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Did You Know?

JoAnn Storey

A trial court may vacate and "ungrant" a new trial order as long as the case is still pending. *In re Baylor Medical Center at Garland*, 280 S.W.3d 227, 231-32 (Tex. 2008) (orig. proceeding) (overruling *Porter v. Vick*, 888 S.W.2d 789 (Tex. 1994). The Court in *In re Baylor* reasoned that "[a] trial court's plenary jurisdiction gives it not only the authority but the responsibility to review any pre-trial order upon proper motion." *Id.* at 231. The court reaffirmed its holding in *Fruehauf Corp. v. Carrillo*, 848 S.W.2d 83, 84 (Tex. 1993), declaring that any time before a final judgment is entered, "a trial court has power to set aside an order granting a motion for new trial."

The opinion in *Guerrero v. Cardenas*, No. 01-20-00045-CV, 2022 WL 210152, at *5-8 (Tex. App.—Houston [1 Dist.] 2022, pet. denied) illustrates this rule continues to be a bit difficult to apply.

Case Updates from the First Court of Appeals

Lily Hann

The Tort Claims Act does not waive immunity for court costs, so they are not recoverable: *City of Houston v. Corrales*, 2025 WL 676650 (Tex. App.—Houston [1st Dist.] Mar. 4, 2025) (Caughey, J.).

In a matter of first impression, the First Court held that the Tort Claims Act does not authorize a prevailing plaintiff to recover costs.

To reach this conclusion, the Court considered the Act's limited waiver of governmental immunity. The Act "waives a governmental unit's immunity from suit only to the extent the Act waives its immunity from liability." *Id.* at *2.

The Act waives immunity from liability for *damages*, not *costs*. *Id.* at *2-3 (citing Tex. Civ. Prac. & Rem. Code § 101.023, .025). The Act contains "no provision allowing for the recovery of court costs (as opposed to just damages) under the limited waiver" for tort claims. *Id.* *3.

The Court "bolstered" its textual analysis by observing that in other circumstances the Legislature explicitly has allowed for the recovery of costs. *Id.* at *4.

Applying this reasoning, the Court rejected the plaintiff's argument that "court costs are recoverable against a governmental party as a matter of course every time immunity from suit is waived." *Id.* at *5. The Court modified the judgment to delete the award of court costs.

The First Court issued a trio of cases on specific personal jurisdiction. Three cases focused on specific personal jurisdiction do not break significant new ground but are good resources to consult when briefing this issue.

***Costamare, Inc. v. Mamou*, 2025 WL 863779 (Tex. App.—Houston [1st Dist.] Mar. 20, 2025) (Dokupil, J.).**

The First Court rejected three different arguments on specific personal jurisdiction. It reversed the trial court's order denying a defendant's special appearance and rendered judgment dismissing the claims.

The plaintiff raised three theories of specific jurisdiction: (1) commission of a tort in Texas, (2) beneficial ownership, and (3) alter ego. The Court held that each failed.

- **Commission of a tort**. This theory failed because although "'Texas law allows an employee's forum contacts to be imputed to the employer,' the evidence showed that [defendant] has no employees." *Id.* at *8.

- **Beneficial ownership**. "Beneficial ownership is the idea that shareholders are the equitable or beneficial owners of the corporate assets because when the corporation is dissolved and its creditors are satisfied, they hold title to the assets in proportion to their respective shares." *Id.* (citation and quotation marks omitted). The Court rejected beneficial ownership as a ground for specific jurisdiction because the defendant had no employees, and there was no evidence that the defendant, "in its role as equitable or beneficial owner, influenced or directed" the trip where the accident occurred. *Id.* at *9.

- **Alter ego**. "When a plaintiff asserts jurisdiction over a nonresident defendant under an alter-ego theory, the plaintiff has the burden to overcome the presumption of separateness by proving its alter-ego allegation." *Id.* The Court considered four factors: "(1) the amount of the subsidiary's stock owned by the parent corporation; (2) the existence of separate headquarters; (3) the observance of corporate formalities; and (4) the degree of the parent's control over the general policy and administration of the subsidiary." *Id.* Plaintiff failed to prove three of the four factors. The court specifically noted that "common ownership and parental involvement that is typical of an investor's involvement does not support a conclusion that a parent is the alter ego of the subsidiary." *Id.* at *11.

***Auto-Owners Ins. Co. v. Millionder*, 2025 WL 375847 (Tex. App.—Houston [1st Dist.] Feb. 4, 2025) (Rivas-Molloy, J.).**

The First Court again rejected three arguments in favor of specific personal jurisdiction. The Court reversed the trial court's order overruling a special appearance and rendered judgment dismissing the case.

The plaintiff made three arguments in favor of specific jurisdiction that failed on the merits. (Another failed because it was not preserved.)

- **Payment of premiums**. Plaintiff argued that defendant was subject to jurisdiction because it accepted insurance premiums from plaintiff when she lived in Texas. The Court disagreed. It held that "the making of payments in Texas is not sufficient to establish minimum contacts." *Id.* *8 (citation omitted). "A plaintiff's unilateral activity in carrying out the terms of a contract is insufficient to establish minimum contacts giving rise to specific jurisdiction." *Id.* (quotation marks and citation omitted).

- **Issuing insurance policy to a Texas resident**. This argument failed on the facts. The defendant issued the policy to plaintiff when she was a Florida resident. Regardless, "the mere sale of a product to a Texas resident will not generally suffice to confer specific jurisdiction upon our courts. Instead, the facts alleged must indicate that the seller intended to serve the Texas market." *Id.* *10.

- **Defending previous litigation in Texas**. The Court held that "[b]ecause specific jurisdiction contemplates a substantial connection between the nonresident defendant's contacts and the operative facts of the litigation at issue, this can only be an argument in support of general jurisdiction, which is based on the defendant's 'continuous and systematic' contacts with the forum." *Id.* at *11. It then rejected this as a basis for general jurisdiction. Defendant was not subject to general jurisdiction "by virtue of . . . having defended other unrelated cases in Harris County." *Id.*

***Adams v. Tort Network, LLC*, 2025 WL 836631 (Tex. App.—Houston [1st Dist.] Mar. 18, 2025, no pet. h.) (Rivas-Molloy, J.).**

The First Court affirmed a defendant's special appearance where the trial court lacked specific jurisdiction.

The core of the plaintiff's argument was that the defendant was subject to specific jurisdiction because it contracted with a Texas entity and received payment from it under a contract. The Court rejected this argument.

- **Contracting with a Texas entity and receiving payments from it**. "It is well-settled that a nonresident defendant's actions in contracting with a Texas entity and receiving payments from Texas under the contract are insufficient in and of themselves to confer personal jurisdiction over the nonresident defendant, especially when as here, the contract calls for performance outside the forum state." *Id.* at *10.

The Court also held that even if the contracts and related payments were "purposeful contacts" they were not "substantially connected to the operative facts of the litigation or form the basis of their causes of action." *Id.* at *11. The alleged harm, and associated activities, occurred in Louisiana, not Texas.

Case Updates from the Fourteenth Court of Appeals

Eleanor Mason

***Lloyd's Syndicate 1967 v. Baylor Coll. of Med.*, No. 14-22-00925-CV, 2025 WL 309722 (Tex. App.—Houston [14th Dist.] Jan. 28, 2025, pet. filed) (Wise, J.).**

In *Lloyd's Syndicate 1967*, the Fourteenth Court of Appeals held that the presence of the COVID-19 virus on Baylor College of Medicine's insured property did not constitute "direct physical loss of or damage to" the property as necessary to recover under Baylor's insurance policy issued by appellants.

During the underlying jury trial, Baylor presented evidence that the COVID-19 virus adhered to hospital surfaces via droplets. The virus droplets made the property less inhabitable and more expensive to maintain, requiring measures like disinfectants, cleaners, filters, and Plexiglass barriers. The evidence also showed that the virus droplets would evaporate on their own or were "easily wipe-able and cleanable"; thus, after a period of time, the property would no longer be damaged. The jury returned a verdict finding that the COVID-19 virus caused direct physical loss of or damage to Baylor's property and the trial court signed a judgment awarding Baylor approximately $12 million in damages.

Appellants challenged this finding on appeal. The court began its analysis by citing to other jurisdictions that had considered the issue and held that potential coverage for "physical" loss of or damage to property generally required a "tangible alteration or deprivation of property." *Id.* at *5. These courts uniformly held that the virus did not cause physical losses or damage, reasoning that that the virus droplets can be removed with cleaning, do not pose long-term risks to the property, and do not constitute damage to the property itself. *See id.* at *6 (collecting cases). The court also pointed out that Baylor did not assert that the additional cleaning caused any physical loss or damage, nor was evidence presented showing that any property was discarded because of the COVID-19 virus.

"Striving for uniformity with other jurisdictions that have applied identical or very similar policy language," the court concluded that the evidence was legally insufficient to support the jury's finding that the COVID-19 virus caused physical loss of or damage to Baylor's property. The court reversed the trial court's judgment and rendered a judgment that Baylor take nothing.

***Sanchez v. City of Houston*, No. 14-22-00667-CV, 2025 WL 271313 (Tex. App.—Houston [14th Dist.] Jan. 23, 2025, no pet. h.) (Hart, J.).**

The Fourteenth Court of Appeals in *Sanchez* analyzed what constitutes "civil disobedience" as necessary to fall within an exception to the waiver of governmental immunity under the Texas Tort Claims Act ("TTCA").

Melissa Sanchez was attending a protest in downtown Houston following the death of George Floyd when she was struck by a police officer riding a horse. Sanchez sued the City of Houston, alleging that the officer "recklessly charged into" her with his horse. The City sought summary judgment on Sanchez's claims and argued that her suit was excepted from the TTCA's waiver of immunity because her injuries arose out of or in connection with an act arising out of a riot or civil disobedience. *See id.* at *1 (citing Tex. Civ. Prac. & Rem. Code Ann. § 101.057(1)). The trial court granted the City's motion and Sanchez appealed.

The definition of "civil disobedience" was a question of first impression for the court. Drawing from Black's Law and Merriam Webster's Dictionaries, the court held that "civil disobedience" as used in the TTCA refers to "a collective, public, nonviolent breach of the law done in support of a cause against the government, including those that seek concessions or question a set of laws." *Id.* at *4.

The evidence showed that the protest Sanchez was attending when she was injured fell within this definition of "civil disobedience." When Sanchez was injured, City officers (including the officer that allegedly struck Sanchez with his horse) were acting in response to a protest "aimed at bringing about a change against governmental policy as it relates to law enforcement's use of force." *Id.* at *6.

The court rejected Sanchez's contention that the exception did not apply to her claims because "she herself was not engaged in civil disobedience." *Id.* Reasoning that the exception did not hinge on an individual-by-individual inquiry, the court held that "the statute applies based on whether the complained-of actions were in response to civil disobedience." *Id.*

The court affirmed the trial court's summary judgment.

***Garza v. Escamilla*, No. 14-23-00271-CV, 2025 WL 677013 (Tex. App.—Houston [14th Dist.] Mar. 4, 2025, no pet. h.) (Christopher, C.J.).**

In *Garza*, the Fourteenth Court of Appeals provided guidance regarding the evidence necessary to sustain a jury's damage assessments for future physical pain and future physical impairment following a minor car crash.

Defendant rear-ended Plaintiff's vehicle; evidence at trial showed Defendant was likely traveling less than 20 miles per hour at the time of the accident. Plaintiff developed neck and back pain and received care from a chiropractor and pain management doctor for about ten months after the accident. Plaintiff did not receive any formal care for her injuries after that point. Plaintiff sued Defendant and a jury trial was held approximately five years after the accident. Defendant stipulated to liability and the jury returned a verdict assessing $530,000 in damages, including $200,000 for future physical pain and $200,000 for future physical impairment.

On appeal, the court undertook a bifurcated analysis examining whether factually sufficient evidence supported both the *existence* and the *amounts* of damages assessed for these categories.

The court concluded that factually sufficient evidence supported the existence of damages for Plaintiff's future pain: Plaintiff's chiropractor testified that she would likely have pain in the future and Plaintiff said she was in pain at the time of trial. Even though Plaintiff had not sought formal medical treatment in the four years prior to trial, this did not render the jury's finding clearly wrong and manifestly unjust.

The court also concluded that factually sufficient evidence supported the jury's future physical impairment finding: Plaintiff said she could no longer engage in outdoor activities like hiking, walking, and exercising, and was not able to enjoy as much time with her grandchildren. No controverting evidence was presented on this issue.

With respect to damages, Plaintiff's counsel suggested to the jury a simple calculation to value Plaintiff's future pain and future physical impairment: $16 per day for the next 25 years for a total of $146,000. The jury increased that amount to $200,000 for both categories. Although the reasons for those increases were unknown, the record "support[ed] at least two plausible hypotheses." *Id*. at *7. First, there was testimony that Plaintiff's medical condition could worsen over time. Second, evidence in the record suggested Plaintiff could live longer than 25 years. Noting that noneconomic damages are not amenable to calculation with "precise mathematical precision," the court concluded the evidence regarding "the nature, duration, and severity" of Plaintiff's injuries was factually sufficient to support the $200,000 assessed for her future physical pain and future physical impairment.

Case Updates from the Fifteenth Court of Appeals

Grant Martinez

Clarifying the Fifteenth Court's non-exclusive jurisdiction: *Kelley v. Homminga*, 706 S.W.3d 829 (Tex. 2025) (per curiam).

The Fifteenth Court has exclusive intermediate appellate and original jurisdiction over three categories of cases. *See* Tex. Gov't Code §§ 22.220(d), 22.221(a), (c-1), 25A.007(a). But what about its non-exclusive jurisdiction? The Government Code provides that "each court of appeals has appellate jurisdiction of all civil cases within its district . . . ." *Id.* § 22.220(a). The Fifteenth Court's district "is composed of all counties in this state." *Id.* § 22.201(p).

So, could *any* civil appeal be heard in the Fifteenth Court? No, as the Supreme Court held in *Kelley v. Homminga*, 706 S.W.3d 829 (Tex. 2025) (per curiam). There, defendants in cases that were not subject to the Fifteenth Court's exclusive jurisdiction nevertheless noticed their civil appeals to the Fifteenth Court. Plaintiffs moved to transfer to the regional courts of appeals for their counties. The motions were ultimately forwarded to the Supreme Court. *Id.* at 830-31; Tex. R. App. P. 27a.

Relying on context to ascertain the relevant statutes' "fair meaning"—the Supreme Court's "interpretive North Star"—the Court concluded that "several textual clues indicate" that the Legislature did not intend "to grant every civil appellant the option of litigating in the Fifteenth Court." *Id.* at 832. Those included the fact that the Fifteenth Court would only have three justices for its first three years of operation and the prohibition on transferring out any cases "properly filed" in the Fifteenth Court. *Id.* at 832-33. Over 5,000 civil appeals are filed every year. If any civil appeal was "properly filed" in the Fifteenth Court, and the Supreme Court could not transfer out such cases, then a three-justice court would get overwhelmed with ordinary civil appeals instead of serving as the specialized court it was designed to be. *Id.* at 832-34.

The Supreme Court held "that the relevant statutes authorize the Fifteenth Court to hear (1) appeals and writs within the court's exclusive intermediate appellate jurisdiction, and (2) appeals we transfer into the court to equalize the courts of appeals' dockets." *Id.* at 830, 834. Anything outside those categories is outside the Fifteenth Court's jurisdiction. *Id.*

The same day it issued *Kelley*, the Supreme Court promulgated corresponding changes to the rule governing transfers to and from the Fifteenth Court. *See* Order, Misc. Docket No. 25–9015 (Tex. Mar. 12, 2025) (modifying Tex. R. App. P. 27a).

Removal and remand from the business court. In a pair of opinions by Chief Justice Brister, the Fifteenth Court considered a decision by the business court to remand a case which had been removed from the local trial court.

Can remand orders be appealed? No, as the court held in *ETC Field Servs., LLC v. Tema Oil & Gas Co.*, 2025 WL 582317 (Tex. App.—Austin [15th Dist.] Feb. 21, 2025, no pet.). The court applied the familiar rule that, absent statutory authorization, appellate courts generally only have jurisdiction over appeals from a final judgment. *Id.* at *1. An order does not qualify as a final judgment unless it (1) disposes of all remaining parties and claims, or (2) contains unequivocal finality language that expressly disposes of all claims and parties. *Id.* And the remand order did not dispose of any parties or claims, nor did it include any finality language. So, the order was not a final judgment and the court lacked jurisdiction over the appeal.

Can remand orders be successfully challenged through mandamus? Sometimes, as the court indicated in the companion case *In re ETC Field Servs., LLC*, 2025 WL 582320 (Tex. App.—Austin [15th Dist.] Feb. 21, 2025, orig. proceeding). The appellant in the case above also filed a mandamus petition challenging the remand order. The Fifteenth Court took the opportunity to "briefly address when mandamus review might be available" in that court. *Id.* at *3.

Basically, the court explained that the normal mandamus considerations for an adequate appellate remedy will apply—the "careful balance of the case-specific benefits and detriments of delaying or interrupting a particular proceeding." *Id.* at *4 (citation omitted). For example, removal "of qualifying cases to the business court is a statutory right that must be respected," but "appellate review of *every* order granting or denying remand would add" unproductive expense and delay to litigation. *Id.* The court observed that "occasional mandamus review" will permit case-specific benefits and helpful development of the law without undue burdens and interference in every case. *Id.*

Can cases filed before September 1, 2024, be removed to the business court? No, as the court held in the mandamus case. The bill creating the business courts and the right to removal says "changes in law made by this Act apply to civil actions *commenced* on or after September 1, 2024." *Id.* at *1 (citation omitted). "Because removal to the business court does not 'commence' a new civil action but simply transfers an existing one, [the court held] the new removal statute does not apply, and the business court did not err by remanding." *Id.*

Jurisdiction over *qui tam* actions in which the State has not intervened: *In re Sanofi-Aventis U.S. LLC*, 2025 WL 920111, at *2 (Tex. App.—Austin [15th Dist.] Mar. 27, 2025, orig. proceeding) (Field, J.).

The Government Code gives the Fifteenth Court exclusive intermediate appellate jurisdiction over "matters brought by or against the state." Tex. Gov't Code § 22.220(d). As a result, Texas courts are now confronting questions of first impression of which parties qualify as "the state."

One such question involves *qui tam* cases, where a private party brings suit on the government's behalf. The State has the option to intervene, but need not do so. *Sanofi-Aventis*, 2025 WL 920111, at *2. In this mandamus proceeding, the State had declined to intervene in a *qui tam* suit, and the real party in interest contended that the Fifteenth Court consequently lacked jurisdiction.

The Fifteenth Court held that "a *qui tam* action qualifies as a suit by the State." *Id.* at *3. First, it explained that the State, even if it does not intervene, retains the ability to control the litigation at any point and receives most of the proceeds from the litigation. *Id.* at *2.

Next, it observed that, under the relevant statute, a private person bringing a *qui tam* suit does so on behalf of themselves and the State. *Id.* at *3. As a result, "a private person acts on behalf of the State and not as an individual litigant in the traditional sense." *Id.*

Additionally, the Fifteenth Court concluded it was "absurd" that the test for its jurisdiction could depend on the State's intervention, which could fluctuate over the course of litigation, even though the subject matter of the suit was not changing. *Id.*

Finally, the Legislature had intended for the Fifteenth Court to have statewide jurisdiction "for a range of cases that implicate the State's interests," and *qui tam* cases fell within that range. *Id.* (quoting *In re Dallas Cnty.*, 697 S.W.3d 142, 146 (Tex. 2024)). Thus, the Fifteenth Court concluded that it had exclusive intermediate appellate jurisdiction over *qui tam* cases.

Case Updates from the Fifth Circuit

Stephani Michel

***Osborne v. Belton*, No. 23-30829, --- F.4th ---, 2025 WL 750348 (5th Cir. Mar. 10, 2025) (Chief Judge Elrod and Judges Oldham and Wilson)**

In *Osborne*, the Fifth Circuit addressed multiple procedural questions regarding appellate review of post-judgment motions.

The district court granted summary judgment for the plaintiff–tenants on various claims against their former landlord. *Id.* at *1. Almost a year later, the landlord timely moved to set the judgment aside under Rule 60(b). *Id.* The district court denied that motion, and, 28 days later, the landlord timely moved to reconsider that denial under Rule 59(e). *Id.* The district court denied that motion, too, and the landlord appealed, stating in his notice of appeal that he was appealing from the order denying his Rule 59(e) motion. *Id.* at *1-2.

The landlord's notice of appeal posed three procedural questions for the Fifth Circuit: (1) what decisions were encompassed by the notice, (2) was the notice timely as to all those decisions, and (3) were those decisions "otherwise reviewable" under 28 U.S.C. § 1291? *Id.* at *2-4.

Scope of the notice. The Fifth Circuit held that the notice of appeal encompassed all three of the district court's rulings—the summary-judgment order, the Rule 60(b) order, and the Rule 59(e) order. *Id.* at *2-3. The court reasoned that a notice designating an appeal from an order disposing of a post-judgment motion encompasses not only the "underlying judgment" but also "any order disposing of a post-judgment motion prior to the specific post-judgment order designated" in the notice of appeal. *Id.* The Court reasoned that result was mandated by Federal Rules of Appellate Procedure 3(c)(5) and 3(c)(6), as well as the principle that notices of appeal should be interpreted "relatively liberally." *Id.* (internal quotations and citations omitted).

Timeliness. Even so, the Fifth Circuit held that the notice was timely only as to the Rule 59(e) and Rule 60(b) orders. *Id.* at *3-4. That holding turned on Federal Rule of Appellate Procedure 4(a)(4)(A), which allows a party to "reset" the default 30-day clock for filing a notice of appeal by, for instance, filing a Rule 59 or 60 motion within 28 days after entry of judgment. *See id.* at *3.

That rule did not "reset" the clock for appealing the summary-judgment order because, while the landlord timely filed a Rule 60(b) motion to set that order aside, he did not file the motion "within the time allowed for filing a motion under Rule 59" (*i.e.*, within 28 days of the summary-judgment order) as required by Rule 4(a)(4)(A). *See id.* The rule did, reset the clock for appealing the Rule 60(b) order, however, because the

landlord had filed his Rule 59(e) motion (seeking reconsideration of the Rule 60(b) order) within the 28-day deadline. *Id.* Consequently, by filing the notice of appeal within 30 days of the Rule 59(e) order, the landlord timely appealed both that order *and* the earlier Rule 60(b) order. *Id.* at *3-4.

Jurisdiction. The Court nevertheless concluded that it could properly review only the Rule 60(b) order. *Id.* at *4. The Court reasoned that "[a]n order denying a Rule 60(b) motion" is a "final decision" that it has jurisdiction over pursuant to 28 U.S.C. § 1291. *Id.* Conversely, an order denying a Rule 59(e) motion is not such a "final decision" because, under Supreme Court precedent, that order "merges with the prior determination"—here, the Rule 60(b) order. *Id.* (internal quotations and citations omitted).

***Silverthorne Seismic, LLC v. Sterling Seismic Services, Ltd.*, 125 F.4th 593 (5th Cir. 2025) (Judges Smith and Clement; Dissent by Judge Higginson)**

In *Silverthorne Seismic*, the Fifth Circuit clarified what constitutes a "controlling question of law" for purposes of seeking an interlocutory appeal under 28 U.S.C. § 1292(b).

The plaintiff sued the defendant for misappropriation of trade secrets, seeking to recover a "reasonable royalty" under the applicable statute. *Id.* at 597. Before trial, the district court entered an order setting forth the standard for calculating a "reasonable royalty." *Id.* On the plaintiff's motion, the district court certified the order for interlocutory appeal under Section 1292(b), and an administrative panel of the Fifth Circuit granted leave to appeal. *Id.*

The merits panel, however, held that leave to appeal had been "imprudently granted" and remanded the case. *Id.* at 598, 602. The Court did so primarily based on its conclusion that the district court's order did not present a "controlling question of law," as required by Section 1292(b). *Id.* at 598-602. The Court reasoned that to be a "controlling question of law," a legal question's "resolution must materially affect the outcome of litigation in the district court." *Id.* at 598 (internal quotations and citations omitted). The Court explained that while a legal question "need not . . . terminate an action" to be "controlling," the "effect" of its resolution "must be immediate and cannot depend on a party's ability to prove additional facts." *Id.* at 598-99 (cleaned up).

Applying that framework, the Court held that the district court's order on damages did not present a controlling question of law because its resolution "would have no immediate impact on the course of the litigation." *Id.* at 600 (internal quotations and citations omitted). The plaintiff had not yet established liability (and by extension, its entitlement to damages), so the effect of resolving the damages issue "would be contingent on the rest of the plaintiff's case" and possibly irrelevant. *Id.* at 599-600.

The case would "proceed to trial regardless of whether [the Court] weigh[ed] in," so an interlocutory appeal was improper. *Id.* at 599-602.

Judge Higginson dissented. He opined that the majority's decision was inconsistent with precedent and the broad "discretion" afforded to appellate courts under Section 1292(b). *Id.* at 603-04 (Higginson, J., dissenting). He characterized a question of law as "an abstract legal issue that the court of appeals can decide quickly and cleanly without hunting through the record," and reiterated that such questions need not be "dispositive" to be "controlling." *Id.* at 604-05 (cleaned up). He argued that the district court's order presented a statutory interpretation issue that was appropriate for interlocutory review, and that the Court should "finish what [it] started" when the motions panel granted leave to appeal "and render a decision." *Id.* at 604-07.

***Pie Development, LLC v. Pie Carrier Holdings, Inc.*, 128 F.4th 657 (5th Cir. 2025) (*per curiam*) (Judges Higginbotham, Willett, and Ho)**

In *Pie Development*, the Fifth Circuit addressed a novel scenario where a dismissal without prejudice can have res judicata effect.

The plaintiff sued several defendants for misappropriation of trade secrets, civil conspiracy, and more. *Id.* at 660. On the defendants' motion, the district court dismissed the claims without prejudice and ordered the plaintiff to file an amended complaint within 30 days. *Id.* The plaintiff did not, opting instead to appeal the dismissal to the Fifth Circuit. *Id.* While that appeal was pending, the plaintiff filed a second suit against other parties in the district court. *Id.* The Fifth Circuit then affirmed the district court's ruling in the initial suit and denied the plaintiff's alternative request for leave to file an amended complaint in that suit. *Id.* Seeking a workaround, the plaintiff amended its complaint in the *second* suit to add the defendants from the initial suit, reasserting the dismissed claims against them. *Id.* On the defendants' motion, the district court dismissed those claims based on res judicata. *Id.* at 661.

The Fifth Circuit affirmed, clarifying two points regarding res judicata. *Id.* at 661-63.

First, the Court clarified that district courts may address res judicata at the motion to dismiss stage—even *sua sponte*—" where all of the relevant facts are contained in the record ... and all are uncontroverted." *Id.* at 661 (internal quotations and citations omitted). That is so regardless of whether the plaintiff "challenge[s] the defendant's failure to plead res judicata as an affirmative defense." *Id.* at 661-62. When, as in *Pie Development*, "all relevant data and legal records are before the court, the demands of comity, continuity in the law, and essential justice *mandate* judicial invocation of the principles of res judicata." *Id.* at 662 (internal quotations and citations omitted).

Second, the Court clarified that although a dismissal without prejudice generally does not constitute a "final judgment on the merits" for res judicata purposes, an exception exists when a plaintiff "declin[es] the opportunity to amend the complaint" and instead appeals the dismissal. *Id.* at 662-63. That action "converts" the dismissal without prejudice "to a dismissal *with* prejudice and constitutes a final judgment on the merits for res judicata purposes." *Id.* While the plaintiff in such instances may not technically have received a ruling "on the merits of its claims," res judicata is appropriate because the plaintiff "slept on its rights to receive [such a ruling] by choosing not to amend its complaint at the district court level" and "*failed to assert the arguments when* [*it*] *should have done so*," that is, "when the district court provided the opportunity to amend". *Id.* at 663 (cleaned up).