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# The Fate of the Texas Law of the Case Doctrine after *Mitschke v. Borromeo*

*Ryan P. Pitts*

The "law of the case" doctrine has persisted as a "principle" in the Texas common law for more than a century. It refers to the idea that an appellate decision rendered on a particular legal issue in a particular case governs further proceedings in that case. In the trial court, the doctrine reflects a command. A trial court cannot deviate from what the court of appeals held on a legal issue and faces a writ of mandamus if it does otherwise. By contrast, in Texas appellate courts, the law of the case doctrine represents a suggestion—the disfavoring of reconsideration. Texas law has always provided intermediate appellate courts with discretion to revisit legal issues in subsequent appeals in the same case (absent a prior decision in the case by the Texas Supreme Court on the issue).

This discretion may be no more. An important decision issued by the Texas Supreme Court last term, *Mitschke v. Borromeo*, seems to leave no room for a discretionary law of the case doctrine in the intermediate courts of appeals. This article briefly examines the discretionary law of the case doctrine as previously applied in Texas law and what remains of it, if anything, in the wake of *Mitschke*.

## I. The Law of the Case Doctrine Generally.

The law of the case doctrine is often referred to loosely as the same rule whether applied at the trial or appellate levels. But it is not.

What the law of the case doctrine means when invoked in trial court should come as no surprise. A "trial court 'has no authority to take any action that is inconsistent with or beyond the scope of that which is necessary to give full effect to the appellate court's judgment and mandate.'"[1] While a remand "for further proceedings" without "special instructions" opens "all issues of fact" for additional litigation, "issues of law are governed by the 'law of the case' doctrine."[2] In other words, in trial court, the law of the case doctrine means the enforcement of the appellate court's decision and mandate. And appellate courts have issued writs of mandamus to enforce them.[3]

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[1] *Brown v. Stackhouse*, No. 14-20-00272-CV, 2022 WL 1112762, at *2 (Tex. App.—Houston [14th Dist.] Apr. 14, 2022, no pet.) (mem. op.) (quoting *Phillips v. Bramlett*, 407 S.W.3d 229, 234 (Tex. 2013)).

[2] *In re Henry*, 388 S.W.3d 719, 727 (Tex. App.—Houston [1st Dist.] 2012, orig. proceeding [mand. denied]).

[3] *See, e.g.*, *In re United Servs. Auto. Ass'n*, 521 S.W.3d 920, 928 (Tex. App.—Houston [1st Dist.] 2017, orig. proceeding [mand. denied]) ("Because our 2014 opinion resolved these legal issues on the merits,

When raised in the courts of appeals, however, the law of the case doctrine stands for a very different proposition: "[A] decision rendered in a former appeal of a case is *generally* binding in a later appeal of the same case."[4] In the appellate courts, the law of the case doctrine has been a prudential rule disfavoring, but not barring, reconsideration of legal issues decided in previous appeals. The Texas Supreme Court set forth the discretionary nature of the rule:

> A decision rendered on an issue before the appellate court does not absolutely bar re-consideration of the same issue on a second appeal. Application of the doctrine lies within the discretion of the court, depending on the particular circumstances surrounding that case.[5]

This discretion came from the premise that the issuance of a previous decision in no way limited the "power" of the appellate court in future appeals.[6] Given the absence of a limitation on this power, the court *could* revisit the previously decided legal issue if it thought appropriate. This shifted the question to when reconsideration during a second, subsequent appeal in the same case was appropriate.

In answering this question, appellate courts have looked to the policies underlying the law of the case doctrine—to "achieve uniformity of decision as well as judicial economy and efficiency" by "narrowing the issues in successive stages of the

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the trial court was constrained by the law of the case doctrine and was not at liberty to disregard and contradict our holdings. . . . Accordingly, we conclude that the trial court abused its discretion in entering the 2016 new trial order and USAA is entitled to mandamus relief.").

[4] *Paradigm Oil, Inc. v. Retamco Operating, Inc.*, 372 S.W.3d 177, 182 (Tex. 2012) (emphasis added). While early decisions suggested that the law of the case doctrine only applied to decisions of law by a court of last resort, the rule's application widened to decisions by intermediate courts of appeals. *See Shiloh Treatment Ctr., Inc. v. Ward*, 608 S.W.3d 337, 341 (Tex. App.—Houston [1st Dist.] 2020, pet. denied) ("Where a losing party fails to avail itself of an appeal in the court of last resort, but allows the case to be remanded for further proceedings, the points decided by the court of appeals will be regarded as the law of the case and will not be reexamined." (quotation omitted)); *accord Dernick Res., Inc. v. Wilstein*, 471 S.W.3d 468, 477 (Tex. App.—Houston [1st Dist.] 2015, pet. denied).

[5] *Briscoe v. Goodmark Corp.*, 102 S.W.3d 714, 716 (Tex. 2003); *accord Gotham Ins. Co. v. Warren E & P, Inc.*, 455 S.W.3d 558, 562 n.8 (Tex. 2014); *Jacobs v. Jacobs*, 448 S.W.3d 626, 630 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *City of Houston v. Precast Structures, Inc.*, 60 S.W.3d 331, 337 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

[6] *Briscoe*, 102 S.W.3d at 717 ("Because application of the law of the case doctrine is discretionary, the court of appeals had the authority to re-visit its jurisdictional decision. Finding clear error in its first decision, it had the power to overturn that first decision on the second appeal.").

litigation," which aids in "putting an end to litigation."[7] Nonetheless, over a century[8] of common-law application, the discretionary nature of the law of the case doctrine led to a dizzying number of exceptions and caveats. A demonstrative (but not exhaustive) list of these nuances is below. The law of the case doctrine:

- "only applies to questions of law and does not apply to questions of fact";[9]
- does not prevent the appellate court from "considering legal questions that are properly before [the court] for the first time";[10]
- will not apply if "the later stage of litigation presents different parties, different issues, or more fully developed facts";[11]

[7] *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986); *accord Wagner v. Exxon Mobil Corp.*, 654 S.W.3d 613, 636 (Tex. App.—Houston [14th Dist.] 2022, no pet.) ("The doctrine's purpose is to streamline litigation by winnowing the issues in each successive appeal, thus promoting efficiency and uniformity in the decision-making process."); *Flores v. Tex. Dep't of Criminal Justice*, 634 S.W.3d 440, 452 (Tex. App.—El Paso 2021, no pet.) ("Application of this doctrine is discretionary and is merely a practice to ensure consistency in court decisions and not a limit to the power of courts." (quotation omitted)); *Barrows v. Ezer*, 624 S.W.2d 613 (Tex. App.—Houston [14th Dist.] 1981, no writ) ("Allowing this procedure would be in clear violation of the dictates of public policy striving to prevent useless, repetitious, and multifarious litigation and appeals. We express the view that in the interest of the public and judicial economic the entire case should be brought on appeal at the very first opportunity and not presented in multiple appeals."); *Kropp v. Prather*, 526 S.W.2d 283 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.) ("The application of the doctrine is not completely rigid and inflexible but the court has considerable discretion in its application.").

[8] *See, e.g.*, *Magnolia Park Co. v. Tinsley*, 73 S.W. 5 (Tex. 1903); *Kempner v. Huddleston*, 37 S.W. 1066 (Tex. 1896); *Galveston, H. & S.A. Ry. Co. v. Faber*, 8 S.W. 64 (Tex. 1888).

[9] *Hudson*, 711 S.W.2d at 630.

[10] *City of Mansfield v. Savering*, No. 02-19-00174-CV, 2020 WL 4006674, at *8 (Tex. App.—Fort Worth July 16, 2020, pet. denied) (mem. op.) (quoting *City of Houston v. Jackson*, 192 S.W.3d 764, 769 (Tex. 2006)).

[11] *Id.* at *8 (quoting *Jackson*, 192 S.W.3d at 769); *see Virani v. Cunningham*, No. 14-11-00331-CV, 2012 WL 355653, at *6 (Tex. App.—Houston [14th Dist.] Feb. 2, 2012, pet. denied) (mem. op.); *Gilliam v. Santa Fe Indep. Sch. Dist.*, No. 01-14-00186-CV, 2016 WL 828055, at *3 (Tex. App.—Houston [1st Dist.] Mar. 3, 2016, no pet.) (mem. op.) ("[W]hen in the second trial or proceeding, one or both of the parties amend their pleadings, it may be that the issues or facts have sufficiently changed so that the law of the case no longer applies."); *Precast Structures*, 60 S.W.3d at 338 ("We find that there has been no substantial change of facts to justify a departure from the law of the case doctrine."); *State v. Brazos River Harbor Navig. Dist.*, No. 14-99-00125-CV, 2000 WL 1676078, at *1 (Tex. App.—Houston [14th Dist.] Nov. 9, 2000, pet. denied) (mem. op.) ("If the first appeal were from the granting of summary judgment, the doctrine will not apply if the parties or causes of action are different under the subsequent proceeding, or if the summary judgment evidence offered in support of the second motion materially differs from that offered in support of the first motion.").

- may not apply if scope of review in the second appeal differs from that applied in the first appeal;[12]
- will not apply where "the earlier holding is clearly erroneous,"[13] such as where "a subsequent applicable standard has been established by the Texas Supreme Court";[14] and
- "does not apply to dicta."[15]

Many of these rules make good sense. But their applications have differed on a case-by-case basis, and the courts of appeals retained discretion in ultimately deciding whether to revisit an issue, or not.

In sum, when applied by the courts of appeals, the law of the case doctrine stood for a rule disfavoring a return to already decided issues in subsequent appeals.[16] It provided a way for courts of appeals to say, "We're not revisiting that legal issue in this case," without further analysis.

For its part, the Texas Supreme Court stayed mostly above the fray. Through two decisions, the Court held that the law of the case doctrine had little practical meaning for it. In *Paradigm Oil, Inc. v. Retamco Operating, Inc.*, the Court held a party could raise an issue lost in a first appeal even though the party had not re-raised (or even mentioned) the issue in the second appeal that led to the Court's review.[17] Similarly, in *Loram Maintenance of Way, Inc. v. Ianni*, the Court explained that a denial of a petition for review does not preclude its later review of an issue presented in the

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[12] *City of Mansfield*, 2020 WL 4006674, at *9; *Farmers Grp. Ins., Inc. v. Poteet*, 434 S.W.3d 316, 329 (Tex. App.—Fort Worth 2014, pet. denied).

[13] *Briscoe*, 102 S.W.3d at 716; *EP Energy E & P Co., L.P. v. Cudd Pressure Control, Inc.*, No. 14-13-00734-CV, 2014 WL 7345938, at *6 (Tex. App.—Houston [14th Dist.] Dec. 23, 2014, pet. denied) (mem. op.).

[14] *McCrea v. Cubilla Condo. Corp.*, N.V., 769 S.W.2d 261, 263 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (quoting *Barrows*, 624 S.W.2d at 617).

[15] *Four Bros. Boat Works, Inc. v. Tesoro Petroleum Cos., Inc.*, 217 S.W.3d 653, 662 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

[16] *See Watanabe v. Summit Path Partners, LLC*, 650 S.W.3d 112, 133 (Tex. App.—Houston [14th Dist.] 2021, no pet.) ("The law-of-the-case doctrine is a prudential doctrine under which issues of law that have been fully and finally litigated by a court of last resort will not ordinarily be relitigated."); *Nw. Indep. Sch. Dist. v. Carroll Indep. Sch. Dist.*, 441 S.W.3d 684, 688 (Tex. App.—Fort Worth 2014, pet. denied) ("Having decided an issue previously, a court of appeals is not obligated to reconsider the matter in subsequent appeals.").

[17] 372 S.W.3d 177, 182-82 (Tex. 2012).

denied petition.[18] In short, the law of the case doctrine does not inhibit the scope of the Texas Supreme Court's review unless the Court had earlier granted review and addressed the issue (in which case the earlier decision was the law of the land—binding precedent).

For ease of reference, and because it may prove helpful for the reader in the future, the substantive decisions of the Texas Supreme Court explicating the law of the case doctrine before *Mitschke v. Borromeo* are contained in the note at the end of this sentence.[19]

## II. *Mitschke v. Borromeo* may have overridden the discretionary law of the case doctrine with horizontal *stare decisis.*

The discretionary aspect of the law of the case doctrine as applied in the courts of appeals has always been at tension with *stare decisis*—the bindingness of past judicial precedents. The tension is this: How does a court of appeals have discretion to revisit decided legal issues from past appeals in the same case without disrupting its earlier precedent? A recent Texas Supreme Court decision seems to have implicitly resolved this tension in favor of *stare decisis*, leaving in doubt what remains—if anything—of the law of the case doctrine's "discretionary" aspect.

In *Mitschke v. Borromeo*, the Seventh Court of Appeals had received an appeal from the Third Court of Appeals under the docket-equalization rules, requiring the Seventh Court to decide the case under the Third Court's precedent.[20] But a conflict of law existed between two decisions in the Third Court on the key issue presented by the appeal.[21] Because the Third Court had no guidance for how "to choose the proper rule of decision" amid "conflicting precedent," the Seventh Court followed the more recent decision rendered by the Third Court.[22]

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[18] 210 S.W.3d 593, 596 (Tex. 2006); *accord Jackson*, 192 S.W.3d at 769 ("[T]he 'law of the case' doctrine in no way prevents this Court from considering legal questions that are properly before us for the first time."); *Gotham Ins. Co.*, 455 S.W.3d at 562 n.8.

[19] *Gotham Ins. Co. v. Warren E & P, Inc.*, 455 S.W.3d 558, 562 n.8 (Tex. 2014); *Paradigm Oil, Inc. v. Retamco Operating, Inc.*, 372 S.W.3d 177 (Tex. 2012); *Perry Homes v. Cull*, 258 S.W.3d 580 (Tex. 2008); *Loram Maint. of Way, Inc. v. Ianni*, 210 S.W.3d 593 (Tex. 2006); *City of Houston v. Jackson*, 192 S.W.3d 764 (Tex. 2006); *Briscoe v. Goodmark Corp.*, 102 S.W.3d 714 (Tex. 2003); *Hudson v. Wakefield*, 711 S.W.2d 628 (Tex. 1986); *Trevino v. Turcotte*, 564 S.W.2d 682 (Tex. 1978); *Conn. Gen. Life Ins. Co. v. Bryson*, 219 S.W.2d 799 (Tex. 1949); *Magnolia Park Co. v. Tinsley*, 73 S.W. 5 (Tex. 1903); *Kempner v. Huddleston*, 37 S.W. 1066 (Tex. 1896); *Galveston, H. & S.A. Ry. Co. v. Faber*, 8 S.W. 64 (Tex. 1888).

[20] 645 S.W.3d 251, 254 (Tex. 2022).

[21] *Id.* at 255.

[22] *Id.*

The Texas Supreme Court granted review and reversed. In its opinion, the Court provided a thorough explication of *stare decisis* and adopted the principle of horizontal *stare decisis*, holding that the Seventh Court should have followed the Third Court's earlier in time precedent. It announced that "three-judge panels must follow materially indistinguishable decisions of earlier panels of the same court unless a higher authority has superseded that prior decision."[23] The Court described this rule of horizontal *stare decisis* as "a manifestation of our commitment to precedent in the first place."[24] And it explained why:

> If one appellate panel decides a case, and another panel of the same court differently resolves a materially indistinguishable question in contravention of a holding in the prior decision, the second panel has violated the foundational rule of *stare decisis*. Affording *stare decisis* authority to the second case would be tantamount to eliminating *stare decisis* altogether, as nothing would stop a third panel from returning to the initial outcome, or going yet another way. For our legal system, the result would not be order and stability, but chaos and unpredictability.[25]

It is unclear what can remain of the discretionary law of the case doctrine following this holding. Because, once a panel issues a decision earlier in a case—resulting in an appellate judgment and a mandate—the panel cannot later depart from the holdings of that decision "unless a higher authority has superseded" it.[26] The Court left no discretion to panels of courts of appeals to revisit issues resolved by an earlier panel decision, even if written by the same panel in the same case.

If discretion did still exist after *Mitschke*, the door would lie open to the "chaos and unpredictability" worried of by the Texas Supreme Court. A hypothetical most clearly illustrates why. Suppose "Panel A" of the Fourteenth Court of Appeals rendered "Holding X" in "Case 1" and remanded for further proceedings. In an appeal from "Case 2," a later "Panel B" of the Fourteenth Court followed horizontal *stare decisis* and decided the appeal based on "Holding X." Then, Panel A decided to alter "Holding X"—however slightly—in a later appeal in Case 1 by invoking its discretion under the law of the case doctrine. Not only has Panel A declined to follow its own prior panel ruling, but the decision of Panel B is now based on an earlier, changed decision. Uncertainty in the law is the likely result. Which decision do future panels follow? What do lawyers advise their clients?

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[23] *Id.* (alterations and quotation omitted).

[24] *Id.* at 257-58.

[25] *Id.*

[26] *Id.* at 255.

Thus, *Mitschke* appears inconsistent with the discretionary aspect of the law of the case doctrine, especially some iterations of it, such as that articulated by the Thirteenth Court: "[W]e are not 'bound' by our prior decisions, but rather, we retain discretion to revisit issues we previously decided that have not been finally determined by the Texas Supreme Court."[27] In *Mitschke*'s wake, where a prior panel decision squarely addressed the issue of law, a future panel—whether the same panel in the same case or a different panel in a different case—*must* follow the prior decision absent intervention by a higher authority. The Court did not leave anything to discretion.

So what remains of the discretionary law of the case doctrine? We will have to see. At a minimum, the question will likely become whether the legal issue decided by the early panel is sufficiently the same such as to trigger horizontal *stare decisis*. While past law of the case precedent may assist in answering this question, panels of intermediate courts of appeals do not enjoy any discretion under *Mitschke* to return to already decided issues. A role that the law of the case doctrine may still play in the intermediate appellate courts is to preclude consideration of issues in a second appeal that an appellant could have but did not raise in the first appeal.[28] But that issue is fodder for its own article.

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[27] *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. John Zink Co.*, No. 13-08-00589-CV, 2010 WL 4523760, at *12 (Tex. App.—Corpus Christi Nov. 10, 2010, pet. denied) (mem. op.). It is notable that some courts of appeals had recognized and applied both horizontal *stare decisis* and the law of the case doctrine, but without resolving the tension between the two concepts. *Compare Chase Home Fin., L.L.C. v. Cal W. Reconveyance Corp.*, 309 S.W.3d 619, 630 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (applying horizontal *stare decisis*), *with Wagner v. Exxon Mobil Corp.*, 654 S.W.3d 613, 636 (Tex. App.—Houston [14th Dist.] 2022, no pet.) ("Under the law of the case doctrine, a decision rendered in a former appeal generally is binding in a later appeal of the same case.").

[28] *See, e.g.*, *Fomby v. ManorCare - Sharpview of Houston, Tex., LL*C, No. 01-19-00618-CV, 2021 WL 2424933, at *4 (Tex. App.—Houston [1st Dist.] June 15, 2021, pet. denied) (mem. op.) ("Fomby asserts on appeal that his challenge to the constitutionality of Chapter 74 has not been addressed and that he has been denied access to the court. . . . The record shows, however, that Fomby had an opportunity to litigate his constitutional challenge [in a prior appeal] and have it decided, but did not."); *Martin v. PlainsCapital Bank*, No. 05-10-00235-CV, 2017 WL 1536508, at *6 (Tex. App.—Dallas Apr. 26, 2017, no pet.) (mem. op.) ("A party may not introduce an issue on remand that it failed to raise in previous appellate proceedings."); *Foreman v. Johnson*, No. 04-14-00074-CV, 2014 WL 6808623, at *3 (Tex. App.—San Antonio Dec. 3, 2014, no pet.) (mem. op.) ("A party may not introduce an issue on remand that it failed to raise in previous appellate proceedings."); *CSFB 1998-PI Buffalo Speedway Off., LTD. P'ship v. Amtech Elevator Servs. Co.*, No. 01-08-00639-CV, 2010 WL 3294287, at *3 (Tex. App.—Houston [1st Dist.] Aug. 19, 2010, no pet.) (mem. op.) ("Amtech argues that CSFB waived its right to complain about the amount of attorney's fees awarded by the trial court because it did not complain about the award of $2,500 in the interlocutory appeal of the original summary judgment."); *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 228 S.W.3d 864, 867 (Tex. App.—Austin 2007, pet. denied) ("A party may not introduce an issue on remand that it failed to raise in previous appellate proceedings."); *Barrows v. Ezer*, 624 S.W.2d 613 (Tex. App.—Houston [14th Dist.] 1981, no writ) ("[W]e hold where no complaint was made on the first appeal as to the appointment of the co-trustee or

## III. Conclusion

Not much will change in trial courts if horizontal *stare decisis* did, in fact, override the discretionary aspect of Texas's law of the case doctrine. Trial courts would still need to follow the decisions and mandates of the courts of appeals. But the landscape would look somewhat different in the courts of appeals. Absent an *en banc* rehearing, a panel could no longer revisit a prior ruling of law in an earlier appeal in the same case. Under horizontal *stare decisis* as articulated in *Mitschke*, all subsequent panels of a court of appeals must follow the earlier panel decision. Little room has been left for the discretionary revisiting of an already decided legal issue during a subsequent appeal in the same case.

directing assets be delivered to Ezer, and in the absence of a finding of fundamental error in the first appeal, the right to question that portion of the judgment has been waived."); *cf. Davis v. City of Austin*, 632 S.W.2d 331, 335 (Tex. 1982) ("In this posture of the appellate record, we must affirm the court of civil appeals' judgment, including its decision that the valuation was grossly excessive. On remand, this unattacked judgment will be the law of this case."); *Medina v. Benkiser*, 317 S.W.3d 296, 299 (Tex. App.—Houston [1st Dist.] 2009, no pet.) ("An appellate court's judgment is final not only in reference to the matters actually litigated, but as to all other matters that the parties might have litigated and decided in the case.").

# Procedural Mandamus Issues: Staying Related Cases and *In Camera* Documents

*Nicholas Bruno*

Every appellate practitioner will likely, at some point, be called upon to help with an original proceeding in one of the Texas courts of appeals. This article highlights a couple recent rulings on procedural mandamus issues related to (1) staying related cases and (2) ensuring that documents presented to the trial court *in camera* are effectively made part of the mandamus record.

This article does not purport to be a comprehensive summary of all procedural considerations for mandamus proceedings. Section 3 of the Texas Rules of Appellate Procedure provides the procedural rules governing mandamus proceedings (*i.e.*, Rules 52.1-52.11). For purposes of this article, Rules 52.10 and 52.7 are most relevant to the issues raised.

## I. Stay of related cases.

Parties to mandamus proceedings often seek emergency relief during the pendency of the mandamus proceeding. Rule 52.10 allows the appellate court to give temporary relief pending its action on the mandamus petition itself. Note the following three emphasized phrases:

> (a) *Motion for Temporary Relief; Certificate of Compliance.* The relator may file a motion to ***stay any underlying proceedings*** or ***for any other temporary relief*** pending the court's action on the petition. The relator must notify or make a diligent effort to notify all parties by expedited means (such as by telephone or fax) that a motion for temporary relief has been or will be filed and must certify to the court that the relator has complied with this paragraph before temporary relief will be granted.
>
> (b) *Grant of Temporary Relief.* The court—on motion of any party or on its own initiative—***may without notice grant any just relief*** pending the court's action on the petition. As a condition of granting temporary relief, the court may require a bond to protect the parties who will be affected by the relief. Unless vacated or modified, an order granting temporary relief is effective until the case is finally decided.
>
> (c) *Motion to Reconsider.* Any party may move the court at any time to reconsider a grant of temporary relief.

Tex. R. App. P. 52.10 (emphasis added).

Note that Rule 52.10(a) in particular allows the appellate court to "stay any underlying proceedings." *Id.* In complex litigation, for a variety of reasons, there may be multiple related proceedings. An appellate court ruling in one may significantly impact the other related cases as well. If a mandamus is taken from only one of those proceedings, can the appellate court stay other related proceedings?

A recent ruling from the First Court of Appeals suggests that the answer is "no"—but the order making this ruling is by no means conclusive.

By way of background, this ruling came from an appeal—not from a mandamus proceeding. The appellant "filed a motion for emergency relief" requesting various rulings, including asking the First Court for relief from an "alleged oral order." *D&R USA Enterps. v. SCF RC Funding IV, LLC*, No. 01-22-00891-CV (Tex. App.—Houston [1st Dist.] Dec. 13, 2022, order). The appellant, however, did not provide "documentation of the order to show that it was entered in the trial court cause on appeal in this case." *Id.* Justice Hightower, who authored the order, noted that, while "general authority [exists] that permits an appellate court to grant stays in accelerated appeals and original proceedings," the appellant offered "no authority permitting this Court to stay proceedings in a different trial court cause than the one involved in the appeal." *Id.* Accordingly, the court denied the motion for emergency relief. *Id.*

That order, with its general reference to an appellate court's power in original proceedings, lends some support to the view that Rule 52.10(a) allows the appellate court to stay the underlying proceedings ***only*** in the trial court proceeding from which the mandamus arises.

But the *D&R Enterprises* order is not conclusive. This order does not analyze the text of Rule 52.10. That observation is not meant as a criticism; this is understandable given that this order was issued in an appeal and not a mandamus proceeding—and that the appellant did not cite Rule 52.10. But one may ask whether a detailed textual analysis compels a different result.

One may accept the premise that Rule 52.10(a)'s phrase "stay any underlying proceedings" gives the appellate court authority to stay only the proceedings from which the mandamus arises and not related proceedings. But what about Rule 52.10(a)'s language that the appellate court can grant "any other temporary relief pending the court's action on the petition"? What about Rule 52.10(b)'s language that the appellate court has authority to grant "any just relief"? Does either phrase compel a different result with regard to an appellate court's power to stay related proceedings? This ruling does not specifically answer these questions.

Beyond raising these questions to the appellate court, practitioners have other avenues to stay related proceedings as well. The parties may simply agree to stay

deadlines in the related case. Or the party seeking to stay a related proceeding may ask for relief from the trial court in which the related proceeding is pending.

## II. Documents presented to the trial court *in camera*.

Parties also often face complications when dealing with sensitive documents in a mandamus proceeding. The most relevant rule requires that the party bringing the mandamus proceeding (the relator) "must file" a mandamus record:

> (a) *Filing by Relator Required.* Relator must file with the petition:
>
> (1) a certified or sworn copy of every document that is material to the relator's claim for relief and that was filed in any underlying proceeding; and
>
> (2) a properly authenticated transcript of any relevant testimony from any underlying proceeding, including any exhibits offered in evidence, or a statement that no testimony was adduced in connection with the matter complained.

Tex. R. App. P. 52.7.

Rule 52.7 may provide a complication if relevant documents were presented to the trial court *in camera*. How does a relator get those documents to the court of appeals?

Entire articles have been written about this topic. *See, e.g.*, Kyle Lawrence, *Confidential and Privileged Information on Appeal: Sealed Records and In Camera Submissions*, 31st Annual Texas State Bar CLE Advanced Civil Appellate Practice, 2017 WL 5814942 (2017). This article will not duplicate the work done by those authors. Instead, it will highlight one recent decision from the Dallas Court of Appeals that both highlights the potentially fatal impact that a failure to properly transmit *in camera* documents to the appellate court may have on a mandamus proceeding and gives a standard for the bare minimum that is required to satisfy Rule 52.7.

The general obligations of a relator in an original proceeding were well-established. The party "seeking relief [has] the burden of providing this Court with a sufficient record to establish their right to mandamus relief." *Walker v. Packer*, 827 S.W.2d 833, 837 (Tex. 1992). The Dallas Court noted that this "burden to provide this Court with a sufficient record requires Relators to request that any documents submitted to the trial court for in camera inspection be carried forward under seal so that the appellate court can evaluate this information." *In re Barnes*, 655 S.W.3d 658, 668 (Tex. App.—Dallas 2022, orig. proceeding [mand. pending]). "Because the record in an original proceeding is assembled by the parties, this Court strictly enforces the authentication requirements of rule 52 to ensure the integrity of the record." *Id.* at 669.

The Dallas Court stated that the *Barnes* relator had several deficiencies in bringing the *in camera* documents to the appellate court:

> Relators submitted documents to this Court with an "In Camera Motion," stating that they did so to protect their assertion of privilege and objections and so "that this Honorable Court may make its own determination as to whether said records, attached [t]hereto as Exhibit 1, are privileged." In doing so, Relators' counsel merely represented that, "Relators provide the Court with the privileged records made the subject of the trial court's order. . . ."
>
> The documents also appear to be in response to Relators' request for their own records, not RPI's request pursuant to its depositions on written questions
>
> The documents submitted to this Court are not certified by, or under seal of, the trial court, or otherwise properly established to be the records reviewed below.
>
> . . .
>
> Here, Relators did not file with this Court an affidavit or unsworn declaration executed by a person with knowledge of relevant facts swearing under penalty of perjury that the documents submitted to this Court in camera are true and correct copies of the original documents submitted to the trial court in camera.
>
> . . .
>
> ***Simply, we have no means to verify that the documents tendered to this Court in camera are the same documents Relators tendered to the trial court.*** Even assuming without deciding that Relators may supplement the mandamus record by submitting the records to this Court in camera, Relators failed to comply with the Texas Rules of Appellate Procedure when doing so.

*Id.* at 668-69 (internal citations omitted) (emphasis added).

The justices on the panel split over the impact of these failures on the viability of mandamus relief. The majority held:

> Fortunately for Relators, to reach our determination here we have a sufficient mandamus record because a review of the health care records is not critical to our determination. The outcome might have been otherwise had it been necessary for us to do so.

*Id.* at 669-70.

It then decided that the relator was entitled to some relief on the merits. On the other hand, the dissenting judge would have denied mandamus relief based on these failures to comply alone:

> This Court may not address the merits of any petition for writ of mandamus absent strict compliance with Rule 52 of the Texas Rules of Appellate Procedure. Relators fail to comply with Rule 52, as the majority concedes. . . . Accordingly, I would follow Texas Rule of Appellate Procedure 52 and this Court's precedent and deny mandamus relief without addressing the merits.

*In re Barnes*, 665 S.W.3d at 676-77 (Pedersen, J., dissenting).

Notably, Justice Pedersen did not expressly address the majority's statement that a review of the *in camera* documents was not critical to its determination of the merits. *See Barnes*, 655 S.W.3d at 669-70. Failure to provide a record in compliance with Rule 52.7 alone appeared to be enough to doom the mandamus in the dissent's view.

An appellate practitioner should not allow the outcome of a mandamus to be placed at risk that the *Barnes* dissent's view prevails—especially when the mandamus is otherwise meritorious. At a minimum, an appellate lawyer should ensure that there is some way (such as the affidavit missing in *Barnes*) that the appellate court can verify that the documents tendered to the appellate court are the same documents the Relators tendered to the trial court.

* * *

Mandamus proceedings often pose unique considerations. Complex cases often pose even more complex procedural questions. Appellate practitioners should keep up-to-speed on rulings made by the courts in these proceedings, especially on procedural issues, so that they are ready to go when an emergency that does not permit much time for in-depth research in the form of a last-minute complex mandamus proceeding arises.

## Did You Know?

*JoAnn Storey*

Filing a motion asking the trial court to render judgment on the verdict for the actual damages found by the jury waives any complaint on appeal that the evidence supporting the actual damages is legally or factually insufficient. *Litton Indus. Prod. Inc. v. Gammage*, 668 S.W.2d 319, 322 (Tex.1984).

To avoid a claim of waiver, submit a proposed judgment agreeing only as to its "form."

Or, to reserve the right to challenge the judgment on appeal, consider using the following language in your motion to enter judgment on the verdict:

> While Plaintiffs disagree with the findings of the jury and feel there is a fatal defect which will support a new trial, in the event the Court is not inclined to grant a new trial prior to the entry of judgment, Plaintiffs pray the Court enter the following judgment. Plaintiffs agree only as to the form of the judgment but disagree and should not be construed as concurring with the content and result.

*First Nat. Bank of Beeville v. Fojtik*, 775 S.W.2d 632, 633 (Tex. 1989) (per curiam).

# Case Updates from the First Court of Appeals

*Parth Gejji*

***Torres v. Pasadena Refining Systems, Inc.*, No. 01-18-00638-CV, __ S.W.3d __, 2022 WL 17684333 (Tex. App.—Houston [1st Dist.] Dec. 15, 2022, no pet. h.) (en banc)**

This *en banc* opinion and the panel opinion are a fascinating read for any serious students of the Restatement (Second) of Torts and Texas tort law.

Although the *en banc* opinion withdraws and vacates the panel opinion, all the majority and dissenting opinions involved demonstrate how there are still disagreements about an area of law that has already resulted in a lot of prior case law.

The *en banc* opinion has produced two dissenting opinions. The panel opinion itself was a split decision and featured a vigorous dissent. *See Torres v. Pasadena Refining Sys., Inc.*, No. 01-18-00638-CV, 2022 WL 1467374 (Tex. App.—Houston [1st Dist.] May 10, 2022).

A personal injury claimant, Michael Torres, sued Pasadena Refining Systems, Inc. ("PRSI") and National Plant Services, LLC ("NPS").

PRSI retained 3-J Ryan, Inc. ("Ryan") as an independent contractor to perform turnaround work at its refinery. In turn, Ryan hired NPS to build the scaffold needed for the work.

Torres was an employee of Ryan—meaning that neither PRSI nor NPS owed him any duties under the employer-employee relationship. Torres slipped and fell while he was on the scaffold attempting to latch his safety lanyard. Torres alleged that, among other things, the scaffold was dangerous because it lacked the proper fall protection—either a self-retracting lifeline or a ladder cage.

The trial court granted summary judgment to both PRSI and NPS on the basis that there was no duty owed to Torres. The panel issued a split decision. The panel majority reversed summary judgment as to both PRSI and NPS. The *en banc* opinion affirmed summary judgment in favor of PRSI, but reversed summary judgment in favor of NPS.

The *en banc* opinion has a comprehensive summary of the current state of the law regarding the duty owed by a premises owner or general contractor when a dangerous condition arises from the work of an independent contractor.

The scope of this duty has been explored at length by the Texas Supreme Court starting in *Redinger v. Living, Inc.*, 689 S.W.2d 415 (Tex. 1985), and in many

subsequent decisions. *See, e.g.*, *Koch Ref. Co. v. Chapa*, 11 S.W.3d 153 (Tex. 1999); *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778 (Tex. 2001); *Dow Chem. Co. v. Bright*, 89 S.W.3d 602 (Tex. 2002); *JLB Builders, L.L.C. v. Hernandez*, 622 S.W.3d 860 (Tex. 2021).

The basic principle is found in Restatement (Second) of Torts § 414:

> One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

Restatement (Second) of Torts § 414.

As to PRSI, the *en banc* court held that there was no evidence of retained control or actual control.

Examining the contract between PRSI and Ryan, the *en banc* court found that none of the provisions allowed the kind of control that would give rise to a duty. At most, the contract gave PRSI a right to inspect the worksite and the right to stop work. This was not enough. In reaching this conclusion, the *en banc* court found no right to control in the following provision:

> ***Correction of Deficiencies.*** **When . . . PRSI notifies [Ryan], either verbally or in writing, that [Ryan] is not complying with a safety and health requirement either set forth in this Contract or incorporated by reference, [Ryan] shall correct the deficiency immediately.**

2022 WL 17684333, at *9 (emphasis in original). The panel majority had found this provision dispositive in holding that PRSI retained a right to control. The *en banc* court disagreed.

Turning to actual control, the *en banc* court found no evidence of control actually being exercised on the worksite. The court searched the record for evidence that PRSI had prior knowledge of a dangerous condition with respect to the safety of the scaffold or that PRSI specifically approved a dangerous act. It found none.

As to NPS, both the *en banc* and panel majority agreed that there was a duty based on actual control. NPS built and maintained the scaffold, inspected the scaffold daily, and would assign the appropriate safety tag for the scaffold indicating whether it could be used.

Thus, the *en banc* court affirmed the grant of summary judgment in favor of PRSI, but reversed the grant of summary judgment in favor of NPS.

***City of Houston v. McGriff*, No. 01-21-00487-CV, __ S.W.3d __, 2022 WL 17684046 (Tex. App.—Houston [1st Dist.] Dec. 15, 2022, no pet. h.)**

In this interlocutory appeal, the City of Houston appealed the denial of its combined plea to the jurisdiction and summary judgment motion asserting governmental immunity. The court of appeals affirmed the denial.

The opinion stands out for its discussion of the "sudden emergency" defense—a unique defense that is not frequently litigated.

Among other things, the Texas Tort Claims Act ("TTCA") waives immunity for personal injuries proximately caused by the negligence of a governmental employee acting in the scope of his employment if the injuries arise from the operation or use of a motor-driven vehicle *and* if the governmental employee would be personally liable to the plaintiff under Texas law.

In this case, the plaintiff was injured while driving a bus when a City employee driving a freightliner and towing a trailer veered into the plaintiff's lane and crashed into the bus.

Thus, under ordinary TTCA principles, governmental immunity should have been waived. The City employee was acting in the scope of his employment, the injuries arose from the operation or use of a motor-driven vehicle, and the employee was likely liable to the plaintiff under Texas law.

But the City employee claimed that his actions were necessitated by the reckless driving of a third party who fled the scene.

Thus, the City argued that the sudden emergency defense applied, and thereby prevented the plaintiff from establishing breach of any negligence duty. The sudden emergency defense is an inferential rebuttal defense, and like any inferential rebuttal, it operates to rebut an essential element of the plaintiff's case.

The sudden emergency defense applies when (1) an emergency situation arises suddenly and unexpectedly, (2) the emergency situation was not proximately caused by the negligent act or omission of the person whose conduct is under inquiry, and (3) after the emergency situation arose that to a reasonable person would have required immediate action without time for deliberation, the person acted as a person of ordinary prudence would have acted under the same or similar circumstances.

The City as the party relying on the inferential rebuttal had the burden to establish the defense as a matter of law.

But the court of appeals found that the evidence did not conclusively establish this defense. Specifically, the court found that the evidence did not conclusively establish that the sudden emergency was not proximately caused by the City employee's negligence. As a result, the trial court was correct in denying the plea to the jurisdiction and the motion for summary judgment.

# Case Updates from the Fourteenth Court of Appeals

*Eleanor Mason*

***Rinkle v. Graf*, 658 S.W.3d 821 (Tex. App.—Houston [14th Dist.] Dec. 8, 2022, no pet.)**

In *Rinkle*, the court concluded that the Texas Medical Liability Act's service requirement was not satisfied when the plaintiff's expert report was filed with the court clerk but not actually served on the opposing party.

The plaintiffs in *Rinkle* asserted medical-liability claims against the defendant. Before the defendant was served or appeared in the lawsuit, the plaintiffs filed a copy of their expert report with the court clerk; the plaintiffs did not serve the defendant with a copy of the expert report. The defendant moved to dismiss the plaintiffs' claims and the trial court denied the motion.

On interlocutory appeal, the court of appeals began its analysis with the applicable statute: the Texas Medical Liability Act requires that a claimant "shall, not later than the 120th day after the date each defendant's original answer is filed, serve on that party or the party's attorney one or more expert reports." Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a). Although the Act does not define "serve," the court noted that other courts had interpreted the term to invoke compliance with Texas Rule of Civil Procedure 21a. *Rinkle*, 658 S.W.3d at 825.

The plaintiffs acknowledged that they did not attempt any method of service described by Rule 21a. *Id.* at 826 n.3. However, they argued and produced evidence showing that the defendant's lawyers had "delivery and actual knowledge" of the expert report because they had accessed the document on the district clerk's website. *Id.* at 826-27.

Rejecting this argument, the court concluded that "actual knowledge and receipt of the expert report is insufficient if service was not properly accomplished on each defendant." *Id.* at 827. Rather, "the plain language of the [Act] places the burden on the claimant to serve the report, not on the defendant to find the report." *Id.* The court then reversed the trial court's order denying the defendant's motion to dismiss. *Id.* at 828.

***Klevenhagen v. Hilburn*, Nos. 14-21-00042-CV, 14-21-00053-CV, __ S.W.3d __, 2022 WL 16935994 (Tex. App.—Houston [14th Dist.] Nov. 15, 2022, no pet.)**

In *Klevenhagen*, the court concluded that the bar on the assignment or turnover of litigation-related legal-malpractice claims was supported by significant public policy concerns.

*Klevenhagen* began with a related suit in which the jury found a medical practice liable for a patient's injuries. The medical practice, in turn, asserted legal malpractice claims against its representing attorneys. The medical practice subsequently dismissed its claims.

In the medical liability case, the plaintiff applied for the appointment of a receiver and issuance of a turnover order. The trial court granted the application and appointed a receiver to prosecute the legal malpractice claims against the medical practice's attorneys. The receiver subsequently filed a legal malpractice suit against the attorneys and asserted claims on behalf of the medical practice. Shortly thereafter, the receiver withdrew from representation; the trial court denied a subsequent application for appointment of a separate receiver and issuance of a turnover order regarding the legal-malpractice claims. The legal-malpractice claims were dismissed altogether.

On appeal, the court noted that Texas courts had identified several reasons why the harm caused by the turnover of legal malpractice claims outweighed its benefits, focusing on two reasons in particular. First, turnover of a legal malpractice claim would permit the substitution of a claim against the judgment debtor's counsel in place of a claim against a defendant with insufficient insurance and non-exempt assets to cover a large judgment. This, the court reasoned "would make lawyers reluctant—and perhaps unwilling—to represent defendants with inadequate insurance and assets." *Id*. at *4 (internal quotation omitted).

Second, the court stated that prosecution of legal malpractice claims by a non-client also presented an increased threat to client confidentiality and control. *Id.* at *5. When a client prosecutes a legal-malpractice claim, it retains control over the scope of the litigation and any disclosures—but that control is lost when the prosecution is turned over to someone else. *Id*. This concern was evident here, where the medical practice had dismissed its legal malpractice claims only to have them re-filed by the receiver.

The court ultimately affirmed, concluding that the trial court did not abuse its discretion in denying the application for appointment of a receiver and for issuance of a turnover regarding the legal malpractice claims.

# Case Updates from the Fifth Circuit

*Kelsi Stayart White*

### *Banca Pueyo SA v. Lone Star Fund IX (US)*, 55 F.4th 469 (5th Cir. 2022)

This appeal involved a challenge to a district court's *ex parte* grant of a discovery order under 28 U.S.C. § 1782 for discovery in a foreign proceeding. It's a good primer on the issue for anyone encountering Section 1782 for the first time.

Section 1782 facilitates third-party discovery from subjects that reside or are found within the jurisdiction of an American district court in aid of parties in foreign proceedings. As interpreted by the Supreme Court, Section 1782 does not require that the information be discoverable in the foreign jurisdiction for the district court to order its production in the United States. The district court must consider specific factors laid out by the Supreme Court in *Intel Corp. v. Advanced Micro Devices*, 542 U.S. 241 (2004), in exercising its discretion to enter a discovery order under Section 1782.

In this case, the Section 1782 application was made *ex parte*, which the Fifth Circuit held was uncommon, but not impermissible. The district court erred, however, in refusing to consider the respondent's arguments that Section 1782's requirements were not met after entering the order *ex parte*. Instead, the district court held that the respondent could only challenge the order with a motion to quash under Rule 45. The Fifth Circuit disagreed, deciding that the district court effectively prevented any adversarial testing of whether Section 1782's requirements were satisfied. The Fifth Circuit held the respondent is entitled to a full adversarial challenge of whether the applicant has met Section 1782's requirements, even if that challenge occurs after the entry of an adverse *ex parte* order.

### *Wallace v. Performance Contractors, Inc.*, 57 F.4th 209 (5th Cir. 2023)

In this decision, the Fifth Circuit reversed and remanded a summary judgment in favor of a construction company on Title VII claims for sex discrimination, harassment, and retaliation. One noteworthy holding is the Fifth Circuit's recognition that a company's refusal to let a female employee do a certain type of work, particularly if it will prevent career advancement, is an adverse employment action.

In response to a motion for summary judgment, the plaintiff proffered evidence of numerous examples of sexual comments and behavior directed at her—including touching—some of which was corroborated by other witnesses. The company also had a policy of not permitting women to work at elevation on the construction site, which

the plaintiff claimed was an adverse employment action. The district court disagreed, finding she had not suffered an ultimate adverse employment action. While the district court did believe she faced severe and pervasive harassment, the district court concluded it was not connected to any tangible employment action that was taken against her. The district court also held the company established its affirmative defense under *Ellerth/Faragher*. As for retaliation, the district court held that the plaintiff had not opposed any unlawful conduct and she could not have reasonably believed the instance of touching was actionable under Title VII.

On appeal, the Fifth Circuit disagreed, reversing and remanding on all claims. The Court agreed with the plaintiff that the company's policy of preventing women from working at elevation was an adverse employment action. The Fifth Circuit determined a reasonable juror could find the policy operated as an effective demotion because it put the plaintiff back into the laborer role she previously occupied, rather than the more senior "helper" role. Plaintiff also needed experience working at elevation in order to seek promotions and advance in the industry. The Fifth Circuit also found the plaintiff had demonstrated she was discriminated against because of her sex: she had specifically been told she could not work at elevation because she was a woman (in more flagrant language).

The district court similarly reasoned the plaintiff suffered a tangible employment action that supported her sex harassment claim. After the touching incident, and because of the ongoing harassment, the plaintiff missed work to go to a doctor's appointment, which led the company to suspend her. The plaintiff was eventually terminated. The superior who signed her suspension notice was one of the employees who had engaged in harassment towards her, and the court found a reasonable jury could conclude the plaintiff was suspended because she "rejected" his harassment.

As for the *Ellerth/Faragher* defense, the Fifth Circuit found the company did not carry its burden to show it had taken reasonable care to prevent and correct any harassment. The plaintiff offered evidence of her attempts to report her concerns to human resources without any success. While the company had a policy, there was a fact dispute about whether that policy was put into practice.

Finally, the Fifth Circuit held that the plaintiff's complaints about not being allowed to work at elevation, the touching incident, and a related sexual comment constituted protected activity that supported her retaliation claim.

***Civelli v. J.P. Morgan Securities, L.L.C*, 57 F.4th 484 (5th Cir. 2023)**

This appeal provides authority for the pursuit of fees under the Texas Theft Liability Act ("TTLA") when a civil conspiracy claim against an alleged conspirator defendant is based on theft under the TTLA.

A plaintiff and his investment company sued J.P. Morgan, claiming it was negligent and breached fiduciary duties when it transferred company shares out of a brokerage account, without the plaintiff's consent, at the instruction of a former business partner to whom the plaintiff had loaned the shares. The district court entered summary judgment for J.P. Morgan and awarded it fees under a novel theory. The Fifth Circuit affirmed.

The Fifth Circuit determined that the negligence claim was barred by limitations because the plaintiff knew the company shares had been transferred in 2014. The Fifth Circuit rejected the plaintiff's argument that the discovery rule tolled limitations because he did not have reason to believe the shares would not be returned until 2016. Under Texas law, the injury occurred when the plaintiff knew the transfer had occurred without his consent—not when he had reason to believe the shares would not be returned.

On the breach of fiduciary duty claim, the Court held that the plaintiff had not established a genuine fact dispute about whether the bank accepted a duty to make the account a "special account" under Texas law, making the bank a fiduciary. In particular, J.P. Morgan is a brokerage firm, not a bank, and does not offer "special accounts" to clients because it contradicts its rights as a brokerage firm.

The plaintiff also claimed J.P. Morgan conspired with the plaintiff's former business partner to commit theft in transferring the shares. The Court rejected this claim because there was no underlying agreement to commit a bad act; because J.P. Morgan was not a fiduciary to the plaintiff, it properly transferred the shares at the instruction of the former business partner, who was the holder of the account.

Finally, J.P. Morgan sought its attorneys' fees under the TTLA because the civil conspiracy claim was predicated on an alleged theft under that Act. Making an *Erie* guess, the Fifth Circuit agreed that, because civil conspiracy is a derivative tort, the plaintiff would have necessarily had to prove theft under the TTLA to succeed; thus, by defeating the derivative claim, J.P. Morgan was a prevailing party under the TTLA.

# A Tribute to Christopher Prine, Retiring Clerk of Texas's First and Fourteenth Courts of Appeals

*Kem Thompson Frost, former Chief Justice, Fourteenth Court of Appeals (Ret.)*

Chris Prine is a marvel—a problem solver, a crisis manager, a change maker, a master of court management and administration, a leader in his field, a picture of professionalism, a model of public service. The recently retired Clerk of Texas's First and Fourteenth Courts of Appeals epitomizes the idea of leaving things better than you found them—the kind of public servant we want to celebrate and emulate. By any measure, Chris Prine is Texas treasure—a gift to the Houston Courts of Appeals and to the public he served so faithfully for the last fifteen years.

Essential with a capital "E," Chris Prine has been central to just about everything falling under the First's and the Fourteenth's administrative umbrellas: budgeting, compliance, audits, staffing, technology, court events, communications, facilities, and operations. When Chris is in charge, things go well. Proactive and fully engaged, he anticipates snags and hitches, he comes prepared, and he is hard-wired to help. Whether innovating, averting disaster, or overseeing daily operations, Chris always brought value to the team.

Initially appointed as Clerk of the Fourteenth in 2008, Chris began his term under the late Chief Justice Adele Hedges, for whom he had served as a briefing attorney at the First Court of Appeals early in his legal career. Chris's strong start as Clerk of the Fourteenth proves the old adage, "The reward for work well done is the opportunity to do more." In 2013, Chris's job doubled when he became Clerk of both Houston Courts of Appeals.

From the moment he took his oath, Chris brought high energy, big ideas, and a Herculean work ethic to the First's and the Fourteenth's most challenging administrative and operational issues, consistently seeking and finding new and creative ways to make the courts more efficient, more responsive, and more productive. And, he did it rain or shine.

Over the years, as the First and the Fourteenth faced a slew of natural disasters, a cyberattack, a pandemic, and other catastrophes, Chris was there, on the front lines of every emergency—the Houston Courts of Appeals' first responder. Unflappable, quick-thinking, resourceful, and decisive, Chris is the embodiment of "keep calm and carry on." Understanding the danger of inaction, Chris moved quickly when systems failed. He always seemed to find a work-around, a temporary fix that could carry the courts through a crisis until they could implement a larger, longer-lasting solution. Then, of course, he would oversee the bigger fix, too.

A sure and steady hand through major transitions in court life, Chris lent his leadership and managerial talents to the 2011 move from the space at South Texas College of Law to the newly renovated Harris County 1910 Courthouse. He facilitated the onboarding of sweeps of new judges. He helped the courts implement legislative changes and emergency mandates. He directed logistics during the shift to remote-working and the post-pandemic return to the courthouse. Amid crippling budget cuts Chris worked imaginatively to stay the course. When asked to accomplish seemingly impossible tasks with relatively few resources, he did it.

Chris pushed the First and the Fourteenth to combine their resources to create greater efficiencies in court operations within their shared ten-county jurisdiction. He came up with great ideas to boost court safety and security, enhance employee training, and streamline internal procedures, all while maintaining a lean operation in the Clerk's office. By sharing his keen insights and administrative know-how, Chris helped the courts become better stewards of their resources and better servants to those who must navigate the appellate system.

It is hard to capture in words the deep gratitude judges and court staff hold for Chris Prine or the high esteem he enjoys within the appellate community. Whether handling a crisis or tending to day-to-day operations, Chris always made things better. Beyond improving the practice in Houston's appellate space, he helped build public confidence in our courts.

Chris has a knack for reimagining processes and systems, and he brings clear vision to the projects he undertakes. He identified ways to enhance public access to court records and to make procedures easier for those who interface with the Houston Courts of Appeals. Before mandated electronic filing of clerk's records and electronic filings of documents in civil cases, Chris shepherded the drafting and approval of local rules that allowed the filing of electronic clerk records and mandated electronic filing of all reporter records. He did the same for the drafting and approval of revised local rules that provided the option for parties to electronically file briefs and other documents. He served on the original task force for the Texas Appellate Management and E-filing System known as TAMES. In implementing the pilot program for the TAMES rollout in the Fourteenth, Chris quickly became a go-to expert for the TAMES system statewide.

A gifted teacher, Chris is good at sharing what he knows with fellow court administrators around the state and across the country. For many years he has brought his strong command of appellate rules and procedure to the important work of the Court of Criminal Appeals Rules Committee, identifying ways to make processes and systems more efficient and working with practitioners and administrators to propose new rules.

Chris's work on behalf of appellate justice has gone far beyond Texas. A recognized leader in his field, he has brought valued guidance to the National Conference of Appellate Court Clerks, serving on its Executive Board and speaking at the organization's annual conferences. Chris Prine put Texas in the limelight for court administration and management.

Throughout his tenure as Clerk of the Houston Courts of Appeals, Chris was a faithful friend to the bar. He helped with special events, working behind the scenes to ensure the smooth running of bench-bar conferences, Law Day events, reenactments of famous cases, and many other special programs. Chris's legendary presentation on "Practicing before the First and Fourteenth Courts of Appeals" has been a perennial favorite among appellate practitioners of all ages and stages.

Chris's contributions have hardly gone unnoticed. Professional groups and bar associations have honored him for his leadership, service, and professionalism. In 2019, the Houston Bar Association presented Chris with a special President's Award for Service to the Houston Courts of Appeals, honoring him for "exemplary work on behalf of the Houston appellate courts" and for "outstanding service to the bar and the people of Houston." The Garland R. Walker American Inn of Court presented Chris with its State Court Professionalism Award. Though he is well-deserving of these and other honors, for Chris, it is never been about recognition. To him, it is all about service. He is a man of uncommon gifts, and he carries them with uncommon humility.

Chris Prine's golden term as Clerk of the First and Fourteenth Courts of Appeals has now come to an end. As a grateful appellate community, in bidding him farewell we applaud his vision and his leadership, we thank him for his many contributions, and we celebrate his extraordinary public service.

## Notice Regarding Inaugural Scribes Fellows Program

In March 2023, Scribes—The American Society of Legal Writers plans to launch its own Canvas site to provide outstanding content about legal writing to its members, law-review editors, and other interested individuals. To accelerate content development and showcase talent from various parts of the legal profession, the Scribes Board has created the **Scribes Fellows Program** to attract attorneys, judges, academics, and librarians willing to produce original, engaging content related to legal writing. For more information, go to the Scribes homepage and view the dedicated news post. Here's a link: news post.