Summaries of Some Recent Opinions of the Second Court of Appeals

Updated Through Week of September 12, 2018

NOTICE OF OTHER SECOND COURT REFERENCES

Please visit the "Second Court Update" page on the website, which will have links to the pages on the Second Court's website showing cases set for submission, and opinions recently released, in addition to providing a compilation of summaries of the opinions in some cases issued by the Court. *See* www.stevehayeslaw.com/update.html .

Summaries of Some Recent Opinions

The following summaries concern opinions issued by the Second Court of Appeals in Fort Worth, Texas, in some, but not all, cases. This compilation will not relate to opinions issued prior to January 1, 2009, and will not necessarily include summaries of opinions issued more than a year ago. This compilation contains the most recently released opinions in Part One. The author of this compilation makes no representation as to the significance of the opinions summarized below.

The Second Court of Appeals does not sponsor nor endorse these compilations, nor does it have any input or involvement in this compilation. These summaries set out below come verbatim from the website of the Second Court of Appeals. You can find the summaries, in chronological order, on the Court's website at Case Summaries. On its website, the Court makes the following notation as to the opinion summaries:

> "Summaries are prepared by the court's staff attorneys and law clerks for public information only and reflect his or her interpretation alone of the facts and legal issues. The summaries are not part of the court's opinion in the case and should not be cited to, quoted, or relied upon as the opinion of the court. "

We group the following summaries by subject matter, as discerned from the summaries themselves. Individual opinions may, and in all likelihood do, address other issues not reflected by the subject matter headings below. Within each subject matter, the summaries appear in chronological order, with summaries from most recently issued opinions set forth first.

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Part One. Opinion Summaries by Court Since Previous Posting of This Compilation

Section A. Civil

Disqualification (Parent Child Relationship)

In re P.K., Nos. 02-17-00213-CV, 02-18-00017-CV (Sept. 13, 2018) (Pittman, J., joined by Walker, J., and Charles Bleil (Senior Justice, Retired, Sitting by Assignment)).

Held: Appellee and Appellant divorced in 2005. While that case was pending, Appellee and her family members sued Appellant for various tort claims. The attorneys who represented Appellee and her family members in the tort case, but not the divorce case, worked at the same firm as an attorney who later became the presiding judge of the 16th District Court of Denton County. In 2014, Appellee filed a petition to modify the parent-child relationship in the 16th District Court. Appellant filed a counterpetition, and both parties filed a petition for enforcement. Appellant then moved to disqualify the trial judge on the basis that the previous tort case was the same matter as the modification and enforcement proceedings before the trial court. The presiding judge of the Eighth Administrative Judicial Region denied Appellant's motion to disqualify. Because the previous tort case is not the same matter as the modification and enforcement proceedings, we affirm the denial of the disqualification motion.

Homeowners' Association (Breach of Contract, Declaratory Judgment):

Severs v. Mira Vista Homeowners Ass'n, Inc., No. 02-16-00157-CV (Sept. 6, 2018) (Pittman, J., joined by Meier and Gabriel, JJ.).

Held: In lawsuit brought by homeowners against their HOA and neighbors, we hold that the trial court did not err in granting summary judgment on homeowners' claims against the HOA for breach of declaration of covenants, conditions, and restrictions (CCRs) and other tort claims; the trial court did err in denying the HOA's counterclaim for its reasonable attorney's fees under the CCRs because the HOA was a "prevailing party" in successfully defending and obtaining a take-nothing judgment on the homeowners' claims; and the trial court did not err in denying neighbors' counterclaim for their reasonable attorney's fees under either the CCRs or Uniform Declaratory Judgments Act because the neighbors were not a "prevailing party" following the homeowners' voluntary nonsuit without prejudice when none of the Epps factors were present. Accordingly, we affirm the trial court's judgment in part, reverse in part, and remand solely to determine the HOA's reasonable attorney's fees under the CCRs.

Section B. Criminal Law.

Bail

Ex parte McIntyre, Nos. 02-18-00163-CR, 02-18-00164-CR (Aug. 16, 2018).[1]

Held: In the capital murder case, the trial court did not abuse its discretion by denying Appellant's application for a pretrial writ of habeas corpus and by denying bail under article I, section 11b of the Texas constitution because Appellant was effectively "released on bail pending trial" while he was a juvenile and then violated the conditions of his release, fled, and allegedly committed multiple additional felonies demonstrating his danger to the community. In the Arlington aggravated robbery case, because Texas constitution article I, section 11b does not support the trial court's decision to deny bail and because we decline to apply the "extraordinary circumstances" exception here, we hold that the trial court abused its discretion by denying Appellant's application for a pretrial writ of habeas corpus seeking reasonable bail in the Arlington aggravated robbery case.

[1]Pursuant to Texas Rule of Appellate Procedure 2, the court on its own initiative, for good cause, has suspended the operation of Texas Rule of Appellate Procedure 47.2(a) in this particular appeal

Part Two. Previously Listed Summaries

Section A. Civil Law

Anti-SLAPP

Arbitration

Miller v. Walker, No. 02-17-00035-CV (Feb. 15, 2018) (Meier, J., joined by Walker and Birdwell, JJ.).

Held: The arbitration panel had the authority to award Miller attorneys' fees in light of the parties' submissions requesting attorneys' fees and Walker's failure to advise the panel that it lacked the authority to award Miller attorneys' fees.

Arbitration

Robinson v. Home Owners Mgmt. Enters., Inc., No. 02-16-00380-CV (Apr. 19, 2018) (Kerr, J., joined by Walker and Meier, JJ.).

Held: Because the availability of class-action arbitration is a substantive gateway issue for the trial court, absent clear and unmistakable language delegating the question of class-action arbitration availability to the arbitrator, the trial court—not the arbitrator—determines whether an arbitration agreement authorizes class-action arbitration.

Arbitration:

Doe v. Columbia N. Hills Hosp. Subsidiary, L.P., No. 02-16-00275-CV (Mar. 23, 2017) (Meier, J., joined by Walker, J., and Charles Bleil (Senior Justice, Retired, Sitting by Assignment)).

Held: Doe did not have notice of Appellees' arbitration policy as a matter of law, considering that Appellees posted the policy on their intranet site, informed Doe about the intranet site, and instructed Doe that she was responsible for familiarizing herself with Appellees' "policies" and that Doe acknowledged that she could access Appellees' "policies" on the intranet site and that she had received "orientation" on "Problem solving/Grievance Procedures."

Legoland Discovery Ctr. (Dallas), LLC v. Superior Builders, LLC, No. 02-16-00425-CV (Apr. 27, 2017) (Gabriel, J., joined by Livingston, C.J., and Pittman, J.).

Held: Superior Builders entered into a construction contract with Legoland that included a broad arbitration clause. In Superior Builders' subsequent suit against Legoland and several of Superior Builders' subcontractors, Legoland's compulsory counterclaims, agreement to a scheduling order, settlement efforts regarding the subcontractors, and "basic" discovery did not substantially invoke the judicial process such that Legoland impliedly waived its contractual right to compel arbitration even though Superior Builders' suit was filed twenty-two months before Legoland filed its motion to compel arbitration.

Bankruptcy

Bill of Review

Alaimo v. U.S. Bank Trust Nat'l Ass'n, as Trustee of the SRMOF II 2012-1 Trust, No. 02-16-00123-CV (Aug. 24, 2017) (Sudderth, J., joined by Livingston, C.J., and Gabriel, J.).

Held: A judgment following the granting of a bill of review not only must grant the bill of review but also must adjudicate the original controversy in the bill of review proceeding. The court lacks jurisdiction because (1) the order in the bill of review proceeding fails to dispose of the merits of the underlying controversy between the parties and is therefore neither a final judgment nor an appealable interlocutory order and (2) the trial court lost plenary power over the underlying controversy by the time it granted the bill of review and therefore had no jurisdiction to grant summary judgment on the merits in the underlying controversy in the original cause number instead of in the bill of review proceeding.

> ***Nussbaum v. Builders Bank***, No. 02-14-00304-CV (October 1, 2015) (op. on reh'g) (Walker, J., joined by Livingston, C.J.; Sudderth, J., concurs without opinion).
>
> Held: Nussbaum presented summary judgment evidence that indicated that Builders Bank knew his current address but nonetheless utilized an outdated address in its Rule 239a certificate of defendant's last known address to support its default judgment. Thus, in light of the Texas Supreme Court's recent opinion in Katy Venture, Ltd. v. Cremona Bistro Corp., No. 14-0629, 2015 WL 4497983 (Tex. July 24, 2015), Nussbaum raised a fact issue as to the third bill-of-review element-that the default judgment was rendered unmixed with his own fault or negligence. Accordingly, the trial court erred in granting summary judgment for Builders Bank.

Certificate of Merit

Church Property

The Episcopal Church v. Salazar, No. 02-15-00220-CV (Apr. 5, 2018) (Sudderth, C.J.; Gabriel, J., concurs without opinion).

Held: Based on the determination by the Supreme Court of Texas in Masterson v. Diocese of Nw. Tex., 422 S.W.3d 594, 608 (Tex. 2013), cert. denied, 135 S. Ct. 435 (2014), that the Episcopal Church is a hierarchical church, and based on binding U.S. Supreme Court precedent addressing how to analyze these matters involving a hierarchical church, the group designated by the Episcopal Church as its local affiliate holds equitable title to the property identified in the 1947 deed as held in trust for "the use and benefit of the Protestant Episcopal Church, within the territorial limits of what is now known as the Diocese of Dallas, in the State of Texas," and this property was not adversely possessed by Appellees because their possession did not become adverse until disaffiliation from the Episcopal Church in 2008. The same group affiliated with the Episcopal Church also constitutes the board of trustees of the Corporation of the Episcopal Diocese of Fort Worth because that entity's bylaws and articles of incorporation were amended before the 2008 disaffiliation, at a time when there was only one "body now known as the Episcopal Diocese of Fort Worth" from which board members could be drawn either from lay persons in good standing in a

parish or mission or members of the clergy canonically resident therein. Under Texas law, the Dennis Canon did not impose a trust on diocesan property in favor of the Episcopal Church, and the Corporation holds title to the property identified in the 1950 deed.

Condemnation

State of Tex. v. Speedway Grapevine I, LLC, No. 02-16-00144-CV (Oct. 19, 2017) (Meier, J., joined by Sudderth, C.J., and Kerry FitzGerald (Senior Justice, Retired, Sitting by Assignment)).

Held: High met his burden to establish a valid factual basis to support his opinion that the market value of Speedway's property before the condemnation was just over $5.4 million; McRoberts's damage opinions were neither conclusory nor speculative, nor did they improperly incorporate noncompensable impairment-of-access damages; and the jury's finding that the remainder property sustained damages in the amount of $4,401,028.00 fell within the range of evidence admitted at trial.

Condemnation

Oak Lawn Apartments., Ltd. v. State, No. 02-16-00287-CV (Jan. 11, 2018) (Walker, J., joined by Pittman, J., and Charles Bleil (Senior Justice, Retired, Sitting by Assignment)).

Held: Because the statements in Oak Lawn's "Motion To Withdraw Award Of Special Commissioners" do not constitute a statement of objections to the special commissioners' award, the underlying administrative proceeding was never converted into a judicial proceeding over which we have jurisdiction.

Condemnation

State of Tex. v. Speedway Grapevine I, LLC, No. 02-16-00144-CV (Oct. 19, 2017) (Meier, J., joined by Sudderth, C.J., and Kerry FitzGerald (Senior Justice, Retired, Sitting by Assignment)).

Held: High met his burden to establish a valid factual basis to support his opinion that the market value of Speedway's property before the condemnation was just over $5.4 million; McRoberts's damage opinions were neither conclusory nor speculative, nor did they improperly incorporate noncompensable impairment-of-access damages; and the jury's finding that the remainder property sustained damages in the amount of $4,401,028.00 fell within the range of evidence admitted at trial.

Constructive Trust

Contract/Declaratory Judgment

Compass Bank v. Durant, No. 02-15-00390-CV (Jan. 5, 2017) (Sudderth, J., joined by Meier, J.; Gabriel, J., concurs and dissents with opinion).

Held: The terms of the parties' swap agreement and loan documents are not inconsistent with each other. Therefore, the trial court erred by granting summary judgment for Appellee on his breach of contract and declaratory judgment claims and by declaring that Appellee had the right to prepay the amount due under the note without the payment of any fee under the swap agreement because the plain language of the swap agreement and related loan documents obligated Appellee to pay the

early termination fee. Appellant was not entitled to summary judgment on its cross-motion for summary judgment because Appellee raised a fact issue that precluded summary judgment on his breach of contract claim and Appellant's grounds as presented in its motion regarding Appellee's declaratory judgment claim did not entitle it to summary judgment under Texas law.

Concurrence and Dissent: A fair reading of Compass's summary-judgment motion shows that Compass moved for judgment as a matter of law on Durant's request for declaratory relief on the same grounds it asserted Durant's breach-of-contract claim failed. Therefore, the court should render judgment in Compass's favor on Durant's request for declaratory relief based on the majority's correct interpretation of the parties' unambiguous contract, which prevented the declaration Durant sought.

Contract

Norhill Energy LLC v. McDaniel, No. 02-16-00011-CV (Apr. 13, 2017) (Sudderth, J., joined by Meier J.; Gabriel, J., concurs and dissents with opinion).

Held: Because Appellant failed to demonstrate that its actual damages for breach of contract amounted to $50,000, the trial court did not err by refusing to substitute the jury's $50,000 award for money had and received in place of the $0 award that the jury found for breach of contract. However, the trial court erred by granting judgment notwithstanding the verdict for Appellee on Appellant's money-had-and-received claim when Appellant did not seek to vary the express agreement between the parties via the equitable claim.

Concurrence and Dissent: Because Norhill's claims were covered by the terms of its valid, express contract with McDaniel, Norhill cannot recover under the equitable, quasi-contractual theory of money had and received even though the jury found Norhill was not entitled to damages for breach of contract.

Defamation

Lane v. Phares, No. 02-17-00190-CV (Feb. 15, 2018) (Pittman, J., joined by Sudderth, C.J., and Meier, J.).

Held: Because Lane is a limited-purpose public figure and failed to produce clear and specific evidence that Phares published defamatory statements about her with actual malice, we affirm the trial court's order dismissing her claims under the Texas Citizens Participation Act.

Default Judgment

Garcia v. Ennis, No. 02-17-00282-CV (June 28, 2018) (Meier, J., joined by Pittman & Birdwell, JJ.).

Held: The trial court erred by denying Garcia's motion for summary judgment on her bill-of-review action. The amendment to rule of civil procedure 107(h) eliminating the requirement that the citation be on file for ten days before the trial court grants a default judgment did not otherwise remove the requirement that the citation be on file before a default judgment is granted. And in

determining whether Ennis strictly complied with the rules of civil procedure, the trial court could not have considered a citation that was filed after the trial court had granted the default judgment.

Dismissal

Bedford Internet Office Space v. Tex. Ins. Grp., Inc, No. 02-17-00009-CV (Dec. 21, 2017) (Sudderth, C.J., joined by Kerr and Pittman, JJ.).

Held: The trial court erred by dismissing the Plaintiff's claims under rule 91a on the basis of the statutes of limitations because doing so required the trial court to look beyond the Plaintiff's pleadings and consider whether the defendant raised the affirmative defense of statute of limitations in its pleadings, which is expressly prohibited by the plain language of rule 91a.

Easement

Lindemann Props., Ltd. v. Campbell, No. 02-15-00392-CV (June 22, 2017) (op. on reh'g) (Meier, J., joined by Sudderth, J.; Walker, J., dissents with opinion).

Held: Compelled by decades-old supreme court precedent, and supported by legally and factually sufficient evidence, Campbell's easement for a radio transmission tower did not terminate when he removed the original tower and replaced it with a new one.

Elections

City of Forest Hill, Tex. v. Benson, No. 02-17-00346-CV (July 12, 2018) (Meier, J., joined by Walker, J.; Kerr, J., dissents with opinion).

Held: In determining which election-code provision to apply as a remedy for Benson's incompatible dual roles, the trial court properly rejected the City's arguments that section 141.034 rendered the relief afforded by section 141.033 moot and that section 201.025 applied.

Dissent: Election code section 201.025 and the common-law principles of incompatibility and effective resignation (from which section 201.025 is derived) more logically apply to Benson—who had already been sworn in to both offices—than election code section 141.033, which addresses ballots.

Employment

Bell Helicopter Textron, Inc. v. Burnett, No. 02-16-00489-CV (June 14, 2018) (Charles Bleil (Senior Justice, Retired, Sitting by Assignment) joined by Walker, J.; Pittman, J., dissents with opinion).

Held: In this age-discrimination case, the evidence supports the trial court's findings on liability and damages. The circumstantial evidence is legally and factually sufficient to prove that Bell Helicopter violated chapter 21 of the Texas Labor Code by terminating Burnett's employment because of his age. Furthermore, the trial court did not abuse its discretion by awarding Burnett front pay as an equitable remedy. Finally, the trial court's award of front pay does not qualify as

"compensatory damages" subject to a monetary cap under section 21.2585 of the Texas Labor Code.

Dissent: There is no evidence of any action that occurred after Burnett turned forty that motivated or precipitated his termination. Accordingly, the plain language of the TCHRA cannot be stretched to cover any discriminatory actions that occurred in this case.

Expunction (Restricted Appeal):

Ex parte E.H., No. 02-17-00419-CV (Aug. 16, 2018) (Sudderth, C.J., joined by Pittman and Birdwell, JJ.).

Held: The Department of Public Safety (DPS) failed to meet all of the required elements to pursue a restricted appeal, depriving this court of jurisdiction. Specifically, DPS failed to show error on the face of the record when the applicable version of code of criminal procedure article 55.01 required expunction of E.H.'s arrest records after the court of criminal appeals, in Ex parte Lo, 424 S.W.3d 10 (Tex. Crim. App. 2013), struck down as unconstitutional the statute authorizing E.H.'s indictment on two counts of online solicitation of a minor. When the indictment disappeared as a result of the trial court's grant of habeas corpus relief because of the void statute, so too did the conditions under which E.H. was "confined" under the trial court's deferred adjudication order. The void statute, E.H.'s subsequently granted habeas relief, and the role under the separation of powers that courts play in expunction and in the interpretation of judgments and statutes mandate expunction of E.H.'s arrest record for these offenses despite E.H.'s having pleaded guilty to them.

Family Law

Waldrop v. Waldrop, No. 02-15-00058-CV (June 7, 2018) (en banc) (Walker, J., joined by Gabriel and Kerr, JJ., Rebecca Simmons, J. (Sitting by Assignment), and Birdwell, J., as to Parts I-IV and, except for the disposition, Part V*; Sudderth, C.J., dissents with opinion, joined by Pittman, J., and Lee Ann Dauphinot (Senior Justice, Retired, Sitting by Assignment); Meier, J., concurs with opinion).

Held: Because we hold that the Contractual Maintenance provision in the Waldrops' agreed divorce decree is purely contractual—not spousal maintenance governed by chapter 8 of the family code—and that the language of the Waldrops' Contractual Maintenance provision authorizes the trial court to modify or terminate Kenneth's maintenance obligation by court order based on a change in Kenneth's circumstances affecting his maintenance obligation, we leave it to the trial court's discretion, as did the parties in the Contractual Maintenance Provision, to determine whether Kenneth's maintenance obligation should be terminated or modified and to determine the amount, if any, of a modification.

Dissent: The majority's failure to explain what the "further orders of the court" clause actually means gives the trial court no guidance on remand and instead invites the trial court to decide for itself what standard to apply. Further, the clause itself is illusory at its core because it purports to allow for modification of the contract without a meeting of the minds as to the circumstances that would trigger such a modification.

Concurrence: The Contractual Maintenance provision is purely contractual and can be modified by

further court order absent one of the four specific circumstances contained under paragraph one of the provision, but I would direct the trial court that the standard to apply on remand in arriving at a "further order[] of the court" should be as follows: "Has there been a material change in Kenneth's circumstances that warrants a modification of the contractual maintenance payment terms?"

*Justice Birdwell would affirm the trial court's judgment because Kenneth did not prove a material and substantial change in circumstances justifying further orders of the court, which is the statutory burden the parties incorporated into their Contractual Maintenance Provision.

Fiduciary Duty

Robbins v. Robbins, No. 02-16-00285-CV (May 17, 2018) (Pittman, J., joined by Walker, J.; Meier, J., concurs without opinion).

Held: Appellant's delivery of the warranty deed after the trial court's rendition did not moot this appeal because his words and other actions showed an intent to continue the appeal. Further, Appellant did not have a fiduciary duty to his ex-wife regarding the marital residential property, which the trial court did not characterize in the divorce decree but ordered sold with the net proceeds split evenly between the former spouses. Finally, an award of attorney's fees is not available for a claim of breach of fiduciary duty.

Forcible Detainer

Jimenez v. McGeary, No. 02-17-00085-CV (Jan. 25, 2018) (Kerr, J., joined by Sudderth, C.J., and Gabriel, J.).

Held: This court's conclusion in Norvelle v. PNC Mortgage, 472 S.W.3d 444 (Tex. App.-Fort Worth 2015, no pet.)-that rule 510.3(a)'s requirement that a petition in an eviction case "must be sworn to by the plaintiff" did not defeat the trial court's jurisdiction when a corporate plaintiff's forcible-detainer petition was sworn to and signed by its attorney-extends to eviction cases in which the plaintiff is a natural person. In such a case, a plaintiff's attorney may verify and sign a forcible-detainer petition as the plaintiff's agent. But even if such a verification were defective, it would not defeat the trial court's jurisdiction over the action.

Fraud (Legal and Factual Sufficiency)

Walterscheid v. Walterscheid, No. 02-17-00062-CV (Aug. 2, 2018) (Pittman, J., joined by Sudderth, C.J., and Gabriel, J.).

Held: In this dispute arising out of a cattle investment in which Appellants provided approximately $1 million to Appellee to deliver to a third party who would then take the funds to purchase cattle and raise them for future sales, but who ultimately had no cattle or funds—original investment funds or profits—to return to Appellants even though it was undisputed that Appellee had actually delivered the funds to the third party, we hold that the evidence is factually and legally sufficient to support the trial court's findings of fact and conclusions of law that no enforceable oral contract exists between Appellants and Appellee because of a lack of definite, material terms of repayment. We also hold that the evidence is factually and legally sufficient to support the trial court's finding of no common-law fraud or fraud by nondisclosure and no civil theft. Thus, we affirm the trial

court's final judgment.

Frivolous Lawsuit

Read v. Verboski, No. 02-16-00399-CV (July 6, 2017) (Pittman, J., joined by Sudderth and Kerr, JJ.).

Held: Because Appellant's lawsuit has no arguable basis in law, the trial court did not err by dismissing his suit as frivolous under chapter fourteen of the civil practice and remedies code.

Governmental Immunity

Schmitz v. Denton Cty. Cowboy Church, No. 02-16-00114-CV (Aug. 31, 2017) (Livingston, C.J., joined by Pittman, J.; Gabriel, J., concurs without opinion.).

Held: In this suit for declaratory judgment, injunctive relief, and damages for nuisance injuries, the trial court did not err by dismissing the claims of Schmitz and the other plaintiffs against the Town of Ponder because they did not plead or prove sufficient jurisdictional facts to show that the Town's immunity was waived. However, the trial court erred by granting Denton County Cowboy Church's plea to the jurisdiction as to Schmitz only because he pled and proved—for jurisdictional, not necessarily merits purposes—sufficient facts to show that his claims based on the Church's imminent future use of its property for rodeo events were ripe and that he had suffered a particularized injury.

Governmental Immunity

City of Fort Worth v. Deal, No. 02-17-00413-CV (May 31, 2018) (Meier, J., joined by Sudderth, C.J., and Pittman, J.).

Held: The TTCA's intentional-tort exception bars Deal's claim that her son's death following a high-speed police pursuit and crash was proximately caused by an unknown police officer's negligent deployment of a tire-deflation device.

Tex. Juvenile Justice Dep't v. PHI Inc., No. 02-17-00013-CV, 02-17-00014-CV (Dec. 21, 2017) (Kerr, J., joined by Pittman, J.; Sudderth, C.J., dissents with opinion).

Held: Because Appellant's van was unoccupied and its ignition was off when it rolled into and damaged Appellee's parked helicopter, it was not being operated or used within the meaning of those terms under section 101.021(1)(A) of the Texas Tort Claims Act because a state employee was not actively operating or using the van at the time of the accident.

Dissent: The final act of operating a motor vehicle includes securing it for safe non-operation. Accordingly, the factual dispute as to whether the state employee properly set the brake on the van would preclude the granting of the plea to the jurisdiction because if the facts are as Appellee alleges, the property damage arose from the employee's negligent operation of a motor-driven vehicle.

Town of Shady Shores v. Swanson, No. 02-15-00338-CV (January 18, 2018) (Pittman, J., joined

by Sudderth, C.J., and Kerr, J.).

Held: Because the Town has the burden to negate jurisdiction, it cannot challenge jurisdiction in a no-evidence motion for summary judgment, and therefore the trial court properly denied the Town's no-evidence motion. And because the Town did not negate jurisdiction as to some of Swanson's claims for declaratory and injunctive relief under the Uniform Declaratory Judgment Act based on alleged violations of Texas's Open Meetings Act, the trial court correctly declined to dismiss those claims. However, the Town negated jurisdiction over Swanson's remaining UDJA claims and her free speech claim, and we therefore dismiss those claims.

Baylor Scott & White v. Peyton, No. 02-17-00135-CV (Apr. 19, 2018) (Walker, J., joined by Pittman, J., and Charles Bleil (Senior Justice, Retired, Sitting by Assignment)).

Held: Because Baylor Scott & White a/k/a Baylor Health Care System's (BHCS) affiliation agreement with Decatur Hospital Authority d/b/a Wise Regional Health System (Wise Regional) expressly prohibits BHCS from managing or operating any aspect of Wise Regional, and because BHCS is not a hospital district management contractor that manages or operates Wise Regional, BHCS does not possess governmental immunity from suit under section 285.072 in the underlying negligence action filed by Appellee Kimberly D. Peyton; we therefore dismiss this appeal for lack of jurisdiction.

Guardianship

In re Guardianship of A.E., No. 02-17-00189-CV (June 14, 2018) (Pittman, J., joined by Gabriel and Birdwell, JJ.).

Held: Clear and convincing evidence established the requirements for a guardian of the person to be appointed for A.E., an incapacitated adult—including that supports and services and alternatives to guardianship that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible—and there was no evidence to the contrary. A.E.'s parents are entitled to and not disqualified from the appointment. Accordingly, the probate court abused its discretion by denying the guardianship application of A.E.'s parents.

Gun Ranges

Alpine Indus., Inc. v. Whitlock, No. 02-17-00396-CV (June 21, 2018) (Sudderth, C.J., joined by Gabriel and Kerr, JJ.).

Held: Civil practice and remedies code section 128.053, which requires the filing of an expert report within 90 days of the filing of the plaintiff's original petition, is not unconstitutional because-like other expert report requirements in the civil practice and remedies code-it does not pose an unreasonable restriction on the ability to pursue a common law claim when balanced against the statute's purpose. The plaintiff's failure to timely serve an expert report, not the existence of the expert report requirement itself, bars the claim. The 90-day statutory deadline for submitting the section 128.053 expert report is not extended by an agreed scheduling order that makes no specific reference to that deadline. Based on the plain language of the statute, section 128.053's expert report requirement does not apply to claims against an employee of a "sport shooting range."

Habeas Corpus

Ex parte Walsh, Nos. 02-17-00136-CR, 02-17-00137-CR, 02-17-00138-CR (Aug. 31, 2017) (Livingston, C.J., joined by Meier and Gabriel, JJ.).

Held: Appellant's claims that the State violated constitutional and statutory provisions by deputizing attorneys from the Texas State Securities Board to prosecute him for three offenses are not cognizable in a petition for writ of habeas corpus. Even if valid, those claims would not result in appellant's immediate release through the dismissal of his indictments.

Healthcare Liability

Villarreal v. Fowler, No. 02-16-00474-CV (June 29, 2017) (Meier, J., joined by Sudderth and Pittman, JJ.).

Held: The trial court abused its discretion by denying Villarreal's motion to dismiss Fowler's health care liability claim because instead of opining that Fowler's claim has merit, Michaels merely opined in her "Clinical Review" that Villarreal violated several ethical rules and should consult with an attorney, thus failing the MLA's minimal expert-report standard.

D.A. v. Tex. Health Presbyterian Hosp. of Denton, No. 02-16-00148-CV (Feb. 16, 2017) (Sudderth, J., joined by Meier, J.; Gabriel, J., concurs without opinion).
Held: Civil practice and remedies code section 74.153, which provides for a willful and wanton standard for liability, does not apply to emergency medical care provided in an obstetrical unit when the patient was not evaluated and treated in a hospital emergency department immediately prior to receiving the emergency medical care.

T.C. v. Kayass, No. 02-16-00248-CV (Nov. 9, 2017) (Pittman, J., joined by Walker, J.; Gabriel, J., dissents with opinion).

Held: T.C.'s claims against Kayass are not healthcare-liability claims. T.C. alleged that Kayass sexually assaulted her while she was in an exam room seeking medical treatment for her children and that he sent her a harassing text message after she left. T.C. was not a patient and did not consent to an examination by Kayass, and the complained-of actions did not arise from Kayass's rendition of health care services. The gravamen of T.C.'s complaint against Kayass and the damages she seeks are related to his offensive, intentional conduct, not his alleged violation of the confidentiality of the information in the medical chart, and the specialized knowledge of a medical expert is not necessary to prove T.C.'s claims.

Dissent: T.C.'s claims against Kayass are healthcare-liability claims subject to the expert-report requirement because those claims were based on the same nucleus of operative facts as her claims against the medical facility and its management companies, which the trial court found to be healthcare-liability claims. T.C. does not challenge this finding on appeal. Additionally, T.C.'s claim against Kayass that these same facts revealed a violation of medical-privacy laws was a healthcare-liability claim, requiring her to file an expert report; thus, all claims against Kayass were subject to dismissal.

Inmate Litigation

Foster v. West, No. 02-16-00250-CV (Feb. 9, 2017) (Meier, J., joined by Gabriel and Sudderth, JJ.).

Held: We dismiss Foster's appeal because as an indigent inmate proceeding pro se, he was required to comply with the requirements of civil practice and remedies code chapter 14, which now expressly applies to an appeal in an appellate court, but he failed to do so by filing an incomplete affidavit or declaration of previous filings.

Insurance

In re Allstate Vehicle & Prop. Ins. Co., No. 02-17-00319-CV (May 3, 2018) (orig. proceeding) (Walker, J., joined by Meier, J.; Gabriel, J., concurs with opinion).

Held: Because the trial court did not abuse its discretion by factually finding and legally concluding that Relator Allstate Vehicle and Property Insurance Company had waived its contractual right to invoke its policy's appraisal provision and because the policy does not contain a nonwaiver clause, we deny Allstate's petition for writ of mandamus.

Concurrence: Although the point of impasse occurred on July 26, 2017, not on May 9, 2017, Allstate's conduct waived its appraisal right.

Hernandez v. Truck Ins. Exch., No. 02-17-00046-CV (June 21, 2018) (Sudderth, C.J., joined by Gabriel and Pittman, JJ.).

Held: Under the supreme court's opinion in Phillips v. Bramlett, 288 S.W.3d 876 (Tex. 2009), if the facts of a medical malpractice case would give rise to a common law Stowers claim by a medical professional against his or her insurer, then plaintiffs who filed their original petition in the underlying medical malpractice lawsuit under article 4590i of the revised (and now repealed) civil statutes prior to September 1, 2003, have standing to bring a direct, statutory Stowers cause of action against the insurer for damages amounting to the difference between the judgment against the medical professional, capped by statute under article 4590i, and the jury's verdict.

Juvenile

In re A. H., No. 02-16-00320-CV (Apr. 27, 2017) (Livingston, C.J., joined by Meier and Gabriel, JJ.).

Held: The judgment was affirmed in this *Anders* appeal from an adjudication of a juvenile. However, rather than granting counsel's motion to withdraw, the court denied the motion, applying the reasoning of In re P.M. to hold that under Texas Family Code section 51.101, appointed counsel continues to serve until all appeals have been exhausted. No. 15-0171, 2016 WL 1274748, at *3 (Tex. Apr. 1, 2016) (order).

In re G.B., No. 02-17-00055-CV (July 6, 2017) (Sudderth, J., joined by Kerr and Pittman, JJ.).

Held: Under the standard of review set out by the court of criminal appeals in Moon v. State, 451 S.W.3d 28, 47 (Tex. Crim. App. 2014), the juvenile court did not abuse its discretion by certifying Appellant, who was fourteen years old at the time of the offense, to stand trial as an adult in this aggravated-robbery-turned-murder case.

In re M. K., No. 02-16-00291-CV (Jan. 23, 2017) (Gabriel, J., joined by Livingston, C.J., and Walker, J.).

Held: The juvenile court lacked subject-matter jurisdiction to render its amended order waiving jurisdiction and transferring Appellant to criminal district court. Appellant allegedly committed the offense of murder on August 7, 1973, when he was fifteen years of age, and the State initiated the waiver and transfer proceeding at issue in this appeal when Appellant was fifty-eight years of age. Given the date of the alleged offense, the current version of the Juvenile Justice Code, codified as Title 3 of the Texas Family Code, and under which the juvenile court conducted the waiver and transfer proceeding, is not applicable to this case. Rather, the law that governs this case is the law that was in effect on the date of the alleged offense, which was Title 3's predecessor, Article 2338-1 of the Revised Civil Statutes of Texas. Under Article 2338-1, a juvenile court does not have subject-matter jurisdiction over a proceeding involving a person who is fifty-eight years of age. Therefore, the juvenile court's amended waiver and transfer order was void.

Nondisclosure

State v. L.P., No. 02-16-00290-CV (June 29, 2017) (Sudderth, J., joined by Meier and Pittman, JJ.).

Held: Because former government code section 411.081 contains no specific statutory grant of jurisdiction, this court must look to the general constitutional grant in article V, section 6(a) and civil practice and remedies code section 51.012 to determine whether it has jurisdiction over an appeal from the trial court's order granting of a petition for nondisclosure. The appeal is dismissed because the record does not reflect the amount in controversy required to invoke this court's jurisdiction.

Parent Child Relationship

In re E.D., No. 02-16-00448-CV (May 24, 2018) (Sudderth, C.J., joined by Walker, Kerr, and Pittman, JJ.) (Birdwell, J., dissenting, joined by Meier and Gabriel, JJ.).

Held: Recognizing that there are significant and troubling irregularities in the record before us, Mother's motion for new trial, filed 66 days after the date the judgment was signed, was untimely. Because alternate service was not ordered or affected under rule 109a—which would have extended Mother's deadline to file her motion for new trial to two years following the judgment—Mother's motion for new trial, which was filed after the applicable 30-day deadline, was untimely.

Dissent: As a result of the significant and troubling irregularities in the record—including a judgment nunc pro tunc issued wholly in violation of rule 316—the trial court effected an almost 180-degree change of possession and access of a child under the age of three from Mother to Father without considering or implementing the safeguards in Texas Family Code section 153.254, when less than two years earlier, the trial court had denied all possession and access to Father because it found he had engaged in a history or pattern of family violence. In analyzing whether Mother is entitled to the extended jurisdictional timetable allowed by rule 109a, we should consider the substance rather than the form of Father's motion for substituted service. That motion indicates that he sought alternate service via the method set forth in rule 106(b) but for the reason set forth in rules 109 and 109a—Mother's location was unknown to him. Because Father sought and was granted

substituted service on that basis, we should apply the two-year notice of appeal deadline, rather than denying it to Mother because Father and the trial court did not properly seek and effectuate service under those rules.

In re G.V., No. 02-17-00220-CV (December 18, 2017) (Kerr, J., joined by Pittman, J.; Walker, J., dissents with opinion).

Held: In a suit to terminate parental rights where the parties reached a mediated settlement agreement under family code section 153.0071 to (1) transfer managing conservatorship from the Department of Family and Protective Services to the children's relatives and (2) make the parents possessory conservators, the trial court did not err by entering judgment on the MSA under section 153.0071(e) notwithstanding the parents' argument that section 153.0071(e) did not apply because this was a termination suit under chapter 161 of the family code. The parents' complaints that portions of the judgment were unenforceable because they restricted when and under what conditions the parents could file a motion to modify were not ripe because the parents had not yet filed a motion to modify and the trial court had not yet ruled on the restrictions' alleged invalidity.

Dissent: Because the State's contractual rights to enforce a mediated settlement agreement in a parental-rights-termination suit do not trump the inherent, constitutional, and statutory rights that Texas parents possess concerning their children, the dissent would hold that custody contracts made under family code section 153.0071 are not enforceable in chapter-161-termination-of-parental-rights suits.

In re G.V., No. 02-17-00220-CV (Jan. 25, 2018) (Walker, J., dissents with opinion to order denying motion for rehearing en banc).

Dissent: The dissent would hold (1) that family code section 153.0071's mediated settlement agreement (MSA) provisions cannot be enforced as binding in a termination suit brought by the Department of Family and Protective Services under chapter 161 of the family code when a party revokes consent prior to judgment on the MSA; (2) that Mother and Father revoked their consent to the MSA in this termination suit before judgment was entered on the MSA; and (3) that Mother and Father's remaining issues-attacking the MSA's provisions imposing a 48-month limitation on the filing of any motions to modify absent some undefined "emergency"-are ripe.

Partition

Carter v. Harvey, No. 02-16-00153-CV (June 29, 2017) (Livingston, C.J., joined by Sudderth, J.; Gabriel, J., concurs and dissents with opinion).

Held: In suit concerning the partition of real property, Carter, who derivatively stood in the shoes of a long-since dissolved corporation, could not bring an equitable adjustment claim based on the value of improvements that the corporation contributed to the property. Next, the trial court did not err by granting a partition by sale of the property because the evidence showed that while an in-kind partition was theoretically possible, the trial court could have reasonably concluded that such a partition was not feasible, fair, practical, or equitable. Finally, the trial court's judgment is not void for failure to join a necessary party because the necessary parties in partition suits are those who own possessory interests in the real property.

Concurrence and Dissent: Although the trial court's order that the property co-owned by Carter and Harvey could not be partitioned in kind was not void, no evidence supported the trial court's conclusion that a partition in kind would be unfair and inequitable. The infeasibility of Carter's proposed partition is not dispositive of the fact-finder's partition determination and no witness testified that the property could not be divided based on Carter's and Harvey's respective ownership interests. The evidence before the trial court compelled a finding that the property was susceptible to in-kind partition, leaving the parameters of the specific partition to the appointed commissioners.

Personal Injury: Paid and Incurred

Ahmed v. Sosa, No. 02-15-00368-CV (Feb. 16, 2017) (Meier, J., joined by Walker and Sudderth, JJ.).

Held: Civil practice and remedies code section 41.0105 did not obligate the trial court to reduce the portion of a judgment rendered on a jury verdict for past medical expenses in light of a health care provider's post-verdict, prejudgment agreement to reduce its lien against the plaintiff's recovery of the same.

Personal Jurisdiction

Nw. Cattle Feeders, LLC v. O'Connell, No. 02-17-00361-CV (June 14, 2018) (Birdwell, J., joined by Walker and Meier, JJ.).

Held: The trial court erred by dismissing, for lack of personal jurisdiction, claims against Jason O'Connell that arise from his alleged misrepresentation that he made while in Texas and that concerned cattle within Texas. Even if Jason's contacts arise from his acts in a representative capacity for an LLC, the fiduciary shield doctrine does not protect him from being subject to specific personal jurisdiction to answer for intentional torts or fraudulent acts for which he may be liable. The trial court did not err by dismissing direct claims against Tom O'Connell because those claims did not arise from any contacts that Tom had with Texas. The trial court erred by dismissing Appellants' denuding claims against Jason and Tom because those claims derive from the LLC's liability (if any) for certain acts, and the LLC's unchallenged jurisdictional contacts are therefore imputed to Jason and Tom. Finally, to the extent that claims against the O'Connells are based on sufficient jurisdictional contacts with this state, the exercise of personal jurisdiction comports with traditional notions of fair play and substantial justice.

Plea to the Jurisdiction (Immunity)

City of Westworth Village, Tex. v. City of White Settlement, Tex., No. 02-17-00211-CV (Aug. 9, 2018) (Sudderth, C.J., joined by Gabriel and Kerr, JJ.).

Held: The trial court did not err by denying Appellant's plea to the jurisdiction on Appellee's breach of contract claim because under the analysis required by Wasson Interests, Ltd. v. City of

Jacksonville, No. 17-0198, 2018 WL 2449184 (Tex. June 1, 2018), Appellant failed to show that its act of entering the economic development agreement was governmental, not proprietary, in nature. That is, per the Wasson analysis, entering into the agreement itself was a discretionary act, and nothing showed that the agreement was undertaken in a governmental capacity when there was no evidence showing that the local retail development fostered a benefit primarily to the state or the public in general, that Appellant entered into the agreement as a branch or arm of the state, or that the economic development fostered by the agreement was sufficiently related to a governmental function as to render the act of entering the agreement governmental.

Plea to the Jurisdiction (Inverse condemnation, ripeness):

City of Crowley v. Ray, No. 02-17-00409-CV (Aug. 23, 2018) (Meier, J., joined by Sudderth, C.J., and Walker, J.).

Held: The trial court properly denied the City's jurisdictional plea because Ray's inverse-condemnation claim is not unripe for lacking a final decision by the City, the City did not carry its burden to show that Ray failed to exhaust administrative remedies, Ray complains of direct governmental action by the City, and the Murr factors weigh against treating Phase 1 and Phase 2 as a single unit for purposes of making an economic-value determination.

Prisoner Litigation

Foster v. West, No. 02-16-00250-CV (Feb. 9, 2017) (Meier, J., joined by Gabriel and Sudderth, JJ.).

Held: We dismiss Foster's appeal because as an indigent inmate proceeding pro se, he was required to comply with the requirements of civil practice and remedies code chapter 14, which now expressly applies to an appeal in an appellate court, but he failed to do so by filing an incomplete affidavit or declaration of previous filings.

Property Tax

Denton Cent. Appraisal Dist. v. Gladden, No. 02-17-00400-CV (July 5, 2018) (Walker, J., joined by Kerr, J.; and Rebecca Simmons, J. (Sitting by Assignment)).

Held: We hold that sections 11.13 and 23.23(c) of the tax code are construed together as in pari materia, and giving the words of both sections their plain meaning, a property must first qualify for a section 11.13 residence homestead exemption—determined on January 1 of each tax year—as a condition precedent to the section 23.23 10% homestead cap taking effect as to a residence homestead on January 1 of the tax year following the first tax year the owner qualifies the property for an exemption under section 11.13. Applying this holding to the present facts, we hold that the first tax year that Gladden could qualify the Property for the Homestead Exemption was the 2013 tax year because January 1, 2013, was the first date that the Property could qualify for the Homestead Exemption as to Gladden, and as such, 2014 was the first tax year that the 10% Homestead Cap could be applied to the Property. Thus, we reverse the trial court's summary judgment for Gladden on his declaratory judgment action and we render a declaratory judgment that the 10% Homestead Cap applies to the Property beginning in the 2014 tax year.

Tarrant Appraisal Dist. v. Tarrant Reg'l Water Dist., No. 02-17-00042-CV (Apr. 19, 2018) (op.

on reh'g) (Meier, J., joined by Walker and Gabriel, JJ.).

Held: TRWD's public property is tax exempt under tax code section 11.11(a) because it is "used for public purposes."

Res Judicata-Arbitration

New Talk, Inc. v. Sw. Bell Tel. Co. d/b/a AT&T Tex., No. 02-15-00199-CV (May 11, 2017) (Kerr, J., joined by Walker and Gabriel, JJ.).

Held: A Public Utility Commission arbitration award resolving a post-interconnection-agreement billing dispute between New Talk and AT&T Texas was a prior, final judgment on the merits by a court of competent jurisdiction. The award therefore had res-judicata effect in a state-court lawsuit between New Talk and AT&T Texas involving the same claims and defenses that were raised or could have been raised in the PUC proceeding. Thus, the trial court did not err by granting summary judgment for AT&T Texas on its breach-of-contract claim based on the award's res-judicata effect.

Responsible Third Party

In re Dakota Directional Drilling, Inc., No. 02-18-00001-CV (Apr. 23, 2018) (orig. proceeding) (Pittman, J., joined by Sudderth, C.J., and Gabriel, J.).

Held: Relator Gabriel Plascencia was driving a truck owned by Relator Dakota Directional Drilling when it collided with a vehicle driven by Lenard Bundick after Bundick slowed to make a U-turn. Real Parties in Interest Lesli Barwick and Renaldo Cardenas (Plaintiffs), passengers in Bundick's car, subsequently sued Relators three days before the end of the limitations period. Relators answered and responded to requests for disclosure five months later. Thirty days later, Relators moved to designate Bundick as a responsible third party. Plaintiffs objected, and the trial court denied the designation on the basis that Relators had not timely responded to Plaintiffs' requests for disclosure. However, Plaintiffs could not have been unfairly surprised or prejudiced by Bundick's designation, and the designation was filed early in the lawsuit and well in advance of the 60th day before any trial date. As such, the trial court's refusal to allow Relators to designate Bundick as a responsible third party was arbitrary and a clear abuse of discretion. Because Relators have no adequate remedy by appeal, they were entitled to mandamus relief.

Sexually Violent Predator

In re Commitment of Bluitt, No. 02-17-00150-CV (July 12, 2018) (Sudderth, C.J., joined by Meier and Birdwell, JJ.).

Held: Chapter 841 of the Texas Health & Safety Code guarantees a person whom the State seeks to have civilly committed as a sexually violent predator the right to appear in person at the trial. Because the requirement that the trial take place within 270 days of filing is waivable, we remand the proceeding to the trial court to determine the extent of Bluitt’s waiver or if a continuance should be granted on any other grounds.

In re Commitment of Michael Edward Perdue, No. 02-17-00017-CV (Aug. 17, 2017) (Kerr, J., joined by Walker and Meier, JJ.).

Held: In proceedings to commit a person as a sexually violent predator under health and safety code chapter 841, the person's right to a jury trial does not preclude a trial court from granting a partial directed verdict on the issue of whether that person is a repeat sexually violent offender when that issue has been conclusively established and is undisputed.

In re Commitment of Short, No. 02-16-00179-CV (June 8, 2017) (Pittman, J., joined by Gabriel and Sudderth, JJ.).

Held: The State presented legally and factually sufficient evidence to support the jury's finding that Appellant has a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence.

Standing

City of Westworth Village, Tex. v. Tex. Voices for Reason & Justice, No. 02-16-00106-CV (May 18, 2017) (Gabriel, J., joined by Walker and Meier, JJ.).

Held: The trial court lacked subject-matter jurisdiction over Appellee Texas Voices for Reason and Justice, Inc.'s (TVRJ) suit challenging the constitutionality of a municipal ordinance enacted by Appellant City of Westworth Village, Texas, because TVRJ, who had filed the suit solely on behalf of its alleged members, lacked standing to do so. TVRJ lacked standing to sue on behalf of its alleged members because (1) under state law, it was a domestic nonprofit corporation that did not have any traditional members, and (2) its alleged members lacked sufficient indicia of membership in the organization to confer standing upon it to sue on their behalf.

Subject Matter Jurisdiction (Ordinance)

In re Pixler, No. 02-18-00181-CV (July 26, 2018) (orig. proceeding) (Meier, J., joined by Sudderth, C.J., and Walker, J.).

Held: The district court lacks subject-matter jurisdiction over the City's claim to enforce the $8,000 in penalties that were administratively assessed against Pixler for violating the City's junked-vehicle ordinance because, contrary to transportation code section 683.0765, the City has not, by ordinance, provided for an alternative administrative adjudication process like the one contained in local government code section 54.044.

Texas Citizens Participation Act (Attorney's fees)

DeAngelis v. Protective Parents Coalition, No. 02-16-00216-CV (Aug. 2, 2018) (Pittman, J., joined by Meier, J.; Gabriel, J., concurs without opinion).

Held: The Texas Citizens Participation Act applies to Appellants' Rule 202 petition for pre-suit discovery. Because Appellants did not meet their burden under the TCPA to establish the prima facie elements under Rule 202, the trial court correctly dismissed their petition. However, the trial court erred by applying the justice-and-equity modifier in section 27.009 of the TCPA in determining the amount of trial attorney's fees to award to Appellees and by not awarding appellate attorney's fees to Appellee Carless. Accordingly, we remand this case to the trial court for further

proceedings.

Texas Citizen's Participation Act

McGibney v. Rauhauser, No. 02-16-00244-CV (Apr. 19, 2018) (Sudderth, C.J., joined by Meier, J., and Kerry FitzGerald (Senior Justice, Retired, Sitting by Assignment)).

Held: The trial court abused its discretion by awarding an unreasonable amount of attorney's fees and monetary sanctions under the Texas Citizens Participation Act (TCPA), by imposing nonmonetary sanctions when the TCPA does not provide for them, and by improperly conditioning the appellate attorney's fee award.

Van Der Linden v. Khan,, No. 02-16-00374-CV (Nov. 9, 2017) (Sudderth, C.J., joined by Kerr, J.; Gabriel, J., concurs and dissents with opinion).

Held: The Texas Citizens Participation Act (TCPA) applies to the private Facebook message in which Appellant told Appellee's business associates that Appellee had admitted to giving money to the Taliban because the TCPA applies to both public and private communication, and Appellant exercised her right of free speech in a communication made in connection with a matter of public concern related to safety and community well-being (financial support for a terrorist organization). Appellee failed to support his tortious-interference-with-contract claim with clear and specific evidence to support a prima facie showing of what contractual obligation his business associate undertook, the breach of that obligation, proximate cause, or damages. Likewise, Appellee failed to support his tortious interference with prospective business relations claim with clear and specific evidence that a relationship would have occurred, causation, or damages. However, Appellee supported his defamation/defamation per se claim with sufficient clear and specific evidence that he had never given money to the Taliban or told Appellant that he had and that Appellant made her statement with knowledge of its falsity. Appellee was not required to offer proof of damages because falsely accusing someone of providing financial support to terrorists constitutes defamation per se. Under D Magazine Partners, L.P. v. Rosenthal, No. 15-1790, 2017 WL 1041234 (Tex. Mar. 17, 2017), the affirmative defense of truth does not come into play when plaintiff bears the burden to prove the falsity of a statement related to a matter of public concern. The TCPA provides for the dismissal of actions, not remedies; accordingly, a TCPA challenge to a request for injunctive relief should be directed at the underlying legal action, not at the requested remedy; other avenues for relief are available should an injunction be wrongfully granted.

Concur and Dissent: Khan failed to proffer clear and specific evidence establishing a prima facie case of the requisite fault by Van Der Linden in making the alleged statements, which is an essential element of Khan's claim for defamation per se. Even if Khan established a prima facie claim of defamation per se, Van Der Linden established by a preponderance her affirmative defense of truth. Either required the trial court to grant Van Der Linden's motion to dismiss Khan's claim for defamation per se under the TCPA. And because Van Der Linden's alleged statements were defamatory per se, Khan cannot make a prima facie case of defamation, which required the dismissal of Khan's defamation claim as well under the TCPA.

Accomplice Testimony

Qualls v. State,, Nos. 02-16-00214-CR (Apr. 12, 2018) (Pittman, J., joined by Sudderth, C.J., and Kerr, J.).

Held: The accomplice testimony tying Appellant to the GameStop forgery was sufficiently corroborated by the eyewitness, the videos, and the nonaccomplice testimony that the $50 bills used at GameStop were counterfeit.

Further, the State invoked the Rule before testimony began. Thus, when the challenged State's witness briefly conferred with another on the second day of trial, even though neither had yet been sworn in or explicitly placed under the Rule, the Rule was violated. Nevertheless, the visiting judge did not abuse his discretion by refusing to strike the testimony of the challenged witness because the record does not show that the two witnesses spoke about an issue impacting Appellant's guilt or innocence and about which they would both later testify.

Aggravated Sexual Assault

Bocanegra v. State, No. 02-15-00198-CR (Feb. 16, 2017) (Sudderth, J., joined by Meier, J.; Walker, J., dissents with opinion).

Dissent: A proper application of the Jackson v. Virginia sufficiency standard of review reveals that any rational trier of fact could have found beyond a reasonable doubt that Bocanegra intentionally or knowingly caused the penetration of the sexual organ of Amy, a child who was younger than fourteen years of age, by inserting his finger into her sexual organ and also could have found beyond a reasonable doubt against Bocanegra on his medical-care defense. The unpublished Majority Opinion, however, reaches a different conclusion because it fails to view all of the evidence in the light most favorable to the verdict and instead crafts its own unique procedure for evaluating the sufficiency of the evidence; fails to recognize that the medical-care defense is a defense of confession and avoidance; and fails to defer to the jury's resolution of conflicts in the testimony, determinations of credibility, and responsibility to draw reasonable inferences from basic facts to ultimate facts.

Blood Draw

State v. Sanders,, Nos. 02-16-00226-CR, 02-16-00227-CR, 02-16-00228-CR (December 14, 2017) (Meier, J., joined by Walker, J.; Kerry FitzGerald (Senior Justice, Retired, Sitting by Assignment) dissents with opinion).

Held: Under the totality of the circumstances, the State failed to carry its burden that exigent circumstances existed at the time the arresting officer ordered Appellant's blood be drawn at the hospital; therefore, the trial court did not err by suppressing the results of the blood draw. Upon arriving at the scene of a fatal accident caused by Appellant having crossed over the center stripe of the highway, two officers observed collectively and immediately that Appellant possessed slurred speech, red and bloodshot eyes, imbalance in her walking, and an odor of alcohol. Appellant also admitted to having imbibed alcoholic drinks earlier in the day. Furthermore, transporting Appellant

to the hospital did not involve a significant amount of time and the record is devoid of any evidence reflecting what procedures existed for obtaining a warrant or whether the arresting officer could have reasonably and timely obtained one. The record indicates that the arresting officer had warrant affidavits on his person and that there was a magistrate five minutes from him at the time he arrived at the hospital with Appellant. The record further indicates that the arresting officer declined the assistance of another available officer.

Dissent: The officer assigned to determine probable cause and, if necessary, to procure a warrant was not able to complete his investigation at the scene because Appellant's boyfriend interfered and because medics later determined that Appellant was injured and needed to go to the hospital. At the hospital, the officer was able to complete his investigation but was not able to procure a warrant before hospital personnel began their medical treatment. To preclude the medical treatment itself from contaminating a blood draw's results, the officer ordered the blood draw without a warrant. The evidence showed exigent circumstances. The majority is second guessing when the officer should have made his probable-cause determination instead of focusing on when he actually made his probable-cause determination. The majority intrudes on law enforcement's investigative function by substituting its judgment for the that of the officer. The officer was under no obligation to find probable cause before completing his investigation.

Burglary

Morgan v. State, No. 02-14-00231-CR (May 28, 2015) (Dauphinot, J., joined by Livingston, C.J., and Gardner, J.).

Held: Because the evidence shows that Appellant lived with Complainant when he kicked the front door open and assaulted her, the evidence is insufficient to support a burglary conviction. Even though burglary was charged via intent to commit assault, attempt to commit assault, and a completed assault, Appellant conceded at trial and in his brief on appeal that he is guilty of the lesser included offense of assault and requested that we modify the judgment to reflect an assault conviction. Further, the evidence is sufficient to support an assault conviction beyond a reasonable doubt, and assault is the highest-level lesser included offense available. In these circumstances, a new trial on guilt-innocence of assault is unnecessary before modifying the judgment to reflect an assault conviction.

Constitution

Horton v. State, No. 02-16-00229-CR (May 11, 2017) (en banc) (Sudderth, J., joined by Walker, Gabriel, Kerr, and Pittman, JJ.; Livingston, C.J., dissents with opinion, joined by Meier, J.).

Held: In keeping with the court of criminal appeals' decision in Salinas v. State, No. PD-0170-16, 2017 WL 915525, at *4, *5 (Tex. Crim. App. Mar. 8, 2017), we sustain Appellant's argument that sections 133.102(e)(1) and (6) of the local government code are unconstitutional as they violate the separation of powers clause of the Texas Constitution. However, the Salinas decision limited retroactive modification of court costs to delete those fees to those cases that were pending before the court of criminal appeals as of the date of the opinion. We must follow the directive of the court of criminal appeals and therefore cannot delete those costs in this case. Additionally, we overrule Appellant's constitutional challenges to section 133.102(e)(5) of the local government code and article 102.0186 of the code of criminal procedure in accordance with our decision in Ingram v.

State, 503 S.W.3d 745, 748 (Tex. App.-Fort Worth 2016, pet. ref'd).
Dissent: When a statute is facially unconstitutional, it is inoperable in all applications from its inception. The Salinas decision and the majority's decision in this case recognize the facial unconstitutionality of provisions within section 133.102 of the local government code, grant relief from the unconstitutional provisions to two classes of defendants, yet apply those provisions to defendants like Appellant who have raised the constitutional issue in intermediate appellate courts. Thus, those decisions violate principles of due process, due course of law, equal protection, and equal access to courts.

Costs

Hawkins v. State, No. 02-16-00104-CR (Apr. 13, 2017) (Pittman, J., joined by Gabriel and Sudderth, JJ.).

Held: Appellant challenges his court costs. The subsections of local government code 133.102 that allocate portions of the $133 consolidated fee he paid to "accounts and funds" for "abused children's counseling" and "comprehensive rehabilitation" violate the Separation of Powers Clause, but the Salinas decision of the Texas Court of Criminal Appeals bars us from awarding Appellant any relief.

Costs: Emergency Management Services

Casas v. State, No. 02-16-00122-CR (July 20, 2017) (Gabriel, J., joined by Livingston, C.J., and Sudderth, J.).

Held: In denying the defendant's motion to suppress, the visiting trial judge expressly stated that he relied on the evidence admitted at the hearing and did not impermissibly rely on his personal knowledge of a disputed fact; therefore, the trial court's conclusion that the arresting officer had reasonable suspicion to stop the appellant was not void. But the statute allowing the imposition of a court cost for emergency-management services upon conviction of an intoxication offense—article 102.0185 of the code of criminal procedure—is facially unconstitutional because it is not related to a legitimate, criminal-justice purpose. Because the appellant is the first party to convince the court that this cost is facially unconstitutional, he is entitled to relief.

Enhancement

Senn v. State, No. 02-15-00201-CR (May 17, 2018) (op. on remand) (Walker, J., joined by Meier and Gabriel, JJ.).

Held: Applying the holding from the Texas Court of Criminal Appeals's recent opinion in Arteaga, which requires the State to prove facts that would constitute bigamy in order to enhance a sexual assault conviction from a second-degree felony to a first-degree felony under Texas Penal Code section 22.011(f), the evidence is insufficient to trigger the statutory enhancement.

Expert Witness: Effect of Medication

Dooley v. State,, No. 02-16-00212-CR (Mar. 1, 2018) (Sudderth, C.J., joined by Kerr and Pittman, JJ.).

Held: Evidence of the side effects of a medication might be admissible in a criminal case if it tends to negate the applicable mens rea. But the expert testimony presented in this case to the possible influence of Chantix did not do that-instead, it provided a possible excuse for his irrational and impulsive behavior of shooting his wife to death while she was on the phone with 911. As such, the expert's testimony was inadmissible.

Jury Charge

Burton v. State, No. 02-16-00067-CR (Jan. 5, 2017) (Sudderth, J., joined by Livingston, C.J., and Gabriel, J.).

Held: We are bound by the court of criminal appeals' holding in Cooper v. State, 430 S.W.3d 426, 427 (Tex. Crim. App. 2014), that separate convictions for aggravated robbery based on the two underlying methods of robbery—causing bodily injury to or threatening the same victim during a home invasion—violated double jeopardy. Therefore, the trial court did not err in charging in the disjunctive aggravated robbery based on the same two underlying methods of robbery.

Post-Conviction DNA Testing

Dunning v. State,, No. 02-17-00166-CR (Mar. 1, 2018) (Walker, J., joined by Meier and Kerr, JJ.).

Held: We hold that Dunning established a reasonable probability that he would not likely have been convicted had the post-conviction DNA testing been available at the time of trial. Therefore, we sustain Dunning's sole point of error, vacate the trial court's May 17, 2017 "not favorable" finding, and remand this case to the trial court for an entry of a finding that had the post-conviction DNA test results attained by Dunning been available during the trial of the offense, it is reasonably probable that Dunning would not have been convicted.

Punishment

McCain v. State,, No. 02-16-00411-CR (Mar. 15, 2018) (Kerr, J., joined by Sudderth, C.J., and Gabriel, J.).

Held: The punishment scheme (imprisonment—without the possibility of parole—for life or for any term of not more than 99 years or less than 25 years) for the offense of continuous sexual abuse of a child under fourteen does not violate the cruel-and-unusual-punishment provisions of the United States and Texas constitutions. Nor do the relevant statutes, either on their face or as applied to Appellant, violate the equal protection clauses of the United States and Texas constitutions.

Banister v. State, No. 02-16-00320-CR (Apr. 27, 2017) (Walker, J., joined by Livingston, C.J., and Pittman, J.).

Held: Although Appellant did not object in the trial court on the grounds that his punishment was disproportionate and that the trial court failed to consider the entire range of punishment, Appellant was entitled to raise the latter due-process complaint for the first time on appeal. Appellant however could not prevail on his due-process complaint because the record established that the trial court did consider the full range of punishment when it imposed a five-year sentence, which is less than the ten-year maximum punishment allowed for a DWI conviction with two prior DWI convictions; did

not willfully impose a predetermined sentence; and did not demonstrate bias; thus, the record did not clearly indicate a denial of Appellant's due-process rights.

Reasonable Suspicion

State v. Binkley,, No. 02-16-00381-CR (Feb. 8, 2018) (Pittman, J., joined by Sudderth, C.J., and Gabriel, J.).

Held: Considering the totality of the circumstances in the record before us and viewing the evidence in the light most favorable to the trial court's ruling, the deputy's testimony indicating a weekly error rate of 33% and potentially up to 100% in his experience with the database and the database coordinator's inability to explain that error rate support the trial court's implicit findings that the database was not reliable and the deputy did not have reasonable suspicion to support the stop.

Search and Seizure

Elliot v. State, No. 02-17-00011-CR (Apr. 12, 2018) (ordered published Apr. 26, 2018) (Meier, J., joined by Walker and Gabriel, JJ.).

Held: During a routine Terry frisk, the arresting officer in this case was justified in removing a cigarette pack from appellant's pocket and seizing the methamphetamine found therein. The officer testified at the suppression hearing that he felt "a card deck-sized object" in appellant's left pocket that had "sharp angles" and "hard edges." The officer further described the object as "something angular" that had a "little density to it." Wanting to ensure that it was not a weapon or something containing a weapon, the officer removed the object from appellant's pocket. It was then that the officer discovered that the object was a "cigarette container with the top flipped back." And there, in plain view, the officer observed that the cigarette container contained what the officer's training and experience had taught him was methamphetamine.

Self-Representation

Lathem v. State, No. . 02-15-00228-CR (Jan. 12, 2017) (FitzGerald (Senior Justice, Retired, Sitting by Assignment), joined by Livingston, C.J., and Walker, J.).

Held: The trial court abused its discretion by denying Appellant's timely, clear, and unequivocal request to represent herself. This error is structural error requiring automatic reversal.

Sentencing

Ette v. State, No. 02-16-00173-CR (May 18, 2017) (Pittman, J., joined by Livingston, C.J.; Kerr, J. dissents with opinion).

Held: The jury verdict, written judgment, bill of cost, and written conditions of community supervision signed by the trial judge and Appellant within minutes of the trial court's oral pronouncement demand that we uphold the lawful fine imposed by the jury but omitted from the oral pronouncement.

Dissent: When a sentence is ambiguous, courts properly look beyond the sentence to construe it.

When a sentence is not ambiguous, looking beyond the sentence to create an ambiguity is improper. Here the trial court's sentence unambiguously does not include any fine. No ambiguity exists to resolve. The trial court's sentence is erroneous because the jury assessed a fine, but it is not ambiguous. Whether Appellant's judgment properly includes a fine does not depend on untangling an ambiguous sentence; rather, it depends on determining how an erroneous sentence impacts the judgment. When the sentence and judgment conflict, caselaw provides that the sentence controls.

Sexual Abuse

Hinesv. State, No. 02-15-00468-CR (May 4, 2017) (Livingston, C.J., joined by Sudderth and Kerr, JJ.).

Held: The evidence is insufficient to show that the proven acts of sexual abuse against the complainant were separated by at least thirty days. Because multiple underlying sexual offenses (indecency with a child and aggravated sexual assault) were proved, remand for a new trial on those offenses is necessary to avoid an unjust acquittal, in accordance with Rodriguez v. State, 454 S.W.3d 503 (Tex. Crim. App. 2015) (op. on reh'g).

Text Messages

Ellis v. State, No. 02-16-00144-CR (Apr. 20, 2017) (Sudderth, J., joined by Livingston, C.J., and Walker, J.).

Held: The trial court did not abuse its discretion in admitting evidence of text messages that had been purportedly sent by decedent on his phone after his body had been found. Testimony showed that the messages could not be directly downloaded from the "burner" phone and therefore the exhibits containing accurate, manually-replicated text messages were admissible as "other evidence" in accordance with the best evidence rule. Tex. R. Evid. 1004(b). As they were not offered for the truth of the matter asserted therein, these text messages were not subject to hearsay bar. Tex. R. Evid. 801.

Written Statement

Gomez v. State, No. 02-17-00002-CR (June 21, 2018) (Sudderth, C.J., joined by Meier and Gabriel, JJ.).

Held: The trial court did not err by admitting the complainant's written statement that had been dictated in Vietnamese by the complainant to her daughter, who then wrote the complainant's statement in English. The complainant adopted the written statement as her own and there was no evidence of any circumstances that would cast doubt on the integrity of the daughter's translation. The written statement was properly admitted as a recorded recollection of the complainant.