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From: Law Office of Steven K. Hayes <shayes@stevehayeslaw.com>
Sent: Saturday, April 27, 2024 10:58 AM
To: shayes@stevehayeslaw.com
Subject: Second Court Newsletter: Webinar on AI, Hall of Fame Nominations, New Opinions and Summary

April 27, 2024

Dear Friends:

COMING UP THIS FRIDAY, MAY 3, AT NOON: The State Bar Appellate Section will present another **Lunch 'N Learn Webinar**, featuring my friends Christina Crozier and Derek Bauman providing us **1 hour of CLE *and* 1 hour of Ethics** credit for their presentation entitled *Generative AI: ChatGPT and Pinocchio -- The Challenges of Becoming a Real Boy*. Recent advances in generative artificial intelligence have created a lot of questions on if and how it is possible to incorporate this new technology into your legal practice. Derek and Christina will explore the development of generative artificial intelligence, demonstrate its pitfalls, and explore its possible use in litigation and appellate practices. ***If you are a Section member, put this on your calendar and register when you get the notice***. If you are not a Section member: join us, through your My Bar page. It's only $30!

My friend Jennie Knapp of Amarillo is spreading the word that the Appellate Section of the State Bar of Texas is now accepting nominations for the Texas Appellate Hall of Fame. The Hall of Fame ***posthumously*** honors advocates and judges who made a lasting mark on appellate practice in the State of Texas.

Nominations should be submitted in writing to kcastaneda@adjtlaw.com no later than Thursday, May 30, 2024. Nominations should include the nominator's contact information, the nominee's bio or CV, the nominee's photo if available, and all the reasons for the nomination (including the nominee's unique contributions to the practice of appellate law in the State). The more comprehensive the nomination materials, the better. All material included with any nomination will be forwarded to the voting trustees for their consideration in deciding whom to induct as part of this year's Hall of Fame class.

Nominations will be considered based upon some or all of the following criteria, among others: written and oral advocacy, professionalism, faithful service to the citizens of the State of Texas, mentorship of newer appellate attorneys, pro bono service, participation in appellate continuing legal education, and other indicia of excellence in the practice of appellate law in the State of Texas.

Please note that an individual's nomination in a prior year will not necessarily carry over to this year. As a result, if you nominated someone previously and would like to ensure his/her consideration for induction this year, you should resubmit the nomination and nomination materials.

The Section will honor Hall of Fame inductees at a presentation and ceremony during the State Bar's Advanced Civil Appellate Practice course, scheduled for September 5-6, 2024.
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Lots of cases and summaries coming out of the Second Court this week, including cases dealing with the following:

Summary by the Court of a recent opinion

- Subject Matter Jurisdiction (Real Property in Other State)

Recent opinions issued by the Court in civil cases cover the following issues

- Commercial Lease (Lease Amendment, Email, Rent Abatement)
- Parental Right Termination (Best Interest/Sufficiency)
- Rule 91a (Contract, Unjust Enrichment, Evidence)
- Tort Claims Act (Auto Collision, Emergency Exception, Official Immunity, Summary Judgment)

Summary by the Court of recent opinions (footnotes omitted in all summaries):

Subject Matter Jurisdiction (Real Property in Other State):

Bauer v. Braxton Minerals III, LLC, No. 02-23-00269-CV (Apr. 19, 2024) (Wallach, J., joined by Sudderth, C.J., and Birdwell, J.).

Held: The trial court did not have jurisdiction over the parties' claims because the gist of the claims involves adjudication of title to real property interests outside of Texas.

Recent opinions issued by the Court in civil cases cover the following issues (footnotes omitted in all summaries unless otherwise stated. All names in suits involving minors are aliases unless otherwise noted):

Commercial Lease (Lease Amendment, Email, Rent Abatement)*: Z2Z Capital, LLC v. Rose, LLC*, No. 02-22-00513-CV–"Appellant Z2Z Capital, LLC (Landlord) appeals from the final judgment in this dispute with its tenant, Appellee Matthew and Riley Rose, LLC (Tenant). Landlord sued Tenant for breach of the parties' commercial lease agreement (the Lease) based on Tenant's payment of a reduced rent amount for multiple months. Tenant countersued for, among other claims, Landlord's failure to abate Tenant's rent after water pipes on the premises burst. The trial court granted partial summary judgment for Tenant; the order dismissed Landlord's claims against Tenant and rendered judgment against Landlord on Tenant's rent abatement claim. Tenant then filed a motion for final judgment and attached evidence to prove up its damages on the rent abatement claim and its attorney's fees. After a hearing, the trial court signed a final judgment awarding Tenant $89,827.61 in rent abatement damages, plus interest, costs, and attorney's fees. On appeal, Landlord argues that the trial court erred by granting Tenant's motion for partial summary judgment on Landlord's breach of lease claim and by determining that Landlord was liable on Tenant's rent abatement claim. Landlord additionally complains about the trial court's proceeding with a bench trial five days before the scheduled trial date, the trial court's determination of Tenant's damages, and the attorney's fees award. Because Tenant's summary judgment evidence was sufficient to establish that it had not breached the Lease but was insufficient to establish Landlord's liability for rent abatement, we will affirm in part and reverse in part, and we will remand for further proceedings.

- **Lease Amendment (Email):** "In its first issue, Landlord argues that the trial court erred in granting Tenant's motion for partial summary judgment on Landlord's breach of lease claim. Under this issue, Landlord argues that the trial court erred by determining that the parties' email exchange constituted a valid amendment to the Lease....Landlord further contends that its email "shows that [Zhu] expected the

parties to sign a final document documenting the email exchange." Zhu may have had that expectation, but that expectation does not make the execution of a separate document an essential term. As stated, the emails constituted an agreement to extend the Fifth Amendment as modified; the Fifth Amendment set out the material terms, and the emails that the parties later exchanged extended it by three months and decreased the deferred amount. Thus, all the material terms of the Sixth Amendment were put in writing by the parties. The circumstances and the language used by Landlord do not support a conclusion that a future memorialization was essential to the agreement....In this case, however, if there were essential terms still left for the parties to negotiate, we do not know what they were. The emails themselves do not indicate that there was anything more for the parties to negotiate."

- **Rent Abatement**: "In Landlord's second issue, it argues that the trial court erred by granting partial summary judgment on Landlord's liability on the Tenant's rent abatement claim. We agree....Sherman's declaration provided facts to show the cause of any damage to the property. However, regarding whether part of the property was unusable through October 2021, Sherman did not provide any facts from which such a conclusion could be drawn....Because the declaration contained no information showing the basis for Sherman's statement that only thirty percent, then fifty percent, and then ninety percent of the premises was usable through October 2021, the declaration is conclusory....Like Sherman's declaration, the email provides no facts to support the conclusion about how much—or if any—of the premises was unusable. Because none of Tenant's summary judgment evidence established as a matter of law Landlord's liability on Tenant's rent abatement claim, the trial court erred by granting summary judgment as to liability."

Commercial Lease (Withdrawal of Counsel, Sufficient Time to Find New Counsel)*: Onuma v. Shallenberger*, No. 02-23-00169-CV–"Emole Onuma appeals from the trial court's judgment for appellees Mike Shallenberger and Vectra 3, LLC (collectively, Vectra) in this commercial-lease dispute. In one issue, Onuma contends that the trial court abused its discretion by granting his counsel's defective motion to withdraw and not giving him more time to find new counsel before trial. We affirm the trial court's judgment....The second withdrawal motion did not address Onuma's right to object.2 Vectra nonetheless argues that the motion was compliant because it noted Onuma's opposition, demonstrating that Onuma knew that he could object. But Vectra does not explain this logical leap, and Rule 10 expressly requires withdrawal motions to address both the right to object and the party's consent. Tex. R. Civ. P. 10. With good reason—a sufficiently specific and "timely request, objection, or motion" will preserve a complaint for appeal, Tex. R. App. P. 33.1(a), but a party's opposition to a withdrawal motion will not....Thus, the second withdrawal motion was defective, and the trial court abused its discretion by granting it. This error was harmless, though, if the trial court allowed Onuma sufficient time to secure new counsel and for that counsel to investigate the case and prepare for trial....Without explanation, Onuma asserts that the 42 days between the withdrawal order and the trial were insufficient. We disagree."

Parental Right Termination (Best Interest/Sufficiency)*: S.G.*, No. 02-24-00045-CV–"In three points, Stuart's mother (Mother) challenges the sufficiency of the evidence to support the trial court's findings that she endangered Stuart and that termination of the parent–child relationship is in his best interest. See Tex. Fam. Code Ann. § 161.001(b)(1)(D)–(E), (2). At the request of appellee the Department of Family and Protective Services, we modify the judgment to delete a predicate-conduct-ground finding that is not supported by the evidence. We affirm the judgment as modified."

Rule 91a (Contract, Unjust Enrichment, Evidence)*: Galindo v. Peterson*, No. 02-23-00268-CV–"Appellants Gabriel Galindo and Patios by Design, LLC (collectively Galindo) appeal from the trial court's order granting Appellees Jeff and Michelle Peterson's amended motion to dismiss pursuant to Rule 91a of the Texas Rules of Civil Procedure. We affirm....The three cases cited by

Galindo thus do not support his argument that a claim for breach of contract may include wrongfully requiring a party to perform work outside the scope of the contract....Galindo [also]...attempts to allege they breached the contract, in effect, by seeking damages for his alleged breach of contract. Not only does he fail to provide any authority that seeking remedial damages for breach of contract in such a manner constitutes a breach of the same contract, his pleadings do not allege any facts to show that the Petersons actually breached the contract; as pleaded, the contract required them solely to pay $10,000 to Galindo for his services, defective or otherwise, which they did. None of Galindo's allegations, taken as true, show a valid basis in law or fact for a claim for breach of contract."

- **Unjust Enrichment:** "In his amended petition, Galindo alleged a cause of action for unjust enrichment stating that the Petersons had retained the benefit of Galindo's additional materials and labor without making full payment. This court has repeatedly held that unjust enrichment is not an independent cause of action....Not only has Galindo not mentioned quantum meruit as a cause of action, although given ample opportunity to do so, his pleading that he performed additional work according to the original contract negates any such cause of action. Without either a new contract or quantum meruit claim or allegation, Galindo is unable to establish a claim for unjust enrichment. Galindo attempts to establish that the additional work he performed, for which he seeks compensation, was performed in addition to the work required under the original contract; however, the Petersons' suit in justice court makes clear that the additional work performed by Galindo was to comply with his obligations under the original contract. Galindo has not pleaded any factual basis for treating the additional work as anything other than work performed under the original contract, which the Petersons paid in full."
- **Evidence:** "Rule 91a.6 does not allow a trial court to consider evidence in ruling on the motion....Although the trial court took judicial notice that Patios by Design had forfeited its charter, it is clear that the trial court did not rely on the charter forfeiture in granting the Petersons' Rule 91a motion to dismiss. We overrule Galindo's third issue.

Tort Claims Act (Auto Collision, Emergency Exception, Official Immunity, Summary Judgment)*: Springtown v. Ashenfelter*, No. 02-23-00204-CV–"Appellee Kalie Ashenfelter sued Appellant City of Springtown after she was involved in an automobile collision with a City police officer. The City appeals the trial court's denial of its combined motion for no-evidence and traditional summary judgment, asserting that it was entitled to immunity based on (1) the police officer's official immunity and (2) the emergency exception to the Texas Tort Claims Act's (TTCA) waiver of immunity. See Tex. Civ. Prac. & Rem. Code Ann. §§ 101.021, 101.055. Because we conclude that the City was not entitled to a no-evidence summary judgment and that evidence attached to the City's own traditional motion for summary judgment raised a fact issue as to whether governmental immunity was waived, we affirm the trial court's order denying the City's combined motion. See Tex. R. App. P. 43.2(a)."

All for now. Y'all stay safe and well. I hope to see you today and next Thursday, and in any event, have a great weekend!

Yours,

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