

A graphic featuring a wooden gavel resting on a wooden surface, with a blurred Texas state flag in the background. The text is overlaid on the image.

Texas Supreme Court Update

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Arbitrability of Disputes Over Structured Settlements: Exclusive power to set aside an order by bill of review does not foreclose arbitration about whether the exercise of that power would be appropriate; the court should decide whether a valid arbitration agreement exists, but the arbitrator decides its enforceability.

Under the Structured Settlement Protection Act (“SSPA”), [Tex. Civ. Prac. & Rem. Code § 141.004](#), the court must approve transfers of structured settlement payment rights. In [RSL Funding, LLC v. Newsome](#), RSL agreed to buy Newsome’s structured settlement payments for a lump sum. The agreement included an arbitration clause. The trial court interlineated the order approving the purchase with a proviso doubling the payment due if unpaid for more than ten days. Seven months later, long after its plenary jurisdiction expired, the same court issued a revised order removing the ten-day penalty pursuant to the parties’ agreement.

The trial court labeled the revised order as “*nunc pro tunc*,” but *nunc pro tunc* orders entered after the loss of plenary jurisdiction are permissible *only* to correct a *clerical*, not *judicial*, error. In other words, *nunc pro tunc* is permitted to make the order accurately reflect what the court *actually* ordered; not to change what the court *actually* ordered to what it intended to order or should have ordered. Asserting that the amended order was void because it sought to correct a judicial error, Newsome sought to enforce the first order’s ten-day payment penalty.

When the trial court refused to compel arbitration, RSL pursued an interlocutory appeal. A divided court of appeals ruled that arbitration was prohibited because only the trial court could hear a direct attack on its final judgment. In a [unanimous opinion by Justice Devine](#), the Texas Supreme Court decided that the state-law exclusive grant of jurisdiction for a bill of review was incompatible with the Federal Arbitration Act’s guarantee that parties are free to contractually agree to arbitrate their disputes. According to the opinion, this guarantee preempts Texas granting trial courts exclusive jurisdiction to hear bills of review.

The court deemed the *power to enforce or set aside* an order was not the same thing as the authority to resolve the issues governing that power. Allowing an arbitrator to decide which order was valid was not incompatible with the statute granting the court exclusive authority to set aside orders by bill of review. The SSPA did not prohibit arbitration; it was entirely silent on the subject. Freedom to contractually agree to arbitrate under the Federal Arbitration Act pre-empted any state limitations on arbitration about which order governed the payment transfer. Arbitrability was a question for the arbitrator, not the trial court.

The court next addressed whether Newsome’s challenge to the second transfer order questioned the *existence* or the *enforceability* of the transfer agreement. Arbitrators decide enforceability, but questions about formation and existence of an agreement are issues the courts must first decide.

¹ 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.

The opinion reasoned that questioning the payment transfer agreement as a public policy violation for want of court approval was, in essence, an assertion that the agreement was illegal. Illegality relates to *enforceability*, not *existence*, of the agreement. Enforceability was an issue for the arbitrator to resolve. The case was remanded to the trial court with instructions to compel arbitration the first or second order governed the transfer of the structured settlement's payment rights.

Banking: Under Business and Commerce Code §4.406, a that bank provides the customer the opportunity to obtain a statement disclosing an improper payment is excused from the obligation to reimburse the customer who fails to inform the bank reasonably promptly of the improper payment.

A bank is only permitted to pay items that are “properly payable.” [Tex. Bus. & Comm. Code §4.401](#). Therefore, a bank will usually bear the loss if it makes an unauthorized payment from a customer's account. This general rule does not apply, however, if 1) the bank makes an account statement available to the customer that would allow identification of the items paid from the account and 2) the customer does not inform the bank reasonably promptly of an improper payment disclosed in that statement. [Tex. Bus. & Comm. Code §4.406](#).

In [Compass Bank v. Calleja-Ahedo](#), the customer resided in Mexico. Per the customer's request, the bank sent the account statements to the customer's brother for four years. An identity thief changed the mailing address for the statements and then drained the account. Nearly one and a half years elapsed before the customer learn of the address change or the unauthorized payments and brought them to the bank's attention.

The customer's obligation to examine account statements is spelled out in [§4.406\(c\)](#).

If a bank sends or makes available [to a customer] a statement of account ... , the customer *must exercise reasonable promptness* in examining the statement ... to determine whether any payment was not authorized If, based on the statement ... , the customer should reasonably have discovered the unauthorized payment, the customer must promptly notify the bank of the relevant facts.

The customer relied on the holding in *FDIC v. Lenk* that, when an imposter obtained bank statements through fraud, those statements were not provided “to a customer” as §4.406(a) required. Therefore, the customer reasoned his duty to examine under [§4.406\(c\)](#) was never triggered.

Notwithstanding the unauthorized address change, the customer could have obtained his account statements during that time by several alternatives, including online banking or requesting a paper copy in person or by phone from any banking branch. By failing to pursue any of these options, the bank was relieved of its obligation to reimburse the customer because the bank made the statements available and customer had not been reasonably prompt in reviewing the information available to him. The obligation to “make [statements] available” to the customer did not obligate the bank to “ensure” their receipt by the customer.

When the customer failed to pursue any of these options for more than a year, the bank was protected from any obligation to reimburse the customer. The opinion deemed [§4.406\(f\)](#) a statute of repose barring reimbursement claims one year after the statement disclosing the fraudulent charge is made available.

Prejudicial Effect v. Probative Value: The possible stigma from evidence of psychological impairment or substance consumption was not unfairly prejudicial when that information was highly relevant to evaluating an actor's culpability. Under these circumstances, its exclusion was a harmful abuse of discretion.

JBS Carriers, Inc. v. Washington was a wrongful death case resulting from a tractor-trailer backing over a pedestrian between intersections. The trial court excluded evidence that the pedestrian had a history of treatment for anxiety, bipolar disorder, and schizophrenia. Also excluded was evidence showing the deceased was a crack cocaine user under the influence of other proscribed drugs and alcohol when the accident occurred. Surveillance videos that captured the incident, however, did not show that the pedestrian was acting erratically. The trial court ruled inadmissible evidence of the deceased's previous medical and psychological condition and of her drug use because it believed the unfairly prejudicial effect of such evidence outweighed its probative value.

In an opinion by the now-retired Justice Johnson, the court's analysis begins with a reminder that such decisions are reviewed for an abuse of discretion by balancing the probative value of the evidence on a material issue against its potential to cause unfair prejudice – i.e., an “undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.” Evidence of a person's mental health issues and consumption of drugs or alcohol is probative of *why* a person acted in a particular manner. It is relevant when the reason why a person acts in a particular way is germane to that person's culpability.

History of psychological problems and alcohol and drug consumption was not unfairly prejudicial when they concerned the disputed issue of the pedestrian's ability to perceive danger.

In *Washington*, the pedestrian was not intoxicated. But intoxication when the accident occurred is not essential for evidence of the pedestrian's mental health issues and drug and alcohol consumption to be germane. The pedestrian's history possibly explained why she decided to jaywalk into the path of a moving truck. An expert testified the pedestrian's actions were consistent with impairment from her psychological disorders, the lack of certain medications, and other drugs later found in her system. Without benefit of this information, the jury would only have a “filtered” view of the circumstances that could have adversely affected its consideration of whether the pedestrian acted as a reasonably prudent person would have under the circumstances.

The opinion recognized that evidence of mental illness and drug or alcohol use carried with it a stigmatizing effect. Nevertheless, the potential stigma was not *unfairly* prejudicial because it was highly relevant to why the pedestrian behaved as she had when the accident occurred. The availability of video recordings of the incident did not diminish the relevance of that evidence to the jury's evaluation of the plaintiffs' claim the pedestrian walked into the path of the truck because she misunderstood the driver's hand gesture to another vehicle to back up. Plaintiffs claimed the pedestrian understood the gesture to indicate she should complete her track across the street. The possibility the jury might have possibly drawn an “unfair negative connotation” from the pedestrian's mental health and substance use history was not *substantially* outweighed by the excluded evidence's probative value.

Excluding the evidence was harmful where its elimination created a one-sided picture on a pivotal issue.

The error in excluding the evidence was harmful because it was not cumulative and the admitted evidence was not so overwhelming that the court could say in hindsight that its exclusion made no difference. After all, the pedestrian's responsibility turned on her understanding of the circumstances when the accident occurred. Without the excluded evidence, the only information the jury heard was the family's theory that the pedestrian mistakenly thought the truck driver's wave was directed at her to indicate that she should proceed to cross the street, not that another driver should get out of the way. The excluded evidence related directly to the pedestrian's understanding of her situation and her evaluation of whether her perceptive abilities were impaired. That, in turn, bore directly on the assessment of the driver's and the assessment of the pedestrian's comparative responsibilities.

No evidence that lack of blind spot training proximately caused this accident. Court declines to rule whether theories of direct liability are permissible when the defendant concedes that it will be liable vicariously.

According to the driver, the pedestrian was in his blind spot. The trucking company conceded that it would have been vicariously liable for any negligence by its driver. Plaintiffs, however, submitted and obtained a jury finding that the trucking company 20% responsible for its own *direct* negligence for failing to train the driver about the presence of

the blind spot. The court reversed and rendered judgment that the family take nothing on this direct liability theory. There was no evidence that lack of blind spot training proximately caused this accident. The opinion does not venture far beyond this conclusion, but the outcome is consistent with the general rule that merely creating the circumstances under which another's conduct can cause injury is not necessarily a substantial or proximate cause of the accident. The opinion reserves for another day the decision whether a direct liability can be asserted when the defendant concedes that it will be vicariously liable for another's conduct.

The Court rendered judgment that the pedestrian's family take nothing from the trucking company on the direct negligence claim. The judgment against the driver and against the trucking company for *respondeat superior* liability were remanded for a new trial due to the error in excluding evidence concerning the pedestrian's psychological condition and history of insobriety.

Sovereign immunity for a municipality on a contract claim depends on the city having entered the contract for a governmental, not proprietary purpose.

Wasson Interests, Ltd. v. City of Jacksonville, 559 S.W.3d 142 (Tex. 2018), decided that governmental immunity applies to a breach-of-contract claim against a municipality if the municipality was engaged in a governmental function when it *entered*, not breached, the contract. By *per curiam* opinion the court remanded [Owens v. City of Tyler](#) so that the court of appeals could consider the effect of *Wasson*, which was decided after its decision in *Owens*.

Texas Citizen's Participation Act: Employer's evidence was sufficient to establish that the employee's breach of a non-disclosure agreement caused contractual damages so that case could proceed notwithstanding the employee's assertion that the employer's suit was retaliatory for the exercise of protected free speech and petition rights about a matter of public concern.

In [S&S Emergency Training Solutions, Inc. v. Elliott](#), the employer, S & S, provided test preparation for an exam necessary to get a paramedic's license.

The employee who oversaw the paramedic exam preparation program asked for a raise because she maintained the program was "running smooth and profitable." After the employer denied the raise – presumably for reasons other than failure to know when to use adverbs – the employee resigned and complained to state regulators that the employer was engaged in unlawful business practices. The employee repeated these allegations in open publication over the Internet. As a result, a partner necessary to the employer's accreditation backed out of their consortium agreement. Without accreditation, the paramedic exam program could not continue.

The employer sued the employee for breach of contract, alleging violation of a non-disclosure agreement. The employee moved for dismissal under the Texas Citizen's Participation Act, claiming the suit was retaliation for the exercise of the rights of petition and of free speech about paramedic training, which was a matter of public concern. After the TCPA was deemed applicable, the focus shifted to whether the employer had established a *prima facie* breach of contract case. In particular, the dispute centered on whether there was some evidence that would have established that the disclosures would disqualify the employer from providing the test preparation course and cause lost profits.

In a unanimous opinion by Justice Johnson, the court ruled affidavits sufficiently established the employee's disclosures had caused the partner to withdraw from the consortium agreement which, in turn, precluded the employer from continuing to offer training for the paramedic test. Regarding lost profits, the court relied in part on the employee's request for a raise as confirmation the paramedic test training was profitable. According to the opinion, the employer's affidavit testimony establishing its revenues, number of classes and class sizes confirmed the employee's statement. The employer's data was enough to calculate profitability and not mere revenue flow. The court concluded the employer met its burden of establishing a *prima facie* case by clear and specific evidence the employee breached the NDA agreement and caused the employer damages. Accordingly, it reinstated the employer's suit.

Medical Malpractice: Under Texas Civil Practice & Remedies Code §74.153, plaintiff is obliged to prove willful and wanton negligence to recover for negligence during provision of emergency care while the patient is in the emergency department or while the patient is in the obstetrical unit. In either situation, previous evaluation or treatment in the emergency room is not necessary for application of this higher liability standard.

Statutory Interpretation: Punctuation rules and grammar rules do not necessarily dictate statutory construction. Resort to legislative history is not appropriate because courts are more concerned with what the Legislature said than what some legislators meant to say.

Texas Civil Practice & Remedies Code §74.153 requires proof the defendant physician or health care provider was willfully and wantonly negligent if the claim arises out of emergency medical care “in a hospital emergency department or obstetrical unit or in a surgical suite immediately following the evaluation or treatment of a patient in a hospital emergency department.” In [*Texas Health Presbyterian Hospital v. D.A. et al.*](#), the emergency originated in the obstetrics unit and was not preceded by evaluation or treatment in a hospital emergency department. The question was whether §74.153 applied if there had been no antecedent emergency room treatment or evaluation. The patient insisted §74.153 could not apply without such treatment; the doctor, on the other hand, insisted it applied regardless of any emergency room evaluation or treatment because the emergency arose in an obstetric unit.

In a unanimous opinion by Justice Boyd, the court agreed with the doctor. It held that the requirement for emergency room evaluation or treatment was limited to emergency care in a surgical suite. After discussion of the appropriate role of commas, the importance of rules of grammar in statutory interpretation, sentence diagramming every middle schooler would envy, and the obligatory reference to Scalia and Garner’s *Reading Law*, the opinion reached the ineluctable conclusion that how the Legislature’s use of “in a” before “emergency department or obstetrical unit” and again before “surgical suite immediately following the evaluation or treatment of a patient in a hospital emergency department” left no room to doubt that the requirement of a preceding ER evaluation or treatment only applied to emergencies that arose during resulting surgery. Otherwise, the requirement would be redundant and would strip ER care providers if the ER emergency had to be preceded by ER treatment and evaluation.

The opinion also took the opportunity to generally disapprove of resort to legislative history as an interpretive aid. What the Legislature said, even if it didn’t correctly say what it meant, controls. “Ultimately, [the court’s] responsibility is to construe the language the legislature enacted, not to determine what the legislature or any individual legislators may have meant to enact.”