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APPELLATE LAWYER

# CASE UPDATES

Case Updates from the First Court of Appeals
*Lily Hann*

Case Updates from the Fourteenth Court of Appeals
*Eleanor Mason*

Case Updates from the Fifteenth Court of Appeals
*Grant Martinez*

Case Updates from the Fifth Circuit
*Stephani Michel*

*February 2025*

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*February 2025*

**Table of Contents**

Houston Bar Association
APPELLATE LAWYER

*February 2025*

## EDITORIAL BOARD

Houston Bar Association
APPELLATE LAWYER

*February 2025*

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# Case Updates from the First Court of Appeals

*Lily Hann*

***Harris v. Howard*, __ S.W.3d__, 2024 WL 4885848, at *12 (Tex. App.—Houston [1st Dist.] Nov. 26, 2024, no pet. h.) (mem. op.) (Landau, J.).**

In this breach of contract case, the First Court joined other courts of appeals in holding that it could remand a case for further proceedings even whether neither party requested that relief.

The trial court interpreted the contract as a matter of law, and the parties agreed on appeal that the contract was unambiguous. The First Court disagreed. It concluded (after significant analysis) that the contract was ambiguous because the meaning of certain provisions was uncertain and doubtful. It held that "the trial court erred in interpreting [the agreement] as a matter of law as an unambiguous contract" and reversed and remanded. *Id.* at *9.

The Court explained that a remand was required even though no party had requested it: "Because the proper course is to have a factfinder determine the parties' intent after receiving extraneous evidence on the matter, we will reverse and remand—a result that no party requested but that is required because the contract is ambiguous." *Id.* at *9.

Justice Goodman dissented. He agreed that the agreement was ambiguous and, therefore, that the court could not interpret it as a matter of law on appeal, but he disagreed with the court's decision to remand the case. He opined: "[W]hen, as here, the only relief the appellants request is premised on us being able to interpret the agreement as a matter of law and they seek rendition alone, but only for the issue of attorney's fees, we have no choice but to reject their appellate issues concerning the proper meaning of the agreement and affirm the trial court's judgment." *Id.* at *13 (Goodman, J., dissenting). Justice Goodman surveyed precedent and noted that "decisions of the courts of appeals are not entirely uniform regarding whether an appellant's failure to seek reversal and remand forecloses this relief." *Id.*

The majority interpreted those authorities differently. It also relied heavily on Rule of Appellate Procedure 43.3. That rule provides generally that "[w]hen reversing a trial court's judgment, the court must render the judgment that the trial court should have rendered" but "allow[s] for a remand when . . . further proceedings are necessary. *Id.* at *10. Responding to Justice Goodman, the Court reasoned that "nowhere does the rule suggest that when a trial court's judgment should be reversed, [an appellate court] must instead *affirm it* if the appellant fails to request the correct post-reversal disposition." *Id.* The Court cited numerous other opinions holding that "an appellate

court is empowered either to render judgment or remand for new trial based on its own application of Rule 43.3 without regard to whether the appellant specifically prayed for that relief." *Id.* It concluded: "To fulfill our obligation to determine whether the [contract] is ambiguous and to follow the rules of appellate procedure, we cannot be limited to the relief [appellant] requested because the parties believed the [contract] was unambiguous." *Id.*

This decision brings the First Court in line with the Fourteenth Court, *see Garza v. Cantu*, 431 S.W.3d 96, 108–09 (Tex. App.—Houston [14th Dist.] 2013, pet. denied), bringing clarity and uniformity on this issue to the Houston Courts of Appeals.

***San Jacinto River Auth. v. Medina*, __ S.W.3d__, 2024 WL 4885853, at *2 (Tex. App.—Houston [1st Dist.] Nov. 26, 2024, no pet. h.) (mem. op.) (Goodman, J.).**

This is an appeal from the denial of a plea to the jurisdiction based on governmental immunity. The First Court reversed and rendered judgment dismissing plaintiffs' claims. It clarified the burden shifting framework for pleas to the jurisdiction and the causation standard for inverse-condemnation claims.

Plaintiff homeowners sued the San Jacinto River Authority after Hurricane Harvey, claiming that the River Authority's decision to release water from Lake Conroe caused flooding that damaged their properties, amounting to an unconstitutional taking. The River Authority filed a plea to the jurisdiction based on governmental immunity. It argued that its immunity was not waived because the homeowners did not allege a viable takings claim.

The first issue on appeal concerned the burden-shifting standard of review: "after a governmental entity asserts and supports with evidence that the trial court lacks subject matter jurisdiction, the burden of production shifts to the plaintiff to provide evidence showing there is a disputed material fact issue regarding jurisdiction." *Id.* at *2.

The homeowners argued that the plea to the jurisdiction could not be granted because the River Authority had not produced conclusive evidence negating the homeowners' allegations, so the burden had never shifted to the homeowners.

The First Court recognized that "[t]hese claims appear to stem from possible confusion caused by this court's opinion in *City of Lake Jackson v. Adaway*, 2023 WL 3588383 (Tex. App.—Houston [1st Dist.] May 23, 2023, no pet.) (mem. op.)." *Id.* at *2. It clarified: "*Adaway* does not . . .state that a governmental entity must produce evidence conclusively disproving the plaintiff's allegations before the burden shifts to the plaintiff to produce evidence in a plea to the jurisdiction challenging jurisdictional facts." *Id.* at *3. However, this clarification was ultimately immaterial because the homeowners produced evidence on the two challenged elements of their claims.

The First Court next analyzed whether the homeowners had established a *viable* takings claim that waived governmental immunity. Of special note, the First Court resolved the parties' dispute about the correct standard for establishing causation in a flood takings case.

The Court held: "[T]o establish but-for causation, we compare the plaintiff's property as it existed before the governmental entity's intentional acts that are the subject of the takings claim and afterwards. A plaintiff in a flood takings case must establish the governmental entity's intentional acts were a substantial factor in bringing about his

damages, whether those damages are flooding or exacerbated flooding effects." *Id.* at *6.

The Court held that the homeowners had not met their burden to provide evidence showing a material fact issue as to the causation element. Thus, they failed to establish a viable takings claim, and the trial court erred in denying the River Authority's plea to the jurisdiction.

***Devon Energy Corp. v. Cormier*, __ S.W.3d__, 2024 WL 4775785, at *1 (Tex. App.—Houston [1st Dist.] Nov. 14, 2024, no pet. h.) (mem. op.) (Hightower, J.).**

In this case about general personal jurisdiction, the First Court held that Texas courts lacked personal jurisdiction over two out-of-state defendants and rendered judgment dismissing the plaintiff's claims.

Plaintiff sued two companies for personal injuries sustained while working on a drilling rig in New Mexico. Both companies were headquartered and incorporated outside of Texas.

The defendant companies filed special appearances asserting that plaintiff had not and could not establish that they had minimum contacts with Texas to confer general or specific personal jurisdiction on the trial court. The trial court denied the motions, and defendants appealed.

The First Court began by discussing its appellate jurisdiction. Plaintiff argued that the defendants' appeal was untimely because they failed to file a notice of appeal within 20 days of the trial court's denial of their special appearance. He relied on the date the trial court made an oral ruling, not the date the trial court signed a written order denying the special appearances, nearly 20 months later. The First Court rejected plaintiff's argument: the time for filing an appeal runs from the date the order is signed.

Next, the First Court considered whether the trial court erred in denying defendants' special appearances. Because plaintiff conceded that specific jurisdiction was not at issue, the analysis focused on general jurisdiction. The Court reiterated the familiar rule that a state court may exercise general jurisdiction only when a defendant is "essentially at home" in the State. " For a corporation the 'paradigm' forums for the exercise of general jurisdiction are the place of incorporation and its principal place of business. However, the exercise of general jurisdiction is not limited to these forums; in an 'exceptional case,' a corporate defendant's operations in another forum 'may be so substantial and of such a nature as to render the corporation at home in that State." *Id.* at *7 (cleaned up). The question was whether this was an "exceptional case."

Plaintiff relied on the fact that defendants collectively own over 100,000 acres of land in Texas, as part of a joint venture, and profit from those acres. Defendants are also involved in drilling rigs that produce oil, and 15% of their oil production originates in Texas.

The Court noted that plaintiff failed to distinguish between the entities (as he should have). It held that, regardless, none of those contacts were sufficiently continuous and

systematic to render the defendants at home. The Court observed that deposition testimony stated that the Texas operations were just one small piece of the companies' businesses. It simply was not enough that the companies had some employees and some property in Texas—or that they had defended other litigation in Texas. Although the companies had a "significant" asset in Texas, it was not the "focus" of their businesses.

Accordingly, the First Court reversed the denial of the special appearances and rendered judgment dismissing the claims for lack of jurisdiction.

# Case Updates from the Fourteenth Court of Appeals

*Eleanor Mason*

***Canales v. Vandenberg*, 699 S.W.3d 666 (Tex. App.—Houston [14th Dist.] 2024, no pet. h.) (Wise, J., majority, and Poissant, J., dissenting).**

In *Canales*, the Fourteenth Court of Appeals reversed the award of mental anguish damages for claims alleging a private nuisance.

Appellants Angie and David Canales were neighbors with appellee Edward Vandenberg in the City of Brookside Village, living approximately 300 yards apart. The Canaleses had a "party barn" on their property and regularly hosted large, loud parties until the early-morning hours. The Canaleses sued Vandenberg for assault after Vandenberg entered the Canaleses' property during one of their parties and got in a fistfight with David. Vandenberg asserted counterclaims for assault, slander, and nuisance. The jury found in Vandenberg's favor on the issue of nuisance and assessed mental anguish damages against the Canaleses.

Amongst other issues, the court examined whether the jury's liability findings on the issue of nuisance could support mental anguish damages. The jury found that the Canaleses were liable for both negligently and intentionally creating a private nuisance.

Concluding that the jury's negligent-nuisance finding did not support an award of mental anguish damages, the court noted that Texas law "does not recognize a general legal duty to avoid negligently inflicting mental anguish." Moreover, a "mere nuisance has never been a basis for recovery of mental anguish in Texas." Therefore, the jury's negligent-nuisance finding did not support an award of mental anguish damages.

Turning to the jury's intentional-nuisance finding, the court noted that the associated charge question asked whether "David ***or*** Angie Canales intentionally create[d] a private nuisance." (emphasis added). However, the trial court's judgment assessed mental anguish damages against David and Angie ***jointly and severally***. Noting that evidence of Angie's and David's intent "was materially different," the court held that it was not clear the jury intended to find that both Canaleses acted intentionally with respect to the created nuisance. Pointing out that the party seeking liability findings against multiple defendants bears the burden to submit questions on each individual defendant's liability, the court held that the jury's "ambiguous" intentional-nuisance finding could not support mental anguish damages assessed against David and Angie jointly and severally.

***CPM of Am., LLC v. Gonzalez*, __ S.W.3d __, 2024 WL 4630521 (Tex. App.—Houston [14th Dist.] Oct. 31, 2024, no pet. h.) (Christopher, C.J.).**

In *CPM of America, LLC*, the Fourteenth Court of Appeals held that the appellee was not entitled to additional, post-arbitration attorney's fees incurred to enforce an arbitration award.

Appellee Robert Gonzalez purchased a home from appellant CPM of America, LLC. After he discovered problems in the home, Gonzalez sued CPM and the parties proceeded to arbitration. The arbitrator made findings in favor of Gonzalez and awarded him approximately $121,000 in damages, costs, and attorney's fees, and ordered CPM to remit the assessed damages in within 30 days of the award.

Upon expiration of the 30-day period, Gonzalez filed a petition alleging that CPM had not remitted payment and thus failed to comply with the arbitration award. Gonzalez sought confirmation of the award plus additional attorney's fees for seeking enforcement of the award. The trial court signed a final judgment confirming the arbitration award and awarding Gonzalez $53,000 as additional attorney's fees. In its appeal, CPM challenged the award of additional, post-arbitration attorney's fees.

The court's analysis began with a well-established precept: a party generally may not recover attorney's fees from an opponent unless so authorized by a statute or contract. Here, neither the governing statutory authority (the Federal Arbitration Act) nor the parties' contract authorized attorney's fees for enforcing an arbitration award.

The court noted that the Fifth Circuit Court of Appeals and other federal circuits have recognized that an award of attorney's fees is permitted when a party has refused to abide by an arbitration decision without justification. However, Texas courts of appeal were split on the issue and both the Fourteenth Court of Appeals and the San Antonio Court of Appeals had declined to extend an exception to the general rule "that would allow for a trial court to award additional attorney's fees on top of what an arbitrator had already provided."

The court upheld CPM's challenge and modified the trial court's final judgment to delete the $53,000 in additional, post-arbitration attorney's fees.

***Litinas v. City of Houston*, __ S.W.3d __, 2024 WL 4982561 (Tex. App.—Houston [14th Dist.] Dec. 5, 2024, no pet. h.) (Wilson, J., majority, and Christopher, C.J., concurring).**

In *Litinas*, the Fourteenth Court of Appeals examined whether a significant reduction in a florist's available parking spaces constituted evidence of a material and substantial impairment as necessary to waive the City's immunity with respect to an inverse condemnation claim.

Appellee Nicholas Litinas owns and operates a flower shop in the Heights on the corner of Durham Drive and 28th Street. From both streets, Litinas's customers can access head-in parking spaces that Litinas constructed as improvements to his property. In 2021, the City of Houston initiated a capital improvement program that proposed reworking the Durham and 28th street intersection to include a bike lane and new sidewalk. The improvements were contained within the City's right-of-way but would block most of the flower shop's head-in parking spaces.

Litinas sued and asserted an inverse condemnation claim under the Texas Constitution, arguing that the City's improvement plan constituted an uncompensated taking. The City filed a plea to the jurisdiction, contending that Litinas failed to prove an actionable vested property interest as necessary to waive the City's immunity. The trial court granted the City's plea and dismissed Litinas's claim.

On appeal, the court noted that diminished property value resulting from impaired access is compensable when that access "is materially and substantially impaired." But access is not materially and substantially impaired merely because the remaining access points are less convenient; rather, a taking occurs only if "the property's purpose for which it was specifically intended was rendered unreasonably deficient."

Reviewing the evidence, the court pointed out that the improvement plan would eliminate "virtually all store-front head-in parking spots on the lot." Although Litinas's business would retain access to a spillover lot located across a City alley, the court reasoned that evidence of this remaining access point did not vitiate Litinas's claim. Rather, the evidence showed that head-in parking spaces were "critical to [Litinas's] type of business, a florist, dependent on impulse buyers." The City failed to prove that the remaining access point was "not unreasonably deficient as to the lot on which the flower shop is situated, and in light of the purpose of the commercial use."

Therefore, because the City failed to prove as matter of law that its improvement plan did not constitute a substantial and material impairment to access Litinas's property, the trial court erred by granting the City's plea to the jurisdiction.

# Case Updates from the Fifteenth Court of Appeals

*Grant Martinez*

The Fifteenth Court of Appeals opened for business as of September 1, 2024. Shortly before then, the Supreme Court rejected several constitutional challenges to the court. *See In re Dallas County*, 697 S.W.3d 142 (Tex. 2024) (orig. proceeding). Governor Abbott appointed to the court Chief Justice Scott Brister and Justices Scott Field and April Farris.

The Fifteenth Court will have exclusive intermediate appellate and original jurisdiction over three kinds of cases: (1) those coming from the newly created business courts; (2) those involving claims *by* or *against* the State, its agencies, and its employees acting in their official capacities; and (3) those challenging the constitutionality or validity of a state statute or rule. *See* Tex. Gov't Code §§ 22.220(d), 22.221(a), (c-1), 25A.007(a). Because the business courts also just opened for business in September, all of the early decisions from the Fifteenth Court fell into the latter categories: cases involving the state government.

**Rejecting temporary relief requested by the State: *State of Texas v. City of Dallas*, No. 15-24-00103-CV (Tex. App.—Austin [15 Dist.] Sept. 24, 2024)**

Right out of the gate, the Fifteenth Court got a high-profile dispute over whether the State Fair of Texas—after a shooting occurred there last year—could exclude patrons carrying firearms from its grounds, which it leases from the City of Dallas. *See* Order, *State of Texas v. City of Dallas*, No. 15-24-00103-CV (Tex. App.—Austin [15th Dist.] Sept. 24, 2024) (per curiam). After a trial court denied a temporary injunction, the State appealed. It filed an emergency motion in the Fifteenth Court seeking temporary relief and an "administrative stay" prohibiting the State Fair and City of Dallas from "excluding, or stating or implying that handgun-license holders carrying a handgun may be excluded, from the state fair." The Fifteenth Court denied that relief in a short, per curiam order. While the court did not explain its reasoning, this first major decision reflected judicial independence in rejecting the State's request for emergency relief.

The Fifteenth Court's decision was reinforced by the Supreme Court's subsequent denial of the same relief. Justice Blacklock, joined by the Chief Justice and Justice Young, wrote a concurring opinion chastising the State for failing to address the central question of the litigation: "whether the State Fair of Texas, a private entity, has the legal authority to exclude patrons carrying handguns from the Fair." *See In re State*, 698 S.W.3d 904 (Tex. 2024) (orig. proceeding) (Blacklock, J., concurring in denial of mandamus and emergency relief).

**Granting temporary relief on grounds never raised by the State: *State of Texas v. Harris County*, 15-24-00120-CV (Tex. App. —Austin Dec. 6, 2024)**

In a case in which my firm was involved, the Fifteenth Court took a much more solicitous approach to the State by granting temporary relief on grounds never raised by the State. *See* Order, *State of Texas v. Harris County*, 15-24-00120-CV (Tex. App. — Austin [15th Dist.] Dec. 6, 2024) (per curiam). There, the State challenged a Harris County program providing relief to the poor. The trial court granted Harris County's plea to the jurisdiction and granted a motion under Rule 12 arguing that the Attorney General lacked authority to represent the State in the trial court in that case. The State appealed.

As in the State Fair case, the State filed a motion for temporary relief under Rule 29.3 and an "administrative stay" for the entirety of the appellate process—i.e., an "administrative" order lasting until the conclusion of any merits review by the Supreme Court. Harris County responded that: (1) because Rule 29.3 only applies to interlocutory appeals, it did not serve as a basis for relief; and (2) administrative orders are only designed to last until an appellate court can rule on the motion for temporary relief. Remarkably, the State's reply brief *agreed* that it could not obtain relief under Rule 29.3 and modified its requested administrative relief.

The Fifteenth Court's order disregarded the State's arguments but still enjoined Harris County's program on grounds that the State never raised—the court's inherent authority to preserve its jurisdiction. The court's jurisdiction was not threatened, however: monthly payments under the program would not end until September 2026—giving the court nearly 21 months to rule before any issue became moot. This solicitous approach, granting the State relief on unraised grounds to preserve jurisdiction that was not threatened, presents a significant contrast from the ruling in the State Fair case.

The merits of the appeal are fascinating and will be discussed in oral argument on February 12. Two of the major issues are whether Harris County's program to provide relief to the poor runs afoul of the Texas Constitution's Gift Clauses and whether the Attorney General lacks the authority to represent the State in the district courts in cases like this one.

**A plea to the jurisdiction is not implicitly denied by proceeding to trial: *Paxton v. City of Austin*, 2024 WL 4446073 (Tex. App. [15th Dist.] Oct. 8, 2024)**

Opinion by Justice Farris, joined by Justice Field and retired Justice Radack.

In this case, the Fifteenth Court held that a trial court's proceeding to trial is not necessarily a merits decision implicitly denying a plea to the jurisdiction.

In this case, the Attorney General had intervened and filed a plea to the jurisdiction asserting that the trial court lacked jurisdiction over the suit. *Id.* at *1. Trial then began and apparently paused. When the trial resumed, the Attorney General contended that the court's proceeding to trial had implicitly denied the pending plea to the jurisdiction. *Id.* The trial court then explicitly declined to rule on the plea and stated it was proceeding with trial. *Id.* The Attorney General filed a notice of interlocutory appeal on the theory that the trial court had implicitly denied his plea. *Id.*; *see* Tex. Civ. Prac. & Rem. Code § 51.014(a)(8). The appellees moved to dismiss.

In the absence of a final judgment, the Fifteenth Court dismissed the appeal for lack of jurisdiction because there the trial court had not denied—implicitly or otherwise—the plea to the jurisdiction. *Paxton*, 2024 WL 4446073, at *2-3. The court rejected the Attorney General's reliance on *Thomas v. Long*, 207 S.W.3d 334, 338 (Tex. 2006). There, the Supreme Court held that an order ruling on the merits of an issue (such as a partial summary judgment) without explicitly rejecting a jurisdictional attack has implicitly denied the jurisdictional challenge. *Id.* at 339-40. The Fifteenth Court distinguished *Thomas* on two grounds: first, the trial court in *Paxton* had explicitly refused to rule on the plea; second, the trial court had not issued any ruling on the merits of an issue but rather proceeded to trial. *Paxton*, 2024 WL 4446073, at *2. Unlike *Thomas*, the trial court in *Paxton* had not ruled on the merits of the dispute, but rather simply proceeded to trial. *Id.* (citing two Fourteenth Court cases). Absent a merits ruling, there was no implicit ruling on the plea, and there was no appealable order. *Id.* at *2-3.

In sum, a trial court's mere decision to proceed with the decision-making process—for example, by conducting a summary judgment hearing or a bench trial—is not itself a ruling on the merits of an issue that implicitly denies a jurisdictional challenge. In those situations, the courts of appeals lack jurisdiction.

# Case Updates from the Fifth Circuit

*Stephani Michel*

***Matter of Riverstone Resort, LLC*, No. 23-20362, --- F.4th ---, 2024 WL 5036280 (5th Cir. Dec. 9, 2024) (Smith, Clement, and Higginson)**

In *Riverstone Resort*, the Fifth Circuit reiterated the general rule that an unfavorable "judgment" is a prerequisite to an appeal, even if the underlying "opinion" itself is not entirely favorable. *Id.* at *3-4.

There, the plaintiff asserted claims against his former lawyer, as well as that lawyer's law firm and business entity, in bankruptcy court for breach of fiduciary duty and unjust enrichment. *Id.* at *1. After a bench trial, the bankruptcy court entered a take-nothing judgment for the business entity, holding that the plaintiff's claims against it were barred by limitations. *Id.* at *2. The bankruptcy court also dismissed the plaintiff's claims against the lawyer and his law firm, reasoning that the court either lacked jurisdiction or should abstain from deciding the claims. *Id.* Despite those favorable judgments, the three defendants appealed to the district court, and, ultimately, the Fifth Circuit, raising various complaints about (among other things) the bankruptcy court's jurisdiction, failure to abstain or postpone trial, and issuance of "an improper advisory opinion." *Id.*

The Fifth Circuit, however, dismissed the appeals because the defendants "[we]re not aggrieved parties entitled to appeal." *Id.* at *1, 3-4. The Court emphasized that "[a] party is generally not 'aggrieved' when it wins a favorable judgment, even if the trial court made subsidiary findings or conclusions that were unfavorable" to it, because "appellate courts review judgments, not opinions." *Id.* at *3 (cleaned up). The Court explained there are only a "handful of situations" in which a party may be "aggrieved by a favorable judgment," like when: (1) "the judgment itself contains prejudicial language on issues immaterial to the disposition of the case," (2) "collateral estoppel may harm [the party] in future proceedings," or (3) the party "will suffer financial loss as a result of the judgment." *Id.* (cleaned up).

Because none of those circumstances were presented in *Riverstone Resort*, the defendants—who had each received either a take-nothing judgment (which is "a full victory for a defendant") or a dismissal (which was "exactly what they had wanted)—could not appeal merely because they were "[u]nhappy" with the bankruptcy court's opinion. *Id.* at *3-4 (cleaned up).

***Anaya v. Schlumberger Tech. Corp.*, No. 24-20170, 2024 WL 5003579 (5th Cir. Dec. 6, 2024) (Clement, Graves, and Willett)**

In this per curiam opinion, the Fifth Circuit addressed a matter of first impression regarding snap removal:[1] "whether a lone forum defendant may remove a matter with complete diversity prior to service of process." *Id.* at *2.

In *Anaya*, the plaintiff (a resident of New Mexico) asserted claims against a Texas corporation in Texas state court relating to a vehicular accident occurring in Texas. *Id.* at *1. The next day, the Texas defendant made a snap removal by removing the case to federal court prior to being served. *Id.* at *1 & n.2. The plaintiff subsequently moved to remand, but the district court denied the motion. *Id.* at *1.

The Fifth Circuit affirmed, rejecting the plaintiff's contention that the "forum-defendant rule" in 28 U.S.C. § 1441(b)(2) required remand. *Id.* at *2-4. The Court's ruling was premised largely on the plain text of the forum-defendant rule, which states that civil actions (like the plaintiff's) that are "otherwise removable" based solely on diversity jurisdiction "may not be removed if any of the parties in interest *properly joined and served as defendants* is a citizen of the State in which such action is brought." *Id.* at *2 (quoting 28 U.S.C. § 1441(b)(2)) (emphasis added). Despite the plaintiff's request, the Court refused to hold that the phrase "properly joined and served" did not create a "temporal limitation," and instead clarified that the forum-defendant rule unambiguously does not apply "until the defendant is served," even if the lone defendant is a forum defendant. *Id.* at *2-3.

The Court emphasized that this holding was a natural extension of its prior decision in *Texas Brine Co. v. American Arbitration Association, Inc.*, 955 F.3d 482, 485-87 (5th Cir. 2020), which recognized the existence of that unambiguous temporal limitation (*i.e.*, joinder and service) in the context of a non-forum defendant using snap removal prior to service of a forum defendant. *Anaya*, 2024 WL 5003579, at *2-3. The Court also recognized that its opinion was consistent with decisions by the Second and Third Circuits allowing "even home-state defendants" to remove diversity actions "prior to service under § 1441(b)(2))." *See id.* at *3 (citing *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699, 704-07 (2d Cir. 2019); *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147, 151-54 (3d Cir. 2018)).

***Lindsley v. Omni Hotels Mgmt. Corp.*, No. 23-11167, --- F.4th ---, 2024 WL 5113204 (5th Cir. Dec. 16, 2024) (Clement, Engelhardt, and Wilson)**

In *Lindsley*, the Fifth Circuit addressed the proper procedure for resolving inconsistent answers in jury verdicts and highlighted the important role that jury instructions play in assessing those verdicts.

*Lindsley* stemmed from a trial on an employee's discrimination lawsuit against her

[1] "Snap removal" is "jargon for removal prior to service on all defendants." *Tex. Brine Co. v. Am. Arbitration Ass'n, Inc.*, 955 F.3d 482, 485 (5th Cir. 2020).

employer, which implicated claims (among other things) under Title VII and the Equal Pay Act. *Id.* at *1-3. At trial, the jury instructions explained to the jury that they should determine the employee's damages under Title VII "only upon a finding of liability," but the actual question on Title VII damages did not contain conditioning language reflecting that instruction. *Id.* at *3. As a result, in answering the special interrogatories, the jury found that the employer was not liable under Title VII, but still owed the employee more than $25 million in Title VII damages. *Id.* at *1, 4. The district court concluded that the jury had been "confused" by the lack of conditioning language and revised the verdict form to add such language. *Id.* at *4. After the district court sent the revised form back to the jury for further deliberation, the jury found that the employer had violated Title VII and awarded the same damages as before. *Id.* The jury also found for the employer on its affirmative defense to the employee's Equal Pay Act claim, which defeated that claim. *Id.*

The district court entered judgment on the second verdict, and the employer challenged the district court's treatment of both the first and second verdicts. *Id.* at *1, 4-8. The Fifth Circuit held that "the district court did not err in handling the first verdict form, but did err in handling the second verdict form," and remanded the case for a new trial. *Id.* at *1.

**The First Verdict**. The Fifth Circuit rejected the employer's contention that the district court was required to enter judgment in the employer's favor based on the first verdict form. *Id.* at *4. The Court began its assessment by recognizing that while judges have a "duty to harmonize … inconsistent responses" in jury verdicts, "how" judges exercise that duty is governed by Federal Rule of Civil Procedure 49, "which itself turns" on whether the verdict is general or special. *Id.* at *5. The Court explained that the distinguishing feature of a "general" verdict is that it "requires the jury to apply law to fact," whereas a "special" verdict requires "the jury merely [to] resolve[] issues of fact." *Id.*

The jury verdict in *Lindsley*—despite "not explicitly ask[ing] who won"—was a general verdict because "several questions in the verdict form require[d] the jury to apply law to fact." *Id.* As a result, Rule 49(b), which governs general verdicts, applied. *Id.* at *5-6. More specifically, Rule 49(b)(4) applied because: (1) the jury's answers to the special interrogatories on Title VII damages and liability were inconsistent, and (2) the jury's "damages answer conflicted with the general verdict that followed from the jury's no-liability finding." *Id.* at *6. In so holding, the Fifth Circuit reiterated that "verdict forms are considered part of the jury instructions," such that the jury instruction on conditioning (despite the lack of conditioning in the jury question itself) established an inconsistency. *Id.* at *6 & n.5. Further, because Rule 49(b)(4) gives district courts discretion to order either additional deliberation or a new trial, the district court did not abuse its discretion by opting for the former. *Id.* at *6-7.

**The Second Verdict**. The result was not the same for the second verdict. *Id.* at *7. While that verdict did eliminate the inconsistency between the Title VII liability and damages answers, another inconsistency doomed it: the jury answered "yes" to the separate question of whether the employer had proved that the alleged pay disparity resulted from "a factor other than sex." *See id.* at *7-8. That answer, while framed in the verdict in terms of the employee's Equal Pay Act claim, operated as a legal bar to the employee's Title VII claim because the Equal Pay Act's affirmative defenses are incorporated into Title VII. *Id.*

The Fifth Circuit reasoned that even though the Title VII questions "did not include language" about this affirmative defense, the "Title VII liability section" in the jury charge explained that it was not unlawful for employers to pay employees less than others based on "reasons other than the employee's sex." *Id.* at *8. By doing so, the jury charge adequately "describe[d]" the defense in the context of the employee's Title VII claim, which "at a minimum," created jury confusion as to how the "yes" finding on the Equal Pay Act affirmative defense affected their resolution of the Title VII claim. *Id.*

Consequently, the Fifth Circuit concluded that a conflict existed, and that Rule 49(b)(4) again governed resolution of that conflict. *Id.* Under that rule, "the district court had no power to enter judgment" on the second verdict form as received, so a new trial was required. *Id.*