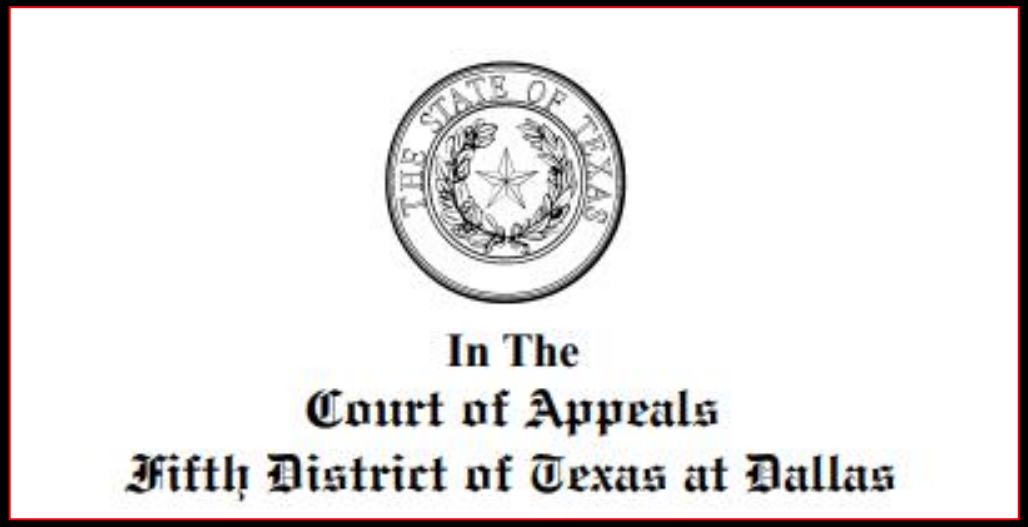
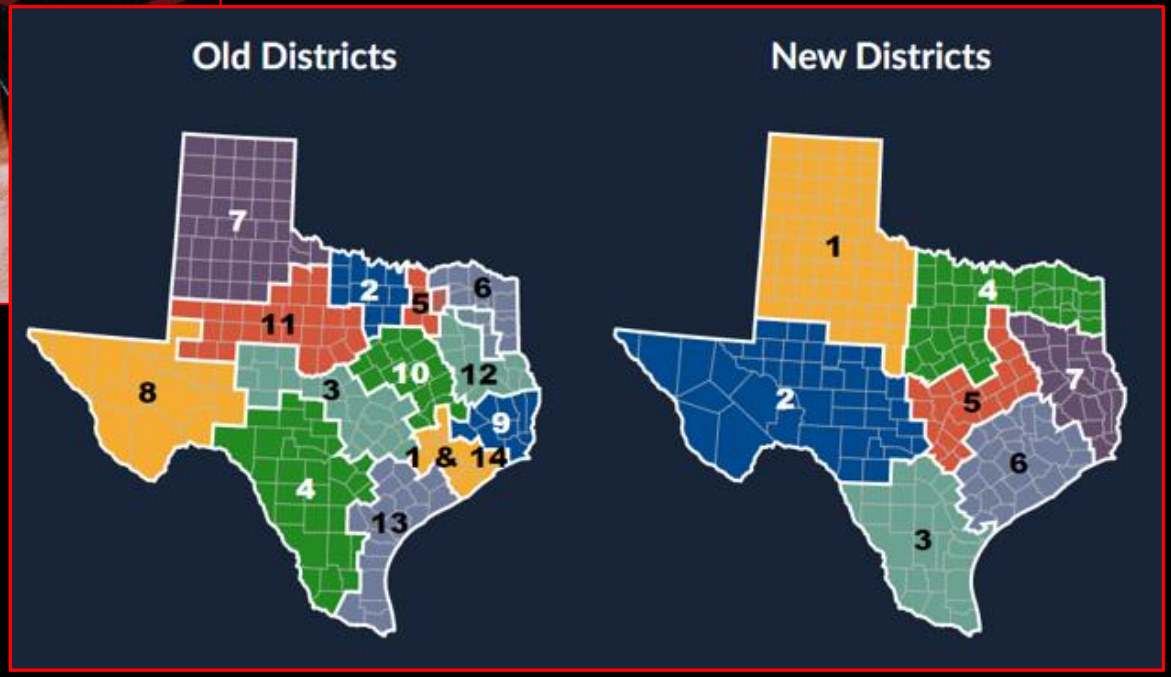
RECENT CASES TO KNOW: U.S. FIFTH CIRCUIT & DALLAS COURT OF APPEALS

DAVID S. COALE
Dallas Bar Association
Business Litigation Section
May 10, 2022


THE STATE OF TEXAS
In The
Court of Appeals
Fifth District of Texas at Dallas

Fifth District Dec. 2018

Fifth District May 2022


Old Districts
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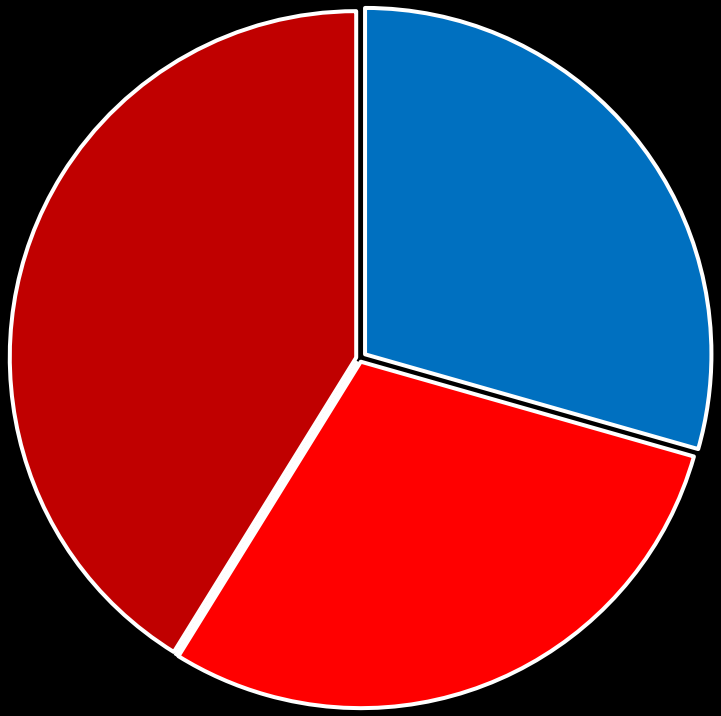
United States Court of Appeals
for the Fifth Circuit

Fifth Circuit May 2022



DEMOCRAT REPUBLICAN (pre-2016) REPUBLICAN (post-2016)

JURY SELECTION

In re Commitment of Barnes,
No. 05-19-00702-CV (Aug. 5, 2020) (mem. op.)

Sec. 841.003. SEXUALLY VIOLENT PREDATOR. (a) A person is a sexually violent predator for the purposes of this chapter if the person:
(1) is a repeat sexually violent offender; and
(2) suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence.

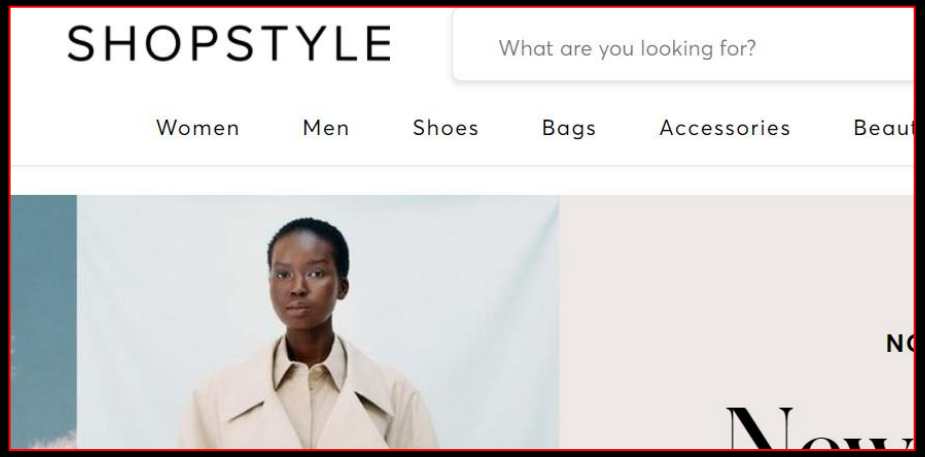
If you are presented with evidence by an expert that the diagnosis of a person is pedophilic disorder, are you going to automatically assume that that person has a condition that by [a]ffecting the emotional or volitional capacity predisposes the person to commit a sexually violent offense to the extent that they become a menace to the health and safety of another person?

"Barnes's questions here sought to answer whether jurors would stop listening to evidence regarding the 'behavioral abnormality' prong of the applicable statutory framework after hearing only the State's evidence. Jurors may be asked to ***commit to follow law*** *and statute, and render 'a true verdict according to the law and to the evidence.'"*

PERSONAL JURISDICTION

Shop Style, Inc. v. rewardStyle, Inc.,
No. 05-19-00736-CV (July 21, 2020, no pet.)

"Basing personal jurisdiction on the ownership or maintenance of a website alone, even one accessible in the forum state, without requiring some form of ***interaction between the website owner and consumers in the forum state****, would create universal jurisdiction over any person or company that maintains a website—a view most courts reject."*



Danziger & De Llano, LLP v. Morgan Verkamp, LLC, 24 F.4th 491 (5th Cir. 2022)

"Danziger alleges in support of its tortious interference with prospective contractual relations claim that Morgan Verkamp emailed Epp (who is not alleged to have been in Texas) to convince him not to formalize his relationship with Danziger. Thus, ***although Morgan Verkamp's allegedly tortious conduct may have affected Danziger in Texas, none of this conduct occurred in Texas****."*

Danziger & De Llano, LLP v. Morgan Verkamp, LLC, 24 F.4th 491 (5th Cir. 2022)

*"[T]his case does not involve **'wide reaching contacts and contemplated future consequences** within the forum state.'…'[T]he plaintiff's Texas location' was not '**strategically advantageous** to the defendant …, suggesting that the defendant had purposefully availed itself of doing business in Texas.' … [T]he defendant's 'communications to Texas rested on nothing but "the **mere fortuity** that [the plaintiff] happens to be a resident of the forum."'*

TEMPORARY INJUNCTIONS

In re Luther, 620 S.W.3d 715 (Tex. 2021)

It clearly appears from the facts set forth in Plaintiff's Original Petition that unless Defendants are immediately ordered to cease and desist from operating the Salon A La Mode business for in-person services located at 7989 Belt Line Road, Ste. 139-1C, Dallas, Texas in violation of State of Texas, Dallas County, and/or City of Dallas emergency regulations related to the COVID-19 pandemic, that Defendants will continue to commit the foregoing acts before notice can be given and a hearing is set on Plaintiff's motion for temporary injunction.

. . .

IT IS THEREFORE ORDERED that Defendants are immediately ordered to cease and desist from operating the Salon A La Mode business for in-person services located at 7989 Belt Line Road, Ste. 139-1C, Dallas, Texas in violation of State of Texas, Dallas County, and City of Dallas emergency regulations related to the COVID-19 pandemic[.]

*"[The order] nowhere specifies **any particular state, county, or city regulation** that Luther has violated, is threatening to violate, or is being commanded to stop violating. Nor does it describe with specificity **which 'in-person services'** were restrained …."*

DISCOVERY

F 1 Constr. v. Banz, No. 05-19-00717-CV (Jan. 20, 2021) (mem. op.)

RULE 194. REQUESTS FOR DISCLOSURE

194.1 Request.

A party may obtain disclosure from another party of the information or material listed in Rule 194.2 by serving the other party - no later than 30 days before the end of any applicable discovery period - the following request: "Pursuant to Rule 194, you are requested to disclose, within 30 days of service of this request, the information or material described in Rule [state rule, *e.g.*, 194.2, or 194.2(a), (c), and (f), or 194.2(d)-(g)]."

"Construction offered no evidence to demonstrate the absence of unfair surprise or prejudice. Indeed, there is nothing to suggest that Defendants had enough evidence to reasonably assess settlement, avoid trial by ambush, or prepare rebuttal to expert testimony."

CONFIDENTIALITY

Toyota Motor Sales v. Reavis, No. 05-19-00284-CV (Feb. 4, 2021) (mem. op.)

1. *"[E]ven assuming the court records contain trade secrets, the* ***existence of trade secrets standing alone is insufficient*** *to overcome the presumption of openness and allow the records to be permanently sealed."*

2. *"Because Toyota did not take* ***adequate steps during trial*** *to protect the exhibits and related testimony from public disclosure and did not seek an instruction prohibiting the jury and other non-parties from discussing the documents beyond the setting of the trial, we conclude any interest Toyota had in maintaining secrecy of the records does not "clearly outweigh" the presumption of openness."*

Toyota Motor Sales v. Reavis, No. 05-19-00284-CV (Feb. 4, 2021) (mem. op.)

3. "Beyond Toyota's blanket assertions that a total seal is necessary and redaction would be meaningless, Toyota did not offer any additional testimony or ***evidence regarding whether the Toyota documents could be redacted or otherwise altered while still protecting its interest****. Toyota also contends on appeal that it showed sealing was the least restrictive means to protect its interest here because it sought to seal 'just four exhibits from a trial involving over 900 exhibits and [covering] pages of closed-courtroom testimony from more than 3,200 pages of trial transcripts.' This argument misses the point. …* ***No matter how many exhibits a party seeks to seal, that party must still meet the requirements of the rule****."*

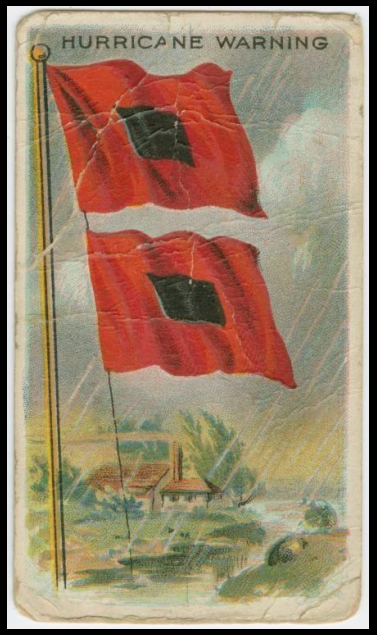
MISREPRESENTATION

Mundheim v. Lepp,
No. 05-19-01490-CV (May 13, 2021) (mem. op.)

"[T]he specific misrepresentations about which Amy complains, that Paul said he was walking away from the title business but was actually accepting a bonus and a well-paid position with Alamo, ***were not referenced in the agreement and were not disclosed*** *to Amy. Thus, we reject the Mundheims' argument that the disclaimer-of-reliance provision in the agreement was binding to preclude Amy from asserting she relied on the Mundheims' misrepresentations when she entered the agreement."*

BBVA Compass v. Bagwell,
No. 05-18-00860-CV
(Dec. 14, 2020, pet denied, rehearing filed) (mem.op.)

*"Our law charges these parties with exercising care to protect their own interests, and a failure to do so is not excused by mere confidence in the honesty and integrity of the other party. Thus, Bagwell—as an experienced businessman, and borrower, in this field—**was required to establish that when he relied upon Meade's oral representations, he was reasonably protecting his multimillion-dollar interest in the transaction**."*



"Justifiable Reliance" and the PJC

PJC 105.2 Instruction on Common-Law Fraud—Intentional Misrepresentation

Fraud occurs when—

1. a party makes a material misrepresentation, and

2. the misrepresentation is made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion, and

3. the misrepresentation is made with the intention that it should be acted on by the other party, and

4. the other party relies on the misrepresentation and thereby suffers injury.

← 2018

2020 →

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3. the misrepresentation is made with the intention that it should be acted on by the other party, and

4. the other party [*justifiably*] relies on the misrepresentation and thereby suffers injury.

ARBITRATION

Baby Dolls Topless Saloons, Inc. v. Sotero, No. 20-0782 (Tex. March 18, 2022)

"

1. "This **AGREEMENT** is entered into by the **LICENSOR** and **LICENSEE** for the leasing of certain portions of the **Premises** and the grant of **License** related thereto . . . ."

2. "[T]he business relationship created between the Club and the **Licensee** is that of (a) Licensor/Licensee and (b) landlord and tenant . . . and . . . this relationship is a material . . . part of this **Agreement**."

3. "This **Agreement** . . . shall terminate on December 31 [2017] . . . . The **License** shall thereafter be automatically extended for successive one year periods running from January 1 though December 31 of each year thereafter."

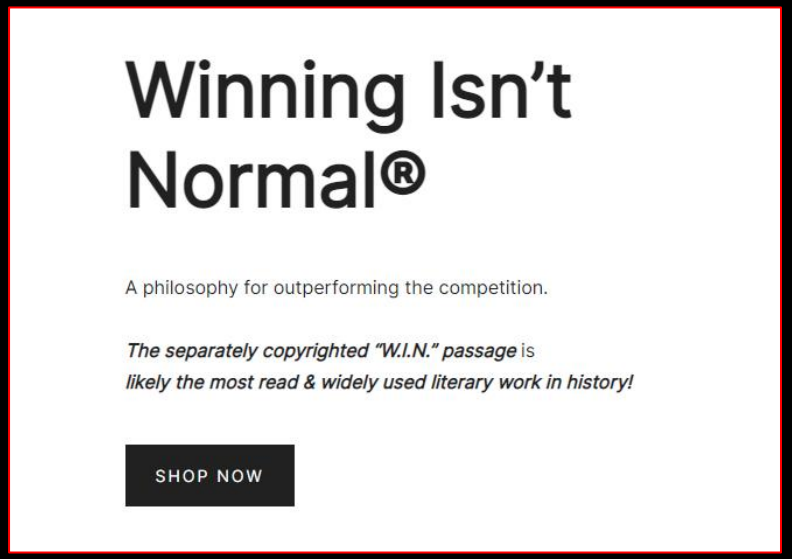
Aerotek v. Boyd,
624 S.W.3d 199 (Tex. 2021)

"It may be that the use of electronic contracts already exceeds the use of paper contracts or that it will soon. The [Texas Uniform Electronic Transactions Act] does not limit the ways in which electronic contracts may be proved valid, but it specifically states that ***proof of the efficacy of the security procedures used in generating a contract can prove that an electronic signature is attributable to an alleged signatory.*** *An opposing party may, of course, offer evidence that security procedures lack integrity or effectiveness and therefore cannot reliably be used to connect a computer record to a particular person. But that attribution cannot be cast into doubt merely by denying the result that reliable procedures generate."*

COPYRIGHT

Bell v. Eagle Mountain Saginaw ISD,
27 F.4th 313 (5th Cir. 2022)

"The tweets do not reproduce such a substantial portion of *Winning Isn't Normal*' as to make available a significantly competing substitute' for the original work. If anything, the properly attributed quotation of a short passage from *Winning Isn't Normal* might bolster interest in the book; it is ***free advertising***."



EVIDENCE

Weinhoffer v. Davie Shoring Inc.,
23 F.4th 579 (5th Cir. 2022)

"Here, there was no testimony to authenticate the archived webpage. Our sister circuit's decisions that the Wayback Machine is not self-authenticating are persuasive in the context of judicial notice. … [A] private internet archive falls short of being a source whose accuracy cannot reasonably be questioned as required by [Fed. R. Evid.] 201."

Seigler v. Wal-Mart Stores LLC
No. 20-11080 (April 5, 2022)

"Seigler described the substance as 'some sort of greasy liquid' at her deposition, but she was not asked questions about its temperature or consistency. Later, in her affidavit, she described the grease as 'cold,' 'congealed,' and 'thicken[ed] up.' These descriptions are not mutually exclusive, nor are they necessarily contradictory. In other words, ***it is possible that 'some sort of greasy liquid' could also be 'cold,' 'congealed' and 'thicken[ed] up.'*** *Thus, we think the proper course in this case is to allow a jury to evaluate the testimony's credibility."*

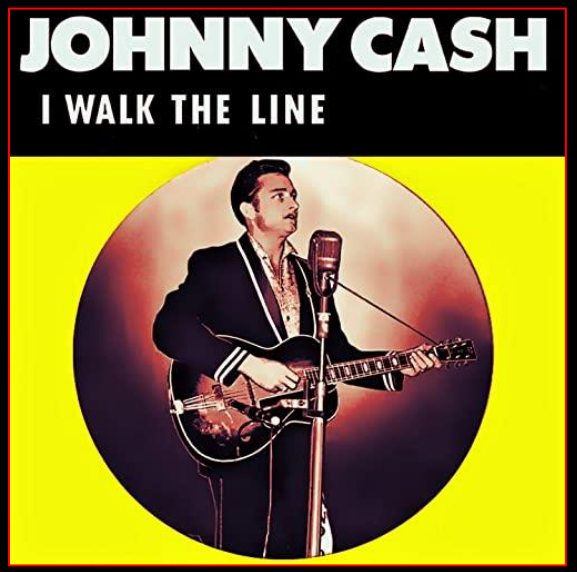
Hardy v. Communication Workers of Am.,
No. 05-19-01388-CV (Dec. 10, 2021) (mem. op.)

"The 2019 affidavit does not mirror the 2016 affidavit—it is organized differently, it is longer, and it contains more factual detail. However, ***a side-by-side comparison of Mathias's statements in the two affidavits does not reveal material contradictions.*** *Nor does Hardy direct us to the specific statements that she asserts are contradictory. Instead, she complains that Mathias fails to explain: (1) why she created a new affidavit, (2) why the new affidavit did not include every statement from the 2016 affidavit, and (3) why certain statements were worded differently."*

Toyota Motor Sales v. Reavis,
672 S.W.3d 713 (Tex. App.—Dallas 2021, vacated by agr.)

"At the heart of this case, like many product liability cases, was a battle of the experts. Plaintiffs' experts examined physical evidence, performed tests, reviewed data, performed calculations, criticized Toyota Motor's experts, and concluded the vehicle was defective. Toyota Motor's experts did the same and concluded the vehicle was not defective. ***The jury properly exercised its prerogative to resolve this conflicting evidence and believed the plaintiffs' experts.*** *This Court may not second guess the jury's decision."*

Earnest v. Sanofi U.S. Services, Inc.,
26 F.4th 256 (5th Cir. 2022)

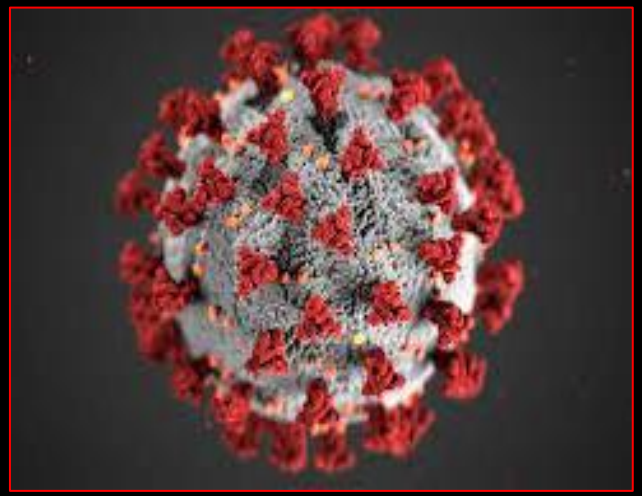


"While parts of Dr. Kopreski's testimony fall within the parameters of Rule 701, ***he also strayed beyond 'facts, . . . subjective beliefs[,] and opinions****,' within either his personal knowledge or his capacity as Sanofi's corporate designee. He testified regarding highly specialized and technical information related to Taxotere, the TAX316 study, and drug studies in general."."*

COVID-19

Terry Black's Barbecue, LLC v. State Auto. Mobile Ins. Co., 22 F.4th 450 (5th Cir. 2022)

"'Physical loss of property' is not synonymous with 'loss of use of property for its intended purpose.' We conclude the Texas Supreme Court would interpret a direct physical loss of property to require a tangible alteration or deprivation of property. Because the civil authority orders prohibiting dine-in services at restaurants did not tangibly alter [the plaintiff's barbecue] restaurants, and [plaintiff] having failed to allege any other ***tangible alteration or deprivation of its property***, the policy does not provide coverage for [plaintiff's] claimed losses."



APPELLATE PROCEDURE

Domain Protection LLC v. Sea Wasp LLC,
23 F.4th 429 (5th Cir. 2022)

"Most of Sea Wasp's appeal challenges the district court's summary judgment rulings finding it liable under both federal and state law. Despite those rulings, however, the court ultimately entered a judgment 'that Plaintiff takes nothing and that Plaintiff's case against Defendant is DISMISSED WITH PREJUDICE.' In other words, Sea Wasp won the war even if it lost some battles along the way. ***Because the final judgment was a full victory for Sea Wasp, it is not an aggrieved party entitled to bring a cross appeal***."

Ali v. Spectra Bank,
No. 05-21-0113-CV (April 6, 2022) (mem. op.)

"[W]e have repeatedly held that ***delay caused by waiting for the trial court to rule on a post judgment motion*** *or for the trial court's plenary power to expire is unreasonable as it reflects an awareness of the deadline for filing a notice of appeal but a* ***conscious decision to ignore*** *it."*

In re: D.M., No. 05-21-00185-CV (April 28, 2022)
(Schenck, J., concurring in denial of en banc hearing)

"Here, as in other instances, appellants explained their untimely notice of appeal was due to late awareness of a final judgment, confusion surrounding post-judgment filings, and a miscalculation of the appellate deadline. ***Because each of these reasons are in fact plausible explanations, it was not necessary for this Court to dismiss appellants' appeal****, and, as a result, the initial dismissal of this case was both improper and contrary to controlling precedent."*

REMOVAL

Dynamic CRM Recruiting Solutions LLC v. UMA Educ., Inc.
No. 21-20351 (April 19, 2022)

> Any dispute arising out of or under this Agreement shall be brought before the district courts of Harris County Texas, situated in the city of Houston, unless mutually agreed otherwise. Notwithstanding this, this choice of forum provision shall not prevent either party from seeking injunctive relief with respect to a violation of intellectual property rights or confidentiality obligations in any appropriate jurisdiction.

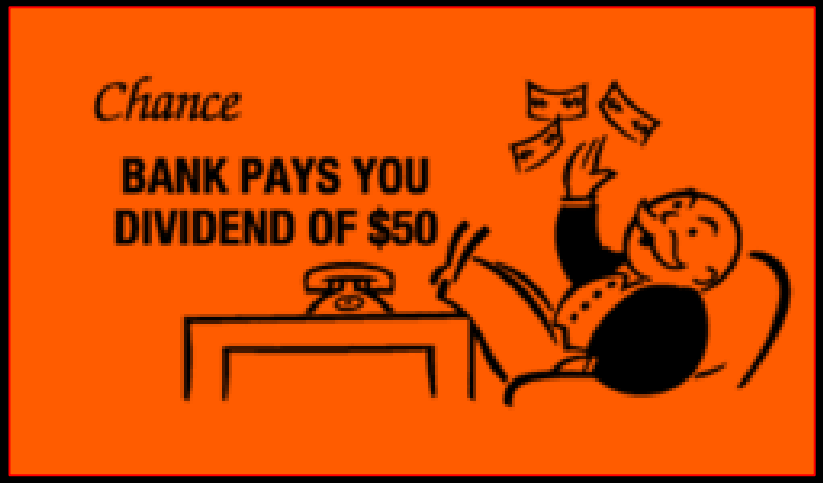
ATTORNEYS' FEES

Apple Texas Restaurants v. Shops Dunhill Ratel, LLC, No. 05-20-01052-CV (March 25, 2022) (mem. op.)

"Dunhill will be required to incur additional attorney's fees if Apple appeals the final judgment entered in this Action. In my opinion, Dunhill will likely incur at least $35,000 in reasonable and necessary attorney's fees if Apple appeals the final judgment to the Court of Appeals. In addition, Dunhill will likely incur at least an additional $35,000 in reasonable and necessary attorney's fees if Apple appeals the final judgment to the Texas Supreme Court and Dunhill is required to respond thereto."

(applying *Yowell v. Granite Operating Co.*, 620 S.W.3d 335 (Tex. 2020)).

In re: Demattia, No. 05-21-00460-CV (April 12, 2022)



"The board may well have a firm basis to believe that the official intentionally injured the corporation and is therefore reluctant to advance funds for his defense, fearing that the funds will never be paid back and resisting the idea of seeing further depletion of corporate resources at the instance of someone perceived to be a faithless fiduciary. But the Delaware courts have determined that ***to 'give effect to this natural human reaction as public policy would be unwise'*** *because the possibility exists that the company's allegations are untrue or cannot be proven."*

DEFAULT JUDGMENT

- "[T]he process was delivered to an entity ***but*** a natural person executed and returned the same …." *Mesa SW Mgmnt v. BBVA, USA*, No. 05-20-01092-CV (Feb. 25, 2022) (mem. op.)

- "The return of service shows that Joe Prado was served ***but*** does not indicate his capacity to receive service on behalf of the purported corporation." *Prado v. Nichols*, No. 05-20-01092-CV (Feb. 25, 2022) (mem. op.)

- *"*The affidavit affirmatively shows that the citation and petition were attached to the door, ***but*** the affidavit contains no explicit statement that no one over the age of sixteen was present when this occurred." *Pro-Fire & Sprinkler, LLC The Law Co.*, No. 05-19-01480-CV (Nov. 29, 2021) (mem. op.).

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