Case Summaries
June 21, 2024

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DECIDED CASES

GOVERNMENTAL IMMUNITY

Ultra Vires Claims

Image API, LLC v. Young, ___ S.W.3d ___, 2024 WL ___ (Tex. June 21, 2024) [22-0308]

At issue is the interpretation of a statute requiring the Health and Human Services Commission to conduct annual external audits of its Medicaid contractors and providing that an audit "must be completed" by the end of the next fiscal year.

HHSC hired Image API to manage a processing center for incoming mail related to Medicaid and other benefits programs. In 2016, HHSC notified Image that an independent firm would audit Image's performance and billing for years 2010 and 2011. Image cooperated fully. The audit, completed in 2017, found that HHSC had overpaid Image approximately $440,000.

Image sued HHSC's executive commissioner for ultra vires conduct, alleging that she has no legal authority to audit Medicaid contractors outside the statutory timeframe. Image sought a declaration that the 2016 audit for years 2010 and 2011 violated Section 32.0705(d) of the Human Resources Code and an injunction preventing HHSC from conducting or relying on any noncompliant audit. The parties filed cross-motions for summary judgment, and HHSC also filed a plea to the jurisdiction. The lower courts ruled for HHSC. Despite the statutory directive that an audit "must be completed" by a certain time, the court of appeals characterized the deadline as "mere[ly] a suggestion." The court reasoned that the lack of any textual penalty for noncompliance, coupled with HHSC's heavy workload, supported "forgo[ing] the common man's interpretation of 'must'" and construing the deadline as directory rather than mandatory.

The Supreme Court affirmed the part of the court of appeals' judgment dismissing Image's claims arising from the 2016 audit, while clarifying the mandatory–directory distinction in Supreme Court caselaw. After agreeing with the court of appeals that Image is a Medicaid contractor, the Court emphasized that a statute requiring an act be performed within a certain time, using words like shall or must, is mandatory. Section 32.0705(d) is therefore mandatory because it states that a statutorily required audit "must be completed" within the time prescribed. What consequences follow a failure to comply is a separate question, which turns on whether a particular consequence is explicit in the text or logically necessary to give effect to the statute. Because there is no textual clue that the relief Image seeks is what the Legislature

intended, the Court held that an injunction prohibiting HHSC from collecting overpayments found by the 2016 audit would be error. The Court remanded the case to the trial court for further proceedings on remaining claims.

TAXES

Tax Protests

Tex. Disposal Sys. Landfill, Inc. v. Travis Cent. Appraisal Dist., ___ S.W.3d ___, 2024 WL ___ (Tex. June 21, 2024) [22-0620]

The issue in this case is whether statutory limits on an appraisal district's ability to challenge an appraisal review board's decision confine the trial court's subject matter jurisdiction.

Texas Disposal Systems Landfill operates a landfill in Travis County. In 2019, Travis County Central Appraisal District appraised the market value of the landfill, and the Landfill protested the amount under a Tax Code provision requiring equal and uniform taxation. The Landfill won its challenge, and the appraisal review board significantly reduced the appraised value of the landfill. The District appealed to the trial court and claimed that the appraisal review board's appraised value was unequal and below market value. The Landfill filed a plea to the jurisdiction, arguing that it raised only an equal-and-uniform challenge, not one based on market value. The trial court granted the Landfill's plea. The court of appeals reversed, holding that review of an appraisal review board's decision is not confined to the grounds the taxpayer asserted before the board.

In an opinion by Justice Bland, the Supreme Court affirmed. The Tax Code limits the trial court's review to the challenge the appraisal review board heard. That limitation, however, is procedural, not jurisdictional. The Court observed that the Tax Code allows the parties to agree to proceed before the trial court despite a failure to exhaust administrative remedies. This signals that the parameters of an appeal are not jurisdictional because parties cannot confer jurisdiction by agreement. Additionally, the Tax Code employs limits like those in other statutes the Court has held to be procedural, not jurisdictional. The Court also noted that the fair market value of the property is relevant to an equal and uniform challenge, but if the fair market value deviates from the equal and uniform appraised value, a taxpayer is entitled to the lower of the two amounts.

Justice Boyd filed a dissenting opinion. The dissent would have held that any limitation the Tax Code imposes on the scope of the District's appeal is jurisdictional, and the statute does not limit the trial court's jurisdiction to the specific protest grounds relied on by the taxpayer.

TEXAS MEDICAID FRAUD PREVENTION ACT

Unlawful Acts

Malouf v. State, ___ S.W.3d ___, 2024 WL ___ (Tex. June 21, 2024) [22-1046]

The issue in this case is whether Section 36.002(8) of the Texas Medicaid Fraud Prevention Act imposes civil penalties when a provider indicates their license type but fails to indicate their identification number on a claim form.

Richard Malouf owned All Smiles Dental Center. Two of Malouf's former employees filed *qui tam* actions against him alleging that he and All Smiles committed violations of the Texas Medicaid Fraud Prevention Act. The State intervened in both actions, consolidating them and asserting a claim under Section 36.002(8) of the Human

Resources Code.

The State filed a motion for partial summary judgment, alleging that All Smiles submitted 1,842 claims under Malouf's identification number even though a different dentist actually provided the billed-for services. Malouf filed a no-evidence summary judgment motion, arguing that a provider violates Section 36.002(8) only when he fails to indicate both the license type *and* the identification number of the provider who provided the service. Because the forms all correctly indicated the correct license type, Malouf argued he did not violate the Act. The trial court denied Malouf's motion and granted the State's, entering a final judgment that fined Malouf over $16,500,000 in civil penalties. The court of appeals affirmed the trial court's judgment apart from the amount awarded in attorney's fees.

The Supreme Court reversed and rendered judgment in Malouf's favor. In an opinion by Justice Boyd, the Court held that based on the statute's grammatical structure, context, and purpose, Section 36.002(8) only makes unlawful the failure to indicate both the license type and the identification number of the provider who provided the service. The Court concluded that the State failed to demonstrate that Malouf committed unlawful acts under Section 36.002(8).

Justice Young filed a dissenting opinion. He would have held that Section 36.002(8) makes unlawful the failure to indicate either the type of license or the identification number.

NEGLIGENCE

Premises Liability

Weekley Homes, LLC v. Paniagua, ___ S.W.3d ___, 2024 WL ___ (Tex. June 21, 2024) (per curiam) [23-0032]

The issue in this case is whether Chapter 95 of the Civil Practice and Remedies Code applies to claims by contractors who were injured on a driveway of the townhome on which they were hired to work.

Weekley Homes, LLC hired independent contractors to work on a townhome construction project. While the workers were moving scaffolding across the townhome's wet driveway, electricity from a temporary electrical pole or lightning killed one worker and injured another. Weekley filed a combined traditional and no-evidence summary-judgment motion arguing that Chapter 95 applies and precludes liability. The trial court granted Weekley's motion, but the court of appeals reversed, holding that Chapter 95 does not apply because the summary-judgment evidence does not conclusively establish that the driveway is a dangerous condition of the townhome on which the contractors were hired to work.

The Supreme Court reversed in a per curiam opinion and held that Chapter 95 applies to the workers' claims. The Court explained that Chapter 95 applies to claims that arise from the condition or use of an improvement to real property where the contractor or subcontractor constructs, repairs, renovates, or modifies the improvement. The Court held that Weekley conclusively established that the electrified driveway is a condition of the townhome because the workers alleged that the electrified driveway was a dangerous condition that they were required to traverse to perform their work, and the summary-judgment evidence established that the driveway, by reason of its proximity to the townhome, created a probability of harm to those working on the townhome.

TAXES

Tax Protests

Oncor Elec. Delivery Co. NTU, LLC v. Wilbarger Cnty. Appraisal Dist. and *Mills Cent. Appraisal Dist. v. Oncor Elec. Delivery Co.*, ___ S.W.3d ___, 2024 WL ___ (Tex. June 21, 2024) [23-0138, 23-0145]

The issue in these cases is whether questions regarding the validity and scope of a statutory agreement under Section 1.111(e) of the Tax Code implicate the trial court's subject-matter jurisdiction over a suit for judicial review under Section 42.01 of the Code.

In 2019, Oncor's predecessor-in-interest, Sharyland, protested the value of its transmission lines in various appraisal districts, including in Wilbarger and Mills counties. Sharyland ultimately settled its protests by executing agreements with the chief appraiser of each district. The agreements with the appraisal districts for Wilbarger and Mills counties each stated a total value for Sharyland's transmission lines within that district. After acquiring the transmission lines, Oncor sought to correct the two districts' appraisal rolls, filing motions to correct under Section 25.25 of the Tax Code with the appraisal review board for each district. Oncor's motions asserted that the valuations listed on each district's appraisal rolls were based on a "clerical error" that occurred when Sharyland's agent sent incorrect mileage data to the districts' agent. The Wilbarger appraisal review board denied Oncor's motions and the Mills appraisal review board dismissed the motions for lack of jurisdiction.

Oncor sought review of those decisions in district court in each county, suing both the relevant appraisal district and review board, asserting the same claims, and seeking substantially identical relief in both cases. The relevant taxing authorities filed pleas to the jurisdiction, which were granted in the Mills case and denied in the Wilbarger case. The Wilbarger appraisal district and Oncor each filed an interlocutory appeal of the decision against them.

The courts of appeals reached conflicting decisions. In the Mills case, the court of appeals reversed in part and remanded for further proceedings, holding that the doctrine of mutual mistake, if applicable, would prevent the settlement agreement from becoming final. In the Wilbarger case, the court of appeals reversed the trial court's order and rendered judgment granting the Wilbarger taxing authorities' plea. Oncor and the Mills taxing authorities petitioned the Supreme Court for review. The Supreme Court granted both petitions and consolidated the cases for oral argument.

The Supreme Court held that a Section 1.111(e) agreement poses nonjurisdictional limits on the scope of appellate review under Chapter 42 of the Tax Code. Accordingly, the Court affirmed the court of appeals' judgment in the Mills case, reversed the court of appeals' judgment in the Wilbarger case, and remanded both causes to their respective trial courts for further proceedings.

PROCEDURE–APPELLATE

Vexatious Litigants

Serafine v. Crump, ___ S.W.3d ___, 2024 WL ___ (Tex. June 21, 2024) (per curiam) [23-0272]

In this case, pro se petitioner Serafine challenges the determination that she is a vexatious litigant.

The court of appeals affirmed the trial court's order deeming Serafine a vexatious litigant by counting each of the following as separate "litigations": (1) Serafine's partially unsuccessful appeal to a Texas court of appeals of a final trial court judgment in a civil action; (2) her unsuccessful petition for review of that court of appeals judgment and motion for rehearing in the Supreme Court of Texas; (3) her unsuccessful petition for writ of mandamus in the court of appeals; (4) a civil action she filed in federal district court that was dismissed for lack of jurisdiction; (5) her unsuccessful appeal of that dismissal to the Fifth Circuit; and (6) her unsuccessful petition for writ of mandamus in the Fifth Circuit. Serafine now challenges the court of appeals' method of counting "litigations" under Section 11.054(1)(A) of the Civil Practice and Remedies Code, which requires a showing that the plaintiff has in the past seven years "maintained at least five litigations as a pro se litigant other than in a small claims court that have been . . . finally determined adversely to the plaintiff."

The Supreme Court reversed and remanded the case to the trial court for further proceedings. It held Serafine is not a vexatious litigant because an appeal and a petition for review from a judgment or order in a civil action are part of the same civil action and therefore count as a single "litigation." Accordingly, Serafine maintained at most only four litigations as a pro se litigant that were determined adversely to her.

GRANTED CASES

INSURANCE

Policies/Coverage

Ohio Cas. Ins. Co. v. Patterson-UTI Energy, Inc., 656 S.W.3d 729 (Tex. App.—Houston [14th Dist.] 2022), *pet. granted* (June 21, 2024) [23-0006]

This case concerns the interpretation of an excess insurance policy that follows an underlying policy, except where the terms, conditions, definitions, and exclusions of the policies conflict.

The Patterson entities hired Marsh USA, an insurance broker, to obtain multiple layers of general liability insurance coverage. Through Marsh, Patterson obtained an underlying policy that provides coverage for defense costs, including attorney's fees. Patterson also obtained multiple policies providing excess layers of coverage, including a policy issued by Ohio Casualty. The Ohio Casualty policy contract states that except for the "terms, conditions, definitions and exclusions" set out in the Ohio Casualty policy, its coverage follows the underlying policy. Patterson was sued for personal injuries following an industrial accident and settled with the plaintiffs. Patterson then sought coverage from its insurers. Ohio Casualty promptly provided its share of the settlement amount, but it refused coverage for Patterson's defense costs.

Patterson sued both Ohio Casualty and Marsh, asserting that either Ohio Casualty breached the insurance contract by failing to provide coverage for defense costs or else Marsh falsely represented to Patterson that the Ohio Casualty policy

covered defense costs. The parties filed competing motions for summary judgment on the issue of coverage. The trial court concluded that the Ohio Casualty policy does cover defense costs and granted summary judgment for Patterson. The court of appeals affirmed, reasoning that the Ohio Casualty policy does not specifically disclaim the underlying policy's coverage of defense costs.

Ohio Casualty filed a petition for review, arguing that its policy only provides coverage for certain types of loss that does not include defense costs. Ohio Casualty contends that because it set out definitions related to covered loss in its policy, those definitions control over the definitions related to covered loss in the underlying policy. The Court granted the petition for review.

OIL AND GAS

Leases

Hahn v. ConocoPhillips Co., ___ S.W.3d ___, 2022 WL 17351596 (Tex. App.—Corpus Christi–Edinburg 2022), *pet. granted* (June 21, 2024) [23-0024]

At issue in this case is the proper calculation of Kenneth Hahn's royalty interest in a tract of land in DeWitt County, Texas.

In 2002, Hahn conveyed the tract to William and Lucille Gips but reserved a 1/8 non-participating royalty interest. Eight years later, the Gipses leased the tract to a subsidiary of ConocoPhillips. The lease entitled the Gipses to a 1/4 royalty and gave Conoco the right to pool the acreage covered by the lease. After Hahn ratified the lease, Conoco pooled the tract into a larger unit. Hahn and the Gipses then signed a stipulation of interest, agreeing that Hahn reserved a 1/8 "of royalty" when he conveyed the tract to the Gipses.

In 2015, Hahn sued Conoco and the Gipses, alleging that he reserved a fixed 1/8 royalty in the tract, rather than a floating royalty. The trial court disagreed and granted summary judgment for the Gipses. But the court of appeals reversed, holding that Hahn reserved a fixed royalty and that the trial court erred by considering the stipulation of interest. Conoco and the Gipses petitioned the Supreme Court for review, but the Court denied their petitions.

On remand, Conoco argued that because Hahn ratified the Gipses' lease, his royalty should be diminished by their 1/4 royalty. The trial court granted summary judgment for Conoco, but the court of appeals reversed, holding that Hahn was only bound to the lease's pooling provision. The court of appeals also disagreed with Conoco that the intervening decision in *Concho Resources, Inc. v. Ellison*, 627 S.W.3d 226 (Tex. 2021), required it to consider the stipulation of interest.

Conoco petitioned the Supreme Court for review, arguing that the court of appeals erred by (1) concluding that Hahn ratified only the lease's pooling provision, and (2) disregarding the stipulation of interest.

The Court granted Conoco's petition for review.

MEDICAL LIABILITY

Expert Reports

Columbia Med. Ctr. of Arlington Subsidiary, L.P. v. Bush, ___ S.W.3d ___, 2023 WL 3017657 (Tex. App.—Fort Worth 2023), *pet. granted* (June 21, 2024) [23-0460]

The issue in this case is the sufficiency of an expert report supporting a health care liability claim against a hospital directly under Chapter 74 of the Civil Practice and Remedies Code.

Ireille Williams-Bush died from pulmonary embolism—a massive blood clot in her lungs—soon after she was discharged from Columbia Medical Center's emergency department. She had presented to the ER with chest pain, shortness of breath, and severe fainting. The ER physicians diagnosed Ireille with cardiac-related conditions, never screened her for pulmonary embolism, and discharged her in stable condition with instructions to follow up with a cardiologist.

Ireille's husband, Jared Bush, sued the hospital for medical negligence. Bush served the hospital with an expert report prepared by a cardiologist, who opined that the hospital should have had a testing protocol to rule out pulmonary embolism and other emergency conditions prior to discharge. The expert also opined that having this protocol would have resulted in a proper diagnosis and precluded Ireille's discharge and eventual death.

The hospital objected to the expert report and moved to dismiss Bush's claim. The trial court denied the motion, but the court of appeals reversed and directed the trial court to dismiss the claim with prejudice. The court of appeals held that the report is conclusory, and therefore insufficient, on the element of causation. Relying on Supreme Court caselaw, the court of appeals reasoned that the report fails to explain how a hospital policy—which can only be implemented by medical staff—could have changed the decisions, diagnoses, and orders of Ireille's treating physicians.

Bush petitioned the Supreme Court for review, arguing that the court of appeals misinterpreted the Court's caselaw to impose too high a burden for causation in a direct-liability claim and that the report is sufficient because it provides a fair summary of the causal link between the hospital's failure and Ireille's death. The Supreme Court granted the petition.

NEGLIGENCE

Vicarious Liability

Renaissance Med. Found. v. Lugo, 672 S.W.3d 901 (Tex. App.—Corpus Christi–Edinburg 2023), *pet. granted* (June 21, 2024) [23-0607]

The issue is whether a nonprofit health organization certified under Section 162.001(b) of the Occupations Code can be held vicariously liable for the negligence of a physician employed by the organization.

Renaissance Medical Foundation is a nonprofit health organization certified by the Texas Medical Board. Dr. Michael Burke, who works for Renaissance, performed brain surgery on Rebecca Lugo's daughter. Lugo sued Renaissance, in addition to suing Dr. Burke, alleging that it is vicariously liable for Dr. Burke's negligence in performing the surgery that caused permanent physical and mental injuries to her daughter.

Renaissance moved for summary judgment, arguing that it cannot be held vicariously liable because it is statutorily and contractually barred from controlling Dr. Burke's practice of medicine. The trial court denied the motion after concluding that Dr. Burke's employment agreement gives Renaissance the right to exercise the requisite degree of control over Dr. Burke to trigger vicarious liability. Renaissance filed an interlocutory appeal. The court of appeals affirmed.

Renaissance petitioned for review, arguing that the Section 162.001(b) framework, which prohibits Renaissance from interfering with the employed physician's independent medical judgment, precludes vicarious liability. The Supreme Court granted the petition for review.