

From: Law Office of Steven K. Hayes <shayes@stevehayeslaw.com>
Sent: Friday, February 14, 2025 4:40 PM
To: shayes@stevehayeslaw.com
Subject: Second Court Newsletter: One Summary from the Court, and Some New Opinions

February 14, 2025

Dear Friends:

One case summary, and several opinions from the Court this week.

Summary by the Court of a recent opinion

- *Governmental Immunity (Recreational Use)*

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

- *Governmental Immunity (Motion Driven Equipment, Inverse Condemnation, Pleadings)*
- *Parental Rights Termination (Effective Assistance of Counsel, Legal and Factual sufficiency, Endangerment, Best Interests)*
- *Texas Citizens Participation Act (Rule 202 Petition)*

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

Governmental Immunity (Recreational Use):

City of Denton v. Rodriguez-Rivera, No. 02-24-00393-CV (Feb. 6, 2025) (Birdwell, J., joined by Kerr and Bassel, JJ.).

Held: By waiting in his truck to dump a load of trash at Appellant’s landfill, Appellee was not engaged in “pleasure driving” as contemplated by the Recreational Use Statute. The statute excludes commercial activity from its application. Mere “off-road automobile driving” without recreational intent does not invoke the limitations of liability imposed by the statute.

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

Governmental Immunity (Motion Driven Equipment, Inverse Condemnation, Pleadings):
Highland Village v. Deines and Palumbo, No. 02-24-00431-CV—“This case arises from flood damage to the home of Appellees Tyler Deines and Dorothy Palumbo (the Homeowners). During the month prior to the flood, Appellant City of Highland Village, Texas, had used skid-steer-type vehicles to place rocks near the Homeowners’ property. On the day of the flood, the City delivered skid-steer-type equipment to the area adjacent to the Homeowners’ home so that the City could begin its Sewer Line Stabilization Project. That evening, over three inches of rain fell, and the Homeowners’ home flooded.

The Homeowners sued the City, alleging a claim under the Texas Tort Claims Act and, in the alternative, a claim for inverse condemnation.... The City answered, asserting a general denial and the affirmative defense of governmental immunity, and later filed a plea to the jurisdiction, arguing (1) that its immunity was not waived because it did not use motor-driven equipment and (2) that the Homeowners had failed to properly plead an inverse-condemnation claim. After additional filings by the parties and a hearing, the trial court denied the plea.

In two issues, the City complains that the trial court erred by denying its plea to the jurisdiction because the alleged damage was not caused by the use of motor-driven equipment and because the Homeowners had failed to properly plead an inverse-condemnation claim. Because we agree with the City's arguments, we reverse the trial court's denial of the City's plea to the jurisdiction, and we remand this case to the trial court to provide the Homeowners with an opportunity to replead."

- **Motor Driven Equipment (Pleadings, Causation):** "In its first issue, the City argues that there is no waiver of its immunity because there was no use of motor-driven equipment. Specifically, the City argues that there is no evidence that it put any motorized equipment into use immediately preceding or during the rainstorm. As we explain below, the Homeowners' current pleading of their claims under the Tort Claims Act fails to meet the Act's causation requirement to waive the City's immunity....the City did not dispute that a skid steer has a motor but argued instead that "the phrase 'operation or use' does not apply whe[n] the motor[-]driven equipment is not actually operating or put into use at the time of the alleged injury." The City's argument, intimating that the skid steers must have been in use during the rainstorm in order to meet the statutory definition, goes too far....[However] We hold that at this stage of the pleadings, the Homeowners' allegations are not sufficient to meet the causation requirement" that "the property damages 'ar[o]se[] from' the operation or use of the bobcats." "In essence, we look to see if the Homeowners' pleadings show that the City's use of the skid steers as part of the Sewer Line Stabilization Project on the swale adjacent to the Homeowners' property during the day on April 4, 2022, caused the Homeowners' house to flood when it rained that night."
- **Inverse Condemnation:** "The Homeowners...failed to take the...step of pleading that the City knew that such actions [i.e., allegations that "the City had 'left the storm drains blocked by sediment rocks' and had parked 'the bobcats . . . in the swale with large blades facing the street'] would result in flooding their home if it rained."

Parental Rights Termination (Effective Assistance of Counsel, Legal and Factual sufficiency, Endangerment, Best Interests): *I.A. and A.A.*, No. 02-24-00471-CV—"In this ultra-accelerated appeal, the father of I.A. and A.A. appeals the trial court's judgment terminating his parent-child relationship with the children. Father... raises two points on appeal, contending that he did not receive effective assistance of counsel and that the evidence is insufficient to prove all of the conduct and best-interest findings. Because we hold that Father has not shown from the silent record that his counsel was ineffective, and because we hold that the evidence is both legally and factually sufficient to prove the trial court's endangerment and best-interest findings, we affirm."

Texas Citizens Participation Act (Rule 202 Petition): *Frazier v. Maxwell*, No. 02-23-00103-CV—"Rule of Civil Procedure 202 is a presuit-discovery device used to investigate a potential claim's existence or to preserve testimony to use in an anticipated lawsuit. See Tex. R. Civ. P. 202.1. In 2022, Appellee Zach Maxwell filed a Rule 202 petition seeking to depose Appellant Makayla Montoya-Frazier "to avoid a delay or failure of justice in an anticipated suit" and to investigate potential claims against "individuals and organizations that performed or aided or abetted abortions in violation of . . . Senate Bill 8."... See Tex. R. Civ. P. 202.4(a)(1)-(2). Montoya-Frazier and Appellant Buckle Bunnies Fund, founded by Montoya-Frazier, moved to dismiss Maxwell's Rule 202 petition under the Texas Citizens Participation Act (TCPA). See Tex. Civ. Prac. & Rem. Code Ann. §§ 27.001-.011.

The TCPA is an expedited adjudication device aimed at "SLAPP"... suits, which are meritless legal actions filed to impede the exercise of some First Amendment rights. *See id.* In *DeAngelis v. Protective Parents Coalition*, this court held that a Rule 202 petition was a "legal action" under the TCPA's definition of that term and that the TCPA could therefore be used to dismiss it. See 556

S.W.3d 836, 850 (Tex. App.—Fort Worth 2018, no pet.). Since then, however, the Legislature has amended the TCPA....*See* Laura Lee Prather, *Striking A Balance[:]* *Changes to the Texas Citizens Participation Act*, 83 Tex. Bar J. 238, 238 (2020) (“On September 1, 2019, significant [TCPA] changes . . . went into effect.”).

The trial court denied Appellants’ TCPA motion, and they brought this accelerated interlocutory appeal. See Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(12). In Appellants’ first of four issues, they argue that, under *DeAngelis*, the TCPA applies to Maxwell’s Rule 202 petition. In his response, Maxwell disagrees. The court decided to revisit *DeAngelis* en banc to determine whether its holding remained sound. See Tex. R. App. P. 41.2.

After requesting and receiving supplemental briefing, hearing oral arguments, and performing a comprehensive analysis of the Rule 202–TCPA interplay through a review of these devices’ text, context, purposes, procedures, statutory definitions, and interpretive case law, we conclude that the TCPA, as amended in 2019, cannot be used to dismiss a Rule 202 petition because a Rule 202 petition is not a “legal action” under the TCPA. We thus overrule Appellants’ first issue—and *DeAngelis*, to the extent it conflicts with this opinion—and affirm the denial of Appellants’ TCPA motion.”

All for now. Y'all stay safe and well. Have a great weekend!

Yours,

Steve Hayes
Law Office of Steven K. Hayes
777 Main Street, Suite 340
Fort Worth, Texas 76102
shayes@stevehayeslaw.com; 817/371-8759; www.stevhayeslaw.com

Law Office of Steven K. Hayes | 777 Main Street Suite 600 | Fort Worth, TX 76102 US

[Unsubscribe](#) | [Update Profile](#) | [Constant Contact Data Notice](#)

