



Texas Supreme Court Update *Opinions Issued April 4, 2017*

By Stephen Gibson¹

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This edition examines the cases in which the supreme court has granted petitions for review since the March 2 edition of The Update. Prominent among the topics of these cases are ongoing concerns about expert reports as vouchsafes against unmeritorious suits, when a contract provision can preclude reliance on a conflicting oral representation, local government issues, and liability for employee injuries. Argument has not yet been scheduled in these cases.

Petitions Granted: A Look Ahead

March 10. The supreme court granted petitions for review in six cases:

TCPRC §74.041's Medical Expert Requirements and Casteel Charge Error

Section 74.041 of the Texas Civil Practice and Remedies Code requires medical malpractice experts to be “practicing medicine” when the claim arose or when giving testimony. *Benge v. Williams* questions whether the statutory definition of “practicing medicine” is exclusive or whether other activities can qualify the expert as “practicing medicine” at the time required under the statute. By cross-petition, the patient challenges the court of appeals’ reversal of the plaintiff’s judgment on the ground that the general negligence inquiry incorporated both a valid (negligence) and invalid (lack of informed consent) liability theories. Under *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000), the combination of valid and invalid liability theories mandates reversal. Here, the question is whether that rule applies when the invalid theory was not specifically alleged but was deemed by the majority to have been implied from the evidence presented.

Constitutionality of Property Tax Code § 23.1241 Concerning Valuation of Heavy Equipment in Dealer’s Inventory

EXP Leasing LLC et al. v. Galveston Central Appraisal District involves the constitutionality of Property Tax Code § 23.1241 concerning the appropriate appraisal method for a dealer’s inventory of heavy equipment. The taxpayer challenges the ruling of the court of appeals that constitutionality of the statute turns on a determination by the trier of fact whether the statutorily-prescribed valuation method is “reasonable.”

What Is a “Direct Conflict” With a Contract Provision that Prevents Reliance as a Matter of Law?

As a matter of law, a party cannot rely on an oral representation that directly contradicts a contractual provision. JP Morgan Chase Bank v. Orca Assets G.P., LLC will explore what is sufficient to directly conflict with a contract provision and whether a direct conflict is the only means by which a defendant may defeat as a matter of law a plaintiff’s alleged reliance on the representation.

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.

May an Associate Family Law Judges Decide Conservatorship Issues?

Texas Family Code chapter 201 authorizes the appointment of associate family law judges to hear child support cases being investigated by a state agency receiving certain federal funding. At issue in [Office of the Attorney General of Texas v. C.W.H.](#) involves whether these judges have the authority to also decide conservatorship issues.

Did the Employer Have Sufficient Control Over the Employee-Driver to be Vicariously Liable for Negligence During Travel from Worksite?

[Painter v. Amerimex Drilling I, Ltd.](#) An oil & gas lessee contracted with Amerimex for a drilling crew. Under the contract, the lessee agreed to pay for Amerimex to transport the crew to the well site on a daily basis. The question is whether Amerimex had sufficient control over the driver-employee at the time of the accident during travel from the worksite so that the employer was vicariously liable for the employee-driver's alleged negligence.

Texas Comm'n on Human Rights Act Waiver of Immunity for Retaliation Claims

[Alamo Heights Ind. Sch. Dist. v. Clark](#) will address whether a claim under the Texas Commission for which immunity is waived requires an allegation of but-for causation between the alleged retaliation and the alleged unlawful employment practice or whether it is sufficient to allege that protected employee conduct is merely a motivational factor.

March 31. The supreme court granted petitions for review in five more cases:

Does the Worker's Compensation Exclusive Remedy Bar Suit Against an Employer's Officer as a Premises Owner?

In [Arnold v. Gonzalez](#), an injured worker recovered worker's compensation benefits then sued the president of the entity that employed him for the same injury on the grounds that the president was personally liable as the owner of the premises where the injury occurred. Other courts have rejected attempts to use a "dual capacity" theory to evade the exclusive remedy of the worker's compensation law. The Corpus Christi court upheld the award against the company president, ruling that he waived the exclusive remedy defense by failing to obtain a jury finding whether he was acting in the course and scope of his employment with respect to the injury causing conditions.

The central issue in the case is whether Texas law still refuses to recognize a dual capacity exception to the exclusive remedy provision of the worker compensation statute. However, the court may not reach that issue. The company president also asserts that the capacity finding is not relevant to application of the exclusive remedy provision and, even if it were, the evidence conclusively established the capacity in which he acted. This case has not yet been scheduled for argument.

May a Utility's Rate Tariff Supersede the Obligations of Its Municipal Franchise Agreement?

[City of Richardson v. Oncor Electric Delivery Co.](#) involves Richardson's suit to enforce Oncor's franchise obligation to pay for relocating equipment in a public right-of-way to accommodate a public improvement project. The court of appeals rendered judgment that Richardson take nothing. It reasoned that a provision in Oncor's tariff, which establishes the terms of the Oncor-retail consumer, effectively superseded Oncor's contractual and common law obligation to Richardson to pay for the costs of relocating its equipment. This case has not yet been scheduled for argument.

Whether a Chapter 74 Health Care Expert Report Requirement Is Satisfied by Saying What the Professional Should Not Have Done Instead of What He Should?

The trial court dismissed the patient's professional liability claim in [Baty v. Futrell](#) for want of an adequate expert report required to accompany the filing of a health care professional liability suit. In this particular case, the patient was blinded by the administration of an injection of anesthesia during a routine cataract surgery. The report was deemed inadequate because the expert cast the discussion of the standard of care in terms of what the health care provider should not have done, instead of what should have been done to comply with that standard. The expert's report was also deemed too "conclusory" to satisfy the safeguards of CPRC Chapter 74 against unmeritorious health care liability claims. This case has not yet been scheduled for argument.

Does Rule 91a Authorize Dismissal for Failure to Comply With Statutory Deadline for Service?

[AC Interests, L.P. v. Texas Comm'n on Environmental Quality](#) arises from the dismissal of a suit pursuant to Texas Rule of Civil Procedure 91a for the alleged failure to serve the citation within 30 days after filing suit as required by the [statute governing appeals from decisions of the TCEQ](#). Ten days after the TCEQ moved for dismissal under rule 91a, AC Interests served the citation. Rule 91a provides for the dismissal of suits that have no basis in law or fact. The trial court nevertheless dismissed the suit pursuant to rule 91a. AC Interests argues that the dismissal was an abuse of discretion under rule 91a's substantive standards because it was not based on deficiencies in the allegations in the pleadings. It further contends that it substantially complied with the statutory service deadline and that failure to strictly comply was not a jurisdictional defect that authorized dismissal.

Are County Constables Entitled to Collective Bargaining Rights?

[Jefferson County v. Jefferson Cty. Constables Ass'n](#) arises out of the arbitration of whether county commissioners violated a collective bargaining agreement when it eliminated several deputy constable provisions. The issues in this case are whether constables are entitled to collective bargaining rights under Local Government Code §174.003, which applies to "police department[s] of a political subdivision. If not, is the collective bargaining agreement invalidated by [Texas Government Code §617.002](#)? Finally, the County argues that the arbitrator's reinstatement of the terminated constables violates article V, §18 of the Texas Constitution by usurping the commissioners' court's authority.