

REVIEW OF DEVELOPMENTS IN LAW



**Chamblee Ryan Case**

**PREMISES LIABILITY:**

Chamblee Ryan has successfully defended on appeal the summary judgment it obtained in a high- damages case involving a bicycIe accident in a private community in *Kemp v. Insight Ass'n Mgmt. GP, Inc.,* No. 05-22-OO59O-CV. 2023 WL 41A4749, at \*1 (Tex. App.— Dallas June 23, 2023, no pet. n.).

Appellate specialist William Newman handled the litigation in Dallas District Court and the appeal in the Dallas Court of Appeals. The trial Court granted summary judgment on premises liability issues. We successfully argued that the plaintiff, a resident of a nearby community, was either a trespasser or licensee on the common property of the defendant community and community management company, and that the defendants lacked

**Premises Liability: *cont.***

actual notice of any unreasonably dangerous condition. The plaintiff alleged she slipped and fell on her bicycle, sustaining serious injuries that required at least $300,000 in past medical for surgeries to reconstruct her elbow and other care. The Court of Appeals affirmed the judgment. The plaintiff had contended on appeal that a nearby homeowner's complaint to the property manager a month before her fall on the community’s hike and bike trail about wet conditions together in that area along with awareness of occasional conditions elsewhere along the trails amounted to the kind of notice that is evidence of actual knowledge. The Court of Appeals properly concluded that the complaint and awareness of other wet conditions does not arise to actual knowledge of a dangerous condition. Accordingly, it affirmed.

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In other developments:

**Texas Supreme Court**:

**June Opinions:**

**NEGLIGENCE**

*Hous. Area Safety Council v. Mendez*, \_\_\_ S.W.3d \_\_\_, 21-0496, 2023 WL 4140238 (Tex. June 23, 2023)

The issue in this case is whether third-party companies that collect and test employment-related drug-testing samples owe a duty of care to the employees being tested. Mendez was required to submit to a random drug test as part of his employment. Houston Area Safety Council collected Mendez’s samples, and Psychemedics tested them. Mendez’s urine sample was negative, but his hair sample was positive for cocaine and cocaine metabolites. Although two subsequent hair tests came back negative, Mendez’s employer refused to assign him to any jobsites. Mendez sued the Safety Council and Psychemedics, alleging the companies negligently administered and analyzed the first hair sample, resulting in a false positive that cost him his job. Both companies filed motions for summary judgment. The *trial court concluded that the companies did not owe Mendez a duty of care* and granted summary judgment for the companies. The court of appeals reversed.

The Supreme Court reversed the Court of Appeals and rendered judgment for the companies. Chief Justice Hecht delivered the opinion of the Court, which held that third-party companies hired by an employer do not owe the employees they test a common-law duty of care. The Court concluded that the risk–utility factors set out in *Greater Houston Transportation Co. v. Phillips* weigh against imposing such a duty and that declining to recognize a duty is consistent with existing tort law. Justice Young filed a concurring opinion joined by one other justice. They agreed with the majority but wrote separately to emphasize that the result could be reached without reliance on the risk–utility factors.

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

*Schindler Elevator Corp. v. Ceasar*, \_\_\_ S.W.3d \_\_\_, 22-0030, 2023 WL 4036171 (Tex. June 16, 2023)

The case concerns whether the trial court abused its discretion by including in the jury charge an instruction on *res ipsa loquitur*.

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

The Supreme Court reversed and remanded for a new trial. The first evidentiary requirement for a res ipsa instruction is that the character of the accident is such that it would not ordinarily occur in the absence of negligence. The Court held that Ceasar presented no evidence to support this requirement because the testimony of Ceasar’s elevator expert was conclusory and conflicting. The Court further held that the court’s submission of the res ipsa instruction was harmful because both of Ceasar’s negligence theories were hotly contested, and the jury returned a 10–2 verdict. Finally, the Court rejected Schindler’s challenges to a discovery sanctions order, the court’s exclusion of evidence, and the court’s refusal to include a jury instruction on spoliation.

**WRONGFUL DEATH/MENTAL ANGUISH DAMAGES**

*Gregory v. Chohan*, No. 21-0017, 2023 WL 4035886 (Tex. June 16, 2023)

In a case of great interest to liability insurers and defendants, the issue was the sufficiency of evidence for an award of a specific amount in mental anguish or grief damages. The Court attempted to lay down some rational bases for evaluating an award of a specific amount of these damages. The Court explained that existing nondeath cases had already required legally sufficient “evidence of the nature, duration, and severity” of mental anguish to support both the existence and the *amount* of compensable loss. *Gregory* reinforces those cases and extends them to death cases.

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

In *divided* opinions, the Supreme Court of Texas reversed. Writing for a plurality, Justice Blacklock concluded that parties must provide both evidence of the existence of mental anguish and evidence to justify the amount awarded. The plurality rule would require parties defending a noneconomic damages award to demonstrate a rational connection between the evidence and the amount awarded. They announced that the “shock the conscience” standard of review is itself insufficient, and parties should not rely on unsubstantiated anchors or ratios between economic and noneconomic damages. An argument (or evidence) that is an unsubstantiated anchor is where attorneys suggest damages amounts by reference to objects or values with no rational connection to the facts of the case. Analogies employed by counsel in this case included a $71 million Boeing F-18 fighter jet and a $186 million painting by Mark Rothko. These are not appropriate. After these inappropriate references, Plaintiff Counsel urged the jury to give defendants their “two cents worth” for every one of the 650 million miles that New Prime’s trucks drove during the year of the accident. “The unmistakable purpose of this argument is to suggest that New Prime can afford a large award and that it should be punished for denying Chohan and her family justice for Deol's death. But punitive damages are not at issue here.”

An impermissible ratio is, as in *Gregory*, where Plaintiff Counsel, attempts to link high economic damages to noneconomic anguish. But the two are unrelated. “The emotional trauma and loss experienced by the decedent's loved ones is different in kind from any lost income the family suffers because of the death. To suggest that greater pecuniary loss necessarily justifies greater noneconomic damages is to suggest that the families of a well-paid decedent suffer more grief and pain than the families of those with less income.” This, the plurality notes, indeed shocks the conscience.

So, “to survive a legal-sufficiency challenge to an award of noneconomic damages, a wrongful death plaintiff should bear the burden of demonstrating both (1) the existence of compensable mental anguish or loss of companionship and (2) a rational connection, grounded in the evidence, between the injuries suffered and the amount awarded.” Importantly, evidence of the fact of anguish is not the same as evidence of an *amount*.

Justice Devine, joined by Justice Boyd, concurred in the judgment. His concurrence expressed concern that the plurality’s “rational connection” requirement is an impossible standard to meet that infringes upon the jury’s traditional role. Justice Bland concurred in part. She agreed that improper argument affected the jury’s verdict but considered that a sufficient basis for reversal in this case.

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

**ARBITRATION**

*Taylor Morrison of Tex., Inc. v. Kohlmeyer*, \_\_\_ S.W.3d \_\_\_,2 1-0072, 2023 WL 4278242 (Tex. June 30, 2023) (per curiam)

The Supreme Court continued to emphasize its desire to grant arbitration even where the party subject to arbitration is not the original party signing the agreement.

The issue in this *per curiam* (an unsigned opinion “of the court,” indicating broad agreement and no new law announced) case is whether subsequent purchasers of a home are required to arbitrate their claims against the builder for alleged construction defects. Shortly after purchasing their home, the Kohlmeyers sued the builder, Taylor Morrison, for negligent construction, violations of the Deceptive Trade Practices-Consumer Protection Act, and breach of the implied warranties of habitability and good workmanship. The Kohlmeyers alleged that construction defects caused a serious mold problem in the home. Taylor Morrison filed a motion to compel arbitration of the Kohlmeyers’ claims, arguing that the Kohlmeyers are bound by the arbitration clause in the original purchase agreement under the doctrines of implied assumption and direct-benefits estoppel.

The trial court denied the motion to compel arbitration, and the court of appeals affirmed, holding that direct-benefits estoppel does not require arbitration of these claims because they do not arise solely *from* the original purchase agreement.

The Supreme Court explained that the court of appeals’ opinion conflicts with the Court’s recent opinion in *Lennar Homes of Texas Land & Construction*, *Ltd. v. Whiteley*. Direct-benefits estoppel requires arbitration of all of the Kohlmeyers’ claims. Accordingly, the

Court reversed and remanded the case to the trial court for further proceedings (i.e. to order arbitration).

**SUMMARY JUDGMENT/DISMISSAL**

*In re First Rsrv. Mgmt., L.P., 4140454,* 22-0227, (Tex. June 23, 2023)

The issue was whether the trial court should have dismissed the plaintiffs’ negligent-undertaking claim against a group of private-equity investors under Texas Rule of Civil

Procedure 91a. After explosions at a chemical plant caused widespread damage and injuries, thousands of lawsuits were filed and consolidated in an MDL court for pretrial proceedings. When it became clear that the original defendant, plant-owner TPC, was bankrupt, Plaintiffs sued TPC’s private-equity investors, First Reserve, for negligent undertaking. Plaintiffs allege that First Reserve undertook to take charge of TPC’s operations and was negligent by failing to provide resources for safety measures that could have prevented the explosions. The trial court denied the motion to dismiss, and the court of appeals denied mandamus relief.

The Supreme Court held that the trial court should have dismissed the claim for lacking a basis in law. The only factual allegation in the petition about how First Reserve controlled TPC’s operations is that First Reserve, together with another investor group, appointed four members to the five-member board of managers that governed TPC. Plaintiffs failed to plead facts that would take First Reserve’s conduct outside the norm of private-equity-investor behavior. Despite its holding, the Court declined to grant relief because of procedural irregularities in the case caused by TPC’s bankruptcy. Justice Boyd concurred in the Court’s disposition but did not file a separate opinion.

*McLane Champions, LLC v. Hous. Baseball Partners LLC*, \_\_\_ S.W.3d \_\_\_, 21-0641, 2023 WL 4306378 (Tex. June 30, 2023)

The issue was whether the Texas Citizens Participation Act (intended to protect Texans from SLAPP lawsuits tending to inhibit speech on important issues) applies to a private business transaction between private parties that later generates public interest. Houston Baseball Partners purchased the Houston Astros from McLane Champions in 2011. The deal included both the team and its interest in a planned regional sports network, in which Comcast also owned an interest. Partners alleges that the Astros’ interest in the proposed network was the primary reason Partners acquired the team. But the network collapsed shortly after the purchase. Partners alleged that Champions and Comcast had materially misrepresented the proposed network’s financial prospects, causing Partners to pay substantially more for the Astros than the team was worth. Partners sued, and Champions moved to dismiss Partners’ claims under the TCPA. The trial court denied the motion, and the court of appeals affirmed.

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

Chief Justice Hecht, joined by Justice Blacklock, dissented. He would have held that Partners’ suit implicated Champions’ right to free speech under the TCPA and that Partners

failed to make a prima facie case for its fraud-based claims. Justice Blacklock dissented separately to further highlight that the basis for Partners’ lawsuit is substantially undermined by the Astros’ extraordinary competitive and financial success under Partners’ ownership.

**CORPORATIONS**

*Skeels v. Suder*, \_\_\_ S.W.3d \_\_\_, 2023 WL 4140683, 21-1014 (Tex. June 23, 2023)

The issue in this declaratory-judgment suit is whether a corporate resolution authorized a law firm to redeem a departing shareholder’s shares on terms unilaterally set by the firm’s founders. As a shareholder in a law firm, David Skeels signed a corporate resolution generally authorizing the firm’s founders “to take affirmative action on behalf of the Firm.” After his relationship with the firm soured, the firm terminated his employment and proposed separation terms, including that Skeels relinquish his rights to his shares. When Skeels did not agree, the founders purported to redeem his shares at no cost. Skeels then sued the firm and two of its founders, and the firm counterclaimed. Both sides raised competing declaratory-judgment claims on whether the resolution authorized the founders’ redemption actions.

In a pretrial ruling, the trial court declared that it did, and the court of appeals affirmed. The Supreme Court reversed. The Court held that the resolution, by modifying “affirmative action” with “on behalf of the Firm,” authorized the founders to take any action the firm could take, but it neither expanded the scope of the firm’s authorized actions nor constituted an agreement that the founders may set redemption terms on Skeels’s behalf. And because the firm was not authorized to set the redemption terms without Skeels’s agreement, the Court held that the resolution did not independently authorize the founders to unilaterally set those terms. Chief Justice Hecht dissented, concluding that Skeels agreed in the resolution that the firm could redeem his shares on his departure without payment.

**EMPLOYMENT**

*Tex. Tech Univ. Health Scis. Ctr.–El Paso v. Niehay*, \_\_\_ S.W.3d \_\_\_, 22-0179, 2023 WL 4278585 (Tex. June 30, 2023)

The issue is whether morbid obesity qualifies as an “impairment” under the Texas Commission on Human Rights Act (TCHRA) without evidence that it is caused by an *underlying* disorder or condition. Texas Tech dismissed Dr. Lindsey Niehay from its medical residency program, and Niehay sued for disability discrimination. claiming that Texas Tech dismissed her because it regarded her as being morbidly obese. Texas Tech filed a combined plea to the jurisdiction and motion for summary judgment, asserting that Niehay had not shown a disability as defined by the TCHRA. Specifically, Texas Tech argued that morbid obesity is not a disability without evidence that it is caused by an underlying physiological disorder.

The trial court denied the plea and motion, and the court of appeals affirmed. The Supreme Court reversed. The majority opinion, authored by Chief Justice Hecht, held that the plain language of the TCHRA’s definition of disability as “a mental or physical impairment” requires an impairment to have an underlying a physiological disorder or condition. It further held that weight is not a physiological disorder or condition—it is a physical characteristic. Niehay presented no evidence that her morbid obesity is caused by an underlying physiological disorder or that Texas Tech perceived it as such, so the Court ultimately held that Niehay has not shown a disability under the TCHRA.

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

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

**FAMILY LAW**

*In re A.A*., \_\_\_ S.W.3d \_\_\_, 21-0998, 2023 WL 3910142 (Tex. June 9, 2023)

The Mother challenged the termination of her parental rights under Section 161.001(b)(1)(O) of the Family Code because the children were relocated to foster care from Father’s home and for his wrongdoing. Mother and Father have a history of drug use and domestic violence. When they divorced, Mother stipulated to a decree giving Father sole custody of the children. DFPS later removed the children from Father’s home due to Father’s drug use and neglect. The trial court signed orders under Chapter 262 that removed the children from both Mother and Father and granted DFPS conservatorship. Later, the court terminated Mother’s rights under Subsection (O), and the court of appeals affirmed.

The Supreme Court also affirmed. Subsection (O) applies when a parent has failed to comply with a service plan imposed “as a result of the child’s removal from the parent under Chapter 262 for the abuse or neglect of the child.” “Removal from the parent under Chapter 262” is not just physical relocation but the transfer by court order of the bundle of rights that the law gives a parent by default from the parent to DFPS. Caselaw establishes that the term “abuse or neglect” in (O) includes the danger to the child’s health or safety created by the parent’s conduct. Finally, the Court held that the record contains sufficient evidence that the children were indeed removed from Mother under Chapter 262 for her abuse or neglect. The trial court’s removal orders were based on evidence that Mother voluntarily gave the children to Father despite his history of violence and drug use and that she lacked stable housing or employment.

Justice Young filed a dissenting opinion, joined by Justice Blacklock and Justice Busby. They would have held that (O) does not apply on these facts as a matter of law.

*In re J.N*., \_\_\_ S.W.3d \_\_\_, 22-0419, 2023 WL 3910042 (Tex. June 9, 2023) []]

This case concerns a trial court’s failure to interview a child under Section 153.009(a) of the Family Code. Under this section, upon application by certain parties, a trial court “shall” interview a child twelve and older to determine the child’s wishes as to who will have the exclusive right to determine their primary residence. This statute applies only to nonjury trials or hearings. Therefore, a litigant must forgo her right to a jury trial to benefit from Section 153.009(a)’s interview provision. In this divorce proceeding, Mother withdrew her jury demand and properly invoked the trial court’s statutory obligation to interview her thirteen-year-old daughter regarding which parent she would prefer to have determine her primary residence. The trial court did not conduct the interview and ultimately granted the father the exclusive right to determine the primary residence of the couple’s four children.

The court of appeals affirmed in a split decision. The panel agreed that the trial court erred in failing to conduct an in-chambers interview but disagreed about whether the error is subject to a harm analysis. The Supreme Court held that the trial court erred in failing to conduct the interview because Section 153.009(a)’s interview requirement is mandatory, and such an error is subject to a harm analysis. Here, the trial court’s error was harmful. Consequently, the Court reversed the judgment in part and remanded for an interview under Section 153.009(a) and a new judgment regarding the child’s primary residence.

*In re J.S*., \_\_\_ S.W.3d \_\_\_, 22-0420, 2023 WL 4036262 (Tex. June 16, 2023)

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

The court of appeals reversed, holding that the trial court’s failure to make the extraordinary-circumstances finding when it granted the extension deprived the court of subject-matter jurisdiction. The court of appeals then vacated the trial court’s judgment and dismissed the case. The Supreme Court reversed. The Court held while Section 263.401(b) requires the best-interest and extraordinary-circumstances findings to be made expressly, these findings are mandatory rather than jurisdictional. As a result, a parent whose rights have been terminated generally must object before the initial automatic dismissal deadline passes in order to preserve the complaint for appellate review. Because Mother did not raise her complaint before the initial automatic dismissal deadline and did not oppose the extension, she had not preserved her complaint. Holding otherwise, the Court said, would penalize the trial court for doing its best to honor the parents’ last-minute requests for a jury trial.

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

**FEDERAL PREEMPTION**

*Horton v. Kan. City S. Ry. Co*., \_\_\_ S.W.3d \_\_\_, 2023, 21-0769, WL 4278230 (Tex. June 30, 2023)

This case is about questions of federal preemption, evidentiary sufficiency, and charge error. Ladonna Sue Rigsby was killed when her truck collided with a train operated by Kansas City Southern Railroad Company while she was driving across a railroad crossing. Her children sued the Railroad Company, alleging two theories of liability: (1) the Railroad Company failed to correct a raised hump at the midpoint of the crossing; and (2) it failed to maintain a yield sign at the crossing. Both theories were submitted to the jury in one liability question. The jury found both the Railroad Company and Rigsby negligent, and the trial court awarded the plaintiffs damages for the Railroad Company’s negligence. A divided court of appeals reversed. The majority concluded that the federal Interstate Commerce Commission Termination Act preempted the plaintiffs’ humped-crossing theory and that the submission of both theories in a single liability question was harmful error. The court remanded for a new trial on the yield-sign theory alone.

Both sides petitioned for review. The Supreme Court granted the petitions and affirmed the court of appeals’ judgment but for different reasons. The Court held that (1) federal law *does not expressly or impliedly preempt* the humped-crossing claim; and (2) no evidence supports the jury’s finding that the absence of the yield sign proximately caused the accident. However, the Court agreed that a new trial is required because submitting both theories in a single broad-form question was harmful error. (This jury charge error is known as *Casteel* error; when erroneous theories of liability or damages are mixed with valid theories and the reviewing court is unable to determine whether the improperly submitted theories formed the sole bases of the jury's verdict or damages, the matter is reversed. *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000))

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

**ELECTIONS**

*Abbott v. Harris County,* \_\_\_ S.W.3d \_\_\_, 22-0124, 2023 WL 4278763 (Tex. June 30, 2023)

In a hot-issue case, the question was case is whether the Governor has authority to issue executive orders that *prohibit* local governments from imposing mask-wearing requirements in response to the coronavirus pandemic. In 2020 and 2021, Harris County officials issued a series of executive orders requiring masks in certain public settings. The Governor then issued executive order GA-38, which stated that no local government or official “may require any person to wear a face covering.” Citing independent authority under the Disaster Act and the Health and Safety Code, Harris County obtained a temporary injunction against the enforcement of GA-38 and future orders. The court of appeals affirmed.

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

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

**GOVERNMENTAL IMMUNITY**

*CPS Energy v. Elec. Reliability Council of Tex. and Elec. Reliability Council of Tex., Inc. v. Panda Power Generation Infrastructure Fund LLC,* \_\_\_ S.W.3d \_\_\_, 22-0056, 22-0196, 2023 WL 4140460 (Tex. June 23, 2023)

In this much anticipated case arising from the blackouts during the Texas freeze in 2021, the main issue was whether ERCOT is entitled to sovereign immunity. In *CPS*, CPS sued ERCOT for breach of contract and other claims, alleging that ERCOT unlawfully short-paid CPS to offset losses suffered after Winter Storm Uri caused some wholesale market participants defaulted on their payment obligations to ERCOT. ERCOT filed a plea to the jurisdiction, asserting sovereign immunity and, alternatively, that the Public Utility Commission had exclusive jurisdiction.

The trial court denied the plea, and the court of appeals reversed and dismissed the claims for lack of jurisdiction.

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

In an opinion by Chief Justice Hecht, the Supreme Court rendered judgment for ERCOT in both cases. After concluding that ERCOT is a “governmental unit” entitled to an interlocutory appeal, the Court held that ERCOT is entitled to sovereign immunity.

In this 5-4 opinion, the Court held that ERCOT is an “arm of the State” because, pursuant to the Utility Code, ERCOT operates under the direct control and oversight of the PUC, it performs the governmental function of utilities regulation, and it possesses the power to adopt and enforce rules. The Court further held that recognizing immunity satisfies the policies underlying immunity because it prevents the disruption of key governmental services, protects public funds, and respects separation of powers principles. The Court also held that the PUC has exclusive jurisdiction.

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

immunity.

*City of League City v. Jimmy Changas, Inc*., \_\_\_ S.W.3d \_\_\_, 21-0307, 2023 WL 3909986 (Tex. June 9, 2023)

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

The Supreme Court likewise affirmed. First, it held that Chapter 380 contracts are not similar to those expressly identified in the Tort Claims Act as being governmental. The Act includes only community-development activities under Chapter 373 and urban-renewal activities under Chapter 374 and does not suggest that local economic-development activities under Chapter 380 should be impliedly included. It then held that the *Wasson* factors weigh in favor of determining that the City’s acts were proprietary. The City’s decision to contract with Jimmy Changas was discretionary, the contract primarily benefited City residents, the City acted on its own behalf (that is, it did not act as an agent of the State), and the City’s acts were not sufficiently related to a governmental function so as to make them governmental as well. Justice Young filed a concurring opinion. Although he agreed with the majority opinion, he suggested that the Court reconsider its reliance on the list of governmental functions in the Torts Claims Act when deciding a contract case, and he questioned the usefulness of the *Wasson* factors in other cases.

Justice Blacklock filed a dissenting opinion, in which Justice Bland joined in part. He agreed with the concurrence that the *Wasson* factors do not aid the Court in answering the ultimate question of whether the City’s acts were governmental or proprietary. The dissent would hold that a Chapter 380 tax-incentive grant program for local economic development is a governmental function because such contracts implement a government grant program operated for a diffuse public benefit. (*Wasson*, a series of two cases decided by the Supreme Court in 2016 and 2018, analogized contractual issues to the tort claims act).

*City of Houston v. Green*, \_\_\_ S.W.3d \_\_\_, 2023 WL 22-0295, 22-0295 (Tex. June 30, 2023) (per curiam)

The issue was whether a police officer is entitled to immunity under the Texas Tort Claims Act’s emergency exception. Houston police officer Samuel Omesa was responding to an emergency call when his vehicle collided with one driven by Crystal Green. Omesa testified that he had his emergency lights on, and his siren activated intermittently. He claimed that he stopped and looked both ways at each intersection he crossed but that Green appeared suddenly from behind other vehicles and did not have her headlights on. Green disputed Omesa’s testimony that he was driving at a reasonable speed and had his siren on. Green sued the City of Houston. The City moved for summary judgment, asserting that the TTCA’s emergency exception preserved the City’s immunity. The trial court denied the motion, and the City appealed. The court of appeals affirmed, holding that Green raised a fact issue as to whether Omesa’s conduct was *reckless*.

In a per curiam opinion, the Court reversed the court of appeals’ judgment and rendered judgment dismissing Green’s claims against the City. The Court held that the emergency exception applies—and that immunity is not waived—because Green failed to raise a fact issue as to whether Omesa acted with reckless disregard for the safety of others. Specifically, Green failed to introduce evidence that could support anything more than a momentary judgment lapse or failure to use due care, neither of which suffice to show reckless disregard for the safety of others.

**MEDICAL EXPERT REQUIREMENT/CHAPTER 74**

Collin Creek Assisted Living Ctr., Inc. v. Faber, \_\_\_ S.W.3d \_\_\_, 21-0470, 2023 WL 4278313 (Tex. June 30, 2023)

This case examines what constitutes a “health care liability claim” under the Texas Medical Liability Act. Christine Faber sued an assisted living facility for premises liability after her mother, a facility resident, died from injuries she sustained while being pushed on a rolling walker by a facility employee along the facility’s sidewalk. A walker wheel caught in a crack, and Faber’s mother fell. The facility filed a motion to dismiss on the grounds that Faber had not timely served an expert report as required by the TMLA. The trial court granted the motion, but the court of appeals, sitting en banc, reversed.

In an opinion by Justice Busby, the Supreme Court reversed the court of appeals’ judgment, rendered judgment dismissing Faber’s claim, and remanded the case to the trial court for an award of attorney’s fees. The Court explained that the court of appeals did not consider the entire record, which included allegations directed to employee conduct, the condition of the walker, and the decedent’s status as a recipient of personal-care services. Applying the factors articulated in *Ross v. St. Luke’s Episcopal Hospital*, the Court held that Faber’s claim is a health care liability claim under the TMLA and that, therefore, an expert report was required.

Justice Young, joined by Justice Blacklock, concurred, suggesting that the *Ross* factors should be revisited. (Ross held that the “safety standards referred to in the definition are those that have a substantive relationship with the providing of medical or health care.” *Ross v. St. Luke’s Episcopal Hospital*, 462 S.W.3d 496, 504 (Tex. 2015). It then concluded that “for a safety standards-based claim to be an Healthcare Liability Claim there must be a substantive nexus between the safety standards allegedly violated and the provision of health care.” *Id*. That nexus must be more than a “but for” relationship. *Id*.

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

**OPEN RECORDS**

Univ. of Tex. Sys. v. Franklin Ctr. for Gov’t & Pub. Integrity, \_\_\_ S.W.3d \_\_\_, 21-0534, 2023 WL4278243 (Tex. June 30, 2023)

The issue was whether documents underlying an external investigation into allegations of undue influence in a public university’s admissions process are protected by the attorney–client privilege and are thus exempt from disclosure under the Texas Public Information Act. The University of Texas System hired Kroll Associates to investigate allegations of improper admissions practices at UT Austin. After Kroll completed its investigation and released its final report, Franklin Center made a request under the Public Information Act for documents that were either provided to Kroll by the System or created by Kroll during its investigation. The System argued that all the documents sought were protected from disclosure by the attorney–client privilege because Kroll was serving as its “lawyer’s representative” under Texas Rule of Evidence 503 in conducting the investigation. After reviewing the disputed documents in camera, the trial court determined that they were privileged.

The court of appeals reversed and ordered disclosure of all the documents. The court reasoned that Kroll did not qualify as a “lawyer’s representative” because the final report did not contain legal advice, Kroll did not provide legal services to the System, and Kroll’s investigation was not performed to advise the System regarding potential legal liabilities.

The Supreme Court reversed, holding that the attorney–client privilege attached to the disputed documents. The Court held that, to qualify as a “lawyer’s representative” for purposes of the privilege, assisting in the rendition of professional legal services must be a significant purpose for which the representative was hired. Applying that standard, the Court concluded that Kroll acted as a lawyer’s representative in conducting the investigation and that the disputed documents were intended to be kept confidential. The publication of the final report did not result in a complete waiver of the privilege as to all documents reviewed or prepared by Kroll. However, to the extent the report directly quoted from or otherwise disclosed “any significant part” of the disputed documents, publication of the report waived the System’s attorney–client privilege with respect to those specific documents.

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

**MOTIONS FOR NEW TRIAL**

*In re Rudolph Auto., LLC*, \_\_\_ S.W.3d \_\_\_, 2023 WL 4035804, 21-0135 (Tex. June 16, 2023)

Only relatively recently has the Court been willing to review orders of new trials after a jury verdict on Mandamus. Traditionally it had held that there was sufficient remedy by appeal (so that the complaining party was forced to try the case a second time—and lose—to have any right to redress). The issue here was whether the trial court abused its discretion in granting a new trial. This case arose after a tragic accident: after several employees consumed beer on the premises of Rudolph Mazda, one departing employee hit Irma Vanessa Villegas, another employee, with his truck when she was walking in the parking lot. Villegas suffered serious injuries and was left permanently paralyzed on one side before passing away several years later. Villegas’s daughter, Andrea Juarez, sued Rudolph and its employees for negligence, failure to train, and premises liability. A pretrial order in limine prohibited testimony about Villegas’s drinking habits aside from the day of the accident. At the end of the three-week jury trial, the final witness—an expert toxicologist—provided testimony that the court found to have violated the order. The judge gave a stern limiting instruction to the jury and the trial proceeded. The jury awarded Villegas and Juarez over $4 million in damages. Juarez then filed a motion for new trial, which the district court granted. The court listed four reasons in its new-trial order: (1) the apportionment of responsibility to Rudolph was irreconcilable with the jury’s failure to find Rudolph negligent; (2) the jury’s awards in certain categories of non-economic damages were inadequate given the record’s positive depiction of Villegas; (3) on the day of the jury verdict, this Court issued a decision in an unrelated case that might have affected the trial court’s earlier rulings; and (4) the expert’s improper testimony was incurable and caused the rendition of an improper verdict.

The court of appeals denied mandamus relief. The Supreme Court *granted* the relief reversing the new trial order) based on its precedents requiring clear, specific, and valid reasons to justify a new trial. In essence, on motion for new trial, the trial court has to behave as an appellate court if it will grant a new trial. The Court reasoned that, individually or collectively, none of the articulated errors warranted a new trial: (1) the verdict could be harmonized as a matter of law, so a new trial was unnecessary; (2) nothing in the new-trial order explained, based on the evidence, why the jury could not have rationally allocated damages as it did; (3) the Supreme Court’s separate decision in a different case had no plausible effect on this verdict; and (4) the jury system depends on the presumption that jurors can and will follow instructions, as they each said they would do in this case regarding the curative instruction about expert testimony. To rebut this presumption, a new-trial order must show why this jury could not follow the instruction, but no such reason was given here.

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

**STATUTE OF LIMITATIONS**

*Levinson Alcoser Assocs., L.P. v. El Pistolón II, Ltd*., \_\_\_ S.W.3d \_\_\_, 21-0797, 2023 WL 4035916 (Tex. June 16, 2023)

The Court held that a prior dismissal for failure to comply with the required expert architectural certificate as required by statute does not toll the statute.

The issue was whether the running of limitations was *equitably* tolled during the appeal of the plaintiff’s earlier, identical suit, which was ultimately dismissed after limitations expired. In 2010, El Pistolón sued Levinson for professional negligence and breach of contract arising from Levinson’s performance of architectural services. El Pistolón’s petition included a certificate of merit as required by statute. Levinson moved to dismiss, challenging the certificate of merit. The trial court denied the motion, but the court of appeals and the Supreme Court held that the certificate failed to satisfy statutory requirements. The trial court dismissed El Pistolón’s suit without prejudice in 2018. El Pistolón immediately refiled with a new certificate of merit and pleaded that equitable tolling paused the running of limitations. Levinson moved for summary judgment on limitations. The trial court granted Levinson’s motion, but the court of appeals reversed, holding that the running of limitations was equitably tolled while the 2010 suit was on appeal. Levinson petitioned for review.

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