's] expert thought [she] would not have been able to shoot herself while hospitalized is not evidence that hospitalization would have made her suicide unlikely after she was released."

I. Comparative Fault and Contributory Negligence

(*see* Section V(E)(3), above)

J. Damages

1. *Waste Management of Texas, Inc. v. Texas Disposal Systems Landfill, Inc.*, S.W.3d (Tex. 2014)(5/9/14)

One waste management company sued another for libel after it spread lies about the former's environmental standards. The Supreme Court ruled that 1) a "for-profit corporation may recover for injury to its reputation," 2) "[s]uch recovery is a non-economic injury for purposes of the statutory cap on exemplary damages," and 3) here, the evidence was legally insufficient for "reputation damages," but it was sufficient for "remediation costs and thereby exemplary damages."

Footnote 7: "Defamation per se (on its face) requires no proof of actual monetary damages, while defamation per quod … does require such proof."

Actual damages include "general damages" (non-economic) and "special damages" (economic). "Compensatory damages may be divided into two … categories: pecuniary harm and non-pecuniary harm." There is a risk of confusing the harm with the remedy. A harm may be non-pecuniary, but the remedy is pecuniary.

Injury to reputation is not a pecuniary loss. "Non-pecuniary harm includes damages awarded for bodily harm or emotional distress.… [T]hese … do not require certainty of actual monetized loss. Instead, they are measured by an amount that 'a reasonable person could possibly estimate as fair compensation.' Conversely, damages for pecuniary harm do require proof of pecuniary loss for either harm to property, harm to earning capacity, or the creation of liabilities."

In a "defamation case a plaintiff may recover for both general and special damages."

In personal injury cases, there are three basic "'elements of recovery. (1) Time losses. The plaintiff can recover loss or [sic] wages or the value of any lost time or earning capacity where injuries prevent work. (2) Expenses incurred by reason of the injury … [like] medical expenses…. (3) Pain and suffering … , including emotional distress and consciousness of loss.'" The first two are pecuniary, the third is not. Mental anguish like reputation damages are "non-economic damages."

There is appellate review of actual damages in defamation cases because they cannot "be a disguised disapproval of the defendant."

Even though "noneconomic damages cannot … be determined with mathematical precision and … juries must 'have some latitude in awarding such damages,' … [they] are not immune from no-evidence review on appeal." Juries cannot simply pick a number. Here, there was no evidence of lost profits corresponding to loss of reputation. But, the evidence included "271 pages of invoices, expenses, time spent on curative work, supplies, mileage, etc. This … provide[s] some evidence of the remediation costs."

Here, because there was actual malice and proof of remediation costs, plaintiff could recover punitive damages. Punitive damages are limited by § 41.008(b) of the CP & RC to twice the economic damages plus the noneconomic damages up to $750,000, or $200,000, whichever is greater. In 2003, § 41.001(4) was amended to provide that "injury to reputation" is a noneconomic damage.

2. *FPL Energy, LLC v. TXU Portfolio Management Company*, 426 S.W.3d 59 (Tex. 2014)(3/21/14 [*n.b.*, opinion is dated 3/21/13, but was released on 3/21/14])

Suit over contract to provide electricity for distribution. The Supreme Court ruled that plaintiff utility "owed no contractual duty to provide transmission capacity. However, … the liquidated damages provisions … are unenforceable as a penalty."

The liquidated damages "provisions are unambiguous because we may discern a definite legal meaning by construing the provisions in light of each contract as a whole." Here, they apply only to Renewable Energy Credits. The "liquidated damages clauses compensate for REC deficiencies and leave common law remedies available for electricity deficiencies."

In this case, the "liquidated damages clauses compensate for REC deficiencies and leave common law remedies available for electricity deficiencies." "Limiting the liquidated damages provisions to their plain language also has the benefit of advancing stability in the renewable energy marketplace, including the vital role of RECs. Under the legislative scheme, RECs and energy are 'unbundled.'"

Here, liquidated damages are unenforceable. "The basic principle underlying contract damages is compensation for losses sustained and no more; thus, we will not enforce punitive contractual damages provisions.… [T]wo indispensable findings a court must make to enforce contractual damages provisions [are]: (1) 'the harm caused by the breach is incapable or difficult of estimation,' and (2) 'the amount of liquidated damages called for is a reasonable forecast of just compensation.' We evaluate both prongs of this

test from the perspective of the parties at the time of contracting.… [A] liquidated damages provision may be unreasonable 'because the actual damages incurred were much less than the amount contracted for.' A defendant making this assertion may be required to prove the amount of actual damages before a court can classify such a provision as an unenforceable penalty. While … [there may be] factual issues first, ultimately the enforceability of a liquidated damages provision presents a question of law.…"

In this case, "damages for RECs were difficult to estimate at the time of contracting." The Court views "the reasonableness of the [damages] forecast from the time of contracting"

Courts "will not be bound by the language of the parties," including inclusion of liquidated damages in a penalty section.

Here, there is a "chasm between the liquidated damages provisions as written and the result of the provisions under the … judgment." A "Deficiency Rate" did not "tie the damages to market value.…"

A "liquidated damages provision may be unreasonable in light of actual damages. The burden of proving unreasonableness falls to [defendant].… [Here, defendant] has met its burden."

"*Phillips* did not create a broad power to retroactively invalidate liquidated damages provisions that appear reasonable as written.… But when there is an unbridgeable discrepancy between liquidated damages provisions as written and the unfortunate reality in application, we cannot enforce such provisions.… When the liquidated damages provisions operate with no rational relationship to actual damages, thus rendering the provisions unreasonable in light of actual damages, they are unenforceable."

3. *Coinmach Corp. f/k/a Solon Automated Services, Inc. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909 (Tex. 2013)(11/22/13) ("corrected opinion" was issued 2/14/14)

Corrected opinion: footnote 7 changed. *See Coinmach*, below, at 11/22/13.

Footnote 7: "Typically, the landlord could not recover both reasonable rent and lost profits because 'recovery … is limited to the amount necessary to place the plaintiff in the position it would have been in but for the trespass.' Lost profits are measured by deducting operating expenses from gross earnings, resulting in net profits. Reasonable rent—i.e., the value of the use of the property—is calculated as part of the **gross earnings**, and thus is already included in the net profit calculation. To allow the plaintiff to recover both reasonable rent and lost profits would, in most cases, constitute a double recovery. In a residential lease—where there is no business or for-profit endeavor—lost profits would constitute the profits normally associated with reasonable rent." (Emphasis added to show change from prior opinion.)

4. *Coinmach Corp. f/k/a Solon Automated Services, Inc. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909 (Tex. 2013)(11/22/13) ("corrected opinion" was issued 2/14/14)

Lease of tenant who supplied washing machines to apartment complex was subordinate to loan on complex. Mortgage on complex was foreclosed, and new owner bought property out of foreclosure. After that, the tenant held over and thus became a "tenant at sufferance." The Supreme Court ruled that the tenant at sufferance is a trespasser and can be liable in tort (although the extent of liability depends on the nature of the trespass).

"[A] trespasser's liability for damages depends on the nature of the trespass and the nature of the harm: 'Every unauthorized entry upon land is a trespass even if no damage is done. However, to determine what damages, if any, are recoverable for a trespass, the type of conduct or nature of an activity that causes the entry must be identified. While a trespass is a trespass, different recoveries are available, depending on whether the trespass was committed intentionally, negligently, accidentally, or by an abnormally dangerous activity.'"

"'One who invades or trespasses upon the property rights of another, while acting in the good faith and honest belief that he had the lawful and legal right to do so is regarded as an innocent trespasser and liable only for the actual damages sustained.'… '[T]he measure of damages in a trespass case is the sum necessary to make the victim whole, no more, no less.'… [That] generally includes the cost to repair any damage to the property, loss of use of the property, and loss of any expected profits from the use of the property."

The "damages available in a trespass to try title suit include lost rents and profits, damages for use and occupation of the premises, and damages for any special injury to the property." "In addition to the reasonable rents, a tenant at sufferance, like any other trespasser, could also be liable for any special injury to the property." Footnote 7: "Typically, the landlord could not recover both reasonable rent and lost profits because 'recovery … is limited to the amount necessary to place the plaintiff in the position it would have been in but for the trespass.' Lost profits are measured by deducting operating expenses from gross earnings, resulting in net profits. Reasonable rent—i.e., the value of the use of the property—is calculated as part of the operating expenses, and thus is already included in the net profit calculation. To allow the plaintiff to recover both reasonable rent and lost profits would, in most cases, constitute a double recovery. In a residential lease—where there is no business or for-

profit endeavor—lost profits would constitute the profits normally associated with reasonable rent."

Tenants "who knowingly and intentionally trespass, or who do so maliciously, may be liable for additional forms of damages." This includes mental distress, which "'may be recovered, as a separate and independent element, *when caused by a deliberate and willful trespass* in which *actual damage* to plaintiff's property is sustained.'"

"[E]xemplary damages exemplary damages are recoverable only when 'the harm … results from: (1) fraud; (2) malice; or (3) gross negligence.'"

When an owner fails to follow the procedure of a forcible entry and detainer suit, the tenant can maintain possession. "But the tenant will generally be liable for reasonable rent for the period the tenant remains in possession, and for any additional damages the tenant may cause to the property."

Here, as a trespasser, tenant "is liable for the reasonable rent and for any other damage it may have caused to the property. Its liability for any additional damages will depend on whether its trespass was willful, intentional, or malicious."

5. *Liberty Mutual Insurance Company v. Adcock*, 412 S.W.3d 492 (Tex. 2013)(8/30/13)

"[C]ommon law and statutory claims, and their procedures for recovering future damages, have long been a cornerstone of our court system. The question is not whether future damages are absolutely knowable but whether the plaintiff proved such damages within a reasonable degree of certainty. It is not grounds to re-open a judgment simply because a plaintiff incurred fewer future medical expenses than the judgment awarded. The requirement that an injury be permanent is a familiar concept to the courts.…"

6. *City of Lorena v. BMTP Holdings, L.P.*, 409 S.W.3d 634 (Tex. 2013)(8/30/13)

"[W]hen a property owner testifies as to the value of his property, '[e]vidence of price paid, nearby sales, tax valuations, appraisals, online resources, and any other relevant factors may be offered to support the claim.'"

7. *Elizondo v. Krist*, 415 S.W.3d 259 (Tex. 2013)(8/30/13)

In a legal malpractice suit, plaintiff, who had settled the claims of himself and his wife against BP, argued he should have gotten much more money. Ion their response to a motion for summary judgment, plaintiffs offered an affidavit from a lawyer with great familiarity with the BP litigation. But he did not compare this settlement with others. Consequently, the Supreme Court ruled that the plaintiffs' expert failed to raise a fact issue on damages, and upheld a summary judgment for the lawyers.

"Summary judgment was warranted for the Attorneys if, after adequate time for discovery, they demonstrated that the Elizondos had failed to offer competent summary judgment evidence raising a genuine issue of material fact as to damages."

In "a legal-malpractice case damages consist of 'the amount of damages recoverable and collectible . . . if the suit had been properly prosecuted.'" Damages are "the difference between the result obtained and the case's 'true value,' defined as the recovery that would have been obtained 'following a trial' in which the client had 'reasonably competent, malpractice-free' counsel." "Here, where the same defendant settled thousands of cases, and indeed made the business decision to settle all cases and not try any to a verdict, … an expert can[] base his opinion of malpractice damages on a comparison of what similarly situated plaintiffs obtained.…"

In "a mass tort litigation involving thousands of similar claimants and arising out of the same event, the expert measures the 'true' settlement value of a particular case by persuasively comparing all the circumstances of the case to the settlements obtained in other cases with similar circumstances arising from the event."

Here, even if the clients themselves offered "some evidence of actual damages, this does not mean they raised a material issue of fact as to *malpractice* damages."

8. *Morton v. Nguyen*, 412 S.W.3d 506 (Tex. 2013)(8/23/13)

In a contract for deed, the seller failed to comply with disclosure requirements. Though that entitled the buyers to rescind, the Court held that the buyers must restore the rent for the remedy of rescission. The buyers "are not entitled to either attorney's fees or mental anguish damages because no claims supporting the awards survived the court of appeals' judgment." Footnote 3: We "are not convinced that mental anguish damages are recoverable for the Property Code violations found by the trial court in this case."

9. *Neely v. Wilson*, 418 S.W.3d 52 (Tex. 2013)(6/28/13) (*see* "corrected opinion" issued 1/31/14)

Doctor sued reporter and TV station for defamation. His professional association was also allowed to proceed in the suit. Footnote 27: "recovery by the association and its members for the same particular injury is a precluded double recovery. 'There can be but one recovery for one injury, and the fact that … there may be more than one theory of liability[] does not modify this rule.'"

10. *In re Nalle Plastics Family Limited Partnership*, 406 S.W.3d 168 (Tex. 2013)(5/17/13)

Attorneys sued a partnership successfully for its past fees, and were also awarded fees incurred in the prosecution of this suit. The Supreme Court ruled that the partnership's supersedeas bond did not need to include an amount for the "attorney's fees incurred in the prosecution or defense of the claim."

"Chapter 52 does not define 'compensatory damages.' According to Black's Law Dictionary, the term means 'damages sufficient in amount to indemnify the injured person for the loss suffered.'" "The phrase's ordinary meaning, our precedent, and the relevant statutes, however, confirm that [attorney's fees] are not [compensatory damages]." "Courts have long distinguished attorney's fees from damages." Footnote 4: "'Attorney's fees are ordinarily not recoverable, therefore, *as* actual damages in and of themselves' … [and] are not economic damages.…"

Lawsuits "'cannot be maintained solely for the attorney's fees; a client must gain something *before* attorney's fees can be awarded.'"

It is "clear that neither costs nor interest qualify as compensatory damages. Otherwise, there would be no need to list those amounts separately in the supersedeas bond statute."

"'Exemplary damages' are 'any damages awarded as a penalty or by way of punishment but not for compensatory purposes.'"

11. *Hancock v. Variyam*, 400 S.W.3d 59 (Tex. 2013)(5/17/13)

Physician sued colleague who circulated a letter accusing him a lack of veracity. The Supreme Court ruled this did not constitute defamation *per se*. Accordingly, he had to prove actual damages in order to recover punitive damages, and here his mental anguish proof was insufficient.

"While a defamatory statement is one that tends to injure a person's reputation, such a statement is defamatory *per se* if it injures a person in her office, profession, or occupation. The common law deems such statements so hurtful that the jury may presume general damages (such as for mental anguish and loss of reputation).…" "Actual or compensatory damages are intended to compensate a plaintiff for the injury she incurred and include general damages (which are non-economic damages such as for loss of reputation or mental anguish) and special damages (which are economic damages such as for lost income)." Footnote 4: "General damages are noneconomic in nature, such as for loss of reputation and mental anguish, while special damages are economic in nature, such as for lost income.…"

"Because the statements [here] did not ascribe the lack of a necessary skill that is peculiar or unique to the profession of being a physician, we hold that they did not defame the physician *per se*. Thus, … the physician was required to prove actual damages. We further conclude there is no evidence of mental anguish because evidence of some sleeplessness and anxiety—but evidence of no disruption in patient care or interaction with colleagues who read the defamatory letter—does not rise to the level of a substantial disruption in daily routine or a high degree of mental pain and distress. Likewise, there is no evidence of loss of reputation because there is no indication that any recipient of the defamatory letter believed its statements. Lastly, because the physician did not establish actual damages, he cannot recover exemplary damages."

"'[S]tate remedies for defamatory falsehood [must] reach no farther than is necessary to protect the legitimate interest involved. It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. . . . [A]ll awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.'"

There "are three types of damages that may be at issue in defamation *per se* proceedings: (1) nominal damages; (2) actual or compensatory damages; and (3) exemplary damages. If a statement is defamatory but not defamatory *per se*, only the latter two categories of damages are potentially recoverable. Nominal damages 'are a trivial sum of money awarded to a litigant who has established a cause of action but has not established that he is entitled to compensatory damages.' In defamation *per se* cases, nominal damages are awarded when 'there is no proof that serious harm has resulted from the defendant's attack upon the plaintiff's character and reputation' or 'when they are the only damages claimed, and the action is brought for the purpose of vindicating the plaintiff's character by a verdict of a jury.…'"

"Awards of presumed actual damages are subject to appellate review for evidentiary support. And the plaintiff must always prove special damages in order to recover them." "There must be both evidence of the existence of compensable mental anguish and evidence to justify the amount awarded. Mental anguish is only compensable if it causes a 'substantial disruption in . . . daily routine' or 'a high degree of mental pain and distress.' 'Even when an occurrence is of the type for which mental anguish damages are recoverable, evidence of the nature, duration, and severity of the mental anguish is required.'"

12. *Strickland v. Medlen*, 397 S.W.3d 184 (Tex. 2013)(4/5/13)

Plaintiffs' dog escaped his yard, was picked up, and taken to a municipal animal shelter. A worker mistakenly placed the dog on a list allowing him to be

killed before plaintiffs returned with the cash necessary to pay the fees to get him out. The Supreme Court ruled that "a bereaved dog owner [may not] recover emotion-based damages for the loss." The dog is "personal property, thus disallowing non-economic damages." "[R]ecovery in pet-death cases is … limited to loss of value, not loss of relationship." "Where a dog's market value is unascertainable, the correct damages measure is the dog's 'special or pecuniary value' (that is, its actual value)—the economic value derived from its 'usefulness and services,' not value drawn from companionship or other non-commercial considerations."

The law "label[s] [pets] as 'property' for purposes of tort-law recovery." The rule for damages of a dog has "two elements: (1) 'market value, if the dog has any,' or (2) 'some special or pecuniary value to the owner, that may be ascertained by reference to the usefulness and services of the dog.'" The "special or pecuniary value" refers not to the emotional bond, but to "the dog's usefulness and services." It is "not emotional and subjective; rather it is commercial and objective."

Footnote 58: The "actual value" of the pet "*can* include a range of other factors: purchase price, reasonable replacement costs (including investments such as immunizations, neutering, training), breeding potential (if any), special training, any particular economic utility, veterinary expenses related to the negligent injury, and so on."

For "irreplaceable family heirlooms … damages may factor in 'the feelings of the owner for such property.'" "An owner's fondness for a one-of-a-kind, family heirloom is sentimental, existing at the time a keepsake is acquired and based not on the item's attributes but rather on the nostalgia it evokes.…" ("[W]ith heirlooms, the value is sentimental; with [the wrongful death of] people, the value is emotional.") But, the default "rule for destroyed non-heirloom property lacking market or replacement value [is] 'the actual worth or value of the articles to the owner . . . excluding any fanciful or sentimental considerations.'" "[P]ermitting sentiment-based damages for destroyed heirloom property portends nothing resembling the vast public-policy impact of allowing such damages in animal-tort cases."

"[M]ental-anguish damages are [not] recoverable for the negligent destruction of personal property.… [M]ental anguish is a form of personal-injury damage, unrecoverable in an ordinary property-damage case."

"Loss of companionship … is fundamentally a form of *personal-injury* damage, not property damage. It is a component of loss of consortium, including the loss of 'love, affection, protection, emotional support, services, companionship, care, and society.' Loss-of-consortium damages are available only for a few especially close family relationships." "[W]e have 'narrowly cabined' [them] to two building-block human relationships: husband-wife3 and parent-child." Plaintiffs cannot seek such damages "if other close relatives (or friends) were negligently killed: siblings, step-children, grandparents, dear friends, and others."

"Amid competing policy interests, including the inherent subjectivity (and inflatability) of emotion-based damages, lawmakers are best positioned to decide if such a potentially costly expansion of tort law is in the State's best interest, and if so, to structure an appropriate remedy."

Footnote 50: Quoting the Restatement: "'[R]ecovery for *intentionally* inflicted emotional harm is not barred when the defendant's method of inflicting harm is by means of causing harm to property, including an animal.'"

13. *El Dorado Land Company, L.P. v. City of McKinney*, 395 S.W.3d 798 (Tex. 2013)(3/29/13)

Inverse condemnation case. In the earlier *Leeco* case, the "possibility of reverter was a protected property interest," valued by the "imminence of possession." "[N]ominal damages would be inappropriate if the defeasible event was reasonably certain to occur in the near future or had already occurred."

Though condemnation case and inverse condemnation cases differ based on who initiates, rules of evidence and measure of damages to property are 'substantially similar' in both kinds of cases."

14. *Kopplow Development, Inc. v. The City of San Antonio*, 399 S.W.3d 532 (Tex. 2013)(3/8/13)

Commercial property owner sued city for inverse condemnation when city would not issue permit unless owner provided more landfill.

The "damages the jury awarded are proper for [landowner's] inverse condemnation claim. The damages the jury found for the easement … and the remainder of [landowner's] property … are recoverable under the inverse condemnation claim."

"It was not harmful error under our Rules and precedent to charge the jury here separately as to the damages for the easement under the statutory takings claim and the remainder of the property under the inverse condemnation claim because the ultimate result was the same."

K. Gross Negligence and Punitive Damages

1. *In the Interest of A.B. and H.B., Children*, ___ S.W.3d ___ (Tex. 2014)(5/16/14)

In a suit to terminate parental rights, the Supreme Court ruled that appellate courts are not required to "detail the evidence … when affirming the jury's decision" to terminate parental rights. The Court compared this to awards of exemplary damages

For "preponderance cases … 'a court of appeals must detail the evidence … and clearly state why the jury's finding is factually insufficient when reversing a jury verdict, but need not do so when affirming a jury verdict.'" But, the Court has "established one exception to the general rule that appellate courts need not 'detail the evidence' when affirming a jury finding: exemplary damages." "'Due to the jury's broad discretion in imposing [exemplary] damages, we believe that a similar type of review is appropriate when a court of appeals is affirming such an award over a challenge that it is based on insufficient evidence or is against the great weight and preponderance of the evidence.'"

"In both exemplary damages and parental termination cases, the standard of proof at trial is heightened—the plaintiff (or in the case of parental termination, the State) must prove the claim by clear and convincing evidence."

Footnote 6: "'[A]n appellate court that reviews the evidence with respect to a finding by a trier of fact concerning liability for exemplary damages or with respect to the amount of exemplary damages awarded shall state, in a written opinion, the court's reasons for upholding or disturbing the finding or award.'"

"Unlike exemplary damages awards, which leave much to the jury's discretion, the Family Code provides a detailed statutory framework to guide the jury in making its termination findings."

The "review of exemplary damages and parental terminations are different processes for an[other] … reason: competing fundamental interests. An award of exemplary damages only implicates one fundamental concern, the defendant's due process rights to her property. Because no competing fundamental interest exists to balance this right in the trial court, we require courts of appeals to detail the evidence of their exacting review on appeal."

2. *Waste Management of Texas, Inc. v. Texas Disposal Systems Landfill, Inc.*, ___ S.W.3d ___ (Tex. 2014)(5/9/14)

One waste management company sued another for libel after it spread lies about the former's environmental standards. The Supreme Court ruled that 1) a "for-profit corporation may recover for injury to its reputation," 2) "[s]uch recovery is a non-economic injury for purposes of the statutory cap on exemplary damages," and 3) here, the evidence was legally insufficient for "reputation damages," but it was sufficient for "remediation costs and thereby exemplary damages." The amount of punitive damages therefore had to be recalculated, along with prejudgment and post-judgment interest.

Here, because there was actual malice and proof of remediation costs, plaintiff could recover punitive damages. Footnote 120: "Recovery of punitive damages requires a finding of an independent tort with accompanying actual damages."

Punitive damages are limited by § 41.008(b) of the CP & RC to twice the economic damages plus the non-economic damages up to $750,000, or $200,000, whichever is greater. In 2003, § 41.001(4) was amended to provide that "injury to reputation" is a noneconomic damage.

3. *Coinmach Corp. f/k/a Solon Automated Services, Inc. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909 (Tex. 2013)(11/22/13) ("corrected opinion" was issued 2/14/14)

"[E]xemplary damages exemplary damages are recoverable only when 'the harm … results from: (1) fraud; (2) malice; or (3) gross negligence.'"

4. *Neely v. Wilson*, 418 S.W.3d 52 (Tex. 2013)(6/28/13) (*see* "corrected opinion" issued 1/31/14)

Doctor sued reporter and TV station for defamation, and the Supreme Court reversed a summary judgment for defendants.

Under the recently passed "Defamation Mitigation Act, … a defamation plaintiff may only recover exemplary damages if she serves the request for a correction, clarification, or retraction within 90 days of receiving knowledge of the publication."

In the context of defamation, "[a]ctual malice means the defendant made the statement ''with knowledge that it was false or with reckless disregard of whether it was true or not;'' and reckless disregard means ''the defendant in fact entertained serious doubts as to the truth of his publication.'"

5. In re Nalle Plastics Family Limited Partnership, 406 S.W.3d 168 (Tex. 2013)(5/17/13)

"'Exemplary damages' are 'any damages awarded as a penalty or by way of punishment but not for compensatory purposes.'"

6. *Hancock v. Variyam*, 400 S.W.3d 59 (Tex. 2013)(5/17/13)

Physician sued colleague who circulated a letter accusing him a lack of veracity. The Supreme Court ruled this did not constitute defamation *per se*. Accordingly, he had to prove actual damages in order to recover punitive damages, and here his mental anguish proof was insufficient.

"While a defamatory statement is one that tends to injure a person's reputation, such a statement is defamatory *per se* if it injures a person in her office, profession, or occupation. The common law deems such statements so hurtful that the jury may presume general damages (such as for mental anguish and loss of reputation).… Because the statements [here] did not ascribe the lack of a necessary skill that is peculiar or unique to the profession of being a physician, we hold

that they did not defame the physician *per se*. Thus, … the physician was required to prove actual damages. We further conclude there is no evidence of mental anguish because evidence of some sleeplessness and anxiety—but evidence of no disruption in patient care or interaction with colleagues who read the defamatory letter—does not rise to the level of a substantial disruption in daily routine or a high degree of mental pain and distress. Likewise, there is no evidence of loss of reputation because there is no indication that any recipient of the defamatory letter believed its statements. Lastly, because the physician did not establish actual damages, he cannot recover exemplary damages."

"'[S]tate remedies for defamatory falsehood [must] reach no farther than is necessary to protect the legitimate interest involved. It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. . . . [A]ll awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.'"

There "are three types of damages that may be at issue in defamation *per se* proceedings: (1) nominal damages; (2) actual or compensatory damages; and (3) exemplary damages. If a statement is defamatory but not defamatory *per se*, only the latter two categories of damages are potentially recoverable. Nominal damages 'are a trivial sum of money awarded to a litigant who has established a cause of action but has not established that he is entitled to compensatory damages.' In defamation *per se* cases, nominal damages are awarded when 'there is no proof that serious harm has resulted from the defendant's attack upon the plaintiff's character and reputation' or 'when they are the only damages claimed, and the action is brought for the purpose of vindicating the plaintiff's character by a verdict of a jury.…'"

"But if more than nominal damages are awarded, recovery of exemplary damages are appropriately within the guarantees of the First Amendment if the plaintiff proves by clear and convincing evidence that the defendant published the defamatory statement with actual malice."

7. *Reeder v. Wood County Energy, LLC*, 395 S.W.3d 789 (Tex. 2012)(8/31/12); new opinion issued 3/29/13

The Supreme Court issued a new judgment in this oil and gas suit that allows attorney's fees. For further discussion of the issues, see below for a treatment of the earlier opinion, issued on 8/31/12.

L. Trial Amendment

No cases to report.

M. Jury Charge and Submission to Jury

1. *Kia Motors Corporation v. Ruiz*, S.W.3d (Tex. 2014)(3/28/14)

Products liability case based upon the failure of an air bag to deploy due to its circuitry. Defendant "did not object to this portion of the jury charge [that addressed a design defect and safer alternative design], and we therefore analyze the evidence in light of the charge as given."

2. *Dynegy, Inc. v. Yates*, 422 S.W.3d 638 (Tex. 2013)(8/30/13)

Dynegy orally agreed to pay for the criminal defense attorney for its officer. When attorney sued for the balance after the trial, it alleged the statute of frauds. The Supreme Court ruled the agreement was unenforceable.

"The party seeking to avoid the statute of frauds must plead, prove, and secure findings as to an exception or risk waiver under Rule 279…." Here, "the burden was on Yates to secure favorable findings on the main purpose doctrine. Yates's failure to do so constituted a waiver of the issue under Rule 279.…"

3. *Nall v. Plunkett*, 404 S.W.3d 552 (Tex. 2013)(6/28/13)

After a party-goer was injured by another guest who was intoxicated, the trial court granted summary judgment for the defense on a negligent-undertaking theory. It was upheld by the Supreme Court.

"[A] jury submission for a negligence claim predicated on a negligent-undertaking theory requires a broad-form negligence question accompanied by instructions detailing the essential elements of an undertaking claim.… [T]he broad-form submission for a typical negligence claim and a negligent-undertaking claim is the same, except that an undertaking claim requires the trial court to instruct the jury that a defendant is negligent only if: (1) the defendant undertook to perform services that it knew or should have known were necessary for the plaintiff's protection; (2) the defendant failed to exercise reasonable care in performing those services; and either (a) the plaintiff relied upon the defendant's performance, or (b) the defendant's performance increased the plaintiff's risk of harm."

4. *In the Matter of L.D.C., a Child*, 400 S.W.3d 572 (Tex. 2013)(5/24/13)

After a street party, a juvenile who fired a rifle in the air and towards a police officer (behind whom were houses) was charged with attempted capital murder, aggravated assault on a police officer, and deadly conduct. After the juvenile did not object to a disjunctive jury instruction for one charge, the Supreme Court ruled the trial court did not commit

"reversible error by submitting elements of an offense to the jury disjunctively, allowing for a nonunanimous verdict."

In juvenile cases, jury verdicts must be unanimous. "In criminal cases, in which the jury verdict must also be unanimous, 'when a single crime can be committed in various ways, jurors need not agree upon the mode of commission.'" "While the jury did not have to agree on how an offense was committed, it had to agree 'on the same act for a conviction', not 'mere[ly] . . . on a violation of a statute'."

Since there was no objection, "the question then became whether the error was reversible when it was not preserved.… [I]n juvenile justice cases, '[t]he requirements governing an appeal are as in civil cases generally.' In civil cases, unobjected-to charge error is not reversible unless it is fundamental, which occurs only 'in those rare instances in which the record shows the court lacked jurisdiction or that the public interest is directly and adversely affected as that interest is declared in the statutes or the Constitution of Texas.' Fundamental error is reversible if it 'probably caused the rendition of an improper judgment [or] probably prevented the appellant from properly presenting the case to the court of appeals.' But we have stated that 'a juvenile proceeding is not purely a civil matter. It is quasicriminal, and . . . general rules requiring preservation in the trial court . . . cannot be applied across the board in juvenile proceedings.' In criminal cases, unobjected-to charge error is reversible if it was 'egregious and created such harm that his trial was not fair or impartial', considering essentially every aspect of the case."

"[W]e will not base reversible error on the possibility that a juror might act irrationally, which a correct instruction cannot prevent. Under the civil standard of review, error in the trial court's disjunctive submission of deadly conduct did not probably cause an improper judgment or probably prevent a proper presentation of L.D.C.'s appeal. Under the criminal standard of review, the error was not egregious, and '[i]t is . . . highly likely that the jury's verdicts . . . were, in fact, unanimous.'" Any error was not harmful.

5. *Hancock v. Variyam*, 400 S.W.3d 59 (Tex. 2013)(5/17/13)

Physician sued colleague who circulated a letter accusing him a lack of veracity. The Supreme Court ruled this did not constitute defamation *per se*. Accordingly, he had to prove actual damages in order to recover punitive damages, and here his mental anguish proof was insufficient.

"If the court determines that an ordinary reader could only view the statement as defamatory and further concludes that the statement is defamatory *per se*, it should so instruct the jury.…"

The "equal inference rule … provides that a jury may not reasonably infer an ultimate fact from 'meager circumstantial evidence which could give rise to any number of inferences, none more probable than another.'"

6. *Kopplow Development, Inc. v. The City of San Antonio*, 399 S.W.3d 532 (Tex. 2013)(3/8/13)

Commercial property owner sued city for inverse condemnation when city would not issue permit unless owner provided more landfill.

Landowner proposed a single jury question. "[B]road form condemnation charges should ask the difference in value of the property before and after the taking." But the court submitted jury separate questions for the easement and the damage of the property. "It was not harmful error under our Rules and precedent to charge the jury here separately as to the damages for the easement under the statutory takings claim and the remainder of the property under the inverse condemnation claim because the ultimate result was the same."

N. Closing Argument

1. *In re Toyota Motor Sales, U.S.A., Inc.*, 407 S.W.3d 746 (Tex. 2013)(8/30/13)

Trial court granted new trial after it believed that defendant violated the motion in limine. The Supreme Court ruled that the defense properly used the questionable evidence in argument.

A motion in limine prohibited the defense from eliciting an opinion from a police officer about seat belt usage. The requesting attorney inadvertently violated the limine by requesting to introduce evidence under the rule of optional completeness. The evidence came in later without objection.

"Attorneys in closing must 'confine the argument strictly to the evidence'; any evidence in the record is fair game." "Once the evidence was in the record—without objection or a request that it be stricken or that the jury be instructed to disregard—it was in for all purposes and a proper subject of closing argument." Objection for the first time "during closing argument was too late."

2. *Certified EMS, Inc. v. Potts*, 392 S.W.3d 625 (Tex. 2013)(2/15/13)

Medical malpractice case. "The … petitions inform a defendant of the claims against it and limit what a plaintiff may argue at trial."

O. Directed Verdict

1. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244 (Tex. 2013)(6/21/13)

"No-evidence summary judgments are reviewed under the same legal sufficiency standard as directed verdicts. Under that standard, evidence is considered in

the light most favorable to the nonmovant, crediting evidence a reasonable jury could credit and disregarding contrary evidence and inferences unless a reasonable jury could not. The nonmovant has the burden to produce summary judgment evidence raising a genuine issue of material fact as to each challenged element of its cause of action."

P. Jurors and Jury Deliberation

1. *In re Health Care Unlimited, Inc.*, S.W.3d (Tex. 2014)(4/25/14)

During jury deliberations, a representative of a corporate defendant communicated with a juror. The trial court granted a new trial, but the Supreme Court ruled that this was an abuse of discretion, holding that "there was no evidence that the communications probably caused injury."

The trial court initially had not held a hearing. The "Texas Rules of Civil Procedure require that 'the court shall hear evidence [of alleged juror misconduct] from the jury or others in open court,' *see* TEX. R.CIV. P. 327(a)." After a hearing, the trial court found that the jury spoke to defendant's manager, twice. The trial court "did not find or conclude, however, that [the juror's communications with [defendant's manager] were material or probably resulted in injury."

A "trial court must give a reasonably specific explanation of its reasons for granting a new trial." And, "an appellate court may conduct a merits-based review of a trial court's order granting a new trial." "Thus, an appellate court may review whether a trial court's explanation supports its decision to grant a new trial." Simply, "articulating understandable, reasonably specific, and legally appropriate reasons is not enough [for a new trial]; the reasons must be valid and correct."

"To warrant a new trial based on jury misconduct, the movant must establish that (1) the misconduct occurred, (2) it was material, and (3) it probably caused injury. TEX. R.CIV. P. 327(a).… The complaining party has the burden to prove all three elements before a new trial can be granted. Whether misconduct occurred and caused injury are questions of fact for the trial court."

Here, misconduct occurred. But, "there is no evidence to satisfy Rule 327's requirement that the misconduct cause probable injury." "[M]isconduct not resulting in injury does not 'condemn a trial as unfair.'"

"'To show probable injury, there must be some indication in the record that the alleged misconduct most likely caused a juror to vote differently than he would otherwise have done on one or more issues vital to the judgment.'" Here, the testimony of those involved in the misconduct did not reveal that the communications were related to the trial. Rule 327 protects the "integrity of the verdict" by "giving due consideration to the right to a jury trial in an effort to best protect the trial process." "Under Rule 327, protecting the trial process in the jury misconduct context requires a finding of misconduct, materiality, and probable injury, not merely that there was an appearance of impropriety from which harm could be presumed."

2. *In re Whataburger Restaurants*, L.P., S.W.3d (Tex. 2014)(4/25/14)

After a 10-2 defense verdict in a premises liability case, the trial court granted a new trial because one juror failed during voir dire to reveal she had been a defendant before. The Supreme Court granted mandamus, ruling the trial court had abused its discretion because there was no evidence the "nondisclosure probably caused injury."

"[A]n appellate court may conduct a merits-based mandamus review of a trial court's articulated reasons for granting a new trial."

"'To warrant a new trial for jury misconduct, the movant must establish (1) that the misconduct occurred, (2) it was material, and (3) probably caused injury.'"

Here, there was "no evidence" of probable injury. Footnote 1: A "juror's failure to disclose information that establishes that the juror is legally disqualified from serving on the jury is per se material.… *See* TEX. GOV'T CODE § 62.105 (listing bases for legal disqualification of jurors). When [as here] the nondisclosure is not per se material, courts must determine the materiality in light of the context as reflected in the record."

A "trial court 'may' grant a new trial based on juror misconduct if 'it reasonably appears from the evidence both on the hearing of the motion and the trial of the case and from the record as a whole that injury probably resulted to the complaining party.' … [But,] there is no showing of a probable injury when the evidence is such that, even without the misconduct, the jury would in all probability have rendered the same verdict…."

In this case, the plaintiff's attorney claimed he would have questioned her about the prior suits and stricken her. But, what "would have" happened is "speculative and conclusory" without evidence. In fact, here he had not questioned other veniremen with prior lawsuits, and one was among the 10 jurors joining in the verdict.

Q. Judgments, Costs, and Interest

1. *Waste Management of Texas, Inc. v. Texas Disposal Systems Landfill, Inc.*, S.W.3d (Tex. 2014)(5/9/14)

One waste management company sued another for libel after it spread lies about the former's environmental standards. The Supreme Court ruled

among other things that the evidence was legally insufficient for "reputation damages," but it was sufficient for "remediation costs and thereby exemplary damages." Thus, the amount of punitive damages had to be recalculated, along with prejudgment and post-judgment interest.

The amount of interest had to be recalculated here because the actual damages figure, upon which punitive damages were based, changed on appeal.

Moreover, "judgment interest does not accrue for the period of any extension" of a deadline on appeal requested by plaintiff. Footnote 122: "TEX. FIN. CODE § 304.005(b) (Post-judgment interest does not accrue '[i]f a case is appealed and a motion for extension of time to file a brief is granted for a party who was a claimant at trial …')."

2. *Long v. Castle Texas Production Limited Partnership*, 426 S.W.3d 73 (Tex. 2014)(3/28/14)

Investors sued operator of a well, which successfully counterclaimed for payments under Joint Operating Agreement. After a lengthy appellate history, the trial court determined it needed to reopen the record to determine the date investors received invoices in order to compute interest on the judgment. The operator waived prejudgment interest, seeking only postjudgment interest from the date of the original judgment, years earlier. The Supreme Court ruled that the trial court did not abuse its discretion by ordering the record reopened, and that operator was entitled to postjudgment interest only from the date of the latter (and final) judgment.

"[P]ostjudgment interest accrues from the final judgment date unless the appellate court can or does render the judgment the trial court should have rendered. If the trial court determines that it must reopen the record on remand based upon the record and pleadings as they existed at the time of the remand, postjudgment interest will accrue from the subsequent judgment. But if the court of appeals can or does render the judgment the trial court should have rendered, postjudgment interest accrues from the original, erroneous trial court judgment."

"Prejudgment interest and postjudgment interest both compensate a judgment creditor for her lost use of the money due her as damages. Prejudgment interest accrues from the earlier of: (1) 180 days after the date a defendant receives written notice of a claim, or (2) the date suit is filed, and until the day before the judgment. Postjudgment interest accrues from the judgment date through the date the judgment is satisfied."

Postjudment "interest accrues on prejudgment interest and, unlike prejudgment interest, postjudgment interest compounds annually. [Footnote 6: Compare id. § 304.104 ('Prejudgment interest is computed as simple interest and does not compound.'), with id. § 304.006 ('Postjudgment interest on a judgment of a court in this state compounds annually.').] Additionally, statutory limits such as the one on health care liability claims may prohibit recovery that includes prejudgment interest, but we have never held that postjudgment interest is subject to that limitation."

"The Finance Code provides that postjudgment interest accrues from a money judgment's date." Under the TEX.R.CIV.P. 301, "only one final judgment exists in any case, and historically we have allowed postjudgment interest to accrue only upon a final judgment." There is an exception when "a court of appeals can or does render the judgment the trial court should have rendered. In such circumstances, … that postjudgment interest accrues from original judgment date." The undefined term "judgment" in the Finance Code means the trial court's judgment.

A "partial summary judgment that grants relief on only one of several claims will not accrue postjudgment interest on the rendered claim until a final judgment resolves all issues among all parties."

Footnote 8: The "joint operating agreement between [the parties] … is contract interest under the Finance Code."

The "finality test for the purpose of appeal differs from the finality test for when a court's power to alter a judgment ends or when the judgment becomes final for the purpose of claim and issue preclusion.… [F]inality for the purpose of appeal bears the closest resemblance to finality for the purpose of accruing postjudgment interest. A judgment is final for the purpose of appeal 'if it disposes of all pending parties and claims in the record, except as necessary to carry out the decree.'" This begins "accrual of postjudgment interest."

If "a remand results in multiple trial court judgments, postjudgment interest accrues from the date of the final judgment (rather than the original, erroneous judgment)."

If "an appellate court renders the judgment the trial court should have rendered [by reversing a j.n.o.v.], postjudgment interest accrues from the date of the trial court's original, erroneous judgment."

"If … a claimant fails to equip the trial court with a sufficient record on remand and decides to waive a claim, only at the time of this waiver does the trial court possess a sufficient record to enter a correct judgment." Here, the trial court did not abuse its discretion by ordering additional evidence of the date the operator sent invoices to the investors.

3. *City of Houston v. Rhule*, 417 S.W.3d 440 (Tex. 2013)(11/22/13)

The Supreme Court ruled that a fireman who sued the city for violating a settlement agreement reached in a worker's compensation claim failed to exhaust his administrative remedies, and thus dismissed the suit for want of jurisdiction. "Subject matter jurisdiction is 'essential to a court's power to decide a case.' … A

judgment rendered without subject matter jurisdiction cannot be considered final."

4. *Coinmach Corp. f/k/a Solon Automated Services, Inc. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909 (Tex. 2013)(11/22/13) ("corrected opinion" was issued 2/14/14)

Footnote 5: "a determination of fact or law in a proceeding in a lower trial court, including a justice of the peace court, is not res judicata or basis for estoppel by judgment in a district court proceeding."

5. *Brighton v. Koss*, 415 S.W.3d 864 (Tex. 2013)(8/23/13)

The court of appeals severed "Brighton's appeal from Koss's, thereby making its order dismissing Brighton's appeal a final judgment. *See* TEX. R. APP. P. 53.1 (requiring a final judgment as predicate for a petition for review in the Supreme Court)."

In this case, the second judgment "restarted the appellate timetable.… [T]he appellate timetable restarts when a trial court modifies the judgment in any respect."

6. *The Finance Commission of Texas v. Norwood*, 418 S.W.3d 566 (Tex. 2013)(6/21/13) ("supplemental opinion" was issued 1/24/14)

""As a rule, court decisions apply retrospectively.…'""

7. *Phillips v. Bramlett*, 407 S.W.3d 229 (Tex. 2013)(6/7/13)

Medical malpractice case had been remanded by the Supreme Court to the trial court. The trial court had "vacated" part of the original judgment, and had computed interest from the date of the judgment entered after the remand. The Supreme Court ruled "that (1) the court of appeals had jurisdiction to review the trial court's remand judgment; (2) postjudgment interest must be calculated from the date of the original judgment; and (3) the trial court's order vacating the original judgment was unnecessary because that judgment had already been reversed in its entirety, but it was not reversible error."

"A judgment that has been wholly reversed … is without effect, and whether the trial court's remand judgment is labeled as a 'new' or a 'modified' version of the earlier judgment does not alter the correctness of its content." A "'vacated, set aside, or reversed judgment, order, or … cannot be made the basis of any rights thereafter.'"

"Prejudgment interest and postjudgment interest compensate judgment creditors for their lost use of the money due to them as damages.… Prejudgment interest performs this function for the time period from the date the damages are incurred through the date of judgment; postjudgment interest, from the date of judgment through the date the judgment is satisfied." "Previously, we have held that prejudgment interest is included among the damages that are capped by former article 4590i. We have never held that postjudgment interest is subject to the damages cap."

Any "'money judgment of a court in this state must specify the postjudgment interest rate applicable to that judgment,' … and … postjudgment interest accrues beginning on the date the judgment is rendered."

When "an appellate court remands a case to the trial court for entry of judgment … , and the trial court is not required to admit new … evidence to enter that judgment, … the date the trial court entered the original judgment is the 'date the judgment is rendered,' and postjudgment interest begins to accrue and is calculated as of that date." When an appellate court reverses and renders, "postjudgment interest begins to run from the date of the trial court's judgment.…"

We "presume that when the Legislature enacted section 304.005 in 1999, it was aware of our interpretations of the word 'judgment' in the predecessor statute.…"

"However, we are not holding today that postjudgment interest *always* accrues from the date of the original judgment when an appellate court remands a case.…"

Comments in the judgment pertaining to a later *Stowers* claim "are recitals and not part of the judgment's decretal language. They are not material to the ultimate disposition of the case, and they do not represent jury findings." To the extent they were sought for a "subsequent *Stowers* claim against Phillips's liability insurer, [plaintiffs] have failed to explain to us how that could be or why they would be entitled to obtain such recitals in a case to which Phillips's liability insurer was not a party."

8. *In re Nalle Plastics Family Limited Partnership*, 406 S.W.3d 168 (Tex. 2013)(5/17/13)

Attorneys sued a partnership successfully for its past fees, and were also awarded fees incurred in the prosecution of this suit. The Supreme Court ruled that the partnership's supersedeas bond did not need to include an amount for the "attorney's fees incurred in the prosecution or defense of the claim."

Under House Bill 4, "To suspend enforcement of a money judgment pending appeal, a judgment debtor must post security equaling the sum of compensatory damages awarded in the judgment, interest for the estimated duration of the appeal, and costs awarded in the judgment." "The amendment also capped security at the lesser of fifty percent of the judgment debtor's net worth, or $25 million. A trial court must reduce the amount of security if a judgment debtor shows he is

likely to suffer substantial economic harm—a less onerous burden than the previous standard.…"

"Chapter 52 does not define 'compensatory damages.' According to Black's Law Dictionary, the term means 'damages sufficient in amount to indemnify the injured person for the loss suffered.'" "The phrase's ordinary meaning, our precedent, and the relevant statutes, however, confirm that [attorney's fees] are not [compensatory damages]." "Courts have long distinguished attorney's fees from damages."

It is "clear that neither costs nor interest qualify as compensatory damages. Otherwise, there would be no need to list those amounts separately in the supersedeas bond statute."

"'Costs,' when used in legal proceedings, refer not just to any expense, but to those paid to courts or their officers—and costs generally do not include attorney's fees. As we have recognized for decades, 'the term 'costs' is generally understood [to mean] the fees or compensation fixed by law collectible by the officers of court, witnesses, and such like items, and does not ordinarily include attorney's fees which are recoverable only by virtue of contract or statute.'"

"Our procedural rules permit a successful litigant to 'recover of his adversary all costs incurred therein, except where otherwise provided.'"

9. *Texas Department of Transportation v. A.P.I. Pipe and Supply, LLC*, 397 S.W.3d 162 (Tex. 2013)(4/5/13)

Inverse condemnation suit which turned on whether government had title to a parcel after an original condemnation judgment in 2003 that awarded it a "right-of-way" was revised by a nunc pro tunc judgment in 2004 that purported to render the 2003 judgment void and grant only an "easement." The Supreme Court ruled that the "void 2004 Judgment cannot supersede the valid 2003 Judgment.…"

The "trial court was correct to consider the 2003 and 2004 Judgments as extrinsic, undisputed evidence."

"A judgment nunc pro tunc can correct a clerical error in the original judgment, but not a judicial one. An attempted nunc pro tunc judgment entered after the trial court loses plenary jurisdiction is void if it corrects judicial rather than clerical errors. 'A clerical error is one which does not result from judicial reasoning or determination.'"

"If 'the signed judgment inaccurately reflects the true decision of the court,' then 'the error is clerical and may be corrected.'"

The "fact that the change was significant is not fatal to the 2004 Judgment's nunc pro tunc status. However, TxDOT and the City produced evidence showing that the 2003 Judgment correctly reflected the underlying judicial determination."

Here, because the city pleaded for fee-simple condemnation and the special commissioners awarded it, the "trial court could 'only perform its ministerial function and render judgment based upon the commissioner's award.'" "Conversely, the 2004 Judgment exceeded the scope of this 'ministerial function' by shrinking the interest awarded by the special commissioners from a fee simple to an easement."

The trial court's plenary power "usually lasts 30 days." So, it could not make substantive alterations of the 2003 judgment. The 2004 judgment was void, and thus "did not convey anything to anyone."

R. Joint and Several Liability

No cases to report.

S. J.N.O.V.

1. *Long v. Castle Texas Production Limited Partnership*, 426 S.W.3d 73 (Tex. 2014)(3/28/14)

This opinion generally addresses the date from which postjudment interest runs.

If "an appellate court renders the judgment the trial court should have rendered [by reversing a j.n.o.v.], postjudgment interest accrues from the date of the trial court's original, erroneous judgment."

2. *Brighton v. Koss*, 415 S.W.3d 864 (Tex. 2013)(8/23/13)

"[A] motion for judgment notwithstanding the verdict [has been treated] as a prematurely filed motion to modify or motion for new trial" for the purposes of appellate deadlines.

T. Motion for New Trial

1. *In re Health Care Unlimited, Inc.*, S.W.3d _ (Tex. 2014)(4/25/14)

During jury deliberations, a representative of a corporate defendant communicated with a juror. The trial court granted a new trial, but the Supreme Court ruled that this was an abuse of discretion, holding that "there was no evidence that the communications probably caused injury."

The trial court initially had not held a hearing. The "Texas Rules of Civil Procedure require that 'the court shall hear evidence [of alleged juror misconduct] from the jury or others in open court,' *see* TEX. R.CIV. P. 327(a)." After a hearing, the trial court found that the jury spoke to defendant's manager, twice. The trial court "did not find or conclude, however, that [the juror's communications with [defendant's manager] were material or probably resulted in injury."

A "trial court must give a reasonably specific explanation of its reasons for granting a new trial." And, "an appellate court may conduct a merits-based review of a trial court's order granting a new trial." "Thus, an appellate court may review whether a trial

court's explanation supports its decision to grant a new trial." Simply, "articulating understandable, reasonably specific, and legally appropriate reasons is not enough [for a new trial]; the reasons must be valid and correct."

"To warrant a new trial based on jury misconduct, the movant must establish that (1) the misconduct occurred, (2) it was material, and (3) it probably caused injury. TEX. R.CIV. P. 327(a).… The complaining party has the burden to prove all three elements before a new trial can be granted. Whether misconduct occurred and caused injury are questions of fact for the trial court."

Here, misconduct occurred. But, "there is no evidence to satisfy Rule 327's requirement that the misconduct cause probable injury." "[M]isconduct not resulting in injury does not 'condemn a trial as unfair.'"

"'To show probable injury, there must be some indication in the record that the alleged misconduct most likely caused a juror to vote differently than he would otherwise have done on one or more issues vital to the judgment.'" Here, the testimony of those involved in the misconduct did not reveal that the communications were related to the trial. Rule 327 protects the "integrity of the verdict" by "giving due consideration to the right to a jury trial in an effort to best protect the trial process." "Under Rule 327, protecting the trial process in the jury misconduct context requires a finding of misconduct, materiality, and probable injury, not merely that there was an appearance of impropriety from which harm could be presumed."

2. *In re Whataburger Restaurants*, L.P., S.W.3d (Tex. 2014)(4/25/14)

After a 10-2 defense verdict in a premises liability case, the trial court granted a new trial because one juror failed during voir dire to reveal she had been a defendant before. The Supreme Court granted mandamus, ruling the trial court had abused its discretion because there was no evidence the "nondisclosure probably caused injury."

"[A]n appellate court may conduct a merits-based mandamus review of a trial court's articulated reasons for granting a new trial. A writ of mandamus shall issue to correct a clear abuse of discretion committed by a trial court in granting a new trial. A trial court does not abuse its discretion so long as its stated reason for granting a new trial is legally appropriate and specific enough to indicate that the trial court derived the reasons from the particular facts and circumstances of the case at hand."

"'To warrant a new trial for jury misconduct, the movant must establish (1) that the misconduct occurred, (2) it was material, and (3) probably caused injury.'"

A "trial court 'may' grant a new trial based on juror misconduct if 'it reasonably appears from the evidence both on the hearing of the motion and the trial of the case and from the record as a whole that injury probably resulted to the complaining party.' … [But,] there is no showing of a probable injury when the evidence is such that, even without the misconduct, the jury would in all probability have rendered the same verdict…."

3. *In re Toyota Motor Sales, U.S.A., Inc.*, 407 S.W.3d 746 (Tex. 2013)(8/30/13)

Trial court granted new trial after it believed that defendant violated the motion in limine. Though it properly explained its reasons, they were unsupported by the record. The Supreme Court ruled that "an appellate court may conduct a merits review of the bases for a new trial order after a trial court has set aside a jury verdict. If the record does not support the trial court's rationale for ordering a new trial, the appellate court may grant mandamus relief."

A "trial court must explain with reasonable specificity why it has set aside a jury verdict and granted a new trial." Then, the "appellate court may, in an original proceeding, determine whether the reasonably specific and legally sound rationale is actually true."

"'New trials may be granted and judgment set aside for good cause, on motion or on the court's own motion on such terms as the court shall direct.'"

Footnote 4: An "'amended motion for new trial filed more than thirty days after the trial court signs a final judgment is untimely' and does not preserve issues for appellate review but … 'the trial court may, at its discretion, consider the grounds raised in an untimely motion and grant a new trial under its inherent authority before the court loses plenary power.'"

In the past, trial courts granted new trials "'in the interests of justice and fairness.'" This is now "inadequate." As appellate courts must "detail reasons" for setting aside a jury verdict, so must trial courts. (Footnote 9: this is necessary to "safeguard parties' right to a jury trial.") The explanation is not based "'on the length or detail of the reasons a trial court gives, but on how well … [it shows] *valid reasons*.'" Thus, a "'trial court does not abuse its discretion so long as its stated reason for granting a new trial (1) is a reason for which a new trial is *legally appropriate* (such as a well defined legal standard or a defect that probably resulted in an improper verdict); and (2) is *specific enough* to indicate that the trial court did not simply parrot a pro forma template, but rather derived the articulated reasons from the particular facts and circumstances of the case at hand.'" Footnote 6: the Court provides "a non-exhaustive list of examples of" sufficient reasons.

Therefore, the "correctness or validity of the orders' articulated reasons can[] also be evaluated." Previously, the Court recognized mandamus was appropriate when the trial court's order was void or if it "erroneously concluded that the jury's answers to special issues were irreconcilably in conflict."

"Simply articulating understandable, reasonably specific, and legally appropriate reasons is not enough; the reasons must be valid and correct."

A new trial as a sanction for defendant's violation of a motion in limine "presupposes sanctionable conduct, and we have just held that Toyota's statements during closing argument were appropriate" because the evidence was admitted without proper objection or motion to strike.

4. *Brighton v. Koss*, 415 S.W.3d 864 (Tex. 2013)(8/23/13)

"[W]hen a motion for new trial or motion to modify is filed before the final judgment is signed, we do not require the party to refile the complaint after the formal judgment to extend the appellate deadlines.…"

5. *In the Interest of J.M. and Z.M., Minor Children*, 396 S.W.3d 528 (Tex. 2013)(3/15/13)

After family court terminated the parent-child relationship, counsel for parent filed a pleading combining a motion for new trial with a notice of appeal. The Supreme Court ruled this was sufficient. "Because the combined filing was titled a notice of appeal and expressed the party's intent to appeal to the court of appeals, we conclude the document was a bona fide attempt to invoke appellate jurisdiction."

"Nothing … prevents a party from combining a notice of appeal with a motion for new trial (or filing both the motion and notice simultaneously)." "Moreover, giving effect to the notice of appeal portion does not render the motion for new trial portion meaningless: the trial court retained plenary power over the case to grant or deny the motion for new trial." "'The trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within thirty days after the judgment is signed.'"

Here, appellant expressed "a bona fide attempt to invoke appellate jurisdiction."

U. Motion to Modify Judgment

No cases to report.

V. Remittitur

No cases to report.

VIII. APPEALS

A. Restricted Appeal

No cases to report.

B. Mandamus

1. *In re Whataburger Restaurants*, L.P., _ S.W.3d (Tex. 2014)(4/25/14)

"[A]n appellate court may conduct a merits-based mandamus review of a trial court's articulated reasons for granting a new trial. A writ of mandamus shall issue to correct a clear abuse of discretion committed by a trial court in granting a new trial. A trial court does not abuse its discretion so long as its stated reason for granting a new trial is legally appropriate and specific enough to indicate that the trial court derived the reasons from the particular facts and circumstances of the case at hand."

"'To warrant a new trial for jury misconduct, the movant must establish (1) that the misconduct occurred, (2) it was material, and (3) probably caused injury.'"

2. *In re Mark Fisher*, S.W.3d (Tex. 2014)(2/28/14)

Venue case. The Supreme Court ruled that the "trial court abused its discretion by failing to enforce the mandatory forum selection clauses" in the operative agreements, and granted mandamus.

"[M]andamus is available if a trial court improperly refuses to enforce a forum selection clause. Further, mandamus relief is specifically authorized to enforce a statutory mandatory venue provision."

3. *In re Melissa Blevins*, ___ S.W.3d ___ (Tex. 2013)(11/1/13)

In this child custody case, foster mother sought a writ of mandamus directing a judge to set aside his order. However, he recused himself. The Supreme Court abated the proceedings and directed the new judge to consider the challenged order.

"[B]ecause the trial judge who signed the order has recused from the case, we abate the proceedings in this Court. We direct the trial judge now presiding over the case to consider the matters underlying the challenged order and determine whether the challenged order should remain in effect, be modified, or be set aside, and to render its own order accordingly. The trial judge is not limited to considering only evidence on which the order was based."

"Although a particular respondent is not critical in a mandamus proceeding, the writ must be directed to someone. And generally a writ will not issue against one judge for what another did. Thus, in an original proceeding where the judge who signed the order at issue has 'cease[d] to hold office,' an appellate court 'must abate the proceeding to allow the successor to reconsider the original party's decision.'"

When the judge who issued an order challenged on appeal has recused, the "appellate[] court should either deny the petition for mandamus … or abate the

proceedings pending consideration of the challenged order by the new trial judge.… Because mandamus is a discretionary writ, the appellate court involved should exercise discretion to determine which of the two approaches" is better. Here, that is an abatement.

4. *In re Stephanie Lee*, 411 S.W.3d 445 (Tex. 2013)(9/27/13)

Footnote 7: "Mandamus relief is available to remedy a trial court's erroneous refusal to enter judgment on an MSA."

C. Preserving or Waiving Error

1. *McAllen Hospitals, LLP v. State Farm Mutual Insurance Company of Texas*, ___ S.W.3d ___ (Tex. 2014)(5/16/14)

Hospital sued insurer after injured victims of car wreck cashed settlement checks from insurer that were made out to both them and hospital, without discharging proper hospital lien. An issue was whether the Hospital Lien Statute created a cause of action for hospital to sue insurer.

Resolving the issue of whether the Hospital Lien Statute creates a cause of action "would be improper, as it was not raised in the trial court as a ground for summary judgment and was not briefed in the court of appeals or in this Court, and therefore has not been preserved for our review.… [A] summary judgment may be affirmed 'if any of the theories presented to the trial court and preserved for appellate review are meritorious'…. [Short mention on oral argument] was insufficient to preserve for our review a ground that was not raised in [insurer's] summary judgment motion.… [A] summary judgment may not be affirmed on grounds not set out in the motion for summary judgment.…"

2. *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, S.W.3d (Tex. 2014)(5/9/14)

Dispute about whether plaintiff accepted defendant's settlement offer.

In a summary judgment, if "the movant does not satisfy its initial burden, the burden does not shift and the non-movant need not respond or present any evidence … because 'summary judgments must stand or fall on their own merits, and the non-movant's failure to … respond cannot supply by default the summary judgment proof necessary to establish the movant's right' to judgment." "Thus, a non-movant who fails to raise any issues in response to a summary judgment motion may still challenge, on appeal, 'the legal sufficiency of the grounds presented by the movant.'"

In the motion for summary judgment, the Court reviews the letter and email sent by plaintiff. "If they constitute evidence of acceptance, they were uncontroverted evidence because [defendant] did not present any evidence to … create a fact issue on the acceptance element.… [Otherwise,] plaintiff did not satisfy its burden of proof.…"

3. *Waste Management of Texas, Inc. v. Texas Disposal Systems Landfill, Inc.*, S.W.3d (Tex. 2014)(5/9/14)

One waste management company sued another for libel after it spread lies about the former's environmental standards. A business disparagement claim was dismissed by directed verdict. Footnote 14: "[B]ecause [plaintiff] did not raise the dismissal of its disparagement claim in the first appeal … it is not now before us."

4. *Kia Motors Corporation v. Ruiz*, S.W.3d (Tex. 2014)(3/28/14)

Products liability case based upon the failure of an air bag to deploy due to its circuitry. Reversing a judgment for the plaintiffs, the Supreme ruled that: 1) § 82.008 of the CP & RC did not create a presumption of nonliability here; 2) legally sufficient evidence supported the jury's finding of a negligent design; and 3) admission of a chart containing warranty claims, many of which were dissimilar, constituted harmful error.

Defendant "did not object to this portion of the jury charge [that addressed a design defect and safer alternative design], and we therefore analyze the evidence in light of the charge as given."

Defendant did not waive error by failing to request a limiting instruction. A "limiting instruction, … must be requested to preserve error '[w]hen evidence . . . is admissible as to one party or for one purpose but not admissible as to another party or for another purpose.'"

"Under Rule 103 of the Texas Rules of Evidence, a party preserves error in the admission of evidence if 'a timely objection or motion to strike appears of record, stating the specific ground of objection.' The rule clarifies that '[w]hen the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections.' Under Rule 103(a), [defendant] was not required to object to the plaintiffs' counsel's questioning [a defense witness] about the spreadsheet to preserve error."

Defendant preserved error because it objected repeatedly to the admission of the other claims; moreover, the oral testimony about them "was not independent of the spreadsheet, but was based directly on the information contained in it."

5. *Gotham Insurance Company v. Warren E&P, Inc.*, S.W.3d (Tex. 2014)(3/21/14)

Suit by carrier to recover payment of a claim after oil well blew out and burned.

The carrier did not waive its contract claim. A "party may raise an independent ground for obtaining the same relief awarded in the judgment as an issue on appeal rather than pursuing a cross-appeal." Carrier "has sought the same monetary relief (a return of payments …) under both its equity and contract claims. Because [carrier] has raised on appeal its contract claim as an independent ground for the relief awarded in the trial court's judgment, it has not waived its contract claim." Footnote 18: "That [carrier] omitted its contractual subrogation claim in its live pleading does not alter the fact that the contract addresses the matter of subrogation."

6. *FPL Energy, LLC v. TXU Portfolio Management Company*, 426 S.W.3d 59 (Tex. 2014)(3/21/14 [*n.b.*, opinion is dated 3/21/13, but was released on 3/21/14])

Suit over contract to provide electricity for distribution. Though the parties did not challenge a lower court finding that a contract provision is unambiguous, the Court "may, nonetheless, declare a contract ambiguous.…" Footnote 1: "[I]ssues [are] waived if not presented in the petition for review or in the briefs."

7. *Zanchi v. Lane*, 408 S.W.3d 373 (Tex. 2013)(8/30/13)

Footnote 5: "Zanchi generally states that it is 'questionable whether the [expert] report [in this medical malpractice case] was 'served' on Zanchi under Rule 21a.' Without more detail, this argument is not preserved."

8. *Dugger v. Arredondo*, 408 S.W.3d 825 (Tex. 2013)(8/30/13)

Footnote 2: "'The brief must state concisely all issues or points presented for review. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included.'"

9. *In re Toyota Motor Sales, U.S.A., Inc.*, 407 S.W.3d 746 (Tex. 2013)(8/30/13)

Trial court granted new trial after it believed that defendant violated the motion in limine. The plaintiff failed to preserve error.

Footnote 4: An "'amended motion for new trial filed more than thirty days after the trial court signs a final judgment is untimely' and does not preserve issues for appellate review but … 'the trial court may, at its discretion, consider the grounds raised in an untimely motion and grant a new trial under its inherent authority before the court loses plenary power.'"

A motion in limine "order alone does not preserve error…. '[T]o preserve error as to an improper question asked in contravention of a sustained motion in limine, a timely objection is necessary.'" When "the party that requested the limine order *itself* introduces the evidence into the record, and then fails to immediately object, ask for a curative or limiting instruction or, alternatively, move for mistrial, the party waives any subsequent alleged error on the point."

Objecting for the first time "during closing argument was too late."

10. *Morton v. Nguyen*, 412 S.W.3d 506 (Tex. 2013)(8/23/13)

The briefing of a seller in a contract for deed suit "at the court of appeals was sufficient under Rule 38.1(i) … to warrant consideration of the issue [of importation of common law restitution into the statute regarding contracts for deeds]. '[W]e have instructed the courts of appeals to construe the Rules of Appellate Procedure reasonably, yet liberally, so that the right to appeal is not lost by imposing requirements not absolutely necessary to effect the purpose of a rule.'"

11. *Nall v. Plunkett*, 404 S.W.3d 552 (Tex. 2013)(6/28/13)

"'A non-movant must present its objections to a summary judgment motion expressly by written answer or other written response to the motion in the trial court or that objection is waived.'[] However, even when a non-movant fails to except, the court of appeals cannot 'read between the lines' or infer from the pleadings any grounds for granting the summary judgment other than those grounds expressly set forth before the trial court."

A "party may obtain a remand to the court of appeals to address issues or points *briefed in that court* but not decided by that court, or we may address those issues in the interest of judicial economy.… [Here, however] Plunkett waived the issue of whether summary judgment was proper on the merits in this case by failing to brief it in the court of appeals."

12. *In the Matter of L.D.C., a Child*, 400 S.W.3d 572 (Tex. 2013)(5/24/13)

After a street party, a juvenile who fired a rifle in the air and towards a police officer (behind whom were houses) was charged with attempted capital murder, aggravated assault on a police officer, and deadly conduct. After the juvenile did not object to a disjunctive jury instruction for one charge, the Supreme Court ruled the trial court did not commit "reversible error by submitting elements of an offense to the jury disjunctively, allowing for a nonunanimous verdict."

Since there was no objection, "the question then became whether the error was reversible when it was not preserved.… [I]n juvenile justice cases, '[t]he requirements governing an appeal are as in civil cases generally.' In civil cases, unobjected-to charge error is not reversible unless it is fundamental, which occurs only 'in those rare instances in which the record shows the court lacked jurisdiction or that the public interest is directly and adversely affected as that interest is declared in the statutes or the Constitution of Texas.' Fundamental error is reversible if it 'probably caused the rendition of an improper judgment [or] probably prevented the appellant from properly presenting the case to the court of appeals.' But we have stated that 'a juvenile proceeding is not purely a civil matter. It is quasicriminal, and … general rules requiring preservation in the trial court … cannot be applied across the board in juvenile proceedings.' In criminal cases, unobjected-to charge error is reversible if it was 'egregious and created such harm that his trial was not fair or impartial', considering essentially every aspect of the case."

13. *Gonzales v. Southwest Olshan Foundation Repair Company, LLC*, 400 S.W.3d 52 (Tex. 2013)(3/29/13)

DTPA suit alleging poor foundation repair. The court ruled that the implied warranty under Melody Home of good and workmanlike quality was superseded by the parties' contract, and that error on this point was preserved.

A "no-evidence challenge in [a] post-verdict motion was sufficient to preserve the argument that there was no implied warranty for appeal. Here, Olshan objected at the charge conference that there was no evidence to submit the implied warranty question to the jury," which preserved error that "no implied warranty exists under the facts of this case."

14. *Kopplow Development, Inc. v. The City of San Antonio*, 399 S.W.3d 532 (Tex. 2013)(3/8/13)

Commercial property owner sued city for inverse condemnation when city would not issue permit unless owner provided more landfill.

The landowner "pursued the [inverse condemnation] claim at trial and on appeal.… We conclude [landowner] preserved its inverse condemnation claim."

A "party waive[s] a pleading defect issue by failing to specially except." "The City … specially excepted to the inverse condemnation claim, TEX. R. CIV. P. 90, but it failed to obtain a ruling…."

15. *Ford Motor Company v. Stewart*, 390 S.W.3d 294 (Tex. 2013)(1/25/13)

Defendant preserved error to complain about a guardian ad litem fee. It filed a joint motion which averred no need for a guardian ad litem, it filed a letter with the court of appeals indicating an appointment was not appropriate, and it "objected to the fees at the settlement prove-up hearing, and the trial court overruled Ford's objections." "'The final fee hearing is an appropriate forum to assert any objections to the fee request and obtain a ruling.'"

16. *State of Texas v. Ninety Thousand Two Hundred Thirty-Five Dollars and No Cents*, 390 S.W.3d 289 (Tex. 2013)(1/25/13)

Forfeiture case in which defendant filed a motion for summary judgment on three grounds. "[O]ur rules of appellate procedure provide for courts of appeals to hand down opinions that are as brief as practicable while covering every issue raised and necessary to disposition of the appeal. It was not necessary for the court of appeals to address Bueno's third ground after it affirmed the summary judgment based on his second ground. The State did not waive its issue by failing to request the court of appeals to address matters beyond those prescribed by the rules."

D. Perfecting and Time for Filing an Appeal

1. *Long v. Castle Texas Production Limited Partnership*, 426 S.W.3d 73 (Tex. 2014)(3/28/14)

This opinion generally addresses the date from which postjudment interest runs.

A "judgment is final for the purpose of appeal 'if it disposes of all pending parties and claims in the record, except as necessary to carry out the decree.'" This begins the appellate timetables.

2. *Brighton v. Koss*, 415 S.W.3d 864 (Tex. 2013)(8/23/13)

In this divorce action, the issue was the timeliness of an appeal after Brighton filed a motion to modify the judgment and the trial court granted some, but not all, of the relief requested in a new judgment. The Supreme Court ruled that the appellate deadlines were extended.

"Generally, a postjudgment motion is subsumed by a subsequent judgment that grants all of the relief requested in the motion. When subsumed by the subsequent judgment, the motion does not extend the appellate deadlines after the subsequent judgment. But when a subsequent judgment does not grant all requested relief, the motion remains as a viable complaint about the subsequent judgment and extends the appellate deadlines after that judgment."

"Generally, a party must perfect its appeal by filing written notice in the trial court within thirty days after the judgment is signed. That deadline is extended to ninety days by the filing of certain postjudgment motions, such as a motion for new trial or a motion to modify the judgment, during that initial thirty-day window. When a party prematurely files a notice of

appeal, our procedural rules treat the premature notice as filed subsequent to the order or judgment to which it applies.… Similarly, when a motion for new trial or motion to modify is filed before the final judgment is signed, we do not require the party to refile the complaint after the formal judgment to extend the appellate deadlines.… [A] motion for judgment notwithstanding the verdict [has been treated] as a prematurely filed motion to modify or motion for new trial[]. And when a court replaces an existing judgment during plenary power, but the new judgment fails to correct an error asserted in a previously filed postjudgment motion, the movant is not required to refile the motion to preserve the error, … or to extend the appellate deadlines.…"

Here, the second judgment "restarted the appellate timetable. … [T]he appellate timetable restarts when a trial court modifies the judgment in any respect." "Because the second judgment did not correct all of the errors or omissions asserted in Brighton's previous motion to modify, the motion operated to extend the appellate timetable applicable to the second judgment." So, Brighton's appeal was timely.

3. *Phillips v. Bramlett*, 407 S.W.3d 229 (Tex. 2013)(6/7/13)

Medical malpractice case had been remanded by the Supreme Court to the trial court. "'The filing of a notice of appeal by any party invokes the appellate court's jurisdiction over all parties to the trial court's judgment or order appealed from.'"

4. *In re Nalle Plastics Family Limited Partnership*, 406 S.W.3d 168 (Tex. 2013)(5/17/13)

Attorneys sued a partnership successfully for its past fees, and were also awarded fees incurred in the prosecution of this suit. The Supreme Court ruled that the partnership's supersedeas bond did not need to include an amount for the "attorney's fees incurred in the prosecution or defense of the claim."

Under House Bill 4, "To suspend enforcement of a money judgment pending appeal, a judgment debtor must post security equaling the sum of compensatory damages awarded in the judgment, interest for the estimated duration of the appeal, and costs awarded in the judgment." "The amendment also capped security at the lesser of fifty percent of the judgment debtor's net worth, or $25 million. A trial court must reduce the amount of security if a judgment debtor shows he is likely to suffer substantial economic harm—a less onerous burden than the previous standard.…"

"Chapter 52 does not define 'compensatory damages.' According to Black's Law Dictionary, the term means 'damages sufficient in amount to indemnify the injured person for the loss suffered.'" "The phrase's ordinary meaning, our precedent, and the relevant statutes, however, confirm that [attorney's fees] are not [compensatory damages]."

It is "clear that neither costs nor interest qualify as compensatory damages. Otherwise, there would be no need to list those amounts separately in the supersedeas bond statute."

5. *In the Interest of J.M. and Z.M., Minor Children*, 396 S.W.3d 528 (Tex. 2013)(3/15/13)

After family court terminated the parent-child relationship, counsel for parent filed a pleading combining a motion for new trial with a notice of appeal. The Supreme Court ruled this was sufficient. "Because the combined filing was titled a notice of appeal and expressed the party's intent to appeal to the court of appeals, we conclude the document was a bona fide attempt to invoke appellate jurisdiction."

"[A]ppeals involving the termination of the parent-child relationship … [are] subject to … accelerated appeals. In an accelerated appeal, the appellant must file a notice of appeal within 20 days after the trial court signs its judgment or order. A party generally perfects its appeal by filing a written notice of appeal with the trial court clerk, TEX. R. APP. P. 25.1(a), but if (as here) a notice of appeal is prematurely filed, it is 'deemed filed on the day of, but after, the event that begins the period for perfecting the appeal.' Filing a notice of appeal invokes the court of appeal's jurisdiction over the parties to the trial court's judgment or order."

A "'timely filed document, even if defective, invokes the court of appeals' jurisdiction.'" In addition, "'the court of appeals, on appellant's motion, must allow the appellant an opportunity to amend or refile the instrument required by law or our Rules to perfect the appeal.'"

"Nothing … prevents a party from combining a notice of appeal with a motion for new trial (or filing both the motion and notice simultaneously)." "Moreover, giving effect to the notice of appeal portion does not render the motion for new trial portion meaningless: the trial court retained plenary power over the case to grant or deny the motion for new trial."

Here, appellant expressed "a bona fide attempt to invoke appellate jurisdiction."

E. Appellate Jurisdiction and Review

1. *Tenaska Energy, Inc. v. Ponderosa Pine Energy*, LLC, ___ S.W.3d ___ (Tex. 2014)(5/23/14)

The Supreme Court affirmed a trial court's decision to vacate an arbitration award based upon inadequate disclosure of an arbitrator's business connections with the winning party's law firm.

"We defer to unchallenged findings of fact that are supported by some evidence. But in determining what the law is and applying the law to the facts, a trial

court has no discretion." The trial court's finding of a failure to disclose information by the arbitrator "is supported by some evidence and" the Court reviews "de novo whether that undisclosed information demonstrates [the arbitrator's] evident partiality."

2. *In the Interest of A.B. and H.B., Children*, S.W.3d (Tex. 2014)(5/16/14)

Suit to terminate parental rights. The Supreme Court ruled that appellate courts are not required to "detail the evidence … when affirming the jury's decision" to terminate parental rights.

"In parental termination cases, our courts of appeals are required to engage in an exacting review of the entire record to determine if the evidence is factually sufficient to support the termination of parental rights. And to ensure the jury's findings receive due deference, if the court of appeals reverses the factfinder's decision, it must detail the relevant evidence in its opinion and clearly state why the evidence is insufficient to support the termination finding by clear and convincing evidence."

This "appeal only requires us to decide whether the court of appeals, in affirming the termination, adhered to the proper standard for conducting a factual sufficiency review. Because the court of appeals' opinion and the record demonstrate the court of appeals considered the record in its entirety—as a proper factual sufficiency review requires—we affirm."

"The authority to conduct a factual sufficiency review lies exclusively with the courts of appeals. Because proper application of the standard involves a legal question, this Court may review a court of appeals' factual sufficiency analysis to ensure the court of appeals adhered to the correct legal standard. Nevertheless, this Court must refrain from transforming such authority into a guise for conducting its own independent review of the facts."

"A factual sufficiency review pits two fundamental tenets of the Texas court system against one another: the right to trial by jury and the court of appeals' exclusive jurisdiction over questions of fact. And, in the context of parental termination cases, a third interest must also be accounted for—that is, parents' fundamental right to make decisions concerning 'the care, the custody, and control of their children.'" In "*In re C.H.*, we articulated a factual sufficiency standard to strike an appropriate balance between these competing principles."

"Because the termination of parental rights implicates fundamental interests, a higher standard of proof—clear and convincing evidence—is required at trial. Given this… , a heightened standard of appellate review in parental termination cases is similarly warranted. Specifically, a proper factual sufficiency review requires the court of appeals to determine whether 'the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the State's allegations.' 'If, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient.' And in making this determination, the reviewing court must undertake 'an exacting review of the entire record with a healthy regard for the constitutional interests at stake.'"

"[W]hile parental rights are of a constitutional magnitude, they are not absolute. Consequently, … the court of appeals must nevertheless still provide due deference to the decisions of the factfinder, who, having full opportunity to observe witness testimony first-hand, is the sole arbiter when assessing the credibility and demeanor of witnesses."

For "preponderance cases … 'a court of appeals must detail the evidence … and clearly state why the jury's finding is factually insufficient when reversing a jury verdict, but need not do so when affirming a jury verdict.'" But, the Court has "established one exception to the general rule that appellate courts need not 'detail the evidence' when affirming a jury finding: exemplary damages."

"In both exemplary damages and parental termination cases, the standard of proof at trial is heightened—the plaintiff (or in the case of parental termination, the State) must prove the claim by clear and convincing evidence."

The "review of exemplary damages and parental terminations are different processes for an[other] … reason: competing fundamental interests. An award of exemplary damages only implicates one fundamental concern, the defendant's due process rights to her property. Because no competing fundamental interest exists to balance this right in the trial court, we require courts of appeals to detail the evidence of their exacting review on appeal."

Here, the court of appeals considered all of the evidence.

3. *Sims v. Carrington Mortgage Services*, S.W.3d (Tex. 2014)(5/16/14)

Footnote 1: "'The supreme court [has] jurisdiction to answer questions of state law certified from a federal appellate court.'"

4. *Kennedy Hodges, L.L.P. v. Gobellan*, S.W.3d (Tex. 2014)(5/16/14)

Attorney left law firm and took some clients. Firm sued attorney, but arbitration was not provided in the employment agreement, and firm did not seek it. Firm sued clients and did seek arbitration as permitted by the retainer agreement. The Supreme Court ruled that firm

did not waive its right to arbitration with clients by litigating its claim with associate.

In this interlocutory appeal based upon the trial court's refusal to compel arbitration, the Supreme Court had jurisdiction because "the court of appeals' decision conflicts with [the Court's] decision in *Perry Homes* … on a question of law material to the disposition of the case[;] [this] confers jurisdiction on this Court over this interlocutory appeal."

The relevant facts were undisputed; thus, the issue of whether the firm "waived its right to arbitrate is a question of law we review de novo."

5. *Waste Management of Texas, Inc. v. Texas Disposal Systems Landfill, Inc.*, S.W.3d (Tex. 2014)(5/9/14)

One waste management company sued another for libel after it spread lies about the former's environmental standards. The Supreme Court ruled that the evidence was legally insufficient for "reputation damages," but it was sufficient for "remediation costs and thereby exemplary damages," and that the trial court did not commit reversible error by excluding certain evidence.

"A party will prevail on its legal-sufficiency challenge of the evidence supporting an adverse finding on an issue for which the opposing party bears the burden of proof if there is a complete absence of evidence of a vital fact or if the evidence offered to prove a vital fact is no more than a scintilla. More than a scintilla exists when the evidence as a whole rises to a level enabling reasonable and fair-minded people to have different conclusions. However, if the evidence is so weak that it only creates a mere surmise or suspicion of its existence, it is regarded as no evidence."

"In conducting a legal-sufficiency review, we consider the evidence in the light most favorable to the judgment, crediting evidence that a reasonable fact finder could have considered favorable and disregarding unfavorable evidence unless the reasonable fact finder could not. We indulge every reasonable inference that supports the trial court's findings."

"To determine whether a statement is made with knowledge of, or reckless disregard for, the falsity, we must consider the factual record in full."

Footnote 97: "We review a trial court's exclusion of evidence for abuse of discretion. The trial court determined that the evidence was expert-opinion evidence not subject to the public record exception of the hearsay rule.… Because the trial court … had limited knowledge of the qualifications of the authors of the opinion testimony, … we cannot say that it abused its discretion by excluding the evidence. Even assuming … error, it was harmless because the testimony excluded was in some form effectively obtained from other sources. [Defendant] thus does not show that the exclusion of evidence probably resulted in the rendition of an improper judgment."

There is appellate review because actual damages in defamation case because they cannot "be a disguised disapproval of the defendant."

Even though "noneconomic damages cannot … be determined with mathematical precision and … juries must 'have some latitude in awarding such damages,' … [they] are not immune from no-evidence review on appeal."

6. *Sawyer, et al. v. E.I. du Pont de Nemours and Company*, S.W.3d (Tex. 2014)(4/25/14)

Certified question from Fifth Circuit regarding an employment dispute. Footnote 1: Pursuant to the Texas Constitution, "'The supreme court and the court of criminal appeals have jurisdiction to answer questions of state law certified from a federal appellate court.'"

7. *In re Health Care Unlimited, Inc.*, S.W.3d (Tex. 2014)(4/25/14)

During jury deliberations, a representative of a corporate defendant communicated with a juror. The trial court granted a new trial, but the Supreme Court ruled that this was an abuse of discretion, holding that "there was no evidence that the communications probably caused injury."

A "trial court must give a reasonably specific explanation of its reasons for granting a new trial." And, "an appellate court may conduct a merits-based review of a trial court's order granting a new trial." "Thus, an appellate court may review whether a trial court's explanation supports its decision to grant a new trial." Simply, "articulating understandable, reasonably specific, and legally appropriate reasons is not enough [for a new trial]; the reasons must be valid and correct."

8. *Crosstex Energy Services, L.P. v. Pro Plus, Inc.*, S.W.3d (Tex. 2014)(3/28/14)

Interlocutory appeal of an order denying a motion to dismiss and granting an extension to file a certificate of merit under Ch. 150.

"This Court has limited jurisdiction over interlocutory appeals. We always have jurisdiction, however, to consider whether a court of appeals appropriately exercised jurisdiction. Further, we have jurisdiction over an interlocutory appeal where, as here, justices of a court of appeals disagree on a question of law material to the decision."

Appellate "courts may consider appeals from interlocutory orders only when such power is conferred expressly by statute. Here, section 150.002(f) provides" that an interlocutory appeal may be taken from an order granting or denying a dismissal.

In medical malpractice, "when the denial of a motion to dismiss and the grant of an extension are inseparable … , courts of appeals have no jurisdiction to review the motion to dismiss." But when they are not inseparable, such as when no expert report is filed, the court of appeals can review the order. The statutory mechanism for granting an extension for the report is irrelevant if an extension could not cure the defect. Here, because plaintiff had no statutory basis for an extension, the court of appeals had jurisdiction to rule upon "the motion to dismiss without entanglement in the appeal of the granted extension."

"We review statutory construction de novo."

9. *Bioderm Skin Care, LLC v. Sok*, 426 S.W.3d 753 (Tex. 2014)(3/28/14)

Suit for personal injuries resulting from laser hair removal. The Supreme Court ruled that the rebuttable presumption that the claim was a health care liability claim applies, and therefore an expert report was required.

"Interlocutory orders denying all or part of the relief sought in a motion to dismiss pursuant to the Medical Liability Act are appealable. We may consider an interlocutory appeal when the court of appeals' decision conflicts with a previous decision of another court of appeals or this Court on an issue of law material to the disposition of the case," as occurs here.

"Whether [plaintiff's] claim is a health care liability claim is a question of law we review de novo.… [The] broad language of the Medical Liability Act evinces legislative intent for the statute to have expansive application. In determining whether [plaintiff's] claim is a health care liability claim, we focus on the underlying nature of the cause of action and are not bound by the pleadings."

10. *Kia Motors Corporation v. Ruiz*, S.W.3d (Tex. 2014)(3/28/14)

Products liability case based upon the failure of an air bag to deploy due to its circuitry. Reversing a judgment for the plaintiffs, the Supreme ruled that: 1) § 82.008 of the CP & RC did not create a presumption of nonliability here; 2) legally sufficient evidence supported the jury's finding of a negligent design; and 3) admission of a chart containing warranty claims, many of which were dissimilar, constituted harmful error.

"We review questions of statutory construction de novo."

"A legal-sufficiency challenge will be sustained if the record reveals that evidence offered to prove a vital fact is no more than a scintilla. Evidence does not exceed a scintilla if it is ''so weak as to do no more than create a mere surmise or suspicion'' that the fact exists. Our ultimate objective in conducting a no-evidence review is to determine 'whether the evidence at trial would enable reasonable and fair-minded jurors to reach the verdict.' Thus, … we 'credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not.'"

Defendant "did not object to this portion of the jury charge [that addressed a design defect and safer alternative design], and we therefore analyze the evidence in light of the charge as given."

The trial court admitted a chart containing other warranty claims. A "trial court's evidentiary rulings are reviewed for an abuse of discretion."

Error admitting evidence "is reversible 'only if the error probably (though not necessarily) resulted in an improper judgment.' In analyzing whether the trial court's error was harmful, '[w]e review the entire record, and require the complaining party to demonstrate that the judgment turns on the particular evidence admitted.'" The Court ruled that "the erroneously admitted spreadsheet probably caused the rendition of an improper judgment."

11. *Long v. Castle Texas Production Limited Partnership*, 426 S.W.3d 73 (Tex. 2014)(3/28/14)

In this case, "we must interpret relevant statutes and our rules of procedure, which are issues we review de novo."

12. *Gotham Insurance Company v. Warren E&P, Inc*., S.W.3d (Tex. 2014)(3/21/14)

Suit by carrier to recover payment of a claim after oil well blew out and burned. Footnote 8: "Under the law of the case doctrine, a court of appeals is ordinarily bound by its initial decision if there is a subsequent appeal in the same case; but a determination to revisit an earlier decision is within the discretion of the court under the particular circumstances of each case. Regardless, the law of the case doctrine does not foreclose our consideration of legal questions properly before us for the first time."

13. *FPL Energy, LLC v. TXU Portfolio Management Company*, 426 S.W.3d 59 (Tex. 2014)(3/21/14 [*n.b*., opinion is dated 3/21/13, but was released on 3/21/14])

Suit over contract to provide electricity for distribution. Though the parties did not challenge a lower court finding that a contract provision is unambiguous, the Court "may, nonetheless, declare a contract ambiguous.…"

14. *City of Houston v. Rhule*, 417 S.W.3d 440 (Tex. 2013)(11/22/13)

In a settlement agreement of a worker's compensation claim fireman brought against self-insured city, city agreed to pay future medical bills. When city quit paying many years later, fireman sued city, without presenting his claim first to the Division of Workers' Compensation. The Supreme Court ruled

that he failed to exhaust his administrative remedies and dismissed the suit for want of jurisdiction.

"Subject matter jurisdiction is 'essential to a court's power to decide a case.' A court acting without such power commits fundamental error that we may review for the first time on appeal. Not only may a reviewing court assess jurisdiction for the first time on appeal, but all courts bear the affirmative obligation 'to ascertain that subject matter jurisdiction exists regardless of whether the parties have questioned it.' A judgment rendered without subject matter jurisdiction cannot be considered final. Subject matter jurisdiction presents a question of law we review de novo."

15. *Dallas Metrocare Services v. Juarez*, 420 S.W.3d 39 (Tex. 2013)(11/22/13)

Patient of governmental mental health care facility was injured when a whiteboard fell and hit him. The facility filed a plea to the jurisdiction. The Supreme Court ruled that the court of appeals should consider the facility's jurisdictional arguments, even if not presented to the trial court.

The facility first argued on appeal that the whiteboard was not a "condition" of property on appeal. However, "because immunity from suit implicates a court's jurisdiction, … [it was error not] to consider the … hospital's new immunity arguments on appeal." "[E]ven 'if immunity is *first asserted on interlocutory appeal*, section 51.014(a) [of the Texas Civil Practice & Remedies Code] does not preclude the appellate court from having to consider the issue at the outset [of its analysis] in order to determine whether it has jurisdiction.…'" An "appellate court must consider all of a defendant's immunity arguments, whether the governmental entity raised other jurisdictional arguments in the trial court or none at all."

16. *Coinmach Corp. f/k/a Solon Automated Services, Inc. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909 (Tex. 2013)(11/22/13) ("corrected opinion" was issued 2/14/14)

Footnote 3: A "final judgment of a county court in an eviction suit may not be appealed on the issue of possession unless the premises are used only for residential purposes."

17. *Nathan v. Whittington*, 408 S.W.3d 870 (Tex. 2013)(8/30/13)

"We review the trial court's summary judgment de novo." "We also review issues of statutory construction de novo."

18. *City of Lorena v. BMTP Holdings, L.P.*, 409 S.W.3d 634 (Tex. 2013)(8/30/13)

"The ultimate determination of whether an ordinance constitutes a compensable taking is a question of law, but 'we depend on the district court to resolve disputed facts regarding the extent of the governmental intrusion on the property.' Thus, we must determine whether any disputed issues of fact exist.…"

19. *Moncrief Oil International, Inc. v. OAO Gazprom*, 414 S.W.3d 142 (Tex. 2013)(8/30/13)

Appeal from a finding of personal jurisdiction for one claim, but not another. "When … the trial court does not issue findings of fact and conclusions of law, we imply all relevant facts necessary to support the judgment that are supported by evidence. The … question of … personal jurisdiction over a nonresident defendant is a question of law we review *de novo*." Specific jurisdiction is reviewed on a "claim-by-claim basis."

20. *Dynegy, Inc. v. Yates*, 422 S.W.3d 638 (Tex. 2013)(8/30/13)

"Whether a contract comes within the statute of frauds is a question of law, which we review de novo."

17. *Elizondo v. Krist*, 415 S.W.3d 259 (Tex. 2013)(8/30/13)

Footnote 36: "'An appellate court reviewing a summary judgment must consider whether reasonable and fair-minded jurors could differ in their conclusions in light of all the evidence presented.'"

18. *Masterson et al. v. The Dioceses of Northwest Texas, et al.*, 422 S.W.3d 594 (Tex. 2013)(8/30/13)

"We review the trial court's grant of summary judgment de novo."

The Court was permitted to address issues to be faced upon remand. The Court can "'provide guidance to the trial court' even though the issue was not necessary to the ultimate resolution of the case.…"

19. *The Episcopal Diocese of Fort Worth v. The Episcopal Church*, S.W.3d _ (Tex. 2013)(8/30/13)

Local Episcopal church wanted to separate from the national organization. An "'appeal may be taken directly to the supreme court from an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state.'" Though not explicit here, it inhered in the trial court's order. It is the "effect" of the order that is determinative. "The trial court substantively ruled that because the First Amendment to the United States Constitution deprived it of jurisdiction to apply Texas nonprofit corporation statutes, applying them to determine the parties' rights would violate Constitutional provisions."

When "both parties move for summary judgment and the trial court grants one motion and denies the other, appellate courts consider the summary-judgment

evidence, determine all questions presented, and render the judgment the trial court should have rendered."

20. *Brighton v. Koss*, 415 S.W.3d 864 (Tex. 2013)(8/23/13)

The court of appeals severed "Brighton's appeal from Koss's, thereby making its order dismissing Brighton's appeal a final judgment. *See* TEX. R. APP. P. 53.1 (requiring a final judgment as predicate for a petition for review in the Supreme Court)."

21. *Dallas County v. Logan*, 407 S.W.3d 745 (Tex. 2013)(8/23/13)

County filed interlocutory appeal after trial court denied its plea to the jurisdiction in a Whistleblower case. The Supreme Court ruled that the appellate court should consider arguments for immunity even if they were not previously raised in the trial court.

"Section 51.014(a)(8) of the Texas Civil Practice and Remedies Code permits an interlocutory appeal of an order denying a plea to the jurisdiction by a governmental unit."

"A court of appeals' judgment is ordinarily conclusive in interlocutory appeals taken pursuant to section 51.014(a), but this Court has jurisdiction to resolve conflicts." Here, the circuits conflicted on whether they could consider new immunity arguments.

"[S]ection 51.014(a) does not preclude an appellate court from having to consider immunity grounds first asserted on interlocutory appeal."

22. *Lennar Corporation v. Markel American Insurance Company*, 413 S.W.3d 750 (Tex. 2013)(8/23/13)

Footnote 35: "'Generally, the State's public policy is reflected in its statutes.'"

23. *State of Texas v. $1,760.00 in United States Currency, et al.*, 406 S.W.3d 177 (Tex. 2013)(6/28/13)

After executing a search warrant, the state seized and sought to forfeit currency and "eight-liners." An exception to the definition of gambling device excluded those which exclusively awarded noncash prizes and "novelties." "The issue is one of statutory construction, which we review de novo."

24. *Nall v. Plunkett*, 404 S.W.3d 552 (Tex. 2013)(6/28/13)

"We review a grant of summary judgment de novo."

"'Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal.'"

"'A non-movant must present its objections to a summary judgment motion expressly by written answer or other written response to the motion in the trial court or that objection is waived.'[] However, even when a non-movant fails to except, the court of appeals cannot 'read between the lines' or infer from the pleadings any grounds for granting the summary judgment other than those grounds expressly set forth before the trial court."

25. *Neely v. Wilson*, 418 S.W.3d 52 (Tex. 2013)(6/28/13) (*see* "corrected opinion" issued 1/31/14)

Doctor sued reporter and TV station for defamation, and the Supreme Court reversed a summary judgment for defendants.

"We review a trial court's grant of summary judgment de novo."

"'In reviewing a summary judgment, we consider all grounds presented to the trial court and preserved on appeal in the interest of judicial economy.' We have held that the constitutional concerns over defamation … do not affect these summary judgment standards of review."

26. *CHCA Woman's Hospital, L.P. d/b/a The Woman's Hospital of Texas v. Lidji*, 403 S.W.3d 228 (Tex. 2013)(6/21/13)

In a birth injury case, parents filed medical malpractice suit, but dismissed before 120 days without having filed an expert report. Immediately upon refiling, they served their expert report on the defendant. The Supreme Court ruled the expert report requirement deadline was tolled during the nonsuit.

In medical malpractice cases, "an interlocutory appeal [is allowed] from an order denying" a motion to dismiss for failure to file a timely report. "However, the court of appeals' judgment in an interlocutory appeal is generally final, and we lack jurisdiction over such cases unless a specific exception applies." One exception is when courts of appeals hold differently from one another on a question of law. Here, there is a conflict among the courts of appeals. "Accordingly, we have jurisdiction over CHCA's petition for review under sections 22.001(a)(2) and 22.225(c) of the Texas Government Code."

27. *Phillips Petroleum Company v. Yarbrough*, consolidated with *In re ConocoPhillips Company*, 405 S.W.3d 70 (Tex. 2013)(6/21/13)

After prior appeal, one of several putative subclasses was certified. Due to an amended pleading that changed the fundamental nature of the subclass by adding an "implied covenant" claim, the Supreme Court ruled the subclass had to be subjected to rigorous analysis, that another interlocutory appeal was proper because of the addition of a claim.

An interlocutory appeal is permitted from an order certifying or refusing to certify a class, and the Supreme Court has jurisdiction to review it. This is a

"narrow exception to the general rule that only final judgments and orders are appealable." "A trial court's order changes the fundamental nature of a class, and is therefore subject to interlocutory appeal … if it modifies the class in such a way as to raise significant concerns about whether certification remains proper."

The trial court's order is reviewed for abuse of discretion. A "trial court thus abused its discretion by failing to conduct the 'rigorous analysis' we have emphasized is required in certifying a class." Compliance "with Rule 42 must be demonstrated; it cannot merely be presumed."

28. *Merriman v. XTO Energy, Inc*., 407 S.W.3d 244 (Tex. 2013)(6/21/13)

"We review the granting of a motion for summary judgment de novo. When the trial court does not specify the grounds for its ruling, a summary judgment must be affirmed if any of the grounds on which judgment is sought are meritorious." "When both parties move for summary judgment and the trial court grants one motion and denies the other, we review all the summary judgment evidence, determine all issues presented, and render the judgment the trial court should have."

29. *The Finance Commission of Texas v. Norwood*, 418 S.W.3d 566 (Tex. 2013)(6/21/13) ("supplemental opinion" was issued 1/24/14)

Voters amended the constitution to allow home equity loans, and then in 2003 amended it again to allow the Legislature to delegate to an agency the power to interpret certain sections. In this suit, homeowners challenged certain rulings by two commissions authorized by the Legislature to create a safe harbor. The Supreme Court ruled that it had jurisdiction to review the matter, and the homeowners had standing.

Section 50 does not deprive the Supreme Court of the power to review the rulings by the commissions. "'Without jurisdiction the court cannot proceed at all in any cause; it may not assume jurisdiction for the purpose of deciding the merits of the case.'"

The homeowners had standing to challenge the commissions' rulings. "Because standing is required for subject-matter jurisdiction, it can be — and if in doubt, must be — raised by a court on its own at any time."

"This Court does not defer to a court of appeals' interpretation of the Constitution but reviews it, as all matters of law, *de novo*. Indeed, the courts of appeals do not even defer to each other's constitutional interpretations."

30. *University of Houston v. Barth*, 403 S.W.3d 851 (Tex. 2013)(6/14/13)

"The issue is one of subject-matter jurisdiction, which we review de novo."

31. *In the Interest of E.C.R., Child*, 402 S.W.3d 239 (Tex. 2013)(6/14/13)

Termination of parental rights.

Footnote 8: "'Because temporary orders in a suit affecting a parent-child relationship are not subject to interlocutory appeal under the family code, mandamus review is appropriate.'"

Mother "also challenged the factual sufficiency of the evidence supporting the best interest finding, a question that the court of appeals must decide."

32. *Phillips v. Bramlett*, 407 S.W.3d 229 (Tex. 2013)(6/7/13)

Medical malpractice case had been remanded by the Supreme Court to the trial court. The trial court had "vacated" part of the original judgment, and had computed interest from the date of the judgment entered after the remand. The Supreme Court ruled that "the court of appeals had jurisdiction to review the trial court's remand judgment.…"

"[Our] mandate and judgment limited the trial court's authority on remand, such limits are not 'jurisdictional' in the true sense of that word." "When an appellate court … remands the case to the trial court, … the trial court is authorized to take all actions that are necessary to give full effect to the appellate court's judgment and mandate.… [It has] no authority to take any action that is inconsistent with or beyond the scope of that which is necessary to give full effect to the appellate court's judgment and mandate." "Jurisdiction" refers "to the trial court's constitutional or statutory power to conduct the necessary proceedings or to enter a judgment.…" "[W]e have reversed, rather than vacated, remand judgments that failed to comport with an appellate court's mandate."

The Supreme Court "has jurisdiction to enforce its judgments and mandates, regardless of whether we render judgment or remand.…" But, it did not have exclusive jurisdiction here. The "court of appeals had … power … to consider an appeal from the remand judgment." The "courts of appeals have jurisdiction to review the final judgments of trial courts within their districts." The Supreme Court does have "exclusive jurisdiction to interpret and enforce judgments that we render on appeal.…"

"'The filing of a notice of appeal by any party invokes the appellate court's jurisdiction over all parties to the trial court's judgment or order appealed from.'"

A trial court lacks "jurisdiction to hear a nonparty's motion for relief from a final judgment after

the expiration of the trial court's plenary power, and consequently the court of appeals lack[s] jurisdiction to review the merits" of such a decision.

A "court of appeals has jurisdiction … to review a trial court's final judgment after remand from this Court. And we in turn have jurisdiction, … to review the court of appeals' judgment."

33. *Hancock v. Variyam*, 400 S.W.3d 59 (Tex. 2013)(5/17/13)

Defamation case. The Supreme Court ruled, "Awards of presumed actual damages are subject to appellate review for evidentiary support. And the plaintiff must always prove special damages in order to recover them."

34. *Rachal v. Reitz*, 403 S.W.3d 840 (Tex. 2013)(5/3/13)

Suit against successor trustee by beneficiary. Trust had an arbitration provision, which the Supreme Court enforced under the TAA.

"TEX. CIV. PRAC. & REM. CODE § 171.098(a)(1) []authorize[es] interlocutory appeal[s] for orders denying applications to compel arbitration."

"We review de novo whether an arbitration agreement is enforceable.… [W]e defer to the trial court's factual determinations that are supported by evidence but review the trial court's legal determinations de novo."

Footnote 3: "Although a court of appeals' decision in an interlocutory appeal is ordinarily final, this Court has jurisdiction to review the appellate court's decision when, as here, there is a dissent in the court of appeals."

35. *Christus Health Gulf Coast v. Aetna, Inc.*, 397 S.W.3d 651 (Tex. 2013)(4/19/13)

"We review [statutory construction] questions de novo."

36. *Texas Department of Transportation v. A.P.I. Pipe and Supply, LLC*, 397 S.W.3d 162 (Tex. 2013)(4/5/13)

Inverse condemnation suit which turned on whether government had title to a parcel after an original condemnation judgment was purportedly nullified by a subsequent judgment.

"Whether a court has jurisdiction is a matter of law we decide de novo."

Footnote 10: "We have jurisdiction over this interlocutory appeal under Texas Government Code section 22.225(c) because of a conflict between the court of appeals' decision and a decision of another court of appeals."

37. *TTHR Limited Partnership d/b/a Presbyterian Hospital of Denton v. Moreno*, 401 S.W.3d 41 (Tex. 2013)(4/5/13)

Interlocutory appeal of the adequacy of expert reports in a medical malpractice case. The review of a trial court determination that an expert report in a medical malpractice case is adequate is "under the abuse of discretion standard. So is ours.…"

38. *Reeder v. Wood County Energy, LLC*, 395 S.W.3d 789 (Tex. 2012)(8/31/12); new opinion issued 3/29/13

The Supreme Court issued a new judgment in this oil and gas suit that allows attorney's fees. For further discussion of the issues, see below for a treatment of the earlier opinion, issued on 8/31/12.

39. *Riemer v. The State of Texas*, 392 S.W.3d 635 (Tex. 2013)(2/22/13)

Interlocutory appeal of denial of class certification. "This Court has jurisdiction to review an interlocutory order refusing to certify a class in a suit brought under Rule 42. We review a class certification order for abuse of discretion, which occurs when the trial court acts arbitrarily, unreasonably, or without reference to any guiding principles."

"Because Rule 42 is patterned after Federal Rule of Civil Procedure 23, federal decisions and authorities interpreting current federal class action requirements are instructive. There is no right to litigate a claim as a class action under Rule 42."

40. *Certified EMS, Inc. v. Potts*, 392 S.W.3d 625 (Tex. 2013)(2/15/13)

Medical malpractice case. Section 51.014(a)(9) allows an "interlocutory appeal of an order denying relief sought by motion [to dismiss] under section 74.351(b) in certain circumstances."

Conflicts among appellate courts gave the Supreme Court jurisdiction. Footnote 8: "'one court holds differently from another when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants.'"

41. *Southern Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676 (Tex. 2013)(2/15/13)

"When both parties move for summary judgment and the trial court grants one motion and denies the other, as here, we review both sides' summary judgment evidence and render the judgment the trial court should have rendered."

42. *Richmont Holdings, Inc. v. Superior Recharge Systems, L.L.C.*, 392 S.W.3d 633 (Tex. 2013)(1/25/13)

The interlocutory appeal of an order denying arbitration was authorized "under the Texas General Arbitration Act."

Footnote 5: "We have jurisdiction to hear an appeal from an interlocutory order denying arbitration when the court of appeals' decision conflicts with prior precedent."

43. *CTL/Thompson Texas, LLC v. Starwood Homeowner's Association*, 390 S.W.3d 299 (Tex. 2013)(1/25/13)

Homeowner's association dismissed suit against engineering firm while the case was on an interlocutory appeal concerning the adequacy of the association's expert report. The Supreme Court ruled that this did not moot the appeal.

An interlocutory appeal of a denial of a motion to dismiss is permitted by § 150.002(f). "Ordinarily, this Court has limited jurisdiction over interlocutory appeals. But we always have jurisdiction to determine whether the court of appeals had jurisdiction."

44. *Ford Motor Company v. Stewart*, 390 S.W.3d 294 (Tex. 2013)(1/25/13)

Appeal of a fee paid to a guardian ad litem. "We review the amount a guardian ad litem is awarded as compensation for an abuse of discretion, which occurs when the trial court rules (1) arbitrarily, unreasonably, or without regard to guiding legal principles, or (2) without supporting evidence."

45. *State of Texas v. Ninety Thousand Two Hundred Thirty-Five Dollars and No Cents*, 390 S.W.3d 289 (Tex. 2013)(1/25/13)

Forfeiture case in which defendant filed a motion for summary judgment on three grounds. The Supreme Court reversed on the second ground and remanded.

Regarding an un-appealed ground concerning whether the trial court had jurisdiction, the Supreme Court observed that it "may not address the merits of a case absent jurisdiction," though here it agreed with the analysis of the court of appeals.

"We review a grant of summary judgment *de novo*. When the trial court does not specify the grounds for its ruling, a summary judgment will be affirmed if any of the grounds advanced by the motion are meritorious."

F. Remand

1. *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, S.W.3d (Tex. 2014)(5/9/14)

Dispute about whether plaintiff accepted defendant's settlement offer. After determined plaintiff had accepted, the Supreme Court remanded the case. Defendant had raised the issues of fraudulent inducement and failure of consideration, not determined by the court of appeals. "Because neither of the parties has briefed those issues to this Court, we remand to the court of appeals.…"

2. *Long v. Castle Texas Production Limited Partnership*, 426 S.W.3d 73 (Tex. 2014)(3/28/14)

This opinion generally addresses the date from which postjudment interest runs.

If "a remand results in multiple trial court judgments, postjudgment interest accrues from the date of the final judgment (rather than the original, erroneous judgment)." The appellate court "'must render the judgment that the trial court should have rendered, except when (a) a remand is necessary for further proceedings; or (b) the interests of justice require a remand for another trial.'" If "a remand does not require the trial court to reopen the record, … postjudgment interest will accrue from the date of the original, erroneous judgment."

The "trial court should determine whether it must reopen the record on remand." "We review the trial court's decision to admit new evidence for an abuse of discretion."

A "trial or appellate court [may] order retrial on only part of a matter affected by error if doing so will not result in unfairness to the parties."

TEX.R.CIV.P. 270 "provides that a court may permit additional evidence to be offered at any time when it clearly appears necessary to the due administration of justice, except that 'in a jury case no evidence on a controversial matter shall be received after the verdict of the jury.'" However, this does not apply when an appellate court remands for further proceedings.

There can be a remand "for recalculation of attorney's fees when evidence of work performed existed but was insufficient to support the amount awarded in the judgment."

3. *Masterson et al. v. The Dioceses of Northwest Texas, et al.*, 422 S.W.3d 594 (Tex. 2013)(8/30/13)

The Court was permitted to address issues to be faced upon remand. The Court can "'provide guidance to the trial court' even though the issue was not necessary to the ultimate resolution of the case.…"

4. *Nall v. Plunkett*, 404 S.W.3d 552 (Tex. 2013)(6/28/13)

After a party-goer was injured by another guest who was intoxicated, the trial court granted summary judgment for the defense on a negligent-undertaking theory. It was upheld by the Supreme Court.

A "party may obtain a remand to the court of appeals to address issues or points *briefed in that court*

but not decided by that court, or we may address those issues in the interest of judicial economy.… [Here, however] Plunkett waived the issue of whether summary judgment was proper on the merits in this case by failing to brief it in the court of appeals."

5. *Phillips v. Bramlett*, 407 S.W.3d 229 (Tex. 2013)(6/7/13)

Medical malpractice case had been remanded by the Supreme Court to the trial court. The trial court had "vacated" part of the original judgment, and had computed interest from the date of the judgment entered after the remand. The Supreme Court ruled that "the court of appeals had jurisdiction to review the trial court's remand judgment.…"

"[Our] mandate and judgment limited the trial court's authority on remand, such limits are not 'jurisdictional' in the true sense of that word." "When an appellate court … remands the case to the trial court, … the trial court is authorized to take all actions that are necessary to give full effect to the appellate court's judgment and mandate.… [It has] no authority to take any action that is inconsistent with or beyond the scope of that which is necessary to give full effect to the appellate court's judgment and mandate." "Jurisdiction" refers "to the trial court's constitutional or statutory power to conduct the necessary proceedings or to enter a judgment.…" "[W]e have reversed, rather than vacated, remand judgments that failed to comport with an appellate court's mandate."

The Supreme Court "has jurisdiction to enforce its judgments and mandates, regardless of whether we render judgment or remand.…"

When "an appellate court remands a case to the trial court for entry of judgment … , and the trial court is not required to admit new … evidence to enter that judgment, … the date the trial court entered the original judgment is the 'date the judgment is rendered,' and postjudgment interest begins to accrue and is calculated as of that date."

The Supreme Court is authorized "to remand a case to the trial court in the interest of justice 'even if a rendition of judgment is otherwise appropriate.'"

6. *State of Texas v. Ninety Thousand Two Hundred Thirty-Five Dollars and No Cents*, 390 S.W.3d 289 (Tex. 2013)(1/25/13)

Forfeiture case in which defendant filed a motion for summary judgment on three grounds. The Supreme Court reversed on the second ground and remanded. "[O]rdinarily a case will be remanded to the court of appeals for further proceedings when we reverse the judgment of the appeals court and the reversal necessitates consideration of issues raised in but not addressed by that court."

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4/25/14	*Long v. Griffin*	
5/17/13	*Hancock v. Variyam*	
5/9/14	*Waste Management v. Texas Disposal Systems*	

6/20/14	*Ritchie v. Rupe*	
6/27/14	*Cardiac Perfusion Services, Inc. v. Hughes*	
2/1/13	*Rodriguez-Escobar v. Goss*	
6/27/14	*French v. Occidental Permian, Ltd.*	