

The image features a wooden gavel resting on a wooden surface, with a blurred Texas state flag in the background. The text "Texas Supreme Court Update" is written in a white serif font, and "Opinions Issued April 5, 2019" is written in a white italicized serif font below it.

## Texas Supreme Court Update *Opinions Issued April 5, 2019*

By Stephen Gibson<sup>1</sup>

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***Contractual Liability:*** The parol evidence rule does not bar enforcement of previous or contemporaneous agreements consistent with a later written agreement, even if the agreement deals with the same subject as the written agreement *if* the agreement is consistent and such that it would naturally be made separately.

Whether the parol evidence rule bars proof an agreement to satisfy a prior debt was the question presented in [West v. Quintanilla](#). The question arises out of a ruling on a motion to dismiss under the Texas Citizens Participation Act (“TCPA”). Buckle up, because the facts are outcome determinative and the opinion’s legal analysis is more instinctive than normative.

West worked for Quintanilla. Between 2011 and 2013, West had profitably traded commodities using Quintanilla’s money. To continue this practice, in 2014 Quintanilla and West entered a written trading agreement (“2014 Trading Agreement”) under which they agreed to share profits and losses equally. West secured his obligation to pay for any losses with a promissory note and pledge of personal assets. West’s trading losses later amounted to roughly \$14 million. As a result, West owed Quintanilla \$7 million, which triggered his liability on the \$5 million note.

In March 2015, West entered a written agreement to sell certain assets to Quintanilla (“2015 Purchase Agreement”). In addition to partial payment directly to West, Quintanilla agreed to pay off some of West’s debts. This arrangement does not reference the 2014 Trading Agreement or West’s indebtedness to Quintanilla under it. The 2015 Purchase Agreement contained the an integration clause saying that it

and each other agreement contemplated to be executed and delivered hereunder constitute the entire agreement between the Parties and supersede any prior understandings or agreements by or between the Parties, written or oral, to the extent they relate in any way to the subject matter hereof.

Justice Boyd’s 8:0 opinion is murky about the precise order of events, but at or near the 2015 Purchase Agreement, West and Quintanilla also entered an *oral* arrangement under which West agreed to let Quintanilla claim the entire trading loss for income tax purposes resulting in a \$3 million tax savings. West also promised to sell Quintanilla assets for \$4.3 million less than their market value thereby satisfying West’s debt under the 2014 agreement.

Circumstantial evidence of the parties’ conduct were consistent with the oral agreement West described. Quintanilla claimed the entire \$14 million trading loss as a tax deduction. Although the March 2015 written agreement did not refer to the 2014 agreement, West received from Quintanilla’s representative copies of the 2014 promissory note and asset pledge marked as “P[ai]d 3-1-15.” These documents were presented in a folder bearing the handwritten notation, “4/10/15 -shared deal -did not exist.” For the remainder of 2015, the parties conducted their affairs in a manner consistent with the oral agreement described by West.

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<sup>1</sup> The opinions expressed are solely those of the author. They do not necessarily represent the views of Munsch, Hardt Kopf & Harr, P.C. or its clients.

Quintanilla later terminated West's employment. To avoid a severance pay obligation, Quintanilla claimed the termination was "for cause," alleging West failed to repay the debt incurred under the 2014 Trading Agreement. Quintanilla filed liens against West's mineral assets. West responded with a suit for slander of title and filing fraudulent liens. These actions required West to prove Quintanilla made a false and malicious statement disparaging West's title to property that caused special damages. Quintanilla moved to dismiss West's suit under the TCPA. To avoid Quintanilla's motion to dismiss under the TCPA, West was obliged to establish a *prima facie* case which, in turn, required clear and specific evidence of the 2015 oral agreement. Quintanilla claimed West could not possibly meet this burden because the parol evidence rule prohibited enforcing prior or contemporaneous agreements inconsistent with a written contract relating to the same subject matter.

*What is the "subject matter" of the oral agreement?*

But which written contract is the "subject matter" to which the oral agreement relates? If it was the 2014 Trading Agreement, the parol evidence rule would not apply because the oral agreement was after, not before or at the same time as, the 2014 Trading Agreement. The opinion proceeds as if the 2015 Purchase Agreement is the one to be evaluated for whether the parol evidence rule applies.

*Is the subject the same?*

While the 2015 Purchase Agreement was an integrated agreement, it only foreclosed consideration of a previous or contemporary inconsistent agreement addressing the same subject matter. It does not preclude enforcement of consistent agreements supported by separate consideration that the parties "might naturally" make separately and which are not so connected to the written transaction that they would be part and parcel of it. West's contention that the oral agreement was "directly related" to or "correlated" with the 2015 Purchase Agreement did not mean the oral agreement was unenforceable under the parol evidence rule. Justice Boyd concluded that the oral agreement and the 2015 Purchase Agreement dealt with different subjects. The oral agreement concerned with the satisfaction of the debt resulting from the 2014 Trading Agreement whereas the 2015 Purchase Agreement "addressed the acquisition of assets."

It is not obvious how a sale agreement and a purchase agreement are categorically different. Footnote 12 of the opinion says that "the 2015 Purchase Agreement was a means to *effectuate* the parties' broader oral agreement to satisfy West's \$7 million debt." Unless parsed to an extremely fine granularity, the means of effectuating a previous agreement reasonably seems to be related to the "same subject." The courts' contrary conclusion rests heavily on the fact that the 2015 Purchase Agreement was silent about the 2014 Trading Agreement or the \$7 million West owed Quintanilla as a result in reaching the conclusion that 2015 Purchase Agreement dealt with a subject that was "separate" from satisfaction of the \$7 million debt addressed in the oral agreement.

*Is the oral agreement inconsistent with the 2015 Purchase Agreement?*

The conclusion that the oral agreement and 2015 Purchase agreement did not deal with the same subject should have ended the inquiry insofar as the parol evidence rule is concerned. But the opinion goes further and addresses Quintanilla's argument that the oral agreement and 2015 Purchase agreement are *inconsistent*, a matter that is relevant only if the two agreements concerned the same subject. The court has not previously explained what "inconsistent" means in this context, so the opinion posits that inconsistency exists when "extrinsic evidence [is offered] to show that a written instrument was executed for a consideration different from that expressed in the instrument" as more than a mere perfunctory recital.

The opinion provides a few examples of when an agreement has been deemed consistent or inconsistent. An alleged cap on fees was inconsistent with a written hourly fee arrangement; an option to purchase leased property for value of lease payments could not be reconciled with the written lease.

An oral agreement how to use the proceeds from a written contract was not inconsistent because it did not change the parties' obligations under the written agreement. Likewise, an oral agreement to continue one business operation's lease from the other as part of the consideration of an agreement to separate those operations into distinct businesses was not inconsistent and, therefore, unenforceable because the lessor-lessee relationship was distinct from the relationship of the parties addressed in the buyout agreement and the lease did nothing to affect the

parties' buyout obligations. In other words, these arrangements were collateral to and did not alter the terms of the written contracts. In this case, the court ruled that the oral agreement was a consistent collateral agreement to the 2015 Purchase Agreement that merely directed how Quintanilla would credit his profits from the 2015 Purchase Agreement.

*Was the oral agreement supported by consideration and one that "might naturally" be made separately?*

The final arguments to invoke the parol evidence rule as a roadblock to proving the oral agreement and avoiding TCPA dismissal were that the oral agreement lacked consideration and was not the type of agreement that would naturally be made separately from the 2015 Purchase Agreement. Justice Boyd's opinion dispensed with the consideration question by pointing to West's surrender of the tax deduction and nearly \$4.5 million in asset value to obtain a release of the \$7 million debt resulting from the 2014 Trading Agreement. The mere fact that the agreements were related and that the former set the stage for the latter, they concerned distinct obligations. The oral agreement was deemed, accordingly, to be a consistent and collateral agreement not rendered unenforceable under the parol evidence rule. The court remanded the case to the trial court to decide whether West could satisfy the *prima facie* case test to avoid dismissal under the TCPA.

***Administrative Procedure: A deadline for review of an administrative decision is not jurisdictional unless the statute makes clear intent to limit subject-matter jurisdiction. Delayed resolution is preferable to an interminable ability to challenge decisions on jurisdictional grounds.***

Under Texas Labor Code §410.252(a), a claimant must file suit in the appropriate *district* court within 45 days to challenge a decision by a Worker's Compensation Division hearing officer. In [\*Texas Mutual Insurance Co. v. Chicas\*](#), the hearing officer ruled that the claimant's husband was not acting as an employee when he sustained fatal injuries. The claimant timely amended her wrongful death pending in probate court to challenge that ruling and add Texas Mutual as a defendant. Six months later, the probate court dismissed the suit against Texas Mutual, the worker's compensation insurer. The widow then filed suit in district court, which dismissed the widow's suit because it was filed beyond the 45-day deadline.

For years, missing a statutorily mandated deadline to review an administrative ruling was deemed a jurisdictional defect. That approach was abandoned in *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000), so that failure to meet the deadline did not divest the court of subject-matter jurisdiction unless the legislature made clear that it conditioned the court's authority on meeting the deadline or other condition necessary to suit. In a unanimous opinion by Justice Brown, the court ruled that the §410.252(a) limit was intended by the legislature to be mandatory, but not jurisdictional.

The statute itself makes no mention of jurisdiction. The absence of a savings clause to excuse failure to meet the deadline might mean that compliance was mandatory, but not every statutory mandate is a jurisdictional requirement. Texas Mutual argued that §410.252(c)'s provision for transfer when suit is filed in the wrong county after the court determines it lacks "jurisdiction" to decide the case meant that the filing requirements were intended to limit subject-matter jurisdiction. The opinion rejected that reading because transfer would not be permissible if the court lacked subject-matter jurisdiction. Indeed, the provision for transfers of suits filed in the wrong county shows that the legislature decided that the risk of delayed compensation determinations was less deleterious to its objectives than treating a missed deadline as a jurisdictional defect. The court appears to have been persuaded by the uncertainty that would ensue if judgments were subject to attack for an unlimited duration. Previous decisions treating failure to meet the deadline as a jurisdictional defect were overruled.

The opinion declined to consider what would be the consequence of missing the deadline in this case, leaving that issue for the trial court to resolve on remand.

***Statute of Limitations: The limitations period applicable to civil conspiracy claims is the limitations period applicable to the underlying tort. Civil conspiracy itself has no categorical limitations statute. A claim against a civil conspirator accrues when the cause of action for the underlying tort accrues – when the plaintiff sustains the resulting harm.***

**Attorney's Fees: Statutes that permit recovery of attorney's fees by a prevailing party applies to both defendants and plaintiffs.**

**Affidavits: An affidavit is not deprived of probative value when it does not recite that the affiant testifies that the statements are true and made under penalty of perjury if the affidavit says the affiant appeared before a person authorized to administer oaths, was duly sworn and submitted the statement under oath.**

In [\*Agar Corp. v. Electro Circuits Int'l, LLC\*](#), the plaintiff alleged that a newly added defendant conspired with the original group of defendants to produce product knock-offs. The lower courts held that all conspiracy claims were governed by the two-year limitations period specified in Texas Civil Practice & Remedies Code § 16.003.

§16.003 contains no reference to claims based on civil conspiracy, but several appellate courts had decided somewhat arbitrarily that civil conspiracy torts could be pigeonholed into §16.003 by categorizing it as a trespass. §16.003 applies to actions for trespass, conversion, personal injury, wrongful death, and taking another's property, among other things. In a unanimous opinion by justice Devine, the court ruled that the limitations period applicable to actions for civil conspiracy was that applicable to the underlying tort in which the defendant allegedly conspired, which was not necessarily 16.003.

The opinion explained that civil conspiracy is a theory for imposing vicarious liability. Despite some occasional loose language calling civil conspiracy a "cause of action" or a recognized tort, it is *not* a stand-alone tort. Because civil conspiracy is not an independent ground of recovery, the applicable limitations period is that for the underlying tort.

A fixed application of §16.003 to all conspiracy claims could result in a longer limitations period for the conspirator than the principal actor. One example is a defamation case for which limitations for the underlying tort is only one year. If §16.003 nevertheless applied, the claim against the principal actor would be barred a year before the action against the conspirator. Many lower courts applied §16.003 to all civil conspiracy claims, but the court rejected the notion that its job was simply to perpetuate incorrect decisions. "[A] long history of mistaken application alone is insufficient to counsel against correcting the error. " The absence of legislative action to reject these decisions is no indication that the lower court decisions accurately reflected legislative intent.

Texas law has also not been consistent on when the cause of action for civil conspiracy accrues. Some decisions trigger limitations on the basis of the conspirator's last overt act furthering the conspiracy. The court rejects that approach in favor of the rule that a cause of action for civil conspiracy accrues when the cause of action for the underlying liability theory accrues – i.e., when the plaintiff sustains resulting harm. The deferred trigger for the expiration of limitations under the discovery rule does not apply separately to discovery of the conspiracy. The discovery rule applies when the resulting harm could not have been reasonably discovered. Once the harm is reasonably discoverable, limitations begins to run regardless of whether the plaintiff knows who caused the harm, whether that person is a principal actor or a conspirator.

Applying these rules to the facts in *Agar*, the court ruled that the plaintiff's claim was barred by limitations. It then turned to whether the defendant was entitled as a "person who prevails" to its attorney's fees under the Texas Theft Liability Act's attorney's fee provision in Texas Civil Practice & Remedies Code §134.005(b). The court rejected the contention that "person who prevails" was necessarily limited to the plaintiff. A defendant who, like the defendant in this case, obtained a take-nothing summary judgment was a prevailing party entitled to its attorney's fees. Recovery of those fees was not undermined because the affidavit proving them up did not include as part of the affiant's testimony a statement that the affiant's testimony was made under penalty of perjury or that the statements were true and correct. The court explained that these statements were unnecessary so long as the affidavit showed that it was taken by a notary or other officer capable of administering the oath, that the witness was sworn, and submitted the statement under oath. In other words, there is no need for the sworn testimony to repeat things established by the jurat.