

# RECENT CASES: U.S. FIFTH CIRCUIT and DALLAS COURT OF APPEALS



**DAVID S. COALE**  
Dallas Bar Association  
February 15, 2023

LYNN **PINKER** HURST **SCHWEGMANN**



In The  
**Court of Appeals**  
**Fifth District of Texas at Dallas**

FIFTH DISTRICT DEC. 2018



■ REPUBLICAN ■ DEMOCRAT

FIFTH DISTRICT FEB. 2023

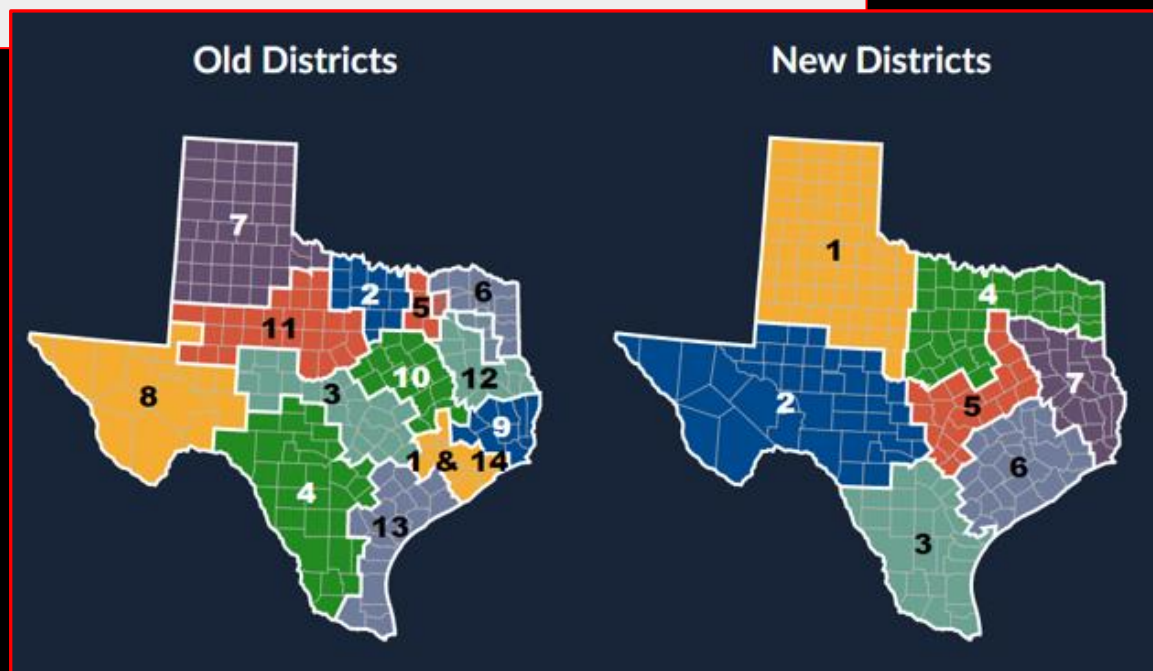


■ REPUBLICAN ■ DEMOCRAT



TLR will also advocate for the creation of a 15th Court of Appeals to hear specialized cases, including those from a specialized business court.

Other top priorities for the tort reform group include public nuisance lawsuits and causes of action.



United States Court of Appeals  
for the Fifth Circuit

Trump-appointed judges are shifting the country's most politically conservative circuit court further to the right

The Washington Post  
*Democracy Dies in Darkness*

...hears cases from Texas, Mississippi and Louisiana, has President Donald Trump.

# Trump's lasting legacy on the judiciary is not just at the Supreme Court



By [Ann E. Marimow](#)

January 29, 2023 at 5:00 a.m. EST

## United States Court of Appeals for the Fifth Circuit

POLITICS & POL

### The Rogue Court That Paved the Way for Roe's Demise

Four judges on the Fifth Circuit are spearheading a partisan movement to redefine constitutional precedent. All of them got their start in Texas politics.



By Michael Hall

September 2022

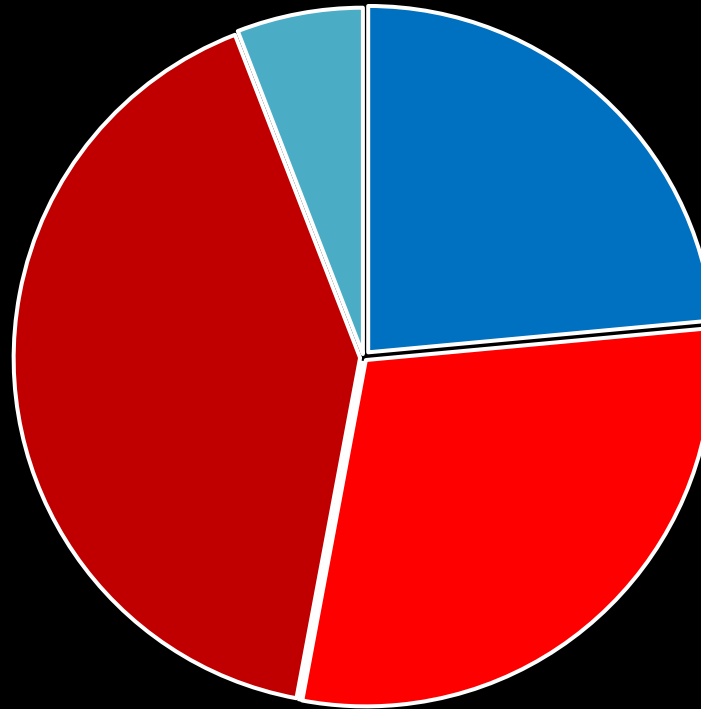
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### The Trumpiest Federal Appeals Court Did Something Truly Beyond the Pale

BY MARK JOSEPH STERN

OCT 20, 2022 • 4:56 PM

**FIFTH CIRCUIT FEB. 2023**  
**(PARTY OF APPOINTING PRESIDENT)**



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

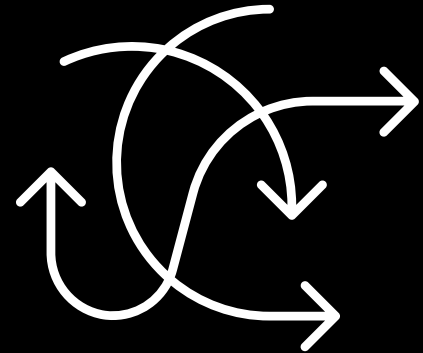
# ARBITRATION

LYNN PINKER HURST SCHWEGMANN



*Newman v. Plains All American Pipeline, L.P.*,  
23 F.4th 393 (5th Cir. 2022)

*“When a court decides whether an arbitration agreement exists, it necessarily decides its enforceability between parties. Therefore, deciding an arbitration agreement’s enforceability between parties remains a **question for courts**.”*



*Newman v. Plains All American Pipeline, L.P.*,  
44 F.4th 251 (5th Cir. 2022) (8-8 en banc vote)

**JUDGES VOTING AGAINST EN  
BANC REVIEW**  
(the “anti” arbitration side)

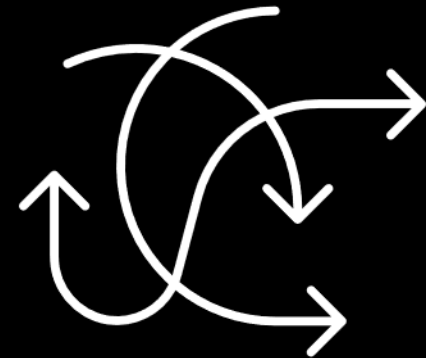
Richman  
Stewart  
Haynes  
Graves  
Higginson  
Costa (panel)  
Willett (panel)  
Engelhardt

**JUDGES VOTING FOR  
EN BANC REVIEW**  
(the “pro” arbitration side)

Jones (opinion)  
Smith (opinion)  
Elrod  
Southwick  
Ho  
Duncan (opinion)  
Oldham  
Wilson

*Prestonwood Tradition, LP v. Jennings,*  
653 S.W.3d 436 (Tex. App.—Dallas 2022) (en banc)

*“Appellants have established that all defenses to arbitration, including validity of the arbitration provision, were **delegated to the arbitrator**. The record shows no arbitrator decided arbitrability. Accordingly, the trial court erred in granting appellees’ motions to stay arbitration and in denying appellants’ pleas in abatement.”*



*Prestonwood Tradition, LP v. Jennings*,  
653 S.W.3d 436 (Tex. App.—Dallas 2022) (7-6 en banc vote)

**JUDGES JOINING MAJORITY**  
(the “pro” arbitration side)

Pedersen (author)  
Myers  
Schenck (concurring)  
Osborne  
Reichek  
Goldstein  
Smith

**JUDGES DISSENTING**  
(the “anti” arbitration side)

Partida-Kipness (author)  
Burns  
Molberg  
Nowell  
Carlyle  
Garcia

## *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022)

*“[T]he usual federal rule of waiver does not include a prejudice requirement. So Section 6 [of the Federal Arbitration Act] instructs that **prejudice is not a condition** of finding that a party, by litigating too long, waived its right to stay litigation or compel arbitration under the FAA.”*



*Green v. Velocity Investments, LLC,*  
No. 05-20-00795-CV (Tex. App.—Dallas Aug. 25, 2022)

*“Recent U.S. Supreme Court precedent rejects any requirement of proof of prejudice as an ‘arbitration-specific’ federal procedural rule in cases brought in federal court. Whether that ruling would govern in state court as a matter of procedure generally, or in cases said to be subject to state arbitration statutes, is unsettled and **a matter for the Texas Supreme Court** to determine in the first instance.”*  
(citations omitted).



# PERSONAL JURISDICTION

LYNN PINKER HURST SCHWEGMANN

# PERSONAL JURISDICTION

## *Online Defamation From Another State*



*Johnson v. TheHuffingtonPost.com, Inc.,  
21 F.4th 314 (5th Cir. 2021)*

*“Charles Johnson says the  
Huffington Post ... libeled him  
by calling him a white nationalist  
and a Holocaust denier. He sued  
HuffPost in Texas. HuffPost is not  
a citizen of Texas and has no ties to the state. But **its website markets  
ads, merchandise, and ad-free experiences to all comers.***



*We must decide whether those features of HuffPost's site grant Texas  
specific personal jurisdiction over HuffPost as to Johnson's libel claim. They  
do not, so we affirm the dismissal and deny jurisdictional discovery.”*

*Johnson v. TheHuffingtonPost.com, Inc.*,  
21 F.4th 314 (5th Cir. 2021) (Haynes, J., dissenting)

*“[T]he Supreme Court [has] articulated two different rules that turned on the nature of the defendant in a libel case. If the defendant alleging lack of personal jurisdiction is a publication (like Hustler Magazine in Keeton), then personal jurisdiction is appropriate when that publication is in ‘substantial circulation’ and that circulation is not ‘random, isolated, or fortuitous.’ If the defendant alleging a lack of personal jurisdiction is the author or the individual approving publication (like the employees in Calder), then personal jurisdiction is appropriate when the **effect of the defendant's conduct is felt in the forum state.**”*



*Johnson v. TheHuffingtonPost.com, Inc.*,  
32 F.4th 488 (5th Cir. 2022) (on petition for en banc rehearing)

**JUDGES VOTING AGAINST  
EN BANC REVIEW**

(against TX jurisdiction over HuffPo)

Richman

Jones

Smith (panel author)

Stewart

Dennis

Southwick

Graves

Higginson

Ho

Duncan

**JUDGES VOTING FOR  
EN BANC REVIEW**

**AND JOINING DISSENT**

(for TX jurisdiction over HuffPo)

Elrod

Haynes (panel dissent)

Engelhardt

Wilson

**OTHER JUDGES VOTING FOR  
EN BANC REVIEW**

Costa

Willet

Oldham

# PERSONAL JURISDICTION

*Out-of-State Individual*

*Hinduja Global Solution, Inc. v. Ganjaei,*  
No. 05-22-00052-CV (Tex. App.—Dallas Jan. 13, 2023)



*“HGSi relies heavily on **directing-a-tort and targeting-assets theories** to urge jurisdiction over Ganjaei. Both of those theories fail, however, because the Texas Supreme Court has clearly stated that “a nonresident **directing a tort** at Texas from afar is insufficient to confer specific jurisdiction,” ... and, notwithstanding the fact that HBI's actions cannot be attributed to Ganjaei for jurisdictional purposes, HBI **did not target or purchase Texas assets**, it simply acquired an interest in a Nevada limited liability company that provides a service that is not based on hard assets located in Texas.” (citation omitted).*

# PERSONAL JURISDICTION

*Stream of Commerce*

*Far East Machinery Co. v. Aranzamendi,*  
No. 05-21-00267-CV (Tex. App.—Dallas Sept. 13, 2022)

*“Appellees alleged Far East Machinery’s contacts with Texas are:*

*arranging for the **shipping** of its products to the Port of Houston;*

*some or all of the pipe was **marked** ‘FEMCO HOUSTON TX’ and Far East Machinery’s deputy manager admitted Far East Machinery marked the pipe ‘FEMCO’;*

*Far East Machinery has a **website** accessible in Texas advertising that its products meet certain standards of the American Petroleum Institute, and Far East Machinery stated on the sales documentation that the pipe had been tested and met those specifications;*

*Far East Machinery has been involved in **litigation** in federal court in the Eastern District of Texas; and*

*Far East Machinery’s deputy manager **travels** to Texas once a year.”*



*In re: Smith & Nephew Ortopaedics, Ltd.,  
No. 05-22-00495-CV (Tex. App.—Dallas Sept. 16, 2022)*

*“[I]nformation sought in jurisdictional discovery must be essential to prove at least one disputed factor that is necessary to the plaintiff’s proposed theory or theories of personal jurisdiction.’ ... **simply inserting the phrase ‘in Texas’** or ‘in Texas field conditions’ into a topic ... would not make it essential to prove specific jurisdiction.” (citation omitted).*





# ANCILLARY PROCEEDINGS

LYNN PINKER HURST SCHWEGMANN

*In re: ASCIS Am. Corp., No. 05-22-00994-CV*  
(Tex. App.—Dallas Jan. 20, 2023, orig. proceeding)

***“[T]he nature of an ancillary discovery proceeding is such that no claims are before the trial court for adjudication on the merits. To conclude otherwise would effectively allow the transfer of litigation first filed in another state to Texas when a party seeks discovery enforcement in Texas. Allowing such an application defeats rather than serves the purpose of the Rule. “***

CALIFORNIA ET AL. v. TEXAS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT

No. 19–840. Argued November 10, 2020—Decided June 17, 2021\*

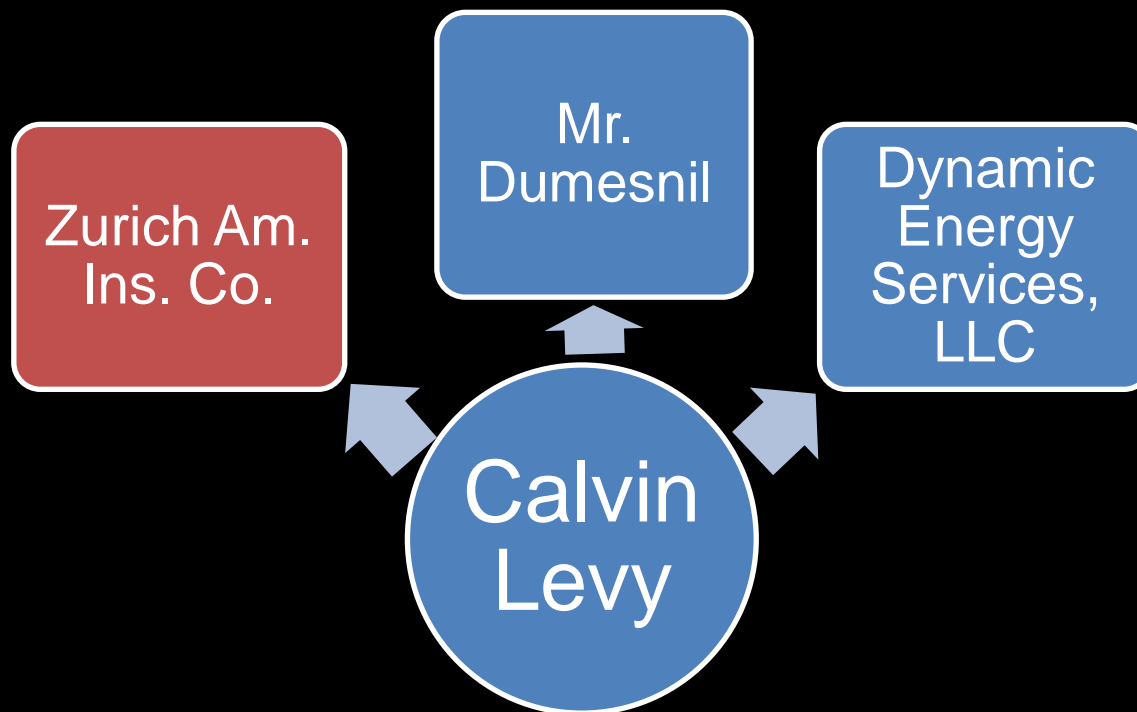
# VENUE (STATE)

Yes, Principal Office	No, Not Principal Office
<p><i>“Schick’s ... testimony ... identified numerous areas—other than the routing of particular parts—in which the <b>manager of the regional distribution center is the authoritative figure in managing the regional facility and its layers and departments of employees.</b> Schick did not identify a decision maker of higher authority in Texas who made day-to-day decisions in running the company, the employees, and the facility than the manager of the Dallas regional distribution center.”</i></p>	<p><i>“Mr. Ruff testified in May 2022 that he lives in Dallas. And since 2013, he has worked approximately one or two days a week out of 7R’s office in Palo Pinto County. He said that he works on 7R matters during ‘that same timeframe,’ and he spends the rest of the week working on ‘<b>other matters.</b>’”</i></p>
<p><i>Deere &amp; Co. v. Bernal, No. 05-22-00916-CV (Tex. App.—Dallas Jan. 17, 2023)</i></p>	<p><i>7R Owners Assoc. v. Prezas, No. 05-22-00776-CV (Tex. App.—Dallas Nov. 30, 2022)</i></p>

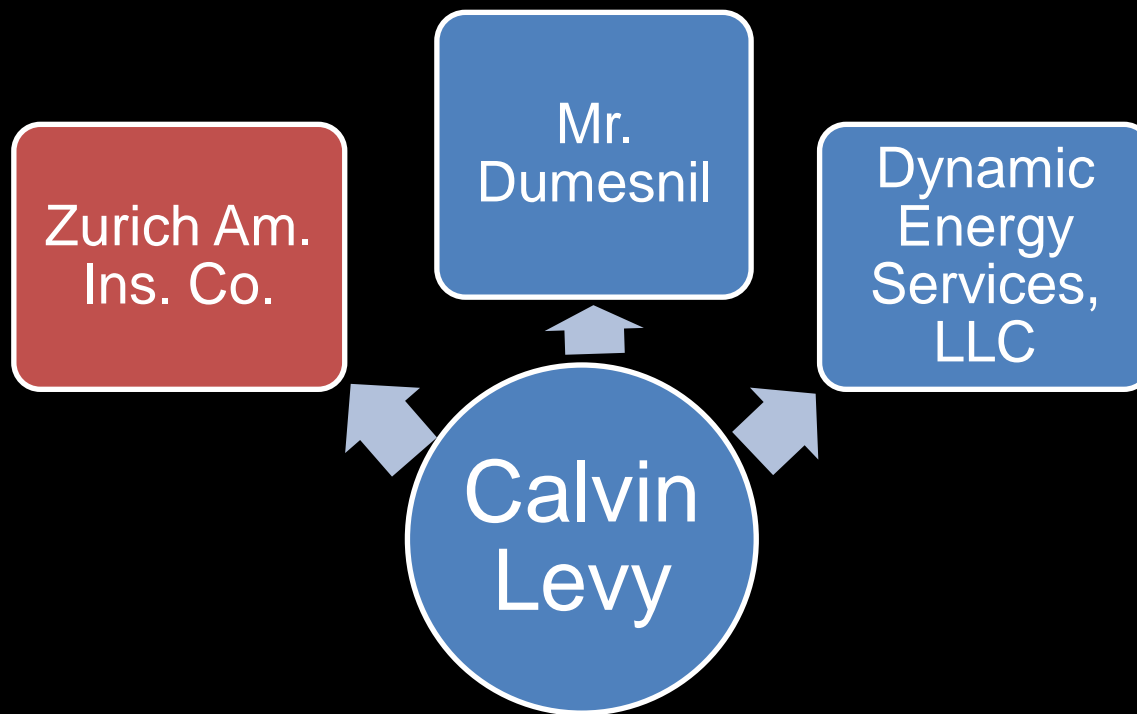
# REMOVAL

LYNN PINKER HURST SCHWEGMANN

*In re: Levy*, 52 F.4th 244  
(5th Cir. 2022) (orig. proceeding)



*In re: Levy*, 52 F.4th 244  
(5th Cir. 2022) (orig. proceeding)



*“[T]he existence of diversity is determined from the fact of citizenship of the parties named and not from the fact of service ....”*



# FEZ SAFETY

LYNN PINKER HURST SCHWEGMANN



*Foley Bey v. Prator*, No 21-30489  
(5th Cir. Nov. 17, 2022)



*“Plaintiffs also cannot point to the **1836 United States-Morocco Treaty of Peace and Friendship** as clearly establishing a right for Moorish Americans to enter the courthouse as a port of commerce without any screening.”*

# STANDING

# *Perez v. McCreary, Veselka, Bragg & Allen, P.C., 45 F.4th 816 (5th Cir. 2022)*

*“Congress’s creation of a statutory prohibition or obligation and a cause of action does not relieve **courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm** under Article III.’ Any other rule would allow Congress to grant private plaintiffs a personal stake in enforcing regulatory law and*

*ultimately usurp the President’s Article II authority to execute the laws. And that would aggrandize our power by letting us resolve disputes that are not ‘of a Judiciary Nature.’”*

S.B. No. 8

AN ACT

1  
2 relating to abortion, including abortions after detection of an  
3 unborn child's heartbeat; authorizing a private civil right of  
4 action.

# TEMPORARY / PRELIMINARY INJUNCTIONS

LYNN PINKER HURST SCHWEGMANN

# Bailey v. Ramirez, No. 05-22-00072-CV (Tex. App.—Dallas Dec. 30, 2022)

*“The temporary injunction order simply sets out the elements necessary for injunctive relief. It does not specify the facts the trial court relied on, making the trial court’s findings conclusory. It also **fails to identify the injury** appellees will suffer if the injunction does not issue. Merely stating that appellees are ‘suffering irreparable harm’ and have ‘no adequate remedy at law’” does not meet the [Tex. R. Civ. P.] 683 requirement for specificity.”*

4. Applicants will suffer probable, imminent, irreparable injury with no adequate remedy at law because (a) Plaintiffs have sought to terminate the Limited Partner interests of Jeri Carroll, Fleur Aung, H.A. Tillmann Hein, and Marc Brown, the legitimacy of such is a pending issue in this case. Further, Plaintiffs’ putative termination of the Limited Partner interests of Jeri Carroll, Fleur Aung, H.A. Tillmann Hein, and Marc Brown would deprive Applicants of the opportunity to have such determination of legitimacy made at trial; (b) Applicants have no adequate remedy at law for loss of their Partnership interest.

TEMPORARY INJUNCTION

PAGE 1

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APPELLANT APPX00003

5. Applicants have shown a cause of action and probable right to relief.
6. The Court finds that the status quo ante of the Partnership is that of the Partnership on November 22, 2021. The imminent harm faced by Applicants far outweighs the potential harm that could be sustained by either Plaintiff if this injunctive relief were not granted because restoring the status quo ante of the Partnership on November 22, 2021 ensures that the Partnership will maintain its status before any contested action altering the relationship between Plaintiffs and Applicants.

*In re: Childrens Med. Center, No. 05-22-00459-CV  
(Tex. App.—Dallas May 18, 2022, orig. proceeding)*

*“... we conclude the findings contained in the order **are sufficiently specific** regarding harm, and as a result relator has failed to show the trial court abused its discretion.”*

The Court finds that Plaintiff has carried her burden at this stage by proving temporary injunctive relief is appropriate for the following reason(s):  
*Plaintiff demonstrated a probable right to relief on her claims that:*

- a. CMC is violating the law by interfering with, controlling, or otherwise directing any physician's professional judgment, in violation of the prohibition against the corporate practice of medicine, and by attempting to restrict Dr. Lopez's exercise of her clinical privileges without taking any formal action to limit her clinical privileges or provide her due process rights.
- b. CMC is violating the law by discriminating against patients on the basis of the patient's gender identity and directing Plaintiff to violate the law by discriminating against patients on the basis of a patient's gender identity.

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TING PLAINTIFF'S APPLICATION FOR TRO AND EXPEDITED DISCOVERY Page - 1  
R253

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- c. There is an imminent and irreparable harm to Plaintiff if a temporary restraining order is not issued as requested.

*CAE Integrated, LLC v. Moov Techs., Inc.,  
44 F.4th 257 (5th Cir. 2022)*

- **Public availability.** *“CAE has not identified a single contact whose information was not publicly available or ascertainable through proper means. Semiconductor industry participants are available in third-party directories, meet at conventions and trade shows, and can be found through online searches.”*
- **Data use.** *“[A]s Meissner testified and forensics confirmed, the Google Drive contained no customer lists when he started at Moov. ... Without any evidence that Meissner and Moov accessed or used data in the Google Drive the remaining potential sources of customer identities is Meissner's personal knowledge or public sources.”*

*MQ Prosper North LLC v. Coulter,*  
No. 05-20-00880-CV (Tex. App.—Dallas Dec. 12, 2022)

*“The trial court’s temporary restraining order cannot be [defendant’s] breach. And to the extent [Plaintiff] argues the order was wrongful, she did not allege either of **two possible actions for wrongful injunction**, nor prove the elements of **malicious prosecution**. ”*

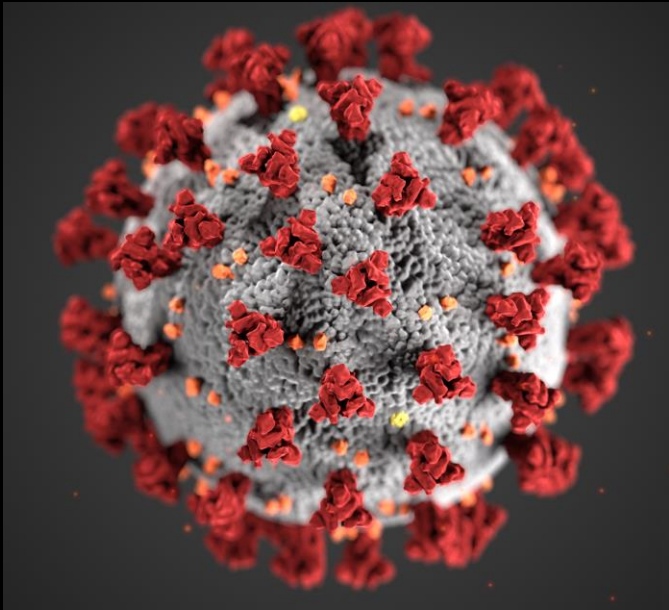




# COVID

LYNN PINKER HURST SCHWEGMANN

*In re: Torres, No. 05-22-00715-CV*  
(Tex. App.—Dallas Dec. 7, 2022, orig. proceeding)



*“Although real parties Diaz and Galvan make **the general claim** that trial courts are facing staffing shortages and COVID-related delays, the record before this Court does not contain any indication that the COVID-19 pandemic has prevented the trial judge from ruling on the pending motion. ...*

*Indeed, as this Court has noted in a prior case, “courts across Texas—including this Court—**have continued to fully tend to most business** of the courts and serve the citizens of Texas while implementing safety precautions above and beyond recommendations by the Centers for Disease Control and Prevention and accommodating Covid-19-related exigencies.”*



# DISCOVERY



*In re Safeco*, No. 05-21-00873-CV  
(Tex. App.—Dallas May 10, 2022,  
orig. proceeding)

*“Safeco provided the trial court with a business record affidavit and two hearing exhibits, one containing a chain of e-mails between counsel and the other containing its supplemental responses to Taiwo’s request for disclosure. Further, the declaration of [the] Senior Complex Resolution Specialist IV for Safeco, stated that Safeco had produced and disclosed ‘1,208 pages of responsive documents and things in this matter, including **its entire, unprivileged claim file**, which included Plaintiff’s Policy, correspondence between the parties, the police report stemming from the accident and witness statements regarding the Accident.’”*





*In re Meadowbrook Baptist Church,  
No. 05-22-00271-CV (Tex. App.—Dallas  
June 15, 2022, orig. proceeding)*

**Default?** *“Where Meadowbrook found no responsive documents to a request, Meadowbrook confirmed that it diligently searched for responsive documents and found none. Indeed, the record shows that Meadowbrook withheld only five responsive documents, which were baptismal certificates of minors. Moreover, in its response and objections to the RFI, Meadowbrook presented a suggested protocol and parameters for searching the computer and stated that it would allow a search of the computer if an agreement could be reached with Blalock as to search terms and search protocols.”*

**Benefit?** *“Mere skepticism or bare allegations that the responding party has failed to comply with its discovery duties are not sufficient to warrant an order requiring direct access to an opposing party’s electronic device.”*



# COMMENT ON THE EVIDENCE

LYNN PINKER HURST SCHWEGMANN

*Newsom, Terry & Newsom LLP v.  
Henry S. Miller Commercial Co.,  
No. 05-20-00379-CV (Tex. App.—Dallas Aug. 31, 2022)*

*“Well, you guys are going to look in the charge. The charge literally says the fact that you can identify the person who is responsible for closing and he didn't close is sufficient to file the responsible third-party. **It's in the charge.** You guys will look at it.*

*Why did I ask all my questions? Because I knew that was going in the charge, right?*

Under this statute, a defendant is not required to provide evidence at the time of the filing of a motion for leave to designate a responsible third party, but the designation may be struck, by the Court, for lack of evidence after an adequate time for discovery has passed.

JURY CHARGE

TAB 1

PAGE 4 OF 10

The designation of a responsible third party may be struck for lack of evidence after an adequate time for discovery has passed, as determined by the court. In resisting a motion to strike a designation of a responsible third party, the Terry Defendants would not have been required to prove the plaintiffs' case that there was fraud in the underlying transaction. They could rely on evidence of the proposed transaction, its failure, and the identity of a responsible third party as the defaulting buyer in resisting a motion to strike a designation of a responsible third party.



# RECORDS

LYNN PINKER HURST SCHWEGMANN

# McGee v. Tatum, No. 05-21-00303-CV (Tex. App.—Dallas Nov. 28, 2022)

*“[N]othing in the record shows that Cruz is a medical professional or that she was testifying as an expert medical professional. Furthermore, Cruz’s statement is nothing more than a ‘bare proclamation that this one event caused another and is not enough to establish causation.’”*

I, Suzanne Cruz, at Katy Emergency Center, do hereby certify under oath the following: On or about August 28, 2015, the plaintiff, Ladonna Tatum was under our care and examination for the following injuries and/or conditions: Motor vehicle collision with severe [illegible] pain lumbar spine diagnosis sprain lumbar region. . . .

Furthermore, based upon the medical history provided by Ladonna Tatum, the medical records and my education, professional training and experience it is my opinion to a reasonable degree of medical certainty that the injury and/or condition that necessitated the above medical care was caused by the accident and/or incident of August 24, 2015.

# *Bosque v. Barbosa*, No.05-22-00230-CV (Tex. App.—Dallas Jan. 30, 2023)

*“In the present case, no witness explicitly testified that the expenses incurred were reasonable and necessary, but the parties agree that a plaintiff need not use these **magic words** to establish the right to recover costs. ... Barbosa’s counsel acknowledged during oral argument that if Del Bosque had testified*

*that the expenses were “reasonable” and “necessary,” it would have rendered the evidence sufficient to support the verdict. This is indicative of the relative strength of the evidence at issue here.”*

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Plaintiff for his damages, if any, that resulted from such failure to comply?

Consider the following elements of damages, if any, and none other: the **reasonable and necessary** expenses incurred by Plaintiff to construct the restaurant in DeSoto, Texas.

# WAIVER

LYNN PINKER HURST SCHWEGMANN

*Fritz Am. Mgmnt LLC v. Huge Am. Real Estate,  
No. 05-20-00332-CV (Aug. 18, 2022)*

*“[A]ssuming the veracity of Fritz’s evidence, as we must, [Plaintiff] ... gave its permission for Fritz to remodel the property ... after **declining to respond either affirmatively or negatively** to Fritz’s e-mail seeking permission for the remodel. ... This is particularly true in light of the evidence showing that both parties were experienced Burger King franchisees that understood the nature of franchisor requirements.”*



# THE ADMINISTRATIVE STATE



- *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022) (“[T]he agency proceedings below were unconstitutional ....”).
- *CFSA v. CFPB*, 51 F.4th 616 (5th Cir. 2022) (“Congress's decision to abdicate its appropriations power under the Constitution, i.e., to cede its power of the purse to the Bureau, violates the Constitution's structural separation of powers.”).
- *Cargill v. Garland*, No. 20-51016 (5th Cir. Jan. 6, 2023) (en banc) (“[T]he Government’s regulation ... purports to allow ATF—rather than Congress—to set forth the scope of criminal prohibitions.”).

# DORMANT COMMERCE CLAUSE

LYNN PINKER HURST SCHWEGMANN





- “Imagine if Texas—a state that prides itself on promoting free enterprise—passed a law saying that only those with existing oil wells in the state could drill new wells.”

*NextEra Energy Capital Holdings v. Lake*,  
48 F.4th 306 (5th Cir. 2022)

- “The residency requirement discriminates on its face against out-of-state property owners. The City doesn't just make it more difficult for them to compete in the market for [Short Term Rentals] in residential neighborhoods; it forbids them from participating altogether.”

*Hignell-Stark v. City of New Orleans*,  
46 F.4th 317 (5th Cir. 2022)

# RECENT CASES: U.S. FIFTH CIRCUIT and DALLAS COURT OF APPEALS



**DAVID S. COALE**  
Dallas Bar Association  
February 15, 2023

LYNN **PINKER** HURST **SCHWEGMANN**