CASE UPDATES

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Did You Know?

JoAnn Storey

If a party files a general denial in the trial court, that pleading puts a plaintiff to his or her proof on all issues, including liability; its effect extends to contesting liability in the event of remand on appeal. *Estrada v. Dillon*, 44 S.W.3d 558, 562 (Tex. 2001) (holding court of appeals erred in remanding case for new trial solely on the damages issue when defendants initially contested liability in the trial court, but did not challenge liability post-judgment or on appeal).

Case Updates from the First Court of Appeals

Lily Hann

***VCC, LLC v. Allied World Specialty Ins. Co.*, No. 1-24-00599-CV, 2025 WL 1225117 (Tex. App.—Houston [1st Dist.] Apr. 28, 2025, pet. filed) (mem. op.) (per curiam).**

The First Court held a permissive interlocutory appeal is not appropriate when the issues raised can be resolved by established law, even if the trial court made an "erroneous ruling."

Civil Practice and Remedies Code section 51.014(d) allows a permissive interlocutory appeal where "(1) the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion; and (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Id.* at *4 (quoting Civ. Prac. & Rem. Code § 51.014(d)).

Examining the first prong of the test, the Court held that the appellant failed to establish that "substantial grounds for difference of opinion exist" because "the law is settled as to both questions." *Id.* at *5. Neither the trial court's "long[ing] for 'new' authorities" nor its "erroneous ruling" were sufficient to change the outcome. *Id.* at *6.

Justice Caughey and Justice Morgan separately concurred. Justice Caughey highlighted an odd consequence of the statutory language: "[W]hen a trial court deviates from binding, settled precedent as to a controlling legal question, that decision is so wrong that it is insulated from a permissive appeal. Yet, a decision that is less clearly wrong could meet Texas's standard for a faster appeal." *Id.* *8 (Caughey, J., concurring). Justice Morgan picked up on the same issue. He observed that it "might seem peculiar to deny permission to appeal an interlocutory order because a trial court's ruling runs afoul of settled Texas law," but opined that "this is not a bad thing." *Id.* *10 (Morgan, J., concurring).

***Thomas Craig Constr., Inc. v. Park Square Condo. Owner's Ass'n*, No. 1-22-00918-CV2025 WL 1759012 (Tex. App.—Houston [1st Dist.] June 26, 2025, no pet.) (mem. op.) (Gunn, J.).**

The issue in this appeal was whether the appellant's conduct during three years of litigation waived the right to arbitrate. The First Court held that appellant waived the right by substantially invoking the judicial process. The court noted that "prejudice" may no longer be a necessary element of the waiver inquiry.

The court applied the "traditional" standard for an implied waiver of arbitration based on a party's conduct: the party seeking to establish waiver must show that "(1) the party moving to compel arbitration substantially invoked the judicial process in a manner inconsistent with the right to compel arbitration and (2) this inconsistent conduct

caused the nonmoving party to suffer detriment or prejudice." *Id.* at *6 (citations omitted). "Whether a party waives its right to arbitration by substantially invoking the judicial process depends on the totality of the circumstances." *Id.*

The court set out and walked through "a multitude of non-exclusive factors." *Id.* Specifically, the court relied on: (1) appellant's 35-month delay in moving to compel arbitration, despite being aware of the arbitration provision; (2) appellant's extensive discovery requests, which far exceeded what would have been permitted in arbitration; (3) appellant's assertion of affirmative claims for relief in the trial court and request for judicial rulings on the merits; and (4) the costs spent on litigation.

On the second factor, prejudice, the court noted that it is uncertain whether a showing of prejudice is still required in Federal Arbitration Act cases. *Id.* at *14. In 2022, the U.S. Supreme Court rejected the prejudice requirement for cases in federal court, and "the Texas Supreme Court has worked hard to keep state and federal law consistent." *Id.* The First Court left the question for "another day" because, in this case, "prejudice plainly exist[ed]. *Id.* at *15.

The Court therefore affirmed the order denying the motion to compel arbitration.

***Lippert Components, Inc. v. Williams*, No. 1-22-00501-CV, 2025 WL 1256624 (Tex. App.—Houston [1st Dist.] May 1, 2025, no pet. h.) (Guiney, J.).**

In this case, the court considered whether a parent company owed a duty to ensure workplace safety at its subsidiary's facility. The court held that there was "no more than a scintilla of evidence" that the parent company "exercised control with respect to the specific aspect of safety that led to [the plaintiff's] injury necessary to impose a duty." *Id.* at *15. The opinion offers a good summary and synthesis of precedent on the sometimes-complicated duty element of a negligence claim.

The bar for holding a parent company liable for a workplace injury is quite high. "Parent corporations generally have no duty to control their subsidiaries." *Id.* at *11. "Only corporations that have the right to control or actually control safety and security policies of the workplace have a duty to the workers to maintain a safe workplace." *Id.* at *11. Where "a plaintiff alleges negligence in maintaining a safe workplace, the plaintiff must show that the party it asserts had a duty to provide a safe workplace had actual control or a right of control over *the specific aspect* of the safety and security of the premises that led to the plaintiff's injury." *Id.* (citation omitted) (emphasis added).

The court held that the plaintiff had not carried his burden to prove that the parent company exercised the requisite level of control, stressing that "[e]vidence of a parent company's general commitment to workplace safety" is insufficient.

The plaintiff had pointed to the parent company's quarterly safety audits and issuance of a safety manual. But the subsidiary had retained responsibility for day-to-day operations, including safety training and equipment decisions.

Accordingly, the court rendered a take-nothing judgment on plaintiff's claims against the parent company.

Case Updates from the Fourteenth Court of Appeals

Eleanor Mason

***Blanco v. Barton*, 715 S.W.3d 433 (Tex. App.—Houston [14th Dist.] 2025, no pet.) (en banc) (McLaughlin, J.).**

In *Blanco*, the en banc Fourteenth Court of Appeals held a jury is free to disbelieve expert testimony regarding the cause and extent of soft-tissue injuries sustained in a low-speed vehicle accident.

The parties were traveling in stop-and-go traffic on Interstate 10 when the defendant rear-ended the plaintiffs' vehicle. No injuries were reported to the police, but the plaintiffs sought treatment a week later for neck and back pain. The jury found the parties equally negligent in causing the accident and concluded that the plaintiffs suffered no compensable injuries. The plaintiffs appealed, arguing that the jury's failure to award any damages was against the great weight and preponderance of the evidence.

The en banc court disagreed. The court noted that a prior panel opinion had held that in a similar low-speed car accident with soft-tissue injures, the jury was not free to disbelieve the uncontradicted testimony of a treating physician regarding causation and injuries. Concluding this opinion "was out of step with this court's precedent and Texas jurisprudence," the court disapproved of the opinion to the extent it held the jury was not free to make credibility determinations of expert testimony generally and, specifically, with respect to soft tissue injuries. *Id*. at 437. Rather, when a party alleges injuries of a primarily subjective nature, for which there is no directly observable or objective evidence, "a fact issue is created which must be determined solely by the jury." *Id*. at 436.

Here, the jury heard the plaintiffs' testimony that they did not have lower back pain before their car accident and the extent of the treatments received for their injuries. Two of the plaintiffs' health-care providers provided similar testimony. But, in this context, the jury was also free to consider "[t]he nature of the accident, the nature of the injuries, and the [plaintiffs'] credibility issues." *Id.* at 439. Given these considerations, the jury's conclusion that the plaintiffs suffered no compensable injuries was not against the great weight and preponderance of the evidence.

***Smith v. Al Ross Luxury Homes LLC*, 720 S.W.3d 149 (Tex. App.—Houston [14th Dist.] 2025, no pet.) (Jewell, J.).**

In *Smith*, the Fourteenth Court of Appeals reiterated a well-established legal precept: whether or not parties are bound by an arbitration agreement is a question for the courts.

The Smiths and Al Ross entered into a home remodeling contract that contained an arbitration agreement. After a dispute arose, the parties signed a mediated settlement agreement ("MSA") in which they declared "null and void" the original contract containing the arbitration agreement. A dispute arose with respect to the MSA, and the Smiths sought to compel arbitration based on the original contract. The trial court denied the motion and the Smiths appealed, arguing that the original contract delegated all decisions regarding the arbitrability of disputes to the arbitrator.

The court summarized the long line of legal precedent holding that "courts, not arbitrators, must decide the fundamental question whether parties are bound by an arbitration agreement." *Id.* at 153. The court reasoned that concluding otherwise here could lead to an untenable situation, in which the arbitrator could ultimately conclude the original contract was null and void, thus divesting the arbitrator of any authority altogether to decide the issue.

Turning to the issue of arbitrability, the court noted that the MSA made no mention of arbitration but did state the original contract was "null and void." Rejecting the Smiths' contention that the arbitration agreement was severable from the remainder of the original contract, the court concluded that "one may not reasonably interpret the MSA's broad release provision as excepting or preserving" the arbitration agreement. Nor was the arbitration agreement saved by a provision stating that it would survive "the termination or repudiation" of the original contract. The original contract was not "terminated"; rather, it was rendered null and void and, accordingly, was superseded and replaced by the MSA.

Therefore, the trial court did not err in denying the Smiths' motion to compel arbitration.

***Nationstar Mortgage, LLC d/b/a Mr. Cooper v. Linicam Investments, LLC*, No. 14-24-00734-CV, 2025 WL 2165643 ((Tex. App.—Houston [14th Dist.] July 31, 2025, pet. filed) (Boatman, J.).**

In *Nationstar Mortgage*, the Fourteenth Court of Appeals delineated the standards underpinning its decision to reverse a judgment in its entirety rather than as to only a single defendant.

Linicam sued Nationstar and Federal National Mortgage Association ("Fannie Mae"), seeking a declaration that it was the owner of a piece of residential property. The trial court granted Nationstar's summary judgment motion and Linicam proceeded to a bench trial against Fannie Mae. After the bench trial, the trial court rendered final judgment in Linicam's favor on its claims against both Nationstar and Fannie Mae—revisiting issues it had previously determined in Nationstar's favor.

The court concluded this was error, noting that a trial court cannot set aside a partial summary judgment after the close of evidence if it precludes a party from "presenting

its case on the issues previously decided." *Id*. at *1. That is exactly what happened here: the trial court set aside the summary judgment in Nationstar's favor without affording Nationstar notice or the opportunity to relitigate the issue.

But the appropriate remedy would not be limited to the judgment against Nationstar; rather, the court reversed and remanded the judgment as to both Nationstar and Fannie Mae. First, the court noted that the parties' rights were interwoven and Linicam's limitations argument (on which the trial court based its judgment) applied to both parties. Second, a remand is also appropriate when "the record was not fully developed below." *Id*. at *2. Here, had Nationstar been afforded an opportunity to address the disputed issues at trial, "the evidence presented may well have been different." *Id*.

Case Updates from the Fifteenth Court of Appeals

Grant Martinez

Clarifying the business court's jurisdiction over new pleadings filed in lawsuits started before Sept. 2024: *In re Kimco Developers, Inc.* and *In re Durant.*

Can new claims in a case filed before September 1, 2024 get your suit into business court? No. Generally, the business court's jurisdiction extends only extends to "civil actions commenced on or after September 1, 2024." Act of May 25, 2023, 88th Leg., R.S., ch. 380, § 8. In a pair of cases decided the same day, Chief Justice Brister clarified that pleadings adding new parties or new claims will not "suffice to get a case commenced before September 2024 into the Business Court." *In re Kimco Developers, Inc.*, No. 15-25-00025-CV, 2025 WL 1841149 (Tex. App.—Austin [15th Dist.] July 3, 2025, orig. proceeding); *In re Durant*, No. 15-25-00019-CV, 2025 WL 1853340 (Tex. App.—Austin [15th Dist.] July 3, 2025, orig. proceeding).

In both cases, the lawsuits had been filed before September 1, 2024. The parties filed new pleadings after September 1, 2024, adding new defendants on claims that, in a newly filed lawsuit, would have brought the cases within the business court's jurisdiction. *See Kimco*, 2025 WL 1841149, at *1 (suing publicly traded company); *Durant*, 2025 WL 1853340, at *1 (adding derivative claims); *see* Tex. Gov't Code § 25A.004(b)-(c). In both cases, defendants removed to the business court, and the business court remanded.

The defendants in both cases filed petitions for mandamus to challenge the remand orders, relying on *In re ETC Field Services, LLC*, 707 S.W.3d 924 (Tex. App.—Austin [15th Dist.] 2025, orig. proceeding) (permitting challenges to remand orders to sometimes proceed via mandamus).

Applying its previous decision in *ETC*, the Fifteenth Court denied both mandamus petitions. In *Kimco*, the court explained that a suit is "commenced" only once: "An amended petition by definition supersedes a previous filing, even when it adds a new defendant, including a publicly traded company, and so it cannot commence a civil action because one has already been commenced." *Kimco*, 2025 WL 1841149, at *1-2 (citing *ETC*, 707 S.W.3d at 926-27; *S&P Consulting Eng'rs, PLLC v. Baker,* 334 S.W.3d 390, 398 (Tex. App.—Austin 2011, no pet.)).

In *Durant*, the Fifteenth Court explained that an "action" refers to the entire lawsuit, not an individual claim. 2025 WL 1853340, at *2. Because the term was not defined, the court used its ordinary meaning. *Id.* The dictionary defines "action" to mean a "lawsuit," and the Supreme Court of Texas specifically has held that *action* refers to "an entire lawsuit or cause or proceeding, not to discrete 'claims' or 'causes of action'

asserted within a suit, cause, or proceeding." *Id.* (quoting *Black's Law Dictionary*; *Office of the Att'y Gen. v. C.W.H.*, 531 S.W.3d 178, 183 (Tex. 2017)).

In both cases, the court explained that the Legislature's use of different terms in different statutes indicated its intent for them to have different meanings. *Id.* (contrasting "action" and "claim"); *Kimco*, 2025 WL 1841149, at *1 (contrasting "commenced" and "filed").

The court also noted that the Legislature was aware of *ETC* when it recently amended the business court's jurisdiction and did not disturb it. Rather "than abrogate it, the Legislature created a work-around when everyone is able to agree." *Id.* (citing Act of June 1, 2025, 89th Leg., R.S., H.B. 40, § 56, sec. 25A.021(a)). So agreement of the parties and permission of the business court can get an older case into the business court, but an amended pleading cannot.

Clarifying the Fifteenth Court's jurisdiction over civil suits by or against river authorities: *Baumgardner v. Brazos River Auth.*, 714 S.W.3d 597 (Tex. 2025).

Does a river authority qualify as an "agency in the executive branch" under the Fifteenth Court's jurisdictional statute? No. In *Baumgardner*, the Brazos River Authority secured a permanent injunction involving the wonderfully named Possum Kingdom Lake. *Id.* at 600. On appeal, the Tenth and Fifteenth Courts disagreed over whether the action fell within the Fifteenth Court's exclusive intermediate jurisdiction and the disagreement reached the Supreme Court of Texas. *Id.* at 600-01. Interestingly, the sending of the disagreement to the Supreme Court was not under Rule 27a—which was specifically designed for such disputes about the Fifteenth Court's jurisdiction—but under the procedures set forth in *Miles v. Ford Motor Co.*, 914 S.W.2d 135, 137 n.2 (Tex. 1995).

The Supreme Court concluded "that river authorities are *not* part of the executive branch of the state government for purposes of" the Fifteenth Court's jurisdictional statute. *Id.* at 602. It based that conclusion on several sources of statutory meaning: the ordinary meaning of the statutory text, the structure of the Texas Constitution, the structure and contents of the river authorities' governing statutes, Supreme Court precedent, and the structure and context of the Fifteenth Court's jurisdictional statute. *Id.* at 601-05.

After reviewing each of those guides, the Supreme Court held that a river authority was not an "agency in the executive branch" and therefore the Fifteenth Court lacked jurisdiction. *Id.* at 605.

Case Updates from the Fifth Circuit

Stephani Michel

***Abraham Watkins Nichols Agosto Aziz & Stogner v. Festeryga*, 138 F.4th 252 (5th Cir. 2025) (en banc)**

Forty-five years ago, the Fifth Circuit, in *In re Weaver*, 610 F.2d 335 (5th Cir. 1980), held that it lacked appellate jurisdiction over a district court order remanding a case to state court based on a defendant's waiver of its removal right. *Id.* at 337. In *Abraham Watkins Nichols Agosto Aziz & Stogner v. Festeryga*, the en banc court "unweave[d] *Weaver*." 138 F.4th at 254.

In *Festeryga*, after the defendant removed the case to federal court, the district court granted the plaintiff's motion to remand, holding that the defendant had "waived his removal rights" by subsequently participating in the state court action. *Id.* at 254-55. Under *Weaver*, such a remand order was "jurisdictional" and "immune from review" under 28 U.S.C. § 1447. *Id.* at 255 (internal quotations and citations omitted). Bound by *Weaver*, the panel held it lacked appellate jurisdiction. *Id.*

The Fifth Circuit granted rehearing en banc. *Id.* On rehearing, the court noted that Section 1447(d) precludes appellate review of remand orders based only on: (1) "a lack of subject-matter jurisdiction," or (2) "a defect in the removal process." *Id.* at 255-56. A remand order based on "any other ground"—including waiver—is subject to appellate review. *Id.* at 256.

Such an order is not based on "jurisdiction" because waiver because arises from common law (rather than "the Constitution and Congress") and does not "bear the hallmarks of jurisdiction doctrine" (*e.g.*, it can be waived and "need not be" raised sua sponte). *Id.* at 257-60. Such an order is also not based on a removal defect because that encompasses only a defendant's "fail[ure] to satisfy one of the express statutory conditions for removal." *Id.* at 260-63. Appellate jurisdiction thus exists over waiver-based remand orders. *Id.* at 254, 263.

Judge Ho, joined by Judge Higginson, concurred to emphasize the separate point that the en banc court does not have an "absolute duty to hear and decide every issue presented in an appeal." *Id.* at 263-64 (internal quotations and citations omitted). Instead, the en banc court—as it did in *Festeryga*—may "leave non-en banc worthy issues for the original panel to address." *Id.* at 263.

***Deep S. Ctr. for Env't Justice v. EPA*, 138 F.4th 310 (5th Cir. 2025) (Judges Graves, Engelhardt, and Oldham)**

In *Deep South Center for Environmental Justice*, the Fifth Circuit discussed the requisite "injury in fact" for organizational and associational standing.[1] *Id.* at 317-26.

Several environmental organization—including Deep South Center for Environmental Justice ("Deep South"), Healthy Gulf, and Alliance for Affordable Energy ("AAE")—petitioned for review of a final rule by the EPA that granted Louisiana "primary enforcement authority" over certain wells. *Id.* at 313-16. The Fifth Circuit held that the organizations all lacked standing to challenge the rule. *Id.* at 316-26.

Organizational Standing. Deep South asserted it suffered an injury "on [its] own behalf" as an organization because it had been (and was still being) forced to divert resources from its "direct service programming" to challenge the EPA's rule. *Id.* at 317-20 (internal quotations and citations omitted). The Fifth Circuit disagreed. *Id.*

Addressing the alleged "past" injuries, the Court cited *Food & Drug Administration v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 394 (2024) to hold that Deep South's expenditures were insufficient because "[a]n organizational plaintiff 'cannot spend its way into standing simply by expending money to gather information and advocate against the defendant's action.'" *Id.* at 317-18 (quoting *Alliance*, 602 U.S. at 394). As to the alleged "future" injuries, the Court held that "Article III requires 'direct interference'" with an organization's "core business activities" to establish standing, such that merely "'divert[ing] … resources in response to a defendant's actions'" is insufficient. *Id.* at 318-19 (quoting *Allian*ce, 602 U.S. at 395). Because the EPA's actions did not prevent Deep South from carrying out its "'core business activities' of developing [environmental] research and policies," it had no cognizable injury. *Id.* at 319-21.

Associational Standing. The Court also held that Healthy Gulf and AAE lacked standing to sue on behalf of their members because they failed to identify any member with an "imminent" injury in fact. *Id.* at 320-26. Instead, all the alleged injuries were for "some indefinite future time." *Id.* at 326 (internal quotations and citations omitted). Even for the "simplest and least attenuated" alleged injury—*i.e.*, that consumers would ultimately bear the economic cost of wells that were built and abandoned in the form of "higher utility bills"—the organizations could not prove that "all" of the links in the "chain of possibilities" leading to that injury were "certainly impending." *Id.* at 321-22 (internal quotations and citations omitted). The Court held further that the alleged injuries were plagued by necessary "guesswork" and "attenuation." *Id.*

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[1] In another significant "standing" decision, the Fifth Circuit recently joined the First, Third, Sixth, and Ninth Circuits in adopting the "class certification approach" for evaluating standing at the class-certification stage. *Wilson v. Centene Mgmt. Co.*, No. 24-50044, 2025 WL 1981287, at *1, 4-7 (5th Cir. July 17, 2025).

Beyond that were causation issues. Because "the same wells could be built … with or without the challenged EPA action," the organizations could not "trace any alleged injuries" to the EPA's action. *Id.* at 326. That independently barred organizational and associational standing. *Id.*

Judge Graves concurred in the judgment only. *Id.* at 327. He agreed that all the organizations lacked standing, but disagreed that *Alliance* required "direct interference," and opined that the majority had improperly heightened the standard for "Article III standing's injury-in-fact requirement." *Id.*

***Carter v. Local 556, Transp. Workers Union of Am.*, 138 F.4th 164 (5th Cir. 2025) (Judges Clement, Engelhardt, and Wilson)**

In *Carter*, the Fifth Circuit addressed the effect of a change in "controlling precedent" that occurs "after judgment but before an appellate resolution is entered."[2] *Id.* at 193-94.

An employee sued her former employer for wrongful termination, alleging, among other things, a claim for failure to accommodate her religious practice. *Id.* at 177, 181-84. At the time of trial, the employer had to prove, as a defense to that claim, that accommodating the employee would pose an "undue hardship" because it "imposed more than a *de minimis* cost on the employer." *Id.* at 189-91 (internal quotations and citations omitted).

Despite that "low" bar for the employer, the jury found for the employee. *Id.* at 181, 191. Then, while the case was on appeal, the Supreme Court raised the bar for employers, holding that they must now show "'substantial increased costs in relation to the conduct of [their] particular business.'" *Id.* at 192-93 (quoting *Groff v. DeJoy*, 600 U.S. 447, 468-71 (2023)). The employer argued that change in law required a new trial, but the Fifth Circuit rejected its argument. *Id.* at 189, 193-94.

The Court observed that while its "general" practice was to "remand for a new trial to give parties the opportunity to present evidence relevant to th[e] new standard," that practice derives from the Court's "concern" with "fairness." *Id.* at 193 (cleaned up). Thus, when new law "*lowers* the bar for the non-prevailing party," fairness dictates affording that party a new trial. *Id.* But when—as in *Carter*—the new law *raises* the bar for the non-prevailing party, neither "precedent" nor "equity" requires granting a new trial because it "belies reason to conclude" that the party could prevail under the new, "more exacting" standard at a new trial. *Id.* at 193-94.

[2] This opinion also contains helpful guidance on preserving sufficiency-of-the-evidence arguments and challenging injunctions for vagueness and overbreadth. *Id.* at 195-96, 203-06.