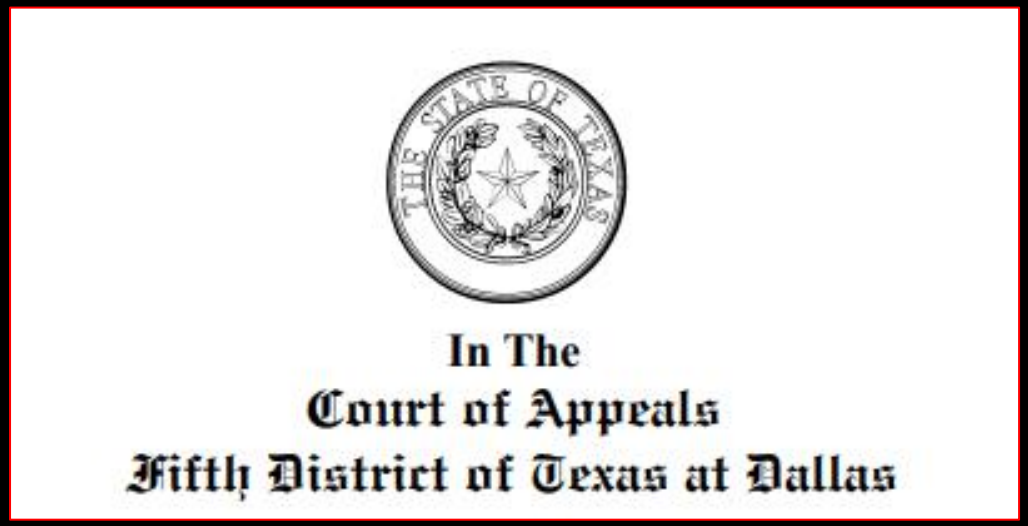
RECENT CASES:

U.S. FIFTH CIRCUIT
and
DALLAS COURT OF APPEALS

DAVID S. COALE
Dallas Bar Association
January 18, 2024

LYNN PINKER HURST SCHWEGMANN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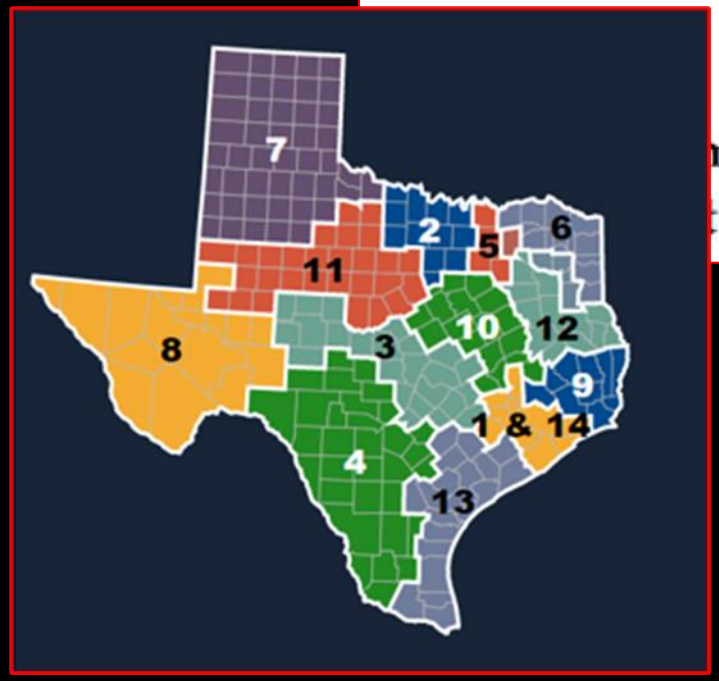
In The
Court of Appeals
Fifth District of Texas at Dallas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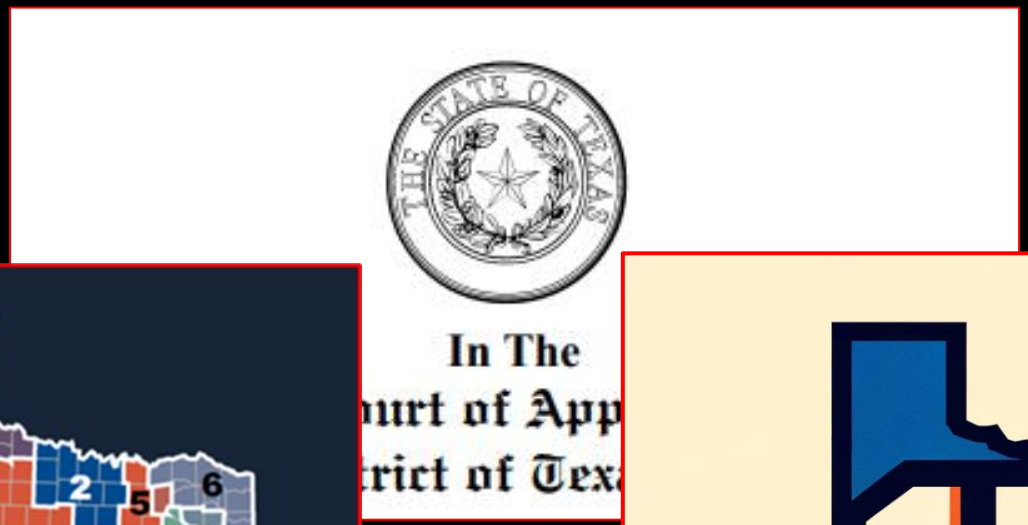
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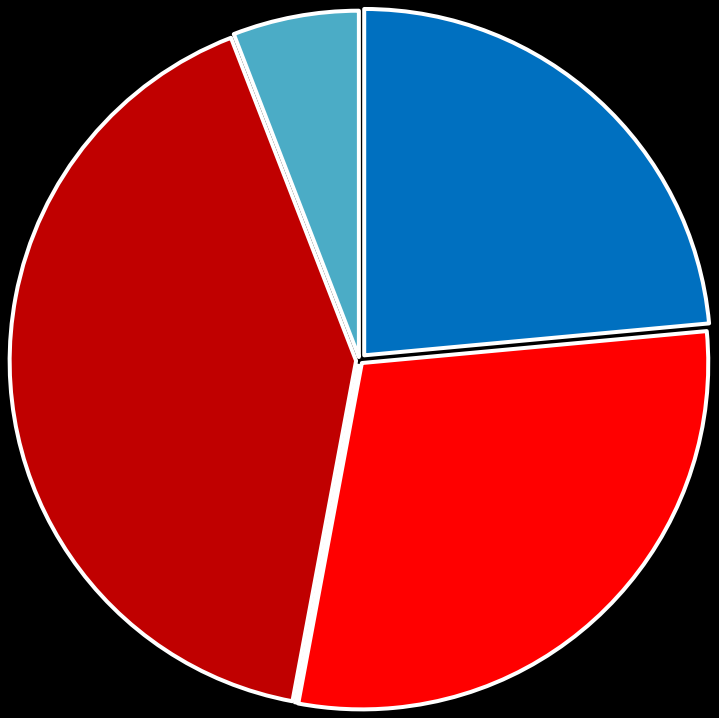
United States Court of Appeals
for the Fifth Circuit

Fifth Circuit Jan. 2024
(Party of Appointing President)



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

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

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

The Washington Post
Democracy Dies in Darkness

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 | 6

The Trumpiest Federal Appeals Court Did Something Truly Beyond the Pale

BY MARK JOSEPH STERN

OCT 20, 2022 • 4:56 PM

LEGAL WRITING

LYNN PINKER HURST SCHWEGMANN

Smith v. School Board of Concordia Parish, 88 F.4th 588 (5th Cir. 2023)

"Delta also forfeited its argument that the district court should have instead applied Rule 54(b). Delta didn't include this argument in its "Statement of the Issue" or in the body of its opening brief—rather, Delta relegated it to a footnote. ***We have repeatedly cautioned that arguments appearing only in footnotes are 'insufficiently addressed in the body of the brief'*** *and are thus forfeited. Delta's Rule 54(b) argument meets this predictable fate."*

LEGAL WRITING / “PARTY PRESENTATION”

LYNN PINKER HURST SCHWEGMANN

United States v. Sineneng-Smith,
140 S. Ct. 1575 (2020)

"In our adversarial system of adjudication, we follow ***the principle of party presentation****. As this Court stated in Greenlaw v. United States, 554 U. S. 237 (2008), 'in both civil and criminal cases, in the first instance and on appeal . . . , we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.'"*

United Natural Foods, Inc. v. NLRB,
66 F.4th 536 (5th Cir. 2023)

- ***Majority:*** *"UNFI did not ask us to base our holding in § 160(b), and it would be improper for us to* ***cross the bench*** *to counsel's table and litigate the case for it."*

- ***Dissent:*** *"The majority first accuses of me of acting 'improper[ly]" by "'ross[ing] the bench to counsel's table and litigat[ing] the case.'* ***Such rhetoric is unfortunate****. It's also misplaced."* (citation omitted).

Elmen Holdings v. Martin Marietta,
86 F.4th 667 (5th Cir. 2023)

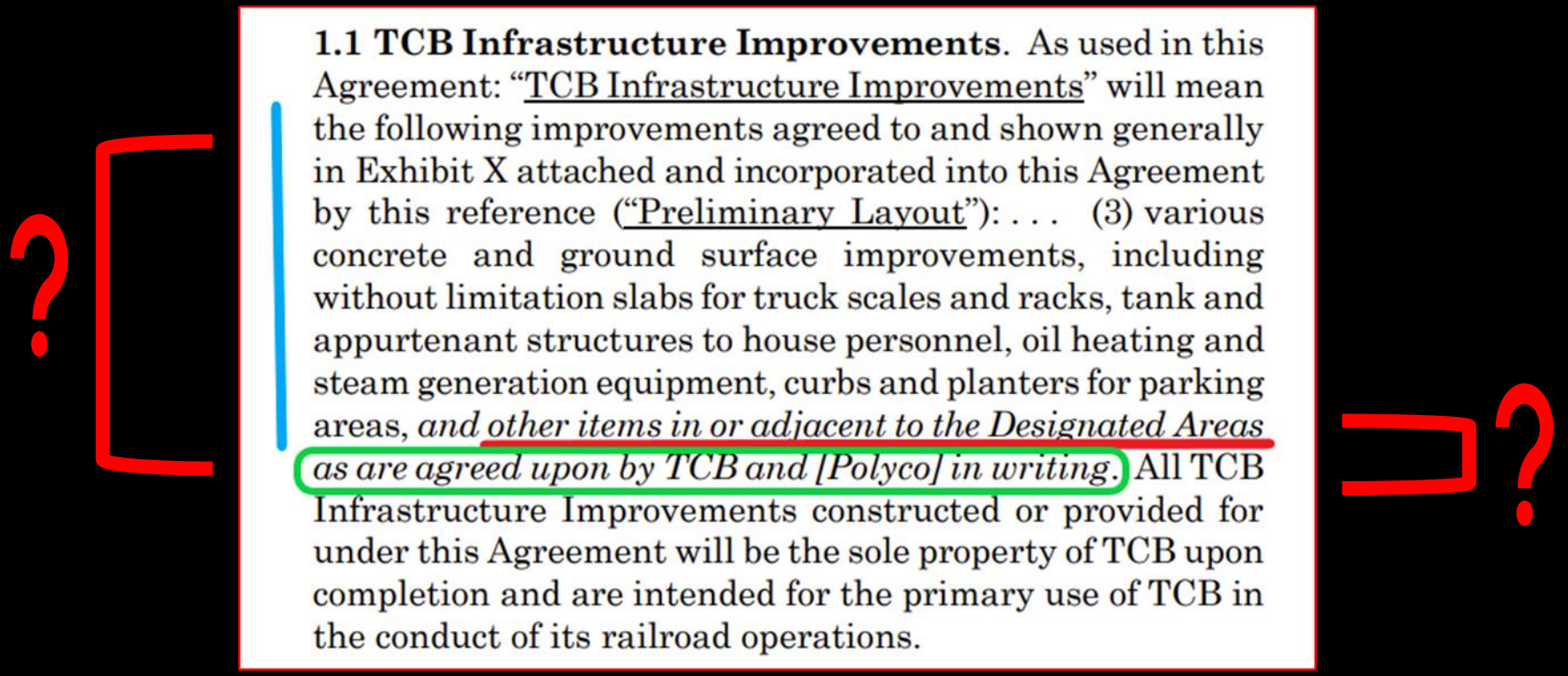
*"The magistrate judge did not 'radical[ly] transform[]' this case to such an extent as to constitute an abuse of discretion**; she merely took a different route than Martin Marietta and Elmen had suggested** to decide . . . questions presented by the parties.' Therefore, the magistrate judge did not violate the **party presentation principle** by interpreting the Gravel Lease to terminate automatically upon a missed royalty payment, even if that interpretation was contrary to the parties' reading of their contract."*

CONTRACT

Great Lakes Ins. v. Gray Group Investments, LLC, 76 F.4th 341 (5th Cir. 2023)

"The Application Form is clearly labeled as such, so the corresponding policy reference seems clear. But the 'full'" 'application for insurance,' slightly different nomenclature, implies a broader set of documents, including the Application Form and those Gray Group submitted during underwriting. The difference in verbiage is critical because under principles of contract interpretation, '[a] word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning.' Because ***'application for insurance'*** *'could suggest more than one meaning' to a 'reasonably intelligent person,' the term is ambiguous."* (citations omitted).

U.S. Polyco, Inc. v. Tex. Central Bus. Lines, No. 22-0901 (Tex. Nov. 3, 2023)



1.1 TCB Infrastructure Improvements. As used in this Agreement: "TCB Infrastructure Improvements" will mean the following improvements agreed to and shown generally in Exhibit X attached and incorporated into this Agreement by this reference ("Preliminary Layout"): . . . (3) various concrete and ground surface improvements, including without limitation slabs for truck scales and racks, tank and appurtenant structures to house personnel, oil heating and steam generation equipment, curbs and planters for parking areas, *and other items in or adjacent to the Designated Areas as are agreed upon by TCB and [Polyco] in writing.* All TCB Infrastructure Improvements constructed or provided for under this Agreement will be the sole property of TCB upon completion and are intended for the primary use of TCB in the conduct of its railroad operations.

U.S. Polyco, Inc. v. Tex. Central Bus. Lines, No. 22-0901 (Tex. Nov. 3, 2023)

"The court of appeals accordingly erred by concluding that there were 'multiple, reasonable interpretations' of Section 1.1(3). By 'multiple,' it simply meant two—the two we have already examined, only one of which we can embrace. And by 'reasonable,' it simply meant plausible, but lawyers in litigation can often generate plausible arguments to advance their clients' position. As we have observed before, ***a 'contract is not ambiguous merely because the parties disagree about its meaning****."*" (citations omitted).

U.S. Polyco, Inc. v. Tex. Central Bus. Lines, No. 22-0901 (Tex. Nov. 3, 2023)

"The task of harmonizing contracts entails reconciling otherwise conflicting contractual provisions. That task does not authorize courts to ensure that every provision comports with some grander theme or purpose, particularly when the parties have not said in the contract which purpose matters most or that everything else in the contract should be read subject to that purpose. ***To hold otherwise would implicitly assume that contracting parties pursue a purpose (at whatever generality) at all costs****."*

JURISDICTION (PERSONAL)

Sevenly Outfitters v. Monkedia, LLC,
No. 05-22-00096-CV (Apr. 19, 2023)

"[T]he courts of appeals of this state have generally found a nonresident defendant purposefully avails itself of this forum when it contracts with a Texas resident as a result of its solicitation of the Texas resident …."

"When the solicitation runs the other way and the plaintiff solicits business with the nonresident defendant, we have concluded there was no specific jurisdiction over the nonresident defendant, even though the defendant made payments to Texas under a contract that includes a Texas choice of law provision."

"[W]hen the record is silent as to which party solicited the others business, courts have found the defendant did not purposefully avail itself of the forum."

TTS LLC v. Evenflow LLC,
No. 05-22-00770-CV (Sept. 15, 2023)

"[Trinity is registered with the Texas Secretary of State and operates a regional service center in Euless, Texas, which employs a manager and thirty-three employees. The record reflects Trinity recruited and employed Evenflow and Manselle while both were still working for TTS, and during such time ***Manselle disclosed to Trinity TTS' confidential business information related to Texas customers and interfered with TTS' business in Texas.*** *… [I]n the twelve months following Trinity's appropriation of TTS' confidential business information, Trinity earned approximately $475,000 in recurring Texas-based business."*

Boyer v. Mode Transp., LLC, No. 05-23-00008-CV (Oct. 4, 2023)

"[T]he Boyer Defendants may have been physically present in Missouri when the Confidential Information was disclosed, but as the forgoing cases illustrate, that does not conclude the inquiry. ***The Texas relationship through which the Confidential Information was acquired*** *and the use of that information to gain economic advantage establish the requisite connection between the misappropriation and breach of contract claims and this state."*

"[Mode's tortious interference and misappropriation claims are based entirely on Mode's Texas residency and its allegations that MX's actions caused Mode to lose business in Texas. … And ***the jurisdictional evidence does not establish any additional conduc****t to establish that MX intentionally targeted Texas and purposefully availed itself of the benefits of conducting activities here in connection with the claims asserted in this suit."*

Nusret Dallas LLC v. Regan,
No. 05-21-00739-CV (June 23, 2023)

2-3 and 5-7 did not address plaintiff's allegations

FACTS ADDRESSING THAT NO TORT AGAINST PLAINTIFF WAS COMMITTED IN TEXAS

. . .

2. I have never been employed by Nusret Dallas, LLC.
3. I have never entered into any agreement with Nusret Dallas LLC. for services.
4. I have never received any funds from Nusret Dallas, LLC in Texas.
5. I have personal knowledge that Nusret Dallas, LLC is Delaware LLC with offices in Florida and as of this affidavit Nusret Dallas LLC has no operating business in Texas.
6. I have personal knowledge that the sole Manager of Nusret Dallas LLC, Naki Ufuk Soyturk, is Turkish Citizen, residing in Florida.
7. I have never been an authorized bank signer on any account owned or operated by Plaintiff in any location.
8. I have never personally received any payment from Jim Benge, Benge Texas, Inc., or any Benge entity.
9. I have never knowingly committed a tortious act in Texas against the Plaintiff OR THE OTHER Defendants.[5]

4 and 8 addressed plaintiff's allegations but didn't "squarely meet or negate" them

9 is conclusory

“Parties complaining that they were harmed by a Web site's publication of user-generated content . . . may sue the third-party user who generated the content, but not the interactive computer service that enabled them to publish the content online."

Doe v. Snap, Inc. **No. 22-20543**
(5th Cir. Dec. 18, 2023) (en banc vote to rehear the above)

FOR REVIEW

Smith
Elrod
Willett
Duncan
Engelhardt
Oldham
Wilson

DID NOT PARTICIPATE

Ho
Ramirez

AGAINST REVIEW

Richman
Jones
Stewart
Southwick
Haynes
Graves (panel)
Higginson (panel)
Douglas

VENUE

Rush Truck Centers v. Sayre,
No. 05-23-00775-CV (Nov. 30, 2023)

"The Sayres respond that ***'[b]ookends are meaningless without the books,'*** *and negotiation and final delivery of the bus are not dispositive or viewed in isolation. Rather, they contend that determining where the bus was supplied also includes all actions that made negotiation and final delivery meaningful."*

In re TikTok, Inc.
85 F.4th 352 (5th Cir. 2023)

*"That evidence, however, only establishes that a high-ranking company executive and other employees worked in Austin as members of a 'Global Business Solutions Group.' It does not tie those individuals to this case, or show that they do any work related to the video-editing functionality or its implementation, or support the proposition that any of them would have physical proof relevant to the adjudication of Meishe's claims. … **[I]t is pure speculation whether any of petitioners' Austin-based employees possesses or has access to proof relevant to this case**."*

DISCOVERY

LYNN PINKER HURST SCHWEGMANN

In re Liberty County Mut. Ins. Co.,
679 S.W.3d 170 (Tex. 2023)

"Liberty expressly narrowed the timeframe of its original requests to five years before the accident and five years after. The record shows that ***Harris was involved in car accidents both before and after the April 2017 accident*** *and that at least some of them involved similar injuries to those she claims arose from the accident at issue here. Liberty's request as modified therefore does not seek production of records from 'an unreasonably long time period' so as to make it impermissibly overbroad."* (citation omitted).

In re Insight Neurodiagnostics, LLC,
No. 05-23-00014-CV (April 5, 2023)

Request for Production No. 11: All financial records of Insight and Life Sciences from 2018 to the present, including all profit and loss statements, general ledgers, and tax returns.

Request for Production No. 13: All documents reflecting any monetary amounts collected by Lifesciences' electroencephalogram (EEG) business from 2018 to the present.

"These requests could cover financial information that does not involve Jones[, and] are ***impermissibly broad*** *because they extend into a time period during which Jones did not work with Insight or Lifesciences."*

PERMISSIVE APPEALS

Singh v. Rategain Travel Techs., Ltd.,
No. 05-23-01088-CV (Dec. 14, 2023)

"Singh thoroughly addresses why he believes the trial court erred in compelling him to arbitration, he does not explain why there is a ***substantial ground for disagreement*** *about the law regarding this issue."*

"[R]egardless of the outcome of this permissive appeal, ***neither party would seek judgment*** *without further litigation."*

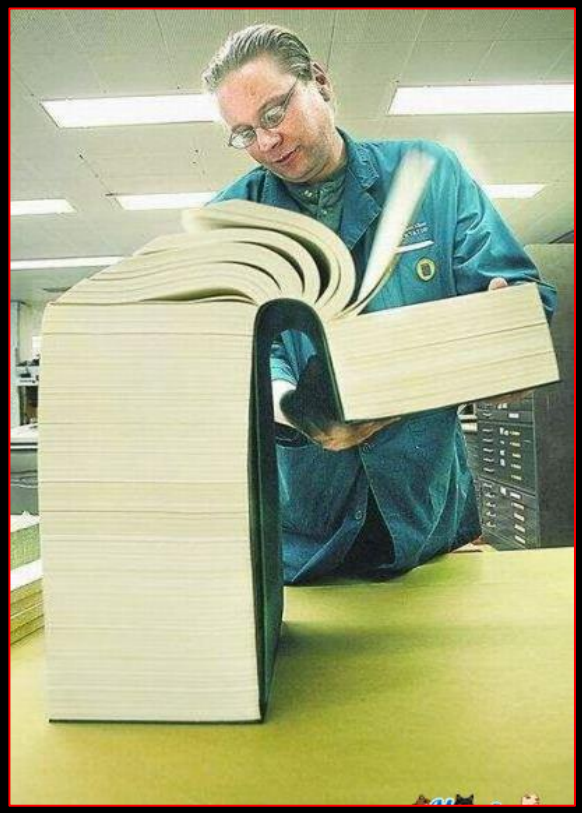
Hartline Barger LLP v. Denson Walker Props., No. 05-23-00126-CV (Dec. 11, 2023)

*"Although the possibility exists that a controlling legal question as to which a substantial ground for disagreement exists might arise in determining whether a fact issue exists in the context of a summary judgment, **it is rare**, and this fact-intensive case is not that rare occurrence."*

PLEADINGS

Davis v. Homeowners of Am. Ins. Co,
No. 05-21-00092-CV (May 31, 2023)

"Rule 59 hardly grants carte blanche to litigants to attach unauthenticated, hearsay, unduly prejudicial, or other traditionally objectionable documents to pleadings and have them considered as 'evidence' in the traditional sense. Rule 59 pleading exhibits merely imbue or ***augment the allegations*** *of the pleading to which they are attached."*



PRESERVATION

LYNN PINKER HURST SCHWEGMANN

Dupree v. Younger, 598 U.S. 729 (2023)

*"**Trials wholly supplant pretrial factual rulings, but they leave pretrial legal rulings undisturbed.** The point of a trial, after all, is not to hash out the law. Because a district court's purely legal conclusions at summary judgment are not 'supersede[d]' by later developments in the litigation, these rulings follow the 'general rule' and merge into the final judgment, at which point they are reviewable on appeal …."*

Marquette Transp. v. Nav. Maritime Bulgare JSC, 87 F.4th 678 (5th Cir. 2023)

*"**[1]** [Defendant's] pretrial objections preserved the arguments contained in Balkan's motion in limine concerning authentication and expert testimony. But **[2]** neither he nor Balkan argued below that the reconstruction was inadmissible summary judgment evidence. That argument thus was not preserved for appeal."*

JURISDICTION

(Subject Matter)

SXSW, LLC v. Fed. Ins. Co., 83 F.4th 405 (5th Cir. 2023)

- *"First, there is a potentially important difference between **LLC membership and LLC ownership**. State law governs LLC formation and organization. Several states permit LLC membership without ownership. … SXSW has not shown the relevant LLCs were formed in States that equate membership and ownership."*

- *"Second, SXSW stated that Capshaw [an LLC owner] was a Virginia resident. But **residency is not citizenship** for purposes of § 1332."*

- *"Finally, there is a timing issue. For diversity jurisdiction, we look to citizenship at the **time the complaint was filed**. … [W]e have no way of knowing whether those later documents reflect SXSW's membership structure as of October 6, 2021."*

SANCTIONS

Calsep A/S v. Dabral,
84 F.4th 304 (5th Cir. 2023)

*" W]hen he was offered **one last "chance"** to "come clean" and submit an unmodified source code control system, he didn't. Instead, he deleted more evidence and produced a copy of the system that had numerous other files missing. Per his own expert, those deletions were seemingly **"intentional"** and done after the filing of Calsep's suit and even **after the district court's disclosure order**. So, the district court concluded that Dabral acted willfully and in bad faith. The court didn't reach that conclusion easily. Instead, it came after **months of violations** and a long evidentiary hearing."*

Van Winkle v. Rogers, 82 F.4th 370 (5th Cir. 2023)

*"Prime destroyed the most crucial piece of evidence **just weeks after** learning that its tire may have caused a car accident; Prime cannot explain **why it transported the tire** to its Salt Lake facility or **what happened to the tire** following the accident; and Prime cannot demonstrate it had **any formal preservation or retention policy** for its equipment, like tires, that may have caused an injury. These circumstances create a Fact question on bad faith, necessitating a jury determination."*

TRADEMARK

Rex Real Estate I, LP v. Rex Real Estate Exch. Inc., 80 F.4th 607 (5th Cir. 2023)

"Plaintiff's anecdotal proof of confusion does not involve swayed customer purchases or initial interest confusion that can result in swayed business. It also does not involve 'potential customer[s] considering whether to transact business with one or the other of the parties.' But it has presented ***instances of potential customers of each respective company mistakenly contacting the other****. … [B]ecause Plaintiff has presented some relevant evidence of actual confusion, a reasonable jury could conclude that this digit weighs in its favor."*

DAMAGES

Ortiz v. Nelapatla,
No. 05-22-00531-CV (July 18, 2023)

"[T]o be compliant, a counteraffidavit need not fully controvert a plaintiff's affidavit. Nothing in the plain language of section 18.001 suggests that a plaintiff is entitled to rely on a section 18.001 affidavit, in full or in part, as evidence at trial if the affidavit is only partially controverted. ***Had the Legislature intended to authorize use of a partially controverted affidavit as evidence at trial, it could have so provided****."*

Antero Resources Corp. v. C&R Downhole Drilling Inc., No. 05-22-00531-CV (July 18, 2023)

"[E]vidence of a competitor's rate is not necessary to prove out-of pocket damages. To show damages, Antero need only prove that the Robertson companies charged it more than the 'value [Antero] received.' … Antero paid $150,000,000 in exchange for a certain number of days of work. But because the Robertson companies did not actually work on all of the Days they billed, the value of the work Antero received was only $138,877,860. The difference in value is the amount overbilled. ***No reference to competitors' rates is needed for that statement to be true****."*

Huffman Asset Management, LLC v. Colter,
No. 05-22-00779-CV (Nov. 7, 2023)

Sufficiency. *"While those statements provide some evidence of the Colters' belief they suffered mental anguish, the testimony* ***does not show the nature, duration, and severity of the mental anguish****, a substantial interruption in the Colters' daily routine, or a high degree of mental pain and distress that is greater than mere worry, anxiety, vexation, embarrassment, or anger. The affidavits also include no evidence to justify the amount awarded."*

Disposition. *"We do not, however, render a take nothing judgment against the Colters as to the mental anguish damages. '[W]hen an appellate court sustains a no evidence point after an uncontested hearing on unliquidated damages following a no-answer default judgment****, the appropriate disposition is a remand*** *for a new trial on the issue of unliquidated damages.'"*

Empowerment Homes LLC v. Alema,
No. 05-22-01082-CV (Oct. 9, 2023)

Incorrect, but well-intentioned, answer. *"'I was not aware that I could not represent Empowerment Homes, LLC as I am not an attorney licensed in the State of Texas."*

Deemed admissions. *"[D]espite notice of the mistake prior to entry of final judgment, appellants did nothing and waited until the motion for new trial to request withdrawal of the deemed admissions. Thus, the equitable considerations that might permit a party to move post-judgment for withdrawal of deemed admissions are not present in this case."*

Misuse of deemed admissions. *"Because appellees failed to establish an element of their summary judgment burden—that Arce acted in bad faith or callous disregard to the rules by not answering the request for admissions—the trial court erred in granting summary judgment based on the deemed admissions."*

EXPERTS

LYNN PINKER HURST SCHWEGMANN

Smith v. Nexion Health, No. 05-22-01140-CV (Aug. 11, 2023)

*"Smith's attending physician at the hospital, in addition to attributing her death to **cardiac arrest**, made diagnoses of unspecified **dementia** without behavioral disturbance, essential **hypertension, hypotension, hypolipidemia**, unspecified, **anemia**, unspecified, and a personal history of **TIA**. Irwin Korngut, M.D., an expert witness designated by appellees, testified that the emergency physicians found **no evidence to suggest that Smith was septic** at the time of her death and did not list sepsis as a diagnosis. Dr. Korngut further testified that Smith's anemia, her known **coronary disease**, or **internal bleeding** could have caused cardiac arrest. The Plaintiffs' experts based their opinions on reliable methodologies and provided relevant, helpful testimony."*

Kim v. American Honda Motor Co.,
86 F.4th 150 (5th Cir. 2023)

"Plaintiffs did not need to conduct a formal risk-utility analysis to prove there was a safer alternative design available; they needed only to offer some evidence the center airbag or reverse geometry seatbelt would not have significantly increased the risk of injury or impaired utility."

INJUNCTION

LYNN PINKER HURST SCHWEGMANN

In re State of Texas,
No. 23-0994 (Tex. Dec. 11, 2023)

"[W]e may grant mandamus relief when the trial court effectively resolves the merits of a case in a temporary restraining order."

Whirlpool Corp. v. Shenzhen Sanlida Elec. Tech., 80 F.4th 536 (5th Cir. 2023)

Text. *"Federal Rule of Civil Procedure 65[(a)(1)] states that a court 'may issue a preliminary injunction only on notice to the adverse party.."*

Precedent*. "[A]s we stated in Corrigan Dispatch Co. v. Casa Guzman, S.A., 'Rule 65(a) does not require service of process,' but rather requires 'notice to the adverse party.'" (citation omitted).*

Practicality. *"[B]ecause 'formal service of process under the Hague Convention . . . can take months,' adopting Shenzhen's position could result in the 'unfortunate effect of immunizing most foreign defendants from needed emergency injunctive relief.'" (citation omitted).*

Direct Biologics v. McQueen,
63 F.4th 1015 (5th Cir. 2023)

*"**The district court did not abuse its discretion by declining to presume irreparable injury** based on McQueen's breach of his non-compete covenants. … [T]he Employment Agreement broadly prohibited him from providing "similar" services to Vivex that he provided to DB. The Operating Agreement covenant was even broader. Thus, McQueen could have breached these covenants even without actually using or disclosing DB's confidential information or trade secrets."*

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