

Supreme Court of Texas
April 24, 2014

In re Steven Lipsky

No. 13-0928

Case Summary written by Mariah Mauck, Staff Member.

JUSTICE DEVINE delivered the opinion of the Court.

This case followed a suit against Range Resources Corporation and Range Production Company (Range) by Steven and Shyla Lipsky (Lipsky) alleging that Range's fracking operations near their property were negligent, grossly negligent, and a nuisance. The Lipsky's also claimed that Range's operations contaminated their water well, causing the water to become flammable and their home uninhabitable. Range moved to dismiss all claims, as well as filed a counterclaim against the Lipskys and a third-party claim against Rich (the Lipsky's environmental consultant) alleging defamation and business disparagement. The Lipskys and Rich then moved to dismiss Range's counter-attack as an improper attempt to suppress their First Amendment rights guaranteed under the Constitution and protected by the Texas Citizens Participation Act (TCPA).

The trial court granted Range's motion to dismiss and also declined to dismiss Range's claims against the Lipskys and Rich. The court of appeals thereafter determined that the TCPA did not require dismissal of all of Range's claims against Lipsky. The court of appeals granted mandamus relief to Lipsky's wife and consultant, while denying similar relief to Lipsky, prompting both Lipsky and Range to seek mandamus relief in this Court. Lipsky's petition argued that the TCPA required the trial court to dismiss all claims against him also. Range's petition argued that the TCPA did not require the granting of mandamus relief to Lipsky's wife, Rich, and Lipsky himself (in part).

In this case, the Court considered circumstantial evidence and the Act's requirement of clear and specific evidence to dismiss a suit. The TCPA places the burden on the plaintiff to establish by clear and specific evidence a prima facie case for each essential

element of the claim in question. The Court disapproves of cases that interpret the TCPA to require direct evidence of each essential element of the underlying claim to prevent dismissal.

The Court held that, in regards to Lipsky's petition to the business disparagement claim, an affidavit from Range's senior vice president was conclusory and therefore insufficient to satisfy the TCPA's requirement of "clear and specific evidence". Furthermore, in regards to his petition to the defamation claim, the Court held that his accusations that Range's fracking operations contaminated the aquifer were harmful to the perception of Range's capabilities as a natural gas producer, and thus were considered defamation per se. Damages to reputation are presumed from defamation per se, and actual damage is not an essential element of the claim to which the TCPA's requirement of clear and specific evidence might apply. In response to Range's petition, the Court held that there was not clear and specific evidence establishing a prima facie case that Shyla Lipsky and Rich published defamatory remarks about Range or conspired with Steven Lipsky "to publicly blame Range for the contamination." Thus, the TCPA required the dismissal of Range's claims against Shyla Lipsky and Rich and Range's conspiracy claim against all parties.

In re Bridgestone Am. Tire Operations, LLC

No. 12-0946

Case Summary written by Jana L. Simons, Staff Member.

JUSTICE LEHRMANN delivered the opinion of the Court.

The present case was before the Supreme Court of Texas on petition for writ of mandamus. In 2009, a car accident occurred in the Mexican state of Neuvo Leon involving four passengers. Armando Alvarado and his wife Maria Isabel Rodriguez were both killed in the accident and their two minor children were injured but survived. Following the accident, in accordance with Mexican law, the children's grandparents assumed guardianship and custody in Neuvo Leon.

The family purchased their 1996 Ford Explorer from a Mexican-based company, Librado Leal who imported the vehicle to

Mexico from a Texas-based company, Gutierrez Auto Sales. A defective tire allegedly caused the accident, which occurred two years after acquisition of the car. The record was deficient on specific facts regarding maintenance of the vehicle or tires over the course of ownership and the record did not indicate that the tire was manufactured in Texas.

The children's uncle, Gilberto Rodriguez, a resident of Texas, filed suit in Texas, as a next friend of the children, against Bridgestone Americas Tire Operations, LLC (a Delaware corporation), Texas-based Gutierrez Brothers, Inc., and Gutierrez Auto Sales.

Bridgestone asserted that Rodriguez could not sue on behalf of the children as a next friend because their grandparents are their rightful guardians. Further, Bridgestone argued that the case belonged in Mexico because there were no substantive ties to Texas and a next friend is not a plaintiff for the purposes of the Texas exception. Bridgestone attempted to transfer the case to Mexico by filing a forum non conveniens motion; but the trial court denied the motion. The appellate court also affirmed the trial court's decision because the children's uncle, who filed the suit, was a resident of Texas, thus concluding the suit was proper in Texas.

Issue: The issue before the Court was multidimensional: (1) whether the children could sue through a next friend when they had no properly appointed or recognized guardian in the United States, (2) whether a next friend of the children was, by definition, a plaintiff that would trigger the Texas exception (which allows all Texas residents to file suit in the state regardless of where the cause of action occurred), and (3) assuming the case could be brought by a next friend on behalf of the children, whether Texas was the proper forum. The Court reviewed the trial court's decision for abuse of discretion.

The Court first addressed the children's right to sue through a next friend under Texas Rule of Civil Procedure 44. Rule 44 allows minors to bring suit through a next friend if he or she lacks a legal guardian. Bridgestone contended this rule exempted Rodriguez due to the existence of legal guardians for the children, their grandparents. The Court clearly stated that if the children's

grandparents were, in fact, their guardians, Rule 44 did not allow a next friend to sue on their behalf. The question next turned on whether the state of Texas recognized the children's grandparents as their legal guardians since they were granted guardianship under Mexican law. The Court compared the guardian position to an executor or administrator. Under those positions, the executor or administrator is only authoritatively recognized in the state in which he or she is appointed. Ultimately, although the children's grandparents were not recognized as legal guardians outside of the jurisdiction that granted the authority, the Court concluded that the grandparents were able to bring a suit as next friend.

The Court also examined the proper definition of a plaintiff in order to determine who was the proper person to sue as next friend of the children, and specifically, whether Rodriguez qualified. The Court stated that a next of friend is not a plaintiff by definition under the Texas Civil Practice and Remedy Code § 71.051(h)(2). Therefore, because the next friend was not an actual party to the suit, the Texas exception was not triggered by the Rodriguez's residency in Texas. Moreover, if the children were of an age to sue personally, they would lack the right to sue in Texas, therefore, a next friend could not do so either.

Finally, the Court considered Bridgestone's contention that the proper forum for the suit was in Mexico. The Court examined the factors of forum non-conveniens and relied on the Court's decision in *In re Pirelli Tire, LLC*, 247 S.W.3d 670 (Tex. 2007) to determine that the accident and evidence occurred in Mexico, with very little connection to Texas. The Court held that public interest favored the case being brought in Mexico. The Court reversed the decision of the appellate court and dismissed the case for forum non-conveniens. Further, Bridgestone submitted to a jurisdiction in Mexico and waived any statute of limitations that might have applied. The Court also briefly mentioned that although a Texas-based company owned the vehicle for a short time, Mexico had jurisdiction over all defendants.

State v. Clear Channel Outdoor, Inc.

No. 13-0053

Case Summary written by Ben Agee, Staff Member.

CHIEF JUSTICE HECHT delivered the opinion of the Court.

Facts: In an effort to widen a freeway in Downtown Houston, the State of Texas condemned some highway frontage land on which sat some billboards owned by Clear Channel. The area of the highway being widened was a high-traffic area, and the billboards were located in a coveted spot because of the high volume of drivers and passengers who would see them. Furthermore, the billboards were built in such a way as to render them practically permanent, and could not be moved and relocated, but only demolished.

After condemning the land, the State settled with the landowners and with Clear Channel in regard to compensation for disruption of ownership and lease interests, respectively. Clear Channel, however, wanted compensation for the loss of business they would suffer by no longer having the billboards near the highway, and sued the State for damages. The State argued that the billboards were personal property not subject to such damages, but that even if Clear Channel was entitled to any compensation, it would be for the cost of the billboards alone, and not any business loss.

At trial, each side presented expert witnesses to determine the actual value of the billboards. Each party's expert came up with roughly equal figures: between \$15,000–\$30,000 for each billboard. Clear Channel also had an expert testify as to the value of lost revenue Clear Channel would suffer because of the State's actions, which he estimated to be between \$692,000–\$722,300. The jury awarded Clear Channel \$268,235.27, and the court of appeals affirmed.

Issues: (1) Were the billboards fixtures or removable personal property on the land; and (2) could Clear Channel be compensated for the loss of business they asserted?

Analysis: In deciding the first issue, the Court stated that because the billboards were built in such a way that they could not be moved without being destroyed, they were fixtures. The

Court qualified this statement by saying that there may be some situations in which billboards should be considered personal property, but under the facts of this case, the billboards were definitely permanent fixtures.

As for the second issue, the Court held that Clear Channel could not be compensated for any potential loss in revenue. The Court agreed with the State's arguments that Clear Channel could only be compensated for the actual value of the billboards. Future profits, the Court decided, are speculative, and cannot be compensated, even if there is evidence that the location was a crucial factor of a business's profits. The Court cited to *State v. Central Expressway Sign Associates*, in which they held that "income from a business operated on the property is not recoverable and should not be included in a condemnation award." *State v. Central Expressway Sign Associates*, 302 S.W.3d 866, 871 (Tex. 2009).

Holding: Because the billboards were fixtures, but Texas does not allow for the recovery of damages for potential lost profits, the Court reversed and remanded the case to the trial court so that proper damages could be determined and issued.

Tex. Student Hous. Auth. v. Brazos Cnty. Appraisal Dist.

07-11-00421-CV

Case Summary Written by Kathryn Almond, Staff Member.

JUSTICE WILLETT delivered the opinion of the Court.

The Texas Student Housing Authority (TSHA) was established with authority under the Higher Education Authority Act. TSHA acquired title to the Cambridge, a student-residential facility in College Station. Because the residential facility was near Texas A&M University (TAMU), the TSHA contracted with TAMU to provide housing to some summer programs hosted there. This was in addition to the students renting units for summer school at TAMU and Blinn College. The Brazos County Appraisal District (BCAD) voided TSHA's tax-exempt status under the education code for 2005–2008 and required payment of millions in back taxes because the property was not exclusively used for students attending the universities during those years. The trial

court ruled that BCAD was correct in denying the tax-exempt status. The court of appeals reversed the decision for only one year.

Issue: Whether using student residential facilities for summer program housing violated the tax-exempt status.

The Supreme Court of Texas ruled that the TSHA proved its tax-exempt status under the Education Code. The Court reviewed the status that it must “clearly show” its statutory exemption. The Court reasoned that both the housing and educational facility provisions of the Education Code are defined in terms of use. Further, the Court reasoned that the title and text of the Education Code declares that these authorities are exempt from taxation because the language focuses on who the property owner is instead of how the property is being used. Moreover, there was nothing in the statute to state that the property be used “nonexclusively” and there was no conditional language in the statute. The Court clarified that this opinion did not hold that the TSHA could not use the property for any purpose and continue to receive exemption. Therefore, the Court held that the Legislature’s clear intent was to grant an exemption to TSHA and there is a presumption that the property was only used for authorized purposes. The Court affirmed the court of appeals decision with regard to 2005, and reversed the decision with regard to the other years.

JAW The Pointe v. Lexington Ins. Co.

No. 13-0711

Case Summary written by Eric Clinton, Staff Member.

JUSTICE BOYD delivered the opinion of the Court.

Jaw the Pointe (JAW) owned an apartment complex (The Pointe) in Galveston, Texas and insured the property with Nations Asset Management. Nation Asset Management purchased several policies that provided coverage layers for the 300 apartment complexes that they insured. Lexington Insurance Company provided the primary coverage layer.

Shortly after Hurricane Ike struck Galveston Island, Emery Jacob, a partner for JAW, attended a meeting at which a City of Galveston official explained that all apartment complexes that

suffered damage equal to or greater than half of their market value would be forced to raise the structures in order to comply with city ordinances. Months later, the city of Galveston sent a letter to JAW informing them that the damage to The Point exceeded half of the market value and that JAW would be forced to elevate the complex three additional feet. As a result, JAW submitted a claim to Lexington, requesting coverage for “all demolition costs, construction costs, architectural and permitting fees, and other expenses that JAW had incurred and would incur to demolish and rebuild the apartments.” A consultant for Lexington reported that The Pointe had suffered wind damage of \$1,278,000 and flood damages of approximately \$3.5 million. Lexington then paid JAW for the wind damage, minus the deductible, but told JAW the insurance policy did not cover damages caused by flood or for the expenses to be incurred in order to comply with the city ordinances.

The insurance policy contained several relevant provisions. First, the parties agreed that the “Covered Causes of Loss” provision provided that Lexington would be obligated to cover all losses that were not specifically excluded later in the policy. The “Exclusions” provision then stated that Lexington would not pay for any damage caused by the exclusions subsequently listed. This provision then specifically listed “Flood” and “[t]he enforcement of an ordinance” as exclusions to the “Covered Causes of Loss” provision. Additionally, the provision contained an “anti-concurrent-causation clause” which provided that Lexington would not cover damages caused “directly or indirectly” by an excluded event “regardless of any other cause or event that contribute[d] concurrently or in any sequence to the loss.” However, the insurance contract later provided that, if a covered cause of loss occurred, Lexington would pay for losses incurred due to the enforcement of an ordinance requiring the non-damaged portions of the complex to be replaced as a consequence of damages resulting from a covered cause.

In July 2009, JAW sued Lexington and others for breach of contract and violations of both the Texas Insurance Code and the Texas Deceptive Trade Practices Act. After multiple claims were dismissed, the jury rendered a verdict in favor of JAW. The case

was then reversed by the court of appeals because the damages were caused, at least in part, by flood.

ISSUE: Does the anti-concurrent-causation clause in the insurance agreement prevent Lexington from being obligated to pay for the expenses JAW incurred as a result of being required to demolish and rebuild The Pointe in compliance with the city ordinance because the damage was caused by both wind (a covered loss under the agreement) and flood (an uncovered loss under the security agreement).

JAW argued that the wind damage was “separate and independent” of the flood damage and itself constituted enough damage for the complex to fall under the city ordinance, thus Lexington should have compensated them for the costs of rebuilding the complex in compliance with the city ordinance. On the other hand, Lexington contended that the agreement only required them to compensate for compliance with an ordinance when “the policy cover[ed] the damage that triggers the ordinances’ requirements.” Additionally, the anti-concurrent-cause provision provided that if an excluded cause contributed to the damage concurrently alongside a covered cause, then Lexington would not be forced to pay. Since the city accounted for both wind and flood damages when determining that the complex fell under the ordinance, Lexington claimed it should not be required to compensate JAW because the damages were at least partially caused by flooding, which was excluded from their obligations.

Despite JAW’s attempt to show that the wind damage was sufficient, in and of itself, to force The Pointe to fall under the city’s ordinance, the Court found that “the city based its decision to enforce the ordinance on the combined total” of the wind and flood damage. Because the city’s report did not differentiate between the different causes of the damage, it was impossible for the Court to determine whether the wind damage alone would have been enough for the city to enforce the ordinance. Since the measure of damage aggregated the two causes, the anti-concurrent-causation clause prevented Lexington from being forced to cover the damages

JAW argued that the common law concurrent-causation

doctrine should have applied instead. When parties offer competing interpretations of a contract, the Court must look to “the language of the policy because we presume parties intend what the words of their contract say.” Applying the language of the agreement, the Court found that both the wind damage and flood damage contributed to the enforcement of the city ordinance.

Vernco Constr., Inc. v. Nelson

08-10-00222-CV

Case Summary written by Garrett Coutts, Staff Member.

PER CURIUM

The 45th District Court, Bexar County granted relief totaling in excess of \$6 million dollars for Vernco Construction, the Plaintiff. On appeal before the 8th Court of Appeals, the judgment was vacated and the case dismissed. The appellate court accepted the defendant’s argument that Vernco had no standing to bring suit as it had assigned its commercial tort claims to its lender after filing of the suit. The Supreme Court of Texas reversed and remanded the cause for reconsideration based upon an error below in failing to consider evidence.

Vernco Construction signed a forbearance agreement (the agreement) with its commercial lender. The agreement required the lender to refrain from foreclosing upon Vernco’s promissory note, and Vernco was required to assign its “receivables and claims” involved in the current litigation. This included Vernco’s commercial tort claims.

Thus, the Respondents argued that Vernco no longer had standing to bring suit. Vernco countered by submitting an addendum to the forbearance agreement and alternatively that as an “assignor in a representative capacity” they maintained valid standing. The addendum stated that Vernco and the commercial lender did not intend for “actual legal ownership” of claims to transfer in the original agreement. At the hearing, Vernco was found to have standing and the case was sent to the district court for trial. During trial the Respondents repeatedly attempted to argue the standing issue, but the judge would not allow the agreement into evidence for that purpose. Eventually, the

Respondents presented the agreement for other evidentiary purposes. Only the original agreement, not the addendum, was entered into evidence at trial. The trial court rendered judgment for Vernco in excess of \$6 million.

On appeal, the court vacated the judgment and dismissed for lack of standing. The appellate court refused to consider the addendum because it was not entered into the record at trial. They only considered the contents of the original agreement. In addition, the appellate court rejected Vernco's claim to standing acting in a representative capacity.

The issue of standing was the only contention brought before the Supreme Court of Texas. The Court reiterated its precedence that jurisdictional issues are subject to the Court's determination and should be decided in priority of other claims because a court should not continue adjudicating a case over which it does not hold proper jurisdiction.

As for the standing issue of this case, first, the Court mentioned that the court of appeals failed to mention that the addendum to the agreement had been included as an exhibit in Vernco's response to the motion to dismiss filed before trial by the Respondents. The Court determined that the appellate court erroneously concluded that the trial court ruled upon the standing issue, when in fact, the only substantive ruling on the issue of standing was made during the pretrial hearing regarding the Respondent's motion to dismiss.

Additionally, it was error for the court of appeals to find that the addendum was not entered into the record. The addendum had been presented at the hearing regarding the motion to dismiss before the pretrial judge, and the trial and appellate courts should have considered all the evidence.

Finally, although pretrial hearings are generally considered nonevidentiary, "a specific indication or assertion to the contrary" may establish the evidentiary nature of the hearing and a record will be necessary for a party seeking review for error.¹ Here, the Court found that Vernco's pretrial hearing was evidentiary. The

¹ *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 782-83 (Tex. 2005).

Court considered Vernco's assertion of legal and factual issues in its response to the motion to dismiss, the pretrial judge's order, and the duration of the hearing.

Although a record should have been included from the pretrial hearing, due to its evidentiary nature, no such record was presented. Regardless, the Court determined that "[c]learly . . . the addendum is part of the clerk's record before the trial court and certainly must be considered if the matter was determined on the pleadings." The Court reversed the judgment and remanded the case for reconsideration due to the error by the appellate court in failing to consider the "relevant portion" of the record—particularly the addendum to the forbearance agreement.

Lippincott v. Whisenhunt

No 13-0926

Case Summary written by Jeryn Crabb, Staff Member.

PER CURIAM.

Warren Whisenhunt, a registered nurse anesthetist, filed suit against Lippincott and Parks for defamation, tortious interference with existing and prospective business relations, and conspiracy to interfere with business relations. Whisenhunt alleged that Lippincott and Parks made disparaging comments in emails about him including that Whisenhunt represented himself to be a doctor, endangered patients for his own financial gain, and sexually harassed employees. Lippincott and Parks sought to dismiss the claims based on the Texas Citizens Participation Act.

Issue: Does the scope of the Texas Citizens Participation Act allow a defendant to dismiss a claim involving the exercise of the right to free speech upon a showing that the communication was made in connection to a public form?

The trial court granted the motion to dismiss in part and denied it in part, concluding that Whisenhunt met the minimum threshold to proceed with the defamation claim but failed to provide sufficient evidence to proceed with the other claim. The court of appeals reversed and remanded, concluding that the Act does not apply to private communications and therefore, was inapplicable to the case.

In order to give effect to the Legislative intent of the statute, the Court looked to the statute's plain language. The Court determined that the right to free speech in the Texas Citizens Participation Act requires that (1) the exercise be made in a communication, and (2) the communication be made in connection with a matter of public concern. The plain language in the statute does not require the form of communication to be public. The emails allege a health care professional's misconduct while providing medical services, which have previously been determined to be a matter of public concern. The private emails concern a public subject; therefore, the statute protects the speech. The Court determined that under the Texas Citizens Participation Act, a defendant may move to dismiss a claim involving the exercise of the right to free speech upon showing that the communication was made in connection to a matter of public concern. The Court's interpretation of the plain language of the statute limits its scope to communications involving a public subject—not communications in public form. The Court remanded the case for further proceedings to determine whether White met the *prima facie* burden that the Act requires.

San Antonio Water Sys. v. Nicholas

No. 13-0966

Case Summary written by Austin De Boer, Staff Member.

JUSTICE BROWN delivered the opinion of the Court.

Debra Nicholas (Nicholas) sued her former employer, San Antonio Water System (SAWS), claiming it violated the Texas Commission on Human Rights Act (TCHRA) by terminating her employment as “retaliation for confronting [Greg] Flores,” a coworker, about his alleged inappropriate lunch invitations to other female employees. After an overly cautious employee reported Greg Flores's actions, Nicholas claimed she confronted him and suggested he discontinue his actions due to a possible sexual-harassment claim against SAWS. Three years later, after SAWS underwent reorganization, Nicholas was appointed to be Flores's subordinate, shortly thereafter her position was eliminated. Nicholas was not interviewed for other positions.

At trial, the jury found for Nicholas, concluding she “opposed sexual harassment by counseling or reprimanding Flores, was fired because of it, and awarded [her] nearly \$1 million in damages.” SAWS appealed, claiming the following: (1) “no reasonable person could believe sexual harassment under the TCHRA has occurred, and therefore Nicholas did not engage in a ‘protected activity’ under the TCHRA when she confronted [her co-worker];” (2) Nicholas “could not show a causal link between her confronting [her co-worker] and her termination nearly three years later;” and (3) “that the trial court failed to apply a statutory damages cap to Nicholas’s front-pay damages award. The court of appeals affirmed; SAWS appealed. Here, the Court dismissed Nicholas’s claim on claim one; therefore, the Court did not consider claims two or three.

Issue: Whether Nicholas could have reasonably believed Flores’s actions amounted to a sexual harassment claim and, therefore she engaged in a “protected activity” under the TCHRA when she confronted him about his alleged inappropriate lunch invitations.

Here, the Court disagreed with the court of appeals, holding “no reasonable person could have believed the invitations gave rise to an actionable sexual harassment claim. . . . Nicholas did not engage in a protected activity under the TCHRA.” Therefore, SAWS retained its governmental immunity and the trial court did not have jurisdiction over Nicholas’s claim.

SAWS, a governmental entity, was privy to governmental immunity. The Texas Legislature, however, waives immunity if a plaintiff alleges a violation of the TCHRA by “pleading facts that state a claim thereunder.” Therefore, a TCHRA claim is “jurisdictional in nature,” meaning if a plaintiff cannot establish the prima facie elements of a TCHRA, a governmental entity retains immunity. To establish a TCHRA violation, Nicholas needed to show: “(1) she engaged in an activity protected by the TCHRA; (2) an adverse employment action occurred; and (3) there exist[ed] a causal link between the protected activity and the adverse action.” Furthermore, to establish the first element, “the employee [was required to] demonstrate a good faith, reasonable

belief that the underlying discriminatory practice violated the TCHRA.”

A sexual-harassment claim is actionable “only if it is so severe or pervasive as to alter the conditions of [the victim’s] employment and create an abusive work environment.” Courts look to a variety of contributing factors, including frequency, severity, nature (e.g., threatening or humiliating), offensiveness, and the extent to which the conduct interferes with the victim’s work performance.

Here, the “lunch invitations were not so severe or pervasive as to alter the conditions of employment or create an abusive work environment.” The employee who reported Flores’s conduct did so “out of an abundance of caution, though he did not believe SAWS’s sexual-harassment policy has been violated.” Similarly, courts have ruled much more offensive acts as not meeting the required threshold, including: (1) “a single incident of [a] male employee reading aloud sexual innuendo contained in a psychological evaluation;” (2) “a single instance of [a] male employee entering [the] women’s restroom and ‘gawking’ at undressed women;” or (3) where a male supervisor commented on a female coworkers underwear “being visible under her uniform.”

For the aforementioned reasons, the Court determined “no reasonable person could have believed the invitations gave rise to an actionable sexual-harassment claim.” As a result, Nicholas’s actions of counseling or reprimanding Flores were not a “protected activity” under the TCHRA. Therefore, “she never pleaded a claim under the TCHRA” and SAWS governmental immunity remained intact. Because of SAWS’s governmental immunity, the trial court lacked jurisdiction over Nicholas’s claim. The Court “reverse[d] the contrary judgment of the court of appeals and render[ed] judgment dismissing Nicholas’s claim.”

JLG Trucking, LLC v. Garza

No. 13-0978

Case Summary written by Jack Fulgham, Staff Member.

JUSTICE LEHRMANN delivered the opinion of the Court.

On July 16, 2008, Lauren Garza was in an automobile collision with an 18-wheeler driven by a JLG Trucking employee. Garza neglected to go to the hospital on the date of the accident, but five days later visited an orthopedic surgeon complaining of back and neck pain. The orthopedic surgeon, Dr. Guillermo Pechero, ordered an x-ray that showed “some straightening of the lordotic curve,” and prescribed Garza physical therapy that lasted about eleven weeks. On October 9, 2008, shortly after completing her physical therapy assignment, Garza was involved in another automobile accident. Garza was taken to the hospital in an ambulance, and on October 31, 2008, she paid another visit to Dr. Pechero. Dr. Pechero ordered an MRI and discovered that Garza had two herniated discs in her neck. After failed attempts to treat the injury without surgery, Garza underwent spinal fusion surgery in January 2012.

Garza sued JLG, alleging that negligence on the part of the JLG driver in the first accident proximately caused her neck injuries. Garza sought recovery of “past and future medical expenses, loss of earning capacity, physical pain, mental anguish, physical impairment, and disfigurement.” Dr. Pechero provided expert testimony on behalf of Garza, testifying that first accident involving the JLG driver caused Mrs. Garza’s neck injuries and subsequent surgery. Dr. Bruce Berberian, a neuroradiologist, provided expert witness testimony on behalf of JLG that Garza’s injuries were degenerative and not trauma-related. The trial court awarded Garza’s pretrial motion to exclude evidence of the second accident on a relevance theory, citing concerns that the evidence might prejudice or confuse the jury. JLG objected to the exclusion ruling, offering evidence of proof of the second accident, but the court maintained its ruling. The jury found for Garza and awarded her \$1,166,264.48 in damages. JLG appealed the verdict, arguing that the exclusion of evidence of the second accident amounted to harmful error, but the Fourth Court of Appeals of

Texas affirmed the trial court's holding. The appellate court held that there was no abuse of discretion by the trial court because "expert testimony would be required to establish any . . . causal link between the second collision and Garza's injuries."

Issue: Did the trial court abuse its discretion by excluding evidence of the second accident because it was irrelevant?

The Supreme Court of Texas relied on the Texas Rules of Evidence in finding that the trial court did abuse its discretion, and that the evidence of the second accident was relevant to the facts. Relevant evidence is any "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." TEX. R. EVID. 401. The Court also pointed to the fact that in a personal injury case the plaintiff has the burden of proving that the defendant's conduct caused the plaintiff's injuries, and evidence related to causation is relevant. The Court held that expert testimony that the second accident was an alternative cause to Garza's injuries should not have been excluded.

The Court was not persuaded by Garza's reliance on *Farmers Texas County Mutual Insurance Co. v. Pagan*. In that case, plaintiff alleged that a 2008 car accident caused neck and shoulder injuries, and excluded evidence of a 2009 "horse incident" in which the plaintiff fell off of a horse. The appellate court held that the evidence was properly excluded, because the injuries were minor and unrelated to the shoulder and neck injuries alleged in the complaint. The Court found that in the present case, the evidence presented by JLG had "a connection between the proposed alternative cause and the plaintiff's injuries" unlike in *Pagan*. The Court noted that the excluded evidence also compromised JLG's ability to cross-examine and probe Dr. Pechero's conclusions about the causation of Garza's injuries.

The Court further held that the court of appeals improperly shifted the burden of proof to the defendant by conflating the concepts of relevance and evidentiary sufficiency. The Court criticized the court of appeals reliance on *Guevara v. Ferrer*. *Guevara*, like this case, was related to injuries sustained in a car accident. In *Guevara*, the Court applied the rule that "expert

testimony is necessary to establish causation as to medical conditions outside the common knowledge and experience of jurors”, but did not intend its holding to mean that a lack of expert testimony rendered evidence irrelevant or otherwise admissible.

The Court found no issue with the fact that JLG’s claims that Garza’s injuries were on the one hand caused by degeneration, and on the other caused by the second accident were conflicting. As long as both claims had a reasonable basis in fact and law, the fact that they were conflicting did not matter. The Court further emphasized that the burden of proof was on Garza to prove causation, and that part of that burden was to “exclude with reasonable certainty other plausible causes of her injuries supported by the record.”

The Court concluded that the trial court’s exclusion of the evidence of the second accident probably caused the rendition of an improper judgment, reversed the court of appeals’ ruling, and remanded the case to the trial court.

Randol Mill Pharmacy v. Miller

No. 13-1014

Case Summary written by Molly Neace, Staff Member.

JUSTICE LEHRMANN delivered the opinion of the Court.

In 2011, Dr. Ricardo Tran treated Stacey Miller for her Hepatitis C symptoms with an intravenous injection of lipoic acid, an antioxidant supplement. Randol Mill Pharmacy compounded twenty-three vials of liopic acid for office use, which subsequently treated Miller. After going through nine weeks of treatment without incident, she suffered an adverse reaction on December 5, 2011. This reaction resulted in her hospitalization, multiple blood transfusions, and blindness.

Miller and her husband consequently sued Dr. Tran, Randol Mill, and several licensed pharmacists employed by Randol Mill; the claims against Dr. Tran were later dismissed. Miller argued due to “negligence in compounding, inadequate and inappropriate warnings and instructions for use, the compounded Lipoic Acid was defective, ineffective and unreasonably dangerous.” Also, she argued that the defendants “breached their implied warranties in

the design, manufacture, inspection, marketing, and/or distribution” of the lipoic acid.

Issue: Whether Miller’s claims against the defendants constituted health care liability claims subject to the Texas Medical Liability Act (the Act) requirements.

The defendants moved to dismiss Miller’s alleged health liability claims for failure to serve an expert report within 120 days of filing suit according to the Act. Accordingly, the Court began its analysis by referring to several of the Act’s definitions for clarity. It first looked at the broad definition of “health care liability claim,” which states that these claims can only be brought against health care providers. This led the Court to look at the definition of “health care provider”, which includes a pharmacist that dispenses prescription medicines. The Court then concluded that the only way Randol Mill and its employees could qualify as health care providers was to meet the Act’s definition of pharmacist.

The Court found the defendants to be pharmacist, so it began to discuss the practice of the pharmacy’s compounding services in furtherance to meet the full definition. First, the Court looked to the Texas Pharmacy Act and its definition of compounding, which permits a pharmacy to “dispense and deliver a reasonable quantity of a compounded drug to a practitioner for office use.” With this definition, the Court looked to decide whether the pharmacy “dispensed” the medication; it held that the compounding constituted “the dispensing of prescription medication.” Next, the Court looked at whether the compounded lipoic acid was a prescription medicine according to the “pharmacist” definition. Looking to the definitions of “prescription drug,” the Court found that the injectable lipoic acid was a prescription medicine under the Act.

Lastly, the Court looked at whether the activities complained of by Miller resulted in health care liability claims. The definition of “health care” is broadly defined in the Act, which ensured that the alleged claims against the defendants fell within the realm of health care liability claims. Miller tried to assert that the claims constituted product liability claims, but the Court did not allow her to recast the claims to avoid the Act.

In conclusion, the Court held that the defendants met the “pharmacist” definition under the Act and that Miller asserted health care liability claims against them. Miller’s failure to serve the defendants with an expert report within the 120-day requirement resulted in dismissal of her claims. The Court reversed the court of appeals’ judgment and remanded the case for further proceedings consistent with its opinion.

William Marsh Rice Univ. v. Refaey

NO. PD–0383–14

Case Summary written by Adam J. Ondo, Staff Member.

PER CURIUM.

In the early morning of July 23, 2009, Officer Gary Spears, a peace officer employed by William Marsh Rice University (Rice University), noticed Rasheed Refaey parked on the street, across from the university. Refaey was kissing a woman located inside the vehicle. When Officer Spears went to investigate what he deemed suspicious behavior, Refaey drove off. Spears pursued him for two miles until he stopped. At gun-point, Spears detained Refaey for obstructing a roadway, evading arrest, and driving while intoxicated. The Harris County District Attorney’s Office dropped all of the charges against Refaey.

Refaey sued Rice University and Officer Spears (the defendants) for an assortment of alleged tortious actions, including: false imprisonment, negligence, gross negligence, assault, and intentional infliction of emotional distress. He claimed that his arrest and detention were unlawful. The defendants moved for summary judgment on the theory that Officer Spears was entitled to official immunity. After the motion was denied, the defendants filed an interlocutory appeal pursuant to Texas Civil Practice and Remedies Code § 51.014(a)(5), which provides that a party can appeal an interlocutory order of a district court that “denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state.”

The court of appeals dismissed the defendants' appeal, reasoning that Officer Spears was not "an officer or employee of the state." The Defendants appealed this decision to the Texas Supreme Court. The first issue the Court had to address was thus whether a peace officer employed by a private university qualifies as an "officer or employee of the state." The Court then decided the secondary issue of whether a private university could pursue an interlocutory appeal pursuant to § 51.0154(a)(5) based on a claim of immunity by one of its peace officers. The Court reversed the court of appeals' decision and remanded the case, holding that private university peace officers could appeal denials of summary judgment pursuant to § 51.014(a)(5).

Because the primary dispute in this case concerned the meaning of the undefined word "officer" in § 51.014(a)(5), the Court turned to Black's Law Dictionary for guidance, because precedent directed the Court to give undefined words "their common, ordinary meaning unless the statute clearly indicates a different result." *Jaster v. Comet II Constr., Inc.*, 438 S.W.3d 556, 563 (Tex. 2014) (plurality) (citing *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011)). Black's Law Dictionary defined the word "officer" as "[s]omeone who holds an office of trust, authority, or command." BLACK'S LAW DICTIONARY 1257 (10th ed. 2014). Furthermore, "office" was defined as a "position of duty, trust, or authority, [especially] *one conferred by a governmental authority for a public purpose.*" Officer Spears appeared to fit the Black's Law Dictionary definition of officer.

The Court then turned to the Occupations Code to help elucidate the Legislature's intent when it used the word "officer" in § 51.014(a)(5). In the Occupations Code, "officer" is defined as a peace officer, which is further defined as a "person elected, employed, or appointed as a peace officer under Article 2.12, Code of Criminal Procedure." TEX. OCC. CODE § 1701.001(3), (4). Article 2.12 provides that "[t]he following are peace officers" and provides a list that includes officers commissioned under Chapter 51 of the Education Code. TEX. CODE CRIM. PROC. art. 2.12(8). Rice University, as a private university, employed Officer Spears pursuant to Texas Education Code § 51.212. This section vests peace officers employed by private universities "with all of the

powers, privileges, and immunities of peace officers” in certain circumstances. These officers are also required to execute and file a bond. This bond is made payable to the governor and is “conditioned that the officer will fairly, impartially, and faithfully perform the duties as may be required of the officer by law.” Private university peace officers thus qualify as “officers” under both the dictionary and statutory definition of “officer.”

The Court held that the court of appeals could hear Officer Spears’s interlocutory appeal, because he was an officer for purposes of § 51.014(a)(5). The Court, giving deference to past decisions, also held that Rice University could rely on its employee’s assertion of immunity when pursuing its own interlocutory appeal under § 51.014(a)(5).

Van Ness v. ETMC First Physicians

No. 14-0353

Case Summary written by Laura Parton, Staff Member.

PER CURIUM.

Melissa and Ronald Van Ness brought suit against Dr. Kristin Ault and her employer, ETMC First Physicians, claiming that Dr. Ault’s negligence caused the death of their son, Nicholas Van Ness. The petitioners appealed the court of appeals’ dismissal of their case. The trial court denied respondents’ motion to dismiss and the court of appeals reversed, holding that petitioners’ expert report “failed to link the expert’s conclusions to the underlying facts.” The Court reversed and remanded.

“Nicholas was born on November 13, 2009.” Nicholas did not present any symptoms during regular checkups on either November 19th or 30th. During a checkup on December 11th, Nicholas presented with a fever, coughing, and nasal congestion. During that checkup, Melissa Van Ness made Dr. Ault aware that Nicholas had experienced coughing fits that inhibited his breathing to the point that his face would become discolored. On December 15th, as Nicholas’s condition worsened, the Van Nesses again brought their child to see Dr. Ault. At that visit, Dr. Ault failed to “perform or order any tests.” Finally, the Van Nesses brought Nicholas to East Texas Medical Center Hospital on

December 20th “where he was treated for acute pneumonia, wheezing, and tachycardia.” Nicholas “was transferred to Children’s Medical Center Hospital . . . where he died on January 20, 2010.”

Dr. Jaffee filed a report as an expert witness for the Van Nesses. According to Dr. Jaffee, treatment of infants should begin within six weeks after they start to cough. Because the day he was taken to East Texas Medical Hospital was within the six weeks guideline, the court of appeals found that earlier treatment would not have improved Nicholas’s condition and, therefore, no causal link existed to show that Dr. Ault’s actions caused Nicholas’s death.

Dr. Jaffee’s report, however, further stated that it was reasonably certain that if Dr. Ault had properly tested, diagnosed, and treated Nicholas he would not have passed away from whopping cough on January 20th. The Court held that this was sufficient to find that the report was a good faith effort and thus, “the court of appeals erred by reversing the trial court’s” denial of respondents’ motion to dismiss.