Houston Bar Association
APPELLATE LAWYER



*March 2026*

Houston Bar Association
APPELLATE LAWYER

*March 2026*

**Table of Contents**

Houston Bar Association
APPELLATE LAWYER

*March 2026*

## EDITORIAL BOARD

Houston Bar Association
APPELLATE LAWYER

*March 2026*

## COLUMNISTS

**Lily Hann** is an attorney at Yetter Coleman LLP, where she focuses on appeals in federal and state courts. Lily graduated from the University of Michigan Law School and clerked for Judge Robert N. Chatigny of the U.S. District Court for the District of Connecticut and Justice Jane N. Bland of the Supreme Court of Texas.

**Grant B. Martinez** is a partner at Yetter Coleman, where he focuses on high-stakes appeals in commercial and government litigation. Formerly focused on a trial-level practice, Grant still enjoys supporting trial teams in all aspects of their work. He is graduate of Yale Law School, an alumnus of Cravath, Swaine & Moore, and a former clerk for U.S. Circuit Judge Diarmuid F. O'Scannlain of the Ninth Circuit.

**Eleanor Mason** attended Rice University and the University of Texas School of Law. She practiced at Bracewell LLP before joining the Fourteenth Court of Appeals as a staff attorney in 2017.

**Stephani Michel** is an appellate associate at Tillotson Johnson & Patton, where her practice focuses on state and federal appeals, as well as assisting trial teams with all stages of trial. Stephani graduated from the University of Texas School of Law and clerked for the Honorable Gregg J. Costa of the United States Court of Appeals for the Fifth Circuit. Prior to becoming a lawyer, Stephani worked as a Certified Public Accountant in the oil and gas industry.

**JoAnn Storey** focuses on appellate law and has been Board Certified in Appellate Law by the Texas Board of Legal Specialization since 1987. She is the past chair of the State Bar of Texas Appellate Section and past chair of the Houston Bar Association's Appellate Practice Section. Ms. Storey was a long-time member of the Texas Board of Legal Specialization's Civil Appellate Law Examination Committee and Civil Appellate Law Advisory Commission. She is a former adjunct professor at the University of Texas School of Law who taught appellate advocacy.

**J. Mark Little** is a partner at Baker Botts, where he focuses on appellate and regulatory litigation in federal and state courts across the country. Mark received his law degree from The University of Texas School of Law and served as a law clerk to the Honorable J. Harvie Wilkinson III of the United States Court of Appeals for the Fourth Circuit.

# Should an *En Banc* Motion Be Filed? A Concurring Opinion in the First Court of Appeals gives Some Guidance.

*Nicholas Bruno*

To paraphrase the fictional Judge Chamberlain Haller of *My Cousin Vinny*, an appellate lawyer who loses an appeal is not a "unique position." Justice David Gunn, joined by Chief Justice Terry Adams and Justice Jennifer Caughey, recently authored an opinion all but telling the appellate bar that the First Court of Appeals is "not about to revamp the entire" TRAPs to accommodate such a lawyer's *en banc* petition. Reviewing this opinion will be eminently useful to appellate practitioners.

Before turning to the opinion itself, the rule controlling the *en banc* procedure should be familiar to every appellate practitioner (and is worth recounting):

> A party may file a motion for en banc reconsideration as a separate motion, with or without filing a motion for rehearing. The motion must be filed within the time prescribed by Rule 49.1 for filing a motion for rehearing. The motion should address the standard for en banc consideration in Rule 41.2(c). No response to a motion for en banc reconsideration need be filed unless the court so requests. While the court has plenary power, a majority of the en banc court may, on its own initiative, order en banc reconsideration of a decision. If a majority orders reconsideration, the judgment or order does not become final, and the case will be resubmitted to the court for en banc review and disposition. The court may dispose of the case with or without rebriefing and oral argument.

Tex. R. App. P. 49.5.

And every appellate practitioner should be well-aware that *en banc* review is "disfavored":

> *En Banc Consideration Disfavored*. En banc consideration of a case is not favored and should not be ordered unless necessary to secure or maintain uniformity of the court's decisions or unless extraordinary circumstances require en banc consideration.

Tex. R. App. P. 49.5.

Justice Gunn recently concurred in the denial of an *en banc* petition in *Campbell v. State*, No. 01-23-00389-CR, Slip Op. (Tex. App.—Houston [1st Dist.] Dec. 16, 2025,

pet. filed). The opinion made enough of an impression among the criminal law bar that a group of *amici curiae* took the unusual step of filing a "Motion to Publish" because, according to this group of appellate practitioners, "as a general rule, because opinions are designated unpublished when 'the issues are settled,' they are rarely read by the vast majority of appellate practitioners[.]" *Campbell v. State*, No. 01-23-00389-CR, *Amicus* Mot. to Publish at 2-3 (Dec. 22, 2025). This group of *amici* asserted that this "concurring opinion does not deal with settled issues, but deals with a matter of significant import to both the bench and bar, to wit: when to seek reconsideration of an opinion by the *en banc* Court of Appeals, rather than filing (1) a motion for rehearing pointing out to the particular panel why the submitting lawyer(s) believe the panel decision to be incorrect, or (2) a petition to the Court of Criminal Appeals seeking discretionary review of the panel decision." *Id.* The First Court shortly thereafter granted the motion to publish. *See Campbell v. State*, No. 01-23-00389-CR, Order of Jan. 6, 2026.

For largely the same reasons given by the *amici*, this author suggests that a review of this concurring opinion would be useful to the civil appellate bar as well.

It is noteworthy that this concurring opinion praised the motion that was filed by the party who lost the appeal. "The motion is respectful and well written; it cites the correct standard; and it offers clear legal arguments in making its case." *Campbell*, Slip Op. at 7. Nonetheless, the motion was unsuccessful—it appears for reasons not all that interesting to the civil bar. What is of interest is that the concurring justices offered "a few comments" to guide practitioners in navigating the preparation of *en banc* petitions.

***First***, the concurring opinion suggested that practitioners "start with a simple statement of no more than a page, presented without argument and standing apart from the body of the argument, just to hit the standard head-on." *Id.* at 2. Taking the motion in that case, it suggested that an author include a "Rule 41 Statement" that looked something like the following:

**RULE 41 STATEMENT**

> The criteria in Tex. R. App. P. 41.2(c) focus on the following questions to evaluate the case's fitness for en banc reconsideration:
>
> 1. Does the motion allege a conflict in the Court's decisions (and if so, what decisions conflict)?
>
> 2. Does it allege any extraordinary circumstances (and if so, what circumstances qualify)?

The answers here are as follows:

1. The motion alleges a conflict within the Court's decisional law. The Panel opinion conflicts with the Court's prior decision in *Baskerville v. Moriarty* and *In re Baker Street* on [*state the relevant holdings*].

2. The motion alleges extraordinary circumstances. The circumstances at hand qualify as extraordinary because [*state the circumstances succinctly*].

*Id.* at 3.

(As a side note, of course, such a section is not mandated by the TRAPs. But practitioners would be well served to heed this advice when a third of the members of a Court have strongly suggested that such a section would be useful to their decision-making.)

***Second***, the concurring opinion gives guidance as to when to seek panel rehearing versus *en banc* review. "[A] conflict in a court's own decisional law is a classic ground for an *en banc* motion, while the motion probably has no hope if it contends that the panel misapplied a correctly-stated rule to a given record." *Id.* at 4. "Seeking *en banc* review for mere misapplication of known law generally constitutes a road to nowhere." *Id.* at 5. While "one could always imagine error so egregious that the full court would perceive extraordinary circumstances," "caution is appropriate." *Id.*

***Third***, the concurring opinion tries to give some guidance as to when circumstances—other than a conflict in the Court's own case law—warrants *en banc* review. It gives some specific examples—"[p]erhaps one must look at the stakes in the case at hand, the recurring nature of the issue, the views of authorities from the academy or other jurisdictions"—but then ends with the indefinite catch-all phrase "and the like." *Id.* But whatever the "and the like" means, the concurring opinion is clear that "it normally will not include error correction." *Id.*; *see also Maritime Overseas Corp. v. Ellis*, 977 S.W.2d 536, 536-37 (Tex. 1996) (Hecht, J., dissenting).

The remainder of the opinion is useful to practitioners in giving an example of the application of this guidance. One of the issues in the case before the Court was the interpretation of North Carolina law. That was not fit for an *en banc* motion: "whatever North Carolina law may say, and whatever the panel may have done in applying it here, that issue seems unlikely to recur in Texas and does not fit my conception of extraordinary circumstances." *Id.* at 6. While the other issue—a "complaint about the 'wrong standard' applied to an issue about the jury charge"—looked more promising ("causes me to read more closely"), a closer inspection also revealed it was not fit for an *en banc* motion (at least in the concurring justices' view).

This, in part, because "the motion does not point to any conflict with our own decisions [and] when read as a whole, the argument seems to be that the panel took the controlling precedents . . . and misapplied them to this record." *Id.* at 6-7.

*En banc* review is rarely successful. Practitioners who seek such review would be well-served to review this concurring opinion's recommendations in seeking the "disfavored" *en banc* procedure. *See* Tex. R. App. P. 49.5.

## Did You Know?

*JoAnn Storey*

As we all know, "[g]enerality in motions for new trial must be avoided because objections phrased in general terms shall not be considered by the court." *In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P.*, 290 S.W.3d 204, 210 (Tex. 2009).

Beware that at least one court has held that a complaint raised in a motion for new trial that is "not sufficiently specific to make the trial court aware of the complaint" does not preserve error. *Baker v. Baker*, No. 04-09-00006-CV, 2009 WL 3382242, at *5 (Tex. App.— San Antonio 2009, pet. denied) (mem. op.).

To avoid the possibility of waiver, phrase the complaint in your motion for new trial with as much specificity as possible.

# Case Updates from the First Court of Appeals

*Lily Hann*

***In re Webber, LLC*, No. 01-25-00563-CV, 2025 WL 2369402 (Tex. App.—Houston [1st Dist.] Aug. 15, 2025, orig. proceeding) (Caughey, J.)**

The First Court held that the trial court's failure to rule on a summary judgment motion within a reasonable time denied the defendant its statutory right to an interlocutory appeal and conditionally granted mandamus relief.

The defendant-relator moved for summary judgment based on an immunity defense that is subject to interlocutory appeal. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 97.002, 51.014(a)(17). A year later, the trial court held a hearing on the motion. Nearly 11 months after that, the trial court still had not issued a decision. The defendant reminded the court of the pending summary judgment motion, but the court did not act. With trial approaching, the defendant filed a mandamus petition.

The First Court held that the trial court abused its discretion and the defendant lacked an adequate remedy at law.

The trial court abused its discretion "by failing to rule within a reasonable time on a summary-judgment motion presenting an issue subject to interlocutory appeal." 2025 WL 2369402, at *2. The Court explained: "It is especially unreasonable to fail or refuse to rule under circumstances that effectively force the parties to trial, thereby depriving them of their statutory right to an interlocutory appeal of the issue that is the subject of the unresolved motion." *Id.* at *3.

Next, the Court held that the defendant lacked an adequate remedy at law because "the failure to rule on a summary-judgment motion asserting immunity under section 97.002 deprives the relator of a statutory right to an interlocutory appeal." *Id.* If defendant were "forced to go to trial without a ruling on this summary-judgment motion, it will have lost its substantive right to interlocutory review of this immunity defense." *Id.*

Note that for summary judgments filed after September 1, 2025, a new statutory provision requires courts to rule on the motion within set time period (depending on the circumstances). Tex. Gov't Code § 23.303. Still, this case will remain helpful if a trial court does not comply with that law or declines to rule on a motion that likewise is subject to an interlocutory appeal.

***Somer v. OakBend Med. Ctr.*, No. 01-24-00187-CV, 2025 WL 2446015 (Tex. App.—Houston [1st Dist.] Aug. 26, 2025, no pet.) (Gunn, J.)**

This appeal presented two issues, one of first impression: whether a nonprofit corporation that is a subsidiary of a municipal hospital authority is entitled to governmental immunity (1) as an "arm of the State" or (2) derivatively based on the immunity of its parent. The court held that the subsidiary is not an arm of the State and, even assuming a derivative-immunity doctrine exists, the subsidiary failed to prove entitlement to it.

Plaintiff sued OakBend Medical Center (the "Center") and OakBend Medical Group (the "Group") for claims related to a ransomware attack. The Center is a municipal hospital authority. *See* Tex. Health & Safety Code § 262.003(a). It created the Group as a "nonprofit corporation . . . to own or operate all or part of one or more ancillary health care facilities." *Id.* § 262.037(a).

Both the Center and Group filed pleas to the jurisdiction. The Center argued that it had governmental immunity because it was a political subdivision of the state. The Group argued that even though it was *not* a political subdivision of the state, it was entitled to governmental immunity because it was controlled and funded by the Center. The trial court granted the pleas. The plaintiff appealed. As to the Center, Plaintiff did not dispute that it was a municipally created hospital authority that enjoyed governmental immunity, but she contended immunity was waived. As to the Group, Plaintiff disputed that the parent's immunity passes down to the subsidiary.

The First Court affirmed immunity for the Center but reversed for the Group. This summary focuses on the Court's analysis of the Group's immunity, which presented an issue of first impression. In determining whether the Group was entitled to governmental immunity, the Court considered two theories: (1) "arm of the State" immunity, and (2) derivative immunity.

***"Arm of the State" Immunity.*** The Court held that the Group was not entitled to arm of the state immunity. The Court concluded that the Legislature did not intend to grant the Group the "nature, purposes, and powers" of an arm of state government. It thoroughly surveyed recent Texas Supreme Court precedent on this issue and reasoned that the Group, a nonprofit corporation created by a hospital authority, is more similar to an economic development corporation (not immune) than open-enrollment charter schools or ERCOT (immune). *Id.* at *6-8. The Legislature restricted the corporation's powers, prohibited the "sponsoring entity" from delegating sovereign power, and provided for relatively little government oversight of the corporation. Extending immunity to the Group would not protect the public treasury or preserve the separation of powers. *Id.* at *9.

***Derivative Immunity.*** The Court assumed without deciding that derivative immunity exists in Texas but concluded that the Group did not establish its entitlement to immunity. "The inquiry focuses on whether the governmental entity had sufficient control over the actions of the entity seeking derivative immunity such that the actions were 'effectively attributable' to the governmental entity or whether the other entity had some discretion." *Id.* at *10. The answer to that question was no: the evidence did not show that the Center exercised control over the Group related to the complained-of conduct.

# Case Updates from the Fourteenth Court of Appeals

*Eleanor Mason*

***BK Park, LTD v. WBRE, LLC*, 725 S.W.3d 462 (Tex. App.—Houston [14th Dist.] 2025, no pet. h.) (McLaughlin, J.)**

In *BK Park, LTD*, the Fourteenth Court of Appeals held that the purchaser of a tract of land was not bound by a restrictive covenant in a neighboring tract's deed.

Appellant BK Park purchased a tract of land and began negotiations for the construction and operation of a Wendy's restaurant. During negotiations, BK Park discovered that the deed to a neighboring tract (owned by appellee Whataburger) imposed a restrictive covenant prohibiting adjacent properties from leasing or selling to a restaurant "engaged in the sale of prepared hamburger products." 725 S.W.3d at 465. BK Park sued Whataburger, seeking a declaration regarding the restrictive covenant's enforceability. The parties filed cross motions for summary judgment and the trial court entered judgement in Whataburger's favor.

The court of appeals reversed, concluding that BK Park did not have notice of the restrictive covenant as necessary to render it enforceable as a covenant running with the land. As the court explained, a purchaser is bound by the terms of instruments in his chain of title, which includes "[t]he successive conveyances, commencing with the patent from the government, each being a perfect conveyance of the title down to and including the conveyance to the present holder." *Id.* at 467 (internal quotation omitted). But, in contrast, a deed or instrument lying outside a purchaser's chain of title "imports no notice." *Id.* at 468. Because the restaurant restriction here did not appear in BK Park's chain of title, BK Park did not have constructive notice of it.

Nor did BK Park's deed impose the duty to make a reasonable inquiry into instruments outside its chain of title. The deed contained generic recitations making the conveyance subject to anything filed in the applicable chain of title; but these generic recitations were insufficient to put BK Park on notice of restrictions in a neighboring tract's deed. The court also rejected Whataburger's argument that the mere filing of the restriction in the Harris County property records sufficed to provide notice. Were it to hold otherwise, the court reasoned, "it would significantly change the rights and obligations of purchasers and title examinations." *Id.*

The court reversed the judgment of the trial court and remanded with instructions that the trial court render a declaratory judgment in BK Park's favor.

***Jones v. Port Freeport*, 722 S.W.3d 754 (Tex. App.—Houston [14th Dist.] 2025, no pet. h.) (Boatman, J.)**

In *Jones*, the Fourteenth Court of Appeals held that, before a governmental entity may acquire private property via eminent domain, it must plead the property's intended use with sufficient specificity to permit the court to determine if it is indeed a "public use."

Seeking to expand its facilities, Port Freeport filed a petition to condemn neighboring landowners' property. To support its acquisition, the Port alleged that it was seeking to acquire the land for "expansion of [Port] facilities" and "the development of business and industries." The Port did not identify any specific plans for the landowners' property. On appeal, the landowners argued that the Port failed to plead a public use with specificity.

The court agreed. The Texas Constitution prevents the government from taking private property for any reason other than public use. And, when an entity with eminent domain seeks to acquire real property, its petition must state the public use "with specificity." *Id*. at 760. This standard makes sense: "[I]f courts must evaluate whether a use is sufficiently public to justify a condemnation, they must know what the proposed use is." *Id*.

Unadorned assertions of public use do not meet this standard, but that is all that was provided in the Port's petition. Thus, the Port failed to "plead a public use that is specific to these Landowners' property." *Id*.

Nor did the Port cure its failure during discovery. *Id*. at 761. The Port's CEO identified many possible uses for the landowner' property—some of which might satisfy the Constitution's public use mandate and some which might not. But that was insufficient to meet its burden because the court "cannot determine where this taking falls unless we know what use is intended." *Id*.

***Dargin v. Noble Drilling Servs., Inc.*, 725 S.W.3d 749, 2025 WL 3072636 (Tex. App.—Houston [14th Dist.] 2025, no pet. h.) (Wilson, J.)**

The plaintiff in *Dargin* nonsuited his case without prejudice. On appeal, the Fourteenth Court of Appeals held that the trial court erred in granting the defendant's motion to convert the dismissal ***without*** prejudice into a dismissal ***with*** prejudice.

Gerald Dargin sued his employer, Noble Drilling Services, and asserted claims under the Jones Act. The trial court held a hearing on Noble's summary judgment motions but did not rule on them. Shortly after the hearing ended, Dargin filed a notice of nonsuit, nonsuiting his claims against Noble without prejudice. Noble filed a motion to declare Dargin's nonsuit a dismissal with prejudice, asserting that Dargin nonsuited his claims to avoid an imminent adverse ruling by the trial court. The trial court granted the motion and declared Dargin's nonsuit a dismissal with prejudice.

In Texas, the general rule is that plaintiffs may take a nonsuit without prejudice at any time until they introduce all their evidence other than rebuttal evidence. But a nonsuit does not affect the adverse party's right to be heard on a pending claim for affirmative relief or on a request for attorney's fees or costs; similarly, a nonsuit does not affect the adverse party's right to be heard on a motion for sanctions. The court also noted that two of its sister courts of appeals had recently held that a dismissal without prejudice could be properly converted to a dismissal with prejudice as a requested sanction under chapter 10. 725 S.W.3d at 754-55.

But here, none of these factors were in play when Dargin nonsuited his claims: Noble did not have a pending claim for relief, a request for fees, or a motion for sanctions. Moreover, the court noted that it did not find any cases where a trial court had made a similar conversion in analogous circumstances. Therefore, the court held that the trial court erred by converting Dargin's dismissal without prejudice to a dismissal with prejudice.

# Case Updates from the Fifteenth Court of Appeals

*Grant Martinez*

***Kreines v. ES3 Minerals, LLC*, No. 15-25-00027-CV, 2025 WL 3502534 (Tex. App.—15th Dist. Dec. 4, 2025, no pet. h.) (Farris, J.)**

**A case from the Business Court not dealing with jurisdiction!** Until *Kreines*, all Fifteenth Court decisions originating from the Business Court had dealt with jurisdictional issues, like whether a case could be removed there. *Kreines* addressed a temporary injunction that prohibited former employees from selling to certain customers of their former employer. The memorandum opinion addresses many issues that are not specific to the Business Court, so its holdings and reasoning may find their way into opinions of other appellate courts.

**Can courts condition a temporary injunction (or TRO) on the enjoined party's knowledge? No.** The temporary injunction prohibited the former employees from selling to entities with whom they had done business within the two years before their departure. An attached exhibit identified specific entities, but also included "any subsidiaries of those entities that are known to be subsidiaries." *Id.* at *5. The appellants challenged that knowledge requirement as violating Rule 683's specificity requirements.

The Fifteenth Court surveyed "a split of authority in Texas law with respect to whether a court can satisfy Rule 683 by conditioning a temporary injunction's applicability on facts within the restricted party's knowledge in cases involving noncompete agreements that prohibit parties from dealing with a former employer's customers or clients." *Id.* at *5-6 (collecting cases).

It then joined the courts requiring an injunction to specifically name the entities and individuals that are off limits: "Where a prohibition is to be enforced by power of contempt, it is not too much to ask for the court to specifically name those entities and individuals who are the subject of the prohibition. The temporary injunction order fails this specificity requirement with respect to its application to certain 'subsidiaries' of entities on the list[.]" *Id.* at *6.

**Do temporary injunctions require exhaustive exposition of the factual basis for irreparable harm? No.** In *Kreines*, the former employees complained that the injunction did not clearly set forth the reasons for its issuance, as required by Rule 683. *Id.* at *6-7. The order did have some explanation in a few sentences, quoted in the court's opinion, but the appellants complained that the statements were conclusory. *Id.* at *7.

The Fifteenth Court disagreed. It explained that a "conclusory statement is one that expresses a factual inference without providing underlying facts to support that conclusion." *Id.* Here, the order's statement of irreparable harm was supported by *some* underlying facts, making it not conclusory. It held that, even if the temporary injunction's "reasoning could have been more specific, Rule 683 does not require an exhaustive exposition of the factual basis for irreparable harm." *Id.* at *8. So, include some underlying facts in your proposed injunction.

**How large should a temporary injunction bond be? Proportionate to the enjoined party's harm if the injunction were later dissolved.** In *Kreines*, the trial court only imposed a $25,000 bond for the injunction, even though evidence showed the injunction would impair contracts worth $3.6 million. *Id.* at *8. The former employees complained this low bond was not adequate security under Rule 684, which mandates a bond in an amount sufficient to compensate the defendant in the event the injunction is dissolved.

The Fifteenth Court observed that, even though thousands of injunctions each year are issued by Texas courts, "determining [an injunction] bond's adequacy is a notoriously unsettled area of Texas law." *Id.* (collecting cases). Guided by "two big picture points"—(1) that the purpose of an injunction bond is to "protect the defendant from the harm he may sustain as a result of temporary relief granted upon the reduced showing required of the injunction plaintiff, pending full consideration of all issues"; and (2) the bond is mandatory—the court adopted a proportionality standard Justice Young had advocated for in a recent solo opinion. *Id.* at *9.

Considering these guideposts, the Fifteenth Court held "that a bond must be proportionate to the degree of harm that an enjoined party will suffer if the injunction imposed proves to have been unwarranted." *Id.* A "trial court should consider the amount of monetary damages and costs that the defendant may sustain as a result of the injunction." *Id.*

**Enjoined parties bear the evidentiary burden on the amount of harm that the injunction might cause**, the court explained. *Id.* The enjoined party is in the best position to know and offer evidence of such harm.

**Within the range of proportional values, the exact bond amount is committed to the trial court's discretion.** The Fifteenth Court explained that the "proportionality standard would not force a trial court to set the bond at the exact value of the interests claimed by the enjoined party." *Id.* A bond that is "disproportionately lower than the estimated value of the assets or financial interests" would not satisfy the standard. *Id.* Within the range of proportional values, the determination of the amount of the bond "remains within the trial court's sound discretion." *Id.* (quotation marks omitted).

**Lost profits may serve as an important, but not dispositive, measure.** Applying the proportionality standard to the dispute in *Kreines*, the Fifteenth Court held that $25,000 was an abuse of discretion, and no evidence suggested it was proportional. *See id.* at *9-10. Resisting this conclusion, the former employer argued for using only the lost profits as the proper measure of the bond and insisted no evidence established that amount. *Id.* at *10. The court agreed that an "enjoined party's estimated profit losses during the injunction period may be an important consideration in determining an adequate bond amount, but the trial court's decision is not limited to this measure," noting that other appellate courts had not treated lost profits "as a strict standard binding the trial court's decision." *Id.*

In any event, the Fifteenth Court noted that there was evidence of $3.6 million in revenue from contracts interrupted by the injunction, plus evidence of the profit margins associated with the overall business. Whatever the lost profits from the specific contracts impacted, the court held that nothing supported $25,000 as proportional to the harm appellants might suffer as a result of an improper injunction.

As a result, the court reversed the bond determination and remanded to the Business Court for an evidentiary hearing to set a proportionate bond.

# Case Updates from the Fifth Circuit

*Stephani Michel*

***Harmon v. Collier*, 158 F.4th 595 (5th Cir. 2025) (Southwick, J.)**

In *Harmon*, the Fifth Circuit assessed whether a jury's verdict was irreconcilable. *Id.* at 618-21.

*Harmon* arose from a jury trial in an employment-discrimination suit that included claims for discrimination and retaliation under the Rehabilitation Act. *Id.* at 604-06, 614. The verdict form asked the jury "a series of yes-or-no questions as to each defendant and their bases for liability." *Id.* at 619. The jury found, among other things, that the defendants terminated and refused to rehire the plaintiff-employee both "'solely because of' her disability" (*i.e.*, the standard for a discrimination claim under the Rehabilitation Act) and "'but for' her protected activities related to her disability" (*i.e.*, the standard for a retaliation claim under the Rehabilitation Act). *Id.* at 608-09, 619. The defendants contended those answers rendered the verdict "irreconcilable" because the employee's disability could not be the "sole" cause if her protected activities were also a "but for" cause—that is, "adverse employment decisions here cannot be solely because of Harmon's disability *and also* retaliatory." *See id.* at 618-19.

Two members of the Fifth Circuit panel disagreed.[1] *See id.* at 619-21, 625. The principal opinion first concluded that the defendants waived their objection to the alleged inconsistency. *Id.* at 619-20. This conclusion flowed from the determination that the jury's verdict was a "general" (rather than "special") verdict because it asked the jury "to apply the law as stated in the jury instructions to the facts as it found them" and "left nothing for the district judge to do . . . other than resolv[e] any arguments as to defects in the verdict, and finding none, to enter judgment." *Id.* (internal quotations and citations omitted). Because Fifth Circuit precedent requires that objections to "inconsistences between a general verdict and answers to verdict questions" be made "while the jury is still empaneled," and here there was none, the defendants waived their complaint. *Id.* (internal quotations and citations omitted).

The principal opinion next concluded that, even if the defendants' complaint was subject to plain error review, it would still fail for two reasons.[2] *Id.* at 620-21. One, Federal Rule of Civil Procedure 49(b), which addresses the interplay of general verdicts and answers to verdict questions, does not address situations like the one at

[1] Judge Dennis dissented in part on other grounds, criticizing the principal opinion for adopting an argument that the defendants presented for the first time in their "post-argument letter" on appeal. *Id.* at 625-26 (Dennis, J., concurring in part and dissenting in part).

[2] The Court noted that "fail[ure] to address [all] the steps of plain error review on appeal" risks forfeiture. *Id.* at 620 n.14.

issue in *Harmon*, where there is "an alleged irreconcilability between answers to the written interrogatories but not between any of those answers and the general verdict." *Id.* at 621. Two, "[c]oncerns of fairness and judicial economy counsel[ed] against ordering a new trial" because "it would be unfair to force [the employee] to endure a new trial and risk a loss because she was too successful in the first trial." *Id.*

Judge Ho dissented in part, agreeing with the defendants that the verdict was irreconcilable. *Id.* at 627-28 (Ho, J., concurring in part and dissenting in part). He reasoned that, because of the unique causation standards imposed by the Rehabilitation Act, "discrimination and retaliation are mutually exclusive theories." *Id.* at 627. And because the jury found for the employee on both theories, vacatur and a new trial were required. *Id.* at 628. Judge Ho also opined that the verdict was "special," rather than "general," because the "jury return[ed] multiple verdicts to resolve one defendant's liability under different claims." *Id.* at 628 n.1 (internal quotations and citations omitted).

***Washington v. Edwards Lifesciences, LLC*, No. 25-10357, 2025 WL 3092764 (5th Cir. Nov. 5, 2025) (per curiam)**

In *Washington*, the Fifth Circuit addressed limitations on a district court's discretion regarding local and judge-specific rules. *Id.* at *1-4.

There, the district court directed the parties in an employment-discrimination suit to "take note" of a Standing Order that governed the court's "policies and procedures." *Id.* at *1. One court-specific rule in those policies and procedures was that footnotes could contain "only explanatory statements and dicta." *Id.* (internal quotations and citations omitted). The plaintiff unintentionally failed to comply with that rule when the parties cross-moved for summary judgment by using footnotes for almost all of her legal and record citations. *Id.* at *1, 3. Based on that unintentional non-compliance, the district court "declined to consider" the plaintiff's briefing, denied her summary-judgment motion, and granted the defendant's summary-judgment motion. *Id.* at *1-2 (internal quotations and citations omitted).

The Fifth Circuit vacated the resultant judgment and remanded for further consideration. *Id.* at *1, 4. It noted that while district courts and judges have "wide latitude" to craft local rules, they cannot "'enforc[e] . . . a local rule imposing a requirement of form . . . in a way that causes a party to lose any right because of a nonwillful failure to comply.'" *Id.* at *2 (quoting FED. R. CIV. P. 83(a)(2) and citing FED. R. CIV. P. 83(b)) (cleaned up). By "rejecting" the plaintiff's "materials due to a nonwillful failure to comply with a requirement of form," the district court impermissibly stripped the plaintiff of "her Rule 56 rights to seek and defend against summary judgment."[3] *Id.* at *3.

In holding that vacatur was required, the Fifth Circuit emphasized that its decision did not strip district courts of power to enforce their local rules—it just required them to "be judicious in selecting the right tool" in doing so. *Id.* at *3-4. Here, the district court simply abused its discretion by starting with "one of the most drastic sanctions" possible: disregarding the plaintiff's summary-judgment materials outright. *Id.* at *4.

[3] The Fifth Circuit also held that the district court "violated Rule 56(c)(3) by refusing to consider" the materials cited in the plaintiff's briefs. *Id.* at *3 (internal quotations and citations omitted).