SUPREME COURT OF TEXAS UPDATE

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Special thanks to all the Staff Attorneys and Law Clerks at the Supreme Court of Texas for their substantial contributions.

July 1, 2013 – June 30, 2014

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I. SCOPE OF THIS ARTICLE

This article surveys cases that were decided by the Supreme Court of Texas from July 1, 2013 through June 30, 2014. Petitions granted during that time but not yet decided are also included.

II. ADMINISTRATIVE LAW

A. Exhaustion of Remedies

1. City of Hous. v. Rhule, 417 S.W.3d 440 (Tex. November 22, 2013) [12-0721].

At issue in this case is whether a workers' compensation claimant must exhaust administrative remedies before suing in district court for breach of a settlement agreement. Christopher Rhule, a firefighter for the City of Houston, suffered an on-the-job spinal injury in 1988. The City, a self-insured municipality, resolved his claims in a settlement agreement that covered Rhule's reasonable lifetime medical expenses. When the City ceased payment, Rhule brought suit in district court for breach of the agreement. A jury found in his favor. The court of appeals affirmed the trial court's judgment and denial of the City's motion to dismiss for lack of jurisdiction.

The Supreme Court reversed the court of appeals' judgment and rendered judgment dismissing the case for lack of jurisdiction. The Court explained that subject matter jurisdiction is fundamental to a court's power to decide a case. When the Legislature confers exclusive jurisdiction upon an administrative agency, a trial court lacks subject matter jurisdiction until a claimant exhausts administrative remedies. Rhule's injury occurred in 1988. The applicable statute at the time of his injury compelled a claimant with a dispute arising from a settlement agreement to first present that dispute to the Industrial Accident Board, now the Division of Workers' Compensation. Rhule's failure to do so divested the trial court of jurisdiction to decide his claim.

B. Railroad Commission Authority

1. Tex. Coast Util. Coal. v. R.R. Comm'n of Tex., 423 S.W.3d 355 (Tex. January 17, 2014) [12-0102].

At issue in this case was whether the Railroad Commission has authority to approve a cost of service adjustment (COSA) mechanism under its general authority to set gas utility rates under the Gas Utilities Regulation Act (GURA).

CenterPoint Energy, a gas utility under GURA, sought to change the rates it charges customers in its Texas Coast Division. In order to effect these changes, CenterPoint initiated rate cases under GURA with the municipalities located in the Texas Coast Division and with the Railroad Commission for unincorporated areas. CenterPoint proposed a COSA formula that would be annually applied to adjust the amount charged to customers for gas utility services. Nine municipalities within the Texas Coast Division rejected CenterPoint's proposed rate change, and CenterPoint appealed to the Railroad Commission. The Commission approved some but not all of CenterPoint's proposed rate changes and enacted a rate that included a COSA, though not the same formula proposed by CenterPoint. The municipalities, acting together as the Texas Coastal Utilities Coalition, and several state agencies sought judicial review, arguing that the Commission exceeded its authority in approving the COSA. The trial court agreed and remanded the case back to the Commission. The court of appeals reversed, holding that because the definition of "rate" in the statute is ambiguous, and because the Railroad Commission has broad authority under GURA, the Commission did not exceed its authority by approving a formula rate.

The Supreme Court granted the Texas Coastal Utilities Coalition's petition for review and affirmed the court of appeals judgment. The Court held that GURA expressly authorizes the Commission to set gas utility rates and defined the

term "rate" to include (among other things) a "practice . . . affecting the compensation, tariff, charge," etc. charged by gas utilities to their customers. Because the COSA constitutes such a "practice," the Court held that it is a "rate" that the Commission has authority to set. The Court further held that because the Commission held a full rate case and approved CenterPoint's new rate, including the COSA, it was not required to re-approve the rate each time the COSA was applied. The Court rejected the Coalition's arguments that this construction interfered with municipalities' original jurisdiction or otherwise violated GURA's rate-making requirements.

C. Texas Water Code

1. Tex. Comm'n on Envtl. Quality v. Bosque River Coalition, 413 S.W.3d 403 (Tex. September 20, 2013) [11-0737].

In this case and a companion case, *Texas Commission on Environmental Quality v. City of Waco*, 413 S.W.3d 409 (Tex. 2013), the principal issue was whether the City of Waco and the Bosque River Coalition were entitled to contested case hearings challenging amended water-quality permits allowing larger herds at dairies in the Bosque River watershed. The Bosque River Coalition, a non-profit environmental protection group, alleged that landowners downstream from a dairy would suffer pollution from dairy-cattle waste runoff. The underlying question in both cases was whether the Commission on Environmental Quality properly determined that neither the City nor the coalition was an "affected person" entitled to contested case hearings challenging the Commission's permit approvals. The Coalition argued that determining status as an affected person is determining standing and must be, on disputed facts, decided in a contested hearing. It also argued that the Commission's conclusion that the dairies' amended water permits would be more protective of water quality than the original permits was irrelevant—thus arbitrary—to a determination that the coalition was not an affected person. Trial courts in each case affirmed the Commission's orders approving the amended water permits, but the court of appeals reversed each, agreeing that the Commission acted arbitrarily and holding that a substantial-evidence review was inapplicable because neither the city nor the coalition had a chance to develop an evidentiary record in a contested hearing.

The Supreme Court held, as it did in *City of Waco,* that a party's status as an affected person does not determine the right to a contested case hearing because the Water Code expressly exempts the proposed amendment from contested case procedures. The Coalition's claim to a contested case hearing was grounded in Water Code chapter 26. Section 26.028(c) 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" upon request. Exempted from this general grant, however, are certain applications to renew or amend existing permits that do not seek either to increase the quantity of waste discharged or materially change the place or pattern of discharge and that maintain the quality of the waste to be discharged. The Commission argued that its classification of the dairy's application as a major amendment is not a concession that the Coalition is entitled to a contested case hearing because the terms major and minor amendment are not mutually exclusive. The Commission submitted that an application to amend may fit both definitions, as in this case. The distinction between the two is primarily significant because a contested case hearing is generally not available for minor amendments. But an amendment's classification as major does not conversely establish a contested case hearing right, even though a classification as minor may foreclose the right.

2. Tex. Comm'n on Envtl. Quality v. City of Waco, 413 S.W.3d 409 (Tex. August 23, 2013) [11-0729].

At issue in this case was whether a city has standing to challenge the issuance of a permit for a "Concentrated Animal Feeding Operation" (CAFO). The O'Kee Dairy filed an application with the Texas Commission on Environmental Quality (TCEQ) to expand its herd from 690 to 999 cows and its total waste-application acreage from 261 to 285.4 acres. The City of Waco intervened, objecting to O'Kee's application and demanding a contested case hearing from the TCEQ. The City based its demand on Section

5.115 of the Texas Water Code, which permits contested case hearings for any "affected person." TCEQ issued an order declining the City's request, which was affirmed by the trial court. On appeal, the court of appeals found that the TCEQ acted arbitrarily and abused its discretion in declining to grant the City's request.

The Supreme Court reversed the court of appeals' judgment and affirmed the decision of the TCEQ. The Court found that, although the Water Code generally permits an "affected person" to hold a contested case hearing, the Code also contains exceptions. One such exception is for permit applications that would "maintain or improve the quality of waste authorized to be discharged," and neither seek to "increase significantly the quantity of waste authorized to be discharged," nor "change materially the pattern or place of discharge." The Court determined that there was evidence in the record to support the TCEQ's finding that this exception was met. Therefore, the Court held that the TCEQ did not abuse its discretion in denying the City's request for a contested case hearing.

III. ARBITRATION

A. Arbitrator Appointment and Removal

1. Americo Life, Inc. v. Myer, S.W.3d , 57 Tex. Sup. Ct. J. 831 (Tex. June 20, 2014) [12-0739].

At issue was the relationship between express terms of the parties' arbitration agreement and American Arbitration Association (AAA) rules incorporated into the agreement by reference. The parties agreed each of their three arbitrators would be a "knowledgeable, independent businessperson or professional." The parties also adopted AAA rules in effect at the time arbitration was invoked. When the parties executed their arbitration agreement, AAA rules presumed party-appointed arbitrators were not impartial unless the parties expressly agreed otherwise. But by the time arbitration was invoked, AAA rules had changed to require impartiality unless the parties expressly agreed otherwise. Myer successfully moved to strike Americo's first-choice arbitrator for partiality toward Americo. Americo maintained the agreement's provisions for arbitrator qualifications did not require impartiality, and that those express terms controlled over the incorporated AAA rules. The trial court agreed with Americo and vacated the arbitration award, but the court of appeals reversed, holding the parties' expressly chosen arbitrator qualifications and the AAA impartiality requirement could be harmonized.

The Supreme Court reversed the court of appeals judgment decision and held the AAA impartiality requirement did not apply because the parties spoke comprehensively in expressly selecting arbitrator qualifications that did not include impartiality. The Court first rejected Myer's argument that the agreement's express terms required impartiality because "independent" could be read interchangeably with "impartial." The Court noted that although dictionary definitions may suggest some overlap between the two words, they carry distinct meanings in the arbitration context. In this case, the parties chose tripartite arbitration, which at the time called for party-appointed arbitrators who would advocate on behalf of their appointing party.

The Court further concluded a conflict existed between the express terms of the agreement and the incorporated AAA rules because both spoke to arbitrator qualifications. Under such a conflict, the terms of the agreement control. The Court reasoned that harmonizing express terms with AAA rules that speak to the same point would render the agreement's express terms hopelessly open-ended.

Justice Johnson, joined by Justice Willett, Justice Lehrmann, and Justice Boyd, dissented. The dissent agreed with the Court's conclusion that the terms of the agreement did not require impartiality, but argued the AAA's impartiality requirement could be harmonized with the terms of the agreement, giving both provisions full effect. The dissent further argued that the parties embraced an open-ended agreement by adopting whatever AAA rules were in place when arbitration was invoked.

B. Arbitrator Partiality

1. Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC, S.W.3d , 57 Tex. Sup. Ct. J. 617 (Tex. May 23, 2014) [12-0789].

At issue in this case was the degree to which a neutral arbitrator must disclose interests and

associations relating to a matter being arbitrated. Tenaska Energy and its affiliates sold their interest in a Texas power plant to Ponderosa Pine Energy, and included a detailed arbitration clause in the purchase agreement. When a dispute arose after the transaction closed, Ponderosa demanded arbitration and sought damages. Ponderosa's law firm, Nixon Peabody, designated Samuel Stern as its arbitrator. The law firm had designated Stern as an arbitrator in three other proceedings. He had also discussed the possibility of Nixon Peabody contracting with a litigation discovery firm, LexSite, in which Stern had an interest. Business discussions were ongoing at the time of arbitration.

After the arbitration panel issued a $125 million award by a two-to-one vote (with Stern in the majority), Ponderosa sought to confirm the award in state district court. Tenaska moved to vacate on the grounds that Stern was not impartial. The trial court vacated the arbitration award, concluding that Stern's interest in LexSite and his discussions with Nixon Peabody implicated his impartiality, and that his interest was only partially disclosed. The court of appeals reversed, holding that Stern's disclosures were sufficient.

The case was appealed to the Supreme Court. Both parties agreed that the Federal Arbitration Act, which permits awards to be vacated on the grounds of "evident partiality," applied. The Court held that an award must be vacated if an arbitrator fails to disclose facts which might, to an objective observer, create a reasonable impression that the arbitrator is partial. Applying this standard to the facts of the case, the Court held that undisclosed information about the relationship between LexSite and Nixon Peabody suggested evident partiality, and that the information disclosed was insufficient. Further, the Court rejected Ponderosa's argument that Tenaska waived its claim. Accordingly, the Court reversed the court of appeals' judgment and reinstated the trial court's order vacating the award.

C. Enforcement of Arbitration Agreement

1. Fredericksburg Care Co. v. Perez, 406 S.W.3d 313 (Tex. App.—San Antonio 2013), *pet. granted*, 57 Tex. Sup. Ct. J. 307 (March 21, 2014) [13-0573].

At issue in this case is whether Civil Practice and Remedies Code § 74.451, the arbitration provision of the Health Care Liability Act, is a law enacted for the purpose of regulating the business of insurance under the McCarran–Ferguson Act and thus protected from federal preemption.

The Fredericksburg Care Company (Fredericksburg) operated a nursing facility. Several former residents sued Fredericksburg under Chapter 74 of the Texas Civil Practice and Remedies Code. Section 74.451 establishes that arbitration agreements between health care providers and patients are not enforceable unless they contain a written notice in 10-point boldface font and are signed by the patient's attorney. The agreements between Fredericksburg and the former residents contained arbitration clauses and were otherwise valid, however, they did not meet section 74.451's requirements.

The trial court denied Fredericksburg's motion to compel arbitration and Fredericksburg appealed. The court of appeals affirmed, holding that the arbitration provision of the health care liability act was a "law enacted for the purpose of regulating the business of insurance" within the meaning of the McCarran–Ferguson Act, and was therefore not preempted by the Federal Arbitration Act. Thus, the arbitration agreement between Fredericksburg and the Former Residents was invalid and unenforceable because the agreement did not comply with section 74.451.

The Supreme Court granted Fredericksburg's petition for review and will hear oral argument on September 14, 2014.

2. Venture Cotton Coop. v. Freeman, S.W.3d , 57 Tex. Sup. Ct. J. 730 (Tex. June 13, 2014) [13-0122].

The issue in this case was whether an arbitration agreement was enforceable under the Federal Arbitration Act (FAA). Two groups of cotton farmers sued to rescind contracts in which they agreed to sell cotton through a cooperative marketing pool. The farmers alleged that they

were fraudulently induced to join the cooperative and sought damages, declaratory relief, and attorney's fees under various statutes. Because the agreements provided for arbitration under the FAA, the cotton cooperative moved to stay the litigation and compel arbitration.

The trial court declined to send the dispute to arbitration. The court of appeals concluded that the arbitration agreement was unconscionable because it forced the farmers "to forego substantive rights and remedies afforded by statute," and denied the farmers the right to recover attorney's fees, while providing the right to the cotton cooperative.

The Supreme Court reversed, concluding that the limitation on statutory remedies was insufficient to defeat arbitration under the FAA and that the appropriate remedy was for the court to sever the offending limitation. The Court further concluded that a contract that failed to provide all parties reciprocal rights to attorney's fees was not unconscionable per se and accordingly disagreed with the court of appeals to the extent it used the contract's "one-sided" attorney's fees provision as an independent reason to hold the arbitration agreement unconscionable. Finally, the Court remanded the case to the court of appeals to consider other arguments raised below but not addressed by the court of appeals.

D. Waiver

1. Kennedy Hodges, L.L.P. v. Gobellan, S.W.3d , 57 Tex. Sup. Ct. J. 584 (Tex. May 16, 2014) [13-0321].

At issue in this case was whether a law firm waived its right to arbitrate a fee dispute with former clients by litigating with a former associate. A party waives its right to arbitration by substantially invoking the judicial process to the other party's detriment or prejudice. There is a strong presumption against waiver. Furthermore, courts must decide waiver on a case-by-case basis by assessing the totality of the circumstances.

Ventura Gobellan was injured when an armored car he was driving for his employer rolled over. Gobellan and his wife retained Kennedy Hodges, L.L.P. to defend against a wrongful death lawsuit and to bring suit against Gobellan's employer. Kennedy Hodges assigned Canonero Brown to the case, who subsequently left Kennedy Hodges but continued to represent the Gobellans. Kennedy Hodges sued Brown to recover fees from its former clients, including the Gobellans. The Gobellans were not a party to that suit. After the Gobellans won their suit, Kennedy Hodges sued the Gobellans, moved for a no-answer default judgment, and moved to compel arbitration pursuant to its fee agreement with the Gobellans. The trial court and the court of appeals both held that because the firm litigated the fee issue with the former associate, the firm waived its right to arbitrate any claims stemming from its fee agreement with the former clients.

When Kennedy Hodges sued Brown, it neither invoked the judicial process against nor caused detriment or prejudice to the Gobellans. Furthermore, Kennedy Hodges' filing of limited pleadings and moving for no-answer default judgment did not constitute waiver. Therefore, without hearing oral argument, the Supreme Court granted Kennedy Hodges' petition for review, reversed the court of appeals' judgment, and remanded the case to the trial court to compel arbitration.

IV. ATTORNEYS

A. Disciplinary Proceedings

1. In re State Bar of Tex., *argument granted on pet. for writ of mandamus*, 57 Tex. Sup. Ct. J. 154 (January 15, 2014) [13-0161].

The issues in this mandamus action concern whether the State Bar can be barred from using records from a criminal trial ending in an acquittal and resulting in an expungement of all related records to pursue disciplinary proceedings against a prosecutor. The Bar began investigating whether John Hall, the lead prosecutor in a Galveston County prosecution for aggravated robbery, failed to disclose exculpatory evidence after a newspaper article on the case came to its attention. The Bar also received a copy of a partial trial transcript showing the prosecutors' failure to disclose exculpatory evidence including witness statements and, most saliently, a recording of the 911 call that undermined a key identification of the defendant as one of the two masked robbers. Based on the exculpatory evidence, the trial judge had granted an acquittal on the defense counsel's motion.

After the Bar began its investigation, the trial judge signed an expunction order providing for expungement of "all records and files pertaining to the arrest" of the defendant for aggravated robbery. The expunction order did not name the State Bar as a respondent, nor was it served on the State Bar.

The Commission for Lawyer Discipline proceeded with a disciplinary action against Hall. Hall asserted that the proceeding would violate his due process rights because the expunged records would be necessary to his defense, but had been destroyed. The Bar, with the consent of the defendant, moved in district court to modify the expunction order so as to access the records. The trial court refused and ordered the Commission to turn over all information related to the arrest. The grievance panel then granted Hall's motion for summary judgment and dismissed the disciplinary action against him.

The State Bar sought mandamus relief in the Supreme Court, claiming that it was not required to seek relief first from the courts of appeals in cases involving interference with disciplinary proceedings. The Bar argued that it was not served with, and therefore is not subject to, the expunction order, and, moreover, that the records are in fact available to Hall to use in his defense. The Court granted argument on the Bar's petition for writ of mandamus and heard oral argument on February 6, 2014.

B. Fees

1. City of Laredo v. Montano, 414 S.W.3d 731 (Tex. October 25, 2013) [12-0274].

This case concerned the evidence supporting an award of attorney's fees in a condemnation case. Texas Property Code § 21.019(c) authorizes the trial court to award reasonable and necessary attorney's fees and expenses to the property owner when condemnation is denied. After the trial court awarded attorney's fees to a property owner in an eminent domain case, the condemning authority appealed the fee award. The court of appeals reduced part of the award, but otherwise affirmed. In a per curiam opinion, the Supreme Court reversed the award and remanded the matter to the trial court because of deficiencies in the property owner's proof.

The property owner's attorney testified that he had reasonably accumulated about 1,356 hours in the case. The attorney came to this number by multiplying his 226 weeks of active employment by a factor of six, representing his estimate of the average number of hours per week he worked on the case. The attorney, however, offered nothing further to document his time in the case other than the "thousands and thousands and thousands of pages" generated during his representation. The attorney conceded that he kept no records of his time in the case, nor had he prepared any bills or invoices for his client.

The Court concluded that the attorney's generalizations that he spent "a lot of time getting ready for the lawsuit," conducted "a lot of legal research," visited the premises "many, many, many, many times," and spent "countless" hours on motions and depositions were not evidence of reasonable attorney's fees under the lodestar method of proof chosen by the property owner. Following *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757 (Tex. 2012), the Court observed that a lodestar calculation requires certain basic proof, including itemizing specific tasks, the time required for those tasks, and the rate charged by the person performing the work. *Id.* at 765. The attorney conceded that he would have itemized his work and provided this information had he been billing his client. The Court concluded that a similar effort should be made when an adversary is asked to pay instead of the client.

2. Long v. Griffin, S.W.3d , 57 Tex. Sup. Ct. J. 470 (Tex. April 25, 2014) [11-1021].

At issue in this case was the requisite level of proof of attorney's fees under the lodestar method. The underlying claim at issue was the Griffins' assignment claim, which involved an agreement between the Griffins and the Long Trusts for the Griffins to pay a portion of drilling and operating costs in exchange for an assignment of a partial working interest in producing wells. The Griffins prevailed at trial and in support of their request for attorney's fees, their attorneys submitted an affidavit indicating two attorneys worked 644.5 hours on the matter, resulting in a total fee of $100,000 based upon their hourly rates. The affidavit provided that thirty percent of the time they expended was on the assignment claim, and

the assignment issue was interwoven with matters that required ninety-five percent of their time in the case. The trial court awarded $35,000 in attorney's fees. In the first appeal, the Griffins prevailed on a portion of their assignment claim and the Supreme Court remanded for the trial court to redetermine the attorney's fee award. The trial court awarded $30,000 based upon the previously filed affidavit, and the court of appeals affirmed.

The Supreme Court reversed, holding that although there was some evidence to support an award of attorney's fees, there was insufficient evidence to support the amount of fees the trial court awarded. Following *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757 (Tex. 2012), the Court observed that a lodestar calculation requires certain basic proof, including itemizing specific tasks and the time required for those tasks. *Id.* at 765. Because the affidavit did not include this specificity, it could not support the amount of attorney's fees. The Court also concluded that, because the final judgment awarded no monetary relief, the contingency fee the Griffins and their attorney's agreed to that was discussed in the affidavit could not support the fee award. The Court reversed the courts of appeals' judgment and remanded for the trial court to redetermine the attorney's fee award.

3. Wells Fargo Bank, N.A. v. Murphy, 2013 WL 510129 (Tex. App.—Houston [14th Dist.] 2013), *pet. granted*, 57 Tex. Sup. Ct. J. 753 (June 20, 2014) [13-0236].

At issue in this case is the availability of attorney's fees under the Uniform Declaratory Judgement Act in a claim related to a nonrecourse home loan. Also at issue is the extent to which an appellate court may re-construe a party's pleadings for relief.

Patrick and Beverly Murphy purposefully defaulted on the home equity loan they received from Wells Fargo Bank. The mortgage was a nonrecourse note, as required by the Texas Constitution. After Wells Fargo initiated foreclosure proceedings, the Murphys filed suit against Wells Fargo in Harris County on several causes of action, including to obtain a "declaratory judgment that Wells Fargo or its successors are not entitled to foreclose on the debt." Wells Fargo cross claimed and both the Murphys and Wells Fargo sought attorney's fees. The trial court granted summary judgement for Wells Fargo on all claims and awarded it attorney's fees.

The Court of Appeals affirmed the trial court's judgment, except it reversed the court's award of attorney's fees. The Court of Appeals held that the Murphys' claim, though pleaded as a request for declaratory judgment, "was a prayer for injunctive relief due to Wells Fargo's alleged breach of contract and fraud," and Wells Fargo's counterclaim, "[w]hile pleaded as a request for a declaratory judgment, . . . was a breach of contract claim." After determining there was no request for declaratory judgement, the court ultimately held that Wells Fargo may only recover its attorney's fees against the secured property, and not against the Murphys personally, because of the nonrecourse nature of the loan.

The Supreme Court granted Wells Fargo's petition for review and will hear oral argument on October 15, 2014.

C. Malpractice

1. Elizondo v. Krist, 415 S.W.3d 259 (Tex. August 30, 2013) [11-0438].

In this attorney malpractice case, Jose Elizondo had been injured in the Texas City refinery explosion that occurred at the BP Amoco plant in 2005. He settled his case for $50,000. One of his attorneys, Ronald Krist, represented BP after the settlement. Jose and his wife sued Krist and other lawyers, claiming that the attorneys had failed to secure an adequate settlement for Jose and had obtained no settlement at all for Jose's wife on her loss of consortium claim. The attorneys moved for summary judgment on various grounds including no evidence of malpractice damages. The Elizondos submitted the affidavit of an attorney-expert, Arturo Gonzalez, who opined that the case, if competently handled, should have settled for far more than $50,000. The trial court granted summary judgment. The court of appeals affirmed.

The Supreme Court affirmed the court of appeals' judgment. The Court rejected BP's argument that the Gonzalez affidavit was insufficient because malpractice damages can only be shown by conducting a "suit within a suit" and

establishing the judgment that would have been recovered after a trial prosecuted by competent counsel. The Court reasoned that in a mass tort case such as the BP refinery litigation, where thousands of cases had settled and indeed none had been tried to a verdict, an expert can rely on settlements obtained in similar cases in evaluating the damages sustained due to attorney malpractice. However, the Court concluded that the Gonzalez affidavit was too conclusory to defeat summary judgment because the affidavit merely declared that the settlement was inadequate without comparing specific settlements obtained in other cases.

The Court also concluded that the attorney-defendants, who had resisted discovery regarding other settlements, were not estopped from relying on the conclusory nature of the Gonzalez affidavit. After reviewing the record, the Court concluded that, despite numerous discovery skirmishes, the Elizondos had not taken the position in the trial court that (1) their expert needed discovery on specific dollar amounts obtained by other claimants, and (2) ruling on the summary judgment motions should be continued until such discovery could be obtained. Finally, the Court disagreed with the Elizondos that their lay testimony regarding their damages was sufficient to raise a genuine issue of material fact on the element of damages. While their lay testimony offered evidence of some damages, proof of malpractice damages required expert testimony because the case settled for $50,000, and the adequacy or inadequacy of that amount depended on many factors, a balancing of which was beyond the expertise of most laypersons.

D. Sanctions

1. Nath v. Tex. Children's Hosp., 375 S.W.3d 403 (Tex. App.—Houston [14th Dist.] 2012), *pet. granted*, 57 Tex. Sup. Ct. J. 154 (January 15, 2014) [12-0620].

This case asks when a client can be sanctioned without sanctioning his attorney, and when that sanction is excessive. In 2006 Nath sued Baylor College of Medicine (Baylor) and Texas Children's Hospital (TCH) under vicarious liability theories, and Dr. Shenaq for tortious interference with prospective business relations and defamation. Nath's dispute with Shenaq was resolved by an agreed order of dismissal with prejudice. Nath amended his petition to include claims for tortious interference, defamation, negligent supervision, and negligent training against Baylor and TCH only. Nath filed another amended petition alleging that further defamatory statements had been made by specific individuals employed by Baylor or TCH. Nath filed his fifth amended petition against Baylor and TCH, adding claims for a declaratory judgment and seeking injunctive relief, and alleging that Shenaq had some type of hepatitis. TCH and Baylor filed summary judgment motions addressing all of Nath's claims. Nath responded and attached an affidavit signed by Nath in which he repeated and expanded on the factual allegations underlying his fifth amended petition. On the day the motions for summary judgment were set to be argued, Nath sought recusal of the trial court judge.

Two weeks later, Nath filed an amended petition in which he abandoned all his previous claims and substituted a claim for intentional infliction of emotional distress. TCH and Baylor supplemented their summary judgment motions to address this claim. The trial court granted both summary judgment motions, and TCH filed a motion to modify the judgment to assess its attorneys' fees as sanctions against Nath. The trial court granted TCH's motion, finding that Nath's claims were groundless, that a reasonable inquiry would have revealed that these claims were without factual basis and barred by well-settled, existing Texas law, and that they were filed in bad faith and for an improper purpose. The trial court ordered Nath to pay TCH's actually-incurred attorneys' fees of $726,000, concluding that this amount adequately punished Nath and fairly compensated TCH for defending against the claims. The trial court later ordered Nath to pay Baylor's actually-incurred attorneys' fees of $644,500.16.

The court of appeals affirmed the trial court's judgment, holding that the sanctions were warranted, the trial court did not abuse its discretion, Nath's constitutional rights were not violated, and the sanction awards did not violate the Excessive Fines clauses of the federal and state constitutions. Nath appealed to the Supreme Court, contending that the sanctions are excessive,

unjust, and therefore improper under the constitutional safeguards mandated by the Court.

The Supreme Court granted Nath's petition for review and heard oral arguments on February 5, 2014.

V. CLASS ACTIONS

A. Unclaimed Distributions

1. Highland Homes, Ltd. v. State, 2012 WL 2127721 (Tex. App.—El Paso 2012), *pet. granted*, 56 Tex. Sup. Ct. J. 864 (August 23, 2013) [12-0604].

At issue in this case is whether parties to a class action may agree to contribute unclaimed settlement amounts to charity or whether the unclaimed funds should be remitted to the comptroller under the unclaimed property provision of the Texas Property Code. Highland Homes withheld certain amounts from its subcontractors' paychecks if the subcontractors did not have adequate proof of insurance. Benny & Benny, one of Highland Homes' subcontractors, filed suit after it learned Highland Homes was not purchasing insurance with the withheld amounts as Benny & Benny believed. Rather, Highland Homes had been deducting the amounts to cover its own increased exposure. The trial court granted class action certification. The parties eventually settled, agreeing that Highland Homes would mail unlocated subcontractors a check at their last known addresses. Any checks unnegotiated after 90 days would be void. Unclaimed funds would be donated to the Nature Conservancy, a charity.

The State intervened, claiming that the unclaimed settlement funds were subject to the unclaimed property provisions of the Texas Property Code, and therefore should be handed over to the Comptroller. The trial court denied the State's motion for partial new trial and motion to modify the judgement. The court of appeals reversed and remanded to the trial court with instructions to strike the portion of the settlement agreement regarding unclaimed funds and held that unclaimed funds should be remitted to the comptroller in compliance with the Property Code. Highland Homes petitioned the Supreme Court for review, arguing that the unclaimed property law does not apply to the funds in this case. Under the law, only property that was actually owned can be considered "abandoned." Here, they argue, the identified non-participating class members do not have a property interest in the settlement funds. The State counters that the court of appeals was correct in concluding that identified non-participating class members do have a property right in the unclaimed funds. The State also argues that Highland Homes does not have standing to challenge the court of appeals' disposition of the unclaimed settlement funds because it no longer has any justiciable interest in those funds. The Court granted Highland Homes' petition for review and heard oral argument on November 7, 2013.

VI. CONSTITUTIONAL LAW

A. Equal Protection

1. In re Marriage of J.B. and H.B., 326 S.W.3d 654 (Tex. App.—Dallas 2010), *pet. granted*, 56 Tex. Sup. Ct. J. 863 (August 23, 2013) [11-0024], *consolidated for oral argument with* State v. Naylor, 330 S.W.3d 434 (Tex. App.—Austin 2011), *pet. granted*, 56 Tex. Sup. Ct. J. 864 (August 23, 2013) [11-0114], *and* In re State, 330 S.W.3d 434 (Tex. App.—Austin 2011), *argument granted on pet. for writ of mandamus*, 56 Tex. Sup. Ct. J. 864 (August 23, 2013) [11-0222].

At issue in these cases is whether trial courts have jurisdiction to grant a divorce to same-sex couples. Also at issue is whether the State may intervene in a same-sex divorce suit. J.B. and H.B. and Angelique Naylor and Sabina Daly are same-sex couples who were legally married outside of Texas. Both couples resided in Texas and eventually filed for divorce in Texas. The trial court in Naylor and Daly's suit approved their oral settlement agreement and granted their divorce. The State then filed a petition in intervention and filed a plea to the jurisdiction, arguing that Family Code section 6.204 deprives trial courts of jurisdiction over divorce suits of same-sex couples. The trial court denied the State's motion to intervene concluding it was untimely, and the State appealed. The court of appeals affirmed, agreeing the State could not intervene. In J.B. and H.B.'s divorce suit, the State intervened before a judgment was entered and filed a plea to the jurisdiction. The trial court denied the plea to the jurisdiction and struck the State's plea in intervention. The State filed an interlocutory

appeal challenging the denial of the plea to the jurisdiction and filed a writ of mandamus regarding the order striking its intervention. The court of appeals held that the trial court abused its discretion by striking the State's intervention and that Texas courts do not have jurisdiction over a same-sex divorce suit.

In the Supreme Court, the State asserts that the Texas Constitution defines marriage as between one man and one woman, and because Family Code section 6.204 prohibits a governmental entity from giving effect to same-sex marriages, courts must decline to exercise jurisdiction over same-sex divorce cases. The State also argues that it may intervene in same-sex divorce cases because the State has a justiciable interest in defending its laws when their constitutionality is questioned. The parties to the divorces argue that the statutory language of section 6.204 does not deprive trial courts of jurisdiction over same sex divorce cases and a contrary construction would violate the Equal Protection Clause of the United States Constitution because it targets a particular class of persons for discrimination. Naylor and Daly also argue that the State could not intervene in their suit after a final judgment had been entered and the separation of powers doctrine counsels against granting the executive branch broad power to challenge judicial decisions.

Also at issue in this case is how the United States Supreme Court's recent decision in *United States v. Windsor*, 570 U.S. 12 (2013), in which the Court held that Section 3 of the Defense of Marriage Act violates the U.S. Constitution, impacts these appeals.

The Court granted the petitions for review, consolidated them for oral argument with the petition for writ of mandamus, and heard oral argument on November 5, 2013.

B. First Amendment Speech

1. Kinney v. Barnes, 2012 WL 5974092 (Tex. App.—Austin 2012), *pet. granted*, 57 Tex. Sup. Ct. J. 109 (December 13, 2013) [13-0043].

At issue in this case is whether a permanent injunction ordering removal of a defamatory statement from the internet is a prior restraint on speech.

This case arises from allegedly defamatory statements made by Andrew Barnes about Robert Kinney. Kinney brought claims for defamation and defamation per se, seeking only injunctive relief. Kinney requested a permanent injunction requiring that Barnes: (a) remove the false statements from his websites; (b) contact subsequent third-party publishers to have them remove the statements; and (c) publish a copy of the injunction, a retraction, and an apology on Barnes's websites. The trial court granted Barnes's motion for summary judgment on the grounds that the injunction Kinney sought would violate the Texas Constitution as a prior restraint. The court of appeals affirmed the judgment in a memorandum opinion. It concluded that Barnes satisfied his burden to show that a permanent injunction requiring the removal of the allegedly defamatory statement would act as a prior restraint on speech.

In his petition for review in the Supreme Court, Kinney argues that the law distinguishes between prior restraints and remedial orders. He argues that the requested injunction would be a remedial order and is not a prior restraint. The injunction would operate only after a court has found the speech to be defamatory and thus unprotected by the first amendment. Moreover, the defamation in this case does not involve a public issue and the plaintiff is not a public figure. Therefore, there is no threat to free and robust debate. Barnes argues that there are no cases authorizing permanent injunctions for defamatory speech and that there is a longstanding history that "equity will not enjoin libel." Barnes contends that a finding of defamation cannot support an injunction under Texas law. Rather, the broad free speech guarantee of the Texas Constitution establishes a preference to sanction a speaker after the speech occurs. Also at issue is whether the single-publication rule applies to statements published on the internet.

The Court granted Kinney's petition for review and heard oral argument on January 9, 2014.

2. Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc., S.W.3d , 57 Tex. Sup. Ct. J. 531 (Tex. May 9, 2014) [12-0522].

At issue in this case was whether the jury's award of reputation damages to a corporation was supported by legally sufficient evidence that comports with free speech concerns.

In 1997, Waste Management and Texas Disposal competed to obtain landfill services contracts with the cities of Austin and San Antonio. During that time, Waste Management published an "Action Alert" that was faxed to several members of the Austin environmental community, apparently attempting to boost its image by distinguishing its business from that of Texas Disposal's. Texas Disposal sued Waste Management for defamation. Texas Disposal alleged that Waste Management's Action Alert depicted Texas Disposal as having received an exception to operating under stringent environmental laws and, as a result, caused the public to view Texas Disposal's landfills as less environmentally friendly.

In the first jury trial, the jury found that Waste Management's Action Alert had defamed Texas Disposal but that Texas Disposal had suffered no damage. The trial court entered a take-nothing judgment against Texas Disposal, and the court of appeals affirmed. On rehearing, however, the court of appeals reversed and remanded for a new trial on defamation and defamation per se. The Supreme Court denied Waste Management's petition for review. The second jury trial on Texas Disposal's defamation and defamation per se claims resulted in a verdict for Texas Disposal for $450,592.03 in mitigation expenses, $5,000,000 in reputation damages, and $20,000,000 in exemplary damages. The trial court statutorily reduced the exemplary damages and entered judgment for Texas Disposal. On appeal from this second jury verdict, Waste Management argued that a corporation cannot recover reputation damages and that the evidence was insufficient to support the jury's verdict. The court of appeals affirmed. The Supreme Court affirmed in part, reversed in part, and remanded to the court of appeals for further proceedings.

The Court held that a corporation may recover reputation damages, and that such damages are non-economic damages for purposes of the statutory cap on exemplary damages. The Court also held that the evidence was sufficient to support the award of remediation damages but insufficient to support the award of reputation damages. Although there was testimony about the injury to Texas Disposal's reputation, no quantifiable evidence supported the amount awarded by the jury. Thus, the Supreme Court could not say that the award was not disguised disapproval of Waste Management. The Supreme Court affirmed the jury's award of remediation damages, reversed the jury's award of reputation damages, and remanded to the court of appeals for it to determine the allowable exemplary damage and pre- and postjudgment interest amounts, or if necessary, to remand to the trial court for further proceedings.

C. Home Equity Loans

1. Sims v. Carrington Mortg. Servs. L.L.C., S.W.3d , 57 Tex. Sup. Ct. J. 588 (Tex. May 16, 2014) [13-0638].

The principal issue in this case was whether the constitutional requirements governing home equity loans apply to loan restructuring.

In 2003, Frankie and Patsy Sims obtained a 30-year home equity loan. Six years later, the Simses, behind on their payments, entered into a Loan Modification Agreement with Carrington Mortgage Services (CMS). The agreement involved capitalizing past-due interest and other charges, and reducing the interest rate and monthly payments. In 2011, with the Simses again behind on their payments, CMS sought foreclosure. The parties, however, reached a second Loan Modification Agreement, further reducing the interest rate and payments. Importantly, both the 2009 and 2011 Loan Modification Agreements provided that all the Simses' obligations and all the loan documents remained unchanged. Following the 2011 agreement, the Simses brought a class action against CMS in United States District Court, alleging that CMS's loan modifications violated Article XVI, Section 50 of the Texas Constitution, which contains certain requirements for home equity loans. The court dismissed the case. The Simses appealed, and after oral argument, the Fifth Circuit certified four questions to the Texas Supreme Court:

1. After an initial extension of credit, if a home equity lender enters into a new agreement with the borrower that capitalizes past-due interest, fees, property taxes, or insurance premiums into the principal of the loan but neither satisfies nor replaces the original note, is the transaction a modification or a refinance for purposes of Section 50 of Article XVI of the Texas Constitution?

If the transaction is a modification rather than a refinance, the following questions also arise:

2. Does the capitalization of past-due interest, fees, property taxes, or insurance premiums constitute an impermissible "advance of additional funds" under Section 153.14(2)(B) of the Texas Administrative Code?

3. Must such a modification comply with the requirements of Section 50(a)(6), including subsection (B), which mandates that a home equity loan have a maximum loan-to-value ratio of 80%?

4. Do repeated modifications like those in this case convert a home equity loan into an open-end account that must comply with Section 50(t)?

The Supreme Court found that the certified questions assumed a distinction between a loan modification and a refinancing that is not clear in the text of Section 50. This led the Court to restate the first question with an emphasis on whether the transaction constituted a *new extension of credit*, for purposes of Section 50, rather than a loan modification or refinance. The Simses argued that any change in principal is a new extension of credit, so capitalizing past-due amounts must comply with the requirements of Section 50. The Court disagreed and answered that the Loan Modification Agreements were not new extensions of credit that must meet the requirements of Section 50, because the loan restructurings did 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. This holding led the Supreme Court to answer the final three certified questions in the negative.

D. Occupation Regulation

1. Patel v. Tex. Dep't of Licensing & Regulation, 2012 WL 3055479 (Tex. App.—Austin 2012), *pet. granted*, 57 Tex. Sup. Ct. J. 154 (January 15, 2014) [12-0657].

The issue in this case is whether Texas cosmetology laws are unconstitutional as applied to eyebrow threaders. Eyebrow threading is a South Asian method of shaping eyebrows by using a piece of cotton thread to pull individual hair follicles out of the skin's pores. The agency charged by the Texas Legislature with regulating the practice of cosmetology, the Texas Department of Licensing and Regulation (Department), requires eyebrow threaders to obtain a cosmetology license to legally practice their trade. To obtain a cosmetology license, threaders must take either 750 or 1,500 hours of instruction in a state-licensed beauty school, depending on which license he or she decides to pursue.

In 2009, the Department inspected threading operations around the state to identify threaders practicing without the appropriate license. Nazira Momin and Vijay Lakshmi Yogi, both of whom work as threaders without cosmetology licenses in mall kiosks, received notices from the Department that they were in violation of Texas law. Together with a third individual threading practitioner and two threading salon owners (collectively, Threaders), Momin and Yogi sued the Department, its director, the Texas Commission of Licensing and Regulation, and the Commissioners (collectively, State), seeking a declaratory judgment that the State violated the privileges or immunities and due process guarantees of the Texas Constitution by unreasonably interfering with the Threaders' right to pursue eyebrow threading, they sought a permanent injunction barring the State from enforcing Texas' cosmetology laws, and attorney's fees. The Threaders argued that requiring eyebrow threaders to undergo hundreds of hours of training in conventional, Western-style cosmetology violated the state constitution.

In response, the State filed a plea to the jurisdiction, arguing that the Threaders' suit was barred by sovereign immunity and the redundant remedies doctrine, the plaintiffs lacked standing, and the claims were not ripe. The trial court

denied the State's plea to the jurisdiction, granted the State's motion for summary judgment on the merits, denied the Threaders' motion for summary judgment, and rendered a final judgment in favor of the State. The court of appeals affirmed. Both parties petitioned the Supreme Court for Review, reiterating the arguments advanced at the trial court. The Supreme Court granted Patel's petition for review and heard oral arguments on February 27, 2014.

E. Open Courts

1. Tenet Hosps. v. Rivera, 392 S.W.3d 326 (Tex. App.—El Paso 2012), *pet. granted*, 57 Tex. Sup. Ct. J. 109 (December 13, 2013) [13-0096].

At issue in this case is whether the ten-year statute of repose for health care liability claims, applied to bar a minor's claim before she reached the age of majority, violates the Open Courts provision of the Texas Constitution.

This case arises from alleged acts of medical negligence by a hospital and emergency room doctor against a child *in utero* in 1996. The child's mother, as next friend, filed suit against Tenet Hospital and the doctor in 2011. The hospital and doctor filed no-evidence motions for summary judgment, arguing that the ten-year statute of repose for health care liability claims time-barred the suit. *See* TEX. CIV. PRAC. & REM. CODE § 74.251(b). The trial court granted the motions for summary judgment, but the court of appeals reversed, holding that the ten-year statute of repose violates the Open Courts provision of the Texas Constitution as applied to minors.

In a petition for review in the Supreme Court, the hospital argues that the Court has already held that the ten-year statute of repose does not violate the Open Courts provision in *Methodist Healthcare Sys. of San Antonio, Ltd., L.L.P. v. Rankin*, 307 S.W.3d 283 (Tex. 2010), and that the appellate court erred in ignoring this binding precedent. Rivera argues that a child is under a legal disability from bringing suit until her eighteenth birthday and so a ten-year statute of repose that operates to bar the child from pursuing her claim before she is legally allowed to do so violates Open Courts. Also at issue is whether application of the statute of repose, enacted in 2003, to a claim that arose in 1996 violates the constitutional prohibition against retroactive laws.

The Court granted the hospital's petition for review and heard oral argument on February 4, 2014.

F. Religion Clauses

1. Episcopal Diocese of Fort Worth v. Episcopal Church, 422 S.W.3d 646 (Tex. August 30, 2013) [11-0265].

At issue in this case was the methodology to be used when Texas courts decide which faction is entitled to a religious organization's property following a split or schism. The Episcopal Church of the United States of America (TEC) is a "hierarchical church," divided into nine geographical provinces, and each province is further subdivided into geographical regions known as "dioceses." In 1983, the Diocese of Forth Worth formed the Corporation of the Episcopal Diocese of Fort Worth (the Corporation) to hold money and title to real property used for Diocesan purposes. When disagreements over church practices and beliefs arose between the Diocese of Forth Worth and TEC, over sixty churches in the Diocese voted to withdraw from TEC. TEC then filed suit to determine who was entitled to possession of the property held by the Corporation, including over sixty church buildings. The trial court granted TEC's motion for summary judgment, ordering the Diocese to surrender control of the Corporation and all church properties. The Diocese filed a direct appeal in the Supreme Court.

The Court first held that it had jurisdiction over the direct appeal. An appeal may be taken directly to the Supreme Court from an order of a trial court granting an injunction on the ground of the constitutionality of a statute. The Court held that the effect of the trial court's order and injunction requiring the defendants to surrender control of the Corporation was a ruling that the Non-Profit Corporation Act would violate the First Amendment if it were applied in this case.

The Court next held, relying on its decision in *Masterson v. Diocese of Northwest Texas*, 422 S.W.3d 594 (Tex. 2013), that the methodology referred to as "neutral principles of law" must be used by Texas courts when determining church property disputes. Under that methodology, courts 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. The trial court had granted summary judgment utilizing the deference method, under which a court determines where the religious organization has placed authority to make decisions about church property and then defers to and enforces the decision of the religious authority if the dispute has been decided within that authority structure. Because the record did not warrant rendition of judgment to either party based on neutral principles of law, the Court reversed and remanded to the trial court for further proceedings.

Justice Willett, joined by Justice Lehrmann, Justice Boyd, and Justice Devine, dissented. The dissent would have dismissed the case for want of jurisdiction, noting that direct appeal jurisdiction is exceedingly narrow. While the dissent recognized that the case had a First Amendment overlay, it pointed out that the trial court did not determine the constitutionality of a statute in its order and verbally stated that its ruling was not based on constitutionality.

2. Masterson v. Diocese of Nw. Tex., 422 S.W.3d 594 (Tex. August 30, 2013) [11-0332].

At issue in this case was which legal methodology should be used to determine 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. In 1974 the Episcopal Church of the Good Shepherd was admitted to the Diocese of Northwest Texas as a parish and incorporated under the Texas Non-Profit Corporations Act. The corporation enacted bylaws, including a requirement that it adhere to the Canons of The Episcopal Church of the United State of America (TEC). The corporation also took title to real estate used by the parish. The bylaws also provided that amendments to the bylaws would be by majority vote of parish members.

In 2006, due to doctrinal differences, a majority of parish members voted to amend the bylaws to withdraw the parish's membership in TEC and change the name of the corporation to Anglican Church of the Good Shepard. The withdrawing faction continued to use parish property so the Diocese and other Episcopal leaders (collectively, the Diocese) filed suit for a declaratory judgment that the property was held by those loyal to the Diocese and TEC. The former parish leaders (Anglican Leaders) filed a counterclaim asserting that they were entitled to retain control of the property. The trial court granted summary judgment for the Diocese, finding that the actions of the Anglican Leaders in seeking to withdraw Good Shepherd as a parish from the Diocese and TEC were void and all property of Good Shepherd is held in trust for TEC and the Diocese. The Anglican Leaders appealed and the court of appeals affirmed.

The Supreme Court first considered which of two constitutional methodologies for resolving church property disputes should be used by Texas courts. Under the deference method, a court determines where the religious organization has placed authority to make decisions about church property and then defers to and enforces the decision of the religious authority, if the dispute has been decided within that authority structure. Under the second approach, referred to as "neutral principles of law," courts 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. The Court reviewed Texas law and concluded that Texas courts should use only the neutral principles methodology to determine property interests when religious organizations are involved. The Court then concluded that because the Diocese did not plead nor urge as grounds for summary judgment that they were entitled to the property on neutral principles grounds, they were not entitled to summary judgment. The Court remanded the case to the trial court for further proceedings.

Justice Boyd, joined by Justice Willett, concurred. The concurrence joined the Court's adoption of the neutral-principles approach in deciding non-ecclesiastical issues, but did not join the Court's addressing whether the adoption of the

bylaws involved ecclesiastical decisions and whether the property was held in irrevocable trust for TEC. The concurrence argued that the parties should first be given the opportunity to develop their pleadings and the record under the neutral principles approach.

Justice Lehrmann, joined by Chief Justice Jefferson, dissented. The dissent also agreed that church property disputes should be resolved under the neutral-principles approach, but would have affirmed the judgment in favor of the Diocese. The dissent would have held that an irrevocable trust on the church property was created in favor of TEC, and even if not irrevocable, the corporation was estopped from revoking that trust.

G. Takings

1. Harris Cnty. Flood Control Dist. v. Kerr, 2013 WL 842652 (Tex. App.—Houston [1st Dist.] 2013), *pet. granted*, 57 Tex. Sup. Ct. J. 885 (June 27, 2014) [13-0303].

The issue in this governmental immunity case is whether the Kerrs presented sufficient evidence to raise a fact issue on each element of their takings claim against Harris County and the Harris County Flood Control District (collectively, the County). This case arises from flood damage to hundreds of homeowners (collectively, the Kerrs) resulting from Tropical Storm Frances, Tropical Storm Allison, and another severe storm in 2002. The Kerrs brought a takings claim under the Texas Constitution. The County filed a combined plea to the jurisdiction and motion for summary judgment, arguing that sovereign immunity deprived the court of subject matter jurisdiction. The trial court denied the combined plea and motion for summary judgment.

The County appealed. The court of appeals majority reviewed the evidence and found fact issues on all elements of a takings claim—intent, causation, and public use. Justice Brown dissented and concurred: He dissented from the majority's holding that the Kerrs raised a fact issue on the Flood Control District's intent, but concurred with the majority's holding that the Kerrs raised a fact issue on Harris County's intent. Justice Brown found all proof spoke to the District's intent, and not Harris County's.

The County sought Supreme Court review. The County chiefly argues that it lacked the intent to cause damage to the Kerrs' property, and that it lacked substantial certainty that its choices in flood control would lead to flooding of the Kerrs' specific property. The Kerrs argue the County made decisions that could only have one result: the flooding of their properties. The parties also dispute the evidence on causation and public use. The Supreme Court granted the County's petition for review and will hear oral argument on November 5, 2014.

2. State v. Clear Channel Outdoor, Inc., 2012 WL 4465338 (Tex. App.—Houston [1st Dist.] 2012), *pet. granted*, 57 Tex. Sup. Ct. J. 566 (May 16, 2014) [13-0053].

At issue in this case is whether Clear Channel Outdoor, Inc., has a right to compensation for its billboards as part of realty condemned by the State, and if so, what expert testimony is admissible to value the billboards at trial.

Clear Channel leased two parcels of land along Interstate 10 in Houston and put a billboard on each parcel. In 2006, the State petitioned to condemn both parcels and all improvements thereon as part of a planned freeway expansion. With the exception of Clear Channel's claim for the State's taking of the billboards, the State settled the case as to every other property interest, including Clear Channel's leasehold interest. For both parcels, the trial court entered summary judgment for Clear Channel, holding the billboards were constructively taken. The cases were consolidated, and a jury trial was held to determine compensation owed to Clear Channel. Clear Channel's expert appraiser presented four methods for valuing billboards, and considering all the methods, the expert testified the fair market value of the billboards was $722,600. Over the State's objection, the trial court admitted the expert's testimony. The trial court entered a final judgment on the jury verdict for $268,235.27.

The court of appeals affirmed, holding the billboards were part of the realty, and therefore, the State must give Clear Channel adequate compensation. As to the evidentiary issue, the court of appeals held the expert's income method of valuation was admissible because although income from a business operated on the property is not recoverable in a condemnation award, any

valuation method is meant to approximate the market value of the property.

The State appealed. The State first argues Clear Channel did not prove the signs were compensable real property, or that they were permanently annexed to the real estate. Instead, the State argued the billboards should be classified as personal property under the test articulated in *Logan v. Mullis*, 86 S.W.2d 605, 607 (Tex. 1985). Second, the State argues testimony that values billboards based on advertising income should be excluded because Texas law prohibits the appraisal of property based on the value or revenue of a business operated on the property.

In response, Clear Channel argues the court of appeals properly applied the test in *Logan* to hold the condemned realty includes the billboards, which are annexed and adapted to the land because they cannot be removed without great difficulty. For the evidentiary issue, Clear Channel asserts that if income produced by property contributes to its fair market value, it is properly considered during valuation. Further, Clear Channel's expert used other valuation methods that did not include business income, and other testimony supports the damages awarded.

The Supreme Court granted the petition for review and will hear oral argument on September 17, 2014.

VII. CONTRACTS

A. Condition Precedent

1. McCalla v. Baker's Campground, Inc., 416 S.W.3d 416 (Tex. August 23, 2013) [12-0907].

At issue was whether a settlement agreement outlining a future contract is enforceable when the agreement contains all the material terms of the future agreement. Walt Baker owned property leased to Anthony and Cheryl McCalla, who held an option to buy the land if Baker decided to sell it. During the McCallas' lease, Baker leased the land to Steven and Karen Davis. The McCallas sued Baker and the Davises to void the third party lease and activate their option to buy the land. After obtaining a favorable jury verdict but prior to judgment, Baker and the McCallas entered settlement negotiations and ultimately agreed that the McCallas would purchase the land if the Davises' lease was declared void by the trial court. The settlement agreement contained a general release, a description of the property, a timeline for closure, and a price. After the trial court declared the lease void, Baker's successor-in-interest, Baker's Campground, refused to sell the land and brought a declaratory judgment to void the settlement agreement. The trial court granted partial summary judgment for the McCallas and held that the settlement agreement was enforceable. The court of appeals reversed and remanded on the basis that a fact issue existed as to whether the contract was presently binding or just an agreement to agree.

The Supreme Court reversed and held that the agreement's enforceability was a question of law, not of fact. As a matter of law, an agreement is enforceable as long as it contains all material terms, regardless of whether the agreement is to enter into a future contract. Courts should only refuse to enforce a future contract when material terms remain open to future negotiation. Here, the settlement agreement contained all material terms and was enforceable as a matter of law. The Court remanded the case to the trial court to address breach and affirmative defenses raised by Baker's Campground.

B. Contract Interpretation

1. RSUI Indem. Co. v. The Lynd Co., 399 S.W.3d 197 (Tex. App.—San Antonio 2012), *pet. granted*, 57 Tex. Sup. Ct. J. 258 (February 14, 2014) [13-0080].

This contract interpretation case presents the issue of RSUI Indemnity Company's obligations under its contract with The Lynd Company. Lynd, a property management company, obtained excess insurance coverage from RSUI for losses exceeding $20 million. Hurricane Rita damaged fifteen properties covered under the excess policy agreement. The underlying insurer paid the first $20 million, activating the excess policy so RSUI became liable for covered losses beyond $20 million.

The parties dispute the means for valuing losses. Under the policy, for any occurrence RSUI pays the least of (a) actual losses; (b) 115% of the scheduled value for each affected property; or (c) the overall policy limit of $480 million. RSUI contends this is a "scheduled" insurance policy, not a "blanket" policy obligating it to pay all losses up to a fixed cap. A scheduled policy,

RSUI argues, allows it to pay the lesser of actual or scheduled value for each damaged property. Lynd contends RSUI must aggregate the actual losses across all damaged properties and compare this figure to the aggregated scheduled values of all damaged properties. The parties filed cross-motions for summary judgment. The trial court granted RSUI's motion and dismissed Lynd's claim with prejudice. Lynd appealed.

The court of appeals reversed and rendered judgment for Lynd. The court of appeals held the policy required RSUI to choose one method of valuation—either actual losses or 115% of scheduled value—for all affected properties. The court of appeals declined to classify the policy as scheduled or blanket. The Supreme Court granted RSUI's petition for review and will hear oral argument on September 18, 2014.

2. Zachry Const. Corp. v. Port of Hous. Auth. of Harris Cnty., 377 S.W.3d 841 (Tex. App.—Houston [14th Dist.] 2012), *pet. granted*, 56 Tex. Sup. Ct. J. 864 (August 23, 2013) [12-0772].

At issue in this case is whether an exculpatory clause in a contract between a port authority and a construction company exculpates the port authority from damages resulting from the port authority's alleged intentional misconduct.

Zachry Construction Corporation contracted with the Houston Port Authority to construct a wharf. The contract had a two-year deadline for completion with an interim "milestone" deadline. Under the terms of the contract, Zachry had the exclusive right to choose the method of performing the work. The contract also contained a clause precluding Zachry from recovering damages for delay "regardless of the source," unless the delay was due to the Port Authority's actions that "constituted arbitrary and capricious conduct, active interference, bad faith and/or fraud." After construction began, the Port Authority decided to increase the size of the wharf and the parties agreed to amend the contract accordingly. The Port Authority expressed concern about Zachry's construction method and requested that Zachry alter it. Zachry altered its construction method to accommodate the additional construction. Zachry did not complete construction within the two-year deadline and did not meet the interim milestone deadline. The Port Authority withheld $2.36 million as liquidated damages for Zachry's failure to meet the deadlines.

Zachry sued the Port Authority for breach of contract, alleging that the Port Authority failed to comply with the terms of the amended contract. Zachry sought the additional costs it incurred due to the construction method change and breach of contract by the Port Authority, and also alleged the Port Authority wrongfully withheld money due under the contract. The trial court found that the Port Authority had failed to comply with the contract and provision granting Zachry the right to choose the method of construction. The trial court instructed the jury that the no-damages-for-delay clause precluded recovery for delay damages unless the delay was due to the Port Authority's actions that "constituted arbitrary and capricious conduct, active interference, bad faith and/or fraud." The jury awarded Zachry $19,992,697 in damages—$18,602,697 for delay damages and the $2.36 million in withheld liquidated damages, less offsets and costs. The court of appeals reversed the trial court's award of delay damages, holding that the parties contemplated the delay that occurred when they negotiated the contract and the no-damages-for-delay clause exculpated the Port Authority from liability. The court of appeals also held that Zachry released any claims to the liquidated damages by signing a release form as part of periodic payment estimate documents.

Zachry appealed the court of appeals' decision. Zachry argues to the Supreme Court that the court of appeals' holding conflicts with Texas cases that have refused to apply a no-damages-for-delay clause when there is intentional misconduct. Zachry further argues that it is contrary to public policy to allow a party to prospectively exculpate itself from liability for intentional misconduct. As to the liquidated damages, Zachry argues that the Port Authority failed to conclusively establish Zachry's release of claims and that any release Zachry signed was limited and did not release Zachry's claims for sums withheld as liquidated damages.

The Court granted Zachry's petition for review and heard oral argument on November 6, 2013.

C. Economic Loss Rule

1. LAN/STV v. Martin K. Eby Constr. Co., S.W.3d , 57 Tex. Sup. Ct. J. 816 (Tex. June 20, 2014) [11-0810].

The principal issue in this case was whether the economic loss rule permitted a general contractor to recover the increased costs of performing its construction contract with the owner in a tort action against the project architect for negligent misrepresentations—errors—in the plans and specifications.

The Dallas Area Rapid Transportation Authority (DART) contracted with LAN/STV to prepare plans, drawings, and specifications for the construction of a light rail transit line. DART incorporated LAN/STV's plans into a solicitation for competitive bids to construct the project. Martin K. Eby Construction Company (Eby) submitted the low bid, and was awarded the contract with DART. Eby and LAN/STV had no contract with each other; LAN/STV was contractually responsible to DART for the accuracy of the plans, as was DART to Eby, but LAN/STV owed Eby no contractual obligation.

Soon after beginning construction, Eby discovered that LAN/STV's plans were full of errors. This disrupted Eby's construction schedule and required additional labor and materials. In all, Eby calculated that it lost nearly $14 million on the project.

In addition to an earlier $4.7 million settlement with DART, Eby filed this tort suit against LAN/STV, claiming that it negligently misrepresented the work to be done in its plans. The jury agreed and assessed Eby's damages for its losses on the project at $5 million, but they also found that the damages were caused by Eby's and DART's negligence as well, and apportioned responsibility 45% to LAN/STV, 40% to DART, and 15% to Eby. The trial court concluded that Eby's $4.7 million settlement with DART should not be credited against the damages found by the jury, but that LAN/STV should be liable only for its apportioned share of the damages. Accordingly, the trial court rendered judgment for Eby for $2.25 million plus interest. Both LAN/STV and Eby appealed, and following the court of appeals' affirmance, both petitioned for review.

The Supreme Court reversed and rendered judgment that Eby take nothing from LAN/STV, holding that the economic loss rule precluded recovery. Eby argued that the economic loss rule should not apply in this case when it did not bar recovery in other negligent misrepresentation cases. LAN/STV countered that to allow such recovery on construction projects, where relationships are contractual and certainty and predictability in risk allocation are crucial, would be disruptive. Ultimately, the lack of an agreement between Eby and LAN/STV led the Court to conclude that the economic loss rule barred Eby from recovering their own delay damages in negligence claims against LAN/STV. Stated more generally, the Supreme Court determined that "one participant on a construction project cannot recover from another . . . for economic loss caused by negligence" as allowing such recovery would magnify and make indeterminate the "risk of liability to everyone on the project."

D. Fraudulent Inducement

1. Ford Motor Co. v. Castillo, S.W.3d , 57 Tex. Sup. Ct. J. 852 (Tex. June 20, 2014) [13-0158].

The issue in this case was whether the evidence was legally sufficient to support the jury's finding that a settlement agreement was procured by fraud. In 2004, Ezequiel Castillo and other occupants of his Ford Explorer sued Ford Motor Company for injuries sustained in a roll-over accident, seeking $35 million in damages. The plaintiffs asserted design defects in the Explorer's roof and in its handling or stability. One of the jurors, Cynthia Cortez, was very interested in being selected foreperson, and the other jurors acquiesced. On the first full day of deliberations, the jury quickly reached a unanimous verdict on the first liability question, with Cortez being the only juror willing to find Ford liable. By the end of the day, eight jurors had voted in Ford's favor on the second, and final, liability question. Cortez was one of two jurors who voted against Ford on the second question, and two jurors remained undecided. The next morning, Cortez failed to return for deliberations. Judge Abel C. Limas informed everyone that Cortez had been in the hospital all night with a

sick child, and dismissed the jurors for the day. That same day, Mark Cantu, one of Castillo's attorneys, dropped his settlement demand from $15 million—the amount he had demanded for months—to $1.96 million. Several times throughout the day's negotiations, Cantu told Ford's managing counsel, Pete Tassie, that his demand would increase to $3 million if the jury were to send a note about damages. Tassie, who had negotiated for Ford for over ten years including multiple prior dealings with Cantu, had never heard such a specific contingency from an opposing negotiator. The following day, the jury submitted a question asking: "What is the maximum amount that can be awarded?" Cantu initially told Tassie that his demand should be $10 or $15 million, but quickly agreed to settle the case for $3 million.

After the case settled, Cortez quickly left the courtroom without speaking to anyone, but Ford's attorneys were able to speak with the other eleven jurors about the case. During the discussion, Ford learned that the jury had not been discussing damages before the settlement, and did not know that Cortez had sent the damages note to the judge. Ford subsequently tried to obtain a statement from Cortez but was not successful. Ford did obtain affidavits from most of the other jurors, who repeated what they told Ford on the day the case settled. After completing its investigation, Ford refused to pay the $3 million to Castillo, who then sued Ford for breach of contract. In its defense to the settlement, Ford asserted fraudulent inducement, unilateral mistake, and mutual mistake. However, Judge Limas prohibited Ford from conducting discovery or offering evidence of the jury's deliberations, including the signed affidavits from the jurors. Judge Limas subsequently granted summary judgment for Castillo, and the court of appeals affirmed. The Supreme Court reversed and remanded to permit Ford to conduct discovery and offer evidence from the jurors in the products-liability suit because the circumstantial evidence indicated outside influence.

On remand, a new jury heard testimony from Tassie, Cantu, and most of the jurors from the products-liability trial, including Cortez. Several of the jurors testified that Cortez kept trying to bring up the damages issue on her own, and sent the note against their specific requests that she not do so. These jurors also testified that all other notes were sent by unanimous agreement. One juror testified that on the morning the case settled—after the day-long recess caused by Cortez's absence—Cortez arrived in a "very happy, very upbeat" mood, and told the other jurors, "this will be settled today." But unlike the other jurors who testified, Cortez could not recall any of the pertinent details of the trial or the jury deliberations. After hearing all of the evidence, the jury found the settlement agreement invalid because of fraudulent inducement and mutual mistake. The trial court rendered a take-nothing judgment and Castillo appealed. The court of appeals reversed the judgment, concluding that the evidence was legally insufficient to support a jury verdict on either defense.

The Supreme Court reversed and rendered judgment in Ford's favor, finding the circumstantial evidence legally sufficient to support a finding of fraudulent inducement. The Court reasoned that Cantu's prediction about the note the night before it came out, combined with his sudden drop in demand on the day Cortez initiated recess, and willingness to ignore the favorable note and settle with Ford for less than a tenth of the damages pled, was circumstantial evidence from which a reasonable jury could infer that Cantu colluded with Cortez in sending the fraudulent note.

E. Guaranty Agreements

1. Moayedi v. Interstate 35/Chisam Road, L.P., S.W.3d , 57 Tex. Sup. Ct. J. 724 (Tex. June 13, 2014) [12-0937].

In this case, Interstate 35/Chisam Road, L.P. (the L.P.) made a loan for the purchase of real estate. Mehrdad Moayedi guaranteed the loan. The guaranty agreement stated that Moayedi waived "any," "each," and "every" defense to liability other than full payment of the guaranteed debt. After the borrower defaulted, the L.P. purchased the property at a foreclosure sale. The purchase price at foreclosure was less than the amount of the loan, but the parties agreed that the market value of the property was greater than the amount of the loan. The L.P. sued Moayedi for the difference between the purchase price at foreclosure and the unpaid balance on the note.

Moayedi contended that he was not liable for any deficiency based on Texas Property Code § 51.003, which allows a deficiency judgment to be offset by the difference between the foreclosure sale price and the fair market value at the time of foreclosure. The trial court granted summary judgment for Moayedi. The court of appeals reversed, concluding that the guaranty agreement waived the right to rely on section 51.003.

The Supreme Court affirmed the court of appeals' judgment holding that section 51.003 creates a defense to liability. The Court reasoned that foreclosure sale proceeds are the default method for determining a deficiency. Section 51.003 does not alter the default definition of a deficiency, but instead, creates a defense to liability for the deficiency. The Court noted that section 51.003 is designed to ensure that debtors and guarantors receive credit when their foreclosed property is sold at an unreasonably low price. But, the Court held, section 51.003 may be waived. Looking at the guaranty agreement between Moayedi and the L.P., the Court affirmed the court of appeals' holding that Moayedi waived his right to apply section 51.003. The Court noted that just because a waiver is broad and all-encompassing does not mean that it is unclear or vague. And, here, the agreement as a whole and the waiver language in particular indicate an intent to waive all defenses to liability, including any offset provided by section 51.003.

F. Liquidated Damages Provisions

1. FPL Energy, LLC v. TXU Portfolio Mgmt. Co., 426 S.W.3d 59 (Tex. March 21, 2014) [11-0050].

At issue in this case is the enforceability of liquidated damages provisions. TXU Portfolio Management sued FPL Energy for breach of contract, seeking liquidated damages for an alleged failure of three wind farms to provide contracted-for amounts of wind energy and renewable energy credits (RECs). FPL Energy's counterclaim asserted that TXUPM failed to provide contractually required transmission capacity. The trial court found that TXUPM owed a duty to provide transmission capacity, but that the liquidated damages provisions were void as unenforceable penalties. The court of appeals reversed the trial court on both rulings.

The Supreme Court affirmed in part and reversed in part. The Court held that TXUPM did not owe FPL a contractual duty to provide adequate transmission capacity to FPL; rather, the contracts allocated the risk of insufficient transmission capacity to FPL.

The Court then addressed the scope of the liquidated damages provisions. The Court concluded that liquidated damages compensated for failure to provide contracted-for RECs, but did not apply to failure to deliver electricity. To evaluate the enforceability of the liquidated damages provision, the Court addressed (1) whether the harm caused by breach was difficult to estimate, and (2) whether the forecast of just compensation was reasonable. The Court also considered whether the actual damages incurred are lower than the amount contracted for.

While the damages were difficult to estimate and the forecast was ostensibly reasonable, the discrepancy between the liquidated damages clause and actual damages was unbridgeable. The Court noted that TXUPM was not subject to regulatory penalties (unlike the original contracting entity), and thus lacked incentive to pursue a regulatory excuse mechanism that would have diminished the actual damages caused by the breach. The Court also noted that the Public Utility Commission did not establish a market value for renewable energy credits, which resulted in a $50 damage amount per REC. In combination, these events caused the relationship between actual damages and liquidated damages to break down. The Court therefore held that the liquidated damages provisions were unenforceable. The Court thus reversed the court of appeals' judgment and remanded to that court to determine damages.

G. Restitution and Unjust Enrichment

1. Gotham Ins. Co. v. Warren E&P, Inc., S.W.3d , 57 Tex. Sup. Ct. J. 336 (Tex. March 21, 2014) [12-01452].

The primary issue in this appeal is the effect of contract clauses on equity claims. Pedeco, Inc. operated an oil well that blew out and caught fire. Pedeco represented to its insurer, Gotham, that it owned a 100% working interest in the well, and

Gotham paid $1,823,156.27 on the claim. Gotham later discovered a joint operating agreement indicating Pedeco might possess only a 12.5% interest in the well. Gotham intervened in a lawsuit between Pedeco and its subcontractors, bringing contract and equity claims against Pedeco and its two co-venturers. Pedeco counterclaimed for further amounts allegedly owed under the policy. The trial court ruled in favor of Pedeco and its co-venturers at summary judgment. The court of appeals reversed, holding that Pedeco was not entitled to insurance benefits because a co-venturer reimbursed it and it thus suffered no loss. The court further held that Gotham was entitled to prevail on its equity claims because Pedeco suffered no loss. The court remanded for the trial court to determine damages. Without holding an additional hearing, the trial court awarded Gotham reimbursement in the amount of $1,823,156.27. On a second appeal, the court of appeals reversed the award because of the trial court's failure to conduct further proceedings. On remand, the trial court conducted hearings and again awarded judgment in favor of Gotham for $1,823,156.27. The third appeal was transferred to a different court of appeals under docket equalization procedures. That court reversed the two holdings of the prior courts of appeals and held that Gotham was not entitled to prevail on its equity claims. The court further held that Gotham could not prevail on its contract claim because the contract included no reimbursement clause.

The Supreme Court held that Gotham could not rely on equity claims and instead had to pursue its contract claim because several clauses in the contract addressed the matter in dispute (such as a clause allowing Gotham to void the policy if Pedeco made material misrepresentations). Further, the Court held that the absence of a reimbursement clause in the contract did not foreclose Gotham's contract claim because Gotham alleged breaches of existing contract clauses. The Court also held that Gotham preserved its contractual claim by raising it in the Court as an additional ground for obtaining the same relief the trial court had awarded. Finally, the Court reversed the ruling in the first appeal that Pedeco suffered no loss because testimony from the CEO of Pedeco's co-venturer indicated that Pedeco and the co-venturer would share evenly in drilling profits and drilling losses at the end of each calendar year. The Court remanded to the court of appeals to consider the parties' remaining arguments on the contract claims.

H. Statute of Frauds

1. Dynegy, Inc. v. Yates, 422 S.W.3d 638 (Tex. August 30, 2013) [11-0541].

At issue in this case was whether the statute of frauds' suretyship provision renders an oral agreement to answer for the debt of another unenforceable. James Olis, a former officer of Dynegy, Inc., was indicted on multiple counts of securities fraud, mail and wire fraud, and conspiracy. Olis hired Terry Yates to defend him and signed a written contract to pay Yates's fees. Dynegy's board passed a resolution to pay Olis's expenses if his actions were taken in good faith and in the best interest of Dynegy. When Dynegy concluded Olis failed this test, it withdrew funds escrowed for Yates and refused to pay Yates's fees. Yates alleged Dynegy made an oral promise to pay for expenses through trial. Dynegy disputed the extent of its promise. Yates brought claims for breach of contract and fraudulent inducement, and a jury found for him on both claims. The court of appeals affirmed the trial court, holding that Dynegy adopted the primary obligation to pay Olis's fees and, therefore, the statute of frauds was inapplicable.

The Supreme Court reversed the court of appeals' judgment and rendered judgment that Yates take nothing. The Court explained that once a party has established the applicability of the statute of frauds, the burden shifts to the opponent to plead and prove an exception. The Court recognized the main purpose doctrine may remove an oral promise from the statute of frauds when the consideration for the promise is primarily for the promisor's own benefit. Yates, however, failed to plead, prove, and secure a finding on the main purpose doctrine. The Court held this failure precluded Yates from recovery because Dynegy successfully pled the affirmative defense of statute of frauds.

Justice Devine filed a dissenting opinion, suggesting Dynegy assumed the primary obligation to pay for Olis's debt rendering the statute of frauds inapplicable, and that even if the

statute applied, the main purpose doctrine removed the promise from the statute of frauds.

I. Warranties

1. Man Engines & Components, Inc. v. Shows, S.W.3d , 57 Tex. Sup. Ct. J. 661 (Tex. June 6, 2014) [12-0490].

In this case, Doug Shows purchased a used yacht equipped with engines manufactured by Man Engines. After an engine failed, Shows sued Man for breach of the implied warranty of merchantability, among other claims. The jury found breach of the implied warranty and awarded damages, but the trial court rendered judgment for Man. The trial court reasoned that the implied warranty claim failed because Shows was a subsequent purchaser and because Man had disclaimed the warranty. The court of appeals reversed, reasoning that the implied warranty passes with the goods on resale and that Man had failed to plead the affirmative defense of disclaimer.

The Supreme Court affirmed the court of appeals judgment. It held that implied warranties, as well as disclaimers thereof, pass with the good to subsequent purchasers. The Court held that Man could not rely on an alleged disclaimer of the implied warranty, contained in a document found on the Internet, because Man had not filed a pretrial pleading alleging this affirmative defense, as required by Texas Rule of Civil Procedure 94. Similarly, the Court held that Man could not rely on another document Shows had signed at the time of sale, stating that the vessel was being sold "as is." This document was on the letterhead of a broker involved in the transaction. The Court held that it could not decide the effect of this clause because Man did not plead that the "as is" clause barred the implied warranty claim and did not reference the clause at trial or in the court of appeals.

VIII. CORPORATIONS

A. Business Judgment Rule

1. Sneed v. Webre, 358 S.W.3d 322 (Tex. App.—Houston [1st Dist.] 2011), *pet. granted*, 57 Tex. Sup. Ct. J. 306 (March 21, 2014) [12-0045].

At issue in this case is shareholder standing to bring direct and derivative actions against a corporation under the Texas Business Corporations Act (TBCA). Lloyd Webre, a director and shareholder of Texas United, a closely-held corporation, filed a shareholder derivative action challenging an acquisition by United Salt, Texas United's subsidiary. Webre's original petition alleged negligence by the officers, and his amended petition asserted causes of action for fraud and breach of fiduciary duty. Webre sought damages equal to the cost of the project. The individual directors filed pleas to the jurisdiction, special exceptions, and pleas in abatement, which included challenges to Webre's standing. Texas United and United Salt intervened and also challenged, inter alia, Webre's standing. The trial court dismissed Webre's claims on standing grounds and granted nonsuit of defendants' and intervenors' request for attorneys' fees and expenses, denied Webre's motion for new trial, and entered final judgment. The court of appeals reversed, reasoning that the requirements of the business judgment rule for shareholder derivative actions do not apply to suits brought on behalf of closely-held corporations because the rule would require a plaintiff to prove "the merits of his case" in order to prove standing. Further, the court reasoned that Webre, being a shareholder of Texas United, was a "beneficial owner" of the shares of United Salt, and could therefore bring a derivative suit on behalf of United Salt. The defendants appealed to the Supreme Court, contending that the court of appeals erred in its application of the business judgment rule to a closely-held corporation and in finding that Webre had standing to maintain a derivative suit without pleading and proving fraud or self-dealing.

The Supreme Court granted Sneed's petition for review and will hear oral argument on September 16, 2014.

B. Shareholder Oppression

1. Cardiac Perfusion Servs., Inc. v. Hughes, S.W.3d , 57 Tex. Sup. Ct. J. 914 (Tex. June 27, 2014) [13-0014].

At issue in this case was a court ordered buyout as an equitable remedy for a finding of oppressive acts by a majority shareholder. Michael Joubran founded Cardiac Perfusion Services (CPS) and hired Randall Hughes as his first employee. Soon after, Hughes became a

shareholder and Joubran and Hughes entered into a buy–sell agreement. A dispute later arose between the parties, and Hughes's employment with CPS terminated. One day later, CPS and Joubran sued Hughes. CPS sought to recover damages from Hughes for breach of fiduciary duty and tortious interference with its contract with a client. Hughes counterclaimed against Joubran for "oppress[ing] Hughes as the minority shareholder." Among other allegations, Hughes alleged that Joubran "utilized the corporation as his personal vehicle to pursue his own self interests" and "misused funds of [CPS] for his own personal gain." Hughes also counterclaimed for breach of fiduciary duty and alleged that Joubran had denied him access to CPS's books and records.

The jury found in favor of Hughes on CPS's claims for tortious interference with a contract and breach of fiduciary duty. With respect to Hughes's counterclaim against Joubran for shareholder oppression, the jury found that Joubran (1) suppressed payment of profit distributions to Hughes, (2) paid himself excessive compensation from CPS's corporate funds, (3) improperly paid his family members using CPS funds, (4) used CPS funds to pay his personal expenses, (5) used his control of CPS to lower the value of Hughes's stock, and (6) refused to let Hughes examine CPS's books and records. In its final judgment, the trial court ordered that CPS and Joubran take nothing on their claims against Hughes, and that Hughes take nothing on his claim against Joubran for breach of fiduciary duty. The trial court also concluded that Joubran engaged in shareholder oppression and that the most equitable remedy was to require Joubran and CPS to redeem Hughes's shares at what the jury found the fair value to be: $300,000. The court of appeals affirmed.

In a per curiam opinion, the Supreme Court affirmed in part and reversed in part and remanded the case to the trial court in the interest of justice. The Court affirmed the court of appeals' holdings that were not challenged. The Court held that under *Ritchie v. Rupe*, ___ S.W.3d ___ (Tex. 2014), a claim for shareholder oppression is only available under section 11.404 of the Texas Business Organizations Code, and that the only remedy available under that statute is a rehabilitative receivership. Because a buyout order was not available under a common-law claim for shareholder oppression or under the receivership statute, and because no alternative claim supported the trial court buyout order, the Court reversed that part of the trial court's judgment. Further, because the Court has broad discretion to remand when the losing party likely presented his case in reliance on controlling precedent that was subsequently overruled, it remanded the case to the trial court.

2. Ritchie v. Rupe, S.W.3d , 57 Tex. Sup. Ct. J. 771 (Tex. June 20, 2014) [11-0447].

In this case, the Texas Supreme Court addressed the body of law that has arisen around "shareholder oppression" allegations for the first time. The Court held that the rehabilitative receivership statute of the Texas Business Organizations Code authorizes courts to appoint a rehabilitative receiver as a remedy for "oppressive . . . actions," if the statute's other criteria are satisfied, when a corporation's directors or managers abuse their authority over the corporation with the intent to harm the interests of one or more shareholders, in a manner that does not comport with the honest exercise of their business judgment, and by doing so create a serious risk of harm to the corporation. The Court further held that the rehabilitative receiver statute does not independently authorize other remedies, such as a court-ordered buyout of shares, but it does preserve those remedies when they are available under other statutes or common-law causes of action. Finally, the Court declined to recognize a common law cause of action for "shareholder oppression," noting a number of existing common-law causes of action that may apply, and typically are also asserted, when the controllers of a business engage in oppressive conduct.

Justice Guzman filed a dissent, joined by Justice Willett and Justice Brown. The dissent would have held that the plaintiff Rupe made out a cognizable claim for shareholder oppression, and that Texas law should recognize a buyout of the minority shareholder as a remedy for such oppression.

IX. DAMAGES

A. Lost Fair Market Value

1. Hous. Unlimited, Inc. Metal Processing v. Mel Acres Ranch, 389 S.W.3d 583 (Tex. App.—Houston [14th Dist.] 2012), *pet. granted*, 57 Tex. Sup. Ct. J. 10 (October 18, 2013) [13-0084].

This petition presents the following question: if real property has suffered environmental contamination and then is successfully remediated, can the property owner recover for the property's lost market value if, because of stigma attached to the harm, the property's value remains diminished after the remediation?

Houston Unlimited, Inc. Metal Processing (HUI) operates a metal processing plant adjacent to Mel Acres Ranch (Mel Acres). In late 2007, the lessee of Mel Acres noticed a spike in premature deaths and birth defects in its livestock. Around the same time, someone on HUI's property was seen dumping the contents of barrels into the ditch. Mel Acres retained an environmental consultant to test water samples in a pond on Mel Acres. The testing revealed various pollutants exceeding TCEQ action levels that were a result of HUI's dumping. TCEQ fined HUI and ordered HUI to cleanup the contamination. Following extensive remediation, TCEQ oversight, testing and expert reports, TCEQ concluded that no further action was required.

Mel Acres sued HUI for trespass, nuisance, and negligence, seeking to recover lost market value as a result of the contamination. Mel Acres presented the testimony of a real estate appraiser who opined that Mel Acres's property value had permanently declined from about $2.3 million to $931,500 as a result of HUI's contamination. HUI's expert real estate appraiser, Robinson, was retained to provide an opinion only as to the amount of temporary damages, as opposed to permanent damage, and did not provide controverting testimony as to lost market value. However, Robinson agreed on the $2.3 million valuation, agreed that Mel Acres would have to disclose the contamination in a future sale and that the contamination would be recorded in the deed records, and he could not rule out HUI contaminating Mel Acres in the future.

The jury awarded $349,312.50 to Mel Acres on the negligence claim. The jury did not find for Mel Acres on its claims for trespass and nuisance. The court of appeals affirmed, holding that a plaintiff-landowner need not show permanent physical damage to recover lost market value or "stigma damages" for injured property so long as the property suffered some physical injury, even if temporary, that resulted in a permanent diminution of the property's value. HUI filed a petition for review arguing that awarding Mel Acres damages for diminution in value after the property had been remediated to TCEQ's satisfaction was tantamount to a double recovery.

The Court granted HUI's petition for review and heard oral argument on December 5, 2013.

X. EMPLOYMENT LAW

A. Civil Service

1. Exxon Mobil Corp. v. Drennen, 367 S.W.3d 288 (Tex. App.—Houston [14th Dist.] 2012), *pet. granted*, 56 Tex. Sup. Ct. J. 864 (August 23, 2013) [12-0621].

This case involves two intertwined issues: whether detrimental activity provisions in an employee incentive program are enforceable and whether New York or Texas law governs the enforceability of the terms in the incentive programs. William Drennen worked as an executive for Exxon Mobil in Houston for over 30 years. Drennen participated in a 1993 and a 2003 Exxon Mobil incentive program. Both plans permitted Exxon to terminate outstanding incentive awards if the participating employee "engaged in a detrimental activity." Each incentive program also contained a choice-of-law clause stating that all actions taken under the Program would be governed by the laws of the State of New York. Drennen retired from Exxon in May 2007 and shortly thereafter went to work at Hess Oil Co. On August 1, 2007, Drennen was informed that his incentive awards had been canceled because Hess is a direct competitor of Exxon.

At trial, the jury found in Exxon's favor. The court of appeals reversed, holding the detrimental-activity provisions to be unenforceable covenants not to compete under Texas law. Exxon argues that there is no conflict between New York law and Texas law because the detrimental-activity provisions are not noncompete provisions. In the alternative, Exxon

argues New York law is proper. Drennen argues that Exxon's contracts are covenants not to compete under Texas and New York law and that they are unenforceable restraints on trade. Drennen argues that the parties have no connection to New York that would support the application of that state's law, and that both parties have substantial connections to the State of Texas. The Supreme Court granted the petition for review and heard oral argument on November 6, 2013.

B. Duty to Maintain Safe Workplace

1. Austin v. Kroger Tex. L.P., *certified question accepted*, 57 Tex. Sup. Ct. J. 436 (April 4, 2014) [14-0216].

At issue in this case is whether an employee may bring a premises defect claim against his employer who is a non-subscriber to the Texas workers' compensation system when the employee was aware of the defect before his injury. The Texas Labor Code prohibits non-subscribing employers from asserting certain defenses, including: contributory negligence and assumption of the risk. However, it is unclear whether or not [under Texas case law] an employee's knowledge of a condition relieves an employer of a duty to warn. The underlying case involves Randy Austin's appeal of the district court's grant of summary judgment on his premises liability claim in favor of his employer, Kroger. Kroger is a non-subscriber to the Texas workers' compensation system. While working as a "floor clean-up person," Austin was to clean up soapy puddles caused by a leaking condenser unit. Austin does not contest that he was aware that the puddle posed a danger or that he took precautions to avoid injury. Nevertheless, Austin slipped and fell, causing multiple serious injuries.

The district court reasoned summary judgment was appropriate "largely based on Austin's subjective awareness of the risk the spill presented." On appeal, the United States Court of Appeals for the Fifth Circuit affirmed in part and reversed and remanded in part (on issues not relevant here), before determining that the Supreme Court of Texas's guidance was necessary to the proper disposition of Austin's premises liability claim. The Fifth Circuit certified the following question to the Supreme Court:

> Pursuant to Texas law, including § 406.033(a)(1)–(3) of the Texas Labor Code, can an employee recover against a non-subscribing employer for an injury caused by a premises defect of which he was fully aware but that his job duties required him to remedy? Put differently, does the employee's awareness of the defect eliminate the employer's duty to maintain a safe workplace?

The Supreme Court accepted the certified question from the Fifth Circuit on April 4, 2014, but has not yet scheduled oral argument.

C. Employment Contracts

1. Colorado v. Tyco Valves & Controls, L.P., S.W.3d , 57 Tex. Sup. Ct. J. 407 (Tex. March 28, 2014) [12-0360].

At issue in this case was whether employees' breach of contract claims were preempted by ERISA. Tyco Valves & Controls closed its West Gulf Bank facility. Tyco's HR director created a severance schedule, and posted it on a bulletin board at the work facility. Tyco also had a company-wide severance plan under ERISA.

The "Gimpel" unit, made up of seventeen employees, worked at the West Gulf Bank location. When Tyco announced its plans to sell the unit, eleven of the employees entered into Retention Incentive Agreements (RIAs) with Tyco and "its successors and assigns." In the RIAs, Tyco agreed to pay a retention bonus plus the "standard severance in accordance to the severance schedule" to employees who stayed through the retention period but were not offered comparable employment with Tyco. The other six employees in the Gimpel unit presented evidence that Tyco orally promised them a standard severance according to the terms of the schedule posted on the bulletin board.

Tyco sold the unit to Dresser Rand Company, which offered the employees continued employment. The employees stayed with the unit through the retention period, and Tyco paid retention bonuses pursuant to the RIAs. Tyco did not pay any severance though, and so the employees filed breach of contract claims against Tyco. The trial court rendered judgment for the employees, concluding that ERISA did not

preempt their claims, the oral agreements and RIAs were valid and enforceable contracts, and Tyco breached the contracts by failing to pay severance. The court of appeals reversed and rendered judgment that the employees take nothing. The court agreed that ERISA did not preempt the employees' claims, but decided that the oral agreements between the six employees and Tyco were not valid and Tyco did not breach the RIAs because Dresser was its successor.

The Supreme Court affirmed the court of appeals' judgment that the employees take nothing, but held that ERISA did preempt the employees' claims. When an employee benefit plan relates to and cannot operate independently of a company's ERISA plan, that plan preempts the employees' breach-of-contract claims on the benefit plan. The severance schedule in this case was an attempt to amend Tyco's ERISA plan, rather than an independent duty to pay benefits. Because the schedule was preempted by ERISA, the Court did not reach the issues of whether Tyco's oral promises were valid and whether Dresser was Tyco's successor.

D. Employment Discrimination

1. City of Hous. v. Proler, S.W.3d , 57 Tex. Sup. Ct. J. 678 (Tex. June 6, 2014) [12-1006].

In this case, Shayn Proler, a captain on a fire suppression unit with the Houston Fire Department, froze at a residential fire in 2006 and was unable to perform his duties. There were reports that he had been afraid to enter a burning building in 2004. On both occasions he had been reassigned to the training academy. After the 2006 reassignment, Proler sued the City for disability discrimination under the federal Americans with Disabilities Act and the Texas Labor Code. The jury found discrimination but awarded no damages. The trial court entered an injunction barring the City from further acts of discrimination and awarded attorney's fees to Proler. The City appealed this judgment, and the court of appeals affirmed.

The Supreme Court reversed and rendered a take nothing judgment on Proler's disability claim. The Court reasoned that Proler had not shown he suffered from a disability. Under federal and state law, a person suffers from a disability if the person suffers from an impairment that limits a major life activity, or if he is perceived as suffering from such an impairment. Proler alleged that the City perceived him as having a disability. To prevail on a disability discrimination claim the plaintiff must also show that he suffered an adverse personnel action on account of his disability. Under federal and state law, a disability requires a showing that the plaintiff is unable to perform the variety of tasks central to most people's daily lives, not merely that he is unable to perform the tasks associated with a specific job. The issue is not whether he can perform his particular job but whether his impairment severely limits him in performing work-related functions in general. In addition, an "impairment" must limit the ability of an individual to perform as compared to most people in the general population, and the adverse action must occur on account of the disability. By these standards and requirements, the Court held that no evidence supported Proler's disability claim. The natural disinclination to enter a burning building is not an impairment because it is the normal human response and fighting fires is not a major life activity. The evidence showed that Proler was reassigned not because he was perceived as suffering from a disability, but because he was perceived as unable to do his particular, highly skilled job.

E. Fraud

1. Sawyer v. E.I. du Pont de Nemours & Co., 430 S.W.3d 396 (Tex. April 25, 2014) [12-0626].

At issue in this case was whether at-will employees and employees subject to a collective bargaining agreement ("CBA") can sue their corporate employer for fraudulently inducing them to move to a wholly owned subsidiary. The appellants, sixty-three former employees of DuPont, sued DuPont in federal district court, alleging that DuPont misrepresented that it would retain ownership of its wholly owned subsidiary, to which DuPont had allegedly persuaded the employees to transfer. A few weeks after the employees transferred, DuPont sold the subsidiary to a third party, after which the employees' compensation and retirement benefits were reduced.

The district court granted DuPont's motion for summary judgment on the employees' fraud

and fraudulent inducement claims. The district court held that all the employees—the fifty-nine who were covered by the CBA and the four who were not—were at-will employees when they worked for DuPont, and therefore, they were unable to assert fraud claims arising from the separation against the company as a matter of law.

The Fifth Circuit held that the four non-covered employees were at-will employees, and, therefore, they were precluded from bringing fraud claims, assuming that an at-will employee's fraud claim is barred as a matter of law in Texas. But the Fifth Circuit admitted that it is unclear whether the fifty-nine employees covered by the CBA were at-will employees.

Because the validity of the employees' fraud claims depended on two unsettled questions of Texas law, the Fifth Circuit certified the following questions to the Supreme Court of Texas:

> 1. Under Texas law, may at-will employees bring fraud claims against their employers for loss of their employment?
> 2. If the above question is answered in the negative, may employees covered under a 60-day cancellation-upon-notice collective bargaining agreement that limits the employer's ability to discharge its employees only for just cause, bring Texas fraud claims against their employer based on allegations that the employer fraudulently induced them to terminate their employment?

On the facts presented, the Supreme Court answered no to both questions. As to the first question, in order to recover for fraud, a plaintiff must prove justifiable reliance on a material representation. A representation dependent on continued at-will employment cannot be material because employment can terminate at any time. Therefore, an at-will employee cannot bring an action for fraud that is dependent on continued employment.

As to the second question, the Court found that the parties had modified the employees' at-will employment status by implementing a CBA which directed that discharge be only for "just cause" and because, if the parties chose to arbitrate a grievance, any decision would be final and binding on all parties. Despite that, the Court pointed out that the employees agreed in the CBA to the contractually provided remedies for discharge without just cause; therefore, the CBA forecloses an action for fraud. Whether the employees' rights under the CBA have been lost is a matter the Court left for the Fifth Circuit; but, in the situation presented, the answer to the second certified question was no.

F. Whistleblower Actions

1. Canutillo Indep. Sch. Dist. v. Farran, 409 S.W.3d 653 (Tex. August 30, 2013) [12-0601].

The primary issue in this case was whether an employee had a cognizable claim under the Texas Whistleblower Act. The Act covers good faith reports of a violation of law to an "appropriate law enforcement authority." Plaintiff Yusuf Farran claimed that he was fired from his position with the Canutillo Independent School District in retaliation for various complaints he had made to the District superintendents, internal auditor, and school board. The trial court granted the District's plea to the jurisdiction. The court of appeals reversed in part, concluding that certain complaints of financial irregularities could be pursued under the Whistleblower Act.

The Supreme Court concluded that the trial court correctly granted the plea to the jurisdiction, so the Court affirmed in part and reversed in part the judgment of the court of appeals and dismissed the case. Relying on *University of Texas Southwest Medical Center v. Gentilello*, 398 S.W.3d 680 (Tex. 2013), and other recent decisions, the Court held that the internal complaints Farran made to District personnel were not good-faith complaints to an appropriate law enforcement authority, because under *Gentilello* the complaint must be made to an official with authority to enforce the allegedly violated laws outside of the institution itself against third parties generally. In this case there was no proof of such authority.

The Court also held that a report by Farran to the FBI failed to support his claim because the record was clear that the District had already decided to terminate Farran before he made that report. Additionally, the Court held that Farran could not pursue an independent claim for breach

of contract, because he had failed to exhaust his administrative remedies.

2. Ysleta Indep. Sch. Dist. v. Franco, 417 S.W.3d 443 (Tex. December 13, 2013) [13-0072].

At issue in this case was whether a school district's governmental immunity was waived under the Whistleblower Act when an employee's report of alleged violations of law is made to someone charged only with internal compliance. Marcelino Franco was a principal in the Ysleta Independent School District. He reported various alleged violations of law to the District superintendent and other school officials. Specifically, Franco alleged that floor tiles and insulating materials in his school contained asbestos. Franco admitted that he made no reports to any individuals outside of the District.

A few months later, the District indefinitely suspended Franco for reasons it claimed were unrelated to his report. Franco then filed this whistleblower action, contending that the District had failed to address the alleged asbestos hazards contained in his report, and that the District had retaliated against him by suspending him. The trial court denied the District's plea to the jurisdiction, and the court of appeals affirmed. The District appealed.

The Supreme Court, relying on its prior decisions in *University of Texas Southwestern Medical Center v. Gentilello*, 398 S.W.3d 680 (Tex. 2013), and *Canutillo Independent School District v. Farran*, 409 S.W.3d 653 (Tex. 2013) (per curiam), held that Franco's report to school officials charged only with internal compliance was jurisdictionally insufficient to confer "law-enforcement authority" status, because Franco failed to show an objective, good-faith belief that the District qualifies as an "appropriate law-enforcement authority" under the Act. The Court held the trial court erred in denying the District's plea to the jurisdiction and reversed the court of appeals judgment and dismissed the case.

XI. EVIDENCE

A. Seatbelt-Usage Evidence

1. Nabors Wells Servs,, Ltd. v. Romero, 408 S.W.3d 89 (Tex. App.—El Paso 2013), *pet. granted*, 57 Tex. Sup. Ct. J. 307 (March 21, 2014) [13-0136].

At issue in this case is whether evidence that a plaintiff was not wearing a seat belt during a collision is admissible to reduce her recovery. Martin Soto was driving an SUV carrying several passengers on the way from Los Angeles to Mexico to celebrate Christmas. Lauro Garcia was a truck driver for Nabors Well Services. At around 4:30 a.m. on the morning of the accident, Soto was driving directly behind Garcia on a two-lane stretch of highway. Garcia slowed for a left turn into a project site at the same time that Soto started to pass him in the passing lane. The vehicles collided. Soto's SUV rolled three times, and an undetermined number of passengers were ejected from the vehicle. Soto was wearing a seatbelt, and was not ejected from the vehicle. Soto and the passengers all suffered personal injuries, and one passenger died. Soto sued Garcia and Nabors Wells Services for negligence and Garcia for gross negligence. The passengers sued Garcia and Nabors Wells Services for negligence.

At trial, the court excluded all evidence related to the passengers' seatbelt non-use. The jury returned a verdict that both Nabors Wells Services and Soto were negligent, with Nabors Wells Services 51% responsible and Soto 49% responsible. Consequently, the trial court rendered judgment for Soto and the passengers. The court of appeals affirmed, holding that the trial court committed no error because seatbelt non-use "is an act which precedes the crash-causing negligence and the duty to mitigate damages [a]rises only after those acts which led to the crash." The court of appeals reasoned that, in repealing the statutory provisions making seatbelt non-use inadmissible, the Legislature had the opportunity to mandate admissibility of such evidence. Because it remained silent on the issue, *Carnation Co. v. Wong* still controlled. 516 S.W.2d 116 (Tex. 1974) (per curium). In that case, the Supreme Court held that evidence of seat belt non-use is not admissible to reduce a plaintiff's recovery.

The Supreme Court granted Garcia's and Nabors Wells Services's petition for review and will hear oral argument on October 9, 2014.

XII. FAMILY LAW

A. Child Custody

1. Danet v. Bhan, S.W.3d , 57 Tex. Sup. Ct. J. 917 (Tex. June 27, 2014) [13-0016].

At issue in this case was whether any evidence supported the jury's finding that appointment of the mother as the child's conservator would substantially impair the child's physical health or emotional development.

Danet and Kranz became the foster parents of a child after the mother lost custody. At a hearing a few months later, the mother agreed to comply with a family service plan to regain custody of her child. However, the mother continued to engage in irresponsible behavior with respect to the child. In 2010, Danet and Kranz sued to seek appointment as the child's joint managing conservators. The mother responded by filing a counterclaim seeking appointment as the child's sole managing conservator. The jury found that the mother's appointment as the child's conservator would significantly impair the child's physical health or emotional development. The court of appeals reversed, holding no evidence existed to support the jury's finding. They held that the mother's misconduct occurred in the distant past and did not show her present lack of fitness to be her child's conservator.

The Supreme Court reversed, holding that the mother's continued inconsistent communication with the child and her erratic behavior during visits, combined with her past drug use, criminal record, and failure to provide the child a stable home, provided some evidence to support the jury's finding. The Court remanded the case for a factual sufficiency review by the court of appeals.

B. Child Support

1. Tucker v. Thomas, 419 S.W.3d 292 (Tex. December 13, 2013) [12-0183].

At issue in this case was whether a trial court has authority to award attorney's fees as additional child support in a non-enforcement modification suit. In the divorce decree, the trial court named both parents, Rosscer Tucker and Lizabeth Thomas, as joint managing conservators of their three children, with Thomas named as the parent with the exclusive right to designate the children's primary residence. Tucker later sued Thomas to modify the terms of the divorce decree and name him as the parent with the exclusive right to designate the children's primary residence. Thomas countersued, seeking to be named the sole managing conservator of the children and seeking an increase in Tucker's child support obligation. The trial court denied both parents' requests to change the conservator designations, but increased Tucker's child support obligation. Additionally, the trial court awarded Thomas's attorney's fees as additional child support, finding the fees necessaries benefitting the children. In a split decision, the court of appeals affirmed.

The Supreme Court held that attorney's fees cannot be awarded as child support in suits seeking only modification of child support obligations. A trial court's authority to award attorney's fees may not be inferred. The Family Code expressly provides for the award of attorney's fees as child support, including through contempt powers, in enforcement suits. However, the Family Code is silent as to the award of attorney's fees in non-frivolously filed modification suits. Therefore, the trial court does not have the authority nor discretion to award attorney's fees as additional child support or as necessaries. The Court reversed the judgment of the court of appeals and remanded the case to the court of appeals for further proceedings.

Justice Guzman, joined by Justice Lehrmann, concurred, but wrote to provide more context and background about why this subject has resulted in confusion among the courts of appeals. Given the fragmented Family Code provisions on attorney's fees and the common-law history of the necessaries doctrine, the concurrence explained how this confusion was possible.

C. Mediated Settlement Agreements

1. In re Lee, 411 S.W.3d 445 (Tex. September 27, 2013) [11-0732].

At issue in this case was whether a trial court may refuse to enter judgment on a mediated settlement agreement (MSA) pursuant to section 153.0071 of the Texas Family Code if the court finds that the agreement is not in the best interest of the child. Stephanie Lee and Benjamin Redus

are the divorced parents of one child. Redus filed a petition to modify the parent-child relationship and to recover excess child-support payments. Lee and Redus entered into an MSA, which provided that Redus would establish the child's primary residence and Lee would have periodic access to and possession of the child. It further provided that Lee's husband, a registered sex offender, would not come within five miles of the child. The associate judge determined that the MSA was not in the best interest of the child and refused to enter judgment on it. Lee then filed a motion to enter judgment on the MSA, to which Redus objected. At the hearing on the motion to enter judgment, Lee testified that she had allowed her husband to have contact with the child in violation of his probation conditions. The district judge denied the motion to enter judgment after finding that the MSA was not in the best interest of the child. The court of appeals denied Lee's request for mandamus relief.

The Supreme Court conditionally granted mandamus relief, holding that the district court abused its discretion in denying Lee's motion to enter judgment on the MSA and setting the case for trial. Section 153.0071(c) provides that a party is "entitled to judgment" on an MSA that meets certain statutory requirements "notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law." Section 153.0071(e-1) provides a narrow exception to this mandate, allowing a trial court to deny entry of judgment on an MSA that would not be in a child's best interest *if* a party to the MSA was a victim of family violence and the family violence impaired the party's ability to make decisions. Thus, the Legislature unambiguously limited the consideration of best interest in the context of entry of judgment on an MSA to cases involving family violence. Because there was no family violence with respect to Lee and Redus, the district court abused its discretion in denying the motion to enter judgment on the MSA on best-interest grounds. This interpretation is consistent with and furthers established Texas public policy favoring the peaceable resolution of disputes involving the parent-child relationship.

In a plurality opinion, Justice Lehrmann, joined by Justice Johnson, Justice Willett, and Justice Boyd, noted that the Court did not reach the issue of whether a trial court may deny entry of judgment on an MSA based on evidence that the MSA would endanger the child, as that issue was not presented or argued. The plurality also noted the numerous statutory mechanisms available to trial courts in protecting children's physical and emotional welfare.

Justice Guzman concurred, opining that a trial court may deny entry of judgment on an MSA based on evidence of endangerment, but that no such evidence had been presented to the trial court in this case.

Justice Green, joined by Chief Justice Jefferson, Justice Hecht, and Justice Devine, dissented. Noting the Legislature's stated policy that the best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child, the dissent concluded that a trial court has discretion to refuse to enter judgment on an MSA that could endanger the child's safety and welfare and is, therefore, not in the child's best interest. The dissent further concluded that there was evidence in the record that the MSA would endanger the child and that the trial court did not abuse its discretion in denying entry of judgment on the MSA.

D. Termination of Parental Rights

1. In re A.B., S.W.3d , 57 Tex. Sup. Ct. J. 595 (Tex. May 16, 2014) [13-0749].

At issue in this case was whether a proper factual sufficiency review requires the court of appeals to detail the evidence contrary to the trial court's judgment in a parental termination case when the court of appeals ultimately affirms the judgment.

The Texas Department of Family and Protective Services filed suit to terminate the parental rights of father, D.B., under section 161.001(1)(E) of the Family Code. At a bench trial in 2009, the trial court terminated D.B.'s parental rights. D.B. appealed, and the court of appeals reversed and remanded the case for a new trial, finding factually insufficient evidence existed to establish the grounds for termination. In June 2011, the case was re-tried before a jury. The jury rendered a verdict in favor of termination. Again, D.B. appealed and the court of appeals reversed based on factual insufficiency.

On rehearing, an en banc court of appeals withdrew its prior decision and affirmed the jury's termination finding. D.B. appealed to the Supreme Court, arguing that the en banc court of appeals did not apply the proper factual sufficiency standard of review because it failed to detail and weigh the evidence contrary to the judgment.

The Supreme Court affirmed the court of appeals' judgment, rejecting D.B.'s contention that a court of appeals conducting a factual sufficiency review is required to detail the evidence contrary to the trial court's judgment when affirming. The Supreme Court noted that although courts of appeals are required to detail the evidence when reversing a jury's finding regarding the termination of parental rights, when the court of appeals affirms the jury's finding it does not run the same risk of usurping the role of the factfinder. And, while the Supreme Court has recognized that courts of appeals must detail the evidence when affirming an award for exemplary damages, this procedural safeguard is in place to protect a defendant's constitutional rights from the jury's unfettered discretion in deciding such awards. Because the jury must operate within the detailed statutory framework of the Family Code in deciding parental termination cases, jurors are not afforded the same "unbridled discretion" courts found troubling in cases involving exemplary damages. Therefore, the Court reasoned that the "procedural safeguard" of detailing the evidence when reversing or affirming a jury's award of exemplary damages is not necessary to ensure the protection of parents' fundamental rights in parental termination cases.

2. In re K.N.D., 424 S.W.3d 8 (Tex. January 17, 2014) [13-0257].

At issue in this case was whether K.N.D. had been removed for "abuse or neglect" under chapter 262 of the Texas Family Code. The day after K.N.D. was born, while K.N.D. remained in the hospital, the Department of Family and Protective Services (the Department) received a referral regarding "neglectful supervision" of K.N.D. The referral reported that A.D. had been involved in a domestic dispute while thirty-seven weeks pregnant, and that A.D. had been taken to the hospital where she gave birth. The Department then conducted an investigation, during which witnesses reported that A.D. had recently relinquished her rights to her previous child, S.L.A.D., after a history of "medical neglect" and "neglectful supervision" of the child. The trial court terminated A.D.'s parental rights to K.N.D. under section 161.001(1)(O) of the Texas Family Code, and appointed the Department as sole managing conservator of the child. The court of appeals upheld the Department's appointment as sole managing conservator but reversed the termination judgment and denied the Department's petition for termination. The court of appeals held that the evidence was legally insufficient to establish that K.N.D. was removed for "abuse or neglect" under chapter 262.

> In *In re E.C.R.*, the Supreme Court held:
> [W]hile subsection O requires removal under chapter 262 for abuse or neglect, those words are used broadly. Consistent with chapter 262's removal standards, "abuse or neglect of the child" necessarily includes the risks or threats of the environment in which the child is placed. . . . If a parent has neglected, sexually abused, or otherwise endangered her child's physical health or safety, such that initial and continued removal are appropriate, the child has been "remov[ed] from the parent under Chapter 262 for the abuse or neglect of the child."

402 S.W.3d 239, 248 (Tex. 2013). The Supreme Court further held in *In re E.C.R.* that a reviewing court may examine a parent's history with other children as a factor of the risks or threats of the environment. *Id*. ("Part of [the] calculus includes the harm suffered or the danger faced by other children under the parent's care."). Therefore, in light of *In re E.C.R.*, the Supreme Court held that K.N.D. was removed for abuse or neglect under chapter 262 of the Texas Family Code. The Court reversed the judgment of the court of appeals and remanded to the court of appeals for further proceedings.

3. In re S.M.R., S.W.3d , 57 Tex. Sup. Ct. J. 670 (Tex. June 6, 2014) [12-0963].

At issue in this case was whether the court of appeals applied an erroneous standard when reviewing the factual sufficiency of a parental termination judgment and whether the court could have affirmed the judgment on a termination ground not included in the judgment. In April 2009, the Department of Family and Protective Services (the Department) took temporary conservatorship of Sergio's three daughters and subsequently established a family-service plan for Sergio to follow in order to regain custody. Sergio completed several, but not all, of the service plan's requirements, and the Department sought termination of Sergio's parental rights.

The Department alleged endangerment of the children under subparts (D) and (E) of section 161.001(1) the Texas Family Code and the parent's failure to comply with court-ordered conditions (the service plan) for the children's return under subpart (O). The trial court terminated both parents' parental rights on the grounds of subparts (D) and (E), but did not include subpart (O) in the judgment. The court of appeals reversed, holding that there was insufficient factual evidence to support the endangerment grounds. The Supreme Court affirmed.

Although the Court agreed with the Department's argument that the trial court erred when it omitted subpart (O) from its judgment as a ground for terminating Sergio's parental rights, the Court disagreed that the this error was fundamental. The Court explained that the court of appeals was not procedurally obliged to consider an implied finding of subpart (O) since the trial court's judgment was facially complete. The Department next contended that it conclusively established subpart (O) as a ground for terminating the father's parental rights in its pleadings. Despite the Court agreeing that there were no factual disputes concerning any of the elements necessary to establish subpart (O), the Court determined that compliance with a family-service plan's requirements is a question of degree. Since the trial court decline to revoke Sergio's parental rights on the grounds of subpart (O), the Court held that the termination ground was not conclusively established, but was in factual dispute. The Department also contested the appellate court's review of the sufficiency of the evidence supporting subparts (D) and (E), but the Court concluded that the lower court followed the appropriate legal standard.

XIII. GOVERNMENTAL IMMUNITY

A. Contract Claims

1. Lubbock Cnty. Water Control & Improvement Dist. v. Church & Akin, L.L.C., 2012 WL 5059548 (Tex. App.—Amarillo 2012), *pet. granted*, 57 Tex. Sup. Ct. J. 53 (November 22, 2013) [12-1039].

The issue here is whether the Texas Legislature intended to waive governmental immunity for breach of lease claims. For a number of years the Lubbock County Water Control & Improvement District operated a marina on Buffalo Springs Lake, but in 2007 it sought proposals from contractors to shift operation of the marina into private hands. Church & Akin, L.L.C. ultimately won the marina contract and according to the terms of the lease agreement, Church & Akin would pay the Water District $3,000 annually plus a percentage of gross sales in exchange for leasing and operating the marina. The lease term was for three years, with an option to renew the lease for an additional five years.

The initial three year lease term ended in December 2010, and at a January 2011 meeting, the Water District board of directors expressed dissatisfaction with Church & Akin's hours and days of operation. Six months later the Water District gave Church & Akin a written notice of termination and asked Church & Akin to vacate the premises by August 20, 2011, even though Church & Akin had already paid, and the Water District accepted, the $3,000 lease payment for 2011. Church & Akin filed suit against the Water District alleging breach of contract, unconstitutional takings, and tortious interference with a business relationship.

The Water District filed a plea to the jurisdiction, which the trial court denied in its entirety. The Water District appealed, and the court of appeals in part and reversed in part. The court of appeals dismissed the takings and tort claims and remanded the case to the trial court on the breach of contract claim. The Water District

petitioned the Supreme Court for review, arguing that the Legislature waived governmental immunity for contracts relating to goods and services but did not waive immunity for real estate transactions. Church & Akin argues that as part of the lease agreement, it was required to provide a service in the form of operating the marina, and therefore the Water District does not enjoy governmental immunity for breaching the lease agreement.

The Court granted the petition for review and heard oral argument on January 8, 2014.

B. Derivative Immunity

1. Brown & Gay Eng'g, Inc. v. Olivares, 401 S.W.3d 363 (Tex. App.—Houston [14th Dist.] 2013), *pet. granted*, 57 Tex. Sup. Ct. J. 453 (April 25, 2014) [13-0605].

At issue in this case is whether a private entity that contracted with a governmental unit to carry out the governmental unit's statutory duties enjoys derivative governmental immunity. Pedro Olivares, Jr., as representative of a deceased motorist's estate, sued several defendants, including the Fort Bend County Toll Road Authority ("FBCTRA"), which operates a portion of the tollway on which the motorist had died, and Brown & Gay, an engineering firm that was FBCTRA's consultant in developing the tollway. Olivares alleged that FBCTRA was negligent in designing, building, and operating the tollway, and that Brown & Gay was negligent in designing certain tollway signs.

FBCTRA urged a plea to the jurisdiction based on governmental immunity. The trial court denied the plea and the court of appeals reversed. Brown & Gay then filed its own plea to the jurisdiction. The trial court granted it, but the court of appeals reversed and remanded. Brown & Gay filed a petition for review in the Supreme Court, arguing that tort claims against a private party should be precluded by governmental immunity when the governmental unit has delegated some of its statutory duties to be performed by that private party.

The Supreme Court granted Brown & Gay's petition for review and will hear oral argument on October 15, 2014.

C. Interlocutory Appeals

1. Dallas Cnty. v. Logan, 407 S.W.3d 745 (Tex. August 23, 2013) [12-0203].

At issue in this case is whether courts must consider arguments raised by a party for the first time on interlocutory appeal when the party files a plea to the jurisdiction based on governmental immunity. Roy Logan, former county deputy constable of Dallas County, filed suit against the county under the Whistleblower Act for declaratory and injunctive relief. The trial court denied the county's plea to the jurisdiction based on governmental immunity, prompting the county to file an interlocutory appeal. On interlocutory appeal, the court of appeals affirmed the trial court's denial and refused to consider new arguments raised by the county for the first time on appeal. The Supreme Court reversed and remanded the case, finding that section 51.014(a) of the Texas Civil Practice and Remedies Code does not preclude an appellate court from considering immunity grounds first asserted on interlocutory appeal.

2. Dallas Metrocare Servs. v. Juarez, 420 S.W.3d 39 (Tex. November 22, 2013) [12-0685].

At issue was whether a refusal to allow a governmental entity to raise on appeal new grounds to support its pleaded governmental immunity defense conflicts with the Court's prior decisions in *Waco Independent School District v. Gibson*, 22 S.W.3d 849 (Tex. 2000) and *Rusk State Hospital v. Black*, 392 S.W.3d 88 (Tex. 2012). Also at issue was whether the plaintiff's allegations were sufficient to show a waiver of the defendant's governmental immunity under the Tort Claims Act. After being sued by a patient who was struck by a falling whiteboard, a governmental entity filed a plea to the jurisdiction, arguing that the alleged injury did not arise from the "use" of personal property and the entity was immune from suit. The trial court denied the plea, and the defendant argued for the first time on appeal that the property's "condition" did not cause the accident. Because the defendant had not originally asserted that argument in the trial court, the court of appeals declined to consider it.

In *Rusk*, which the Supreme Court decided shortly after the court of appeals issued its opinion

in *Dallas Metrocare*, the Court held that because immunity from suit implicates a court's jurisdiction, a court should consider new immunity arguments on appeal. Relying on *Rusk*, the Court issued a per curiam opinion, in which it held that an appellate court must consider all of a defendant's immunity arguments, whether the governmental entity raised different jurisdictional arguments in the trial court or none at all. The Court further held that if the court of appeals based its judgment on the "use" prong, this was also error because Juarez had not demonstrated that the Act's "use" prong waived Metrocare's immunity. Therefore, the Court reversed the judgment of the court of appeals and remanded for further consideration of the defendant's jurisdictional arguments.

D. Recreational Use Statute

1. Univ. of Tex. at Arlington v. Williams, 2013 WL 1234878 (Tex. App.—Fort Worth 2013), *pet. granted*, 57 Tex. Sup. Ct. J. 307 (March 21, 2014) [13-0338].

At issue in this case is whether the Recreational Use Statute limits the liability of a property owner when a plaintiff is injured while exiting the premises after watching an outdoor sporting event. Sandra and Steve Williams paid admission and entered the University of Texas Arlington (UTA) Maverick Stadium to watch their daughter's soccer game. When the game ended, Sandra walked down the stadium stairs toward the field level, and at the bottom she stopped to wait for her daughter by a gate that separated the stands from the field, which, at other times, had been left open with a portable stairway to connect the stands to the track five feet below. While waiting, Sandra placed her hand on the gate—at this time secured with a rusted chain and padlock—and as she did so, it swung open. Sandra fell onto the track below, sustaining serious injuries, including a broken arm and rib.

The Williamses brought this premises liability lawsuit against UTA, with Sandra seeking to recover for her personal injuries and Steve for his loss of consortium. UTA responded with a plea to the jurisdiction and motion to dismiss, contending that: (1) the Recreational Use Statute limits its liability to the duty owed to a trespasser; (2) the Williamses did not raise a fact question on whether UTA was grossly negligent; and (3) the Williamses did not raise a fact question on whether UTA had actual or constructive knowledge of the premises defect. The trial court denied UTA's motions, and UTA filed an interlocutory appeal. The court of appeals affirmed, holding that watching a sporting event does not fall within the Recreational Use Statute, including its catchall provision covering "any other activity associated with enjoying the outdoors." *See* TEX. CIV. PRAC. & REM. CODE § 75.001(3)(L).

The Supreme Court granted UTA's petition for review and will hear oral argument on October 9, 2014.

E. Texas Tort Claims Act

1. Alexander v. Walker, S.W.3d , 57 Tex. Sup. Ct. J. 657 (Tex. June 6, 2014) [11-0606].

In this case, the Supreme Court considered whether an employee who is sued in his official capacity may be dismissed pursuant to subsection (a) of the Texas Tort Claims Act's (TTCA) election-of-remedies provision.

April Walker brought suit in state court against two Harris County Sheriff's Department employees (Officers) related to the Officers' conduct incident to her arrest. Walker filed a separate action against Harris County and the Harris County Sheriff in federal court, lodging essentially the same allegations. In state court, the Officers moved for summary judgment pursuant to the election-of-remedies provision of the TTCA. The trial court denied the motion, and the Officers filed an interlocutory appeal. The court of appeals affirmed, and the Officers petitioned the Supreme Court for review.

The Supreme Court considered whether the Officers were entitled to dismissal pursuant to subsection (a) or subsection (f) of the election-of-remedies provision. Relying on its opinion in *Texas Adjutant General's Office v. Ngakoue (TAGO)*, 408 S.W.3d 350 (Tex. 2013), the Court concluded that the Officers should have been dismissed under subsection (f). The Court explained that subsection (f) is the appropriate avenue for dismissal when an employee is considered to have been sued in his official capacity, while subsection (a) is the appropriate avenue for dismissal when an employee has been

sued in his individual capacity. Because the Court concluded that the Officers had been sued in their official capacities, it reversed the judgment of the court of appeals, and rendered judgment in favor of the Officers.

2. City of Watauga v. Gordon, S.W.3d , 57 Tex. S. Ct. J. 683 (Tex. June 6, 2014) [13-0012].

The Texas Tort Claims Act (Act) waives governmental immunity for personal injuries allegedly caused by the negligent use of property. But the Act does not waive immunity when the claim arises out of an intentional tort.

The question in this interlocutory appeal was whether an arrestee's lawsuit against a city for injuries, accidentally caused by a police officer's use of handcuffs, stated a battery, for which immunity had not been waived, or a negligence claim, for which the Act's waiver might apply. It was undisputed that the police officer did not intend to injure the arrestee when the officer allegedly handcuffed him too tightly. The court of appeals concluded that, because the injury was unintended, the underlying claim was for negligence and affirmed the trial court's order that had denied the city's governmental-immunity plea. The Supreme Court held that the underlying claim was an intentional tort—a battery—and accordingly reversed the court of appeals' judgment and dismissed the case. The Court concluded that battery includes not only harmful contact but offensive contact, such as handcuffing a person during an arrest. Moreover, battery may include subsequent injuries arising out of the initial offensive contact whether such injuries were intended or not.

3. Stinson v. Fontenot, S.W.3d , 57 Tex. Sup. Ct. J. 660 (Tex. June 6, 2014) [11-1015].

In this case, the Supreme Court considered whether an employee who is sued in his official capacity may be dismissed pursuant to subsection (a) of the Texas Tort Claims Act's (TTCA) election-of-remedies provision.

Tiffany Stinson brought suit in state court against a Harris County Sheriff's Department employee, Fontenot, related to the officer's conduct incident to her arrest. She filed a separate action against Harris County and the Harris County Sheriff in federal court, lodging essentially the same allegations. In state court, Fontenot moved for summary judgment pursuant to the election-of-remedies provision of the TTCA. The trial court denied the motion, and Fontenot filed an interlocutory appeal. The court of appeals reversed, holding that the officer was entitled to dismissal pursuant to subsection (a) of the election-of-remedies provision.

The Supreme Court agreed that Fontenot was entitled to dismissal, but pursuant to subsection (f) rather than subsection (a). Relying on its contemporaneously issued opinion in *Alexander v. Walker*, ___ S.W.3d ___ (Tex. 2014) (per curiam), the Court explained that subsection (f) is the appropriate avenue for dismissal when an employee is considered to have been sued in his official capacity, while subsection (a) is the appropriate avenue for dismissal when an employee has been sued in his individual capacity. Because the Court concluded that Fontenot had been sued in his official capacity, it disapproved of the court of appeals' reasoning, but affirmed its judgment.

4. Tex. Adjutant Gen.'s Office v. Ngakoue, 408 S.W.3d 350 (Tex. August 30, 2013) [11-0686].

This case involved the interpretation and application of section 101.106 of the Texas Civil Practice and Remedies Code, which is the election-of-remedies provision of the Texas Tort Claims Act (TTCA). At issue was the scope of section 101.106(b), which bars suit against a governmental unit when a plaintiff files suit against a government employee unless the governmental unit consents, and section 101.106(f), which generally provides for dismissal of a suit against a government employee for conduct that was within the scope of employment.

Michele Ngakoue was involved in a car wreck with Franklin Barnum, an employee of the Texas Adjutant General's Office (TAGO). Ngakoue filed suit against Barnum, but not his employer, alleging negligent operation of a motor vehicle, a claim for which the TTCA waives governmental immunity. Barnum filed a motion to dismiss the suit against him under section 101.106(f), arguing the collision occurred while he was acting within the course and scope of his employment with TAGO. Ngakoue filed an amended petition adding TAGO as a defendant,

but failed to properly dismiss Barnum. TAGO subsequently filed a plea to the jurisdiction and a motion to dismiss itself under section 101.106(b), alleging that because Ngakoue had sued Barnum, but had not properly dismissed Barnum within thirty days of Barnum's filing a motion to dismiss as required by subsection (f), subsection (b) barred suit against TAGO. The trial court denied Barnum's motion to dismiss and TAGO's plea. The court of appeals reversed the order denying Barnum's motion to dismiss but affirmed the denial of TAGO's plea to the jurisdiction. The court of appeals reasoned that Ngakoue's failure to comply with subsection (f) did not result in suit against TAGO being barred under subsection (b) because the government consented to suit via the waiver of immunity in the TTCA.

The Supreme Court affirmed. Rejecting TAGO's argument that a governmental unit does not "consent" to suit under subsection (b) via a waiver of immunity contained in the TTCA, the Court went on to address the effect of subsection (f) on subsection (b)'s bar to suit against the government when suit is filed against an employee. Subsection (f) provides in part that if a suit is brought against a government employee 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 employee in his official capacity only. Because a suit against a government employee in his official capacity is, in all but name only, a suit against the governmental unit itself, the Court held that such a suit does not trigger subsection (b)'s bar to suit against the government. The Court also addressed the impact of subsection (f)'s requirement that suit against an employee in his official capacity be dismissed on the employee's motion unless the plaintiff files amended pleadings substituting the governmental unit for the employee within thirty days of filing the motion. The Court held that subsection (f) is not an exception to subsection (b), but instead provides a procedure by which an employee who is considered to have been sued in his official capacity will be dismissed from the suit, whether by the plaintiff's amended pleadings or the trial court's order. Thus, a plaintiff's failure to amend his pleadings pursuant to subsection (f) does not bar subsequent suit against the government under subsection (b).

Justice Boyd, joined by Justices Johnson, Willett, and Guzman, dissented. The dissent concluded that subsections (b) and (f) are both triggered when a TTCA plaintiff sues a government employee based on conduct within the scope of employment, and that such plaintiffs can avoid dismissal of their claims against a governmental unit under subsection (b) only by complying with the procedure laid out in section 101.106(f). Because Ngakoue did not comply with subsection (f)'s procedure, the dissent opined, his claims against TAGO had to be dismissed under subsection (b). The dissent further concluded that Ngakoue's claims against TAGO did not fall within subsection (b)'s "consent" exception because Ngakoue did not comply with the jurisdictional requisites for waiver of immunity under the TTCA, which include the provisions of section 101.106.

5. Tex. Dep't of Aging & Disability Servs. v. Cannon, 383 S.W.3d 571 (Tex. App.—Houston [14th Dist.] 2013), *pet. granted*, 57 Tex. Sup. Ct. J. 641 (Tex. June 6, 2014) [12-0830].

At issue in this case is whether a trial court may grant a pending motion to dismiss governmental employees pursuant to subsection 101.106(e) of the Texas Tort Claims Act (TTCA) even when a plaintiff amends her pleadings to assert a new cause of action not brought under the TTCA. Mary Cannon's son was a resident of Brenham State School, one of the many state-supported living centers operated by the Texas Department of Aging and Disability Services (the Department). During an altercation, Cannon's son had to be restrained by employees of the school (Employees). He later died. Cannon brought suit against the Department and the Employees, alleging only state law tort claims. In response, the Department moved to dismiss the Employees pursuant to subsections 101.106(a) and (e) of the TTCA's election-of-remedies provision. The Employees moved for their own dismissal under the same subsections. The Department also filed a plea to the jurisdiction, asserting sovereign immunity. The motions and the plea were set for a hearing.

On the day of the hearing, Cannon amended her petition to add claims against both the Department and the Employees for violations of her son's Constitutional rights under 42 U.S.C. § 1983. Cannon later agreed to dismiss all her tort claims. Citing this dismissal, the trial court granted the Department's plea to the jurisdiction, granted the Department's motion to dismiss the Employees, and granted the Employees' motion to dismiss themselves relative to Cannon's tort claims. However, the trial court denied the same plea and motions relative to Cannon's section 1983 claims. The Department and the Employees filed an interlocutory appeal.

In the court of appeals, the Department and the Employees challenged the trial court's denial of their motions to dismiss the Employees. They argued that the trial court should not have considered Cannon's amended petition alleging claims under section 1983 because those claims were not "before the court" as a result of the Department's subsection (e) motion, by which a trial court is directed to dismiss governmental employees "immediately." TEX. CIV. PRAC. & REM. CODE § 101.106(e). The court of appeals disagreed, and concluded that because the trial court had not signed an order dismissing the employees, the plaintiff's amendment to her petition had been effective. For that reason, the court of appeals affirmed the trial court's denial of the motions to dismiss the employees.

The Supreme Court granted the Employees and the Department's petition for review and will hear oral argument on September 18, 2014.

XIV. INSURANCE

A. Duty to Defend

1. McGinnes Indus. Mgmt. Corp. v. Phoenix Ins. Co., *certified question accepted*, 57 Tex. Sup. Ct. J. 884 (June 23, 2014) [14-0465].

At issue in this case is whether an insurer's duty to defend is triggered by letters and orders from the Environmental Protection Agency (EPA) to an insured. In 2005, in response to its determination that three ponds contained hazardous material, the EPA sent a series of demand letters to McGinnes Industrial Management Corporation. The letters named McGinnes a Potentially Responsible Party (PRP) for the material, asserted McGinnes may be responsible for clean-up costs, invited the company to enter negotiations, requested documents, and asked a number of questions. Additionally, the letters noted the EPA's authority under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to fine McGinnes for failing to respond, and demanded McGinnes cover the costs the EPA had already incurred. Because McGinnes failed to respond to the offers to negotiate, the EPA issued a Unilateral Administrative Order stating McGinnes was liable for penalties, including punitive damages.

McGinnes asked its insurers—Phoenix Insurance and Travelers Indemnity (collectively, Travelers)—to provide a defense pursuant to the commercial general liability (CGL) policy it had issued to McGinnes. Travelers refused to defend, claiming that no suit had been filed. The district court agreed that the EPA's actions had not triggered the duty to defend. But, because the issue has not been decided by the Texas Supreme Court or any court of appeals in Texas, the U.S. Court of Appeals for the Fifth Circuit certified the following question to the Court: Whether the EPA's PRP letters and/or Unilateral Administrative Order, issued pursuant to CERCLA, constitute a "suit" within the meaning of the CGL policies, triggering the duty to defend.

McGinnes argues that the term "suit" is ambiguous and, because ambiguities in insurance policies are interpreted in favor of the insured, a broad definition applies. Travelers argues that a broad definition of "suit" renders the term "claim" in the CGL policy meaningless, as the policy drafters intended the two to convey different meanings.

The Court has not yet scheduled oral argument.

B. Hospital Lien Statute

1. McAllen Hosps., L.P. v. State Farm Cnty. Mut. Ins. Co. of Tex., S.W.3d , 57 Tex. Sup. Ct. J. 579 (May 16, 2014) [12-0983].

At issue in this case was whether an insurer's issuance of a settlement draft made jointly payable to a lienholder hospital and a claimant releases the insurer from liability under the Texas Hospital Lien Statute. A driver insured by State Farm caused a multi-vehicle accident. McAllen

Medical Center (the Hospital) provided medical services to the injured parties and then secured liens on their causes of action against the driver, including any settlement proceeds. The injured parties filed bodily injury claims with State Farm. State Farm settled with two claimants and issued each a check that was jointly payable to the Hospital and the claimant. The claimants successfully cashed the checks without the Hospital's knowledge or endorsement. The Hospital remains unpaid.

The Hospital sued State Farm, alleging a violation of the Texas Hospital Lien Statute for settling the claims without first resolving the Hospital's liens. The trial court granted State Farm's motion for summary judgment and denied the Hospital's cross-motion. The court held there was no genuine issue of material fact as to whether State Farm had discharged its duty to protect the Hospital's liens. The court of appeals affirmed, holding that State Farm discharged its statutory duty by including the Hospital as a copayee. The Hospital filed a petition for review, arguing that the court of appeals' holding defeats the purpose of the Hospital Lien Statute, which is intended to protect hospitals' right to reimbursement after providing emergency medical service to injured victims who are unable to pay their bills.

The Supreme Court reversed. Under the Statute, if a 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 against the person whose negligence necessitated the treatment is invalid. Because State Farm attempted to meet its obligations by issuing checks, the Court applied the Uniform Commercial Code to hold that State Farm failed to pay the Hospital as required. The Court agreed with State Farm that delivery of the checks to the patients constituted constructive delivery of the checks to the Hospital, however, such delivery did not constitute payment to the Hospital. Specifically, the Court held that payment to one nonalternative copayee without the endorsement of the other is not payment to a "holder" as the UCC requires. Accordingly, State Farm did not discharge its liability to the Hospital on the instrument or the underlying obligation. As a result, the Hospital's liens on the patients' causes of action against the insured driver remained intact.

The Court also questioned the propriety of reading into the Hospital Lien Statute a cause of action for enforcement against a third-party insurer. However, the Court held that resolution of this issue would be improper, as it was not raised in the trial court or the court of appeals. Accordingly, the Court reversed the court of appeals' judgment and remanded the case to the trial court for further proceedings.

C. Policies/Coverage

1. Ewing Constr. Co. v. Amerisure Ins. Co., 420 S.W.3d 30 (Tex. January 17, 2014) [12-0661].

At issue in this case was the interpretation of the contractual liability exclusion in a Commercial General Liability (CGL) insurance policy. Ewing Construction Company, Inc. (Ewing) entered into a contract with Tuluso-Midway Independent School District (TMISD) to serve as general contractor to, among other things, construct tennis courts at a school in Corpus Christi. Shortly after construction of the tennis courts was completed, TMISD complained that the courts started flaking, crumbling, and cracking. TMISD filed suit in Texas state court against Ewing and others. Its damage claims against Ewing were based on alleged faulty construction of the courts and its theories of liability were breach of contract and negligence. Ewing tendered defense of the suit to its insurer, Amerisure Insurance Company, but Amerisure denied coverage. Ewing filed a coverage suit in the U.S. District Court for the Southern District of Texas. The district court granted Amerisure's motion for summary judgment, finding that the contractual liability exclusion in the CGL policy, which provides that the insurance does not apply to property damage "for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement," precluded coverage. Ewing appealed and the United States Court of Appeals for the Fifth Circuit certified the following questions to the Texas Supreme Court:

> 1. Does a general contractor that enters into a contract in which it agrees to perform its construction work in a good and workmanlike manner, without more specific provisions enlarging this obligation, "assume

liability" for damages arising out of the contractor's defective work so as to trigger the Contractual Liability Exclusion?

2. If the answer to question one is "Yes" and the contractual liability exclusion is triggered, do the allegations in the underlying lawsuit alleging that the contractor violated its common law duty to perform the contract in a careful, workmanlike, and non-negligent manner fall within the exception to the contractual liability exclusion for "liability that would exist in the absence of contract."

The Court answered the first question "no," concluding that Ewing's express agreement to perform the construction in a good and workmanlike manner did not enlarge its general law obligations and was not an "assumption of liability" within the meaning of the policy's contractual liability exclusion. The Court relied on *Gilbert Texas Construction, L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118 (Tex. 2010), in which the Court interpreted the contractual liability exclusion in a CGL policy and held that the contractual liability exclusion did not apply so narrowly as to apply only to an agreement in which the insured assumes the liability of *another*, but applied when a liability was contractually assumed. The Court held that TMISD's allegations that Ewing failed to perform in a good and workmanlike manner were substantively the same as its claims that Ewing negligently performed under the contract because they contained the same factual allegations and alleged misconduct. Because the Court answered the first question "no," it did not answer the second.

2. Greene v. Farmers Ins. Exch., 376 S.W.3d 278 (Tex. App.—Dallas 2012), *pet. granted*, 57 Tex. Sup. Ct. J. 10 (October 18, 2013) [12-0867].

At issue in this case is whether an insurance company can deny a claim based on a policy condition that did not contribute to the insured's loss. Lawyane Greene owned a home with a homeowner's insurance policy issued by Farmers Insurance Exchange (FIE). The policy contained a vacancy provision, which suspended damage coverage sixty days after the house became vacant. Greene moved into a nursing home and put up the house for sale. Four months later, a fire spread from a neighboring property to Greene's house, causing damage. FIE denied coverage based upon the vacancy provision. FIE asserted that it was not required to show that the vacancy contributed to Greene's loss in order to deny coverage.

Greene brought the underlying action against FIE. The trial court held that FIE breached the insurance contract and that Greene's violation of the vacancy clause did not render the policy void. The trial court concluded that Insurance Code Section 862.054 required FIE to establish that Greene's violation contributed to the loss before it could assert the vacancy clause as a defense. As a result, the trial court awarded Greene damages. The court of appeals reversed, holding that section 862.054 did not apply and rendered a take-nothing judgment. The Supreme Court granted Greene's petition for review and heard oral argument on January 7, 2014.

3. In re Deepwater Horizon, *certified question accepted*, 56 Tex. Sup. Ct. J. 1192 (September 6, 2013) [13-0670].

At issue in this case is whether an insurer can deny coverage to an additional insured on an umbrella insurance policy because the named insured has a contractual obligation to indemnify the additional insured for the covered loss. Transocean owned the Deepwater Horizon, an off-shore drilling unit that sank into the Gulf of Mexico in 2010 following an onboard explosion. At the time of the accident, the Deepwater Horizon was engaged in exploratory drilling activities under a Drilling Contract between Transocean and British Petroleum (BP). The Drilling Contract required Transocean to name BP as an additional insured "in each of [Transocean's] policies, except Workers' Compensation for liabilities assumed by [Transocean] under the terms of this Contract." Another provision of the Drilling Contract that addressed pollution-related liabilities specified that Transocean would assume liability "for pollution or contamination . . . originating on or above the surface of the land or water." After BP notified Transocean's insurers of its pollution-related losses, the insurers filed a declaratory judgment action against BP in federal district court, seeking a declaration of no

coverage. The district court granted summary judgment for the insurers. The United States Court of Appeals for the Fifth Circuit initially reversed, but on rehearing, the panel withdrew its decision and issued an order certifying the following questions to the Supreme Court of Texas:

1. Whether *Evanston Ins. Co. v. ATOFINA Petrochems., Inc.*, 256 S.W.3d 660 (Tex. 2008), compels a finding that BP is covered for the damages at issue, because the language of the umbrella policies alone determines the extent of BP's coverage as an additional insured if, and so long as, the additional insured and indemnity provisions of the Drilling Contract are "separate and independent"?
2. Whether the doctrine of *contra proferentem* applies to the interpretation of the insurance coverage provision of the Drilling Contract under the *ATOFINA* case, 256 S.W.3d at 668, given the facts of this case?

The Supreme Court accepted the certified questions on September 6, 2013 and will hear oral argument September 16, 2014.

4. Lennar Corp. v. Markel Am. Ins. Co., 413 S.W.3d 750 (Tex. August 23, 2013) [11-0394].

Lennar Homes used exterior insulation and finish systems (EIFS) in hundreds of its homes in the 1990s. After learning that homes with EIFS suffered severe and often hidden water-related damage, Lennar undertook to remove the product from all the homes it had built and replace it with conventional stucco. Lennar notified its insurers that it would seek indemnification for the remediation costs, but the insurers refused to participate. Almost all homeowners accepted Lennar's remediation offer and the few that did sue settled. After its insurers denied coverage, Lennar sued. The trial court granted summary judgment for all insurers, but the court of appeals reversed in part, regarding Lennar's claims against two of its insurers. After remand, and a settlement with Lennar's primary insurer, the case went to trial with Markel as the only remaining defendant. The trial court rendered judgment on the verdict for Lennar. The court of appeals reversed and rendered judgment for Markel, but the Supreme Court reversed and affirmed the trial court's judgment for Lennar.

There were two issues presented to the Court: (1) whether an insurer who had not consented to a homebuilder's remediation program is nonetheless responsible for the costs if it suffered no prejudice as a result; and (2) whether an insurer is responsible for costs to determine property damage as well as the repair, and for costs to remedy damage that began before and continued after the policy period.

The parties accepted as law of the case the court of appeals' prior holdings that (1) Markel's liability would not be excused under a policy condition — forbidding Lennar from making a "voluntary payment" without the insurer's consent — unless Markel could prove, as a matter of fact, that it had been prejudiced by Lennar's remediation program; and (2) Lennar's costs to remove and replace EIFS as a preventative measure were not covered by the policy, and Lennar must therefore separate those costs from the costs to repair water damage to the homes.

Markel argued to the Court that it had shown prejudice as a matter of law, and even if it had not, that it could insist on compliance with a separate provision with similar "consent to settlement" language without proving prejudice. The Court rejected these arguments, concluding that the purpose of both provisions was the same and the requirement that Markel show prejudice from Lennar's non-compliance with either operated identically. Because Markel had failed to convince the jury that it was prejudiced by Lennar's settlements with homeowners, Lennar's settlements established both Lennar's legal liability for the property damages and the basis for determining the amount of loss that Markel was obligated to pay under the policy.

As to the second issue, the Court concluded that under no reasonable construction could the cost of finding EIFS property damage in order to repair it not be considered to be "because of" the damage and thus covered by the policy. Also, there was no question that all the homes at issue suffered property damage, which began before or during the policy period and continued until it was repaired, and the policy expressly covered "continuous or repeated exposure to the same general harmful condition." Thus, the Court

concluded that the policy covered Lennar's total remediation costs. The Court rejected apportioning the costs pro rata among Lennar's other insurers, instead leaving up to insurers who share responsibility for a loss to allocate it among themselves according to their subrogation rights.

Justice Boyd concurred, but wrote separately to address the prejudice issue. Justice Boyd would have held that the insurance policy did not cover Lennar's liabilities because Lennar incurred those liabilities through settlements to which Markel had not consented. However, because the Court's prior jurisprudence disregards a policy's consent requirement unless the insurer can prove harm or prejudice, he concurred in the opinion but urged the Court to say that the prejudice requirement stems from public policy, not from the basis of contract principles.

D. Subrogation

1. Allstate Ins. Co. v. Spellings, 388 S.W.3d 729 (Tex. App.—Houston [1st Dist.] 2012), *pet. granted*, 56 Tex. Sup. Ct. J. 1212 (September 20, 2013) [12-0824].

At issue in this case is whether the doctrine of equitable subrogation allows an insurer to settle a third-party claim against its insured and later stand in the shoes of that third party to recover liability payments from other alleged tortfeasors. Seventeen-year-old Amber Jeffrey was legally intoxicated when she lost control of her vehicle and collided with another vehicle occupied by Jim and Helen Haywood. The impact killed Amber and left the Haywoods severely injured. Allstate Insurance Company, the liability insurer for Amber and her father, Scott Jeffrey, settled with the Haywoods. Scott then filed a wrongful-death suit against five other parties (collectively "respondents") alleged to have contributed to the fatal event. Allstate claimed it was entitled to intervene based on contractual subrogation (for payments made to Scott) and equitable subrogation (for payments made to the Haywoods).

The respondents moved for summary judgment against Allstate, arguing Allstate was precluded from recovery under any subrogation theory because it abandoned the claims of its insured by settling with the Haywoods. The trial court granted summary judgment in favor of the respondents for claims based on payments made to the Haywoods and severed the equitable subrogation claim. The court of appeals affirmed, concluding Allstate was not entitled to recoup payments made to the Haywoods under an equitable-subrogation theory. The court of appeals distinguished this claim from *Frymire Engineering Co. ex rel. Liberty Mutual Insurance Co. v. Jomar International, Ltd.*, 259 S.W.3d 140 (Tex. 2008), based on the voluntary nature of Allstate's payment.

Allstate petitioned the Supreme Court for review. Allstate argues the court of appeals ignored this state's broad application of equitable subrogation in the insurance context. Specifically, Allstate contends *Frymire* provides direct support for its position. The respondents argue that Allstate used the guise of an equitable subrogation claim to bypass Texas law forbidding settling tortfeasors from seeking contribution. Respondents assert Allstate could only recover such contribution if the claim was prosecuted through its insured, rather than through settlement with the Haywoods. The Supreme Court granted the petition for review and heard oral argument on December 3, 2013.

XV. INTENTIONAL TORTS

A. Defamation

1. Burbage v. Burbage, 2011 WL 6756979 (Tex. App.—Austin 2011), *pet. granted*, 57 Tex. Sup. Ct. J. 53 (November 22, 2013) [12-0563].

This defamation action presents issues involving the common-interest privilege, excessive damages, and the propriety of a permanent injunction restraining speech. W. Kirk Burbage (Kirk) and Allen Chadwick Burbage (Chad) are brothers with a history of conflict over family-owned assets, including a funeral home and a cemetery. The brothers' mother and grandmother transferred their respective interests in the cemetery to Kirk. Kirk claims that in 2007, Chad sent letters to the descendants of non-Burbage family members buried in the cemetery. These letters declared that the families did not have authority to put their loved ones in the cemetery and advised them that the brothers were in conflict. Chad then created and publicized a website on which he criticized Kirk's treatment of their mother and grandmother, describing it as

elder abuse, and stated that "Kirk has also been known to abuse the dead, specifically his cousin, Anne Prettyman Jones." In 2008, Chad also sent two letters to Bryce and Shirley Phillips, who had purchased mausoleums in the cemetery. These letters accused Kirk of elder abuse as well as committing fraud, abusing family members, and operating the cemetery without a license. Kirk sued Chad for defamation. The trial count rendered judgment on the jury's verdict in Kirk's favor, awarding him $3.8 million in compensatory damages, $3.5 million of which were for future injury to reputation, and $5.8 million in exemplary damages. The trial court also permanently enjoined Chad from publishing statements to third parties that were of the same or a similar nature to those at issue in the lawsuit. The court of appeals affirmed the award of compensatory damages, holding in pertinent part that the common-interest privilege did not apply with respect to the letters sent to the Phillipses and that the award was not excessive. The court of appeals also modified the award of exemplary damages, reducing it to $750,000 and vacated the permanent injunction as an unconstitutional prior restraint on speech.

The Supreme Court granted the parties' petitions for review and heard oral argument on January 9, 2014.

XVI. JURISDICTION

A. Personal Jurisdiction

1. Moncrief Oil Int'l, Inc. v. OAO Gazprom, 414 S.W.3d 142 (Tex. August 30, 2013) [11-0195].

At issue in this case was whether there was personal jurisdiction over Russian entities in Texas state court regarding misappropriation of alleged trade secrets from two meetings in Texas with a Texas company about a proposed joint venture in Texas. On two separate occasions, OAO Gazprom and Gazprom Export, LLC (collectively, Gazprom) met with Moncrief Oil International, Inc. (Moncrief) in Texas, where Moncrief disclosed alleged trade secrets regarding a proposed joint venture with Gazprom and Occidental Chemical Corporation (Occidental) to build and operate a facility in Texas to import natural gas from Russia. Gazprom later met with Occidental to allegedly encourage it to pursue the joint venture without Moncrief. A Gazprom subsidiary subsequently established an entity in Texas to sell natural gas domestically. Moncrief sued the Gazprom entities for misappropriation of trade secrets and tortious interference. The trial court granted Gazprom's special appearance, and the court of appeals affirmed.

The Supreme Court held that there was personal jurisdiction over Gazprom as to the trade secrets claim. Gazprom claimed it did not purposefully avail itself in Texas because its intent in meeting with Moncrief in Texas was to discuss an unrelated federal suit. But what parties thought and said is no evidence of jurisdictional contacts. Rather, Gazprom's attendance at the meetings in Texas, where it received alleged trade secrets developed in Texas by a Texas company regarding a proposed Texas joint venture, was sufficient to confer jurisdiction. However, the Supreme Court held that there was no personal jurisdiction over Gazprom as to the claims that Gazprom tortiously interfered with Moncrief's relationship with Occidental. The tortious interference claims either arose from Gazprom's California contacts (which could not support jurisdiction in Texas) or from the contacts of a Gazprom subsidiary no longer in the proceeding that could not be imputed to Gazprom. The Supreme Court also affirmed the trial court's refusal to compel additional depositions because Moncrief did not demonstrate what additional jurisdictional contacts those depositions might reveal. The Court remanded for further proceedings.

XVII. MARITIME LAW

A. Admiralty Jurisdiction

1. Schlumberger Tech. Corp. v. Arthey, S.W.3d , 57 Tex. Sup. Ct. J. 840 (Tex. June 20, 2014) [12-1013].

The issue in this case was whether, under the tests prescribed by the United States Supreme Court in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995), admiralty jurisdiction existed when a driver, after having become intoxicated on a small, chartered fishing boat, later, while driving home, crossed into oncoming traffic and struck two motorcyclists. Schlumberger Technology Corp. invited employees from some of its business partners, along with several of its salesman, to a retreat at Schlumberger's expense at Shoal Grass

Lodge in Aransas Pass near the Gulf of Mexico. For three days, Schlumberger had the Lodge provide the guests with rooms, meals, an open bar, and a total of eight to ten hours of bay fishing from small boats with professional guides. The Lodge did not provide alcoholic beverages on the boats, but Schlumberger's outfitter could "make it happen," and did, at guests' request. On Friday morning, David Huff, an employee of Petrobras America, Inc., a Schlumberger employee named William Ney, and a guide left the Lodge on a fishing boat between 9:00 and 10:00. Neither Huff nor Ney remember whether there was alcohol on the boat, though Huff assumed so, and there had been the day before. Ney recalled that Huff was drinking something from a can wrapped in a "koozie," though Huff slept most of the time they were out. The boat returned to the lodge between 12:30 and 1:00 p.m., and Huff left to drive home. At 2:34 p.m., approximately 40 miles from the Lodge, Huff crossed into oncoming traffic and struck a motorcycle ridden by Christopher and Denise Arthey. Both Artheys were severely injured. An expert retained by the Artheys extrapolated Huff's blood alcohol content at the time of the accident to be 0.31.

The Artheys sued Schlumberger, alleging that it negligently allowed Huff to drink excessively. The Artheys asserted that federal maritime law applied because Huff became intoxicated while on the fishing boat. The trial court granted summary judgment for Schlumberger, and the Artheys appealed. The court of appeals reversed and remanded, concluding that maritime law applied and that fact issues precluded summary judgment.

The Supreme Court reversed and rendered judgment in favor of Schlumberger, holding that maritime law did not apply because the action did not fall within admiralty jurisdiction. To determine the applicability of admiralty jurisdiction, the Court utilized the tests prescribed in *Grubart*, which focus on the location of the incident in question and the connection between the incident and the federal interest in the regulation of maritime commerce. The Court found that the evidence presented a factual dispute over whether the Artheys could satisfy the location test. Specifically, Ney's presence on the boat where he could see Huff's condition and his subsequent inaction were viewed as at least some evidence that Schlumberger's challenged conduct — its failure to prevent Huff from drinking just before driving home — occurred on the boat. However, the Court determined that the Artheys' action failed to satisfy each of the two parts of the connection prong because: (1) the incident, described at an intermediate level of generality as the consumption of alcoholic beverages by guests aboard small, chartered fishing boats on navigable waters, posed merely a fanciful risk to commercial shipping; and (2) the general character of the activity in question, the consumption of alcoholic beverages by a guest aboard a small, chartered fishing boat on navigable waters, was not substantially related to traditional maritime activity.

B. Specific Orders Doctrine

1. King Fisher Marine Serv., L.P. v. Tamez, 2012 WL 1964567 (Tex. App.—Corpus Christi 2012), *pet. granted*, 57 Tex. Sup. Ct. J. 10 (October 18, 2013) [13-0103].

At issue in this maritime case is: 1) whether a general order given in an emergency should be the legal equivalent of a specific order; and 2) whether a jury charge objection presented before the charge is read to the jury but after the deadline posed by a docket control order is timely. In 2008, Jose H. Tamez injured his back while working aboard a drudging vessel. The injury occurred when Tamez responded to his captain shouting at him to assist him and another shipman attempting to lift and control a heavy object. Tamez aided the men, but may have failed to drop the tool he held, forcing him to lift with only one arm and causing the injury. When Tamez sued his employer King Fisher, King Fisher asserted that Tamez's negligent response to the order contributed to his injuries. Prior to trial, the trial court judge instructed the parties to have their proposed jury charges and objections before the court by a certain time. After that deadline, but before the charge was read, King Fisher made one objection that the trial court deemed untimely and refused to consider. A jury found that both King Fisher and Tamez were negligent and each was 50% responsible for Tamez's injuries, but determined that Tamez's actions were in response to a specific order. The trial court entered

judgment on the verdict without reducing the recovery for Tamez's percentage responsibility. The court of appeals affirmed the trial court's application of the specific orders doctrine and found King Fisher waived its jury charge argument for untimeliness.

The Supreme Court granted King Fisher's petition for review and heard oral arguments on December 5, 2013.

XVIII. MEDICAL LIABILITY

A. Expert Reports

1. Zanchi v. Lane, 408 S.W.3d 373 (Tex. August 30, 2013) [11-0826].

This case involved the expert-report requirement of the Texas Medical Liability Act (TMLA). At issue was whether a plaintiff complies with the TMLA's mandate that the report be served on a "party" by serving it on a defendant who has not yet been served with process. Reginald Lane filed health care liability claims under the TMLA against Michael Zanchi, M.D., and others. The TMLA requires a plaintiff to serve an expert report on each party within 120 days of filing a petition. Before Zanchi was served with citation, Lane sent an expert report to Zanchi's place of employment via certified mail within the 120-day deadline. After subsequently being served with citation, Zanchi filed a motion to dismiss, arguing that he was not a "party" to Lane's suit until he was served with process, so any transmittal of the report to him before the date he was served with process could not satisfy the TMLA's requirements. The trial court denied the motion to dismiss, and the court of appeals affirmed.

The Supreme Court affirmed, holding that a defendant named in a health care liability claim under the TMLA is a party regardless of whether he has been served with process. The Court held that this interpretation of the term "party" is consistent with the common law as well as the purpose of the expert-report requirement, which is to eliminate frivolous claims early in the litigation while preserving meritorious ones. The Court went on to examine the TMLA's requirement that a defendant file and serve any objections to the sufficiency of an expert report within twenty-one days of service, holding that when a defendant is served with a report before being served with process, the objection period does not begin to run until service of process is accomplished. Because Zanchi filed no objections to the sufficiency of the report within twenty-one days of being served with process, such objections were waived. Finally, the Court held that the method of service of an expert report prior to service of process need not comply with the requirements of Rule 106 of the Texas Rules of Civil Procedure, which apply solely to service of citation.

B. Health Care Liability Claims

1. Bioderm Skin Care, LLC v. Sok, 426 S.W.3d 753 (Tex. March 28, 2014) [11-0773].

At issue in this case was whether a negligence claim against a physician and his limited liability company alleging injuries arising during laser hair removal constitutes a health care liability claim. Veasna "Sandee" Sok received a laser hair removal treatment from Bioderm Skin, LLC that allegedly caused burns and scarring to her legs. She sued Bioderm and Dr. Quan Nguyen, a licensed physician and Bioderm's sole member, for negligence. The defendants asserted in their answers that Sok's claim was a health care liability claim and later moved for dismissal after Sok failed to serve an expert report. The trial court denied the motion, and the court of appeals affirmed.

The Supreme Court held that under *Loaisiga v. Cerda*, 379 S.W.3d 248, 252 (Tex. 2012), the Medical Liability Act creates a rebuttable presumption that a patient's claims against a physician or health care provider based on facts implicating the defendant's conduct during the patient's care, treatment, or confinement are health care liability claims. Because Dr. Nguyen, as sole member of Bioderm, had the power to direct its management and policies, the Court held that Bioderm constituted a health care provider as an affiliate of a physician. Also, Sok's medical records indicate she was Dr. Nguyen's patient. Accordingly, the rebuttable presumption that Sok's claim is a health care liability claim applied.

The Court further held that Sok did not rebut this presumption. Because federal regulation limits the procurement of such a laser to medical practitioners for supervised use in their medical practices, a physician must provide testimony regarding its proper use. Additionally, the

extensive six-month training regimen Dr. Nguyen imposes on Bioderm employees before they may operate the laser demonstrates that proper use of the laser is outside the common knowledge of laypersons. Because expert health care testimony is needed to prove or refute the merits of her claim, Sok failed to rebut the presumption that her claim was a health care liability claim. And because Sok did not serve the statutorily required expert report, the trial court was required to dismiss her claim. The Supreme Court reversed the court of appeals' judgment and remanded for the trial court to dismiss the claim and consider Dr. Nguyen's and Bioderm's request for costs and attorneys' fees.

2. Psychiatric Solutions, Inc. v. Palit, 414 S.W.3d 724 (Tex. August 23, 2013) [12-0388].

At issue in this case was whether an employee's claims against his mental health hospital employer alleging inadequate security and training were health care liability claims. Kenneth Palit was a psychiatric nurse at Mission Vista Behavioral Health Center. He was injured at work while restraining a patient during a behavioral emergency and sued the operators of the center (Mission Vista) regarding his personal injuries. When he failed to timely file an expert report, Mission Vista moved to dismiss. The trial court denied the motion to dismiss and the court of appeals affirmed.

The Supreme Court held that the claims were health care liability claims in light of the 2003 amendments to the Texas Medical Liability Act (TMLA). Those amendments broadened the TMLA to include claims by claimants, not just patients, for alleged departures from standards of medical care, health care, safety, or professional or administrative services directly related to health care. Palit's suit alleged that Mission Vista failed to provide proper security, a safe working environment, and training. These allegations claimed departures from accepted standards of health care and safety, making Palit a claimant and his claim health care liability claims. Because the TMLA requires dismissal of health care liability claims when no expert report is timely filed, the Court dismissed the claims and remanded to the trial court for an assessment Mission Vista's request for statutory attorney's fees.

Justice Boyd, joined by Justice Lehrmann, concurred. The concurrence agreed with the Court's disposition of the claims at issue, but disagreed with the Court's construction of the TMLA that claims of violations of safety standards do not have to be directly related to health care. But because the claims in this case were directly related to health care, the concurrence agreed they were health care liability claims.

3. Rio Grande Valley Vein Clinic, P.A. v. Guerrero, S.W.3d , 57 Tex. Sup. Ct. J. 484 (Tex. April 25, 2014) [12-0843].

At issue in this case was whether a negligence claim against a professional association alleging injuries arising during laser hair removal constitutes a health care liability claim. Guerrero received a laser hair removal treatment from Rio Grande Valley Vein Clinic, P.A. that allegedly caused burns and scarring to her face, chin, and neck. She sued the clinic for negligence. The clinic asserted in its answer that Guerrero's claim was a health care liability claim and later moved for dismissal after Guerrero failed to serve an expert report. The trial court denied the motion, and the court of appeals affirmed.

The Supreme Court held that under *Bioderm Skin Care, LLC v. Sok*, 426 S.W.3d 753 (Tex. 2014), claims for improper laser hair removal are health care liability claims due to the necessity of expert health care testimony to prove or refute the claims. As in *Bioderm*, a rebuttable presumption that her claim was a health care liability claim applies because Guerrero sued a physician and health care provider over injuries allegedly received during care or treatment.

The Court further held that Guerrero did not rebut the presumption that her claim is a health care liability claim because the laser at issue is subject to federal regulations requiring the surgical device to be acquired only by medical practitioners for supervised use in their medical practices, and this regulation indicated that proper operation of the device is not within the common knowledge of laypersons. Because expert health care testimony is needed to prove or refute the merits of her claim, Guerrero did not rebut the presumption that her claim is a health care

liability claim. And because Guerrero failed to serve the statutorily required expert report, the trial court was required to dismiss her claim. The Supreme Court reversed the court of appeals' judgment and remanded for the trial court to dismiss the claim and consider the clinic's request for costs and attorney's fees.

4. Ross v. St. Luke's Episcopal Hosp., 2013 WL 1136613 (Tex. App.—Houston [14th Dist.]), *pet. granted*, 57 Tex. Sup. Ct. J. 885 (June 27, 2014) [13-0439].

At issue in this case is whether a claim for negligence should be considered a health care liability claim for purposes of the Texas Medical Liability Act (TMLA) when the injury and its cause are unrelated to the provision of health care. Lezlea Ross suffered personal injuries when she slipped and fell on a wet floor in the lobby of St. Luke's Episcopal Hospital. Ross was a visitor at the hospital, not a patient. After the fall, Ross was not admitted to or treated by St. Luke's. One month later, Ross sued St. Luke's, asserting that the hospital acted negligently by failing to make the premises safe. St. Luke's then filed a motion to dismiss Ross's claims for failure to serve an expert report within 120 days of filing suit, as required by the TMLA.

The trial court granted St. Luke's motion to dismiss. The court of appeals affirmed, holding that because Ross's claim was related to safety, to which the TMLA applies, the Court's holding in *Texas West Oaks Hospital, LP v. Williams*, 371 S.W.3d 171 (Tex. 2012), demanded that Ross was required to serve an expert report. The Supreme Court granted Ross's petition for review and will hear oral argument on November 5, 2014.

XIX. NEGLIGENCE

A. Affirmative Defenses

1. Dugger v. Arredondo, 408 S.W.3d 825 (Tex. August 30, 2013) [11-0549].

The issue in this case was whether the common law unlawful acts doctrine survives as an independent affirmative defense in light of Texas's proportionate responsibility scheme and the statutory affirmative defense provided in section 93.001 of the Texas Civil Practice and Remedies Code. Geoffrey Dugger, 25, and Joel Martinez, 21, spent one Friday evening watching TV, eating pizza, drinking tequilla, smoking a marijuana "blunt," and snorting "cheese"—a mixture of black tar heroin and Tylenol PM—in Dugger's bedroom in the house he shared with his parents. As the evening progressed, Martinez fell asleep on Dugger's bed and then began vomiting while still unconscious. Dugger tried to wake him to no avail and yelled down the hall to his parents. Dugger called Martinez's mother, Mary Ann Arredondo, and told her Martinez had been drinking and was throwing up. After about fifteen minutes, Dugger's father called 911, and an ambulance and police arrived at the Dugger house. Dugger never told the authorities nor Arredondo that Martinez had ingested heroin. Martinez died shortly after reaching the hospital.

Arrendondo sued Dugger under the wrongful death and survival statutes, alleging that Dugger was negligent both in failing to call 911 immediately and in failing to disclose Martinez's heroin use to the paramedics. Dugger raised an affirmative defense based on the common law unlawful acts doctrine, which bars a plaintiff from recovering if the plaintiff was engaged in an unlawful act at the time of the injury that was inextricably intertwined with the injury. The trial court granted summary judgment on Dugger's affirmative defense. The court of appeals reversed, holding that section 93.001 of the Civil Practice and Remedies Code supersedes the common law unlawful acts doctrine. Dugger appealed to the Supreme Court.

Affirming the court of appeals' judgment, the Supreme Court held that the common law unlawful acts doctrine is not available as an affirmative defense in personal injury and wrongful death cases. The unlawful acts doctrine fits within the categories of former common law defenses that are now exclusively controlled by Chapter 33's proportionate responsibility scheme, thus Chapter 33 controls over the unlawful acts doctrine in the wrongful death context. 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—the Court interpreted 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 by providing a complete bar to recovery

only in the certain limited circumstances articulated by subsections 93.001(a)(1) and (2).

Justice Hecht, joined by Justices Willett and Devine, dissented. Justice Hecht reasoned that the unlawful acts doctrine is not merely contributory negligence that can be compared with other fault in allocating responsibility for a plaintiff's injuries. The dissent contended that neither the language of the statutory provisions at issue nor public policy support the holding of the Court, and the unlawful acts doctrine protects the integrity of the legal system. Accordingly, Justice Hecht would have held that the wrongful acts doctrine has not been abrogated by either the comparative responsibility scheme in Chapter 33 or section 93.001's affirmative defense.

B. Premises Liability

1. Boerjan v. Rodriguez, S.W.3d , 57 Tex. Sup. Ct. J. 902 (Tex. June 27, 2013) [12-0838].

At issue in this case was the duty a landowner or occupier owes to a trespasser. A young family of three hired a "coyote" to drive them to Houston or New Orleans. During the drive, they trespassed on a private ranch. A ranch employee confronted the coyote, who drove away at high speed. After several miles the truck rolled over, ejecting and killing the family. The decedents' family (the Rodriguezes) sued the ranch employee and the ranch operators (collectively, the Ranch Petitioners), bringing claims for negligence, gross negligence, and wrongful death. The trial court granted the Ranch Petitioners' traditional and no-evidence summary judgment motions. The court of appeals affirmed in part and reversed in part.

The Supreme Court reversed in part the court of appeals' judgment and remanded the case to the trial court for further proceedings. First, the Court explained that its earlier opinion in *Dugger v. Arredondo*, 408 S.W.3d 825 (Tex. 2013), which recognized the abrogation of the unlawful acts doctrine, rendered that doctrine an invalid basis for summary judgment. The Court affirmed this part of the court of appeals' judgment. Second, the Court addressed the duty a landowner or occupier owes to a trespasser. The Court reiterated that a land occupier owes a trespasser only a duty to avoid causing injury wilfully, wantonly, or through gross negligence. Therefore, the Court reversed the court of appeals' judgment on the negligence claim because that court applied the wrong duty analysis and consequently reached the wrong result. Finally, the Court addressed the evidence of gross negligence. Reviewing the evidence in a light favorable to the Rodriguezes, the Court held there was no evidence of gross negligence. The evidence supported the inference that the employee followed the coyote, but not that the employee engaged in the type of objectively risky behavior that gives rise to gross negligence claims.

2. Graham Cent. Station, Inc. v. Peña, S.W.3d , 57 Tex. Sup. Ct. J. 858 (Tex. June 20, 2014) [13-0450].

At issue in this case was whether Jesus Peña had properly established that the petitioner, Graham Central Station, Inc., owned and operated the Graham Central Station nightclub in Pharr, Texas. Plaintiffs must establish that they are suing the actual owner of a premises when bringing a negligence lawsuit. If a plaintiff fails to establish a defendant's ownership of a premises, then a judgment against that defendant for negligently maintaining that premises cannot be upheld.

Peña claimed he was attacked at the Graham Central Station nightclub, sustaining long-lasting injuries and suffering from mental anguish as a result. He sued Graham Central Station for failing to provide proper security on the nightclub's premises. Graham Central Station, early and often, repeated that it was not the corporate entity that owned the nightclub. Graham Central Station identified Pharr Entertainment Complex, L.L.C. as the owner of the nightclub and urged Peña to sue that entity instead. Peña failed to add Pharr Entertainment to his lawsuit, and he did not allege that Graham Central Station acted as the alter ego of Pharr Entertainment. The trial court awarded Peña damages for his injuries, implicitly finding that Graham Central Station owned the nightclub. The court of appeals affirmed, relying on testimony by Graham Central Station's president.

After a close examination of the record, the Supreme Court found that no evidence existed to show that Graham Central Station, and not Pharr Entertainment Complex, owned the nightclub. Because Peña failed to establish that Graham

Central Station owned the nightclub or acted as an alter ego of Pharr Entertainment Complex, the Court reversed and rendered judgment in a per curiam opinion.

XX. OIL AND GAS

A. Contract Interpretation

1. Hooks v. Samson Lone Star, L.P., 389 S.W.3d 409 (Tex. App.—Houston [1st Dist.] 2012, *pet. granted*, 57 Tex. Sup. Ct. J. 496 (Tex. May 2, 2014) [12-0920].

At issue in this case is whether an oil and gas lessee complied with its contractual obligations. Samson Lone Star, L.P. has a number of oil and gas leases from landowners in Hardin and Jefferson counties, including three from the Hooks family. The Hooks family sued Samson for fraud and breach of contract after Samson induced them to pool their acreage under one of the leases, which they claimed was to their detriment. The trial court granted Samson's motion for partial summary judgment concerning claims for additional royalties related to their claims of "unpooling" and the "most favored nations" clause. A jury trial commenced on the remaining issues of (1) whether Samson committed fraud against the Hooks family when it drilled a well within the buffer zone of one of the leases and failed to fulfill its resulting responsibilities under the lease, and (2) whether Samson failed to pay royalties for "formation production." The jury returned a verdict against Samson on both issues, and the trial court entered a final judgment accordingly. Samson appealed, and the Hooks family cross-appealed.

The court of appeals affirmed the trial court's judgment in favor of Samson on its offset obligations—the Hooks family's sole issue on cross-appeal. The court also affirmed that portion of the trial court's judgment that awarded the Hooks family reimbursement for *ad valorem* taxes as stipulated by the parties. The court reversed the remainder of the final judgment, however, and rendered judgment that the Hooks family take nothing on those claims.

The Hooks family filed a petition for review with the Supreme Court. The issues before the Court are whether (1) the jury's fraud award is barred by the statute of limitations; (2) a lessor's acceptance of royalties from an unauthorized replacement unit estops him from later claiming royalties from the old unit; (3) the lessee's obligation to increase the royalty paid to the lessor under the "most favored nations" clause was triggered by a pooling agreement the lessee entered with another lessor; (4) the parties' trial stipulation entitles the lessor to attorney fees; and (5) the proper post-judgment interest rate is the normal rate or the maximum allowed by law.

The Supreme Court granted the petition for review and will hear oral argument on September 17, 2014.

B. Duty of Utmost Good Faith

1. Steadfast Financial, L.L.C. v. Bradshaw, 395 S.W.3d 348 (Tex. App.–Fort Worth 2013), *pet. granted*, 57 Tex. Sup. Ct. J. 885 (June 23, 2014) [13-0199].

The issue here is the nature of the duties owned to a non-participating royalty interest owner by the holder of the executive rights. Betty Lou Bradshaw holds a non-participating royalty interest (NPRI) in 1,800 acres in Hood County, which she inherited from two deeds executed by her parents in 1960. The deeds reserved in any future leases of the land a "Royalty of not less than one-eighth (1/8)," half of which would belong to the NPRI holder.

In 2006, Steadfast Financial, L.L.C. ("Steadfast") purchased the surface and mineral estates on land that included Bradshaw's NPRI. The same day, Steadfast entered into an oil and gas lease with Range Production I, L.P. ("Range") that provided for a 1/8 royalty. As per the 1960 deeds, Steadfast and Bradshaw split this royalty in half, with each receiving a 1/16 royalty interest in the lease. Steadfast then assigned parts of its 1/16 royalty to R.J. and Kathy Sikes, R. Crist Vial, Greg and Pam Louvier, and Dacota Investment Holdings, L.L.P. (together with Roger Sikes and Christy Rome, "the Royalty Owners/Holders"). Steadfast also assigned parts of its royalty to Peter Bennis, who in turn conveyed part of his interest to Ronny Korb.

In January 2007, Bradshaw filed suit alleging that Steadfast (as the executive interest owner) had violated its fiduciary duty to her (as the NPRI holder) when it entered into the 1/8 royalty lease with Range because it owed her a duty to secure a 1/4 royalty—the alleged market rate in Hood

County. Bradshaw filed a partial motion for summary judgment, arguing the deeds provided for a "fraction of a royalty" that always entitled her to a *minimum* of a 1/16 royalty in a lease (½ x 1/8), rather than a *fixed* 1/16 "fractional royalty." Under a fraction of a royalty, Bradshaw would obtain ½ of any lease royalty. The trial court agreed with Bradshaw that the deeds provided the NPRI holder a fraction of a royalty, and court of appeals affirmed (*Bradshaw I*).

In April 2010, Bradshaw filed her first amended petition (*Bradshaw II*), renewing her argument that Steadfast violated its duty to her in the manner in which it negotiated and structured its 2006 lease transactions with Range. Bradshaw alleged that Steadfast engaged in self-dealing by obtaining an excessively large bonus payment of $13,306,365 by structuring the lease to substantially reduce the lease royalty to 1/8, rather than—at minimum—the alleged market rate of 1/4. She claimed that Steadfast's 1/8 lease deprived her of 1/16 of the royalty she was due.

The trial court held that Steadfast owed no duty to Bradshaw to secure more than the minimum 1/8 lease royalty, and therefore granted final summary judgment against all of Bradshaw's claims brought against all parties. The court of appeals ruled almost entirely in favor of all of Bradshaw's four claims, reversing and remanding all of the summary judgments except for those in favor of Bennis and Korb. The court of appeals sustained Bradshaw's first and most dispositive issue, reversing the trial court's grant of summary judgment for Steadfast on its alleged breach of fiduciary duty. The court of appeals concluded that Bradshaw presented enough evidence to raise a fact question as to whether Steadfast breached its duty by securing only the minimum 1/8 royalty.

Steadfast petitioned the Supreme Court, arguing that it did not breach its obligation of utmost good faith and fair dealing to Bradshaw because it secured for her the precise NPRI to which she was entitled under the 1960 deeds. Bradshaw argues that Steadfast's obligation of utmost good faith and fair dealing to her cannot be modified by the language of the deeds. The Court granted Steadfast's petition for review and will hear oral argument on October 15, 2014.

C. Royalty Payments

1. French v. Occidental Permian Ltd., S.W.3d , 57 Tex. Sup. Ct. J. 906 (Tex. June 27, 2014) [12-1002].

The principal issue in this case was whether royalty owners are required to share with the working interest the expense of removing CO_2 injected into a reservoir for the purpose of increasing oil production.

Oxy, the working interest owner to two leases in the Cogdell Field, began a CO_2 flood in 2001.

This involves injecting CO_2 into the reservoir, which increases pressure in the reservoir and helps sweep oil toward the wellbores. The CO_2 then returns to the surface entrained in casinghead gas. More than 10 million cubic feet of casinghead gas per day is simply transported in pipelines from the production wells back to the injection wells and pumped back into the reservoir, which is permitted under the parties' unitization agreement. That agreement also provides that no royalty is owed on that casinghead gas.

The rest of the casinghead gas is sent to a processing facility 15 miles away. Oxy contracted with Kinder Morgan to build a plant that could process the CO_2-laden gas. Using Cynara membrane technology, the Kinder Morgan plant removes at least 90% of the CO_2 and most of the hydrogen sulfide (H_2S) for reinjection, and also extracts some of the natural gas liquids (NGLs), about two-thirds of the total produced from the gas stream. Kinder Morgan contracts in turn with Torch Energy Marketing to further process the gas at its Snyder Gasoline Plant. There, the rest of the CO_2 and H_2S are removed for reinjection, and the rest of the NGLs are extracted. For its services, Kinder Morgan receives from Oxy a monetary fee, plus 30% of the total NGLs in kind and all the residual gas at the tailgate of the Snyder plant. Thus, Oxy pays French a royalty on 70% of the NGLs, but not on the 30% given to Kinder Morgan as in-kind compensation, or on any of the residual gas also given as in-kind compensation.

French sued Oxy for underpaying royalties on casinghead gas since the beginning of the CO_2 flood. French contended that processing the casinghead gas, except for the removal of H_2S and the extraction of NGLs at Snyder, is all part of

production that must be borne by Oxy as the working interest owner. French asserted that her royalty should be based on the value of 100% of the NGLs net of the expense of extracting them from the gas and removing H_2S, plus the value of the residue gas.

The trial court agreed with French and awarded her $10,074,262.33 in underpaid royalties, a declaratory judgment defining Oxy's ongoing royalty obligations consistently with the award, and attorney fees. The court of appeals reversed, focusing on French's damages calculations. It disagreed with French that all the processing at the Cynara plant was part of removing CO_2 and thus a production expense. If nothing else, the court reasoned, the cost of removing H_2S, which French admitted was a postproduction expense at Snyder, was no less a postproduction expense at Cynara, to be subtracted from the value or proceeds of the NGLs in calculating royalties. Because French had not proved the amount of that expense, the court concluded, she had not proved the value or proceeds of the NGLs and residue gas on which her royalty should be calculated. Thus, the court did not reach the issue whether the cost of separating CO_2 from the casinghead gas was a production expense.

The Supreme Court affirmed the court of appeals' judgment, though for different reasons. The Court disagreed with French's argument that no part of the CO_2 removal is a postproduction expense. Because the parties' agreements gave Oxy the right and discretion to decide whether to reinject or process the casinghead gas, and having benefitted from that decision, the Court held that French must share in the cost of CO_2 removal.

D. Surface Easements

1. Key Operating & Equip., Inc. v. Hegar, S.W.3d. , 57 Tex. Sup. Ct. J. 847 (Tex. June 20, 2014) [13-0156].

At issue in this case was whether, when parts of two mineral leases have been pooled but there is production from only one lease, the mineral lessee has the right to use a road across the surface of the non-producing lease to access the other. Since 1987, Key Operating has operated the Richardson No. 1 well on the Richardson property. Adjoining that property is the Rosenbaum-Curbo tract to which Key Operating obtained an oil and gas lease and the rights to operate the Rosenbaum No. 2 well. Key Operating built a road across the Rosenbaum-Curbo tract and used this road to operate both the Richardson No. 1 and the Rosenbaum No. 2. The Rosenbaum No. 2 stopped producing in 2000 so Key Operating's lease to the Rosenbaum-Curbo tract terminated. However, Thomas and Kenneth Key—the owners of Key Operating—acquired an undivided twelve and a half percent interest in the Rosenbaum-Curbo mineral estate and leased their interest to Key Operating. Key Operating then pooled its mineral interests in the Richardson tract with those in the Rosenbaum-Curbo tract.

In 2002, Will and Loree Hegar purchased eighty-five acres of the Rosenbaum-Curbo surface estate. The Hegars' purchase included the road Key Operating used to access the Richardson No. 1. After Key Operating drilled a new well on the Richardson tract, traffic increased on the road. This prompted the Hegars to file suit against Key Operating, alleging trespass and seeking a permanent injunction to bar Key Operating from using the road.

The trial court found that no minerals were being extracted from the Hegars' land and Key Operating was trespassing. The court of appeals affirmed. The Supreme Court reversed the court of appeals' judgment and rendered judgment in favor of Key Operating. The Court held that, because leases held by Key Operating permitted pooling, the output from the new well on the Richardson tract is legally treated as production on the adjoining Hegar property. Although the appellate court found that the Hegars were not bound by the lease and pooling agreements because they were not in the chain of title, the Court explained that recording a mineral lease in a surface purchaser's chain of title is not legally required. Furthermore, the Court found that the implied property rights of Key Operating's owners (and, by extension, the company itself) permit the use of the Hegars' surface tract. The Court rejected the Hegars' argument that Key Operating did not have an implied right to access their road for the purpose of producing minerals only from the Richardson tract, explaining that such a contention failed to recognize the legal effect of a pooling agreement. The Court also

declined to accept the contention that pooled mineral leases do not grant the lessee the right to burden a surface estate. The Supreme Court clarified that Key Operating, pursuant to their property rights, enjoyed the ability to use the surface estate to remove minerals from any of the pooled acreage.

E. Trespass

1. Envtl. Processing Sys., L.C. v. FPL Farming Ltd., 383 S.W.3d 274 (Tex. App.—Beaumont 2012), *pet. granted*, 57 Tex. Sup. Ct. J. 53 (November 22, 2013) [12-0905].

At issue in this case is whether Texas recognizes a common law trespass cause of action for the deep subsurface migration of injected wastewater.

FPL Farming owns the surface and non-mineral subsurface on land in Liberty County that it primarily uses for rice farming. Environmental Processing Systems (EPS) operates a wastewater injection well pursuant to a TCEQ permit on an adjacent tract of land. EPS uses the well to inject a variety of wastes into the Frio formation—a porous, subsurface strata containing briny water—approximately 8,000 feet below the surface of its land. In 2006 FPL Farming sued EPS for trespass and alleged that the injected waste had migrated beneath FPL Farming's land and contaminated the subsurface water. A jury found in EPS's favor on all claims and the trial court entered a take-nothing judgment. The court of appeals initially affirmed on the grounds that EPS was insulated from liability because EPS was operating under a valid TCEQ permit. The Supreme Court reversed and remanded, holding that a government-issued permit does not shield the permit holder from civil tort liability. On remand the court of appeals held that FPL Farming had a property interest in the deep subsurface of its property and that Texas recognizes a trespass cause of action for the subsurface migration of wastewater. The court of appeals further held that EPS should have borne the burden of proof on the issue of consent, and that FPL Farming was not entitled to a directed verdict on the issue of consent.

Both FPL Farming and EPS filed petitions for review. The Supreme Court granted the petitions and heard oral argument on January 7, 2014.

XXI. PARTNERSHIP

A. Partner Liability

1. Am. Star Energy & Minerals Corp. v. Stowers, 405 S.W.3d 905 (Tex. App.—Amarillo 2013), *pet. granted*, 57 Tex. Sup. Ct. J. 307 (March 21, 2014) [13-0484].

At issue in this case is whether the limitations period on a suit against general partners for a judgment debt of a general partnership begins to run when the judgment against the partnership is entered or when the underlying cause of action that is the basis for the debt accrued.

Richard "Dick" Stowers, Richard W. Stowers, Frank Stowers, and Linda Jasurda (the partners) formed a Texas general partnership called S & J Investments. In 1993, American Star Energy and Minerals Corporation sued S & J Investments for breach of an operating agreement. American Star obtained a judgment against S & J, which became final in 2009. In 2010, when the judgment debt could not be satisfied through the assets of the partnership, American Star sued the four individual partners to confirm their liability for the judgment debt of the partnership. In response, the partners argued that the action was barred by the four-year statute of limitations that applies to breach of contract.

Considering motions for summary judgment from the partners and American Star, the trial court entered a take-nothing judgment in favor of the partners, holding the suit against the partners was time-barred because it accrued when the underlying claim against the partnership accrued. A divided court of appeals affirmed, holding the action against the individual partners accrued at the same time as the claim accrued against the partnership.

American Star appealed to the Supreme Court, arguing that because there is no debt on which the individual partners can be sued until the judgment against the partnership is final, the statute of limitations cannot begin to run until judgment is rendered. American Star contends this is consistent with the language of Texas partnership law and the entity theory of partnerships. The Court granted American Star's

petition for review and will hear oral argument on October 14, 2014.

XXII. PROCEDURE—APPELLATE

A. Mandamus Relief

1. In re Blevins, S.W.3d , 57 Tex. Sup. Ct. J. 38 (Tex. November 1, 2013) [12-0636].

This original proceeding arose from a placement order in a Suit Affecting the Parent Child Relationship (SAPCR). The order transferred possession of two children from the foster parents with whom they had been living to the children's father in Mexico. One month after he signed the order, the trial judge recused because of a potential conflict of interest. The foster parents asserted that the trial court abused its discretion by transferring possession of the children and sought a writ of mandamus directing the trial judge to set aside the order.

Texas Rule of Appellate Procedure 7.2 requires an appellate court to abate an original proceeding when the judge who signed the order at issue ceases to hold office in order to allow the successor judge to reconsider the decision. The Supreme Court recognized that the courts of appeals were split on the matter of whether Rule 7.2 applies when the trial judge who signed the challenged order has not ceased to hold office, but has only recused from further participation in the case. The Court held that appellate courts should either deny the petition for mandamus or abate the proceedings pending consideration of the challenged order by the new trial judge. Further, the Court decided that, because mandamus is a discretionary writ, the appellate court involved should exercise discretion to determine which of the two approaches affords the better and more efficient manner of resolving the dispute.

Here, the Court concluded that the better and more efficient approach was to abate the proceedings instead of to deny the petition. Accordingly, the Court did so, directing 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.

XXIII. PROCEDURE—PRETRIAL

A. Discovery

1. In re Doe, 2012 WL 1893733 (Tex. App.—Houston [1st Dist.] 2012), *argument granted on pet. for writ of mandamus*, 56 Tex. Sup. Ct. 983 (August 30, 2013) [13-0073].

At issue in this case is whether Texas Rule of Civil Procedure 202.2(b), which requires a petition authorizing discovery to be filed in a "proper court," should be interpreted to mean that a trial court must have personal jurisdiction over an anonymous defendant in order for his identity to be discovered.

The Reynolds & Reynolds Company (R&R) filed a Rule 202 petition against Google seeking the contact information of an internet blogger. R&R's petition claimed an individual using the pseudonym"Trooper" formed and authored an internet blog that defamed and disparaged R&R. John Doe filed a special appearance objecting to the court's personal jurisdiction over him. Doe further argued the disclosure of his identity would violate his fundamental First Amendment right to anonymous free speech, and that the statements made on the blog did not rise to the level of actionable conduct warranting the disclosure of Doe's identity. The trial court ultimately granted R & R's petition, denied Doe's motions, and ordered Google to disclose Doe's identity. Doe's subsequent petition for writ of mandamus to the court of appeals was denied. Doe then filed a petition for writ of mandamus in the Supreme Court.

Doe primarily argues that discovery cannot be obtained in a Rule 202 proceeding if it would be precluded in the anticipated action, and argues that, as a result, Rule 202 implicitly requires a finding of personal jurisdiction. Additionally, Doe construes Rule 202.4(b), requiring the petition to be filed in a "proper court," to mean that the court must find as a condition precedent to suit that there is proper jurisdiction based on the substantive law respecting the anticipated dispute. Furthermore, Doe argues that the Constitution requires a court to have personal jurisdiction over the anticipated defendant to strip his First Amendment rights under Rule 202.

R&R argues that Rule 202.2(b) does not require a finding of personal jurisdiction prior to granting the petition based on the plain language

of the statute, which defines "proper court" only as a court where venue of the anticipated suit may lie. R&R also argues that in its ordinary usage, the term "proper court" means a court with subject matter jurisdiction to hear the case, not personal jurisdiction. Furthermore, R&R argues that the Due Process Clause does not require the trial court to find it has personal jurisdiction over Doe because Doe is an anticipated defendant and not a party to the Rule 202 petition with Google as the named defendant. As a result, it would be inappropriate and inequitable to require R&R to establish personal jurisdiction when the identity of the anticipated defendant is unknown.

The Supreme Court granted argument on the petition for writ of mandamus and heard oral argument on November 7, 2013.

2. In re Ford Motor Co., 427 S.W.3d 396 (Tex. March 28, 2014) [12-1000].

At issue in this products-liability case was whether a plaintiff can depose a corporate representative of an expert's employer to further explore the bias of the expert witness. The suit arose from injuries plaintiff Saul Morales sustained after a Ford vehicle rolled over him. Morales sued Ford Motor Company and Ken Stoepel Ford, Inc. (collectively "Ford"). To defend the lawsuit, Ford hired two expert witnesses. Morales deposed both experts, allegedly producing testimony demonstrating their bias in favor of automobile manufacturers.

After deposing the two expert witnesses, Morales sought to depose a corporate representative of each expert's employer on seventeen topics, arguing the additional depositions were necessary to further prove each testifying expert's bias. Ford filed this mandamus petition challenging the trial court's discovery order allowing the depositions.

In a per curiam opinion, the Court held the Rules of Civil Procedure do not permit such discovery on the facts of this case. While an expert witness's bias is discoverable, Rule 195 limits the methods for obtaining such information to disclosures, expert reports, and oral depositions of expert witnesses. These particular discovery requests were overbroad because Morales sought detailed financial and business information for all cases the companies handled for Ford or any other automobile manufacturer covering a twelve-year time frame. Additionally, Morales already had evidence of bias from the depositions of the individual experts, and he did not demonstrate any other circumstance to warrant deposing the witnesses' employers' corporate representatives. The Court conditionally granted mandamus relief.

B. Dismissal

1. Crosstex Energy Servs. v. Pro Plus, Inc., 430 S.W.3d 384 (Tex. March 28, 2014) [12-0251].

At issue in this case was whether a defendant can waive the right to dismissal under § 150.002 of the Texas Civil Practice and Remedies Code when the plaintiff fails to file a certificate of merit and, if so, whether Pro Plus's conduct waived the right of dismissal here.

Crosstex contracted with Pro Plus to construct a natural gas compression station. A gasket failure at the station led to a fire and significant property damage. Crosstex sued Pro Plus for negligence, negligent misrepresentation, breach of warranty, and breach of contract. Just before limitations expired on some of Crosstex's claims, the parties entered into a Rule 11 agreement to move the expert-designation date to April 2011. On December 2, 2010, after limitations had run, Pro Plus moved to dismiss Crosstex's claims pursuant to § 150.002(e) because Crosstex failed to file a certificate of merit with its original petition. Crosstex moved for an extension of time to file its certificate of merit. The trial court denied Pro Plus's motion to dismiss and granted Crosstex an extension. Pro Plus brought an interlocutory appeal of this order. The court of appeals determined it had jurisdiction to hear the interlocutory appeal and rejected Crosstex's argument that § 150.002(c)'s "good cause" exception provided a basis for extension. The court of appeals then reversed and remanded, holding that, even if a defendant could waive the subsection (e) dismissal right, Pro Plus had not waived it in this case.

The Supreme Court affirmed the court of appeals' judgment. The Court held that the court of appeals correctly exercised jurisdiction over the interlocutory appeal. As to the merits, the Court held that subsection (c)'s exception only applied to plaintiffs filing within ten days of the end of the limitations period. Because Crosstex did not file

within this period, it was not entitled to a good cause exception. The Court then held that subsection (e) dismissal was mandatory, but did not impose a jurisdictional requirement. Mandatory duties are subject to waiver, and therefore the Court held it is possible to waive the subsection (e) right to dismissal. After reviewing the record, the Court concluded that Pro Plus's conduct did not amount to waiver.

C. Forum Non Conveniens

1. In re Ford Motor Co., 2012 WL 5949026 (Tex. App.—Corpus Christi 2012), *argument granted on pet. for writ of mandamus*, 56 Tex. Sup. Ct. 1213 (September 20, 2013) [12-0957].

At issue is this case is whether decedents and wrongful death beneficiaries are a single "plaintiff" for purposes of section 71.051(h)(2), of the Texas Civil Practices and Remedies Code (CPRC) regarding forum non conveniens. Also at issue is whether only the decedent's residence is considered when determining whether a plaintiff is a "legal resident" of Texas under section 71.051(e), Texas-Resident Dismissal Exception, of the CPRC.

Juan Tueme Mendez was driving a Ford Explorer in Nuevo Leon, Mexico, when a tire allegedly failed, causing a rollover accident. Cesar Mendez Tueme, Juan's brother, was the front seat passenger and died in the accident. Both were Mexican citizens. Juan filed suit against his brother Cesar's estate. The estate was opened in the Probate Court of Hidalgo County. Yuri Tueme, Cesar's daughter and a Texas resident, was appointed administrator. Yuri then filed a third-party action against Ford and Michelin on behalf of the estate. Subsequently, Yuri and other family members intervened in the lawsuit to assert claims against Ford and Michelin, both individually and as wrongful death beneficiaries of the decedent. Two of the intervenors were Melva Uranga and her daughter, J.T., both U.S. citizens and Texas residents. J.T. is the child of Melva and Cesar. Juan later amended his petition to add claims against Ford and Michelin. Michelin has since settled with Real Parties.

Ford argues that under section 71.051(h)(2), the decedent and wrongful death beneficiaries are a single "plaintiff," and the residency of the decedent controls for the purposes of the statute's Texas-resident dismissal exception. Ford argues that the Texas Supreme Court has previously interpreted substantially similar language regarding the definition of "claimant" to mean that the two parties are considered one "plaintiff" for purposes of the statute. Ford further argues that treating the parties as a single plaintiff is consistent with the plain language of the statute and also with the general rule that "wrongful death action plaintiffs stand in the legal shoes of the decedent." Ford additionally argues that an intervenor assumes the same position as a "third-party plaintiff" and thus does not constitute a "plaintiff" under CPRC section 71.051(h)(2).

Real Parties in Interest argue that the express language of the statute inclusively defines "plaintiff," and that the statute contemplates that there may be multiple plaintiffs to a wrongful death or personal injury action. They further argue that there is no legal basis for holding that only the decedent's residence controls for determining the Texas-resident dismissal exception, and that there is no express language in the forum non conveniens statute suggesting the decedent's residence controls.

Also at issue in this case is whether dismissal is warranted under the forum non conveniens factors in section 71.051(b).

The Supreme Court granted argument on the petition for writ of mandamus and heard oral argument on December 3, 2013.

D. Settlements

1. Amedisys, Inc. v. Kingwood Home Health Care, LLC, S.W.3d , 57 Tex. Sup. Ct. J. 547 (Tex. May 9, 2014) [12-0839].

The parties in this case disputed whether they had entered into an enforceable settlement agreement under chapter 42 of the Civil Practice & Remedies Code and rule 167 of the Texas Rules of Civil Procedure. The defendant, Kingwood Home Health Care, made a settlement offer to the plaintiff, Amedisys, Inc., that Amedisys attempted to accept. Later, the defendant sought to avoid the settlement, arguing, among other things, that the plaintiff had not validly accepted the offer because the plaintiff's acceptance letter did not mirror the exact terms of the offer letter. Specifically, the defendant asserted that its offer

referenced "all claims asserted or which could have been asserted" while the plaintiff's acceptance referenced "all monetary claims asserted." The plaintiff argued that the issues of offer and acceptance were governed exclusively by rule 167 and chapter 42, not common law principles, and was enforceable under the rule and statutes.

The Court held that common law principles of acceptance applied, but that the plaintiff had satisfied these principles. The plaintiff's acceptance communications demonstrate a clear intent to accept the defendant's settlement offer. Although the plaintiff's acceptance communication did not use exactly the same language to refer to the claims being settled, the defendant's settlement offer also used different language at different points, sometimes referencing "all monetary claims between the parties," other times "all claims asserted or which could have been asserted" in the case, and other times "all monetary damages claimed." While these variances in terminology could be material under different circumstances, the Court held that the variances were not material on the record of this case, in which there were no non-monetary claims and none of the parties had indicated that there were, or in the future might be, claims that could have been asserted in the case other than the monetary claims. Thus, the Court reversed the court of appeals' judgment and remanded the case to the court of appeals.

E. Statute of Repose

1. Nathan v. Whittington, 408 S.W.3d 870 (Tex. August 30, 2013) [12-0628].

At issue in this case was whether a statute that suspends the running of a statute of limitations applies to a statute of repose that otherwise "extinguishes" a plaintiff's cause of action. Stephen Whittington initially filed suit in Nevada and prevailed on his claims against a former business partner. To collect on the judgment, he then filed another suit in Nevada against both his former partner and Marc Nathan. In the second suit, Whittington alleged that his former partner had fraudulently transferred assets to Nathan in violation of the Nevada Uniform Fraudulent Transfer Act. After six months, the Nevada court dismissed the case for lack of personal jurisdiction over Nathan. Less than sixty days later, Whittington filed suit in Texas under the Texas Uniform Fraudulent Transfer Act, alleging the same fraudulent transfer to Nathan.

The trial court found that Whittington's claim was extinguished under the Act's statute of repose and granted Nathan's motion for summary judgment. Whittington appealed, and the court of appeals held that section 16.064(a) of the Texas Civil Practice & Remedies Code suspended the expiration of the statute of repose, allowing Whittington to file this new suit within sixty days of dismissal in the Nevada court. The Supreme Court reversed the court of appeals' judgment, and reinstated the trial court's judgment of dismissal.

The Supreme Court held that statutes of repose are absolute in nature, and their key purpose is to eliminate uncertainties under the related statute of limitations to create a final deadline for filing suit that is not subject to any exceptions. The parties and the court of appeals agreed that the provision in the Fraudulent Transfers Act is a statute of repose rather than a statute of limitations. The Supreme Court held that section 16.064(a) of the Remedies Code applies only to a "statute of limitations." Therefore, because a trial court may dismiss a case for lack of jurisdiction long after the statute of repose extinguishes the cause of action, application of section 16.064 would frustrate the certainty the statute of repose provides.

Thus, the Supreme Court held that because the provision at issue in the Fraudulent Transfer Act is a statute of repose, and section 16.064 of the Remedies Code applies only to statutes of limitations, the latter does not save or revive Whittington's claim.

F. Venue

1. In re Fisher, S.W.3d , 57 Tex. Sup. Ct. J. 276 (Tex. February 28, 2014) [12-0163].

At issue in this case was whether the trial court abused its discretion in failing to enforce venue selection clauses in corporate acquisition documents. Mike Richey sold his oilfield services company, Richey Oilfield Construction, Inc. (Richey Oil), to Nighthawk Oilfield Services, Ltd. (Nighthawk). Nighthawk was comprised of a general partner and at least two other limited

partners, Mark Fisher and Reece Boudreaux. The primary agreements regarding the transaction were a stock purchase agreement, an agreement for the purchase of Richey's goodwill, and a promissory note. Each contained a clause naming Tarrant County as the venue for state court actions.

Shortly after the acquisition, Nighthawk made a $20 million special distribution to its partners. Six months later, according to Richey, Fisher and Boudreaux asked him to loan the company $1 million which would be repaid plus ten percent in six months. Six months later, Richey requested repayment of the loan and Fisher refused. In May 2009, Bank of America stopped payment on Richey Oil checks, which Richey had signed, for insufficient funds and returned them to the payees. Richey alleged Fisher told the payees that the lack of funds was Richey's fault. One month later, Nighthawk and Richey Oil filed for bankruptcy.

Richey filed suit against Fisher and Boudreaux in Wise County alleging causes of action for defamation related to the statements regarding the returned checks, common-law and statutory fraud, various breaches of fiduciary duty, violations of the Texas Securities Act, and "aiding and abetting" of those claims. Fisher and Boudreaux filed motions to dismiss and pleas to the jurisdiction, arguing that Richey's claims must be transferred because each implicates a mandatory contractual venue selection clause. They also argued that Richey's claims belong to Nighthawk or Richey Oil—now the bankruptcy trustee—not to Richey individually. The trial court denied the motions and Fisher and Boudreaux sought mandamus relief.

The Supreme Court first held that Richey's pleadings did not negate that he had standing to bring his claims. The Court next held that the trial court erred by failing to enforce the Tarrant County venue selection clauses in the acquisition documents. Texas Civil Practice and Remedies Code § 15.020 requires that an action arising from a major transaction may not be brought in a county if the party bringing the action has agreed in writing that an action arising out of the transaction must be brought in another county. The Court concluded that section 15.020 applied and Richey agreed in writing that claims must be brought in Tarrant County. While venue may have been proper in Wise County, section 15.020 applies "notwithstanding any other provision," indicating that the Legislature intended it to prevail over other mandatory venue provisions. The Court conditionally granted mandamus relief.

XXIV. PROCEDURE—TRIAL AND POST-TRIAL

A. Enforcement of Judgments

1. In re State Bd. for Educator Certification, 411 S.W.3d 576 (Tex. App.—Austin 2013), *argument granted on pet. for writ of mandamus*, 57 Tex. Sup. Ct. J. 258 (February 14, 2014) [13-0537].

At issue in this case is whether a trial court ever has authority to deny a government agency supersedeas when the government agency files a notice of appeal.

The State Board for Educator Certification revoked Erasmo Montalvo's educator certificate after a female former high-school student accused Montalvo of sexual assault, despite the administrative law judge's recommendation to not take disciplinary action. The trial court reversed the Board's order and entered a permanent injunction in Montalvo's favor prohibiting the Board from revoking his certification.

After the Board filed a notice of appeal in the court of appeals, Montalvo posted security with the trial court under Rule 24 of the Texas Rules of Appellate Procedure to enforce the judgment pending appeal. The trial court entered an order enforcing the judgment during the pendency of the appeal and refusing supersedeas. The Board filed a petition for writ of mandamus in the court of appeals challenging the trial court's injunction, arguing that the Board has a right to supersedeas pursuant to Rule 25.1(h) of the Texas Rules of Appellate Procedure and section 6.001 of the Texas Civil Practice and Remedies Code. The Court of Appeals denied the petition for writ of mandamus with opinion, and the Board filed a petition for writ of mandamus in the Supreme Court.

The Supreme Court granted the Board's petition for writ of mandamus and will hear oral argument on October 14, 2014.

B. Finality of Judgments

1. In re Vaishangi, Inc., S.W.3d , 57 Tex. Sup. Ct. J. 690 (Tex. June 9, 2014) [13-0169].

The issue in this case was whether and when a valid Rule 11 agreement can be enforceable as a judgment. Vaishangi, Inc., and Southwestern National Bank executed a real estate lien note for a commercial real estate transaction involving a hotel property. Eventually, disputes arose and the Bank accelerated the note and then foreclosed on the property. Vaishangi filed suit for wrongful foreclosure. Before trial, the parties reached a settlement and executed a handwritten Rule 11 agreement, which the trial court also signed, whereby Vaishangi agreed to execute a loan modification agreement. The Bank filed the Rule 11 agreement with the trial court and attached the loan modification agreement, although it was not yet signed by Vaishangi. Four days later, the trial court signed an agreed order dismissing all claims. The dismissal order did not incorporate the entirety of the Rule 11 Agreement.

Nearly one year later, after further disagreement regarding the loan modification, the Bank filed a motion to enforce the settlement agreement in the original cause number. The trial court granted the Bank's requested relief and ordered Vaishangi to execute the loan modification agreement and pay damages. Vaishangi sought mandamus relief first from the court of appeals—which was denied—and then the Supreme Court.

Vaishangi argued that the trial court lacked jurisdiction to enforce the settlement because the court's plenary power had expired. The Supreme Court conditionally granted relief because the Rule 11 agreement, while potentially binding and enforceable as between the parties, was not the final judgment of the trial court because it lacked any indication that the trial court intended to dispose of all claims and all parties through the Rule 11 agreement. The agreed dismissal order signed four days later was the trial court's final judgment. Therefore, the trial court lacked jurisdiction to enforce the settlement after its plenary power in the case had expired.

C. Juror Misconduct

1. In re Health Care Unlimited, Inc., 429 S.W.3d 600 (Tex. April 25, 2014) [12-0410].

At issue in this case was a new trial order granted based on juror misconduct. The underlying suit was a survival and wrongful death action against Health Care Unlimited (HCU) and its employee, Edna Gonzalez, involving a fatal car collision. The decedent's estate and survivors (the Real Parties in Interest) sued Gonzalez and HCU, alleging that Gonzalez was acting within the course and scope of her employment at the time of the accident, and therefore HCU was vicariously liable. The jury unanimously found that Gonzalez was solely responsible for the accident and was *not* acting within the scope of her employment at the time of the accident. HCU moved for entry of judgment, but the Real Parties in Interest moved for mistrial, alleging juror misconduct during deliberations. The Real Parties in Interest based their motion on allegedly improper communications during jury deliberations between Dominique Alegria, the presiding juror, and Sonny Villarreal, an HCU employee. HCU's counsel challenged the trial court's refusal to hear any evidence and cited Rule 327 of the Texas Rules of Civil Procedure, which sets the standard for motions for new trial grounded in jury misconduct, but the trial court granted the motion for new trial. HCU moved the trial court to reconsider the new trial order and, in the alternative, to correct the order granting the mistrial, after which the trial court held an evidentiary hearing on the Real Parties in Interests' motion for mistrial. Alegria and Villarreal testified that their alleged communications during deliberations involved an upcoming church retreat. The trial court still granted a new trial. The two-page amended order enumerated a few findings of fact about the circumstances of the case and alleged misconduct, and ultimately concluded that a new trial should be granted in the interest of justice.

The court of appeals denied the petition for writ of mandamus without comment. In a per curiam opinion, the Supreme Court conditionally granted relief and ordered the trial court to withdraw its First Amended Order Granting New Trial and render judgment on the verdict. The Court held that there was no evidence of

misconduct, materiality, and probable injury as required by Rule 327 to grant a new trial based on juror misconduct.

2. In re Whataburger Rests. LP, 429 S.W.3d 597 (Tex. April 25, 2014) [11-0037].

This case arose from a premises liability suit filed against Whataburger for injuries sustained in a fight outside of its restaurant in El Paso. The jury selection process included a written questionnaire that inquired whether the potential jurors had "ever been a party to a lawsuit." One juror did not properly disclose her status as a previous defendant. The case proceeded to trial and the jury found for the defendant. Thereafter, the trial court found that the juror did not complete her juror questionnaire correctly, that the mistake was material, and that it resulted in probable injury. The court granted a motion for new trial on the ground that the plaintiff was denied the opportunity to question or strike the juror in light of the missing information.

The review of this case occurs in light of the Supreme Court's holding in *In re Toyota Motor Sales*, 407 S.W.3d 746 (Tex. 2013) (holding that an appellate court may conduct merit-based mandamus review of a new trial order). The Supreme Court held that because the record contains no competent evidence that the juror's nondisclosure resulted in probable injury, and the only competent evidence supports that it did not, the trial court abused its discretion in granting a new trial.

D. New Trial Orders

1. In re Toyota Motor Sales, U.S.A., Inc., 407 S.W.3d 746 (Tex. August 30, 2013) [10-0933].

At issue in this case was whether an appellate court can conduct a merits-based mandamus review of the reasons given by a trial court for granting a motion for new trial under *In re Columbia Medical Center of Las Colinas Subsidiary, L.P.*, 290 S.W.3d 204 (Tex. 2009). Also at issue was whether the trial court abused its discretion by granting a new trial in the interest of justice and as a sanction. Richard King was thrown from a vehicle and died. The King family sued Toyota, and the trial court granted the Kings' motion in limine to exclude an officer's testimony that King was not wearing his seatbelt. After the jury returned a verdict in Toyota's favor, the Kings moved for a new trial, arguing that Toyota's attorney violated the motion in limine and subsequent evidentiary rulings by referring to the testimony during closing argument. The trial court granted the Kings' motion, and Toyota sought mandamus relief in the court of appeals. The court of appeals held it did not have authority under *Columbia* to conduct a review of the reasons given for the granting of a motion for new trial and denied relief.

The Supreme Court conditionally granted mandamus relief. The Court explained that *Columbia* requires a trial court to provide understandable, reasonably specific, legally appropriate reasons for granting new trial. Without merits-based review these requirements would be meaningless because trial courts could set aside a jury verdict for reasons that are facially valid but unsupported by law or evidence. The Court held that merits review was appropriate and that the trial court's reasons for granting new trial in this case conflicted with the record, which showed that it was the Kings' attorney who originally introduced the officer's testimony into the record. Because the record did not support the trial court's order, the Supreme Court conditionally granted relief.

Justice Lehrmann, joined by Justice Devine, concurred in the Court's judgment, emphasizing that trial courts must still be allowed significant discretion in deciding whether to grant a new trial.

E. Post-Judgment Appellate Timetable

1. Brighton v. Koss, 415 S.W.3d 864 (Tex. August 23, 2013) [12-0501].

At issue here was whether a subsequent judgment that did not grant all relief requested in a motion to modify the previous judgment restarted and extended the appellate deadlines. This case arose out of a divorce decree entered by the trial court on October 18, 2010. Thirty days later, Tara Brighton filed a motion to modify the decree and six days later Gregory Koss filed a notice of appeal. The trial court signed a second judgment on December 22, 2010. Brighton filed a notice of appeal on March 7, 2011, seventy-five days after the trial court's second judgment. The court of appeals dismissed Brighton's appeal as untimely.

The Supreme Court reversed, holding that the second judgment signed on December 22, 2010 restarted and extended the appellate timetable. Brighton's motion to modify requested that the Court (1) correct the original decree to identify the properties against which the equitable lien attaches; (2) reform the decree to include repayment terms of the economic contribution award; and (3) order Koss to sign a lien note and/or deed of trust to secure the equitable lien. The judgment signed on December 22 included relief as to Brighton's first request but did not mention or address the latter two requests. Because the December 22 judgment did not correct all the errors in Brighton's motion to modify, the motion operated to extend the appellate deadlines applicable to the second judgment. Under the extended deadline, Brighton had ninety days to file her notice of appeal from December 22, 2010, which she did. Therefore, the court of appeals incorrectly dismissed her appeal.

F. Post-Judgment Interest

1. Long v. Castle Tex. Prod. Ltd., 426 S.W.3d 73 (Tex. March 28, 2014) [11-0161].

At issue in this case was whether postjudgment interest runs from the date of a judgment entered after remand or the date of an original, erroneous judgment. The Long Trusts sued Castle Texas Production Ltd. over breach of a joint operating agreement and conversion of natural gas. Castle counterclaimed for amounts owed on joint interest billings. Both parties prevailed on their claims in 2001. The court of appeals reversed and remanded the Long Trust's claims and remanded Castle's claims for recalculation of prejudgment interest. On remand, Castle moved for entry of judgment on the existing record, but the trial court determined new evidence was needed and set the matter on its trial docket. Castle eventually waived its claim for prejudgment interest in 2009. The trial court rendered judgment for Castle, awarding postjudgment interest from the date of the original 2001 judgment. The court of appeals affirmed.

The Court held that, generally, the Finance Code and rules of procedure provide that postjudgment interest accrues from the date of the final money judgment, which is the subsequent judgment if a trial court issues more than one judgment. But under the Rules of Appellate Procedure, if an appellate court can or does render the judgment the trial court should have rendered, that final judgment relates back to accrue interest from the date of the original, erroneous judgment. Thus, if a trial court is required to reopen the record on remand, the appellate court could not render the judgment the trial court originally should have rendered and postjudgment interest accrues from the date of the subsequent final judgment. The Court held the trial court did not abuse its discretion in determining new evidence was required. Accordingly, postjudgment interest should have accrued from the date of the last judgment.

XXV. PRODUCTS LIABILITY

A. Design Defects

1. Genie Indus., Inc. v. Matak, 2012 WL 6061779 (Tex. App.—Corpus Christi 2012), *pet. granted*, 57 Tex. Sup. Ct. J. 307 (March 21, 2014) [13-0042].

The issue in this case is whether the Genie Aerial Work Platform–40S ("the lift" or "AWP–40S") contains a defective design. The AWP–40S was being used by Gulf Coast Electric employee Walter Pete Logan Matak and his supervisor, James Boggan, to install fiber optic cables along the ceiling of the Cathedral in the Pines Church in Beaumont. At the base of the lift, there were four adjustable legs, called outriggers, that contained round, metal pads on the bottom that were designed to be pressed into the floor to support the base of the lift. The lift was designed so that it could not be raised until all four of the outriggers were attached, extended, and pressed firmly into the ground so that the lift was sufficiently stable. Although the lift's design did not prevent operators from removing the outriggers while the lift was elevated, it contained several warnings, including one located at eye level that displayed an image of the lift tipping over, cautioning against removing the outriggers from the ground while the lift was raised, or else death or serious bodily injury would result. The men began using the lift as instructed—lowering it to the ground and having Matak exit the basket before raising the outriggers and rolling it to another location. However, at the suggestion of a church employee, the men attempted to raise the

outriggers and move the lift while it was still occupied by Matak and elevated to its full forty foot height. The lift tipped over, resulting in Matak's death.

Matak's estate filed suit against Genie, alleging a defective design, and presented four alternative designs to the jury. The jury found that the AWP–40S possessed a design defect and the defect was the producing cause of the injuries suffered. The jury allocated 20% of responsibility toward the church, 20% toward Gulf Coast Electric, and 5% toward Matak. The remaining 55% of responsibility was attributed to Genie, resulting in a judgment of $1,305,701.70 for Matak's estate. Genie appealed. The court of appeals rejected Genie's legal sufficiency challenge and found that there was more than a mere scintilla of evidence to support the jury's verdict.

Genie filed a petition for review with the Supreme Court, arguing that its design is not unreasonably dangerous as a matter of law, and all of the proposed designs presented by Matak's estate are legally insufficient as alternative designs because the designs could present new dangers, reduce the lift's utility, or would not have prevented the accident that occurred. The Supreme Court granted Genie's petition and will hear oral argument on September 17, 2014.

2. Kia Motors Corp. v. Ruiz, S.W.3d , 57 Tex. Sup. Ct. J. 375 (Tex. March 28, 2014) [11-0709].

The issues presented in this case were whether (1) Kia is entitled to a rebuttable presumption of nonliability on the Ruizes' design-defect claim under Texas Civil Practice and Remedies Code § 82.008, (2) the Ruizes' claim fails due to lack of evidence of a design defect, and (3) the warranty claims listed in an admitted spreadsheet were reasonably similar to the claimed defect. Andrea Ruiz was fatally injured in a head-on collision while driving her 2002 Kia Spectra. The Kia's passenger-side frontal air bag deployed in the collision, but the driver-side frontal airbag did not. The Spectra's Airbag Diagnostic Unit indicated there had been an open electrical circuit in the driver-side wiring harness that was closed by the force of the impact. The Ruiz family sued Kia for negligence, alleging that defectively designed connectors in the wiring harness created the open circuit that prevented the air bag from deploying. A spreadsheet admitted at trial showed that 432 airbag-related warranty claims relating to 2002 Spectras and similarly designed vehicles had been submitted to and approved by Kia, 67 of which involved the same error code that Ruiz's Spectra's diagnostic unit registered. Kia asserted that it was entitled to a rebuttable presumption of nonliability under Civil Practice and Remedies Code § 82.008 because the 2002 Kia Spectra was in compliance with Federal Motor Vehicle Safety Standard (FMVSS) 208 for Occupant Crash Protection. The trial court held that Kia was not entitled to the presumption.

The jury found that Kia negligently designed the Spectra's air bag system, and the trial court rendered judgment on the jury's negligence verdict. The court of appeals affirmed, holding that Kia was not entitled to a nonliability presumption, that the evidence was sufficient to support the jury's finding of a design defect, and that the admission of the spreadsheet did not cause an improper verdict.

The Supreme Court addressed these three issues, agreeing with the court of appeals on the first two, but not the third. First, the Court held that Kia was not entitled to a nonliability presumption. Under § 82.008 of the Civil Practice and Remedies Code, a 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 or regulations, (2) the standards or regulations were applicable to the product at the time of manufacture, and (3) the standards or regulations governed the product risk that allegedly caused the harm. While Kia showed that the air-bag system's design complied with FMVSS 208, a safety standard that was applicable to the product at the time of manufacture, FMVSS 208 did not govern the product risk that allegedly caused the harm. The Supreme Court held that the relevant "risk" was that of occupant injury due to the failure of the air bag to reliably activate and deploy, and that FMVSS 208, which only required vehicles to have frontal driver- and passenger-side air bags that provide a certain degree of protection to dummy occupants during a crash test, did not address that risk. The Court next held that legally

sufficient evidence supported the jury's finding that the air-bag system had a design defect. Finally, the Supreme Court held that the trial court abused its discretion in admitting the warranty-claim spreadsheet. The Court held that the vast majority of the incidents reflected on the spreadsheet were not sufficiently similar to the underlying incident to be relevant and admissible, and that Kia did not waive its objection to the spreadsheet's admission. The Court concluded that the trial court's admission of the document probably caused the rendition of an improper judgment and thus was reversible error. Accordingly, the Court reversed the court of appeals' judgment and remanded the case to the trial court for a new trial.

XXVI. REAL PROPERTY

A. Contract for Deed

1. Morton v. Nguyen, 412 S.W.3d 506 (Tex. August 23, 2013) [12-0539].

At issue in this real estate contract for deed case was whether a buyer who exercised the statutory right to cancel and rescind a contract for deed under Subchapter D of the Texas Property Code must restore to the seller all benefits the buyer received under the contract. In January 2007, Hung and Carol Nyugen entered into a contract for deed to purchase a home from Kevin Morton. Over the next three years, the Nguyens made their required monthly payments, and Morton provided the Nguyens with annual statements, including the amount of interest paid each year and the balance remaining under the contract, but not all the required information under section 5.007 of the Property Code. Because Morton had violated the disclosure rules of Subchapter D, the Nguyens notified him in November 2009 that they were exercising their statutory right to cancel and rescind the contract for deed.

Morton sued the Nguyens for breach of contract, and they countersued for monetary damages, rescission, and statutory damages under the Property Code, the Finance Code, and the Deceptive Trade Practices Act. Morton alleged that he was entitled to a setoff in the amount of the fair market rental value of the property for the time the Nguyens occupied the house. Following a bench trial, the trial court rendered judgment for the Nguyens, awarding them rescission and cancellation of the contract for deed and damages, including statutory penalties and mental anguish, plus costs and attorney's fees. Both parties appealed. The court of appeals affirmed the trial court's judgment awarding the Nguyens rescission and restitution under the Property Code, attorney's fees, and mental anguish damages, but reversed the trial court's judgment regarding statutory penalties. Only Morton appealed, arguing that the court of appeals erred by denying him mutual restitution and affirming the awards of attorney's fees and mental anguish damages after reversing the claims for statutory penalties.

The Supreme Court held, in light of *Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817 (Tex. 2012), that Subchapter D's cancellation-and-rescission remedy contemplates mutual restitution of benefits among the parties. While a buyer is entitled to "a full refund of all payments made to the seller," rescission requires that the buyer also restore to the seller the value of the buyer's occupation of the property; otherwise, the buyer receives a windfall. Because the trial court here did not consider the value of the Nguyens' interim occupation of the property for the purpose of an offset, the Court remanded the case to the trial court to determine the rental value of the property during the Nguyens' occupation. Additionally, the Court reversed the award of attorney's fees and mental anguish damages because the court of appeals reversed the only two causes of action that supported an award of attorney's fees or mental anguish damages—the claim for liquidated damages under section 5.077 of the Property Code and the Finance Code claims—and no remaining cause of action supported an award of attorney's fees or mental anguish damages.

Justice Boyd, joined by Justice Willett and Justice Lehrmann, concurred with the reversal of attorney's fees and mental anguish damages, but dissented from the Court's holding regarding mutual restitution. Justice Boyd would have held that the language of Subchapter D indicates that the cancellation-and-rescission remedy is unilateral. Because the Legislature has said that buyers are entitled to "a full refund of all payments made to the seller," the dissent disagreed that Morton was entitled to mutual restitution.

B. Eminent Domain

1. Carlson v. City of Houston, 401 S.W.3d 725 (Tex. App.—Houston [14th Dist.] 2013), *pet. granted*, 57 Tex. Sup. Ct. J. 641 (June 6, 2014) [13-0435].

At issue in this case is whether homeowners are entitled to compensation when an order to vacate that is adjudged to violate Due Process prevents them from entering their homes.

In response to complaints that a condominium building was structurally unsafe, and because the building did not display a certificate of occupancy, the City of Houston ordered the residents of the building (Owners) to vacate their homes. In a separate suit, this order was found to be in violation of Due Process.

The instant suit commenced when the Owners brought an inverse condemnation action against the City, claiming that the Takings Clause entitled them to just compensation for the period of time during which they were unable to enter their homes. The City filed a plea to the jurisdiction, which the trial court granted. In the court of appeals, the City argued that the order to vacate was a remedial action authorized by state law. The Owners argued that the City's order requiring them to vacate their homes on account of a purportedly dangerous condition was a taking for a public use.

In a divided opinion, the court of appeals reversed and remanded the case. The majority agreed with the Owners, concluding that the taking was for a public use. Justice Frost dissented, arguing that a takings claim must be predicated on the exercise of lawful authority. Because the order to vacate had violated Due Process, Justice Frost concluded that it could not serve as the basis for a takings claim.

The Supreme Court granted the City's petition for review and will hear oral argument on September 18, 2014.

C. Foreclosure

1. PlainsCapital Bank v. Martin, 402 S.W.3d 805 (Tex. App.—Dallas 2013), *pet. granted*, 57 Tex. Sup. Ct. J. 708 (June 13, 2014) [13-0337].

At issue in this case is the application of section 51.003 of the Texas Property Code, which requires suits to recover deficiencies following non-judicial foreclosure sales to be brought within two years of the foreclosure sale.

PlainsCapital loaned William Martin $790,400 to purchase real estate and build a home to sell after construction. Martin failed to sell the house and the bank foreclosed. The bank estimated the house might sell for $770,000 after a substantial marketing time and purchased the house for $539,000 at the foreclosure sale. The bank resold the house over a year later for $599,000 after incurring over $120,000 in post-foreclosure costs. The bank sought its out of pocket damages from Martin, less the $599,000 it resold the house for. The trial court held that section 51.003 did not apply because the bank gave Martin credit for the resale price rather than the foreclosure sale price and that Martin would not be entitled to an offset even if section 51.003 applied. The court of appeals reversed and remanded. The court held that the bank could not avoid the requirements of section 51.003 by applying the resale price rather than the foreclosure sale price. The court remanded for the trial court to assess the fair market value of the house on the foreclosure date.

The Supreme Court granted PlainsCapital's petition for review and will hear oral argument on September 18, 2014.

D. Inverse Condemnation

1. City of Lorena v. BMTP Holdings, L.P., 409 S.W.3d 634 (Tex. August 30, 2013) [11-0554].

At issue in this case was whether a municipality validly applied a moratorium on sewer connections against a previously approved development. After approving BMTP Holdings, L.P.'s (BMTP) final plat for a subdivision containing seven lots, the City of Lorena enacted a moratorium on sewer connections due to capacity issues with its sewer. BMTP sued for a declaratory judgment that the moratorium could not validly apply to its seven lots and sought damages under an inverse condemnation claim for a regulatory taking. The trial court granted summary judgment to the City on both claims. The court of appeals reversed, holding that the Local Government Code prevents moratoria from applying to approved development.

The Supreme Court held that the Local Government Code prohibits moratoria from

applying to development that a municipality has approved at any stage of development by requiring municipalities to include a summary of the evidence that the moratorium does not affect approved development. The Supreme Court therefore affirmed the court of appeals' reversal of the summary judgment for the City on the declaratory judgment claim. The Supreme Court also held that fact issues existed with respect to the extent of the government intrusion that the trial court must resolve before determining whether a taking had occurred. The Supreme Court also remanded the issue of attorney's fees under the declaratory judgment claim.

Justice Lehrmann concurred but wrote to emphasize that the harsh result of the City not being able to enforce a moratorium against development it had approved was required by the statute, and that the Local Government Code also requires municipalities to weigh the impact of new development on utilities when approving the development.

Justice Hecht, joined by Chief Justice Jefferson, dissented. The dissent concluded that the Court's reading of the statute rendered a portion of it (prohibiting municipalities from imposing moratoria on unaffected areas) meaningless. The dissent would have held that the City made sufficient findings to justify the imposition of the moratorium on the property in question.

E. Leases

1. Coinmach Corp. v. Aspenwood Apartment Corp., 417 S.W.3d 909 (Tex. November 22, 2013) [11-0213].

At issue in this case were the rights and liabilities of a tenant at sufferance. In 1994, Coinmach Corp. leased laundry rooms at an apartment complex when the property was foreclosed on. Aspenwood, the new owner, immediately gave Coinmach written notice to vacate the laundry rooms, asserting that the foreclosure sale had terminated the lease. Coinmach refused to vacate, and the parties spent the next six years contesting rightful possession of the laundry rooms, during which time Coinmach continued to occupy the premises.

In 2000, the trial court ruled as a matter of law that the 1994 foreclosure sale had terminated Coinmach's lease agreement, and Coinmach vacated the premises. The trial court then granted Coinmach's motion for new trial and entered a partial summary judgment, ruling that the foreclosure sale terminated the lease and that Coinmach became a tenant at sufferance. Based on these holdings, the court struck all of Aspenwood's breach of contract claims. The court then ruled, as a matter of law, that a tenant at sufferance cannot be a trespasser; that Aspenwood could not seek declaratory relief and attorney's fees under the UDJA; that Aspenwood's trespass, trespass to try title, DTPA, and tortious interference claims were moot; and that, since Coinmach was not a trespasser, it could not be liable for such tort-based claims. The court entered judgment that Aspenwood take nothing on its claims. The court of appeals affirmed in part, reversed in part, and remanded.

The Supreme Court affirmed the parts of the court of appeals' judgment affirming the trial court's dismissal of Aspenwood's breach of contract and DTPA claims. It rendered judgment against Aspenwood on its declaratory judgment claim. Finally, it affirmed the part of the court of appeals' judgment reversing and remanding Aspenwood's claims for trespass, trespass to try title, and tortious interference with prospective business relations and remanded those claims to the trial court. The court held that a tenant at sufferance cannot be liable for breach of a terminated lease agreement because there is no longer a contract, but a tenant at sufferance can be liable in tort as a trespasser because he has no possessory interest in the property. The court made it clear that the grace period afforded to a tenant at sufferance by statutory eviction procedures does not create a possessory interest in the wrongful possessor. The court also held that Aspenwood's Deceptive Trade Practices Act claim failed because it was not a consumer, and also that the Uniform Declaratory Judgments Act was not a proper avenue in which to determine the property interests in this case.

Justice Guzman joined Justice Boyd's majority opinion but also wrote separately, joined by Justice Devine and Justice Brown, to address her concerns about the effect the ruling will have on low-income tenants. In her concurrence she explained that a tenant who trespasses in good

faith would not have the intent required to entitle the plaintiff to either emotional distress or punitive damages, thereby protecting innocent trespassers from excessive liability.

F. Property Damages

1. Gilbert Wheeler, Inc. v. Enbridge Pipelines (E. Tex.) L.P., 393 S.W.3d 921 (Tex. App.—Tyler 2013), *pet. granted*, 57 Tex. Sup. Ct. J. 154 (January 15, 2014) [13-0234].

At issue in this case is whether a finding on the permanent or temporary nature of an injury to real property is required before breach-of-contract damages can be awarded. Enbridge Pipelines (East Texas) L.P. and Gilbert Wheeler, Inc. entered into a right-of-way agreement that permitted Enbridge to construct a pipeline across the Wheeler property. The agreement included a provision requiring Enbridge to lay the pipeline using the boring method in order to preserve the surface of the land. However, despite the boring provision, Enbridge's contractors bulldozed part of the easement, destroying vegetation and disrupting the flow of a stream on the property. The Wheelers sued Enbridge for breach of contract and trespass.

At trial, Enbridge sought a finding from the trial court that the injury to the land in this case was permanent as a matter of law. The trial court refused to make a finding on whether the injury was permanent or temporary, and submitted a charge to the jury that did not include a question on the nature of the injury. The jury found Enbridge liable for both breach of contract and trespass and awarded damages for each cause of action. The trial court entered judgment in favor of Wheeler for $300,000, the cost to restore the property, based on breach of contract. The court of appeals reversed and rendered a take-nothing judgment in favor of Enbridge. According to the court of appeals, the appropriate measure of damages to real property is determined by the nature of the injury, a question of fact that must be determined before damages can be awarded. Because an essential element was missing from the charge, the court of appeals rendered judgment in favor of Enbridge.

The Wheelers appeal the court of appeals' decision, arguing that contractual damages are not determined by the permanent or temporary nature of the injury, and even if the nature of the injury is determinative, the evidence conclusively established that the injury was permanent. The Wheelers further argue that if the charge included an improper damages question, the court of appeals should have remanded the case rather than rendering judgment for Enbridge. The Court granted Wheeler's petition for review and heard oral argument February 27, 2014.

G. Property Taxation

1. Galveston Cent. Appraisal Dist. v. TRQ Captain's Landing, L.P., 423 S.W.3d 374 (Tex. January 17, 2014) [07-0010].

At issue in this case was whether a community housing development organization may, as holder of equitable title, obtain an ad valorem tax exemption for properties legally owned by its subsidiaries. In this case, as in *AHF-Arbors at Huntsville I, LLC v. Walker County Appraisal District*, 410 S.W.3d 831 (Tex. 2012), the Supreme Court held that legal title is not required and equitable title is sufficient. In 2003, the American Housing Foundation, a Texas non-profit and a qualified community housing development organization, formed CD Captain's Landing, LLC and became its sole member. CD, in turn, purchased TRQ Captain's Landing, L.P., which owned the Captain's Landing Apartments, by obtaining a 99% limited partnership interest directly along with a 100% membership interest in TRQ Galveston, LLC, which held the remaining 1% interest as general partner. Once the transaction was complete, CD filed an application with the Galveston Central Appraisal District seeking a 2003 ad valorem tax exemption for the apartments under section 11.182 of the Texas Tax Code, which allows exemptions for certain real property owned by community housing development organizations. The District denied the exemption on the grounds that CD did not "own" (i.e., have legal title to) the apartments for the purposes of section 11.182.

TRQ Captain's Landing and the Housing Foundation sought judicial review in district court, claiming that they were entitled to an exemption as the equitable owners of the property. The trial court upheld the Appraisal District's decision, but the court of appeals reversed. The Supreme Court granted the Appraisal District's

petition for review and heard oral argument on January 15, 2008, but abated the case after the Foundation sought protection in bankruptcy. While the case was abated, the Supreme Court addressed section 11.182's ownership requirement in *AHF-Arbors*, holding legal title is not required and equitable title is sufficient. *AHF-Arbors* is dispositive of the ownership issue in the present case, and accordingly, the Court affirmed the court of appeals' judgment.

H. Slander of Title

1. HMC Hotel Props. II Ltd. v. Keystone-Tex. Prop. Holding Corp., S.W.3d , 57 Tex. Sup. Ct. J. 718 (Tex. June 13, 2014) [12-0289].

At issue was whether legally sufficient evidence supported a jury's finding that a tenant caused the demise of a pending sale of the rented property. Keystone owned the land underneath a hotel owned and operated by HMC. Pursuant to the terms of HMC's ground lease, Keystone notified HMC it planned to sell the land to a third party and requested HMC waive its right under the lease to negotiate to purchase the property. HMC initially expressed interest in purchasing the property but eventually indicated it would execute the requested waiver. However, days before the closing, HMC altered course and sent a letter claiming Keystone had breached the lease by reaching a deal with a third party before notifying HMC. HMC never provided the requested waiver.

HMC sued Keystone for breach of the lease and Keystone counterclaimed for slander of title and tortious interference with a contract. A jury found for Keystone, and the court of appeals affirmed. The Supreme Court reversed because there was no evidence HMC's letter caused the sale's demise. The Court noted that the title insurers working the deal and the terms of the sale itself required Keystone to furnish a waiver of HMC's right to negotiate under the lease, but it was undisputed HMC was not obligated to provide a waiver. The title insurers testified the waiver would have been required regardless of HMC's letter. The Court acknowledged testimony about the letter's impact on the sale and that HMC changed its position on the waiver, but concluded Keystone failed to provide evidence of the "but for" prong of the cause-in-fact element of proximate causation. There was no evidence, the Court held, that the outcome would have been different had HMC sent its letter earlier, worded it differently, or not sent it at all. Rather, the sale failed because Keystone was unable to convince HMC to voluntarily waive its rights.

Keystone pointed to testimony in which the title insurers acknowledged they discussed issuing policies notwithstanding HMC's letter and that the letter was a substantial contributing factor in the decision not to do so. But the Court concluded Keystone's argument was, at most, speculation about what the title insurers could, rather than would, have done. Additional testimony reflected that issuing policies without the waiver was never an option, although the title insurers discussed whether it was possible. Furthermore, the title insurers' testimony about the letter's impact on their decision only spoke to half of the cause-in-fact element of proximate causation. The testimony was evidence of the letter's impact but did not provide evidence of a different outcome had HMC not sent it.

XXVII. TIM COLE ACT

A. Eligible Claimants for Compensation

1. In re Blair, 408 S.W.3d 843 (Tex. August 23, 2013) [11-0441].

The issue in this original mandamus proceeding against the Comptroller under Texas Government Code §22.002 was whether a person who would otherwise be entitled to compensation for wrongful imprisonment under the Tim Cole Act, TEX. CIV. PRAC. & REM. CODE §§ 103.001–.154, cannot recover because, before he was exonerated of that charge, he "is convicted" of another "crime punishable as a felony." *Id.* § 103.154(a). The Court denied mandamus relief, with plurality and concurring opinions adopting different rationales for denial, and four justices dissented based on their reading of the Act.

In 1994, Michael Blair was wrongfully convicted and sentenced to death for the 1993 murder of a seven-year-old girl. While Blair steadfastly maintained his innocence of murder, in 2003 he admitted to sexually abusing children in 1992 and 1993. In 2004, Blair pleaded guilty to four felony counts of indecency with a child and was given four life sentences, three consecutive and one concurrent. Blair is currently serving those sentences.

In 2008, the Court of Criminal Appeals set aside Blair's murder conviction based on DNA evidence establishing his actual innocence. In June 2009, Blair applied to the Comptroller for compensation for having been wrongfully incarcerated from 1993, when he was arrested for murder, to 2004, when he was sentenced for the sexual abuse felonies. That application was denied and the Supreme Court denied review. In 2011, Blair filed a second application for the same compensation. The Comptroller observed that the second application was "virtually identical" to the first.

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." *Id.* § 103.154(a) (emphasis added). The plurality opinion discussed whether to construe the statutory phrase "is convicted" to refer to either: (1) a claimant's status as a felon, or (2) the act of a claimant's felony adjudication. The first construction would result in the denial of payments for wrongful imprisonment to a claimant who, during the time he would receive them, has been convicted of a felony, whether the conviction happened before or after he became eligible for compensation. The second construction would result in a felon-claimant's compensation being conditioned on the date of his felony conviction, barring compensation if the conviction occurred after the date the claimant becomes eligible.

Justice Hecht's plurality opinion, joined by Justice Green, Justice Guzman, and Justice Devine, adopted the first construction, reasoning that the second construction would lead to unreasonable results: it would treat felon–claimants who committed the exact same acts disparately on the basis of whether they were convicted of the felony before or after their eligibility for compensation for wrongful imprisonment. The plurality stated that it "will not read a statute to draw arbitrary distinctions resulting in unreasonable consequences when there is a linguistically reasonable alternative, as there is [here]." Accordingly, the plurality concluded that the Comptroller correctly denied Blair's claim for compensation. The plurality also concluded that the Act does not require claimants to submit an application to cure after a denial of compensation as a prerequisite of judicial review "if there is nothing to cure," as it found was the case here, and the plurality also concluded that the Act does not prohibit successive applications.

Justice Boyd, joined as to Part IV by Justice Willett and Justice Lehrmann, concurred in the decision. In Part IV of his opinion, Justice Boyd disagreed with the plurality opinion's construction of the phrase "is convicted," finding it to be an unreasonable construction. Justice Boyd concluded that only the second construction considered by the plurality was linguistically reasonable and would therefore have found Blair to be eligible for compensation had his petition not been procedurally barred from judicial review. Nonetheless, Justice Boyd concurred in the result, concluding that judicial review of Blair's second application was procedurally barred. In support of that conclusion, Justice Boyd reasoned that the Act prohibited successive applications and Blair's second application was successive. Justice Boyd further reasoned the Act required claimants to submit an application to cure to the Comptroller following a denial as a prerequisite of judicial review and Blair failed to submit such an application following the denial of his second application.

Justice Lehrmann, joined by Chief Justice Jefferson, Justice Johnson, and Justice Willett, dissented. Justice Lehrmann concluded that Blair was not procedurally barred from seeking judicial review of the Comptroller's decision for the same reasons as the plurality, but she would depart from the plurality and hold that Blair's felony convictions do not foreclose eligibility for compensation under the Act.

XXVIII. WORKERS' COMPENSATION

A. Exclusive Remedy

1. Liberty Mut. Ins. Co. v. Adcock, 412 S.W.3d 492 (Tex. August 30, 2013) [11-0934].

At issue in this case was whether the Texas Workers' Compensation Act (TWCA) allows a permanent determination of lifetime income benefits (LIBs) to be re-opened. Ricky Adcock was determined to be eligible for LIBs under the TWCA in 1991 after losing the use of his foot and hand. The workers' compensation carrier sought to re-open that determination approximately ten

years later when it believed Adcock had regained some use of his hand and foot. The Texas Department of Insurance, Division of Workers' Compensation (Division), re-opened the determination and held that Adcock remained entitled to LIBs. On judicial review, the trial court granted Adcock's motion for summary judgment and the court of appeals affirmed—holding that the Legislature removed the mechanism to re-open LIB determinations in 1989.

The Supreme Court affirmed, holding that the current version of the TWCA lacks any mechanism to re-open the LIB determination. The Court explained that the TWCA is a comprehensive statutory scheme, such that courts should not engraft new rights and remedies the Legislature did not incorporate. The Court reasoned that the Legislature removed the mechanism to re-open LIB determinations in 1989, making the LIB determination permanent in nature.

Justice Green, joined by Chief Justice Jefferson and Justice Hecht, dissented. The dissent concluded that the TWCA gives the Division the power to re-open the LIB determination, which is especially important because the Division cannot determine if a claimant who is eligible for LIBs will remain eligible for life.

B. Payment of Benefits

1. State Office of Risk Mgmt. v. Carty, S.W.3d , 57 Tex. Sup. Ct. J. 861 (Tex. June 20, 2014) [13-0639].

The United States Court of Appeals for the Fifth Circuit certified the following questions to the Supreme Court:

1. In a case involving a recovery by multiple beneficiaries, how should the excess net settlement proceeds above the amount required to reimburse a workers' compensation carrier for benefits paid be apportioned among the beneficiaries under section 417.002 of the Texas Labor Code?
2. How should a workers' compensation carrier's right under section 417.002 to treat a recovery as an advance of future benefits be calculated in a case involving multiple beneficiaries? Should the carrier's right be calculated in a case involving multiple beneficiaries? Should the carrier's right be determined on a beneficiary-by-beneficiary basis or on a collective-recovery basis?
3. If the carrier's right to treat a recovery as an advance of future benefits should be determined on a beneficiary-by-beneficiary basis, does a beneficiary's nonbinding statement that she will use her recovery to benefit another beneficiary make the settlement allocation invalid?

Christy Carty's husband died in a Texas Department of Public Safety training accident. State Office of Risk Management (SORM), the State's workers' compensation carrier, began paying benefits to Carty and her minor children. Carty, on behalf of herself, her husband's estate, and the children, filed a products-liability and wrongful death suit in federal court against Kim Pacific Martial Arts and Ringside, Inc. Carty settled with Ringside for $100,000 and reached an agreement with SORM on its portion of that recovery. Carty settled with Kim Pacific for $800,000, and SORM intervened, seeking reimbursement from the settlement for the workers' compensation benefits it had paid to Carty and the children, as well as a credit for future benefits owed to them. Carty is no longer eligible for benefits because she has remarried; however, the three Carty children remain eligible.

The district court held a prove-up hearing to determine whether the settlement should be approved and how it should be apportioned. Carty indicated to the district court that she would use her portion to provide for her children. The district court approved the settlement and apportioned $290,000 for attorney's fees and costs, $78,000 to SORM for reimbursement, $351,000 to Carty, and $80,000 to the children. The district court also determined that SORM was entitled to suspend future payments to Carty's children until the value of the suspended payments equaled the amount of the settlement proceeds allocated to the children. SORM appealed the settlement apportionment to the Fifth Circuit, which certified the above-referenced questions.

The Supreme Court answered Question 2 by holding that, when multiple beneficiaries recover compensation benefits through the same covered employee, the carrier's rights to a third-party

settlement are determined by treating it as a single, collective recovery rather than separate recoveries by each beneficiary. The Court noted that it had previously interpreted subsection 417.002(a), which requires that the net amount recovered by "a claimant" be used to reimburse the carrier for benefits paid, to mandate that the first money recovered go to the carrier irrespective of the number of beneficiaries. It therefore followed that subsection 417.002(b), which provides that any excess proceeds after reimbursement are treated as an advance against future benefits to which "the claimant" is entitled, similarly requires that the first money go to the carrier. The Court concluded that this was consistent with section 417.001, which grants the carrier a subrogation interest in the total benefits paid or assumed by the carrier, and with the statute's purpose of minimizing carrier costs. The Court distinguished the situations in which multiple covered employees, or both beneficiaries and nonbeneficiaries, recover from a third party. Because a carrier has no interest in a nonbeneficiary's recovery, and because each covered employee constitutes a separate "claimant" under section 417.002, such recoveries would need to be apportioned before evaluating the carrier's reimbursement claim.

The Court's answer to Question 2 was dispositive, and the Court therefore did not reach the remaining questions.

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