

Supreme Court of Texas
August 29, 2014

Hamrick v. Ward

No. 12-0348

Case Summary written by Theresa Golde, Staff Member.

JUSTICE GUZMAN delivered the opinion of the Court.

This is a case arising out of a dispute over an easement for roadway access on a parcel of land. The land at issue, which consisted of 41.1 acres, was inherited in 1936 by Paul Bourgeois. A dirt road was thereafter built on the land's eastern edge to provide access to a public road—Richardson Road. Over the course of several decades, there were various owners who either inherited or bought the land all of whom used the dirt road. It was not until the late 1990s that a problem arose with regard to continued usage of the road.

A developer, William Cook (“Cook”), was constructing the Barrington Woods subdivision on Bourgeois’ remaining property and wanted to close the road. The owner of the 41.1 acres of land at the time was Anna Bell (“Bell”), who still used the dirt road as a means to access her property. When Cook’s plan to construct a paved driveway for Bell fell through due to county regulations (requiring the land to be platted and requiring there to be a “one foot reserve and barricade between her property and the new street”), he proceeded to create a special restriction amendment that would give Bell and any of her guests a prescriptive easement in the subdivision’s deed restrictions. This prescriptive easement, which Bell was not aware of until September 2005, gave Bell access to Lots 3 and 4 on the southeast property line.

When Cook proceeded to sell Lots 3 and 4 of the Barrington Woods subdivision to David and Maggie Hamrick (the “Hamrick”), he told the Hamricks that they would recover the dirt road upon Bell selling her property. However, in 2004, Bell sold her home to Tom and Betsey Ward (the “Wards”), which was before the Hamricks closed on their home. The dirt road was then used by the Wards until the Hamricks sued in 2006 to restrain them from doing so. The trial court granted a temporary injunction. As a result, the Wards were unable to use the easement when constructing their home, thus prompting them to plat their property, remove the barrier and reserve that was required by the county regulations, and put in a driveway that would give them access to the paved road. Despite solving their problems of access through taking such measures, the Wards asserted a counterclaim against the Hamricks for an implied, prior use easement.

The trial court held in favor of the Wards asserting that they successfully proved the presence of a prior use easement. The trial court failed to specify, however, the width of the easement. When the Hamricks appealed, they contended that the Wards lacked a showing of continued necessity of the easement as well as a showing that the easement was beneficial prior to severance. The court of appeals affirmed the trial court’s holding with the exception that there remained a fact issue with the Hamricks’ affirmative defense of bona fide purchaser, consequently

calling for an error in the trial court's denial of the Hamricks' motion for summary judgment.

Issue: Did the Wards have an implied easement on the Hamricks' land giving them the right to use the dirt road, or did the lack of continued necessity do away with such easement?

The Supreme Court focused its attention on clarifying the difference between the two types of implied easements that exist: necessity and prior use. In doing so, it remarked that the argument on whether a prior use easement required continued necessity was misplaced. Both the trial court and court of appeals made decisions based off of the wrong theories of law—looking at the theory for prior use easements rather than necessity easements. When an easement involves previously unified, landlocked parcels as it does here, the proper easement to consider is a necessity easement; thus, the proper law to evaluate falls under the necessity easement doctrine for roadways.

The Court acknowledges that great confusion arises from the term “implied easement” as necessity and prior use easements are both implied and derive from previously unified landlocked parcels. However, the Court clarified the major distinctions. First, the Court explained that a necessity easement requires an easement that is strictly necessary and this necessity is continuing and present. Additionally, the Court goes on to explain that a necessity easement's temporary nature—existing only until it is no longer absolutely necessary—supports the idea that such easements apply only to landlocked parcels for roadway access as these easements present more of an encumbrance.

Prior use easements, on the other hand, which were established two decades after the necessity easement doctrine for roadways, extend the use of implied easements to areas of land that present a much smaller hindrance than roads. The Court gives the examples of water, sewer, or power lines as types of prior use easements that are not as intrusive on servient estates. Prior use easements were established as a means to address easements that were not absolutely necessary. As such, the following doctrine was created:

[I]f an improvement constructed over, under, or upon one parcel of land for the convenient use and enjoyment of another contiguous parcel by the owner of both be open and usable and permanent in its character . . . the use of such improvement will pass as an easement, although it may not be absolutely necessary to the enjoyment of the estate conveyed.

Howell v. Estes 12 S.W. 62, 63 (Tex. 1888).

After clarifying the distinction between the two types of implied easements, the Court holds that this case falls under a necessity easement. Because the Wards did not assert a necessity easement claim at the trial court level, procedurally, the Supreme Court cannot make a decision on a theory that has not yet been addressed. Accordingly, the Court remanded the case back to the trial court in order to give the Wards the opportunity to assert a necessity easement claim if they so choose.

Burbage v. Burbage & Burbage Funeral Home

No. 12-0563

Case Summary written by Kimberly Grinnan, Staff Member.

Justice Green delivered the opinion of the Court.

Plaintiff, Burbage Funeral Home owner and operator Kirk Burbage (Kirk), filed a defamation suit against his brother, Defendant Chad Burbage (Chad). The brothers' grandmother, Anna Burbage, owned and managed a funeral home that had been in the family for centuries. Through a series of probate issues and the wishes of various parties, Kirk obtained interest in the funeral home while Chad did not. Chad believed Kirk obtained the interest through manipulation, and started airing his grievances via a website (www.annaburbage.com), posters around town, and letters to patrons detailing Kirk's alleged misdeeds, which included elder abuse and a variety of other crimes. Kirk sued and won a defamation suit against his brother, obtaining a favorable jury verdict on all ten submitted questions, over \$3.8 million dollars in compensatory damages, \$5.8 in exemplary damages, and a permanent injunction that barred Chad from future defamatory speech on set topics. Chad, who appeared pro se, appealed, and the court of appeals reduced the exemplary damages award to \$750,000 and vacated the injunction, but upheld the other damage awards. Both parties petitioned for review.

Issues: (1) whether any defamatory statements fell within a qualified privilege; (2) whether evidence supports the jury's damage awards; and (3) whether the trial court abused its discretion by issuing the permanent injunction.

As to the first issue, the Court could not reach the determination of the affirmative defense of qualified privilege. Chad argued that the court impermissibly combined valid and invalid theories of liability, but Chad did not make an objection that would preserve for appeal his complaint of the jury charge. The Court held that Chad failed to preserve error in the charge because, although he objected based on qualified privilege, he did not make an objection to the form of submission. Accordingly, the Court affirmed the court of appeals and did not address the issue further. Next, the Court looked to whether or not the evidence supports the jury's damage awards. The jury awarded a total of \$3,802,000 in compensatory damages, \$3.5 million of which was based on future damages. The Court remarks that damages for defamation in Texas beyond nominal must be based on evidentiary support. Although the jury has broad latitude, damages must be based on actual injury. In this case, the Court found that no evidence of actual damage existed in the record. The evidence did not show actual loss, actual loss of reputation, the actual value of the funeral home, or that anyone actually believed the defamation. Therefore, the Court overturns the award of compensatory damages and exemplary damages, because exemplary damages cannot exist without compensatory damages. As a matter of law, plaintiff is only entitled to nominal damages and, because Chad did not challenge them, damages for mental anguish (totaling \$2,000).

Lastly, the Court examined whether the trial court abused its discretion by issuing a permanent injunction that prohibits Chad from future speech on several specified topics; for example, that Chad may not assert that due to any of Kirk's selfish, greedy, or unlawful actions, he or any third party suffered. The Court found that prohibiting future speech that has been adjudicated to be defamatory impermissibly places prior restraints on free speech. Therefore, the Court affirms court of appeals' reversal of the permanent injunction.

Highland Homes Ltd. v. Texas

No. 12-0604

Case Summary written by Allison Grayson, Staff Member.

Chief Justice Hecht delivered the opinion of the Court, in which Justices Green, Guzman, Lehrmann, and Brown joined.

Highland Homes, Ltd. employed hundreds of subcontractors as a homebuilder throughout the state of Texas. During that time, Highland Homes started docking the pay of any subcontractors who were unable to prove they had general liability insurance coverage. In doing this, Highland Homes explained that it would use the docked pay to cover its increased liability from working with uninsured contractors. In 2006, Benny & Benny sued Highland Homes arguing that the homebuilder had said it would use those pay deductions to buy insurance for the subcontractors. Three years later, Benny & Benny added another subcontractor to its pleadings. The two subcontractors together brought claims on behalf of 1,800 subcontractors.

The trial court certified the class action lawsuit and Highland Homes appealed shortly thereafter. Highland Homes and the subcontractors settled while the appeal was pending, but the settlement was subject to approval by the class and the trial court. If the trial court approved the settlement and the class was notified, Highland Homes would send refund checks to any existing subcontractors. The parties agreed that any refund checks not negotiated within ninety days would be given to the Nature Conservancy. The money distributed to the Nature Conservancy would constitute a *cy pres* award.

The class representative agreed to release Highland Homes from any liability for claims that were brought or could have been brought. The trial court required notices to be sent to the class members, some of which were undeliverable. Subsequently, the trial court found that these actions complied with Texas Rule of Civil Procedure 42. The state of Texas intervened before the decision became final, arguing that *cy pres* awards violated the Unclaimed Property Act. The State further argued that any undistributed residue should be held for three years before payment to the Comptroller. After the trial court denied this argument, the State appealed. On appeal, the court reversed the trial court's decision and remanded the case. In doing so, the court of appeals stated that Sections 74.308 and 74.309 of the Act prohibit deadlines for negotiation and *cy pres* awards.

Issue: whether settlement proceeds collected by class representatives for absent class members are considered unclaimed, abandoned property, which are subject to the Unclaimed Property Act. In answering this question, the Supreme Court held that neither provision of the Act applied to the facts of this case. The Court explained that the State based its argument on the fact that class members had not exercised ownership in the litigation. Further, the Court stated that the class members had exercised ownership through the class representative, and therefore, the property was not abandoned. In approving the settlement agreement, the trial court ensured that notice was set to all class members. By sending notice, the property was not unclaimed by the class members. This claiming of property through the class representatives, the Court mentioned, was sufficient to make the Act inapplicable.

Devine, J. Dissenting, joined by Justices Johnson, Willet, and Boyd

In his dissent, Justice Devine argued that the Court's application of Rule 42 conflicted with the language of the Unclaimed Property Act. He further explained that the Court's decision stating that the funds had not been abandoned rendered Sections 74.308 and 74.309 of the Unclaimed Property Act meaningless. Justice Devine rationalized that while the class representatives had authorization to settle, they did not have authority handle the settlement checks. Moreover, he stated that the class representative lacked the authority to give any class member's settlement check to anyone else. Since the property was unclaimed by the actual individual, Justice Devine argued, the property was abandoned. Justice Devine therefore agreed with the court of appeals' decision holding that the *cy pres* award violated the Unclaimed Property Act.

Nath v. Tex. Children's Hospital

No. 12-0260

Case Summary written by Catharine Hansard, Staff Member.

Justice Guzman delivered the opinion of the Court.

Dr. Rahul Nath, a plastic surgeon, worked for Baylor College of Medicine (Baylor) and was also affiliated with Texas Children's Hospital (Hospital). The Chief of Baylor College of Medicine's Division of Plastic Surgery, Dr. Saleh Shenaq, to whom Nath directly reported, was also Nath's partner at the Hospital's Obstetrical Brachial Plexus Clinic (Clinic). Baylor received fifteen percent of the partner's total fees from the Clinic, and Nath and Shenaq split the remainder.

Nath's colleagues began to notice Nath was billing patients excessively and performing unnecessary procedures in 2003. Upon complaints of Nath's lack of professionalism, Baylor sent Nath a letter informing him of the complaints against him. The letter also informed Nath that Baylor would not renew his faculty appointment and would terminate his employment effective June 30, 2004.

Nath sued Shenaq, Baylor, and the Hospital in 2006. (Nath eventually settled with Shenaq in 2008.) Nath amended his pleadings multiple times. Included in his original complaint were accusations of defamation and tortious interference with business relations. His subsequent amendments (amendments three through five) included (1) allegations of negligent supervision and training, both of which relied on the defamation and tortious interference allegations in his original pleading; (2) allegations that Shenaq operated on clients with impaired vision; (3) accusations that Shenaq operated on clients with hepatitis; and (4) a motion for declaratory judgment that Nath should be able to reveal Shenaq's medical prognosis with patients.

In 2010, the Hospital and Baylor each filed motions for summary judgment, and Nath filed a motion to continue the summary judgment hearing, which the trial court granted. At the end of the continuance, Nath again filed to continue the motion for summary judgment, and this time, the trial court denied his motion. Subsequently, Nath retained new counsel, who filed a motion to recuse the judge, after which Nath filed another motion to recuse the judge who was hearing the motion for recusal. All recusal motions were denied.

After the trial court denied the recusal motions, Nath amended his pleading again to drop the claims of defamation, tortious interference, negligence, and declaratory judgment and instead proceed on a claim of intentional infliction of emotional distress (IIED). The Hospital and Baylor both filed a motion for summary judgment on Nath's new complaint, and instead of responding to their motion, Nath proceeded under a theory that the notice of hearing contained a technical defect. In June 2010, more than four years after Nath originally filed the suit, the trial court heard the motions for summary judgment and dismissed Nath's claims.

In August of 2010, the Hospital filed a motion for sanctions against Nath. Based upon findings that Nath (1) filed the claims for improper purposes, (2) exhibited bad faith, and (3) lacked sufficient factual evidence to support his claims, the trial court ultimately awarded approximately \$1.4 million in sanctions for the Hospital and Baylor, collectively, against Nath. The award was one of the largest sanction awards not only in Texas, but also the United States. Due to the amount of sanctions awarded and the due process involved in imposing sanctions, the Court granted Nath's petition for review.

Issue: Whether it was appropriate for the trial court to impose sanctions against the plaintiff physician and whether the amount of those sanctions was unjust and excessive.

The Court addressed that it would review the trial court's decision for an abuse of discretion. The Court further relied on Chapter 10 of the Texas Civil Practice and Remedies Code (Code), which warrants that parties (1) will not file a motion whose primary purpose is to harass the other party or cause unnecessary delay in litigation; (2) will not file pleadings that contain frivolous arguments; and (3) will support their allegations with factual evidence. TEX. CIV. PRAC. & REM. CODE § 10.001. The Code further provides that sanctions may be imposed upon a

party who does not follow these requirements. CIV. PRAC. & REM. § 10.004(a). The Texas Rules of Civil Procedure (Rules) also provide that sanctions may be imposed upon a party, but the Court noted that the Rules require pleadings to be “groundless and also either brought in bad faith, brought for the purpose of harassment, or false when made” in order to warrant sanctions. TEX. R. CIV. P. 13. The Court found that under the Rules, courts may not impose sanctions for groundlessness alone.

The Court also found that sanctions must comply with due process and relied on its decision in a previous case to employ a two-part test in determining whether the sanctions were fair and non-excessive. *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d at 913 (Tex. 1991). The Court stated that the test in *TransAmerican* first requires a direct link between the offensive conduct, the person who committed the offensive conduct, and the awarded sanctions. Included in this prong, the Supreme Court noted, is the determination of whether courts should impose sanctions against the party, the party’s attorney, or both, and warned that such a determination will often be difficult. The Court then explained that the second prong requires courts to weigh the proportionality of the offensive conduct against the sanctions, stating that the sanctions should not be more excessive than necessary to serve their purpose. After specifically pointing to a motion Nath filed on December 10, 2010 to find that Nath did not waive his objection to contest the sanctions as Baylor and Hospital contended, the Court considered the awarded sanctions as applied to each claim to determine if Nath set forth an appropriate legal basis.

Fourth, Fifth, and Sixth Amended Pleadings: The trial court specifically found Nath’s inquisition into Shenaq’s health in each of his amended pleadings to be irrelevant to his claims of defamation, tortious interference, and negligence, and used this as a basis for the sanctions it imposed on Nath. The Court found this evidence created a direct link between the sanctions and Nath’s conduct. Furthermore, the Court also found the trial court appropriately levied sanctions due to a letter that Nath sent to the Hospital regarding discovery of Shenaq’s health. The trial court equated such conduct to extortion, which the Court found an appropriate finding. Moreover, the court found that the trial court properly imposed sanctions, because there was sufficient evidence that Nath’s involvement in the case rendered him the true offender. The Court upheld the trial court’s finding that the information regarding Shenaq’s health likely came from Nath.

Defamation: The trial court sanctioned Nath based upon the finding that Nath pursued his legal defamation claim after the statute of limitations had passed (the statute of limitations for defamation is one year), which rendered the claim legally groundless. The Court found the imposition of sanctions for this reason alone improper, because the Rules provide that a court may not impose sanctions for groundlessness alone if the party is represented by counsel. TEX. R. CIV. P. § 10.004(d). The Court, however, did find that the trial court’s finding that Nath brought the defamation claim for improper purpose was supported by sufficient evidence. Thus, because the trial court supported groundlessness with an

additional finding, the Court found imposing sanctions against Nath was appropriate. Furthermore, the Court held that because there was no evidence to the contrary that Nath aided his attorney in drafting the defamation claim, the trial court imposed sanctions properly upon the party (as opposed to the attorney).

Tortious Interference & Negligence: The trial court held that Nath's claims for tortious interference and negligence were lacked merit as of the time it granted summary judgment. The Court found the trial court incorrectly imposed sanctions for this claim due to the trial court incorrectly assessing "the vantage point for assessing evidentiary support." The Court noted that the time to assess whether there is evidentiary support is at the time the party files the pleading, not at the time the court grants or dismisses a motion.

The Court did find, however, that evidence supported the trial court's finding that Nath's tortious interference claims relied solely on the defamations claims, which shortens the tortious interference statute of limitations to the same amount of time as the defamation statute of limitations—one year. Because Nath brought claims for tortious interference after one year, the trial court did not abuse its discretion in imposing sanctions for Nath's tortious interference claim. Similarly, the Court held that the trial court's findings that Nath's negligence claims were time-barred to be supported by sufficient evidence. Nath brought his negligence claims four years after he discovered the basis of the claim, which was beyond the two-year statute of limitations for negligence.

Ultimately, the Court found that the trial court did not abuse its discretion in imposing sanctions on Nath due to ample evidence supporting sanctions for each claim. It remanded the case, however, to reassess the amount of sanctions awarded. The Court found that the trial court did not address an important factor in determining an appropriate amount for sanctions: "the degree to which the offended person's own behavior caused the expenses for which recovery is sought." *Low v. Henry*, 221 S.W.3d 609, 620 n.5 (Tex. 2007). While Nath's claims did prove to be frivolous and time-barred, the Hospital and Baylor engaged in litigation for almost five years before moving for summary judgment. Thus, the Court found that a "defending party cannot arbitrarily shift the entirety of its costs on its adversary." Additionally, the Court noted that the trial court abused its discretion by considering all factors set forth in *Low* but ignoring the defendants' responsibility for the attorney's fees incurred. This amounted to a failure of the trial court to adhere to guiding rules and principles.

Justice Green, dissenting, joined by Justices Lehrman, Boyd, and Brown.

The dissenting Justices believed (1) the trial court considered each *Low* factor, including the defendant's responsibility for their attorney's fees; and (2) the trial court's discretion was broader than the Court found it to be.

First, the dissenting justices found that the trial court did adequately consider each *Low* factor in its opinion, pointing specifically to the trial court's finding of facts in its judgment for the Hospital and Baylor. The dissent noted that in the language of the trial court's order on the consideration of defendants'

responsibility for the attorney fees they incurred, Nath's name was where the name the name of the Hospital or Baylor should be. ("[T]he degree to which Nath's own behavior caused the expenses for which the Texas Children's Hospital seeks reimbursement") The dissent found this to be purely typographical error, and contended that the court fully considered each factor, as evidenced by the exhaustive record in the case. Furthermore, the dissent read the language in *Low* to guide courts to assess factors relevant to their case, not necessarily consider every factor in each case. *Low*, 221 S.W.3d at 621.

The dissenting Justices also found that the Court should have respected the trial court's determination of relevant *Low* factors in determining the amount of sanctions it awarded, because it witnessed Nath's behavior firsthand. Thus, the dissent found the trial court's discretion reliable. Furthermore, it noted that the judge who decided the case lost reelection in 2012, which required the new judge to review the remanded decision based on a "cold record."

Exxon Mobil Corp. v. Drennen

No. 12-0621

Case Summary written by Shelby Hall, Staff Member.

Justice Green delivered the opinion of the Court.

Respondent worked as a geologist for Exxon Mobil Corporation (ExxonMobil). While he was employed at ExxonMobil, he received several forms of incentive compensation; these incentive programs included bonus awards, award of restricted stock options, and earning bonus units. Over the course of his employment, Respondent was awarded 73,900 shares, 50% that were to be delivered three years after each grant and 50% that were to be delivered seven years after each grant. The incentive programs included choice of law provisions that provided for the application of New York law, despite ExxonMobil's being incorporated in New Jersey and headquartered in Texas. The incentive program also contained termination provisions, which allowed ExxonMobil to terminate any outstanding incentive awards if the employee is engaged in a detrimental activity. A detrimental activity under both incentive programs involved working for the benefit or becomes employed by a competitor of ExxonMobil. After a poor performance review, Respondent was told he was going to be replaced and, upon asking whether retiring would affect his receipt of his unvested options, was told that they would not be affected so long as he did not go to work for one of the other major competitors of ExxonMobil (BP, Shell, ChevronTexaco, or Conoco Phillips). Upon his retirement, Respondent still had 57,200 shares still in the restricted period. When Respondent told his supervisor he was going to be taking a position with Hess Corporation (another energy company), his supervisor warned him that he might lose all his incentives. Shortly thereafter, Respondent's supervisor sent him a letter cancelling his incentive awards, explaining that accepting a job with Hess

Corporation was a “detrimental activity” under the incentive programs and respondent’s outstanding 57,200 shares would be cancelled.

Respondent sued to recover the shares, claiming three things: (1) the detrimental activity provision in the incentive program was being utilized as a covenant not to compete, (2) the covenant not to compete is invalid because they are not limited as to time, scope of activity, or geographic area, and (3) the recovery of his shares was an impermissible attempt to recover damages for an alleged breach of an invalid covenant not to compete. The jury found for Petitioner and the trial court denied Respondents JNOV. On appeal, the court of appeals reversed and ordered the trial court to enter declaratory judgment in favor of respondent. ExxonMobil petitioned the Supreme Court for review, arguing that the choice of law provisions were valid and, under New York law, the detrimental activity provisions were valid and enforceable.

Issues: Should New York law be applied in this case pursuant to the choice of law provision in the incentive agreement? Are the contested provisions valid covenants not to compete?

Texas follows the Restatement (Second) of Conflict Laws. Under §187(2), parties may agree to be governed by a the law of another state, unless there is no substantial relationship to the parties of the transaction or the application of the law of the chosen state would be contrary to a policy of the state which has a material greater interest. Thus, even when a relationship is not substantial, the parties may still choose another state’s law when they have another reasonable basis for their choice such as choosing a law they know well or a law that is better developed. ExxonMobil claimed that New York’s law is well-developed in regard to employee incentive programs and ExxonMobil stock is listed on the New York Stock Exchange. Therefore, under this prong of the Restatements, New York law may be applied.

The Court also looked at whether the choice of New York law passed the three-step approach in accordance with §187(2)(b) of the Restatements. The three step approach determines: (1) which state has a more significant relationship with the parties and their transaction, (2) which state has a materially greater interest, and (3) whether the application of the other state’s law is contrary to the fundamental policy of the other state. The court considered these major factors in determining the first step: the parties were located in Texas, the negotiations and execution of the incentive program agreement was in Texas, the performance of the agreement took place in Houston, Respondent’s place of employment is in Texas, ExxonMobil is a national corporation with a presence in New York, and Respondent spent three years of his career working in the New York office. Weighing these facts and the respective interests at play, the Court found that Texas had a more significant relationship to New York. The Court also concluded that second step of the analysis weighs in favor of Texas because where both the employee and employer are Texas residents.

Before concluding the choice of law analysis, the Court next looked at the circumstances of this case and determined whether the provisions at issue are

covenants not to compete under Texas law. In Texas, covenants not to compete are defined as “covenants that place limits on former employees’ professional mobility or restrict their solicitation of the former employers’ customers and employees.” *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 768 (Tex. 2011). The Court determined that when looking at the facts from the other non-compete cases, the incentive program here does not fit the mold. This is because there is a difference between protecting an investment in an employee through a non-compete agreement and rewarding an employee’s loyalty through a voluntary incentives program that are subject to required continued loyalty in order to continue receiving benefits. Therefore, “[w]hatever it may mean to be a covenant not to compete under Texas law, forfeiture clauses in non-contributory profit-sharing plans, like the detrimental-activity provisions in ExxonMobil’s incentive programs, clearly are not covenants not to compete.” Therefore, under Texas law, there was no valid covenant not to compete.

Turning back to the third prong of the choice of law analysis, ExxonMobil had a significant interest in the uniform application of its employment agreements. The Court reasoned that uniformity is a frequent goal of contracting and, though application of Texas and New York law could accord different results, the application of New York law is not contrary to some fundamental policy of Texas. Therefore, the choice of law provision is valid and the Court applied New York Law.

Under New York law, covenants not to compete are not favored and will only be enforced to the extent reasonably necessary to protect valid business interests. However, some post-employment benefits, such as the incentive agreement provisions, fall within the “employee choice” doctrine recognized in New York. Under this doctrine, so long as the employee was terminated for cause or voluntarily left their position, a restrictive covenant such as this will be enforced. Because Respondent agreed that he would forfeit any benefits should he engage in the specified detrimental activity and he left his position voluntarily, the termination of his awards was valid under New York law.

In the Interest of K.M.L.

No. 12-0728

Case Summary written by Rebekah Jacobson, Staff Member.

Justice Green delivered the opinion of the Court, in which Chief Justice Hecht, Justice Willett, Justice Guzman, and Justice Brown joined, and in which Justice Johnson and Justice Boyd joined except as to Parts II.B, II.D, and IV, and in which Justice Lehrmann and Justice Devine joined except as to Parts III and IV.

A mentally ill and intellectually disabled woman gave birth to a child, K.M.L., while still in high school. When K.M.L. was two-years-old, she suffered non-life-threatening injuries to her teeth and jaw when she fell off a set of stairs not yet railed in the apartment she lived in with her mother and other family members. The day

after the accident, the Texas Department of Family and Protective Services (DFPS) removed K.M.L. from the home, placed her in foster care, and filed a petition to terminate her mother's parental rights.

Approximately two months after the suit was filed, DFPS served K.M.L.'s father by publication. The child's father, who did not have any involvement in K.M.L.'s life, did not receive notice of the proceedings; however, after the child's grandmother contacted him, K.M.L.'s father acknowledged paternity, requested that his parental rights not be terminated, and provided his sister's address as his place of current residence. Even though K.M.L.'s father filed a response in opposition, he was not provided with notice of any hearings in the case, nor is there any evidence in the record that he received notice of trial.

After proceedings in the termination suit began, the child's mother executed an affidavit of voluntary relinquishment naming DFPS as managing conservator of K.M.L. Six weeks later, the mother made several attempts to strike the affidavit of relinquishment without success. On the first day of trial, the State served K.M.L.'s father with a subpoena to attend, and police escorted him to court. He sat in the hallway for the first few hours of the proceeding. Once he entered the courtroom, the judge instructed that it was possible that the father could have been entitled to appointed counsel, but that it was "a little late for that now."

At the conclusion of the four-day trial, the jury found that termination of both the mother and father's parental rights was in best interest of K.M.L. Additionally, the jury found termination grounds for the mother based on endangerment, voluntary relinquishment, and failure to follow a court-ordered reunification plan, and for the father based on endangerment, failure to follow a court-ordered reunification plan, and constructive abandonment. Accordingly, the trial court ordered termination of parental rights and appointed DFPS as K.M.L.'s managing conservator.

The child's mother challenged the sufficiency of the evidence to support all four grounds for termination. Because parental termination could be affirmed under voluntary relinquishment alone, the court of appeals did not address the other three grounds for termination. As to the father's parental rights, the court of appeals held that the jury verdict for the father's constructive abandonment was supported by legally sufficient evidence, and did not address his legal and factual sufficiency challenges to the other grounds for termination. Moreover, the court of appeals held that the father waived his complaint about notice of trial by appearing, and concluded that he had waived his right to counsel because he did not request an attorney or file an affidavit of indigence until after trial.

On appeal, the Court considers two issues. The first issue is whether the trial court properly terminated the parental rights of the child's mother based on the affidavit of voluntary relinquishment. The second issue is whether the trial court properly terminated the parental rights of the child's father when he was not appointed counsel nor provided with notice of trial.

As to the first issue, the Court holds that the evidence was legally sufficient to support the jury finding that termination of the mother's parental rights was in the best interest of the child, reasoning that K.M.L.'s mother lacked the ability to tend to

K.M.L.'s physical and emotional needs both now and in the future, and could not provide the child with a stable home. However, the Court also holds that the termination of parental rights under voluntary relinquishment was improper because the evidence was legally insufficient to lead to the conclusion that the mother executed the affidavit of voluntary relinquishment knowingly and intelligently. Accordingly, the Court reverses the court of appeals' judgment regarding termination under voluntary relinquishment, and remands the case to consider the factual sufficiency of the other three grounds for terminating the mother's parental rights, which the court of appeals did not consider.

As to the second issue, the Court holds that the child's father was entitled to notice of the trial, and that the father did not waive that right to notice by appearing, because the record did not show that he appeared voluntarily such as to waive his right to notice. Lack of notice renders the judgment of the court of appeals unenforceable and void; therefore, the Court reverses the judgment and remands the case to the trial court for a new trial.

Justice Lehrmann, joined by Justice Devine, concurring:

Justice Lehrmann agrees with the majority, finding legally insufficient evidence that K.M.L.'s mother knowingly and voluntarily relinquished her parental rights. As to K.M.L.'s father, Justice Lehrmann agrees that the court of appeals' judgment should be reversed; however, she reaches this conclusion by way of different reasoning. Justice Lehrmann would discuss issues not reached by the majority, including whether the trial court erred in failing to appoint counsel to represent the child's father, and whether the trial court erred in failing to admonish the child's father of his right to counsel. Justice Lehrman would hold that the trial court erred in failing to admonish the child's father of his right to counsel reasoning that an indigent, who is not informed of his right to counsel, or how to exercise that right, effectively has no right to counsel in the first place.

Justice Johnson, joined by Justice Boyd, dissenting in part:

Justice Johnson believes that the judgment of the court of appeals should have been affirmed in regards to the termination of the mother's parental rights. Justice Johnson disagrees with the majority's conclusion that there was absolutely no evidence in the record that K.M.L.'s mother understood the consequences of signing the relinquishment affidavit. He reasons that the mother's execution of two prior notarized affidavits attempting to relinquish her parental rights; an attorney's explanation about what relinquishment meant; and opinion testimony that the mother understood what relinquishing her parental rights meant; all supported the conclusion that the record contained evidence that was legally sufficient to support the jury finding.

Zachry Construction Corp. v. Port of Houston Authority of Harris County

No. 12-0772

Case Summary written by McKenzie Jordan, Staff Member.

Chief Justice Hecht delivered the opinion of the court, joined by Justice Green, Justice Guzman, Justice Devine, and Justice Brown.

Petitioner, Zachry Construction Company contracted with respondent, the Port of Houston Authority of Harris County, to construct a wharf on the Bayport Ship Channel. The concrete wharf would extend over the water to be used for loading and unloading ships carrying different goods. A provision of the contract made Zachry an independent contractor in sole charge of choosing the manner in which the work would be conducted, insulating the Port from liability. Zachry had a complicated yet innovative plan to construct the port, but because time was of the essence to the Port, Zachry agreed to pay \$20,000 per day as liquidated damages for any missed deadlines. Nine months into the project, the Port requested that an additional section be added to the wharf. While the Port had reservations about the plan discussed with Zachry to complete this new addition, it did not share its concerns and the change order was finalized. Two weeks later the Port ordered Zachry to redo its plans for the new addition, but Zachry protested saying that the Port had no right to determine the method of the work pointing to the control section of the contract. At this point, Zachry's only option was to do as the Port requested, causing delays in the completion of the project. After Zachry completed the original section of the wharf, the Port began withholding liquidated damages from payments because the remainder of the project was not yet complete. The project was finished more than two-and-one-half years after the contract deadline. Zachry sued the Port claiming damages from delays caused by the Port. The Port asserted that a section of the contract precluded delay damages. Zachry also sought recovery in delay damages withheld by the Port.

The trial court found that such a no-delay-damages provision could not be enforced if the Port's intentional misconduct caused the delay. The court also held that the contract's liquidated damages provision was invalid, and that the language of that provision and releases signed by Zachry did not unambiguously release Zachry's claim to the liquidated damages withheld. The jury found that the Port breached the contract, the delay was the result of the Port's conduct, that Zachry had not released its claims, but that the Port was entitled to an offset of damages for the use of defective wharf fenders.

The court of appeals held that the no-delay-damages provision of the contract barred Zachry's recovery, that Zachry had unambiguously released its claims to the liquidated damages withheld, and that the Port was entitled to the offset.

Issue One: Whether the Local Government Contract Claims Act waives a local governmental entity's immunity from suit on a contract claim for delay damages the contract does not call for. The issue is broken into two parts: first, whether the Act's limitations on recovery held define and restrict the scope of the waiver immunity, and second, whether the delay damages Zachry seeks are

permitted by the Act, so that the Port's immunity is waived. The court concluded that the delay damages Zachry seeks are permitted by the Act; therefore, the Port's immunity is waived.

The Act's immunity clause, Section 271.152, states that "[a] local governmental entity . . . that enters into a contract subject to this subchapter waives sovereign immunity to suit . . . subject to the terms and conditions of this subchapter." The court determined that the contract between the Port and Zachry qualifies under the Act. The "terms and conditions" referred to are found in the Act's other nine sections. The focus of this decision was on section 271.153(a)(1), which states that ". . . the total amount of money awarded . . . is limited to . . . the balance due and owed by the local governmental entity under the contract . . . including any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration." Because Zachry pled facts with evidentiary support that constituted a claim for which immunity is waived, the court concluded that the Act does not waive immunity from suit on a claim for damages not recoverable under section 271.153.

In regards to section 271.153(a)(1)'s reference to "the balance due and owed," the Port asserted that no balance could be due and owed under a contract unless the contract expressly calls for payment. However, the court found no such requirement in the statute. It determined that a balance due and owed is the amount of damages for breach of contract payable and unpaid. The Act allows recovery of contract damages, including delay damages, and nothing in the Act suggests that those recoverable damages be stated in the contract, mainly because owner-caused delays cannot be determined in advance.

Issue One Holding: The court concluded that the Local Government Claims Act waives immunity for a contract claim for delay damages not expressly provided for in the contract.

Issue Two: Whether Zachry's claim is barred by the no-damages-for-delay provision of the contract. The court concluded that the provision was unenforceable.

The court reiterated the principle that contractors can agree to assume the risk of construction delays and not seek damages, but that there are exceptions to the enforcement of that agreement to not recover delay damages. Zachry urged that two of these five exceptions applied in this case: 1) when the delay resulted from fraud, misrepresentation, or other bad faith on the part of one seeking the benefit of the provision, and 2) when the delay was based upon active interference or other wrongful conduct, including arbitrary and capricious acts.

While the jury found that the delay damages resulted from the Port's capricious conduct and active interference, the court of appeals determined that the exceptions could not apply if the parties intended the no-damages-for-delay provision to cover the Port's conduct. Because of the language of the provision, the court of appeals said that the parties were bound by the contract. However, looking to the law that states a contractual provision exempting a party from tort liability for harm caused intentionally is unenforceable, the Supreme Court determined

contract liability should be treated the same. Concluding otherwise would lead to wrongful conduct and would strain contractual relationships.

Issue Two Holding: The no-damages-for-delay provision of the contract was unenforceable.

Other Issues: Zachry also sought to recover damages the Port withheld as liquidated damages for the failure to meet deadlines; however, the Port argued that Zachry's execution of documents entitled "Affidavit and Partial Release of Lien" for each progress payment constituted a release of claims for those payments. The court held that as a matter of law, the releases are unambiguous, but that they do not cover Zachry's claim because the releases referred to claims for work completed, not for liquidated damages withheld—work not completed.

The trial court and court of appeals offset Zachry's award for the use of defective wharf fenders. The court determined that the evidence was legally sufficient to support the jury's finding that the fenders were defective and that Zachry breached this part of the contract.

Finally, because Zachry prevailed on its claims for delay damages and recovery of liquidated damages, the Port's attorney fees will not be awarded.

Justice Boyd, dissenting, joined by Justice Johnson, Justice Willett, and Justice Lehrmann.

The dissent argues that the delay costs are not part of "the balance due and owed" under this contract and therefore, the Port's immunity against Zachry's claim is not waived. The dissent relies upon the legislature's declaration that courts cannot construe a statute to waive immunity unless the waiver is clear and unambiguous.

Although the dissent agrees with the majority that delay damages *can* be part of the balance due and owed, it does not agree that these delay damages are due and owed under *this* contract because the contract expressly provides that the Port would have no liability for any delay damages. The Act is construed to read that when a payment is not provided for under the contract, but does arise under the common law, that payment may be due and owed under the court's judgment, but not as part of "the balance due and owed under the contract."

The dissent urges that the majority shifted the focus from the "mature debt" that is "under the contract" to prospective liability that a court may impose in a breach of contract action. The balance due and owed is not equivalent to the amount of damages for breach of contract payable and unpaid. The dissent also states that under the majority's construction of the Act, the amount of damages is not limited at all. The dissent contends that section 271.153(a)(1) only allows for recovery of amounts provided for in the contract. Not only does the dissent disagree with the majority's construction of the Act, but it also states that prior case law indicates that a "balance due and owed . . . under the contract" must be provided for in the parties' agreement.

Although the dissent agrees that owner-caused delay damages are not quantifiable at the time of contracting, because the parties here expressly agreed

that Zachry would receive no compensation for delay even if that delay was owner-caused, then delay damages are not recoverable. Therefore, those delay damages are not a part of “the balance due and owed.”

The dissent would hold that section 271.153 permits an award of delay damages, but only if those damages are provided for in the agreement. Because the dissent finds that Zachry’s delay damages are not part of “the balance due and owed,” there should be no award for damages in this case, and thus, the Port’s immunity is not waived. The claim should be dismissed for lack of jurisdiction.

Greene v. Farmers Insurance Exchange

No. 12-0867

Case Summary written by Matt A. Kelley, Staff Member.

Justice Johnson delivered the opinion of the Court.

Plaintiff, as next friend of the insured, brought suit for breach of contract against defendant insurance company. Plaintiff’s residence had been vacant for several months when it was damaged by a fire that spread from a neighbor’s property. The residence was insured under a Texas homeowner’s policy that contained a clause suspending coverage if the residence was vacant for more than sixty days. The insurer then denied the homeowner’s claim, though the vacancy was unrelated to the loss as a result of the fire.

The plaintiff argued several points, the first concerning § 862.054 of the Texas Insurance Code that prohibits an insurer from denying coverage for destruction of property when the insured has merely breached or violated a warranty, condition, or provision of the fire insurance policy that did not contribute to the cause of the destruction. The Court differentiated between a “triggering” condition and a “breach,” and held that because the vacancy clause did not contain an obligation on the part of the Plaintiff to occupy the residence her vacancy did not constitute a breach of the policy, rendering § 862.054 inapplicable. The plaintiff then argued that refusing to include trigger in the definition of breach would lead to absurd results and would unfairly disadvantage policyholders. The Court disagreed and held that the vacancy clause simply addresses the scope of the policy’s coverage, and though sixty days may be an arbitrary length of time, the plaintiff could have purchased endorsements that would have extended the coverage of the policy notwithstanding the vacancy clause. Next, the plaintiff argued that the defendant could not deny coverage unless the vacancy of the residence prejudiced the defendant in some way. Once again, the Court differentiated between the vacancy clause and a material breach of contract and held that the vacancy clause simply contemplated an agreement of the parties concerning the scope of the policy’s coverage and that the plaintiff’s extended vacancy was not a breach. Finally, the plaintiff argued that underlying public policy concerns should prohibit her insurance claim denial. The Court again disagreed, it reasoned that the Texas Department of Insurance (TDI) has not only been charged by the legislature to

create fair and balanced insurance policies, but that the insurance contract at issue was a form TDI policy. Additionally, the fact that TDI offers endorsements through which an insured can purchase coverage during extended vacancies demonstrates the important policy considerations TDI has already taken into account.

The Court then affirmed the decision of the court of appeals and held that the plaintiff may not recover.

Boyd, J., Concurring, joined by Justice Willett

Justice Boyd agreed with the conclusion of the majority, but wrote separately to characterize the Court's opinion in light of its holdings in four other insurance policy cases. In those cases, the Texas Supreme Court had imposed a prejudice requirement allowing a breaching policyholder to recover in the absence of prejudice on the part of the insurer. Justice Boyd thinks those four decisions are analogous to the instant case because they similarly involved scope of coverage provisions, though the Court in those decisions determined that the provisions were, in fact, breachable obligations. In the case at bar, because the majority termed the provision as one concerning scope of coverage rather than breachable obligation, the prejudice requirement did not apply. Justice Boyd worries that the Court's determination that the scope of coverage provisions were breachable obligations in the past, in light of its opinion today, gives both insurance companies and insurance policyholders poor guidance for predicting when the Court will impose a prejudice requirement and when it will not.

Kinney v. Barnes

No. 13-0043

Case Summary written by Samantha Kelly, Staff Member.

Justice Lehrmann delivered the unanimous opinion of the Court.

Robert Kinney worked as a legal recruiter for BCG Attorney Search, Inc. In 2004, he left BCG and started a competing firm. Years later, BCG's President, Andrew Barnes, posted statements about Kinney on two websites. The statements connected Kinney with an unethical scheme in which Kinney purportedly paid associates under the table to hire Kinney's candidates. Kinney sued Barnes for defamation, seeking a permanent injunction but no damages. At trial, Barnes filed a motion for summary judgment, arguing that the injunctive relief is a constitutionally impermissible prior restraint on speech. The trial court granted the motion. The court of appeals affirmed the trial court's order granting Barnes' motion, but did not address the merits, i.e. whether Barnes' statements were actually defamatory.

Issue: Is a permanent injunction an unconstitutional prior restraint on free speech if it (1) requires removing or deleting speech that has been adjudicated defamatory, and (2) prohibits future speech that is similar to the speech that has been adjudicated defamatory?

The Court held that the first category, a permanent injunction requiring the removal of defamatory speech, is not a prior restraint and it is constitutional. The second category, a permanent injunction prohibiting future speech, is a prior restraint and it is unconstitutional.

The Court looked to its decisions in *Hajek v. Bill Mowbray Motors, Inc.* and *Ex Parte Tucker* to conclude that a post-adjudication permanent injunction in a defamation case is not a prior restraint. In *Hajek*, the plaintiff sought to temporarily enjoin the defendant from driving his car with painted messages on its side stating that the plaintiff sold the defendant a lemon. The Court held that the injunction was a prior restraint and therefore unconstitutional. The Court also overturned an injunction in *Tucker* and held that “the abuse of privilege . . . is not to be remedied by denial of the right to speak, but only by appropriate penalties for what is wrongfully spoken.” Because the part of Kinney’s request that seeks erasure of Barnes’ statements does not prohibit future speech—rather, it requires removal of past speech that has already been found defamatory—it is a remedy and therefore not a prior restraint.

Kinney’s request, however, was broader than just this. He also asked the trial court to permanently enjoin Barnes from making similar statements in the future. The Court held that an injunction against future speech based on an adjudication that similar statements were found defamatory is a prior restraint, and then turned to whether such prior restraints violate the Texas Constitution. Again citing *Hajek* and *Tucker*, as well as several Supreme Court decisions, the Court stated that “defamation alone is a not sufficient justification for restraining an individual’s right to speak freely.” It concluded that the appropriate remedy under the Texas Constitution is damages, not injunctive relief. Ultimately, an injunction applied to future speech unreasonably risks prohibiting speech that is not defamatory. This kind of restriction on free speech is overbroad and therefore unconstitutional because of its potential to chill protected speech.

The Court reversed the court of appeals’ judgment to the extent that Kinney’s requested injunction did not constitute a prior restraint, and remanded the case to the trial court.

In re John Doe A/K/A “Trooper”

No. 13-0073

Case Summary written by Bryson Matthews, Staff Member.

Chief Justice Hecht delivered the opinion of the Court, joined by Justices Green, Willett, Guzman, and Brown.

An anonymous blogger, referring to himself as “the Trooper”, began an online attack on The Reynolds & Reynolds Co. and its chairman and CEO, Robert T. Brockman (referred to collectively as Reynolds). The Trooper’s online posts would criticize both the CEO and the company as a whole. In order to determine the identity of the Trooper, Reynolds filed a Rule 202 petition in the district court in

Harris County. *See* TEX. R. CIV. P. 202.1. Rule 202 allows a person to petition a court to depose another to obtain testimony for use in an anticipated suit, or to investigate a potential claim, if authorized by the court. *See* TEX. R. CIV. P. 202.1. Reynolds was seeking to depose Google, Inc., who was the host of the blog, for personal information pertaining to the owner of the blog, and to the email address that was posted on the blog.

Although Google did not oppose this petition, Trooper did. Appearing through counsel as John Doe, to preserve his identity, Trooper filed a special appearance to challenge the court's personal jurisdiction over him. Under Rule 202, the petition must be filed in a "proper court" of any county. *See* TEX. R. CIV. P. 202.2(b). The trial court ordered Google deposed. Trooper unsuccessfully sought mandamus relief in the court of appeals. In this original mandamus proceeding, Trooper argued that because he does not have the requisite minimum contacts with Texas to satisfy personal jurisdiction, there was no proper court that could order a deposition to investigate a suit to which he might be a defendant under Rule 202. In addition to arguing that the lack of personal jurisdiction violated Rule 202, Trooper also argued that this Rule 202 deposition violated due process.

Issue: Whether a proper court under Rule 202 must also have personal jurisdiction over the potential defendant.

The Court held that for two reasons, a proper court must also have personal jurisdiction over the potential defendant. Before its analysis, the Court went through a discussion of the history of Rule 202, and its previous versions. The Court recognized that the Rule specifically addressed venue within the rule. The Court also recognized that although the rule is silent on subject-matter jurisdiction, it was implicit that a proper court must have subject-matter jurisdiction over the action. Addressing its first reason, the Court concluded that allowing discovery for a potential claim against a defendant over which the court would not have personal jurisdiction would deny the defendant of the protection that Texas procedure would otherwise afford. The Court noted that Rule 120a of the Texas Rules of Civil Procedure entitles a defendant who files a special appearance to have the issue of personal jurisdiction decided before any other matter. Discovery under this rule is limited only to matters that are directly relevant to the issue of personal jurisdiction. The Court found that if personal jurisdiction was not required under Rule 202, a witness could be deposed more extensively for a potential suit than if a suit was actually filed, effectively circumventing the protections of Rule 120a.

The Court also recognized the burden that Rule 202 would pose to a defendant if personal jurisdiction was not required. A defendant could not simply ignore Rule 202 discovery sought from another party, because by doing so the defendant would risk that discovery being used against him in a proceeding in which there was personal jurisdiction. The Court held that by allowing this discovery under Rule 202, the defendant was forced to litigate the merits of an important issue before it was shown that the court had personal jurisdiction over him. Trooper also argued that his right of due process was violated. The Court held,

though, that because it decided that personal jurisdiction was required, it did not reach the constitutional issue.

Finally, the Court reached its second reasoning, that not requiring personal jurisdiction would unreasonably expand the rule. The Court noted the Rule 202 was already the broadest pre-trial discovery authority in the country. If personal jurisdiction was not required, the Court stated that this rule could be used by anyone, limited only by subject-matter jurisdiction and the court's grasp over witnesses. The Court found that this was not the intent behind Rule 202. The Court also noted the trial court's discretion in regard to this rule, but recognized that this discretion is still subject to guiding rules and principles. The Court stated that if personal jurisdiction was not required, there would be no principle to guide a court's decision in allowing or denying this discovery. The Court held that the burden is on the plaintiff to plead personal jurisdiction in an action, and that the potential plaintiff has this burden in Rule 202 as well. The Court conditionally granted the writ of mandamus, conditioned on the trial court vacating its order authorizing discovery.

Justice Lehrmann, joined by Justices Johnson, Boyd, and Devine, dissenting.

The dissent argues that by requiring personal jurisdiction for Rule 202, the majority is requiring a premature and impossible showing for personal jurisdiction. The dissent begins by pointing out that the Internet has already made it more difficult to obtain redress for defamation, and that the majority has made it nearly impossible for those wanting to remain anonymous. Next, the dissent looks at what personal jurisdiction has historically protected, the right of a defendant to not be subject to distant litigation in which a final judgment may be issued. The dissent concludes that if a defendant is not in peril of being subject to a final judgment, then personal jurisdiction should not come into play.

The dissent next argues that even if a proper court is to take personal jurisdiction into consideration, that the holding of the majority prevents this. As the dissent points out, the plaintiff must show that the defendant has the requisite minimum contacts to satisfy personal jurisdiction. The dissent goes on to explain that this showing is made extremely difficult, if not impossible, when the potential defendant is remaining anonymous. A court is unable to conduct the required analysis for personal jurisdiction if a party remains anonymous. The dissent points to some federal court holdings, which say that the personal jurisdiction arguments were premature when the court did not have the requisite information to conduct the analysis, especially when this information was being withheld by parties remaining anonymous.

In addition to the above arguments, the dissent also disagreed with the majority that without the requirement of personal jurisdiction in Rule 202, Texas would become the place of choice for conducting pre-trial discovery. The dissent noted that it could not find any authority of other states that required personal jurisdiction for similar procedural situations, and also that many other states contained discovery rules similar to Rule 202. Ultimately, the dissent argued that

there was no evidence to show that people would prefer to conduct discovery under the Texas rules.

Finally, the dissent argues that many other states have varying standards on what is required to obtain information from people remaining anonymous. The dissent states that regardless of what standard is applied, the findings required under Rule 202 would take First Amendment considerations into account. The dissent would hold that a trial court does not need to establish personal jurisdiction over an anticipated defendant in order to authorize pre-trial discovery.

King Fisher Marine Serv., L.P. v. Tamez

No. 13-0103

Case Summary written by Jeri Leigh McDowell, Staff Member.

Justice Brown delivered the opinion of the Court, in which Justices Johnson, Willett, Lehrmann, and Boyd joined. Justice Guzman filed a dissenting opinion, in which Chief Justice Hecht and Justices Green and Devine joined.

Jose Tamez worked as a welder on a dredging vessel operated by King Fisher Marine Services, L.P. (King Fisher). As one of the ship's crewman, Tamez assisted with the periodic removal and reattachment of the "cutterhead" to the ship. The cutterhead acted as a device that allowed the ship to extend the maximum depth it could dredge. A large nut with a cap welded over it secured the cutterhead to the ship, meaning that any removal or reattachment required the use of a large, heavy, socket-wrench assembly manned by several crew members.

Tamez injured his left arm during the reattachment process. Only two individuals—Tamez and ship's Captain—claimed to have knowledge of the events leading up to the injury, and their reports differed wildly. Tamez stated that he had just finished up with a prior welding task when he noticed the captain and another crew member attempting to manipulate the assembly by themselves. Tamez told the court that the captain yelled at him to quickly come help before the assembly fell, and that Tamez immediately complied using his left arm only to help support the assembly's weight. By comparison, the captain claims that he and the other crewman had not begun attempting the process of reattachment until they had secured Tamez's assistance. The captain stated that Tamez lifted the assembly using both hands after twice assuring the other men that he was ready to lift.

Tamez sued for recovery on his injuries under the Jones Act, arguing that "he was injured working under a specific order to lift equipment that the crew should have lifted with mechanical assistance or with additional manpower." *See* 46 U.S.C. § 31014 (2014); *Weeks Marine, Inc. v. Garza*, 371 S.W.3d 157, 166 (Tex. 2012) (concluding that contributory negligence may not reduce the damages awarded to a seaman carrying out a specific order). King Fisher countered by arguing that Tamez was contributorily negligent in causing his own injuries, and

that his actions leading to injury were not the result of a specific order. After finding Tamez also at fault, the jury awarded \$420,000 in damages. King Fisher appealed.

On appeal, King Fisher attacked the legal sufficiency of the evidence supporting the jury's specific order finding as well as the trial court's refusal to add King Fisher's proposed specific order definition to the jury charge. The appellate court affirmed, and King Fisher appealed again.

Issue: (1) Did the trial court abuse its discretion by refusing to grant King Fisher's jury charge objection?

(2) Did the appellate court error during its sufficiency of the evidence review by incorrectly relying on Ninth Circuit precedent to expand the specific-orders exception beyond that espoused in *Garza*?

The Supreme Court of Texas affirmed the appellate court, holding that the trial court did not abuse its discretion by refusing to grant King Fisher's jury charge objection, and that the trial court did not error during its sufficiency of the evidence review. Looking first to the jury-charge objection, the Court concluded that both the plain language of and the purpose behind Rule 272 of the Texas Rules of Civil Procedure (Rule 272) support a wide grant of discretion to the trial court for setting charge objection deadlines. The Court noted that while multiple Texas appellate courts have considered issues dealing with charge-objection deadlines, none have "balked at the trial court's authority to impose them." Further, the Court reasoned that while Rule 272 mandates the granting of a "reasonable time" for the parties to review the jury charge and present objections, it does not preclude a trial court from setting a hard deadline to when this review and objection period should be concluded by. Although the Court did not personally agree with the trial court's decision to not entertain King Fisher's objection, it ultimately determined that because counsel had been afforded reasonable time to examine and object to the charge, the trial court did not abuse its discretion by setting a charge-objection deadline that preceded the reading of the charge to the jury.

Looking next to the sufficiency of the evidence review, the Court concluded that the appellate court did not rely on Ninth Circuit precedent in its sufficiency of the evidence review. The Court noted that the appellate court only cited the Ninth Circuit case in question for a very general proposition of law rather than for an expansion of the specific-orders exception. The Court reasoned that because a jury has complete discretion to determine factual issues under the Jones Act and because the record evidenced contradictory testimony presenting "some evidence about which reasonable minds could differ" supporting the verdict, sufficient evidence existed to support the jury's specific-order finding. Thus, the appellate court had not erred during its sufficiency of the evidence review. Accordingly, the Court affirmed in full the appellate court's judgment.

Justice Guzman, dissenting:

Justice Guzman dissented only on the matter of proper interpretation of Rule 272, holding that the history, purpose, and plain language of the rule supports a litigant's ability to object to a jury charge at any time before the trial court reads the charge to the jury. Justice Guzman pointed out that both policy and precedent support a trial court deciding an objection on its merits rather than on a procedural technicality. By construing the rule to disallow objections timely made under the plain language but untimely under judicially constructed limitations, the court incorrectly placed concerns of docket control over those of adjudication on the merits. Therefore, Justice Guzman would have remanded the case to consider whether the trial court's failure to consider King Fisher's charge objection caused reversible harm.

Wheeler, Inc. v. Enbridge Pipelines

No. 13-0234

Case Summary written by Julio Montiel, Staff Member.

Justice Lehrmann delivered the opinion of the Court.

Wheeler owned a 153 acre tract of land. Enbridge wanted to build a pipeline across Wheeler's land. Wheeler agreed but wanted Enbridge to construct the pipeline by boring it underground to preserve the trees on the property. Both parties agreed but Enbridge failed to instruct the pipe builders about using the boring process and the company destroyed some of the trees. Wheeler filed suit for breach of contract and trespass. Enbridge requested the court to determine whether the damage to the property was temporary or permanent to assess whether to award damages for the cost of restoring the property or for the loss in fair market value. The jury did not decide that issue and found Enbridge liable for contract and trespass. For the contract claim, the jury awarded \$300,000 dollars to Wheeler for the reasonable cost to restore the land, which Wheeler elected to recover over a lesser award for the intrinsic value of the trees under the tort claim. On appeal, the court of appeals reversed the judgment for Wheeler and awarded a take-nothing judgment for Enbridge because Wheeler failed to address the issue of whether the damage was permanent or temporary. Therefore, Wheeler had waived its right to an entitlement and did not have a claim for the intrinsic value of the trees because such a finding was also not found.

Issue: In a contract claim, does the permanent versus temporary distinction apply if there is injury to real property?

The distinction does apply. The Court begins by discussing the parameters of the legal distinctions between permanent and temporary injury to property and its relation to the calculation of damages. The Court acknowledges that the doctrine is not entirely clear. Nevertheless, the distinction does serve a number of purposes. In the present case, the legal distinction provided for the determination of damages for

injury to a landowner for a breach of contract claim and the loss of trees. The doctrine provides the following general rules: (1) for temporary injury, the landowner is entitled to the amount required to restore the land to the condition prior to the injury, and (2) for permanent injury, the landowner is entitled to the difference in fair market value before and after the injury.

The Court held that the distinction between temporary and permanent injury is not limited to tort actions and can include contract actions when injury to real property is involved. Thus, breach of an easement is treated the same as a negligence claim to allow for a proper calculation of damages. The court then defines “temporary” and “permanent” to address whether the jury or the court can properly determine if an injury is permanent or temporary. The Court held that this is a question of law for the courts to decide because juries are not able to decide legal issues such as the estimation of damages. Nevertheless, the jury can still decide factual issues in this regard under proper instruction. The Court discussed the following exceptions to the permanent versus temporary distinction doctrine: (1) the economic feasibility exception and (2) the intrinsic value of trees exception. Under the economic feasibility exception, for temporary injury, courts award damages for the loss in fair market value when the cost to repair an injury is greater than the loss of market value to the extent that repair is not economically feasible. Having applied this exception before, the Court recognized this exception. For the intrinsic value of trees exception, a landowner can recover the ornamental and utilitarian value of the trees lost if he shows that the loss of the trees did not diminish the property’s fair market value or resulted in only a nominal decrease.

In applying the law to the present case, the Court rejected the court of appeals premise that the temporary-versus-permanent distinction was a question of fact. Therefore, the question regarding the permanent-versus-temporary distinction did not need to go to the jury because disputes over fact have no bearing on the injury’s classification. Since it is a question of law, the Court classified the injury as permanent based on the economic feasibility exception and the agreement of the parties. As a result, the trial court instructed the wrong calculation for damages to the jury because it used the cost of restoration and the jury’s award could not be upheld. Then, the Court moved to the jury’s award of \$288,000 for the intrinsic value of the trees. The Court reasoned that the loss of the trees was nominal to the fair market value at best and made the intrinsic value exception proper. Moreover, the Court found harmless error with regard to the submission of the trespass action to the jury because the breach of the easement was valid for liability. Consequently, the Court reversed the court of appeals and remanded to address the issues not addressed in the opinion pertaining to the admission and exclusion of expert testimony and the failure to submit a jury question on breach of contract defenses.

