Supreme Court of Texas
June 12, 2015

Dacus v. Parker
No. 13-0047
Case Summary written by Allison Grayson, Online Edition Editor.

JUSTICE DEVINE delivered the opinion of the Court.

A majority of voters in Houston amended their city charter to create a fund for drainage and streets, requiring Houston to obtain funding for the project. Plans for charging beneficiaries of the drainage system for their use were published in a local newspaper. The ballot did not mention these charges.

After the vote, several voters "sought a declaration that the proposition was 'illegal and invalid as a matter of law' and a determination that the adoption of the amendment was invalid." The trial court ruled in favor of the city, which the court of appeals affirmed.

ISSUE: "Whether a ballot proposition for a proposed city charter amendment meets the common law standard preserving the integrity of the ballot[?]"

In reversing the court of appeals decision, the Court explained that a proposition must contain sufficient language so as not to mislead voters. Further, the Court stated that "the ballot in this case should have mentioned the drainage charges required by the amendment." Although the ballot does not serve to educated voters, the ballot must include sufficient information to allow voters to distinguish between various measures.

To accomplish this, the ballot must show the measure's character and purpose to fulfill its requirements. A failing to meet the requirements "may affirmatively misrepresent the measure's character and purpose or its chief features." Additionally, it "may mislead the voters by omitting certain chief features that reflect its character and purpose."

In this instance, the ballot misled voters by failing to identify the charges involved with the fund. Therefore, the Court remanded the case back to the trial court.

JUSTICE GUZMAN, joined by JUSTICE WILLET concurring.

Justice Guzman wrote separately to discuss the viability of the common-law standard discussed in the majority opinion. In discussing Texas's history of requiring precise language on ballots, the dissent urged that Houston's ballot construction was not sufficient to meet the required standards. The dissent further stated that "[p]roviding only enough information on a ballot to allow propositions to be distinguished from one another is necessary, but not necessarily sufficient."

Zorilla v. Aypco Constr. II, LLC

No. 14-0067

Case Summary written by Tyler Frankel, Articles Editor.

JUSTICE GUZMAN delivered the opinion of the court.

Mirta Zorilla (Petitioner) contacted Aypco Construction II, LLC and its owner, Jose Luis Munoz (together as Respondent), for the limited purpose of constructing modifications to the master bedroom and bathroom in a partially finished, 3,740 square foot residence located at North 23rd Street in Edinburg, Texas. After the modifications in the bathroom were completed, Petitioner was satisfied with the work, and the parties entered into negotiations to complete the rest of the North 23rd Street residence. After failing to pay Respondent for the work invoiced on May 2007, Respondent sued Petitioner.

Other than the fact that Petitioner agreed to pay for certain construction services, every other aspect surrounding the relationship between Petitioner and Respondent was disputed. Petitioner stated that the agreement was an oral agreement between her and Munoz, the owner, only. Additionally, Petitioner states she specifically indicated to Respondent that she would not pay for work after April 2007 unless she expressly agreed to it in writing. Furthermore, Petitioner testified that she explicitly told Respondent to discontinue work at the end of April 2007. Thus, Petitioner refused to pay Respondent for the work it completed in May of 2007. On the other hand, Respondent stated that there was, in fact, a written agreement between Petitioner and Respondent and that Petitioner knew that she was contracting not only with Munoz, but with the construction company as well. Additionally, Respondent stated that it was never told to cease working. Respondent worked until the residence was 80% complete, which went into May

2007, and invoiced Petitioner several times during that month. Because Petitioner failed to pay, Respondent sued Petitioner under fraud, breach of contract, and quantum meruit theories.

The jury found that Petitioner defrauded Respondent and awarded $56,654.15 in economic damages and $250,000 in exemplary damages. The jury also found Petitioner breached an agreement to pay Respondent for construction services at her two homes and awarded a total of $56,654.15 in actual damages. In addition to compensatory and exemplary damages, the jury awarded Respondent $150,000 in attorney's fees through trial and conditional attorney's fees in the event of an appeal. The court of appeals affirmed the trial court's judgment except the award of attorney's fees. Concluding that sufficient evidence supported the jury's fraud verdict and giving effect to Aypco Construction's election of its fraud remedies, the court reversed the attorney's fee award.

Issues: (1) Whether the court of appeals erred in refusing to consider Petitioner's evidence-sufficiency challenges to the jury's breach-of-contract findings; (2) Whether the statutory cap on exemplary damages is waived if not pleaded as an affirmative defense or avoidance; (3) Whether the prejudgment-interest rate award to Respondent was excessive; and (4) Whether foreclosure of the statutory and constitutional mechanics and materialman's liens were proper.

As to the first issue, the court held that the court of appeals did not err in its refusal to consider Petitioner's evidence-sufficiency challenges to the jury's breach-of-contract findings. The court's reasoning was that any obligation imposed by the December 2006 contract impacts the fraudulent-inducement analysis only if the jury necessarily determined that Petitioner had, in fact, agreed to the terms of the December 2006 contract or that there was otherwise an agreement between the parties requiring written approval for modifications. However, the evidence on that point conflicted; the jury was neither asked whether the agreement was in writing nor asked to determine the essential terms of any agreement; and, importantly, both the fraud and breach-of-contract questions permitted the jury to award damages based on the existence of an oral agreement that did not include any such requirement. In the absence of a finding that Petitioner and Respondent agreed that modifications must be approved

in writing, Petitioner's argument concerning the contract-enforcement issue failed.

Secondly, the court held that the exemplary damages award did exceed the statutory cap and thus, reduced the damage award to $200,000. In reaching this decision, the court first looked at whether, because not explicitly stated, the damages cap fell into the residual category of Texas Rules of Civil Procedure Rule 94 governing affirmative defenses. It held that the exemplary damages cap did not bear the characteristics of an affirmative defense or avoidance, and therefore applied automatically. Specifically, it does not require proof of any additional fact to establish its applicability. Moreover, there is no defense to a statutory cap on exemplary damages. Though certain types of claims are excluded from the statute's application, the statutory cap applies automatically to claims not expressly excepted. Thus, the court stated that the cap is therefore the rule, not the exception, and even though Petitioner did not specifically plead it in the trial court, it still applied.

Regarding Petitioner's third point of error, the court held that the prejudgment-interest award of 1.5% per month was appropriate. In post-verdict motions filed in the trial court, Petitioner argued that prejudgment interest should be set at 6% per annum because there was no proof of an agreement specifying a different interest rate. The trial court, however, awarded prejudgment interest at the rate of 1.5% per month under the Prompt Payment Act, which applies when a real property owner fails to pay a contractor the amount allowed under a contract within thirty-five days after the owner receives a written payment twenty-three request from the contractor. On appeal, Petitioner argued that the Prompt Payment Act was inapplicable because there was insufficient evidence she agreed to compensate Respondent for the construction work performed in May 2007. The court of appeals concluded that the essential contract finding was subsumed in the jury's fraud verdict, in which the jury expressly found Petitioner had failed to pay Respondent $56,654.15 for construction services pursuant to an agreement to pay for that work. Because the court of appeals concluded the evidence was sufficient to support the fraud verdict, and based on Respondent's election of fraud remedies, the court determined that Petitioner's evidentiary challenges to the jury's breach-of-contract findings were not material to the prejudgment-interest

inquiry. The court then indicated that Petitioner's argument here was "somewhat muddled." The court stated that it had already concluded that the fraud finding was valid and concluded that there was more than a scintilla of evidence to support the jury's finding of such an agreement. Therefore, the prejudgment-interest award was affirmed.

Finally, as to Petitioner's final argument, the court affirmed the court of appeals holding that the liens were proper. Petitioner asserted two reasons for contesting foreclosure on the liens. First, Petitioner continued her evidence-sufficiency challenge to the breach-of-contract charge. Second, Petitioner argued that lien foreclosure was improper as to another property because it was her homestead and there was no proof of a written agreement.

Regarding Petitioner's first reason, this court agreed with the court of appeals' analysis upholding the foreclosure of the liens based on the jury's fraud verdict because (1) the court had found sufficient evidence to support the verdict, as part of the fraud submission, and (2) the jury determined that Respondent was entitled to compensation for the work performed in accordance with an agreement. Performance and existence of a contractual debt were encompassed in the jury's fraud findings; the court of appeals found the evidence sufficient to sustain the fraud verdict; and Petitioner did not challenge the court of appeals' analysis of that issue. Therefore, this court rejected Petitioner's first argument.

This court also rejected Petitioner's second argument that the other property was her homestead. It rejected this argument because Petitioner failed to establish that it was her homestead and, even if she did establish it was, Petitioner did not preserve the argument in the trial court. To claim the constitutional protection afforded to homesteads, Petitioner carried the initial burden of establishing (1) overt acts of homestead usage and (2) the intention to claim the property as a homestead. The court held Petitioner did not meet her initial burden. Furthermore, the court held that Petitioner waived this argument. Therefore, this court affirmed the court of appeals on this point of error.

Thus, the Court reversed the exemplary damages and rendered them to be $200,000 and affirmed all other points of error.

Atkins N. Am., Inc. v. CCE, Inc.
No. 11-0481
Case Summary written by Allison Grayson, Online Edition Editor.

Per curiam.

The Texas Department of Transportation (TxDOT) hired a general contractor for a road construction project, which involved plans created by Atkins North America, Inc. After silt began escaping onto nearby property, TxDOT directed CCE to rid the property of the silt.

TxDOT later declared CCE in default of its direction when CCE failed to comply. Upon receipt of an order from TxDOT to stop work, "CCE hired a third party to complete the road project, then sued Atkins for the additional costs, alleging that Atkin's plans were faulty and led to the release of the silt." CCE's claims included negligence, negligent misrepresentation, breach of contract, and breach of warranty.

In response, Atkins moved for summary judgment under the notion that "the economic loss rule barred recovery of negligence damages[.]" Atkins refrained from making the same arguments in terms of its negligent misrepresentation claim. The trial court granted Atkin's motion for summary judgment. While the court of appeals affirmed part of the trial court's ruling, the court remanded the case for a closer look at CCE's negligent misrepresentation claim.

ISSUE: Whether the Supreme Court of Texas should grant Atkin's motion for rehearing?

In this instance, the Court refrained from rehearing the case. In explaining its decision, the Court stated that "the economic loss rule barred a general contractor from recovering delay damages from project architect with which it did not contract."

Harris Cnty. Flood Control Dist. v. Kerr
No. 13-0303
Case Summary written by Allison Grayson, Online Edition Editor.

JUSTICE DEVINE delivered the opinion of the Court, in which CHIEF JUSTICE HECHT, JUSTICE GREEN, JUSTICE GUZMAN, and JUSTICE BOYD joined.

More than 400 residents and homeowners in Harris County experienced flooding during "Tropical Storm Francis in 1998, Tropical Storm Allison in 2001, and an unnamed storm in 2002." In response to the flooding, the homeowners blamed "Harris County and Harris County Flood Control District, asserting that they approved new upstream development without implementing appropriate flood-control measures, and that they were substantially certain flooding would result."

In 1976, the U.S. Army Corps of Engineers created a report looking at recurrent damaging floods in the White Oak Bayou. While the problem mainly came from the "inadequate channel capacities of the streams[,]" increasing suburban development furthered the problem. In response to these problems, the Army Corps of Engineers recommended changes to reduce any flooding in the future.

The government entities agreed to take charge of the project, where they hoped to "maintain or reduce the bayou's 100-year flood plain." Although the federal government was responsible for funding much of the project, the funding did not keep pace with new development in the area. Many of the new homes constructed "were not in the 100-year flood plain when built or approved."

In response to the delay in funding, Harris County officials developed their own plan. In 1984, the county adopted the "Pate Plan" to eliminate flooding.

After experiencing a flood, residents in the area asked about the county's flood control measures. Discovering flaws in the Pate Plan, the flood control district commissioned another report, which the government entities later adopted in the 1990s.

By 1999, the residents argued that "all of their homes were within the 100-year flood plain[,]" which was evident from three successive floods that occurred between 1998 and 2002. Based on these facts, the homeowners in the area filed an inverse condemnation suit. Subsequently, the government entities filed a plea to the jurisdiction and motion for summary judgment. "The trial court denied the motion, and the court of appeals affirmed the denial of the plea to the jurisdiction."

<u>Issue:</u> Whether "homeowners raised a fact question as to the elements of a taking."

Here, the Court explained that in a takings case, showing that the act in question was intentional is not enough. Instead, "there must also be knowledge to a substantial certainty that the harm will occur."

In this instance, the Court determined that a fact question existed as to "whether the government entities were substantially certain their actions in approving development without appropriately mitigating it would cause the plaintiffs' homes to flood." Further, the Court explained that no evidence existed to show that the government entities were substantially certain the flooding would occur when they approved the development. Therefore, the Court held that the homeowners raised a fact question concerning the intent of the government entities.

Additionally, a study suggested that a fact question existed as to whether the approval of the development caused the flooding of the homeowners' homes. Moreover, the Court determined that at "least some evidence [existed] that in approving new development and drainage plans causing flooding, the entities' were acting for a public use."

Based on the determination that fact questions still existed in this case, the Court denied the government entities' plea to the jurisdiction and affirmed the decision by the court of appeals.

<u>JUSTICE WILLETT, joined by JUSTICE JOHNSON, JUSTICE LEHRMANN, and JUSTICE BROWN, dissenting.</u>

Justice Willett dissented because he did not believe the homeowners presented a cognizable takings claim. Further, he explained that the majority's decision would "encourage governments to do nothing to prevent flooding, rather than studying and addressing the problem." Additionally, Justice Willett wrote that the majority opinion left out other important elements required for a takings claim, including: affirmative conduct, specificity, and public use.

Justice Willett also discussed the fact that the Takings Clause and sovereign immunity often conflict in situations such as this one. Explaining his position, he stated that "[w]hile the right to compensation for a taking is constitutionally mandated, sovereign immunity is also a matter of constitutional significance."

Ultimately, Justice Willett wrote that he was concerned the Court's decision "unnecessarily expand[ed] taking liability." Further, he

argued that the decision could "make the government an insurer for all manner of natural disasters and inevitable man-made accidents."

JUSTICE LEHRMANN, joined by JUSTICE WILLET, dissenting.

Justice Lehrmann wrote separately to further discuss "the availability of compensation when a taking occurs, regardless of whether it is for public or private use." She explained that the Court has never "held that a taking that fails to satisfy the public-use element is not compensable." When the government takes private property without paying the owner for it, "the owner may recover damages for inverse condemnation."

Austin v. Kroger Texas, L.P.
No. 14-0216
Case Note written by Tyler Frankel, Articles Editor.

JUSTICE BOYD delivered the opinion of the Court, in which JUSTICE JOHNSON, JUSTICE GUZMAN, JUSTICE LEHRMANN, and JUSTICE DEVINE joined, and in which CHIEF JUSTICE HECHT, JUSTICE GREEN, JUSTICE WILLETT, and JUSTICE BROWN joined except as to Part IV.

In this case, Randy Austin (the employee) fell while mopping a restroom floor at the Kroger where he worked in Mesquite, Texas. The employee was a self-described "floor clean-up person" whose supervisor instructed him to clean up two oil-like spills, one in the women's bathroom and one in the men's bathroom. Kroger's safety handbook indicated that employees who clean these types of spills should do so using a "Spill Magic" system that involves a powdery absorbent product, a broom, and a dustpan. This system likely reduces the chances of a slip-and-fall by about 25% (according to the Kroger handbook). But, this system was not available at the store the day the employee was instructed to clean the spills, thus the employee attempted to clean the spills with a mop. After successfully cleaning the women's bathroom, the employee began to carefully clean the men's bathroom. The employee successfully cleaned about 30% of the spill before he slipped and fell in the remaining amount of liquid, resulting in a fractured femur, a dislocated hip, and a nine-month hospital stay. During the

employee's hospital stay, he underwent six surgeries, leaving his left leg two inches shorter than his right.

Kroger, the employee's employer, had elected not to subscribe to the Texas workers' compensation system. The employee sued in state court, asserting claims for negligence, gross negligence, and premises liability. In support of his negligence claim, the employee alleged that Kroger had engaged in negligent activities and failed to provide a necessary instrumentality—namely, the Spill Magic System. Kroger removed the case to federal district court, which granted Kroger's motion for summary judgment on all of the employee's claims. The Fifth Circuit affirmed as to the employee's negligent activity and gross negligence claims, but reversed and remanded the necessary-instrumentalities claim. Regarding the employee's premises liability claim, the Fifth Circuit found that the nature and scope of an employer's duty to provide its employees with a safe workplace is arguably unclear under Texas law when the employee is aware of the hazard of risk at issue, thus leading to the Fifth Circuit certifying a question to the Texas Supreme Court.

Issues: (1) The Fifth Circuit asked the Texas Supreme Court to address the following certified question: Pursuant to Texas law, including § 406.033(a)(1)-(3) of the Texas Labor Code, can an employee recover against a non-subscribing employer for an injury caused by a premises defect of which he was fully aware but that his job duties required him to remedy? Put differently, does the employee's awareness of the defect eliminate the employer's duty to maintain a safe workplace? (2) Whether contemporaneous negligent activity by the employer is necessary to an employee's instrumentalities claim.

The Texas Supreme Court addressed the Fifth Circuit's certified question, clarifying that, under Texas law, (1) subject to two limited exceptions, an employer generally does not have a duty to warn or protect its employees from unreasonably dangerous premises conditions that are open and obvious or known to the employee; and (2) under this general rule, the Texas Workers' Compensation Act's (TWCA) waiver of a non-subscribing employer's common law defenses does not eliminate an employee's burden of proving that the employer owed him a duty as an element of a premises liability claim. The court reasoned that, generally, an employer has the same premises-liability duty to its employees as other landowners have to its invitees on their premises—

which is the duty to make safe or (adequately) warn. Moreover, it reasoned that the TWCA's waiver has no effect on an employer's duty, only on their liability, due to the statutory waiver of defenses. Therefore, even if an employer has waived the TWCA, the employee must still prove that the employer owed him a duty of care. Furthermore, the court then held that the two exceptions to this general rule were (1) the criminal activity exception, which may arise when a dangerous condition results from the foreseeable criminal activity of third parties; and (2) the necessary-use exception, which may occur when the invitee necessarily must use the unreasonably dangerous premises, despite the invitee's awareness and appreciation of the dangers, the invitee is incapable of taking precautions that will adequately reduce the risk. The court held that the employee's case did not fall under one of the two exceptions and declined to create a new one. Thus, based on the general rule, Kroger satisfied its duty.

The court then turned to the employee's necessary-instrumentalities claim. While this issue was not part of the certified question, part of the court addressed it at Kroger's request. Kroger alleged that the claim fails as a matter of law. While the court declined to decide the merits of the employee's instrumentalities claim, it did address one of Kroger's arguments dealing with the relationship between the instrumentalities claim and the premises-liability claim. The court held that an employer owes additional duties to its premises-liability duties to its employees, including the duty to provide the employees with necessary instrumentalities. It held that contemporaneous negligent activity is not an element of an instrumentalities claim, but rather this type of claim may be founded on nonfeasance or misfeasance. The court reasoned that while only an employer that has control over the premises where the employee is injured has a premises-liability duty, the duty to provide necessary and safe instrumentalities applies generally to employers.

In its final answer, the court stated that, under Texas law, an employee cannot recover against a nonsubscribing employer for an injury caused by a premises defect of which he is fully aware but that his job duties required him to remedy. Employers, like landowners to invitees, have the duty to maintain their premises in a reasonably safe condition for their employees, but employers will ordinarily satisfy their duty as a matter of law by providing an adequate warning of concealed

dangers of which they should be or are aware of. If an exception applies (one of the two explained above), the employer may owe a duty to protect the employee from the reasonably safe condition despite the employee's awareness, and the TWCA will prohibit a nonsubscribing employer from raising defenses based on the employee's awareness.

Kachina Pipeline Co., Inc., v. Lillis
No. 13-0596
Case Summary written by Frederick C. Hutterer, Staff Member.

JUSTICE BROWN delivered the opinion of the Court, in which JUSTICE JOHNSON, JUSTICE WILLET, JUSTICE GUZMAN, JUSTICE LEHRMANN, and JUSTICE BOYD joined.

Kachina Pipeline Company, Inc. (Kachina) purchased natural gas from Michael Lillis to resell to Davis Gas Processing (Davis). Kachina installed a compression system, which permitted it to transfer gas to Davis via a high-pressure inlet. In order to successfully transfer gas to Kachina, a producer's compression system had to have sufficient pressure to overcome the working pressure of Kachina's system.

Kachina and Lillis entered into a five-year gas purchase agreement in 2005, in which Lillis would provide Kachina with gas, and Kachina would pay Lillis a portion of resale proceeds obtained from Davis. At the end of the five-year period, Kachina had the option to purchase gas from month to month. The agreement stated that "[i]f Buyer installs compression to effect delivery of Seller's gas, Buyer will deduct from proceeds payable to Seller hereunder a value equal to Buyer's actual costs to install, repair, maintain, and operate compression . . . ." There was also an option requiring that Lillis notify Kachina of third party purchase offers, granting Kachina the option to "continue the purchase of gas under the terms of this Agreement" from Lillis with price adjustments allowing Lillis to receive the same benefit as the third-party offer. Lillis entered into a gas purchase agreement with Davis in 2008.

Lillis sued, arguing that Kachina breached the gas purchase agreement. Lillis claimed that the agreement did not allow for compression taking place after the gas was transferred to be deducted from his proceeds. Kachina counterclaimed, stating that Lillis's failure

to notify them of his new agreement with Davis constituted a breach of the original purchase agreement. Both parties sought summary judgment.

The trial court granted Kachina's motions for summary judgment, asserting that Kachina had the right to deduct and that Kachina exercised an option to extend the contract termination date to May of 2015. The court of appeals reversed, holding that the Agreement did not permit the deduction of compression costs. It also held that the option did not provide for a five-year extension.

Issue: Whether the compression cost provision of the agreement applied to compression occurring after Lillis delivered gas to Kachina and whether the option supported a five-year contract extension.

The Supreme Court of Texas held that the agreement only permitted Kachina to deduct the costs of compression installed during the contract term if additional systems were necessary to compensate for the working pressure of Kachina's compression system. Additionally, the Court held that the option did not permit a five-year extension, thereby affirming the court of appeals' decision that the deduction of compression costs and a five-year extension were inappropriate.

As to the first issue, the court reasoned that under the section of the agreement providing for the deduction of compression costs, Lillis had the duty to overcome Kachina's working pressure. In the case that a producer failed to provide sufficient pressure, the agreement permitted Kachina to either do nothing or install additional compression and deduct costs from Lillis. The Court asserted that the right to deduct compression costs was contingent upon Kachina's elective installation of additional compression. Notably, the agreement did not apply to preexisting compression because it would be unreasonable for the parties to intend for the provision to apply to compression already in place. Kachina argued that "deliver" referred to final delivery to Davis, but the Court rejected this reasoning because the Agreement repeatedly used "delivery" to reference transfers from Lillis to Kachina. Additionally, there was no evidence that Kachina's systems were under-pressurized because the record established that compression was not necessary to effectuate gas flow from Kachina to Davis. Lastly, Kachina argued that Lillis acquiesced to compression costs due to the deduction of costs from a prior contract between the two. The Court concluded that evidence of Lillis's subjective intent

under a prior contract could not be considered to interpret the agreement's unambiguous meaning.

As to the final issue, the Court reasoned that the language of the Agreement did not support a five-year extension because it only permitted Kachina to continue to purchase gas pursuant to the contract terms. Kachina argued that the five-year period was a term under the Agreement. The Court stated that another term of the Agreement was that it would continue month-to-month, not that the parties would be subjected to an additional five-year term. Kachina also claimed that the market price of gas changes, necessitating a new five-year period to enable Lillis to receive the same economic benefit as he would have with Davis. The Court asserted that the language of the agreement still did not support a new five-year term, and that a month-to-month term would protect Lillis's interests by permitting him to engage in a more lucrative outside deal. Lastly, Kachina claimed that the Court's interpretation would result in absurdity, as it would have to exercise its option every month. The Court responded that a month-to-month term allowed Lillis to acquire a better deal and that Kachina could have contracted for a longer Agreement if the economics required it.

In this case, the Court held that Kachina could not deduct compression costs from Lillis's proceeds and that the agreement did not provide for a five-year extension. The Court affirmed the court of appeals' judgment and remanded the case to the trial court for determination of accounting and costs and fees.

<u>CHIEF JUSTICE HECHT, joined by JUSTICE GREEN and JUSTICE DEVINE, concurring in part and dissenting in part.</u>

Chief Justice Hecht concurred with regard to the Court's judgment regarding the five-year extension but dissented with the Court's conclusion that Lillis was not obligated to pay for preexisting compression. The dissent argued that the Court simply speculated that no compression was needed to transfer gas from Lillis to Kachina. The dissent also stated that it would not make sense for Lillis to stop paying for compression installed during his prior contract with Kachina, only to pay for newly installed compression under the new agreement. In the dissent's opinion, Lillis avoided paying for compression as was his obligation pursuant to the Agreement, while Kachina did not have the right to extend the agreement by five-years.

SeaBright Ins. Co. v. Lopez
No. 14-0272
Case Summary written by Kayla Hackerott, Staff Member.

JUSTICE GREEN delivered the opinion of the Court, joined by CHIEF JUSTICE HECHT, JUSTICE WILLETT, JUSTICE GUZMAN, JUSTICE LEHRMANN, JUSTICE BOYD, JUSTICE DEVINE, and JUSTICE BROWN.

Interstate Treating, Inc. fabricated materials for the oil and gas industry in Odessa, Texas, and also provided installation services at other remote locations. In September 2007, Candelario Lopez was assigned by Interstate Treating to work on the installation at a plant near Ridge, Texas, 450 miles away from his home in Rio Grande City, Texas. While working at this job site, Interstate Treating paid Lopez an hourly wage and per diem for his food and lodging expenses, but Lopez was responsible for making his own living arrangements. The company also provided him with a company vehicle, paid for the insurance, and provided Lopez with a credit card to pay for fuel. Interstate Treating did not pay Lopez for any travel time to get to the job site.

Lopez stayed in a hotel in Marlin, Texas, 40 miles away from the job site. Everyday, Lopez drove from the hotel to the job site, often allowing other employees to carpool with him. On September 11, 2007, while Lopez and two other employees were driving to the job site, Lopez was killed in an automobile accident.

SeaBright Insurance Company, Interstate Treating's workers' compensation insurance carrier, denied Maximina death benefits, claiming that at the time of the accident, Lopez was not acting in the course and scope of his employment. During an administrative proceeding, the hearing officer ordered SeaBright to pay the death benefits, finding Lopez was acting in the course and scope of his employment. An appeals panel affirmed the decision. SeaBright sought judicial review, and both parties filed motions for summary judgment. The trial court granted Maximina's motion, affirming the administrative decision. The court of appeals affirmed.

<u>Issue:</u> Was Lopez acting in the course and scope of his employment at the time of his death when he was driving from his hotel room, which the company was paying for, to the remote job site in the company's vehicle?

This Court previously held that to be part of the "course and scope of employment" the injury must (1) relate to or originate in, and (2) occur in furtherance of the employer's business. *Leodeanu v. American Protection Insurance Co.,* 330 S.W.3d 239, 241 (Tex. 2010). While an employee's travel to and from work generally does not meet the first element, it does if "the relationship between the travel and the employment is so close that it can be fairly be said that the injury had to do with and originated in the work, business, trade or profession of the employer." *Shelton v. Standard Ins. Co.* 389 S.W.2d 290, 292 (Tex. 1965). This can be met if the employee's travel was "pursuant to express or implied conditions of his employment contract." *Meyer v. W. Fire Ins. Co.*, 425 S.W.2d 290, 292 (Tex. 1965).

In analyzing the nature of Interstate Treating's business, the Court found that the company's business required non-local work crews to often work on temporary assignments at remote locations to help with the installation process. The Court then analyzed the nature of Lopez's employment with Interstate Treating. As part of Lopez's job overseeing installation projects in remote locations, Interstate Treating paid him per diem for food and housing, requiring him to find temporary housing in that area. The company also provided Lopez with a company vehicle, requiring him to travel from the temporary housing to the job site. The Court found Lopez's travel to and from the remote location, was analogous to employees such as deliverymen or messengers. Because of this, the Court held the relationship between Lopez's travel and employment is so close that his injury had to do with and originated in the work, thus establishing the first element. The Court also held Maximina established the second element because Lopez's travel to the job site was in furtherance of Interstate Treating's business.

According to § 401.011(12)(A)-(B) of the Texas Labor Code, even when both elements are met, an employee still may not be acting in the course and scope of his employment if his actions fall within one of the two exclusions. Subsection (A) applies to travel to and from employment, while subsection (B) applies to travel for both business and personal affairs, otherwise called dual-purpose travel. Because Lopez was not traveling for any personal affairs, the exclusion in subsection (A) applies; however, because Interstate Treating provided

Lopez a company vehicle and paid for his transportation, the exclusion of this subsection does not apply.

Because Lopez's travel to the job site originated in and furthered Interstate Treating's business, the Court held Lopez was acting in the course and scope of his employment when he died, thus affirming the court of appeals' judgment.

JUSTICE JOHNSON, dissenting.

Justice Johnson dissented because he did not believe Lopez was acting in the course and scope of his employment when he was killed. While Justice Johnson agreed as to the two elements required for an injury to occur in the course and scope of employment, he explained that in this case, Lopez did not meet the first element because of the "coming and going rule."

Justice Johnson explained how Lopez was not traveling as *part of* his work, but merely to *get to* his work. At the time of the accident, Lopez had not begun working for that day. He further explained that it was not Lopez's work duties that created the chances of him being injured. Lopez was exposed to the same risk of injury that morning as any other person traveling on public roads. Justice Johnson also noted that Lopez, not Interstate Treating, made the choice to stay in Marlin, 40 miles away from the job site, instead of hotels closer to Ridge. He further noted that according to the record, nothing shows Interstate Treating had to offer transportation, but that Lopez had requested the company truck for the job. According to Justice Johnson, Lopez's work duties were not analogous to those of delivery and service workers.

Chesapeake Exploration, L.L.C. v. Hyder

No. 14-0302

Case summary written by Nirav Patel, Executive Managing Editor.

CHIEF JUSTICE HECHT delivered the opinion of the Court, in which JUSTICE GREEN, JUSTICE JOHNSON, JUSTICE BOYD, and JUSTICE DEVINE joined.

Chesapeake Exploration, L.L.C. (Chesapeake) acquired a mineral lease in the Barnett Shale, consisting of nearly 950 acres. The lease contained a lessor's royalty for 25% "of the price actually received by the Lessee" for all gas production. The royalty was to be "free and clear of

all production and post-production costs and expenses." The lease also contained a "perpetual, cost-free (except only its portion of production taxes) overriding royalty" of 5% of gross production obtained from any directional wells.

The lessors, the Hyder family, filed suit after discovering post-production expense deductions from their lessor's royalty and overriding royalty. The trial court rendered judgment for the Hyders, determining that the post-production costs were wrongfully deducted from the royalties. The court of appeals affirmed. On appeal to the Supreme Court of Texas, Chesapeake only challenged the lower court's judgment regarding the overriding royalty.

The Court first noted that an overriding royalty is generally free of production costs, but subject to post-production costs, such as transportation costs and taxes. This general rule, however, can be modified by agreement of the parties. Chesapeake argued that the cost-free language in the overriding royalty clause did not make it free of post-production expenses. Rather, Chesapeake stated that this language was merely repeating the general rule that an overriding royalty is free of production costs. The Hyders argued that the "cost-free" language must be given effect and that the only way to do so would be to interpret it as free of post-production costs, in addition to being free of production costs.

The Hyders also drew the Court's attention to the parenthetical exception for production taxes in the cost-free language of the overriding royalty. The Court noted that "[i]t would make no sense to state the royalty is free of production costs, except for postproduction taxes." According to the Court, this would be similar to saying "no dogs allowed, except for cats." Ultimately, the Court affirmed the court of appeals' decision—the overriding royalty was free of both production *and* post-production costs.

The Court did not give any effect to a so-called *Heritage* disclaimer in the lease, which stated that the Court's 1996 decision in *Heritage Resources v. NationsBank N.A.* should have no effect on the lease. The *Heritage* decision did not directly apply to this case because the *Heritage* royalty was based on market value at the well, while the overriding royalty in this case was based on gross production.

JUSTICE BROWN, joined by JUSTICE WILLET, JUSTICE GUZMAN, and JUSTICE LEHRMANN, dissenting.

The dissenting Justices did not agree that the cost-free language of the overriding royalty could only refer to post-production costs. They noted that parties commonly decide to state that the royalty interest is free of production costs, even though this is the general rule. Thus, the dissenting Justices did not think the cost-free language expressed "an intent to abrogate the default rule that the lessee bears post-production costs." Finally, the Court noted that production taxes are not always post-production costs and that parties "often allocate tax liability on the royalty owners while at the same time specifically emphasizing that the royalty is free from production costs." Thus, the dissenting Justices did not think the reference to production taxes supported the Hyders' argument that "cost-free" means free of post-production costs.

Plains Exploration & Prod. Co. v. Torch Energy Advisors, Inc.
No. 13-0597
Case Summary written by Keirsten Hamilton, Staff Member.

JUSTICE GUZMAN delivered the opinion of the Court.

In 1970, Congress enacted the Coastal Management Act (CZMA) to strike a balance between state federal interests in activities "occurring in the waters off 'coastal states shorelines." As a response to legal challenges to the scope of the regulation, Congress amended the CZMA in 1990 that generally required consistency checks between state and federal coastal management plans. This meant that potential leases would be subject to the consistency checks before "any new lease[s] could be granted." Leases could be extended, but if the federal government found consistency issues, an injunction could be issued ceasing development. In this case, the Mineral Management Service extended the leases in question for years without consistency determinations, setting the background for the present case.

"Amidst [this] evolving regulatory environment" marked by the challenges to the scope of the CZMA, in 1994, Torch Energy Advisors (Torch) assigned half of its rights to exploration and production of oil and gas in its leases off the coast of California to Nuevo Energy. Two years later, Torch assigned the remainder of its rights to Nuevo in a

purchase and sale agreement, except for assets reserved to Torch "under [an] 'Excluded Assets' clause."

Ultimately, over a decade later, in 2002, Nuevo sued the federal government for breaching its lease. During the lawsuit, Plains Exploration & Production Company (Plains) merged with Nuevo, entitling Plains to the leasehold interests. The Court of Federal Claims found in favor of the lessees; Plains, Nuevo's successor in interest rights to the lease, received $81 million as "restitution of the up-front bonuses" previously paid to secure the leases (the *Amber* judgment). *See Amber Res. Co.*, 538 F.3d 1367, 1379. Upon Plains' victory, Torch sought more than half of the bonuses, arguing that the bonuses were part of the "Excluded Assets" provision of the purchase and sale agreement executed in 1996. Plains refused to pay; Torch brought suit.

While the trial court found in favor of Plains—issuing a take-nothing judgment on all of Torch's contract, tort, and equitable claims—the court of appeals affirmed in part and reversed in part. Both parties petitioned for review to the Supreme Court of Texas, believing that the court of appeals incorrectly remanded the case to the trial court for "a trial in equity"; rather, the two parties believed that the case turned on contract theory, i.e., the "1996 agreement unambiguously determine[d] who owne[d] the disputed asset." The parties were not, however, in agreement on the construction of terms in the agreement.

Issue: Ultimately, the issue before the Court was "the proper construction of [the] 1996 purchase and sale agreement" between Torch and Nuevo governing the leasehold interests "in undeveloped oil and gas fields located outside territorial waters off the coast of California."

The Court made several factual determinations at the outset regarding the relationship between the parties. Ultimately, the Court based its analysis solely on the 1996 PSA's Excluded-Assets provision. While the contract language in § 1.2 (b) defined excluded assets, the parties disputed the meaning of several of the terms including whether "claims and causes of action" encompassed both contingent and accrued claims. Additionally, the parties disputed whether the *Amber* judgment was an excluded asset as defined in the Excluded-Assets provision.

Torch argued that the scope of the provision included actions arising from "events occurring before the contract's effective date." Further, Torch argued that while it would not have any interest in any future production gains, its conveyance of interests in the leases under

the 1996 PSA was "somewhat of a contingent gift to Nuevo (and derivatively, Plains)," but that the parties contemplated that if the leases were worthless, Torch would keep "something of value": thus, it negotiated the Excluded Assets portion of the PSA, including the restitution payments.

To determine whether Torch had a right to recover any of the *Amber* judgment, i.e., "the right to recover 'the funds the plaintiffs or their predecessors-in-interest had paid in the form of upfront bonus payments as consideration for the rights associated with the offshore leases,'" the Court focused on the interpretation of the terms "arising from," "arising under or with respect to," and "attributable to." Finding none of the terms defined in the contract, the Court gave each term its plain meaning; thus, the contract required a "pre-effective date causal nexus" for inclusion in the Excluded Assets provision.

While Torch argued the terms only required a simple relatedness requirement satisfied by a mere "but for" nexus, the Court rejected this argument. Importantly, the Court noted that to accept Torch's argument would unnecessarily expand the scope of the provision. Thus, while the Court "embraced the breadth and potential ambiguity of the same or similar types of words" in other contract cases, the Court noted that this case was distinguishable because it lacked important policy justifications present in other cases. Instead, the Court favored "a more direct relatedness standard," reasoning that a narrow interpretation was necessary lest the court reach an illogical and unreasonable result. Because none of the proceeds from the *Amber* judgment satisfied the causal nexus requirement—as determined by the Court—the Court reversed the court of appeals' decision and rendered a take-nothing judgment in favor of Plains.

Valdez v. Hollenbeck
No. 13-0709
Case summary written by Ashleigh Hammer, Staff Member.

JUSTICE GUZMAN delivered the Court's unanimous opinion.

A number of civil suits arose in Bexar County after the county discovered that a former probate clerk had been stealing money from county residents that had died intestate. This suit, in which the

deceased's heirs were defrauded of nearly half a million dollars, was among those cases.

The underlying case came about when the appellant, Robert A. Valdez, was appointed as administrator of the deceased's estate. As estate administrator, Valdez filed an inventory and appraisement of the estate with the probate court. Valdez's inventory valued the deceased's personal property, dispersed between five separate banking accounts, at $261,000.

Two months later, a certified public accountant filed a tax return on behalf of the deceased. The tax return indicated that the deceased actually had open accounts with ten different financial institutions rather than only five. The discrepancy went unnoticed and the probate court approved final settlement of the account in May 1996.

Years later, after the probate clerk's criminal activity was uncovered, another certified public accountant, Rishebarger, was tasked with determining the amount of money stolen from the deceased's estate. In April 2003, Rishebarger sent a letter to the deceased's heirs estimating the value of the deceased's personal property at $698,000, considerably more than the $260,000 that Valdez had initially reported. Rishebarger also recommended retaining an attorney to pursue legal remedies. In August 2003, the deceased's heirs were served with Rishearger's final report, which concluded that the probate clerk had stolen approximately $522,000 from the deceased's estate.

The heirs ultimately applied to re-open administration of the estate in 2005. At this time, Rishebarger sent the heirs a copy of the tax return. In December 2006, the heirs filed a petition for a bill of review to set aside the probate orders. The probate court granted the heirs request and ultimately rendered judgment against Valdez and the surety, Fidelity. The court of appeals affirmed.

The only issue before the Supreme Court of Texas on appeal was whether the equitable bill of review was timely. Both the probate court and the court of appeals concluded, in relevant part, that the equitable bill of review was timely because the limitations period was tolled until the heirs discovered or should have discovered extrinsic fraud in March or April 2003, which was within four years of the date the heirs filed their petition for a bill of review. The Supreme Court of Texas disagreed.

The Court first resolved the issue regarding the applicable limitations period for a bill of review; specifically, whether it was two or four years. The Court held that regardless of whether the bill of review was statutory or equitable, § 31 of the Texas Probate Code proscribes a two-year limitations period for bills of review. The Court recognized that the shorter limitations period is consistent with legislative intent to afford finality to probate judgments.

Applying the two-year statute of limitations, the Court held that the heirs' petition for a bill of review was untimely. It determined that even assuming the limitations period was tolled, the heirs filed their petition more than two years after they were placed on inquiry notice of wrongdoing in March or August 2003. The heirs' contended that the limitations should have been tolled until they were provided a copy of the tax return; however, the Court held that Rishebarger's letters adequately informed the heirs of the wrongdoing. Moreover, the Court stated that the tax return itself elicited no more information than Rishebarger's letters. Thus, because the heirs failed to act reasonably and make further inquiry within the two-year limitations period, the Court reversed the court of appeals' decision and held that the petition for a bill of review was untimely.