STATE BAR LITIGATION SECTION REPORT

THE ADVOCATE

Litigating Through Crisis

VOLUME 93

WINTER

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EDITOR'S COMMENTS

LONNY HOFFMAN

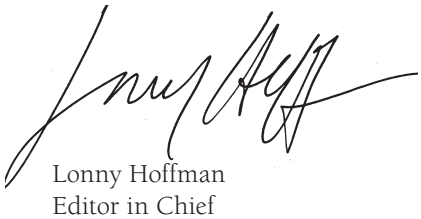
WE BEGAN PLANNING THIS ISSUE IN EARLY APRIL. It's hard to even remember how little we knew about the pandemic back then. We certainly knew enough to realize that the crisis was going to be greatly disruptive to the judicial process. (Indeed, the Supreme Court of Texas had already issued eight emergency orders relating to COVID-19 by the time we had our first planning meeting.) But we also realized it could be premature to devote an entire issue to the pandemic's effects on the practice of law: there was just so much that was changing—almost on a daily basis. Getting out in front of our toes was a real concern.

Appreciating the challenge, we realized that one sensible approach was to seek out vantage points that could offer a sense of perspective: how have courts dealt with past crises and what light might those prior experiences shed on the current one. The articles by Stephen Pate, Hiram Sasser, Professor Sandy Levinson, and from (former Chief Justice) Tom Phillips and Professor Steven Vladek all take this wider-lens approach. Fortunately, some of the pandemic's impacts were already apparent enough in the spring for us to engage other authors to look at those impacts. These articles span a wide range of ways in which it was already possible to recognize COVID-19's substantive law fingerprints: from novel tort claims and contract-based issues to employment law and family law matters. Finally, we sought out one perspective on how the pandemic may lead us to think harder about remote jury selection. Collectively, I think you'll find the articles in this volume to be deeply engaging and thought provoking.

At the same time, it's comforting to know that some things haven't changed. We are again indebted to Rob Ramsey and Luke Soules for another valuable installment of Procedure and Evidence Update.

Finally, I would be remiss if I did not offer my special thanks to Judge Karin Crump and to the editorial board subcommittee that she chaired whose members (Sofia Adrogué, Jason Fulton, Greg Love, Stephen Yelenosky, and Evan Young) worked tirelessly in helping bring this issue together.

Regards,



Lonny Hoffman
Editor in Chief

CHAIR'S REPORT

The Litigation Section – Where Great Trial Lawyers are Made!

HON. XAVIER RODRIGUEZ

I WOULD BET THAT MANY OF YOU ARE EXPERIENCING ZOOM FATIGUE and anxiously awaiting whatever the new normal will look like. I have followed with interest the various articles and webcasts that have discussed what the practice of law will look like post-pandemic. I tend to agree with some of the predictions that virtual hearings and virtual depositions will continue in many cases because of the time and cost savings that have been realized.

But other natural disasters have caused disruptions in the past (and will in the future). It is our hope that this edition of the Advocate will be of assistance to you as we continue to navigate this current pandemic and remain a resource as you engage in contingency planning for working through future calamities.

Some advice will necessarily promote technology as a means of business continuity and ensuring that the civil justice system continues. But as big of a technology enthusiast that I am, I remain in the skeptic camp about going all in for remote proceedings.

Virtual conferences can improve the consistent and timely communications with clients. Virtual hearings for initial status conferences and motion hearings have been met with praise by most judges and practitioners. Absent any technical or bandwidth issues, lawyers can be just as effective arguing a point in a virtual space as they can be in a courtroom and the virtual practice advances the goal of making civil proceedings less costly, as litigants no longer have to bear the expense associated with time and travel to the courthouse. But even here there are limitations. Privacy or confidentiality concerns in certain cases can't be fully addressed in the remote context where the public may have access to the proceedings.

Some mediators are reporting good outcomes in the virtual setting. That's surprising to me since in many cases a litigant needs to be heard and offered an opportunity to vent before serious movement is made towards settlement. How to achieve these cathartic opportunities in a virtual format will no doubt be the subject of psychological studies.

In an effort to resume trials some courts are exploring virtual jury trials. The Texas Office of Court Administration has a listing (as of 9/29/20) of trials that have been approved as part of the limited jury trial order. Most of the cases listed are criminal cases, scheduled for in-person trials. A few family law and civil cases were also approved for an in-person trial. I saw three civil cases scheduled for a virtual trial – a personal injury case and two other unspecified civil cases were either cancelled or continued. An eviction case scheduled for a virtual trial was settled.

For now, a host of issues make virtual trials unwise to me. First, in many parts of the population there exists a digital divide, with individuals not having access to high speed internet access. Jurors facing this problem will likely not be able to hear or see all the evidence in a case adequately. Excusing jurors who do not have high speed internet access may result in challenges that the composition of the jury violates due process. Secondly, once a jury is selected how a court will monitor the attentiveness of a juror remains to be seen. Further, although courts have always had to rely upon jurors to adhere to admonishments not to do independent research or investigation in a case, at least in the open courtroom setting courts could watch for inappropriate activity. There will be no such check in the virtual setting. Lastly, juries engage in a collective bonding process while at the courthouse. How they replicate this interaction and deliberation process in the virtual setting requires yet additional study.

No doubt with time we shall see technology improvements and studies that will advance our understanding of human behavior in a remote setting. In the interim, count me in the camp of hoping for a safe and effective vaccine that becomes widely available soon. Otherwise, please enjoy this edition of the Advocate. Finally, as always if you have any ideas on how the Litigation Section can further assist practicing litigators, please do not hesitate to contact us.

Stay safe,

Xavier Rodriguez
Chair, Litigation Section

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SYMPOSIUM ON
LITIGATING
THROUGH CRISIS

LITIGATING THROUGH CRISIS

A Journal of the Plague Years: Texas Litigation in Times of Pandemic and Epidemic

BY STEPHEN PATE

FINES FOR NOT WEARING A MASK IN A PANDEMIC? Forced quarantines? Mandatory vaccinations? Riots while a disease rages? Courthouses closed for fear of spreading a virus? Jury trials paused—even in the middle of a criminal trial? Those all sound familiar—but they are episodes from over a century ago in Texas. The Covid-19 pandemic has stretched on and on. Courthouses are shuttered, and most lawyers cannot regularly go to their own offices. How much of today's crisis is a repetition of what came before? With some extra time, many Texas litigators with a sense of history have looked for past historical parallels that may guide them regarding how this crisis will play out. Most have read about the Spanish Flu Pandemic of 1918-1920. Few, however, realize quite how many epidemics has Texas suffered over the course of its history or their effect on Texas law.

Few, however, realize quite how many epidemics has Texas suffered over the course of its history or their effect on Texas law.

There were major outbreaks of cholera in 1833 and 1849, the latter outbreak killing approximately 500 people in San Antonio. Worse than cholera, the most dangerous and recurrent disease to hit Texas was yellow fever—the dreaded "Yellow Jack"—so called because a victim's skin would turn yellow because of the liver failure the disease produced. That disease caused epidemic conditions in only two weeks, killing many in a horrible death that arrived about a week after infection. It caused a systematic breakdown of the clotting system, causing a body's organs to hemorrhage. Galveston, which was Texas' largest city during the nineteenth century, experienced at least nine major yellow fever epidemics between 1839 and 1867, and smaller outbreaks until 1905. Another outbreak in 1873 caused Victoria, Corpus Christi, Beaumont, and San Antonio to be quarantined. Texas has also seen major outbreaks of smallpox, encephalitis, polio, dengue fever, and measles. Smallpox was especially prevalent, with a notable outbreak occurring in Laredo in 1898.

What effect did these "plagues" have upon Texas lawyers and litigation? Were courts shuttered, as many are now? Today, we have seen an early raft of Coronavirus lawsuits over lockdowns and mask mandates. Moreover, many claims against insurance carriers have been filed because of business closures. Did comparable litigation arise from these outbreaks?

The answers we have are often incomplete. We have a fair idea of court closures during the Spanish flu. Before that, it is difficult to find a complete picture of how lawyers were affected. The historical records reflect that some epidemics—especially yellow fever—ground commerce to a standstill. Quarantines were in place, but more importantly, people were afraid to congregate. Given this, courts must have been shuttered and trials non-existent. Many of these epidemics occurred when Texas was still a frontier society, with only a nascent legal practice. Events unrelated to epidemics would also have affected court operations. For example, the worst yellow fever epidemic to hit Galveston was in 1867, in the midst of Reconstruction. This was a time when famed early Texas attorney W.P. Ballinger described Texas courts as disorganized and barely functioning. "Yellow Jack" and other diseases certainly kept courts from opening—but they were already limited.

The Spanish Flu Pandemic of 1918-1920 provides a much clearer picture. When the flu struck, courts began to close in October 1918—but not all of them, and some with much reluctance. In Fort Worth, lawyers themselves forced the issue. On October 21, 1918, the Tarrant County Bar Association met and unanimously passed a resolution to adjourn all courts until the influenza epidemic had subsided. A committee of three then notified all four state judges of the resolution—and all four recessed their courts. One court was impaneling a jury when it received the resolution, and immediately adjourned. The criminal district court dismissed a venire panel of 200. On October 25, 1918, Travis County District Judge George Calhoun announced a postponement of jury trials in Austin for a week, based on advice from the Health Board and different physicians. Judge Calhoun did this despite having been told (quite wrongly) that "the epidemic is beginning to wane[.]" He said that "the fact remains those who have had [the

influenza] are yet carrying and it would be next to impossible for the crowd that will assemble at the courthouse Monday should court be held to be free altogether as carriers." Both federal and state courts in El Paso also adjourned. Smaller counties were not exempt. In Ballinger, a murder trial was already under way when the trial judge adjourned it until the next term because of the influenza outbreak. In rural Bowie County, trials were adjourned from October until November.

Yet strangely, some courts remained defiantly open. Some federal courts remained open even as state courts closed. In Dallas County, jurors already hearing cases were allowed to vote regarding whether to recess the trials in light of the pandemic. They voted to continue by the narrow margin of 27-24.

Even so, many courts that wanted to go forward simply could not. In San Antonio, just before the quarantine, both the fact that potential jurors were in the army and others were sick depleted the venire panels. Obviously, many summoned for jury duty were not reporting because of fear of contagion. In El Paso, Judge W.D. Howe solemnly warned a jury panel not to dodge jury duty. The *Dallas Morning News* wrote "there was little activity in any court. Judges find it difficult to get cases to trial. Often witnesses cannot be found. At other times, lawyers cannot be present." By late 1918, courts opened again, and despite flare-ups in 1919 and 1920, they remained open.

Even if we do not know the exact status of courts during other epidemics, except by surmise, we at least know about the litigation related to them. Indeed, with some, we can say there were some litigation "trends." In 1852, in *Young v. Lewis,* the Texas Supreme Court decided an odd case arising out of the 1849 cholera epidemic—one that related to treating humans as mere property, a scourge even worse than and far longer lasting than cholera. A forever-unnamed slave woman had been hired out by her owner on a month-to-month basis. When she died of cholera during the hire-out, the owner sought her full value of $500. The Court said there was no averment of negligence that caused her to contract cholera and no showing of lack of due diligence by the renter in caring for her. Thus, there could be no recovery. The first Texas Supreme Court case on yellow fever came in 1858. In *Fulton v. Alexander*, a bailment case, Alexander, a Texas merchant, entrusted Fulton, another merchant, with delivering a package to an attorney named Hays in New Orleans. Fulton arrived in New Orleans in the midst of a yellow fever epidemic. Feeling it was unsafe to remain, he left the package with a commercial firm he knew and left the same day. He also deposited his own money with the firm. The firm tried on several occasions to deliver the package to Hays, but never could. Later, Hays called the firm to get his money, only to find the firm had failed. Alexander sued Fulton. The Texas Supreme Court held in 1858 that Fulton had acted in good faith in leaving the money with a firm that he had confidence in, as evidenced by the fact he had left his own money there and that he had every right to do so instead of delivering the money himself, which would have protracted his stay in a city in which a "malignant epidemic" was raging. There was no recovery.

Apart from commercial situations, many reported cases dealt with legal issues relating to controlling the spread of yellow fever. Cities, especially San Antonio and Galveston, would impose quarantines upon an outbreak. More notably were the bans on commerce with neighboring states. In 1895, the Texas Legislature passed an act granting the Governor extensive powers to order quarantines and embargoes. In 1899, a case of yellow fever was reported in New Orleans. Texas immediately embargoed all interstate commerce with New Orleans, prohibiting all freight, passengers, and even U.S. mail from entering Texas from that city. Not surprisingly, Louisiana sued Texas complaining of an unreasonable restraint on interstate commerce. Louisiana brought the case in the United States Supreme Court, invoking its original jurisdiction in controversies between the states. However, the Supreme Court rejected the case because it said Louisiana was acting on behalf of its private citizens who were losing money. This was not a true "controversy between states," and thus there was no jurisdiction.

There were many reported cases arising out of this yellow fever quarantine. A merchant in San Antonio received a delayed and damaged shipment of bananas. The damage occurred because the bananas had been re-routed to avoid New Orleans, then quarantined because of the fever. When the merchant sued the shipper, the San Antonio Court of Civil Appeals denied relief, holding that the merchant ordered the bananas knowing full well there was a quarantine—he should have expected a delay.

George White, owner of the Maverick Hotel in San Antonio, sued the City of San Antonio over the New Orleans Quarantine. A theatrical troupe left News Orleans on the last train before the quarantine was declared and made it to San Antonio. Some of the troupe registered at the Maverick Hotel. The troupe was rehearsing at the Opera House, when, under the direction of the Mayor and his Health Officer, the police took charge of them and delivered them all to the Maverick, over White's protest. The troupe was quarantined

there as "yellow fever" suspects for six days. The effect of this confinement ruined the Hotel's business for months. White was forced to sell out. He sued the Mayor, the Health Officer, and the City for trespass. White dismissed the Mayor and Health Officer before trial. He obtained a verdict against the City. In reversing that verdict, the Court of Civil Appeals did not rely on the City's argument that the City's charter gave it the right to order quarantines. Instead, the court ruled that the actions of the Mayor and Health Officer were not those of the City. In fact, it held that the Mayor and Health Officer were "probably liable" for "unwarranted trespass." Yet, since they had already been dismissed, there was no recovery.

All these cases were decided in 1900. This was the year that Dr. Walter Reed discovered that yellow fever was not spread person to person. Instead, it was spread by the bite of a mosquito. The quarantines were useless.

There do not seem to be any reported cases regarding a business owner's liability for serving customers in the midst of a yellow fever epidemic. There are cases involving mental anguish suffered when a telegraph warning of yellow fever was not delivered. In the first decade of the twentieth century, R.B. Rich of Crockett and other members of his family were planning to go to San Antonio to take Rich's father-in-law for medical treatment with a Dr. Dupuy. Yellow fever broke out in San Antonio, and Dr. Dupuy sent a telegram through Western Union warning Rich to stay away. Though the Crockett Western Union agent received the telegram before the San Antonio train left, it was not delivered, and Rich departed. Sometime later, the telegram was delivered to Rich's home. Rich's wife, in a panic, sought to have Western Union deliver the telegram at some stop along the way. Western Union refused, the train arrived in San Antonio, and Rich and his family members spent eighteen hours in San Antonio before they could depart. No one contracted Yellow Fever and the court made a point of saying that there were only three active cases in San Antonio while Rich was there. Amazingly, even though the court was writing in 1910, long after Dr. Reed's discovery, it held that it was common knowledge that yellow fever was a "contagious or infectious disease." When Rich attempted to recover for his fear of contracting yellow fever, the court held that Western Union's negligence had led to mental anguish.

Science and preventive efforts would triumph over yellow fever. By 1918, the worry was the Spanish Flu Pandemic. Like today, some lawyers saw a way to generate business from the virus. In early December 1918, this headline appeared in the *Austin American Statesman*: "Chance for Damage Suits Looms Big Say Texas Lawyers." The accompanying article related that attorneys were discussing the "revival of the damage suit industry" in Texas because of the influenza pandemic. The theory was that owners of theatres and other public gathering places owed a duty to the public to keep their premises safe and influenza free. A review of case law, however, reveals no appellate decisions on this point. There was no hullabaloo about "business interruption" insurance claims as there is today. For one thing, businesses were closed only a short period of time. For another, few, if any, companies would have had such coverage.

There was, however, much litigation centered around life insurance claims. "Life insurance" was a relatively new concept. Many cases involved misrepresentation, as carriers denied claims on the grounds that the deceased hid their influenza when applying for insurance. Carriers also tried to deny claims based on a "War Service" exclusion. This exclusion voided coverage for deaths while on active military service. Since this was the end of a war and Spanish flu was prevalent in the services, this caused controversy. Ultimately, Texas courts frowned on these denials, holding that having influenza was not equivalent to being killed in military action. Worker's compensation was also comparatively new in Texas, and litigation ensued, with many courts ruling that catching the flu while at work was indeed within the course and scope of employment.

Smallpox was another major scourge of early Texas. As opposed to yellow fever, and like the Spanish flu, smallpox was a contagious disease. Yet alone of these, smallpox was easily preventable in the early years of the last century. Edward Jenner had developed a smallpox vaccine in the 1800s. By the end of the nineteenth century, many states, including Texas, had some form of compulsory vaccination. Many objected to being vaccinated. In 1899, smallpox hit Laredo hard. The Texas State Health Officer and Laredo's mayor ordered compulsory vaccinations, fumigations, and what was in effect a quarantine. There was a $1000 fine for not wearing a mask. Anyone refusing vaccination was subject to immediate arrest.

Most of these orders were directed to Laredo's Hispanic population. Many resisted the health orders. The Texas Rangers were called in to help with the immunization efforts. When the Rangers met resistance, they broke down doors and removed suspected victims by force. Eventually a riot broke out, with open warfare between the Rangers and Mexican Americans. There were deaths, many wounded, and arrests. Eventually, however, the brutal tactics of the Rangers did aid in ending the epidemic.

Gradually, compulsory vaccination became the norm, at least for children attending public school. There is a line of cases challenging the vaccination requirements. In 1909, one high school student developed smallpox in Fort Worth. The school district thus ordered all schoolchildren to be immunized. Mrs. M.H. McSween refused to vaccinate her daughter—for reasons unknown to us—and the daughter was suspended from school. Mrs. McSween sued the School Board, alleging that its actions violated the Texas and United States Constitutions. The Fort Worth Court of Civil Appeals disagreed. In *McSween v. Board of Trustees of City of Fort Worth*, it held that the Texas Legislature had enacted a special charter for Fort Worth, establishing its school district, and that charter gave the Fort Worth Board broad powers that included the right to protect students' health. Even if only one student had smallpox, the rest could be forced to be vaccinated.

Still, over a course of years, several more cases challenged compulsory vaccination. In *Staffel v. San Antonio School Board of Education*, a case from the San Antonio Court of Civil Appeals, five residents of San Antonio, parents of school age children, sought to enjoin a San Antonio School Board Resolution requiring students to be vaccinated against smallpox. This time we know why there was an objection: "plaintiffs and their children are conscientiously opposed to vaccination; …their faith, religion and conscience forbid them to submit to vaccination." Indeed, they called vaccination "loathsome, terrible and dangerous." They also alleged, against all scientific evidence, that the vaccine did not prevent smallpox. The Court of Civil Appeals would not even discuss their arguments, saying they had no bearing on the School Board's Resolution. The State had given control of the schools to the School Board, and not to individual parents, no matter what their convictions were. Compulsory vaccination was reasonably necessary to preserve public health and was thus upheld.

The issue arose in the Texas Supreme Court in late 1918. *City of New Braunfels v Waldschmidt* involved a suit not against a school board, but against a city. The New Braunfels City Council passed an ordinance denying pupils to attend either public or *private* school unless vaccinated for smallpox. Fritz Waldschmidt and his two children were Christian Scientists who refused vaccination because they believed in, as the Court said, "the Christian Science treatment of Smallpox, which is 'a denial of the reality of sickness and disease.'" The Waldschmidt children, denied entry to the schools, sued. They claimed the Ordinance deprived them of their liberty to care for their own health as they saw fit and that they had property rights in local and state school funds which they would lose if the Ordinance was enforced. Finally, they contended that there was no smallpox epidemic in New Braunfels, and that the Ordinance was therefore unreasonable. The Court of Civil Appeals actually ruled for the Waldschmidts—this was in the heydays of the *Lochner* era and substantive due process—saying that no city had the power to adopt such an ordinance. The court added that there was no epidemic in New Braunfels and the Ordinance was thus unreasonable.

The Supreme Court, however, had none of it. It held the Ordinance to be a legitimate exercise of the police power the state of Texas gave to the city by charter to protect the health of its residents.

The Court went further however, using unfortunate language that, alas, reflects the time and place. It was true that when the trial court heard the case there had been only one case of smallpox in New Braunfels, but there was a reasonable *fear* of an epidemic spreading. Why? Because the city was 30% "Mexican." Mexicans, according to the Court and its understanding of the record, were known to spread smallpox. The Court's opinion reflects that a doctor had testified at trial that "in winter the Mexican population in New Braunfels increased, when they gathered together in unventilated little huts, and the disease was most likely to originate among them and spread to all the people." This fear made the Ordinance "reasonable." This decision is not the only example of thinking along these lines. Indeed, in 1934, in the last reported opinion regarding compulsory smallpox vaccination, the Fort Worth Court of Civil Appeals referred to the "large Negro and Mexican population" of Fort Worth and their supposed tendency to spread smallpox as a reason to uphold compulsory vaccination.

Preventative measures eliminated yellow fever and cholera in Texas. Spanish flu ran its course by about March 1920. Vaccination has now caused the global eradication of smallpox. Before these diseases went, though, they left a mark on Texas's legal landscape. Though we do not yet know to what extent, Coronavirus will leave its mark, too. What we do know is that the past is prologue—and that, in another century, another article, perhaps in the *Advocate*, will unearth the happenings of 2020 just as we scour the records of the past today.

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VIRUS IN THE SYSTEM: ADVANCING ACCESS TO JUSTICE WHEN ALL SEEMS LOST

BY HARRY REASONER & TRISH MCALLISTER

TEXAS LEGAL AID PROVIDERS AND ACCESS TO JUSTICE advocates have significant experience dealing with massive disasters like hurricanes, floods, fires, and human crises. The coronavirus pandemic, however, is a game changer affecting not only the entire state, but also the entire nation. Its impact on access to justice and the way that the courts engage with the public cannot be overstated.

COVID's Impact on the Need for Legal Assistance and Legal Aid

COVID has disrupted and damaged our society in many ways. Some of the consequences cry out for immediate legal assistance:

1. Income Maintenance: Millions of people have lost their jobs and are in desperate need of money to cover basic living expenses like food and shelter. More than 3.6 million Texans have filed unemployment claims since mid-March[1] and thousands have yet to start receiving unemployment compensation. Many have still not received their Economic Impact Payment through the CARES Act. Without legal assistance, most low-income Texans would not be able to navigate their way through these systems successfully.

2. Evictions: Our nation is on the precipice of an eviction crisis. With sudden job losses and delays in obtaining unemployment benefits, thousands of tenants cannot pay rent at a time when losing housing would place them at risk of contracting a deadly disease. Since the inception of the pandemic, there have been several national, state, and local orders that have delayed the wave of evictions but the reality is that tenants who cannot pay rent will be evicted once those orders expire. The Centers for Disease Control eviction moratorium that began on September 4, 2020 will terminate at the end of the year as will the limited extension of the CARES Act eviction moratorium and the emergency orders issued by the Texas Supreme Court. Unless these are extended or another moratorium issues, the new year will usher in an onslaught of evictions and debt incurred from accumulated rent and late fees. Legal aid has already seen hundreds of cases where landlords have violated existing moratoriums or resorted to illegal lockouts and utility shutoffs to force tenants to leave. Without legal assistance, tenants are ill equipped to advocate their rights, especially rights granted under complex federal law.

3. Domestic Violence: Sadly, domestic violence, and its level of lethality, has risen during the pandemic. Due to stay in place orders, people experiencing domestic violence have had a difficult time reporting problems or accessing legal services because they cannot risk getting caught doing so by their abuser. To make it easier for survivors to get access to emergency assistance, domestic violence shelters, and protective orders, some legal aid programs have started offering services by chat and text.

4. Employment: Employees need help with a variety of employment related issues. Many low-income workers classified as "essential" are working in unsafe conditions and need help securing a safer work environment, including basic protective equipment. Employees who become ill with COVID-19 need help protecting their employment and obtaining paid medical leave under the CARES Act. Some need help with the terms of their layoffs.

5. Medical Care: Most individuals who lost their jobs also lost their health care and do not qualify for Medicaid in Texas, leaving people without a way to pay for their current medications or needed support services and at risk of incurring significant debt if a medical event occurs. People with disabilities are also struggling to get the attendant and nursing care they need due to a reduction in the number of medical personnel willing to make in-home visits. Individuals with mental health issues, which have been exacerbated by stay in place orders, need help accessing low cost or free mental health services.

6. Consumer Debt: People who have lost their jobs have not been able to pay their mortgages, car loans, student loans, or credit cards and need help negotiating mortgage forbearance and payment plans. Debt collection through garnishment and

turnover receivers resumed during the summer. Individuals have had CARES Act funds seized and protected income, like child support, frozen at a time when parents and children desperately need it to cover basic living expenses.

7. **General Family Law Issues:** Many families have been grappling with how to handle visitation and schooling under stay in place orders. Parents under supervised visitations have not been able to see their children due to closures of visitation centers. Stay in place orders have also slowed cases that require an investigation or home study, like guardianships or the removal of a child from their home. Parents who have a child with disabilities living in a group home are not able to visit or monitor their care. Tragically, these children often think their parents have abandoned them.

8. **Social Safety Net:** Thousands of people newly qualify for benefits like the Supplemental Nutrition Assistance Program (SNAP, formerly food stamps), Temporary Assistance for Needy Families (TANF), or the Children's Health Insurance Program (CHIP), and need assistance with navigating the application process.

Public access via libraries and coffee shops present problems due to stay in place orders and are concerning on an ongoing basis due to privacy issues.

Legal aid has already seen a significant rise in the number of people seeking help and is expecting to be inundated with request for assistance in the coming months, especially once moratoriums on evictions are lifted.

Access to Justice and the Advent of Remote Hearings

At the same time, the courts have contended with how to hear cases safely during COVID. How to address the multitude of concerns and logistics involved in moving courts online was not always apparent, especially when trying to tackle access to justice challenges facing low-income people and self-represented litigants.

1. **Technology:** Some of the problems pertain to a lack of available technology or familiarity with the use of technology. Many Texans still do not have access to reliable internet in the home. Public access via libraries and coffee shops present problems due to stay in place orders and are concerning on an ongoing basis due to privacy issues. A victim of domestic violence is unlikely to disclose what happened in a public place. Many people do not have a computer, tablet, or smart phone to enable them to participate in a video hearing and may only have a phone with limited call or data minutes. Participation solely by phone raises concerns about a litigant's ability to see nonverbal cues from witnesses, the opposing party, or the judge, and respond accordingly. Some people do not have email or regular access to email because they rely on public internet to check their email, making it difficult when courts require people to accept notice of hearing by email or submit evidence by email. Even when they do have email, they may not understand the importance of checking email regularly, the speed with which some cases – like evictions – move, or the consequences of failing to act in a timely manner.

2. **Accessibility:** Other concerns relate to accessibility issues for people who are limited English proficient or who have disabilities. Self-represented litigants with accessibility needs tend to arrive at the courthouse to make their needs known. With the courthouses closed, it became very important for courts to establish a way for litigants to inform them of these needs as soon as possible before the virtual hearing, preferably in the citation and preferably with contact information to both a live person and email. Because accessibility matters are complex and involve various, and sometimes conflicting laws, the Texas Access to Justice Commission, in collaboration with Disability Rights Texas, compiled information and best practices for courts to reference. The best practices are located on the Office of Court Administration's Electronic Hearings webpage under the heading Getting Started with Zoom: http://bit.ly/OCARemoteHearings.

3. **Evidence and Witnesses:** Remote hearings have also presented some logistical issues that tend to disproportionately impact low-income and self-represented litigants. How to handle evidence has been particularly challenging. Some courts ask litigants to email evidence to the court before the hearing, which is not feasible for litigants who do not have a smart phone or the ability to scan documents, snap a photo of it with their phone, or otherwise digitize their evidence. These litigants also may not have email that will receive or download large attachments, making it impossible for them to see the evidence used against them. Several justice courts report that litigants often do not share evidence until the virtual hearing. While understandable in hearings with short deadlines, such as eviction cases, it is problematic for litigants who are participating by phone only. Similar problems arise with the participation of witnesses, who may not have the technology to participate or, as one judge reported, did not want to participate because

she was worried the court would see how messy her house was.

Although there are challenges, remote hearings also come with benefits. Virtual hearings eliminate some common barriers to accessing the courts. People do not need to take a full day off work and risk getting fired to wait for their case to be called. They do not have to travel significant distances to get to the courthouse, which can be particularly burdensome for populations like the elderly or people with disabilities. Virtual hearings also protect people with compromised immune systems from health risks associated with crowded courtrooms.

Some people simply prefer remote hearings. It can feel less intimidating to participate in a hearing from home than in the courthouse. Some people with disabilities like remote hearings because they have the auxiliary aids they need to participate at home and favor using their own equipment. Many virtual conferencing platforms like Zoom have already incorporated technology for the most common accessibility needs, such as closed captioning or the ability for interpreters to communicate with a litigant or witness who has limited English proficiency, which makes it easier for courts too.

The Office of Court Administration reports that more people are participating in their court hearings than in the past. So while there are still a lot of issues to work out, remote hearings have already had a beneficial impact on access to justice and have the potential to be an effective access to justice tool going forward.

Your Help is Badly Needed

In Texas, with our high poverty levels, legal aid operates on a triage system even in normal times. They only had the resources to help one out of every ten people who were financially eligible *before COVID-19*. Without more volunteer help, this pandemic will overwhelm our legal aid system. While there are many worthy efforts to which you could donate your time, those of us who are lawyers and legal professionals have specialized training and a monopoly on solving legal problems. In times like these, we are called to help our fellow Texans access justice. If you aren't already signed up to volunteer, please consider visiting ProBonoTexas.org/COVID to get involved. There are opportunities for every type of lawyer, even if you have never done any pro bono before, and the resources and support available to ensure your success.

Legal aid also desperately needs more financial support. Legal aid programs are working to help the many more who now qualify for services and need more resources to do so. Unfortunately, the pandemic has created an economic uncertainty that has caused many donors to dial back. Access to justice partners are zealously advocating at the state level to ensure funding for legal aid remains a priority for our legislature, but State aid alone will not be enough. The stark reality is that those who need justice most will not receive it without continued and increased financial support of our Texas legal aid programs. Decreased funding for these programs will be crippling and the consequences will reverberate in our communities for years to come. Please consider contributing at TexasATJ.org/donate. Sustaining your financial support during these unprecedented times will help legal aid programs get through this crisis and continue offering their critical services. We need your support more than ever.

We would appreciate your thoughts and ideas on how to make virtual hearings better for folks who lack the knowledge base and skill set of a lawyer and do not have the financial resources to hire one, and on how to improve access to justice overall. Please contact Trish McAllister at tmcallister@texasatj.org.

Harry Reasoner is Chair, Texas Access to Justice Commission and a Partner at Vinson & Elkins LLP.

Trish McAllister is Executive Director, Texas Access to Justice Commission. ★

[1] *Texans have filed more than 3.6 million unemployment claims during the coronavirus pandemic*, Anna Novak and Mitchell Ferman, The Texas Tribune, updated October 16, 2020, *available at* https://apps.texastribune.org/features/2020/texas-unemployment/.

RELIGIOUS LIBERTY IN A PANDEMIC—WHAT GIVES?

BY HIRAM SASSER

THE CURRENT PANDEMIC UNSETTLED ALMOST ALL FACETS of daily life for Americans and indeed the entire world. Religious liberty is no exception. Many places of worship voluntarily went online; others gave up in-person meetings only because of governmental commands. This experience—and the potential for its repetition or modification in future emergencies—warrants asking how religious liberty is faring and whether it is in any way different from other constitutional rights. To assess that question, the starting place must be the status of religious liberty when there is no emergency. Many readers will find that background very basic; others may be surprised by it. But it is the starting point for addressing how pandemics or other crises will affect religious liberty. This article then describes what has happened already and poses questions about what might come next.

Structure of Religious Liberty and Its Protection

Traditional liberties, including religious liberty, receive judicial protection based on how rigorously courts scrutinize the actions of the other branches or the states. The Free Exercise Clause generated comparatively little case law early on, but for most of the Twentieth Century, the Supreme Court gave that clause broad substantive scope[1] and mandated that alleged infringements on religious liberty be subject to strict scrutiny.[2] To survive strict scrutiny, the government bears the burden of proof in demonstrating two things about the challenged law: (1) it advances a compelling government interest and (2) is the least restrictive means of achieving that interest. Strict scrutiny does not compel a particular outcome, but rather guarantees a particular process—one that gives the courts a significant role and requires the government to bear a very high burden to withstand cross-examination from a religious claimant.

Traditional liberties, including religious liberty, receive judicial protection based on how rigorously courts scrutinize the actions of the other branches or the states.

But by 1990, the Court mostly withdrew from the field. In *Employment Division v. Smith*, the Supreme Court held that Free Exercise claims would fail if the challenged law—despite sweepingly negative impacts on religious activity—was neutral and generally applicable.[3] Strict scrutiny remained applicable for laws that specifically target religious practice, as the Court clarified in 1993 in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*.[4]

Just a few months after *Lukumi* clarified the small scope of strict scrutiny for religious liberty cases, President Clinton signed the Religious Freedom Restoration Act, or "RFRA," which was Congress's response to *Smith*.[5] With bipartisanship that would be unimaginable today—unanimous in the House and 97-3 in the Senate—RFRA sought to restore the strict-scrutiny standard for all Free Exercise Clause claims. At the signing ceremony, President Clinton referred to religious freedom as "the first freedom,"[6] and characterized RFRA as "basically say[ing] that the Government should be held to a very high level of proof before it interferes with someone's free exercise of religion."[7] President Clinton called on the nation to "respect one another's faiths, fight to the death to preserve the right of every American to practice whatever convictions he or she has, [and] bring out values back to the table of American discourse to heal our troubled land."[8]

In a case starting in Boerne, Texas, the Supreme Court responded to this overwhelming political and public support by declaring RFRA unconstitutional as applied to the states but constitutional as applied to the federal government.[9] Once again, the Free Exercise Clause of the First Amendment had no real power to blunt states and their political subdivisions from infringing upon their citizens' religious freedom, so long as they were not overt about it.

Pandemic strikes

Setting aside debates about its origin, COVID-19 became a significant public issue in the United States in mid-March 2020. On March 16, the White House Coronavirus Task Force announced "15 Days to Slow the Spread,"[10] which later became "30 Days to Slow the Spread."[11] Included in both

announcements was the recommendation to follow local health authorities' guidance. The federal government largely left the particulars of how to "Slow the Spread" to the states, ostensibly due to states' retained police powers and the lack of a general federal police power.[12] Soon thereafter, governors began issuing various decrees and orders consisting of a mix of suggestions and mandates. State legislatures have remained mostly silent during the pandemic.

One feature of many state and local "orders" was a prohibition on gatherings exceeding some specified number, usually ten. Orders often feature exemptions for various industries and occupations, sometimes but not always tied to the Department of Homeland Security's list of "essential" occupations.[13] Inevitably, some benefited economically, while others suffered (with federal relief efforts attempting to mitigate the effects of shutdowns). For example, a large multi-purpose retailer that sold groceries along with sports equipment remained open to sell even the sports equipment while sports-equipment retailers remained shuttered. Millions walked grocery aisles not knowing who had touched various shelved items or the health conditions of those who may be standing near them. But people were largely barred from entering a church, mosque, synagogue, or other house of worship.

Literally billions of people across the globe practice a faith that demands some form of corporate worship. But as a result of the orders from most governors, religious institutions could not meet for corporate worship. Religious institutions found creative ways to follow their religious mandates and callings. Some started worshipping together virtually—an option that would not have been available even a short time ago, and one that remains imperfect, given many with slow internet or who otherwise desperately feel called to join together in a physical sense for any number of religious reasons, ranging from the desire to partake of consecrated host at communion to raising voices together in hymns.

Drive-In Church

Some churches creatively turned to the drive-in church model, where families parked their cars more than six feet apart while a pastor preached from the pulpit set up in the parking lot. Amplification via speakers or a short-range radio signal, to which cars could tune, allowed all to hear. This solution appeared reasonable and appropriate to many. But it met government resistance in some areas.

In Louisville,[14] Mayor Greg Fischer issued an order banning drive-in church services—but allowing drive-through liquor stores and restaurants. On Good Friday, April 10, 2020, On Fire Christian Church filed a lawsuit seeking a temporary restraining order against the City of Louisville to allow its Easter drive-in church services. The next day, Judge Justin Walker (now a D.C. Circuit judge), entered an order enjoining Louisville from enforcing its ban on drive-in church services.[15] In so holding, the court had to address a rather old precedent, *Jacobson v. Massachusetts*.[16]

Jacobson involved a Fourteenth Amendment challenge to compulsory smallpox vaccination, but the plaintiff asserted no Free Exercise Clause claim. Instead, Jacobson challenged the state's general police power to protect the community's health, safety, and welfare—the sort of substantive-due-process challenge for which *Lochner v. New York* is famous. (Indeed, the Supreme Court decided *Jacobson* the very week that it heard argument in *Lochner*.) But even in that legal climate, *Jacobson* held that states retained emergency police powers (over the dissent of two justices, including Justice Peckham, *Lochner*'s author). *Jacobson* antedated the modern formulation of levels of judicial scrutiny for various types of constitutional claims and rarely found its way into legal discourse before the current pandemic, with one key exception: it provided the foundation for the Court to hold in *Buck v. Bell* that sterilizing the intellectually disabled does not violate the Constitution.[17] Regardless of *Jacobson*'s history, it remains on the books; Judge Walker acknowledged it, and then proceeded with traditional Free Exercise Clause analysis.

The deciding factor in *On Fire* was the differential treatment of religious and other gatherings via automobile and parked cars. Thus, while under *Smith* one might think that *Jacobson* would deal a devastating blow to religious-liberty claims in a pandemic, *Lukumi* suggests the opposite. In *Lukumi*, the Court rejected local ordinances banning adherents of Santeria from sacrificing animals despite providing many other ways to slaughter animals; the Court, even after *Smith*, protects religious practitioners from rules that create burdens for the faithful but not for secular comparators. As Judge Walker explained, Louisville's actions were "underinclusive"—the city did not "prohibit a host of equally dangerous (or equally harmless) activities that Louisville has permitted on the basis that they are 'essential.' Those 'essential' activities include driving through a liquor store's pick-up window . . . if beer is 'essential,' so is Easter."[18]

This theme of local and state governments giving non-religious uses preference continued in subsequent litigation. On May 8, 2020, another federal judge in Kentucky entered a statewide temporary restraining order against all state-level prohibitions on in-house, but socially distanced, religious worship

services.[19] The court held that if "social distancing is good enough for Home Depot and Kroger, it is good enough for in-person religious services, which, unlike the foregoing, benefit from constitutional protection."[20] The axis of comparison in these cases is important because the *Lukumi* path to strict scrutiny under the Free Exercise Clause depends on identifying a more-favorably-treated secular activity that is similarly situated with religious activity.

Given the basis for limiting religious exercise—reducing the risk of harm—the cases that sided with religious bodies focused on other activities the government allowed (usually deemed "essential"). The courts asked the government to justify, with evidence, why those other "essential" activities posed less risk of transmission of the virus than a religious gathering. The courts that ruled favorably for religious liberty did not look for comparators that resembled the religious activity in its conduct.

On the other hand, some general studies suggest, for example, that grocery shopping will spread less disease than a worship service. But would such evidence meet the formulation of *strict scrutiny* for religious claims? In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,[21] Chief Justice Roberts—in his first year as Chief Justice—outlined for the unanimous Court exactly how a court should adjudicate whether the government has a compelling interest. The government asserting a *general* interest in prohibiting the spread of a virus (or in the case of *O Centro*, the use of illegal and harmful drugs), he explained, cannot satisfy its burden. Rather, the government must make the case why it has a compelling interest in denying an exception for the *particular* religious claimant in that case.[22] If this test reflects the law—in *all* cases involving the federal government, given RFRA, and in cases involving states where the *Lukumi* threshold of differential treatment has been shown—it is difficult to see how the Court would deny relief to a religious assembly when the government cannot prove that particular assembly will cause more harm than the other "essential" activities the government is allowing.

But that is exactly what happened in several Supreme Court decisions denying temporary relief under these circumstances.

Chief Justice Roberts, Laundromats, and the Future of Religious Assemblies in a Pandemic

Just as religious institutions appeared to gain the upper hand in court, including a statewide injunction in favor of in-person worship services in one state, a case out of California made its way to the Supreme Court.[23] *South Bay* sought emergency relief—to not be subjected to a 25% capacity limit when secular businesses were not—and lost in a 5-4 vote. The voting fell along typical culture-war lines, with Chief Justice Roberts casting the deciding vote and writing a rare concurrence to give some explanation. In *South Bay*, Chief Justice Roberts wrote that restrictions on religious assemblies were similar to restrictions on "lectures, concerts, [and] movie showings" and dissimilar to so-called essential activities such as "grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods."[24]

The median Protestant sermon is thirty-seven minutes, with Catholic homilies typically taking fourteen minutes.[25] The average time a person spends in a grocery store is forty-one minutes.[26] The average load of laundry takes just over a half hour to wash and about forty minutes to dry.[27] While dorm laundromats may be an exception, most non-college community laundromat users learn from experience that leaving the laundromat while the washing and drying occur is a recipe for disaster. In community laundromats, it is not uncommon for most to sit there for well over an hour, with others sitting there, all in close proximity with each other and each other's dirty clothes.

Chief Justice Roberts, the champion of the particularized-harm view of protecting religious liberty in *O Centro*, seemingly abandoned that position in *South Bay*. The burden on California to justify its distinctions evaporated. Chief Justice Roberts retreated from a detailed justification paradigm in *O Centro* and instead relied on "the eye test." If the activity does not look like a seated gathering, it is not an appropriate comparator for Free Exercise clause analysis.

Then came *Calvary Chapel Dayton Valley v. Sisolak*,[28] where the church lost by the same 5-4 vote. The dissenters thought it violated the Free Exercise Clause for the Governor to allow crowded casinos—people sitting together in a large room smoking cigarettes, pulling levers, placing bets on cards, and throwing dice—while forbidding more than 50 to attend a worship service no matter the size of the building. The majority, including the Chief Justice, deferred to the Governor.

So where is this all headed? The path forward for religious institutions is old-fashioned and yet timeless—develop the record. At some point, perhaps once the crisis abates further, government officials will need to face cross-examination, something that has not really occurred to date in the cases challenging religious assembly shutdowns. No government officials have had to face significant cross-examination

exploring why a grocery aisle is less dangerous than a church aisle.[29] Of course, no one—or close to no one—argues that the law should inevitably exempt religious institutions from government bans on gathering.

There will be future emergencies; no one thinks that COVID-19 is the last one. If future emergencies require restrictions on ordinary life, as this pandemic has, and if those restrictions include exceptions, as every executive order in every jurisdiction regarding COVID-19 has, then one result that may follow once the dust settles in this crisis is a clearer paradigm for addressing religion. Current doctrine suggests that the proper balance might be struck if the government provides the necessary justifications that can withstand cross-examination under the strict-scrutiny regime. If the government can make its case with studies and other evidence as to why a particular religious practice of a particular set of practitioners must be banned, then nothing should block the government from banning or otherwise restricting that activity. If the government cannot, then the First Amendment requires the government to yield to Americans' exercise of what President Clinton aptly called their "first freedom."

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1 *See* Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940) (incorporating the Free Exercise Clause pursuant to the Fourteenth Amendment and finding that a discretionary licensing requirement for religious solicitation violated the Free Exercise Clause); United States v. Ballard, 322 U.S. 78, 86 (1944) (holding it is inappropriate for courts to determine the truth or falsity of a sincerely held religious belief).

2 *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963) (applying strict scrutiny in a Free Exercise Clause case), *overruled by Employment Div. v. Smith*, 494 U.S. 872 (1990).

3 494 U.S. 872, 879–82 (1990).

4 508 U.S. 520, 533 (1993).

5 Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488 (codified at 42 U.S.C. §§ 2000bb et seq.), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

6 William J. Clinton, Remarks on Signing the Religious Freedom Restoration Act of 1993 (Nov. 16, 1993), https://www.govinfo.gov/content/pkg/WCPD-1993-11-22/pdf/WCPD-1993-11-22-Pg2377.pdf

7 *Id.*

8 *Id.*

9 City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

10 *15 Days to Slow the Spread*, WHITEHOUSE.GOV (MAR. 16, 2020), https://www.whitehouse.gov/articles/15-days-slow-spread/.

11 30 Days to Slow the Spread, WHITEHOUSE.GOV, https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf (last visited Oct. 12, 2020).

12 *See* United States v. Lopez, 514 U.S. 549, 566 (1995).

13 Cristopher C. Krebs, Advisory Memorandum on Ensuring Essential Critical Infrastructure Workers Ability to Work During the COVID-19 Response (Aug. 18, 2020), https://www.cisa.gov/sites/default/files/publications/Version_4.0_CISA_Guidance_on_Essential_Critical_Infrastructure_Workers_FINAL%20AUG%2018v3.pdf

14 The author was a counsel of record for On Fire Christian Center.

15 On Fire Christian Ctr. v. Fischer, No. 3:20-CV-264-JRW, 2020 U.S. Dist. LEXIS 65924, at *10–11 (W.D. Ky. Apr. 11, 2020).

16 197 U.S. 11 (1905).

17 Buck v. Bell, 274 U.S. 200, 207–08 (1927).

18 *On Fire Christian Ctr.*, 2020 U.S. Dist. LEXIS 65924, at *13–14; *see also* Maryville Baptist Church, Inc. v. Beshear, 2020 U.S. App. LEXIS 14213 (6th Cir. May 2, 2020).

19 Tabernacle Baptist Church v. Beshear, No. 3:20-cv-00033-GFVT, 2020 U.S. Dist. LEXIS 81534, at *15 (E.D. Ky. May 8, 2020)

20 *Id.* at *14.

21 546 U.S. 418 (2006). While *O Centro* is a case interpreting RFRA, it is instructive for Free Exercise cases precisely because the analysis is the same once strict scrutiny applies through *Lukumi* and in fact the Court in *O Centro* borrowed analysis from pre-*Smith* Free Exercise clause jurisprudence to support its reasoning.

22 *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 432 (2006).

23 S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020).

24 *Id.* at 1613 (Roberts, C.J., concurring).

25 *The Digital Pulpit: A Nationwide Analysis of Online Sermons*, PEW RESEARCH CENTER (Dec. 16, 2019), https://www.pewforum.org/2019/12/16/the-digital-pulpit-a-nationwide-analysis-of-online-sermons/?utm_source=adaptivemailer&utm_medium=email&utm_campaign=19-12-16%20sermonator&org=982&lvl=100&ite=5064&lea=1160563&ctr=0&par=1&trk=.

26 *Grocery Shopping Statistics: 23 Fun Size Facts to Know*, CREDITDONKEY (July 2, 2020), https://www.creditdonkey.com/grocery-shopping-statistics.html.

27 Based on observation and personal experience, including four years in a college laundromat.

28 Calvary Chapel Dayton Valley v. Sisolak, No. 19A1070, 2020 U.S. LEXIS 3584 (July 24, 2020)

29 Here is an example of what can happen at the grocery store: https://www.youtube.com/watch?v=vv9JQ0iPfgE.

A Response to Mr. Sasser: Comments on Our Culture Wars

BY SANFORD V. LEVINSON

MR. SASSER HAS WRITTEN AN EXCELLENT OVERVIEW of the extent to which the legal system will protect or otherwise accommodate what might be termed idiosyncratic notions of religious duties. It is important to note that the deep controversy about this—the fact that it is often described as a "culture war" is a quite contemporary phenomenon. The first Supreme Court case testing the meaning of the Free Exercise Clause, *Reynolds v. United States* (1879),[1] saw the Court view it as unproblematic that George Reynolds, a leader of the Church of Jesus Christ of Latter Day Saints (the Mormon Church), was sent to prison for violating federal law by observing what was then his religious obligation to engage in plural marriage. The Court might simply have declared that it was bigamy itself that was beyond the pale, which the judges clearly believed. But, doctrinally, what they did instead was to distinguish very sharply between "beliefs" and "actions," so that what "free exercise" meant was that the State could not punish you for your idiosyncratic beliefs, but it could freely punish you for any "actions" that defied ordinary law.

Not surprisingly, many of the early 20th century cases involved the freedom of unpopular religious groups, especially the Jehovah's Witnesses, to express their often vivid ideas without running afoul of laws banning offensive speech. But, for example, the freedom to express what many might term outrageous ideas did not extend to actions like refusing to give one's child a blood transfusion that might save her life. (The Witnesses view transfusions as the equivalent of "eating blood," banned, they believe, by the Bible.)

By the end of the 20th century, most of the relevant cases involved the intersection of beliefs with actions (beyond the simple action of articulating the beliefs). South Carolina refused to give unemployment compensation to a Seventh Day Adventist who was unavailable for work on her Sabbath, Saturday, even though the state did not condition the same benefits on other Christians' availability to work on Sundays. The Supreme Court, in *Sherbert v. Verner* (1963),[2] held that South Carolina had violated the First Amendment. Interestingly enough, the Court, through Justice Brennan, did not simply say that it violated the Equal Protection Clause by treating those with "deviant" beliefs and practices worse than mainstream Christians, which was surely true, but, instead, that the South Carolina policy violated Ms. Sherbert's basic right of religious liberty. That is, one no longer has to compare her treatment with that of other religious believers; instead, one treats her basically in isolation.

A line of cases more-or-less based on *Sherbert* came crashing to an end, as Mr. Sasser notes, in the (in)famous *Smith* case, where a sharply divided Court held that Mr. Smith could be fired from his state employment for ingesting peyote, a violation of Oregon's drug law, even though it was part of a centuries-long established religious practice of Native American religion.[3] For the majority, Justice Scalia said that "neutral laws of general application" could be applied to the detriment of religious observers, unless, as established in a later case, the law was clearly passed with the aim of afflicting a vulnerable religious minority. But if that affliction was just collateral damage from an otherwise neutral law, the minority was out of luck. Justices Brennan, Marshall, and Blackmun dissented, but by far the most interesting opinion, in context, was Justice O'Connor's concurring opinion. She sharply disagreed with Scalia's jettisoning of the *Sherbert* doctrine that seemingly required the state to present a "compelling interest" before it could infringe religious liberty. But, unlike the dissenters, she argued that Oregon *did* have such an interest in enforcing its drug laws. This was, after all, they heyday of the "war on drugs," and O'Connor, without presenting much in the way of an actual argument, simply asserted that anything the state believed suitable to win that war met the "compelling interest" test.

Had O'Connor instead of Scalia been assigned by Chief Justice Rehnquist to write the majority opinion in *Smith,* and had it gained the necessary five votes, the case would be a relatively unimportant illustration, thirty years later, of the capitulation by the Court to the presumed importance of the "war on drugs," but of no real doctrinal importance at all. Instead, what was viewed as the extremity of the Scalia opinion triggered the all-important Religious Freedom Restoration Act that,

far more than the First Amendment, serves as the practical foundation for almost all legal tests of *national* legislation. As Mr. Sasser notes, RFRA received almost unanimous support in both the House of Representatives and the Senate; it had been supported by President George H.W. Bush and was happily signed by his successor, Bill Clinton, with the warm approval of groups ranging from the Southern Baptist Convention to the American Civil Liberties Union.

That was then and this is now, however. The issue of "religious liberty" and how it is to be defined, particularly with regard to what otherwise would be duties to comply with "neutral laws of general application," bitterly divides the American polity. Not surprisingly, these divisions are mirrored by the Supreme Court, which has issued a series of sharply-divided decisions in which the justices often talk past one another and, it is safe to say, persuade almost no ordinary Americans, whether lawyers (or law professors) or laity, to change their minds on the underlying issues. A remarkable number of Americans can engage in bitter argument, for example, about whether bakers should be required to prepare wedding cakes for same-sex couples. Can a baker who believes that such unions violate "God's laws" refuse to prepare a cake? If so, would a baker who adheres to the so-called "curse of Ham" and believes that mixed-race marriages are equally religiously proscribed, refuse to comply with the Civil Rights Act of 1964 with regard to a mixed-race marriage?

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One might treat the "wedding-cake" wars as relatively trivial or sources of Olympian amusement (or bemusement), save for the persons involved in them. After all, against the claims of deprivation of religious liberty are tendered equally plausible notions that to allow this exemption from the standard civil rights laws against discrimination would be for the state to tolerate and legitimate an attack on the dignity of all who reject a certain conception of gendered heterosexual propriety. Considerably less trivial or amusing are cases like *Hobby Lobby*,[4] in which the owners of a large corporation that is closely held by a devoutly religious family were allowed, courtesy of a five-Justice interpretation of RFRA, to avoid complying with a federal mandate to include contraception as part of the medical insurance they must make available to their employees under the Affordable Care Act (Obamacare). Many other examples of contemporary litigation could be given.

What Mr. Sasser justifiably focuses on, though, are some of the Covid-19 cases, all involving churches that articulate a constitutionally protected right to continue meeting *en masse* even in localities that have ordered "lockdowns" or minimal meeting sizes for all but certain "essential" persons or organizations. As a matter of fact, no city or state has ordered that *everyone* remain home or meet in a setting with no more than, say, half a dozen people. That would, to take the most obvious example, make it impossible to operate hospitals or grocery stores, for starters. So we are not presented with the situation where everyone is confined and churches are demanding a right to be treated as truly exceptional, uniquely able to congregate while everyone else remains home. Instead, the argument takes two forms. The first is that religion is "essential" to those who believe in certain doctrines. So if hospitals or grocery stores can remain open to people, so should churches, subject, presumably, to masking or social distancing requirements. A second, related but slightly different argument, at least in its rhetorical effect, is that almost no rational persons could view certain businesses that have been allowed to reopen, in some places, as "essential" save in the most particular sense that their owners depend on the income they will receive from selling drinks (in bars), renting bowling balls and shoes, or offering custom tattoos.

Mr. Sasser does another excellent job in summarizing several of the judicial decisions that have taken up such issues. I have nothing useful to say, beyond expressing my own doubts that "thinking like a lawyer" is really very helpful at this particular moment faced with the particular challenges posed by a pandemic. Our responses will, I strongly suspect, depend on what psychologists call our "priors" with regard to our own religious beliefs (or non-beliefs) and our estimates of the social risks attached to the church services in question. What I am willing to say, though, is that the federal judiciary today is very, very different from that even in 1990, when the conservative Catholic Antonin Scalia wrote *Smith*, an opinion that, if taken seriously, would have made legal a federal prohibition law that did not include an exemption for wine to be used in communion services. It was also the case that the paradigm litigant in "religious liberty" cases was a member of a Native American church, as in *Smith,* or a member of a decidedly non-mainstream sect like a Jehovah's Witness, a Seventh Day Adventist, or a member of the Amish community.

Today, however, federal judges are far more likely to be openly religious themselves, picked in part *because* of their religious commitments by Republican presidents who have created as key parts of their voting base those who themselves are religious and wish to see fellow Christians (which is most often the case) in office generally and on the federal bench in particular. And the strongest members of that base tend to be Evangelical Protestants who, not at all coincidentally, are far more likely to belong to the churches bringing the "Covid-19 cases" than are members even of other Christian denominations. With some exceptions, the Roman Catholic hierarchy has been quite willing to comply with laws that have been imposed by secular authorities; the same is true of "mainstream" Protestants and Jewish temples and synagogues. (The exceptions within the Jewish community have come from Hasidic or "ultra-Orthodox" sects, as, incidentally, is also true in Israel.).

On some issues, one finds "the religious" somewhat united against "secularists" who are insufficiently respectful of religious impulses. Here, though, I think it is fair to say that the "culture war" includes rifts within religious communities themselves, perhaps as reflected in Chief Justice Roberts, who himself is a quite conservative Catholic, straying from the fold of his equally conservative (and, except for Justice Gorsuch, a convert to Episcopalianism from Catholicism) Catholic colleagues in the name of protecting the overall social order from the potential harms of mass gatherings, even to celebrate religious rites. The costs of wedding cakes, whatever side one is on, are largely symbolic; that is not true of the costs of "getting it wrong" with regard to "opening up" too soon or unwisely. I agree with Mr. Sasser's conclusion: "If the government can make its case with studies and other evidence as to why a particular religious practice of a particular set of practitioners must be banned, then nothing should block the government from banning or otherwise restricting that activity. If the government cannot, then the First Amendment requires the government to yield to Americans' exercise of what President Clinton aptly called their 'first freedom.'" The problem, frankly, is that it is not clear that we as a society necessarily trust institutions, whether "the government" or particular religious groups, to be honest or fair in offering the requisite "studies and other evidence." To stand on one's "rights" while scoffing at presumed "evidence" is a recipe for social disaster and simply deepens the sense of cultural warfare.

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1 98 U.S. 145 (1879).
2 374 U.S. 398 (1963).
3 *Employment Division v. Smith*, 494 U.S. 872 (1990).
4 *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

Postscript: SASSER'S REPLY TO PROFESSOR LEVINSON

Professor Levinson's realistic depiction of the Supreme Court's "practice" in controversial areas is compelling. The courts, and indeed the advocates before the courts, should not abandon doctrine. Courts should uphold the doctrine they articulate and advocates should continuously push courts to define the doctrine with particularity and consistency, with an eye toward an unchanging meaning of the terms agreed upon by the drafters of the various constitutional promises preserved in the text. Perhaps greater clarity in the religious liberty field is on the horizon; time will tell. But if there is no fixed constitutional star, how shall we guide our ships through the shoal waters of crises?

An In-Progress Look at the Texas Supreme Court's COVID Response

BY THOMAS R. PHILLIPS & STEPHEN I. VLADECK

On September 25, 2020, the Texas Supreme Court issued its 27th emergency order relating to the COVID pandemic—the latest in a series of extraordinary mandates spanning just over five months that have run the gamut from extending statutes of limitations and limiting grand and petit jury proceedings to altering the rules in certain foreclosure and eviction proceedings, creating an eviction diversion program, and cancelling the July 2020 sitting of the Texas bar exam. Even while grappling with a significant number of lawsuits challenging emergency orders from local and state executive officials, the Justices have been promulgating wide-ranging emergency orders of their own.

Much of the Court's authority for these emergency measures can be traced to a 2009 statute, codified at Section 22.0035 of the Texas Government Code, that expressly empowers the Court to "modify or suspend procedures for the conduct of any court proceeding affected by a disaster during the pendency of the disaster declared by the governor." Although such orders can last for only 90 days, they can be—and, in many cases, have been—renewed. All the Court's emergency orders are currently set to expire no later than December 2020, but they could be further extended if the Governor extends the statewide emergency order.

In the following essay, we briefly introduce the Texas Supreme Court's formal response to COVID by breaking its emergency orders into two rough categories: Those focused primarily at internal judicial matters and operational considerations (what we call "the judicial emergency"), and those focused primarily at broader regulatory and subject-matter issues within the Court's jurisdiction ("the judicial role in the broader emergency").

The Judicial Emergency

Many emergency orders advance the Court's twin goals of keeping the courts both open and safe during the pandemic. The Court issued its first emergency order on March 13, 2020, the same day that Governor Greg Abbott declared a "state of disaster" to "facilitate and expedite the use and deployment of resources to enhance preparedness and response."[1]

Order No. 1, made jointly with the Court of Criminal Appeals, was a general order covering a wide array of procedural changes. It provided that "all courts in Texas may in any case, civil or criminal—and must to avoid risk to court staff, parties, attorneys, jurors, and the public—without a participant's consent," impose a variety of procedural modifications" for "a stated period ending no later than 30 days after the Governor's state of disaster has been lifted." Some of these measures were already within a trial court's inherent power; a few were already permitted by the spirit of the Rules of Judicial Administration;[2] and all were consistent with generally accepted COVID safety precautions. Specifically, judges were directed to:

- **a.** Allow or require anyone involved in any hearing, deposition, or other proceeding of any kind—including but not limited to a party, attorney, witness, or court reporter, but not including a juror—to participate remotely, such as by teleconferencing, videoconferencing, or other means;
- **b.** Consider as evidence sworn statements made out of court or sworn testimony given remotely, out of court, such as by teleconferencing, videoconferencing, or other means;
- **c.** Conduct proceedings away from the court's usual location, but in the county of venue, and only with reasonable notice and access to the participants and the public;
- **d.** Require every participant in a proceeding to alert the court if the participant has, or knows of another participant who has, COVID-19 or flu-like symptoms, or a fever, cough or sneezing; and
- **e.** Take any other reasonable action to avoid exposing court proceedings to the threat of COVID-19.

Order 1, § 2(b)–(f), Misc. Docket No. 20-9032 (Tex. Mar. 13, 2020). The "same county" limitation on change of venue was eliminated six days later, Order 3, Misc. Docket No.

20-9044, § 2(a) (Tex. Mar. 19, 2020), but only gradually did the Court permit grand and petit jurors to act remotely as well. Order 12, § 3(b), Misc. Docket No. 20-9059 (Tex. Apr. 27, 2020); Order 17, § 3(c), Misc. Docket No. 20-9071 (Tex. May 26, 2020). These provisions have been carried forth in subsequent general orders and remain in effect today. Order 22, § 3(c)–(g), Misc. Docket No. 20-9095 (Tex. Aug. 6, 2020).

As knowledge about disease transmission increased, the orders became more specific. At first, courts could not "conduct non-essential proceedings in person contrary to local, state, or national directives, whichever is most restrictive, regarding maximum group size." Order 3, § 3. Then, the Court provided: "Courts must not conduct in-person proceedings contrary to guidance issued by the Office of Court Administration regarding social distancing, maximum group size, and other restrictions and precautions. Courts should use all reasonable efforts to conduct proceedings remotely." Order 12, § 4, Misc. Docket No. 20-9059 (Tex. Apr. 27, 2020). In Order 17, the Court inserted this sentence between the other two: "Prior to holding any in-person proceedings . . . , a court must submit an operating plan that is consistent with the requirements set forth by the Office of Court Administration's Guidance for All Court Proceedings During COVID-19 Pandemic . . . ." Order 17, § 4. The Supreme Court instructed the regional presiding judges to assure that "all courts in each region are operating in full compliance with the Court's Orders and the guidance issued by the Office of Court Administration" and that no trial courts at any level were "conduct[ing] in-person proceedings inconsistent with the Court's Orders and the latest guidance issued by the Office of Court Administration." Beyond that, the presiding judges were directed to report non-compliance to the Chief Justice. *Id.* § 10. These provisions remain in effect, Order 22, § 10, with the presiding judges currently meeting twice a week to fulfill their monitoring and managerial duties.

More controversially, the emergency orders from the outset have also permitted judges to extend court deadlines. Order No. 1 permitted (or, to "avoid risk," *required*) judges to "[m]odify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order, for a stated period ending no later than 30 days after the Governor's state of disaster has been lifted." Order 1, § 2(a). This provision also remains in effect, except that the stated period now runs until December 1. Order 26, § 2(a), Misc. Docket No. 20-9112 (Tex. Sept. 18, 2020).

All these expansions of judicial power permit some degree of judicial discretion, and all are made "[s]ubject only to constitutional limitations."

All these expansions of judicial power permit some degree of judicial discretion, and all are made "[s]ubject only to constitutional limitations." *E.g.*, Order 1, § 2; Order 26, § 2. But the first order also provided: "All courts in Texas may extend the statute of limitations in any civil case for a stated period ending no later than 30 days after the Governor's state of disaster has been lifted." Order 1, § 3. This extension was soon made mandatory, with "[a]ny deadline for the filing or service of any civil case" being tolled "unless extended by the Chief Justice of the Supreme Court." Order 8, § 3, Misc. Docket No. 20-9051 (Tex. Apr. 1, 2020). The deadline, minus the unique delegation of authority to the Chief, finally expired on September 15. Order 21, § 3, Misc. Docket No. 20-9091 (Tex. July 31, 2020).

The Court has previously extended deadlines to meet exigencies, such as when the courthouse closed for a local holiday,[3] but such blanket extensions of statutory filing deadlines have previously been legislative or constitutional in origin.[4] A constitutional challenge to the Court's extension was not reached in *In re Oprona*,[5] and another such challenge was held waived in *Flores v. Villareal*.[6] Of course, a more serious constitutional issue would arise if the Court extended a limitations period that had already run,[7] but that has not occurred. No Court orders have extended any appellate deadlines, although several have cautioned that appellate extension requests "should be directed to the court involved and should be generously granted." *E.g.*, Order 8, § 3.

Several of the Court's more recent orders have focused on jury proceedings. As to grand juries, the Court has provided: "Existing grand juries may meet remotely or in-person as long as adequate social distancing and other restrictions and precautions are taken to ensure the health and safety of court staff, parties, attorneys, jurors, and the public. Courts should consider extending the term of a grand jury under Section 24.0125 of the Texas Government Code and reassembling discharged grand juries under Article 19.41 of the Texas Code of Criminal Procedure." Order 17, § 5. This provision remains in effect. *See* Order 26, § 4. As to jury trials, the Court directed the Office of Court Administration, assisted by regional presiding judges and local administrative judges, to cooperate with trial courts conducting "a limited number of . . . in-person or remote proceedings" and to report "its observations" to the Supreme Court. Order 17, § 7. In its September 18 Order, the Supreme Court prohibited justice courts and municipal courts from conducting any jury

proceedings, either selection or trial, until December 1, but prohibited higher courts from doing so unless:

- **a.** the local administrative district judge . . . has . . . submitted a plan for conducting jury proceedings consistent with the Guidance issued by the Office of Court Administration . . . ;
- **b.** the court has obtained prior approval for that jury proceeding from the local administrative district judge and Regional Presiding Judge;
- **c.** not more than five days before the jury proceeding, the local administrative district judge has consulted the local public health authority and verified that local health conditions and plan precautions are appropriate for the jury proceeding to proceed;
- **d.** the court has considered on the record any objection or motion related to proceeding with the jury proceeding . . . ; and
- **e.** the court has established communication protocols to ensure that no court participants have tested positive for COVID-19 within the previous 30 days, currently have symptoms of COVID-19, or have had recent known exposure to COVID-19

Order No. 26, § 6. Remote jury trials are permitted in criminal cases not involving the possibility of jail or prison time more freely, but more serious cases require "appropriate waivers and consent obtained on the record from the defendant and prosecutor." *Id*. § 7. In all other cases, including cases in justice and municipal courts, remote jury proceedings must not be conducted unless the court has complied with paragraph 6(d). In both civil and criminal matters, "a court may not permit or require a petit juror to appear remotely unless the court ensures that all potential and selected petit jurors have access to technology to participate remotely," unless the matter is non-binding. *Id*. § 8

The Court also issued several orders relating to current members of the Texas bar. It first tolled or extended "[a] ll deadlines, whether prescribed by statute, rule, or order, related to attorney professional disciplinary and disability proceedings," Order 5, Misc. Docket No. 20-9046 (Tex. Mar. 20, 2020), *see* Order 12, § 9; Order 17, § 13, before providing that courts could "conduct the proceeding remotely, such as by teleconferencing, videoconferencing, or other means," Order 18, § 13, Misc. Docket No. 20-9080 (Tex. June 29, 2020); Order 26, § 13 The Court also ordered that the 2020 bar elections proceed without paper ballots. Order 6, § 4, Misc. Docket No. 20-9047 (Tex. Mar. 22, 2020). Finally, the Court extended the payment of bar dues until October 31. Order 23, § 3, Misc. Docket No. 20-9096 (Tex. Aug. 7, 2020).

The Judicial Role in the Broader Emergency

Although many of the emergency orders issued by the Texas Supreme Court have been focused on the *judicial* emergency, the Court has also issued a series of orders that have had effects outside of Texas courtrooms. Order No. 2, for instance, clarified that, absent agreement between the parties, COVID-related school closures would not impact court-ordered schedules in child custody disputes. Order 2, § 2, Misc. Docket No. 20-9043 (Tex. Mar. 17, 2020). One week later, Order No. 7 extended Order No. 2 to also address the impact in such cases of local or state-wide shelter-in-place orders. Order 7, § 3, Misc. Docket No. 20-9050 (Tex. Mar. 24, 2020).

Order No. 4, issued on March 19, suspended deadlines in residential eviction proceedings, and also barred enforcement of writs of possession, absent specific showings that the tenants posed an imminent threat of physical harm or were engaged in criminal activity, until after April 26, 2020. (That deadline was subsequently extended by Orders No. 9 and 12.) After Congress enacted the CARES Act, the Court revised the emergency rules to account for the new federal statutory protections. *See* Order 15, §§ 2–3, Misc. Docket No. 20-9066 (Tex. May 14, 2020). Those provisions were further extended in Order 20, § 3, Misc. Docket No. 20-9086 (Tex. July 21, 2020), and Order 24, § 3, Misc. Docket No. 20-9097 (Tex. Aug. 21, 2020). And Order No. 25 modified those rules to also account for the federal moratorium on some evictions promulgated by the Centers for Disease Control. *See* Order 25, § 3, Misc. Docket No. 20-9109 (Tex. Sept. 17, 2020). The Court took a step even further in Order No. 27, formally creating an "Eviction Diversion Program" that, among other things, encourages parties to resolve the dispute without further judicial proceedings and ensures the confidentiality of records in cases that the plaintiff does not later seek to reinstate. *See* Order 27, §§ 5–7, Misc. Docket No. 20-9113 (Tex. Sept. 25, 2020). Although the program only takes effect in a handful of "pilot" counties on October 12, *id*. § 9, it goes into effect statewide on November 9.

In Order No. 10, the Court addressed actions to collect consumer debts. Among other things, the Order allowed for parties to obtain, but not serve, writs of garnishment; barred receivers from freezing any financial accounts; and barred dismissal of cases for want of prosecution during the emergency. Order 10, § 3, Misc. Docket No. 20-9054 (Tex. Apr. 9, 2020). Those provisions were subsequently updated

and extended by Order 14, § 3, Misc. Docket No. 20-9061 (Tex. Apr. 29, 2020). After Congress enacted the CARES Act, the Court modified the consumer debt provisions to account for the overlapping federal protections. *See* Order 16, § 3, Misc. Docket No. 20-9067 (Tex. May 14, 2020).

Finally, the Texas Supreme Court also grappled with the complicated and controversial question of what to do with the bar exam. Order No. 13 initially endorsed moving ahead with an in-person exam in July, but also directed the Board of Law Examiners to offer an in-person exam in September. Order 13, §§ 1–2, Misc. Docket No. 20-9060 (Tex. Apr. 29, 2020). But as the situation unfolded, and after significant pushback from applicants, law schools, and the bar, Order No. 19 cancelled the July 2020 bar exam while adding an online exam in October. *See* Order 19, § 4, Misc. Docket No. 20-9083 (Tex. July 3, 2020).

Taking Stock of the Response

It's difficult to paint these 27 (and counting) orders with one brush. But a couple of themes can be extracted from the Court's output in this context. First, at least by volume, the overwhelming majority of these orders have been directed to the adjustment of procedural rules for judicial proceedings in order to account, as best as possible, for the practical, logistical, and economic difficulties posed by the pandemic. Second, other than those relating to the state bar, virtually all of these orders have been grounded in the 2009 statute—which was one of the products of a task force appointed by the Texas Supreme Court in 2007 to propose reforms in light of difficulties encountered during the 2005 hurricane season. At least outwardly, that statute appears to have provided the Court with all of the authority it has needed to respond to the COVID pandemic, but it would obviously behoove the legislature to revisit the matter when it reconvenes in January.

If nothing else is clear, though, it is that the ongoing experiment in remote learning, working, and socializing have had—and will have—profound and disruptive changes in many facets of society, and courts have been, and will be, no exception. A generation ago, the pandemic would have brought legal proceedings to a halt across the country. Technological developments and improvements have allowed for a remarkable degree of accommodation over the first six months of the COVID pandemic. But the adequacy of such accommodations depends, in turn, upon a degree of access to reliable and affordable internet service that may not yet be the norm.

At the same time, some of these accommodations have, perhaps counterintuitively, allowed the promise of open courts to be realized as never before. While courthouses have been physically closed, viewers across the world have been able to watch Texas justice in action. "Texas, which has held more than 350,000 virtual hearings since mid-March, has been a leader in promoting public access. Court administration encouraged judges to create YouTube channels, which have been collected into an online directory. [Hundreds of Texas courts livestream at http://streams.txcourts.gov/]."[8] This commitment to openness brings additional responsibility on judges to protect confidential matters, such as personal data or trade secrets; if done right, the virtual court could enhance public understanding of the rule of law and the legal process.

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1 https://gov.texas.gov/news/post/governor-abbott-declares-state-of-disaster-in-texas-due-to-covid-19

2 Rule 7a(6)(b) provides: "A district or statutory county court judge shall . . . (6) to the extent consistent with safeguarding the rights of litigants to the just processing of their causes, utilize methods to expedite the disposition of cases on the docket of the court, including . . . (b) the use of telephone or mail in lieu of personal appearance by attorneys for motion hearings, pretrial conferences, scheduling and the setting of trial dates."

3 *See Walles v. McDonald*, 889 S.W.2d 236 (Tex. 1994) (independent political candidate's deadline to file Declaration of Intent extended); *Miller Brewing Co. v. Villarreal*, 829 S.W.2d 770 (Tex. 1992) (motion for new trial deadline extended).

4 *See Bender v. Crawford*, 33 Tex. 745 (1871).

5 No. 14-20-370-CV, 2020 WL 5087891, at *2 (Tex. App.—Houston [14th Dist.] Aug. 28, 2020).

6 No. 13-20-309-CV, 2020 WL 5050638, at *10 (Tex. App.—Corpus Christi-Edinburg Aug. 17, 2020).

7 *See generally Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126 (Tex. 2010).

8 Mia Armstrong, *Justice, Livestreamed,* https://slate.com/technology/2020/08/zoom-courts-livestream-youtube.html

INNOVATIVE TORT CLAIMS IN THE WAKE OF COVID-19

BY MINI KAPOOR & JULIE PETTIT

Introduction

Shelter-in-place or stay-at-home orders have kept some individuals and businesses busy, and these same orders have already put litigators and courts to work across the nation. As COVID-19 prompted executives to shut businesses down and then gradually re-open them, Plaintiff's lawyers quickly developed innovative and interesting tort claims, and these cases are likely just the tip of the iceberg. Meanwhile, defense lawyers are already gearing up for counterarguments to these newly-created claims and theories.

I. Negligent Transmission

Plaintiffs' Perspective:

As the number of cases of the virus multiply, it is increasingly clear that in order to avert the damages of COVID-19, or at least mitigate harm, people must rely on one another to do their part to try to help slow the spread. Expectations for cleanliness, social distancing, wearing masks, and the execution of state and federal guidelines are the epicenter of debate across the country. As these expectations are interpreted to be legal duties according to federal and state mandates, breaches of such duties serve as the foundation for negligence claims against those who willfully or haphazardly transmit COVID-19 to others.

Expectations for cleanliness, social distancing, wearing masks, and the execution of state and federal guidelines are the epicenter of debate across the country.

To establish a cause of action for negligence, a plaintiff must prove that: (1) there is a duty owed by the defendant; (2) that duty was breached; (3) a causal connection between the defendant's conduct and the harm incurred to the plaintiff exists; and (4) the plaintiff sustained damages. The negligent transmission of diseases other than COVID-19 has long been recognized as a cause of action by courts and have been allowed based on both actual and constructive knowledge, imposing liability on individuals who have harmed others.

For example, six local businesses in the southern province of Jeju Island of South Korea filed a lawsuit in March against two travelers who tested positive for COVID-19 after a five-day trip to the island. The plaintiffs argue that despite having symptoms of COVID-19 and despite the fact that their daughter tested positive for COVID-19, the defendants still traveled to Jeju. As a result, 90 residents were quarantined, and more than 20 businesses were forced to close temporarily.

As individuals and businesses are confronted by the ramifications of people's actions, causes of action for negligent transmission of COVID-19 are sure to encounter the dockets of courts across the country.

Defendants' Perspective:

Considering the trend of increasing number of COVID-19 negligence lawsuits, businesses should take a pro-active approach to limiting liability for such claims. One of the strongest defenses against negligence-related claims could be evidence that a defendant made good-faith efforts to implement and enforce the applicable COVID-19 safety guidance from federal, state, and local sources. Such evidence may effectively counter an argument that the defendant breached its reasonable duty of care. Therefore, defendants should closely monitor and strive to implement and enforce the applicable COVID-19 safety guidance. To the extent it is infeasible to implement any guidance, it would be prudent to ensure that alternative means that provide equal or greater protection are implemented.

Businesses operating in sectors where industry-specific COVID-19 guidance is available must follow such specific guidance. And where no industry-specific guidance is available, efforts should be made to monitor and implement safety measures generally adopted in that industry. All efforts made for containing the spread of COVID-19 must be documented.

Some parties have argued that COVID-19 safety guidance is not legally binding and cannot define a defendant's duty of care. While that argument has force, defendants must note

that at least a few state OSHA programs have adopted COVID-19-specific safety standards for maintaining safe workplaces. There, plaintiffs may argue that the specific OSHA standards define a legally binding duty of care. A defendant's good-faith efforts to comply with the COVID-19-specific standards could be evidence that it complied with its duty of care.

Defendants must be mindful of third-parties that may be wholly or partially responsible for plaintiff's alleged exposure to COVID-19. It might be possible to point affirmatively to a third-party's conduct as the cause of plaintiff's claimed exposure. Here again, evidence that the defendant implemented and enforced the applicable COVID-19 safety guidance would be helpful.

Applicability of defenses such as comparative and contributory negligence, recognized in some form in most jurisdictions, should be considered. Such defenses may reduce the claimed damages against the defendant or eliminate them altogether. Generally, in comparative negligence states, a plaintiff's damages are reduced by the percentage of his own fault, and in some states, including Texas, if plaintiff is 51% at fault, he is barred from recovering any damages. In some contributory negligence states, any percentage of negligence on the plaintiff's part may completely bar recovery. Such defense may be critical in instances where the plaintiff refused to follow defendant's COVID-19 safety rules such as refusing to wear a mask or failing to follow the social distancing rules.

II. Premesis Liability

Plaintiffs' Perspective:

Another negligence-related cause of action claimed by plaintiffs is premises liability. To succeed on a premises liability claim, a plaintiff will typically need to show a number of elements. First, the plaintiff must show that the property owner had a duty of care to the visitor. A property owner does not need to guarantee a visitor's safety, but it has a duty to exercise reasonable care to keep the premises in reasonably safe condition. Certainly, the COVID-19 pandemic presents unique challenges to keeping premises safe, particularly given the fact that the understanding of the virus and its transmission is still evolving.

Next, a plaintiff must show that the property owner or someone acting on its behalf breached that duty of care to the visitor. This will likely be dictated by whether the property owner had notice of the risk and took reasonable steps to make the property safe. In the COVID-19 context, notice of the risk seems obvious—just watch the news. The issue will likely come down to whether the property owner took reasonable steps to protect visitors. This will likely be a highly fact specific inquiry.

Lastly, a plaintiff must show the breach of duty of care to the visitor caused injury, and the breach of the duty must be a substantial contributing factor in causing the injury. Here, the injury would be the contracting of COVID-19 and financial damages associated with it.

However, plaintiffs' lawyers have already filed premises cases that are loosely tied to the transmission of COVID-19. For example, in a Texas premises liability case, the plaintiff alleged that a plexiglass partition that was improperly installed as protection from COVID-19 fell and injured her foot while she was visiting the defendant business owner's premises as a customer.[1] The plaintiff claimed that the area where she was injured posed an unreasonable risk of harm, and the business owner/defendant breached its duty of care by failing to eliminate the unreasonably dangerous condition, and by failing to warn the plaintiff of the unreasonably dangerous condition.

Defendants' Perspective:

Because premises liability suits are a variation of negligence lawsuits, the defense perspective for negligence suits applies here. A premises owner should have a written plan for preventing and limiting COVID-19 infection and for responding to confirmed/suspected cases on the premises, consistent with the applicable guidance, including closing off and cleaning and disinfecting areas potentially exposed to COVID-19, and contact tracing for identifying persons on the premises who may have also been exposed.

Third-party visitors such as customers, clients, and contractors should be required to follow the owners' COVID-19 safety rules. Contractors should be required to agree in writing that their employees will comply with the owners' COVID-19 safety rules while on the premises.

Premises owners should ensure that all persons present have notice that while the safety measures may limit exposure to COVID-19, they are not a guarantee against exposure. Such evidence may be helpful in showing that a plaintiff had notice of the risk of exposure and assumed that risk prior to entering the premises.

In most premises liability cases, plaintiffs may face a substantial hurdle in proving causation—that they were exposed to COVID-19 at the defendant's premises. In view of the wide community spread of COVID-19 infection, asymptomatic

transmission and a latency period of 2-14 days, plaintiffs may need to negate multiple alternate sources of exposure to prove that the defendant's conduct caused their disease. For example, in a Texas case, the court granted summary judgment in favor of the defendant hospital on claims that the decedent contracted the H1N1 virus while working in the hospital's premises. Despite plaintiff's expert's testimony that there were likely unconfirmed cases of H1N1 in the hospital premises, the court found that because of community spread of the virus at the time, the plaintiff did not meet his burden to show that any exposure at the hospital's premises was the cause of the decedent's infection.[2]

III. Product Liability

Plaintiffs' Perspective:

Attorneys will likely bring product liability claims generally related to "defective" products. Claims that allege that the defendant defectively designed a product, manufactured a product, sold or marketed a product, or breached an express or implied warranty on a product will be among the most popular causes of action in a product liability suit related to COVID-19.

Plaintiffs' lawyers will likely attempt the following types of causes of action:

- Claims relating to the failure to warn about the presence of COVID-19 in a manufacturing or distribution facility;
- Claims relating to the failure to warn about potential side effects or impacts caused by drugs or devices;
- Misrepresentation claims relating to the protection against viruses, germs, and bacteria;
- Claims against companies that sell, manufacture, distribute, or advertise products that claim to protect against COVID-19, claim to treat COVID-19 or lessen its impact, claim to boost immune systems, or claim to detect COVID-19 or related antibodies; and
- Claims against businesses that sell sanitizers, protective gear, and disinfectants that misrepresent these products' protection against viruses, germs, and bacteria.

Defendants' Perspective:

Businesses should be aware of any applicable immunity offered by federal or state laws against liability arising from COVID-19-related products. For example, businesses must understand whether their product falls within the scope of "covered countermeasures" to be eligible for immunity provided by the declaration under the federal Public Readiness and Emergency Preparedness Act (PREP Act).[3] The covered countermeasures generally include any drug, devise, or biological product that is approved, cleared, or licensed by the FDA and is used to diagnose, mitigate, prevent, treat, cure or limit the harm of Covid-19. The PREP Act declaration provides for immunity against claims arising from manufacturing, distributing, administering, or using covered countermeasures. The Coronavirus Aid, Relief and Economic Security Act (CARES Act) expanded the covered countermeasures to include respiratory protective devices subject to certain conditions. Some states have also provided for similar immunity. A good understanding of whether the subject product falls within the scope of federal and/or state laws providing immunity from product liability claims is essential.

To minimize potential for product liability, businesses must conduct a thorough review of their product labels, instructions, warning and marketing materials for accuracy of such information. If the information is based on the evolving understanding of COVID-19, such facts should be explicitly stated. For example, any drugs or other products allegedly sold as a cure for or protection against COVID-19 must expressly state any limitations of the product based on the scientific understanding at the time. Where appropriate, product warranties must be clearly disclaimed. As to products such as face masks or respirators, it should be noted that while their use may limit COVID-19 exposure, it does not guarantee against infection. Businesses in the sanitation and disinfectant product industry should note that the Center for Disease Control and Prevention (CDC) has provided a list of approved disinfectants against COVID-19. Businesses must ensure that the product information aligns with that provided by the CDC.

Generally, product liability suits are brought against multiple businesses in the supply/distribution chain including manufacturers, suppliers, distributors and sellers. Where feasible, businesses throughout the chain must make a concerted effort towards minimizing product liability. Additionally, businesses should assess possible contractual indemnity from entities in the chain for COVID-19-related claims.

Conclusion

COVID-19 not only confronted the immune systems of Americans and challenged the healthcare system's reaction to the pandemic, but it is now on its way to imposing effects on local and federal justice systems across the country. Litigators may expect to be busy advocating and defending COVID-19-related tort claims associated with fraud, the

service industry, whistleblowing, disability, and constitutional rights. These claims will especially be interesting to monitor as they approach jury trials in the years to come, considering the great controversy that COVID-19 has already wreaked on the country.

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1 *Homsy v. HEB*, Cause No. 2020-28576; In the 113th Judicial District of Harris County (May 8, 2020).

2 *Ebaseh-Onafa v. McAllen Hospitals*, 2015 WL 2452701 (Tex. App.—Corpus Christi May 21, 2015) (mem. op.).

3 https://www.hhs.gov/sites/default/files/prep-act-advisory-opinion-hhs-ogc.pdf.

COVID-19 AND THE WORKPLACE: TOP TRENDS IN EMPLOYMENT LAW

BY MARK A. SHANK & SHELBY K. TAYLOR

THE COVID-19 PANDEMIC HAS CREATED SEVERAL new considerations for employers when managing their relationships with their employees and the parallel agreements that may impact terminations, layoffs, and return to work procedures. The discussion set forth below analyzes the top trends we have seen as a result of the COVID-19 pandemic's impact.

1. Although Enforceable, Non-Compete Agreements Are Likely More Disfavorable in Texas

As a matter of law, non--compete agreements have steadfastly maintained their enforceability in Texas. Although COVID-19 has not changed this body of law in Texas, the context has changed as to whether a non-compete agreement will be upheld factually. A non-compete must be reasonable in order to be enforceable. When evaluating reasonableness of a non-compete clause, Texas courts consider whether the non-compete agreement is reasonable in scope, duration, and geographic location. If any of these are found to be unreasonable, the non-compete is unenforceable. The Court has wide discretion to determine reasonableness and it is authorized to consider the facts and circumstances associated with the formation of the non-compete. These facts and circumstances include the COVID-19 pandemic and the environment it has created for employees.

In a time of mass layoffs and sky-high levels of unemployment, Texas judges are more likely to view such clauses as unreasonable, and that the balance of the employer's need to protect its business against an employee's need to work may have shifted. In Texas, we expect a knee-jerk reaction against enforcing non-compete agreements for either laid off or terminated employees, when alternative employment will be more difficult to obtain. We further predict that courts will closely consider whether the former employer's need to protect confidential information and relationships trumps the need to get workers (particularly laid off or underemployed workers) back to work to support their families and keep the economy moving.

The chances of a laid-off employee finding work in the current climate are reduced even more if he or she is bound by the restrictive terms of a non-compete agreement. This reality is further worsened by socioeconomic status: low-earning employees have fewer resources to fight against a former employer attempting to enforce a non-compete.

The counter argument remains: Even in this climate, endeavoring to enforce a non-compete is an important company interest—such as the need to protect trade secrets or proprietary information—and it may be crucial for the employer to ensure that its employeeis not providing confidential information to a competitor.

Employers should take to heart the admonition of the courts that such covenants are restraints on trade that need to be narrowly tailored to preserve a protectable interest—such as confidential information. The covenants should be written with that principle in mind.

2. Employers Should Double Check Their Timekeeping Mechanisms to Avoid Wage and Hour Actions

During the COVID-19 pandemic, the shift to teleworking has created tension on efforts to track employee hours and productivity, using traditional timekeeping mechanisms. Moreover, employer legal obligations to do so have not been diminished. Consequently, employers may be more susceptible to employee claims that companies have failed to provide adequate compensation for employees working remotely for all required meal periods, rest breaks, and overtime. We expect that these conditions will eventually give rise to wage and hour claims, alleging violations of the FLSA against employers who provide more flexible work conditions because of the COVID-19 pandemic.

To proactively minimize potential wage and hour related claims, employers should ensure—to the extent possible and practicable—that their employees are properly compensated for all hours worked and that the employer remains in compliance with the Fair Labor Standards Act. Employers also need to ensure that their non-exempt employees still qualify as such. In addition, employers should be careful to reimburse employees for certain expenses incurred in order to telework,

such as cell phone, high-speed internet, or other equipment costs as required by applicable federal, state, local laws, and their own company handbooks or other agreements.

As a practice tip per the Texas Wage Commission, an employer should be careful not require or allow employees to pay business costs with the net result of taking them below the minimum wage. Reimbursements for actual business expenses do not count under the regular rate for overtime calculation purposes, while reimbursements in excess of the actual amounts would be considered extra pay that would count towards the employee's regular rate of pay. Other than what an employer must reimburse to the employee in order to keep the employee's pay at least at minimum wage, expense reimbursements do not constitute "wages" and may not be the subject of a Texas Payday Law wage claim.

Under the WARN Act, a covered employer ordering a mass layoff or plant closing must provide sixty days of advance written notice to affected non-union employees, union representatives, and certain government officials.

Moreover, employers should encourage managers and supervisors to set clear expectations with employees, conduct regular check-ins, address issues promptly, and make other efforts to maintain clear communication with employees.

Accordingly, it is crucial for employers to keep in mind that employees working remotely, employers cutting wage rates, layoffs, RIFs and a variety of the other now-common personnel actions may have significant consequences in terms of wage and hour obligations and potential liability.

3. WARN Act Violations: Is COVID-19 An "Unforeseeable Business Circumstance"?

In the early months following the COVID-19 pandemic's initial turmoil, many employers were put in the difficult position of implementing layoffs and other workplace reductions due to COVID-19-related business losses. Unfortunately, the efforts to quickly downsize likely made it more difficult for employers to provide mandatory notice under the federal Worker Adjustment Retraining Notification Act to their affected employees. Such failures could spark suits alleging employers failed to adhere to obligations under the WARN Act and its state counterparts (referred to colloquially as the "mini-WARN" acts – but note that Texas does not currently have its own "mini-WARN" act at this time).

Under the WARN Act, a covered employer ordering a mass layoff or plant closing must provide sixty days of advance written notice to affected non-union employees, union representatives, and certain government officials. An exception to this requirement, for which an employer bears the burden of proof, is available for "unforeseeable business circumstances." A WARN Act notice must be given when there is an employment loss, as defined under the Act. A temporary layoff or furlough that lasts longer than 6 months is considered an employment loss. A temporary layoff or furlough *without notice* that is initially expected to last six months or less but later is extended beyond 6 months may violate the Act unless the extension is due to due to business circumstances (including unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial layoff *and* notice is given when it becomes reasonably foreseeable that the extension is required

This exception still requires notice, but allows employers to provide "as much notice as is practicable" (*i.e.*, fewer than sixty days of notice) when a plant closing or mass layoff is caused by "business circumstances that were not reasonably foreseeable as of the time that notice would have been required." In order to rely on this exception, an employer must demonstrate that the plant closing or mass layoff occurred due to "some sudden, dramatic, and unexpected action or condition outside the employer's control." Generally, employers that fail to provide timely notice may have to provide workers back pay, plus penalties.

The "unforeseen business circumstances" exception in federal WARN Act may excuse strict compliance with notification requirements but the legislative branch has yet to provide any legislation on the application of this exception to the COVID-19 pandemic. Further, while some states have expressly stated in an executive order that the current pandemic is an unforeseeable business circumstance under federal law, it nonetheless remains unknown what weight courts will give state executive orders. The Department of Labor has provided guidance on the issue, explaining that the exemption likely does apply to layoffs (which can be either temporary furloughs or group layoffs) arising out of the COVID-19 pandemic.

Given the continued lack of clarity on the applicability of certain exceptions, employers should analyze the applicability of this exception rather than make assumptions about it or review the DOL guidance in the interim.

4. OSHA's Workplace Safety Recommendations and Potential NLRA Issues

In response to the COVID-19 pandemic, the federal Occupational Safety and Health Administration ("OSHA") has issued recommendations—rather than establishing emergency standards—for essential businesses. OSHA has been vocal that it has been prioritizing inspections to conserve resources. While it has recently revised its policy and stated that it plans to expand inspections beyond those in healthcare facilities.

In so far as COVID-19 workplace safety is concerned, manyemployers have seen an increased number of OSHA complaints. In most of these cases, OSHA has utilized its "rapid response investigation" informal investigation approach, which typically does not include an on-site investigation. Until late summer, OSHA was taking a hands-off approach to record-keeping issues, but its recent guidance included an announcement of enforcement activity in this area. Under OSHA's recordkeeping requirements, COVID-19 is a recordable illness and employers face potential risks for failure to comply with recording and reporting requirements.

The trend seems to be encouraging employers to eradicate potential OSHA deficiencies so that OSHA does not have to get involved in solving problems that could otherwise be ameliorated by the employer. Bear in mind, however, that a lack of emergency standards from OSHA does not excuse employers from ignoring any statewide or local standards for safety.

It would also be prudent for employers to remember that the National Labor Relations Act protects employees who engage in concerted activity, which can include talking to co-workers on social media about ways to improve workplace safety, the speakers warned. Practically speaking, if employees say they're too afraid to work, employers may want to consider taking the time to find out why and work with their employees on solutions—which may save employers an OSHA investigation in the long run.

5. EEOC OK's COVID-19 Testing in the Workplace, But Be Careful of Discrimination Claims.

A hot topic in the return to work discussions has been whether employers may require temperature checks or COVID-19 tests before an employee may return to work. EEOC guidance has confirmed that employers are authorized to administer COVID-19 tests and implement other safety measures before allowing employees to enter the workplace and such actions are not *facially* discriminatory. But, employers should remember that discrimination laws permit employees to challenge actions that have a disparate *impact* on workers of a certain national origin, age or other protected class, even if the employer did not discriminate intentionally.

As employers begin to formulate their return-to-work policies and procedures, many may find some employees reluctant to return, particularly employees with preexisting conditions who may be at a greater risk of contracting COVID-19 if they return to work and are exposed to COVID-19 than if they continued to telework. Employers may invite Americans with Disabilities Act lawsuits by mandating employees to report to work on-site, or unfairly denying an employee's request for a reasonable accommodation that allows them to safely perform their job duties.

In order to assess their ADA compliance considering recent guidance regarding the ADA, the Rehabilitation Act, other EEO laws and their interplay with the COVID-19 pandemic climate, employers should discuss these issues with counsel In addition, employers should follow required protocols set forth by the EEOC with respect to employees who might be at a greater risk of contracting COVID-19 or at a greater risk of disparate impact claims should employers require COVID-19 testing prior to returning to work.

6. Texas Unemployment Insurance Benefits Paid as Result of COVID-19 Will Not Be Charged Against Employer Accounts, But Higher Premiums Are Expected

The Texas Workforce Commission ("TWC") announced that state unemployment insurance benefits paid as a result of COVID-19 will not be charged against employer accounts. However, employers should always carefully read over any statements they receive from the TWC to ensure that they are not being erroneously charged for COVID-19 unemployment insurance benefits.

If an erroneous charge is posted, an employer has 30 days to file a protest with the TWC, as listed on the notice. The TWC also encourages employers that have had to lay off their employees to file one mass claim on behalf of all impacted workers, in order to reduce website traffic and make the claims process easier on the TWC and the employer.

Because of these changes, it is likely that employer premiums will increase, and employers should be mindful of the potential impact of such increases.

7. The CARES Act

Texas has recently finished disbursing a $300 weekly unemployment subsidy to workers eligible for the additional stimulus money under the federal CARES Act. However, Texas is continuing to pay money to newly eligible workers.

According to the TWC, there are many cases in Texas where a worker's unemployment application may have been delayed and was approved after September 5, 2020. To this end, workers who fall under this category would then get a $300 subsidy if they were unemployed in August. Per the TWC, Texas will pay those claims until there are no more claims or until FEMA requests the state to discontinue payments.

Notably, Governor Greg Abbott has been urged to detail additional COVID-19 aid spending plans for all additional money Texas (about $5.6 billion) has received from the federal government and he is expected to unveil his plans for such money—and if any of that additional money will go towards additional aid—very soon. Governor Abbott's response is forthcoming, as federal officials will recoup any dollars that are not spent by December 30, 2020.

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LITIGATING FAMILY LAW THROUGH COVID-19

BY JODI LAZAR

THE MOST PROFOUND ADJUSTMENTS LITIGATING Family Law cases in the time of COVID-19 have been procedural and advocacy-related. In an instant, our courthouse buildings were shuttered. Very quickly, our Texas judiciary found ways to adapt and innovate to provide access to justice and to move the dockets online. We became a virtual judiciary with virtual courthouses and virtual courtrooms.

The first thing we learned quickly was that, in the virtual court world, every judge runs their virtual courtroom differently. Every court administrator runs their virtual docket differently. Differently not just from each other, but differently from how they were running things before COVID-19. Appearing virtually before our judges, understanding and adjusting to the new docket and new procedures in our home counties became like walking into a far-away Texas county courthouse, not knowing a soul in town. For lawyers familiar with their judges and court staff before COVID-19, and who were used to a certain way of doing things around the courthouse, the adjustment was stark. It was a reminder not to get set in our ways as lawyers. Change came rapidly, and we have a responsibility to be resilient and to adapt.

Throughout the pandemic, as the virus level in our communities change and vary, there will be changes and adaptations to the court's procedures.

Read the "Local" COVID-19 Rules

The judiciary is publishing rules and orders at a rapid pace to provide us with procedural rules to guide us in our virtual family law litigation practice before the courts. The admonishment to "read the local rules" is foremost now.

In the time of COVID-19, the term "local rules" covers so much ground. By "local rules" now, I mean a court's COVID-19 rules, orders, and procedures, which will be located in many different places. You must understand the COVID-19 rules, orders, and procedures governing your family law case; and they change often. Throughout the pandemic, as the virus level in our communities change and vary, there will be changes and adaptations to the court's procedures. Counties change their virtual platforms; counties go from stacking dockets to individual settings and back again; counties change their pretrial requirements and their courtroom procedures as they try new things and innovate and adapt. Just because you were familiar with the "local rules" last month doesn't mean you are up to date. Check often.

Your first source for the "local rules" is the internet. Whatever local rules, orders, or procedures adopted in the county where your family law case is filed should be posted on the court's website. Check for the county's filing rules, the court administrator's rules, and the court's standing orders regarding rules governing practice during COVID-19. If you cannot find the county's rules relating to practice in their courts during the COVID-19 pandemic, you need to ask the clerk, the court administrator, and the court staff directly. You can also ask the county's local bar association for the current rules governing practice before that county's courts. You are responsible to know the county's and the individual judges' rules, even if you can't find them on the internet.

Once your case is assigned to a judge, you should immediately find the court's current rules related to practice before that judge. There are likely to be COVID-19 rules relating to submissions, communications, dockets, setting hearings, announcements, pretrial filing forms and deadlines, exhibit delivery, and virtual hearing procedures. If this information is not provided online, contact the judge's staff. In any event, I do recommend a call in to the court staff to confirm you are operating under the current rules and procedures for that judge.

Also, look for the associate judges' rules and procedures. If the district court does not have published rules, but the associate judge does, this will help you to understand how the courts operate in that county.

You also need to keep current with the Texas Supreme Court COVID-19 Emergency Orders. These substantive and procedural orders from the Texas Supreme Court, while not "local" rules, govern all of Texas practice during the COVID-19 pandemic. *The Supreme Court of Texas Emergency Orders Regarding the COVID-19 State of Disaster* are published by the Texas Judiciary Branch on their Court Coronavirus Information page: txcourts.gov/court-coronavirus-information/emergency-orders. At the time of this writing, we are up to 27 Emergency COVID-19 Orders.

Pretrial Practice Changes in COVID-19

During the pandemic, the how of practicing family law leading up to trial has not changed much. Notably, we have had to edit our citations, orders to appear, subpoenas, notices of hearing, and notices of deposition to account for virtual appearances.

During COVID-19 and virtual judiciary, it is recommended to follow-up with court staff. Judges are making docket settings during virtual hearings that may not actually get set on the court's docket. If you don't follow up to confirm the docket setting with the court staff or online (although some counties do not maintain up-to-date online dockets), you won't know until you try to show up at the court's virtual courthouse link that you are not on the docket that day.

We are also now submitting orders electronically, and there is no way to know for sure that your order has made it to the judge. Make it a practice to set reminders for your office to check if your order has been signed, filed, and returned. If not, contact the court staff to gently check-in on the status of your order. These things can languish, and it is our job to make sure our orders are signed and filed.

Depositions are now virtual and more prevalent. In my practice, we are seeing more depositions being taken in advance of virtual evidentiary hearings. Now that courts are drastically reducing the time allowed to put on evidence in family law cases—in many courts down to 3 hours maximum for a final hearing—depositions are a good idea and an excellent tool. Deposition testimony can be entered into the record. TEX. R. EVID. 207. Especially during the COVID-19 pandemic, and for so long as we are putting on evidence in the virtual courtroom, depositions should be videotaped. They are being conducted via camera anyway in our virtual world. With a videotaped deposition, ask the videographer to sync the tape to the transcript. That way, you can easily identify and capture the portions of videotape you want to submit for your evidentiary hearing. It comes with a cost, but it is much less expensive than the hourly rate for someone in your office to try to do it themselves. This is a crucial and valuable tool for getting evidence before the judge without it costing you precious hearing time.

File Business Records Affidavits. With the limited time we are being given in the virtual courtroom to try our contested family law cases, you must choose your witnesses wisely. The court will want to hear from each party, and you may have time for one other witness each, maybe. It is more important than ever to rely on the tools provided by the rules of civil procedure and the rules of evidence to get evidence into the record without using up your allotted hearing time. You can obtain school records, medical records, therapy records, and all other business records using the subpoena power for documents provided under the rules of civil procedure. TEX. R. CIV. P. 176.6(c). These entities can provide you with a business records affidavit that gives testimony proving the elements of the business records exception to the hearsay rule. TEX. R. EVID. 803(6). If filed 14 days prior to your hearing, records filed under a business records affidavit are authenticated and are excepted from the hearsay rule as business records. TEX. R. EVID. 902(10). It takes a lot of work to get complete records under a proper business records affidavit filed 14 days before a family law hearing. But it's worth it, because then you offer the records into evidence without a sponsoring witness. The records are already in the court's file. Now you can use these records in your examination of the parties and your argument to the court without having to bring in another witness. That leaves those witnesses who will only appear in court to provide their records (if you really need them to prove your case, i.e. CPS) to worry about fitting into your hearing time limit.

Ask for court conferences. I have found that the judges are quite open to virtually confer with counsel on the status of the case during COVID-19. Court conferences can get a lot of things handled to help everyone have a good, clean virtual hearing--dealing with pretrial and discovery issues; how to handle the presentation of evidence in the virtual hearing; planning for the virtual hearing; and making sure everyone is on the same page with respect to expectations and deadlines. In one county, the judge sets a conference with counsel two weeks prior to the week of the virtual hearing just to see where we are at. We talk about witnesses, scheduling, and preferences. It is very helpful in preparing to present my case to this judge in the virtual world.

Watch YouTube. Access to justice means that family law hearings are now broadcast on the courts' YouTube channels. Spend some time watching your judge on the virtual bench.

You will learn how the judge runs their virtual courtroom. You may be surprised to learn that your judge turns off their camera after announcing the case on the record and leaves the camera off for the entirety of the presentation of evidence. That's just something you would want to know before starting your case.

Preparing Your Client for Virtual Appearances

Take care in preparing your client for their virtual deposition or trial appearance. Schedule a virtual prep with your client and try to recreate as many actual experiences they will have in the virtual deposition or hearing.

First, choose the location where your client will sit for their virtual appearance. Have your client walk you through options in their environment and choose the best room that presents them in the best light. Speaking of light, you need front light to illuminate your face for the camera. Work with your client to adjust lighting in the room, from the window and on the client's face. If they are bound to a desktop computer in a room that cannot change, make sure the background is suitable and not distracting. Whenever your client is relying on a laptop for their virtual appearance, make sure to remind them to have their power cord with them.

Some judges believe that because the rule states that the court shall interview the child "in chambers" and the courthouse is closed, they are not interviewing children until COVID-19 restrictions are lifted.

I instruct the client not to have anyone else at home with them during the deposition/hearing. That means they may have to arrange for childcare, even to the point of having someone else designated to take calls from school that day and to be the point person for the children until the deposition has concluded. I also instruct the client not to have their phone with them during the deposition/hearing. I instruct them to power their phone off and to leave it off and charging in another room. I have yet to have a virtual deposition where the party was not asked (1) who else was at home with them and (2) if they have their phone with them.

If the client does not have a suitable environment to sit for their virtual appearance—or even if they feel more comfortable leaving their environment for their deposition/hearing—I offer them the conference room at our office. Our office is closed to the public during COVID-19, but we do work behind closed doors and wear masks in the hallways and public spaces, and we are happy to accommodate our clients to provide a professional, quiet, private, and safe environment for them.

Use a separate breakout room for your client during breaks. We use our office Zoom to confer with our client when the deposition is off the record or court is not in session. It gives everyone a greater sense of safety to be out of the official link when you are working with your client off the record. We start the day with the client in our office Zoom, then go over to the depo/court link, then back to our office Zoom link throughout the day. I also instruct the client not to chit-chat at all and to wait for my instruction to leave the depo/court link. I always stay in the virtual room and wait for my client to leave before I leave.

Judicial Interview of Child

Check with your judge early in the case, weeks before trial, to find out how they are handling interviews of children "in chambers" during COVID-19. Some judges will do virtual interviews. Some judges will ask that the child be brought to the courthouse for a socially distanced "in-chambers" interview. Some judges believe that because the rule states that the court shall interview the child "in chambers" and the courthouse is closed, they are not interviewing children until COVID-19 restrictions are lifted. This means that if there is to be a child interview as a matter of right under TEX. FAM. CODE § 153.009, your case may not be heard during the pandemic. These are not things you want to learn for the first time at your hearing and will affect the strategy of your case.

Virtual Trial

You will receive a link from the court for the virtual courtroom. Confirm you have this link according to the rules of your judge and/or county. Some courts send a link directly to your calendar through your email.

Before the day of your hearing, do a test run of your technology with the court's virtual courtroom software application. Some use Zoom; some use Teams; some may use other software. You need to make sure the computer you will use for trial has the proper program downloaded, installed, run, and settings made. You need to test your camera, your microphone, your speakers, and your sound. You need to make sure you know where and how to log in. If you need a password, make sure you have the password and the login name. Even if you use that program every day, make sure you do a test run with the court's link. I have been able to participate on a Zoom call with no issues through my office Zoom account but needed different credentials to log into the

court's Zoom. I have been prompted for passwords I was not familiar with using Teams. I relied on 2 staff members to get me so I could log in for a hearing. You do not want this to happen the day of your hearing.

Log into the court's virtual courtroom at least 15 minutes early. There's an old trial lawyer saying: "If you aren't early to court, you are late". Just like you should always be sitting and ready in the courtroom well before your docket call, you should log into the court's hearing link with plenty of time for the court staff to check in with you.

Exhibits are now delivered electronically to the court reporter or the court staff prior to the hearing, according to the court's rules and procedures. You should receive a link from the court reporter or the court staff if they are using a software program for downloading exhibits. Review and follow the court's instructions regarding marking exhibits.

Some courts do not have electronic download software capability for exhibits. You will need to check the rules and procedures and talk to the judge's staff to find out how the judge will receive documentary evidence. In one court, we can email up to 15 pages of exhibits to the court staff, but if we have more than 15 pages total, we must hand deliver the exhibits to the court directly.

Pre-COVID-19, I never walked into the courtroom for an evidentiary hearing without my entire paper file and with just about all records marked and ready to go as exhibits, just in case I might need them. For virtual trials, I now significantly cull my exhibits so as not to inundate the court. I save more exhibits for rebuttal now, identifying early what I don't expect to introduce in my case in chief, but would only use if it came up in trial. I am having to identify and prepare my exhibits much earlier than I used to.

Most courts are now requiring us to upload or exchange exhibits at least the day before a hearing, sometimes 48 hours or more. If the .pdfs are not downloadable from the court's exhibit software, then make sure to provide and to receive .pdf copies of both side's exhibits. This is the same as providing opposing counsel with a copy of the exhibit you intend to introduce at trial. It's not enough for the exhibit to be available to view on the screen as the court and witness see it. Each side needs to have access to their own document of the exhibit so that they can read ahead, highlight, or otherwise review the exhibit at their own pace.

Bring your paralegal or a second-chair attorney to provide support to you at virtual trial. Usually their camera does not need to be on, and you should rely on them to find and pull up exhibits, monitor any communication with your client, and otherwise free you up to concentrate on the screen and what is happening in the moment in trial.

We are facing unprecedented times, but we are making it work. Be flexible and accept and adapt to the inevitable changes COVID-19 has brought and will bring to our family law litigation practices. Our clients are depending on it.

Jodi Lazar is the Founding Partner of Lazar Law, a boutique family law firm in Austin, Texas, and is a retired trial advocacy adjunct professor at The University of Texas School of Law. ★

LITIGATING THROUGH THE COVID-19 CRISIS

BY MICHAEL SHAUNESSY

THE UNPRECEDENTED ECONOMIC DISRUPTIONS caused by COVID-19, including government-ordered closures of some businesses, have increased unemployment, caused drastic disruptions in the supply chain as well as demand for goods and services, and have made a significant impact on business relationships. In many instances, companies are legally, economically and/or logistically unable to fulfill contractual obligations. While a pandemic like COVID-19 is in many ways unique, Texas has nonetheless seen and survived its fair share of economic and natural disasters and, accordingly, there is established law that courts will look to in determining when performance is or is not excused based on COVID-19 and the governmental responses to it.

In this climate, frequently laypeople, and even lawyers, continuously use terms such as "*force majeure,*" "Act of God," and/or "impossibility of performance" to explain or justify the failure to perform contractual obligations. These three terms are frequently used interchangeably and are almost uniformly used to suggest that a breach of contract is legally excused. However, each of these legal concepts has a distinct meaning and scope of application, and attorneys, as well as clients, need to understand when they will apply and the scope of relief they provide.

Additionally, the COVID-19-related cases that have been decided indicate that courts are applying the established rules of contract interpretation to determinations of insurance coverage due to COVID-19-related business disruptions.

I. Doctrines That Might Excuse Performance Due to COVID-19

A. *Force Majeure:*

The purpose of *force majeure* is to excuse a party from non-performance when the non-performance is caused by circumstances beyond the reasonable control of the defendant or when non-performance is caused by an event which is unforeseeable at the time the parties entered the contract. *Valero Transmission v. Mitchell Energy,* 743 S.W.2d 658, 663 (Tex. App.—Houston [1st Dist.] 1987, no writ); *see also Gulf Oil Corp. v. F.E.R.C.*, 706 F.2d 444, 452 (3d Cir. 1983), *cert. denied,* 464 U.S. 1038, 104 S. Ct. 698 (1984).

At one time, *force majeure* had an independent meaning in Texas common law, but now is commonly used as a shorthand for a type of event that may excuse performance pursuant to the terms of a contract.

At one time, *force majeure* had an independent meaning in Texas common law, but now is commonly used as a shorthand for a type of event that may excuse performance pursuant to the terms of a contract. *R.R. Comm'n v. Coppock*, 215 S.W.3d 559, 566–67 (Tex. App.—Austin 2007, pet. denied) (citing *Sun Operating Ltd. P'ship v. Holt,* 984 S.W.2d 277, 282–83 (Tex. App.—Amarillo 1998, pet. denied); 30 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 77:31 (4th ed. 1990 & Supp. 2004) (explaining that the specific language of a clause indicates what events will excuse performance and a typical clause states that a party's performance is subject to "acts of God, war, government regulation, terrorism, disaster, strikes . . . civil disorder, curtailment of transportation facilities, or any other emergency beyond the parties control")). Accordingly, Texas courts do not apply a common law doctrine of *force majeure* in the absence of a *force majeure* provision in a contract. *R.R. Comm'n*, 215 S.W.3d at 566–67. The scope and applicability of *force majeure* is entirely dependent on the terms of the contract and its language. *See Zurich Am. Ins. Co. v. Hunt Petroleum (AEC), Inc.*, 157 S.W.3d 462, 466 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *Sun Operating Ltd. P'ship v. Holt*, 984 S.W.2d 277, 282–83 (Tex. App.—Amarillo 1998, pet. denied).

Typically, *force majeure* is offered as a justification for failing to perform and, in litigation, it is asserted as an affirmative defense against a claim for breach of contract. The party claiming a force majeure clause as an excuse for performance bears the burden to show that it is applicable. *Hydrocarbon Mgmt., Inc. v. Tracker Exploration, Inc.*, 861 S.W.2d 427, 436

(Tex. App.—Amarillo 1993, no writ); *see also Kodiak 1981 Drill. v. Delhi Gas Pipeline*, 736 S.W.2d 715, 723 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.)

The starting point for any evaluation of whether the performance is excused by *force majeure* is the terms of the contract. *R.R. Comm'n*, 215 S.W.3d at 566–67. When a contract specifically lists different types of *force majeure* events and one of the listed events occurs, that can simplify the process for the defendant. *Sun Operating Ltd. P'ship*, 984 S.W.2d at 282–83 ("When the parties have themselves defined the contours of force majeure in their agreement, those contours dictate the application, effect, and scope of force majeure.").

For example, in *Eastern Air Lines v. McDonnell Douglas Corp.*, 532 F.2d 957 (5th Cir. 1976), McDonnell Douglas was unable to manufacture planes by a date certain and sought to invoke a *force majeure* clause which excused performance timing issues if they "would be delayed by governmental acts, priorities, regulations or orders." *Id.* at 992. McDonnell Douglas specifically asserted that the military had required it to rapidly produce aircraft for use in Vietnam and prioritized such production over civilian work. *Id.* at 990. Because governmental regulations were specifically mentioned in the contractual *force majeure* clause, McDonnell Douglas could show, as a matter of law, that the parties had contemplated governmental regulations or priorities that could prevent or delay performance. *Id.*

Frequently, *force majeure* clauses have a "catch-all" clause that references "other" events that prevent performance. "Catch-all" provisions establish the parties' intent that all *force majeure* occurrences outside the performing party's reasonable control excuse performance. *Sun Operating P'ship v. Holt*, 984 S.W.2d 277, 287 (Tex. App.—Amarillo 1998, pet. denied). At the same time, whether a particular event excuses performance based on a "catch-all" provision hinges on whether the event in question was reasonably foreseeable. *See TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W.3d 176, 182 (Tex. App.—Houston [1st Dist.] 2018, pet. denied) ("Thus, the question we must decide is whether this 'catch-all' provision includes events that are foreseeable, such as a fluctuation in the oil and gas market that affects a party's ability to obtain financing.").

Events that were foreseeable at the time the parties contracted are not excused by a "catch-all" *force majeure* provision in a contract. *Id.* Texas courts have held that changing market conditions, including dramatic declines in prices, are NOT unforeseen circumstances under a catch-all provision. *TEC Olmos, LLC*, 555 S.W.3d at 181. However, if a contract provides that performance is dependent upon economic viability, then market changes can constitute an event of *force majeure*. *Kodiak 1981 Drill*, 736 S.W.2d at 721 (failure to perform was excused by the agreement's *force majeure* provision expressly covering an economic downturn); *see also Eastern Air Lines*, 532 F.2d at 990–92.[1]

There will be considerable litigation in the coming years regarding whether previous epidemics/pandemics (e.g., Spanish Flu, H1N1, SARS, MERS and/or Ebola), or even the emergence of COVID-19 in China prior to its arrival in the USA, made the COVID-19 pandemic foreseeable.

Force majeure may also have an independent meaning beyond the contractual terms when it is used in a warranty or supply contract. *See TEC Olmos, LLC*, 555 S.W.3d at 196. During prior market downturns involving take-or-pay contracts, many oil purchasers argued that downturns in the oil market were beyond their control and, therefore, constituted *force majeure* under catch-all provisions. As restated in *TEC Olmos*, these events fail to fall under catch-all provisions because they are not unforeseeable: price fluctuation or changes in market conditions could not qualify as *force majeure* events in a gas supply contract but, rather, "there must be an 'element of uncertainty or lack of anticipation' surrounding the event's occurrence, and the event 'must affect the availability and the delivery of gas' to excuse compliance with the contract that warrants a certain supply." *Id.* at 194–96. Additionally, "routine mechanical repairs at one supply source" did not qualify as a *force majeure* that would excuse performance. *Id.* Thus, *force majeure's* application in supply contracts and warranty contracts must be something that could not have been anticipated at the time of contracting. In other words, the event be must something the parties could not reasonably anticipate would disrupt or prevent the ability to perform.

B. Impossibility of Performance:

Impossibility of performance is a common-law contract defense that does not depend on contractual language but, rather, on the intervening events during the contract's performance. *See Centex Corp. v. Dalton*, 840 S.W.2d 952, 954 (Tex. 1992); Restatement (Second) of Contracts § 261, cmt. d. The doctrine of impossibility excuses performance under the contract when a party would suffer "unreasonable loss or difficulty" or "risk of injury" from performing. *Chevron Phillips Chem. Co. LP v. Kingwood Crossroads, L.P.*, 346 S.W.3d 37, 60 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).

The Texas Supreme Court has also explicitly approved the

application of the impossibility doctrine when performance would become illegal due to a change in the law. *Centex Corp.*, 840 S.W.2d at 954. In sum, Texas courts have excused performance of contracts due to: "(1) the death or incapacity of a person necessary for performance, (2) the destruction or deterioration of a thing necessary for performance, and (3) prevention by governmental regulation." *Tractebel Energy Mktg. v. E.I. du Pont de Nemours & Co.*, 118 S.W.3d 60, 65 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). This last factor certainly has application to COVID-19 because of states and local governmental entities issuing "stay-at-home" and "shelter in place" orders enforceable by law. We anticipate that some parties will also argue that actions by foreign countries that interrupt international supply chains also made performance impossible. Additionally, cancelation of events or activities because of the threat of COVID-19, even where governmental regulations would have allowed the activity or event to go forward, will also be argued as creating situations where it was impossible for a party to perform.

Critically, a party relying on the impossibility doctrine "must demonstrate it took virtually every action within its powers to perform its contractual duties," but was still unable to do so. *Chevron Phillips Chem. Co. LP*, 346 S.W.3d at 59; *Huffines v. Swor Sand & Gravel Co., Inc.*, 750 S.W.2d 38, 40 (Tex. App.—Fort Worth 1988, no writ); *Metrocon Const. Co., Inc. v. Gregory Const. Co., Inc.*, 663 S.W.2d 460, 462 (Tex. App.—Dallas 1983, writ ref'd n.r.e.) (impossibility defense unavailable "[i]f the impossibility might have reasonably been anticipated and guarded against in the contract"). Accordingly, the defense of impossibility is unavailable when the events precluding performance were self-imposed. *Samson Exploration, LLC v. T.S. Reed Props., Inc.*, 521 S.W.3d 26, 44–45 (Tex. App.—Beaumont 2015), *aff'd* 521 S.W.3d 766 (Tex. 2017) (holding that the defense of impossibility was unavailable because the defendant caused the events which made performance impossible).

A party contesting the defense of impossibility should, therefore, seek discovery and offer proof regarding the degree to which the breaching party caused or could have overcome the events resulting in the alleged impossibility to perform.

C. Act of God:

Unlike *force majeure*, the term "act of God" still has a common-law meaning and application in Texas; however, it is typically applied as a defense in tort cases. "An occurrence is caused by an act of God if it is caused directly and exclusively by the violence of nature, without human intervention or cause, and could not have been prevented by reasonable foresight or care." Texas Pattern Jury Charges 3.5; *Dillard v. Tex. Elec. Coop.*, 157 S.W.3d 429, 432 n.5 (Tex. 2005) (quoting same). To avoid liability due to an act of God, the defendant must show that "1) the loss was due directly and exclusively to an act of nature and without human intervention, and 2) no amount of foresight or care which could have been reasonably required of the defendant could have prevented the injury." *McWilliams v. Masterson*, 112 S.W.3d 314, 320 (Tex. App.—Amarillo 2003, pet. denied). This typically requires that "the act of nature must be unusual or unprecedented," though it need not be the worst of such events ever experienced. *Id.* Act of God defenses are typically seen for natural disasters or weather events like tornados. *See, e.g.*, *Transport Ins. Co. v. Liggins*, 625 S.W.2d 780, 782 (Tex. App.—Fort Worth 1981, writ ref'd n.r.e.) (employee sought recovery of worker's compensation after he was injured by a tornado while operating a truck, and employer asserted act of God defense).

A party relying on an act of God to defend a tort claim must first convince the court that the COVID-19 pandemic is unusual, unforeseeable, and purely caused by nature. Opposing parties will likely argue that: (1) prior epidemics/pandemics mean that the disease was not unprecedented; and (2) the pandemic was the result of man-made actions and decisions, not events purely outside the control of man.

In contrast to tort cases, in contract cases there must be a contractual clause for a party to be entitled to an act of God defense, much like a force majeure clause. *GT & MC, Inc. v. Tex. City Ref., Inc.*, 822 S.W.2d 252, 259 (Tex. App.—Houston [1st Dist.] 1991, writ denied). Without that contractual clause, a party cannot raise an act of God defense in a jury instruction. *See id.* Accordingly, parties to a contract that does not have a *force majeure* or act of God clause will likely be contending with the doctrine of impossibility of performance.

II. Current Litigation Addressing COVID-19 Specifically

While COVID-19 litigation will continue for many years, federal district courts in Texas, sitting in diversity jurisdiction, have already addressed two cases seeking to determine whether COVID-19 related disruptions were covered by insurance.

In *Diesel Barbershop, LLC, et al. v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 U.S. Dist. LEXIS 147276 (W.D. Tex. Aug. 13, 2020), a set of plaintiff barbershops in Bexar County had policies preventing "accidental direct physical loss" from State Farm. *Id.* at *6. After Bexar County issued executive orders ordering all non-exempt business to cease activity in the wake of COVID-19, the plaintiffs sued when State Farm

denied claims for business losses without investigation. *Id.* at *9. State Farm relied on a written exclusion in the insurance policies which excluded any loss as a result of a "[v]irus, bacteria, or other microorganism that induces or is capable of inducing physical distress, illness or disease." *Id.* at *7, 9.

The plaintiffs attempted to argue that the Bexar County executive orders were the source of their loss, rather than the COVID-19 virus itself. *Id.* at *13. State Farm responded that the virus exclusion was added in a direct response to the SARS pandemic in the early 2000s and was meant to encompass similar pandemics that could lead to contingent claims. *Id.* The court ultimately concluded that plaintiffs failed to plead a direct physical loss, because there was no actual physical alteration of the properties, and that, furthermore, the virus exclusion in the policies barred the plaintiffs' claims. *Id.* at *16–18. Because COVID-19 was the direct reason that the Bexar County orders were issued, the court concluded the virus was still the underlying cause of plaintiffs' alleged damages and, therefore, barred by the virus exclusion in the insurance policies. *Id.* at *20.

In *Vandelay Hosp. Grp. LP v. Cincinnati Ins. Co.*, No. 3:20-CV-1348-D, 2020 U.S. Dist. LEXIS 149196 (N.D. Tex. Aug. 24, 2020), the plaintiff purchased an "all risk" commercial property insurance policy from its registered insurance broker to insure three restaurants. *Id.* at *2. The plaintiff closed its restaurants after the County Judge of Dallas County issued an order prohibiting access to dine-in restaurants. *Id.* at *2–3. Plaintiff filed a notice of claim with its insurer and, when the insurer responded with a reservation of rights letter indicating a lack of coverage, the plaintiff sued for breach of contract, declaratory judgment, and negligent representation that the policy would cover disruptions like COVID-19. *Id.* at *3. The insurer removed to federal court and the insurance broker filed a motion to dismiss. *Id.* at *4.

The district court granted the insurance broker's motion to dismiss on the negligent representation claims, construing the plaintiff's claims as seeking benefit of the bargain damages that were not available under Texas law. *Id.* at *13. Because only reliance damages were available, the plaintiff could not seek the amount they were covered under the insurance contract and did not plausibly state which out-of-pocket reliance damages they sought. *Id.* at *14–15. The district court also dismissed the declaratory judgment claims against the insurance broker as being duplicative of the breach of contract action and failing to state a plausible right to relief from the broker. *Id.* at *17.

These cases illustrate that, while COVID-19 may have led to extraordinary circumstances, the same principles from contract and insurance litigation will continue to apply.

III. Conclusion

While the disruptive nature of COVID-19 may have forced all of us to adjust in new ways, the law's defenses to breach remain unchanged. Excuse of performance will still typically require explicit contractual language, and contractual exemptions can still prevent recovery if they concern events related to viruses or pandemics. Practitioners should look to any written contracts and precedent regarding disastrous or unexpected events to determine their clients' potential claims or defenses and, as always, prepare thoroughly for potential opposition.

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[1] At least one Texas case holds that a party does not have an obligation to seek to avoid an event that may constitute *force majeure*. *Sun Operating Ltd. P'ship*, 984 S.W.2d at 284. In *Sun Operating* the trial court instructed the jury that the party asserting the defense "must have exercised due diligence and taken all reasonable steps to avoid, remove and overcome the effect of 'force majeure.'" *Id.* at 281. The Amarillo Court of Appeals held the instruction was in error, holding that the "court erred in instructing that they had to use due diligence to avoid, remove, and overcome the effects of *force majeure*. Such was not intended by the parties, given the language in their agreement. Nor do we choose to contort their language to achieve an end that effectively works a forfeiture." *Id.* at 284.

REMOTE JURY SELECTION: LOOKING OVER THE HORIZON

BY HON. MARK A. DRUMMOND

"Long distance is the next best thing to being there."
–Bell Systems Advertisement Circa 1965

I **WILL NOT TYPE THE WORD "GOOD"** in the same sentence as the word "pandemic." However, there may be some things that the pandemic has forced upon us that we will want to keep even after the tragedy is over. The pandemic may have changed how we select our juries—forever. We may want to keep remote jury selection. It is safer for all—and may save time and resources for everyone.

In March, our executive director, Stephen D. Susman, of Susman Godfrey realized that the Civil Jury Project needed to pivot to examine remote jury trials in light of the pandemic. If there is an attorney who has benefited from being in the courtroom in front of 12 jurors arguing his client's case, it was Steve Susman. However, he realized to get his clients their day in court, he would have to do it remotely for the foreseeable future. Steve embraced finding the best ways to do just that.

Throughout his career, Steve was not only a legendary trial lawyer, he was a legendary trial innovator. I have taught for National Institute for Trial Advocacy since 1986. Once Steve published his *Trial by Agreement* protocols, I urged those advocates who are truly interested in getting to trial, as opposed to just kicking the can down the road, to seriously consider using them.

Tragically, Steve did not get to see the full extent of his work in this new reality due to his untimely death. I do not have to tell the readers of this publication all of Steve's accomplishments, but it is an understatement to say he was our guiding light, mentor, and friend. He will be missed.

In March, under Steve's guidance, we started on our model protocols. We had a working group of Judicial and Academic Advisors. Our protocols project had input from our Advisors spread across the nation, many in states that are leaders in adopting remote trials.

For courts looking to achieve the delicate balance between best methods for public safety and restarting jury trials, remote jury selection, while being a small percentage of a trial, may deliver the most benefit. I'll use the court I used to sit in for my example.

Pre-pandemic we would summon close to 100 jurors to the courthouse. We set our criminal cases first since many had speedy trial deadlines. The jurors would sit in the waiting room until a trial was ready to go. Many times, although we tried to eliminate this, defendants who said they would not take the plea agreement offered decided to plead guilty or waive the jury trial at the last minute. Some jury terms, the trial judge would walk into the jury room to report that we had three cases that were "definitely going to go" all plead out and we discharged the entire venire.

Of course, the 100 who had traveled to the courthouse were happy that what could have been a week of jury duty was now just a Monday morning. However, those 100 lost at least a half-day of work, had to arrange for sitters for perhaps the entire week, travel to the courthouse and find parking. How has remote selection changed all that?

Instead of 100 potential jurors traveling to the courthouse, they would be assigned times during the day to log into the court session. The attorneys would know in which order the jurors are appearing since the clerk has done the random selection and given them a time.

Let's take potential Juror #5 as an example. She has received and filled out a questionnaire that specifically applies to the case that is being heard. Based upon her answers, she may be told that she is not needed for that particular trial, but to report back three days later. She filled out the case questionnaire on the court's secure website a week before the trial was to commence. She may not even be required to log-in on Monday since she has been excused without questioning by agreement of counsel.

If she is not pre-excused, she knows that she must be available to log-in at a location in her home, office or other setting where she will not be disturbed. She will be given a starting

time and an ending time, such as starting at 9:00 a.m. for a two-hour period. She then knows that she can go about her day from 11:00 a.m. on and, if chosen, when she needs to log-in again to start the trial.

People may be able to get in a half-day of work or actually be at work and letting the supervisor know that they need to be in a quiet room by themselves for the period of questioning. I realize this is not feasible at all workplaces, but it would allow some workers this option.

The main argument by trial attorneys against remote selection is that they prefer in-person voir dire for rapport building and juror assessment. However, in-person these days is not like the old days. One need only look at the actual trials and mock trials that have been done in-person with social distancing.

First, the attorneys cannot get as close to the jurors as they once could. The attorney might find himself or herself looking through not one, but two plexiglass barriers. Some judges may allow clear face shields instead of masks, but some may not. The bottom line is that attorneys may get a better sense of any particular juror's reaction when looking at them in full screen view on a computer.

Other anecdotal evidence indicates that jurors may be more forthcoming with information when they are at a remote location. This was reported by one of our mock jurors in our remote trial exercise held in May and has also been reported in subsequent mock jury selection exercises.

It is intimidating to answer personal questions in front of 50 or more people. It is even more intimidating to admit, perhaps, to a personal bias. Although court and counsel pre-pandemic were careful to offer in-camera examination when the person felt uncomfortable, remote selection not only offers that, but allows the juror to reveal information in a more comfortable setting.

The cost savings for remote selection could, over time, be substantial for both the court system and the individual jurors. Many of our jury improvement lunches are held in large cities. When we open the discussion up to the jurors on how we can improve the system, there are, of course, comments about what happens in court. However, the overwhelming number of comments involve waiting around without being told the reason and—parking.

Some court systems pay for parking, some pay only up to a certain amount and some do not pay at all. Moreover, for those court systems that pay mileage to and from the courthouse the savings could be substantial.

We have all heard variations of the phrase, "The wheels of justice turn slowly, but grind exceedingly fine." We live with the paradox that, for a time, the wheels of justice stopped; but then courts around the country pivoted quickly to get them moving again. I was licensed to practice law in 1980. In the past 40 years I have never witnessed this much change in how we deliver justice. Some of the changes may be for the better—we hope.

Hon. Mark A. Drummond (ret.) is a practicing attorney and the Executive/Judicial Director of the Civil Jury Project at the NYU School of Law. ✯

THE *SUI GENERIS* "SUPER SUS"—STEPHEN D. SUSMAN

BY SOFIA ADROGUÉ

Epic/Warrior/Legendary/Trailblazer & Trial Legend/ A Force of Nature/ A Towering Courtroom Giant/Visionary & Innovator/Fearless/Peerless Texas Pioneer/ Egalitarian/Entrepreneur/Charismatic & Fun/Larger than Life with a Heart of Gold/Hope Diamond/ Not a Man of Half-measures/ Outsized Influence/Advocate of High Risk/High Reward/ Susman Godfrey's Founding Partner/Big Daddy/Not "Mr. Susman"/ Institution-builder/not a cult leader/ Professor/Friend/ Son/Brother/Super Sus/Father/Grandfather/ Papa/ Champion of the Civil Jury System

Editor's Note:
We already had invited Judge Drummond to contribute an article to this symposium offering his perspective about how the pandemic may catalyze us to think harder about remote jury selection when we learned of Steve Susman's untimely passing. Since Judge Drummond's perspective is informed by his role as the Executive and Judicial Director of the Civil Jury Project at NYU School of Law, an academic center that Steve was instrumental in founding, we asked Sofia Adrogué, who is a member of our editorial board and the person who connected us to Judge Drummond, to share some of her personal and professional recollections of Steve.

COGNIZANT THAT THERE ARE NO WORDS TO DESCRIBE the loss for many, indulge me as I sought to capture above Steve's irrepressible spirit via an amalgamation of descriptive words for truly a *sui generis* fellow lawyer, friend, mentor, and sponsor. His legacy and imprimatur are palpable and everlasting.

I had the luxury of meeting Steve 30 years ago; working for and learning from him at Susman Godfrey; trying a case with him in federal court in Puerto Rico; preparing with him as he participated in the Trial of Hamlet in federal court; and, most impactfully and unforgettably, benefitting from his encouragement and guidance in my role as Editor of ALM's TEXAS BUSINESS LITIGATION with my co-editor, Caroline Baker. (Rightfully, our 2021 5th Edition will be dedicated to him and his success in innovation of commercial litigation trial work and the reinvigoration of the vanishing jury trial.) Litigation in the twenty-first century remains the subject of vigorous substantive debate and commensurate study. It is undisputed that the jury trial faces extinction, with numbers in a precipitous decline across state and federal courts nationwide.

Indeed, in 2019, in Texas state civil courts, according to the State Bar of Texas Office of Court Administration Aug. 2020 report, *Jury Trials During the COVID-19 Pandemic*, only 0.11% of the civil cases were disposed of by jury trial. In paradigmatic Susman form, he dedicated countless hours and commensurate resources to address why jury trials are vanishing. He sought to give lawyers, the judiciary, and, indeed, society, a roadmap to keep jury trials from becoming extinct. He envisioned, founded, led, and funded the Civil Jury Project at NYU School of Law—a "collaborative effort between law students, lawyers, judges and political bodies across the nation" to "examine the factors leading to decline in civil jury trials and educate the legal community and the public on methods to revitalizing the dying system."

To date, the Civil Jury Project has engaged over 400 Judicial Advisors, 73 Academic Advisors and 43 Jury Consultants, who are focusing on educating the public on their right to a jury trial, informing the public that jury trials are declining at an alarming rate, and advocating for the utilization of tools to reduce the costs of trial such as time limits and jury innovations, including juror questions, early instructions to the jury, as well as interim arguments.

To address these unchartered, unprecedented times, the April 2020 Newsletter of his brainchild and legacy, the Civil Jury Project at NYU School of Law, opened with a few keen and prophetic observations by Susman: "The Covid-19 pandemic has accelerated courts' turning to technology in order to deliver justice." "It will have far reaching effects for all of us—and for our justice system." In the last newsletter he would pen, Susman also appropriately remarked that the list of considerations of "moving from the physical courtroom to a courtroom in cyberspace is long," including the following insightful Susmanesque inquiries: (i) constitutional concerns

of having jurors deliberate remotely; (ii) whether costs of an already burdened system will decrease or increase; and (iii) could a virtual trial deliver the same quality of justice.

Susman vehemently believed that juries reflect the views of the community and are sacrosanct. To that end, he invited his Civil Jury Project team to survey and analyze how a virtual trial would work. As a result, the academic center that Steve guided so skillfully has turned its focus to developing best practices for the potentiality of virtual jury trials.

Steve elevated and refined the much-debated roadmap for reform of our modern civil justice system. As his colleagues so aptly noted in the August Civil Jury Project Newsletter, "He crisscrossed the country at his own expense to talk to trial attorneys, trial judges and most importantly, jurors." Advancing jury innovations, Steve "was a champion of and a cheerleader . . . `the purest, fairest, most inclusive and robust expression of direct democracy that the world has ever seen.'"

Certainly, a virtual trial for Steve, Judge Drummond, and the NYU Civil Jury Project is not the same as actually being there—but "it is the next best thing." Characterizing it as a "Swiss Army Knife," Judge Drummond has posited in the October Civil Jury Project Newsletter that "[u]ntil COVID-19 is defeated, shouldn't we offer as many options as possible for access to justice?" Undoubtedly, Susman created his legacy being there. Regardless of how the bar and the judiciary tackle the challenges of this new world, it is clear that proactive communication and consistent reassurance will be necessary to maintain public confidence and maximize participation in the jury process. Preservation is the key.

Here's to authentic, empathetic, realistic, belligerent optimism as we seek to navigate, innovate, and litigate in this "new normal" by emulating Steve's *joie de vivre*. We have no other option. Speaking about Susman Godfrey's democratic structure and culture, as well as his professional legacy, Steve's own words (recounted in a Law360 July 2020 article) express magnificently what we all know and revere about him:

> "I want them to say: 'He was very fair. He was very honest. He loved to play. . . And he was very proud of doing things the right way. The moral way. The ethical way.' And I have been. I have been."

Here's to our "Super Sus"—our *sui generis* SDS. May he rest in peace.

SDS—Veni, *Vidi, Vici!*

Sofia Adrogué, Partner, Diamond McCarthy, LLP; Editor, TEXAS BUSINESS LITIGATION (ALM 5th Edition forthcoming). ★

STATE BAR LITIGATION SECTION REPORT
THE ADVOCATE

EVIDENCE & PROCEDURE UPDATES

UPDATES ON CASE LAW pertaining to procedure and evidence as compiled by Luther H. Soules III, of Soules & Wallace and Robinson C. Ramsey, of Langley & Banack, Inc.

LITIGATING THROUGH CRISIS

EVIDENCE UPDATE

BY LUTHER H. SOULES III & ROBINSON C. RAMSEY

RULE 606: JUROR MISCONDUCT

Wichman v. Kelsey-Seybold Med. Group, PLLC, No. 14-18-00641-CV, 2020 WL 4359734, at *3, 4 (Tex. App.—Houston [14th Dist.] July 30, 2020, no pet. h.) (mem. op.) Texas Rule of Civil Procedure 327(b) and Rule of Evidence 606(b) both provide that "jurors may not testify about statements or matters occurring during jury deliberations, but they may testify about an outside influence improperly brought to bear on a juror."

"[J]urors' discussion of improper matters during deliberations does not constitute the bringing to bear of an outside influence on a juror; thus, Rule 327(b) and Rule 606(b) prohibit a trial court from considering a juror's testimony as to such discussions."

In this medical malpractice case, "two jurors testified as to alleged juror misconduct by Juror 10—the alleged sharing with other jurors about her father's diverticulosis and his lack of symptoms until he woke up one day in excruciating pain." Both of the testifying jurors said that "Juror 10 told the other jurors that what happened to [the plaintiff] was 'going to happen no matter what.'" This testimony reflected that "during deliberations Juror 10 shared her personal experiences and inferences or conclusions about [the plaintiff]'s medical condition based on these experiences."

"[A]ll of this testimony concerned statements or matters occurring during jury deliberations, and none of this testimony addressed an outside influence brought to bear on a juror." The plaintiff "did not submit any evidence from a source other than a juror." Therefore, the trial court "did not err in determining that the testimony from the two jurors did not address an outside influence and should not be considered, and the trial court did not err in denying [the plaintiff]'s motion for new trial."

RULE 702: EXPERT OPINION

Witt v. Michelin North America, Inc., No. 02-18-00390-CV, 2020 WL 5415228, at *1, 2-4 (Tex. App.—Fort Worth Sept. 10, 2020, no pet. h.) (mem. op.) "Qualified experts may offer opinion testimony if that testimony is both relevant and based on a reliable foundation. To be relevant, the proposed testimony must be sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute. Expert testimony is reliable if it meets the *Robinson* factors, or if the trial court can otherwise assess its reliability."

"The six non-exclusive *Robinson* factors are (1) the extent to which the theory has been or can be tested; (2) the extent to which the technique relies upon the subjective interpretation of the expert ... ; (3) whether the theory has been subjected to peer review and/or publication; (4) the technique's potential rate of error; (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and (6) the non-judicial uses which have been made of the theory or technique."

"Expert testimony is unreliable if there is too great an analytical gap between the data on which the expert relies and the opinion offered. Whether an analytical gap exists is largely determined by comparing the facts the expert relied on, the facts in the record, and the expert's ultimate opinion. …To gauge reliability, [courts] evaluate the methods, analysis, and principles relied upon in reaching the opinion."

In this fatal traffic accident case, the appellants challenged the order excluding the testimony of their expert witness "as to two alleged defects in the tires: belt irregularities and liner pattern marks." The trial court determined that the expert "had not demonstrated a reliable foundation for these theories."

The appellee did not challenge the expert's qualifications, nor did it dispute his "general method of evaluating the case." It objected only to "the reliability of the analysis and principles … advanced in support of his defect theories."

"In the absence of any peer-reviewed support," the expert testified that he "ultimately rested his opinion on his training and experience in the industry." But "in very few cases will the evidence be such that the trial court's reliability determination can properly be based only on the experience of a qualified expert."

Furthermore, although the expert argued that "manufacturing

variance may contribute to tire failure, he agreed that all of the irregularities he found in the tire were within [the appellee]'s specifications." To constitute a manufacturing defect, "the product must deviate from its specifications or planned output in a manner that renders the product unreasonably dangerous." Therefore, "[t]o some degree," the expert's "own testimony created an analytical gap between the undisputed realities of the case and his opinion that these irregularities constituted a defect."

The court of appeals determined this was "not one of those rare cases where the expert's experience, in itself, paves a path to the admission of his theory." Instead, because the "belt-irregularity theory appeared to go against the majority of the established literature and testing" and because the expert "seemingly agreed that there was no manufacturing defect insofar as the tire irregularities remained within specifications," the court of appeals concluded that the trial court "did not abuse its discretion by excluding this testimony."

RULE 901: AUTHENTICATION

Fleming v. Wilson, __ S.W.3d __, No. 19-0230, 2020 WL 5985187, at *2–3 (Tex. Oct. 9, 2020) "Rules 901 and 902 of the Texas Rules of Evidence govern how a proponent may authenticate or identify evidence. Rule 901 requires the proponent to 'produce evidence sufficient to support a finding that the item is what the proponent claims it is' and then provides a non-exclusive list of examples of such evidence. Rule 902 provides an exclusive list of certain items that are 'self-authenticating' and 'require no extrinsic evidence of authenticity in order to be admitted.'"

Under Rule 902 domestic public documents that are "sealed and signed" or "signed and certified" are "automatically authenticated." Because the domestic public documents here were not "sealed or certified," they were not "self-authenticating." Therefore, under Rule 901, the movant in this summary-judgment case "had to produce evidence sufficient to support a finding that they were what [he] claimed they were."

The court of appeals held that Rule 901 required the movant to produce "extrinsic evidence, outside of and in addition to the documents themselves." The Supreme Court of Texas, however, disagreed: "Rule 901 provides a non-exclusive list of examples of the types of evidence a proponent can use to authenticate an item, such as the testimony of a witness with knowledge of the item," the Court explained. "Some of these examples indicate the need for extrinsic evidence … Other examples, however, do not require or contemplate the need for extrinsic evidence." For instance, "subsection (b)(7) recognizes that public records may be authenticated with evidence that they were 'filed in a public office as authorized by law' or are 'from the office where items of this kind are kept' without suggesting that such evidence cannot be found on or within the item itself."

"As the court of appeals accurately observed, rule 902 states that self-authenticating items 'require no extrinsic evidence of authenticity in order to be admitted.' But that does not mean that rule 901 requires extrinsic evidence. Unlike rule 901;s non-exclusive list, rule 902 provides an exclusive list of items that courts must always accept as authentic, but it does not preclude courts from accepting other items that demonstrate on their face that they are what the proponent claims they are."

"Rule 901's route to authentication is less open-and-shut. It requires the trial court to evaluate the evidence that supports the item's authenticity—whether found within the item itself or provided by an extrinsic source. If the proponent produces only the item, but the item itself constitutes or contains evidence that it is what the proponent claims it is, the court may find it to be authentic."

Here, the summary-judgment movant "produced uncertified copies of [a] jury verdict and final judgment, which the trial court judge had himself received and signed." These documents "bore a diagonal watermark from the district clerk's office, a stamp and signature noting when they were filed in the clerk's office, and the trial judge's own signature." The nonmovants "never suggested that the documents were faked, forged, or altered, but instead complained only that they were not certified copies." Therefore, "[c]onsidering the documents' appearance, contents, substance, … [and] other distinctive characteristics, taken together with all the circumstances," the court of appeals determined that the trial court did not abuse its discretion "by accepting the documents as authentic."

The trial court "could permissibly have concluded that the documents were authentic under rule 901(b)(7), which recognizes that public documents may be authenticated by evidence that they were 'recorded or filed in a public office as authorized by law' or are ;from the office where items of this kind are kept.'" Although "a certified copy of a public record would automatically be self-authenticating, an uncertified copy of a public record could itself contain sufficient evidence that it was filed or kept in a public office." Here, "the watermark and file stamp from the district clerk's office

on the documents qualify as sufficient evidence, so the trial court did not abuse its discretion by finding them authentic."

The nonmovants argued, however, that "even if the documents were authentic, they still could not qualify as competent summary-judgment evidence unless they were sworn or certified," citing Rule 166a(f), "which requires parties to attach or serve '[s]worn or certified copies of all papers or parts thereof referred to in an affidavit' submitted to support or oppose a summary-judgment motion." But the movant "did not provide copies of the … verdict and judgment as affidavit attachments." Instead, "he submitted them as copies of public records, which rule 166a(c) permits courts to rely on if they are 'authenticated or certified.'" If, as the court of appeals held, "the trial court acted within its discretion by finding the documents authentic, rule 166a(c) permitted the court to consider the documents in deciding the summary-judgment motion."

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PROCEDURE UPDATE

BY LUTHER H. SOULES III & ROBINSON C. RAMSEY

CITATION

In the Interest of A.C.S., No. 09-19-00153-CV, 2020 WL 4006111, at *2 (Tex. App.—Beaumont July 16, 2020, no pet. h.) (mem. op.) "Strict compliance with the rules governing service of citation is mandatory if a default judgment is to withstand an attack on appeal. The failure to affirmatively demonstrate strict compliance with the rules of civil procedure renders the attempted service of process invalid."

Texas Rule of Civil Procedure 103 provides that "citation and other notices and papers issued by the court may be served anywhere by, among others, any person certified under order of the Supreme Court." Rule 107 requires that "the return of service include the name and signature of the person who served the citation, and if that person was a process server certified under order of the Supreme Court, his identification number and the expiration date of the certificate must be disclosed in the return." A trial court shall not grant a default judgment "until proof of service as provided by Rule 107 has been on file with the clerk of the court for ten days, excluding the day of filing and the day of judgment."

In this restricted appeal, because the affidavit of service included the server's "identification number and the expiration date of his certificate as required by Rule 107," the citation and its return "strictly complied with the rules of civil procedure." Therefore, the appellant "failed to show that error [was] apparent on the face of the record."

CERTIFICATE OF SERVICE

Johnson v. Harris County, No. 14-18-00784-CV, 2020 WL 5792027, at *2–3 (Tex. App.—Houston [14th Dist.] Sep. 29, 2020, no pet. h.) (mem. op.) "A document filed electronically under Texas Rule of Civil Procedure 21 must be served electronically through the electronic filing manager if the email address of the party or attorney to be served is on file with the electronic filing manager," except for pro se litigants, who "are not required to participate in the electronic service program."

"If a document is not filed electronically or if a document is filed electronically and the email address of the party to be served is not on file with the electronic filing manager, the document may be served by fax, by email, or by such other manner as the court in its discretion may direct."

Here, the rules required the pro se appellant to "designate an email address on his pleadings," which he did. "The certificate of service show[ed] that the [appellee] served [the appellant] by email to the email address he provided in his pleadings," which the appellant [did] not dispute. Instead, he claimed that "he told opposing counsel that communications should be sent to another email address." The record, however, contained "no evidence of this communication," nor did it show that the appellant provided a different email address to the trial court."

"The certificate of service in the summary-judgment motion and the notice of submission of the motion raised a presumption that the [appellee] served each document and that [the appellant] received each document. To rebut the presumption of receipt, [the appellant] had the burden to present evidence showing that he did not receive the summary-judgment motion and the notice of submission. In the absence of any proof to the contrary, the presumption has the force of a rule of law.

Because the appellant "submitted no evidence to the trial court in support of his motion for new trial, he failed to rebut the presumption of proper service, receipt, and notice." Therefore, "[i]n the absence of any evidence rebutting these presumptions," the court of appeals concluded "the trial court did not err in denying [the appellant]'s motion for new trial."

Stettner v. Lewis & Maese Auction, LLC, __ S.W.3d __, No. 14-18-00928-CV, 2020 WL 5796493, at *1–3 (Tex. App.—Houston [14th Dist.] Sep. 29, 2020, no pet. h.) Although the appellant complained in his motion for new trial that the appellee "did not give him notice of the filing of its summary-judgment motions or the notices of submission for the motions, the law presumes that a trial court will grant summary judgment only after proper notice to the parties."

Therefore, the appellant "had the burden to affirmatively show a lack of notice by submitting evidence to the trial court rebutting this presumption."

"A document filed electronically under Texas Rule of Civil Procedure 21 must be served electronically through the electronic filing manager if the email address of the party or attorney to be served is on file with the electronic filing manager. Electronic service is complete on transmission of the document to the serving party's electronic filing service provider. The electronic filing manager will send confirmation of service to the serving party. A certificate of service or an affidavit showing service of a notice constitutes prima facie evidence of the fact of service," however, this prima facie proof "does not preclude any party from offering proof that the document was not received."

The appellant urged that the certificates of service "[did] not properly show the method of service because in each, counsel for [the appellee] state[d] that [the appellant]'s attorney was served by facsimile or by email," yet the appellant's attorney "was served only electronically through the electronic filing manager."

"Presuming, without deciding, that the references to service by email do not cover service through the electronic filing manager, and that the certificates incorrectly describe the method of service," the court of appeals held that Rule 21a "does not require that the certificate of service specify the method of service, and a certificate of service raises a presumption of service and receipt, even if the certificate contains an incorrect statement as to the method of service." Therefore, the certificates of service "raised a presumption that [the appellee] served each document and that [the appellant]'s attorney received each document."

"To rebut the presumption of receipt, [the appellant] had the burden to present evidence showing that [his] attorney did not receive the summary-judgment motions and the notices of submission. In the absence of any proof to the contrary, the presumption has the force of a rule of law."

"In his affidavit filed in support of the Motion for New Trial, [the appellant]'s attorney conceded that he received the June 29 Email that forwarded to him [the appellee]'s summary-judgment motions and notice of the submission of these motions, but he asserted that he did not see or open the email until after the trial court granted the summary-judgment motions. [He] testified that he first opened the June 29 Email on July 30, 2018. [His] month-long delay in opening the June 29 Email does not show that [he] did not receive the June 29 Email on June 29, 2018." Therefore, the appellant's attorney could not "shift the blame for his delay in opening the June 29 Email … and his failure to open the June 29 Email promptly does not show that he did not receive notice of [the] summary-judgment motions or notice of the submission of these motions." Furthermore, the law "imputes to [the appellant] all notice his attorney received during the existence of their attorney/client relationship."

The appellant did not dispute that his attorney received the June 29 email, which gave notice of the summary-judgment motions and that they "would be submitted to the trial court for a ruling on July 23, 2018," nor did he claim his attorney did not receive the June 29 email on June 29. Instead, he argued that his attorney "did not have actual notice of the summary-judgment motions and their submission until after the trial court granted the motions." But his attorney's "month-long delay in opening the June 29 Email does not mean that he did not receive the June 29 Email giving notice of the motions and their submission."

"In the absence of any evidence rebutting these presumptions, the trial court did not err in denying the part of the Motion for New Trial in which [the appellant] sought a new trial on the ground that he did not receive notice of [the] summary-judgment motions or their submission."

Langford v. Quality Event Flooring Sys., No. 09-18-00389-CV, 2020 WL 4006112, at *2–3 (Tex. App.—Beaumont July 16, 2020, no pet. h.) (mem. op.) Texas Rule of Civil Procedure 21a provides that "court papers served by certified mail must be sent by certified or registered mail, to the party's last known address." Service by mail is "complete upon deposit of the paper, enclosed in a postpaid, properly addressed wrapper, in a post office of official depository," and a certificate of service "is prima facie evidence of service."

Here, the appellee "attached a certificate of service with its First Amended Original Petition providing prima facie evidence of Rule 21a service," and the appellant "did not present any evidence that she did not receive the First Amended Original Petition under the allowed means of service under Rule 21a other than to assert that she did not receive personal service of it with citation."

Even though a certificate of service "is prima facie evidence of service," Rule 21a(e) provides: "[n]othing herein shall preclude any party from offering proof that the document was not received, or, if service was by mail, that the document

was not received within three days from the date that it was deposited in the mail...."

Although the appellee did not to provide "the means of service to [the appellant] in its certificate of service," Rule 21a "does not require that a certificate of service detail the method of service used." Furthermore, the appellant "failed to provide the Court with any evidence that she did not receive the amended petition after [the appellant] provided prima facie evidence of Rule 21a service." Therefore, the trial court "did not err by granting the default judgment."

SUGGESTION OF DEATH

Kim v. Estate of Kim, No. 02-19-00228-CV, 2020 WL 5047896, at *4–5, 6 (Tex. App.—Fort Worth Aug. 27, 2020, no pet. h.) (mem. op.) "A suggestion of death of a defendant notifies a trial court that the party has died. The legal consequence of that notice is a jurisdictional defect—the deceased party is beyond the power of the trial court[,] and the case cannot proceed until jurisdiction is acquired over the legal representative of the deceased by service of scire facias."

"Texas Rule of Civil Procedure 152 provides the mechanism for bringing the deceased's legal representative into the suit: Where the defendant shall die, upon the suggestion of death being entered of record in open court, or upon petition of the plaintiff, the clerk shall issue a scire facias for the administrator or executor or heir requiring him to appear and defend the suit and upon the return of such service, the suit shall proceed against such administrator or executor or heir."

"A scire facias issued under Rule 152 does not begin a new action, but rather is a process in the nature of an ordinary citation to an action previously instituted. The legal representative substituted as defendant in the action stands in the shoes of the deceased defendant, and as such, if a deceased defendant had filed an answer in the case, that answer inures to the benefit of the substituted defendant, and the substituted defendant need not file another. Because an answer is on file, a trial court may not grant a no-answer default judgment, even if the substituted defendant does not file a separate answer or otherwise make an appearance."

The trial court here incorrectly concluded that Rule 152 "authorizes a no-answer default judgment on the basis that [a] [s]ubstituted [d]efendant had not made an appearance of some sort." Rule 152 "does not mention default judgments, and under long-established law, the trial court could not properly grant a no-answer default judgment." Although the trial court "characterized the judgment rendered as a no-answer default judgment, because an answer was on file, the trial court rendered what [was] in effect a post-answer default judgment."

"Judgment after a post-answer default cannot be entered on the pleadings, but, rather, a plaintiff must offer evidence and prove his case as in a judgment on trial, and [b]efore entering a post-answer default judgment, the trial court must hold a hearing on the plaintiff's evidence, and the defendant must be given notice of the hearing. A party that has filed an answer is entitled to notice of the trial setting as a matter of due process under the Fourteenth Amendment to the United States Constitution."

Here, the substituted defendant "had no notice before the trial court granted the post-answer default judgment, and the default judgment therefore should not have been granted." A legal representative "substituted under Rule 152 for a deceased defendant stands in the shoes of the deceased. Thus, if the deceased defendant filed an answer before his or her death, the plaintiff is not entitled to a no-answer default judgment."

Rule 152 "does not prohibit the taking of a post-answer default judgment, but the law requires notice and an opportunity to be heard before the trial court may grant a post-answer default judgment." Because "[n]o notice or hearing was provided here, the granting of the default judgment was improper, and the trial court abused its discretion by denying [the] [s]ubstituted [d]efendant's motion for new trial."

SUMMARY JUDGMENT

Murray v. Hondo Nat'l Bank, No. 04-19-00408-CV, 2020 WL 5646931, at *2 (Tex. App.—San Antonio Sept. 23, 2020, no pet. h.) (mem. op.) "Under well-settled legal precedent, a respondent to a no-evidence summary judgment motion must specifically identify in his response the supporting proof he seeks to have considered by the trial court. General references to the summary judgment record are inadequate to meet the [respondent's] evidentiary burden."

"Attaching entire documents and depositions [ ] to a response and referencing them only generally does not relieve the party of pointing out to the trial court where in the documents the issues set forth in the [ ] response are raised. When a summary judgment respondent fails to direct the [ ] court to specific summary judgment evidence, a fact issue cannot be raised sufficient to defeat summary judgment."

The no-evidence motion for summary judgment motion here "challenged specific elements of [the respondent]'s affirmative

defenses and counterclaims." The response, however, "did not specifically identify the proof [the respondent] sought to have considered by the trial court, nor did he point to the evidence that supported each challenged element of his affirmative defenses and his counterclaim." Instead, he "generally argued that he submitted enough evidence to support his claims and affirmative defenses which would require the court to deny" the traditional and no-evidence motions for summary judgment.

The response "listed the evidence attached to it, then broadly asserted that this evidence was sufficient to support the elements of his respective causes of action and affirmative defenses." Because the response did not "specifically identify any supporting proof," it "failed to present evidence raising a genuine issue of material fact as to the challenged elements." Therefore, the trial court "properly granted the … no-evidence summary judgment motion."

Raym v. Tupelo Management, LLC, __ S.W.3d __, No. 02-19-00477-CV, 2020 WL 3865273, at *5–6, 8 (Tex. App.—Fort Worth July 9, 2020, no pet. h.) "A trial court must render a summary judgment on the pleadings on file at the time of the hearing. Where there is no live pleading urging a cause of action, there can be no summary judgment. A trial court cannot grant summary judgment on grounds not presented in the motion. Similarly, a trial court's judgment must conform to the pleadings and the nature of the case proved. A court's jurisdiction to render judgment is invoked by pleadings, and a judgment unsupported by pleadings is void. A party may not be granted relief in the absence of pleadings to support that relief."

"In its first amended petition, [the plaintiff] alleged claims for breach of contract; imposition of a purchase money resulting trust or, alternatively, a constructive trust; declaratory judgment; foreclosure of its constitutional lien; and trespass to try title. In its motion for summary judgment, [the plaintiff] moved for summary judgment on all of its claims except its trespass-to-try-title claim. The trial court initially granted summary judgment on all of [these] claims. But [the plaintiff] later nonsuited all of its causes of action except for its request for a declaratory judgment imposing a purchase money resulting trust on the [p]roperty."

After granting the plaintiff's motion for summary judgment, the trial court "signed a modified order granting a nonsuit without prejudice of [the plaintiff]'s claims for breach of contract, foreclosure of the constitutional mechanic's and materialmen's lien, and trespass to try title." After the nonsuit, the plaintiff's motion to modify the judgment "made clear that [the plaintiff] intended to limit its claim for relief to a declaratory judgment imposing a purchase money resulting trust on the [p]roperty." But the "modified" order "granted relief beyond this limited declaratory relief." Therefore, the issue on appeal was "whether the summary judgment can be affirmed on the basis of this declaratory relief alone."

"[A]fter the nonsuit, [the plaintiff]'s pleadings and motion for judgment were limited to a request for a declaration imposing a purchase money resulting trust and for attorney's fees. While the uncontradicted summary judgment evidence support[ed] the existence of a purchase money resulting trust for the $21,530.78 paid for the [p]roperty, the judgment improperly ordered the imposition of a purchase money resulting trust that included those amounts paid for renovations, still owed to a contractor, and due for 'construction management.' In addition, the judgment improperly ordered transfer of title, injunctive relief, and attorney's fees. Because these parts of the judgment were not supported by the pleadings, evidence, or law, they [could] not stand."

ORAL DEPOSITIONS

In re Berrenberg, No. 08-20-00104-CV, ___ S.W.3d ___, 2020 WL 4218795, at *4–5 (Tex. App.—El Paso July 23, 2020, orig. proceeding) "A notice for an oral deposition must state a reasonable time and place for the deposition. The place may be in (1) the county of the witness's residence; (2) the county where the witness is employed or regularly transacts business in person; (3) the county of suit if the witness is a party or designated as a party representative under Rule 199.2(b)(1); (4) the county where the witness was served with the subpoena, or within 150 miles of the place of service, if the witness is not a Texas resident or is a transient person; or (5) subject to the foregoing, at any other convenient place directed by the court in which the cause is pending. A party or witness may object to the time and place designated for an oral deposition by motion for protective order or by motion to quash the notice of deposition."

"A trial court may limit discovery methods permitted by the rules so long as it determines either that: (a) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or (b) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."

"A movant seeking protection regarding the time or place of discovery must state a reasonable time and place for discovery with which it will comply. To protect the movant, the court may make any order in the interest of justice, including an order that the discovery not be undertaken at the time or place specified."

Here, the order cancelling the deposition "was not an abuse of discretion given the unfolding and uncertain situation with the COVID-19 pandemic and given that at the time the trial court's written order came down, the Texas Supreme Court's First Emergency Order was in effect, which provided trial courts with extra leeway in handling procedural matters in light of impending travel restrictions and shelter-in-place orders."

However, "the portion of the order requiring any future deposition of Real Party in Interest to take place in Fort Worth, at whatever point the future deposition is later scheduled" was an abuse of discretion, because: (1) "where a witness is a party, the Rules of Civil Procedure expressly provide that the place of a deposition may be the county of suit"; and (2) there was "insufficient evidence to support a finding of undue hardship or unnecessary expense for the deposition of Real Party in Interest to take place outside of the county of suit."

"A trial court cannot exercise its discretion in the absence of evidence. Because the arguments of counsel and the pleadings were unsupported by actual affirmative evidence in the record, the trial court could not make a determination that Real Party in Interest would suffer undue hardship or unnecessary expense, and without a predicate finding of such conditions supported by more than a scintilla of affirmative evidence, it was an abuse of discretion to order the deposition to proceed in Fort Worth."

MENTAL EXAMINATIONS

In re Estabrook, No. 10-20-00175-CV, 2020 WL 6192923, at *2, 4-5 (Tex. App.—Waco Oct. 21, 2020, orig. proceeding) (mem. op.) "Medical and mental exams are regulated under Texas Rule of Civil Procedure 204. Under Rule 204.1, a party may, no later than thirty days before the end of the applicable discovery period, move for an order compelling another party to submit to a physical or mental examination by a qualified physician or psychologist."

"The party seeking the examination must show both (1) good cause, and (2) that the mental or physical condition of a party is in controversy or the party responding to the motion has designated a psychologist as a testifying expert or has disclosed a psychologist's records for possible use at trial. These requirements are not satisfied by conclusory allegations in the movant's pleadings or by mere relevance to the case."

"Texas Rule of Civil Procedure 204.1(d) requires the trial court to specify the time, place, manner, conditions, and scope of the mental examination. Texas courts have held that the failure to place any limitations on the scope of the mental examination, especially to the mental conditions specifically in controversy in the matter, constitutes an abuse of discretion."

Because the trial court's order here "did not limit the neuropsychological examination to the mental conditions in controversy," the court of appeals concluded that the trial court "abused its discretion to the extent that it ordered the mental examination without proper limitations …"

DEFAULT JUDGMENT

Hildebrand v. Hildebrand, No. 01-18-00933-CV, 2020 WL 4118023, at *4, 5 (Tex. App.—Houston [1st Dist.] July 21, 2020, no pet. h.) (mem. op.) "A post-answer default is one rendered when the defendant has filed an answer, but fails to appear at trial. When a party has filed an answer, he has appeared and placed 'in issue' the matters raised in the plaintiff's petition, and the case becomes 'contested.' The rules require trial courts to set contested cases on written request of any party ... with reasonable notice of not less than forty-five days to the parties of a first setting for trial."

"A defendant who has answered in a lawsuit has a constitutional due process right to receive notice of the final hearing. A trial court's failure to comply with notice rules in a contested case deprives the defendant of his constitutional right to be present at the hearing, to voice objections in an appropriate manner, and results in a violation of fundamental due process." Therefore, a plaintiff "may not take a post-answer default judgment against a defendant on less than 45 days' notice of the final hearing; otherwise the post-answer default judgment is ineffectual and should be set aside."

In this divorce case, the husband "filed an answer denying the allegations in [the] divorce petition, which placed in issue and contested the matters that [the wife] raised in her petition." Therefore, the husband "had a constitutional due process right to receive adequate notice of the final hearing." Because he received "less than 45 days' notice of the final hearing," he was "deprived him of his due process right to receive notice." As a result, "the post-answer default divorce decree [was] ineffectual for lack of adequate notice."

REOPENING EVIDENCE

Abante & Jopio LLC v. UR Properties, L.P., No, 14-18-00792-CV, 2020 WL 4524674, at *4 (Tex. App.—Houston [14th Dist.] Aug. 6, 2020, no pet. h.) (mem. op.) Texas Rule of Civil Procedure 270 provides that a trial court "may permit additional evidence to be offered at any time when it clearly appears necessary to the administration of justice." This rule "allows, but does not require, a trial court to permit additional evidence."

In deciding whether to grant or deny a motion to reopen the evidence, the trial court "may consider a number of factors, including (1) the diligence of a party in presenting its evidence, (2) whether reopening the record will cause undue delay, (3) whether granting the motion to reopen the evidence will do an injustice, and (4) whether the evidence to be introduced is decisive." A trial court "does not abuse its discretion by refusing to reopen a case after evidence is closed if the party seeking to reopen has not shown diligence in attempting to produce the evidence in a timely fashion."

Here, the appellants "requested attorney's fees in their pleading, but failed to put on evidence of their fees in the trial court. By filing their motion for fees after the evidence was closed and the … order was signed, [they] asked the trial court to reopen the evidence to allow them to put on evidence of reasonable attorney's fees." The trial court, however, denied that motion, and the court of appeals noted that the appellants "cite no authority, nor have we found any, in which an appellate court held that the trial court abused its discretion in denying a motion to reopen evidence to put on evidence of attorney's fees." Therefore, it "decline[d] to extend abuse of discretion to apply in cases where the trial court chose not to reopen evidence two months after trial concluded."

FINDINGS OF FACT

S.L. v. S.L., No. 02-19-00017-CV, 2020 WL 4360448, at *5, 6 (Tex. App.—Fort Worth July 30, 2020, no pet. h.) (mem. op.) "After a bench trial, a party may request that the trial court issue separate written findings of fact and conclusions of law. The party must file its request within twenty days after the signing of the judgment. If the party files its request for findings of fact and conclusions of law before the trial court signs the judgment, the request shall be deemed to have been filed on the date of but subsequent to the time the judgment was signed."

"If the trial court does not file its findings of fact and conclusions of law within twenty days after the party's timely request, then the party must file a 'Notice of Past Due Findings of Fact and Conclusions of Law' within thirty days of its original request. Otherwise, the party waives its appellate complaint of the trial court's failure to file findings of fact and conclusions of law."

In this family law case, although the mother timely requested findings of fact and conclusions of law under Rule 296, she did not timely file her notice of past due findings and conclusions under Rule 297. Therefore, she "waived error as to the absence of findings of fact and conclusions of law under Rule 296."

However, Texas Family Code section 154.130 provides: "(a) Without regard to Rules 296 through 299, Texas Rules of Civil Procedure, in rendering an order of child support, the court shall make the findings required by Subsection (b) if … a party files a written request with the court before the final order is signed, but not later than 20 days after the date of rendition of the order" or if a party "makes an oral request in open court during the hearing …"

Here, "two days after the trial court's rendition by letter," the mother "timely filed a written request for findings under Section 154.130." Therefore, "Rules of Civil Procedure 296 through 299 did not apply to this request for findings" and her "late notice of past due findings thus did not waive her complaint under Section 154.130." As a result, the trial court "erred by not making the Section 154.130(b) findings."

JURY ARGUMENT

Witt v. Michelin North America, Inc., No. 02-18-00390-CV, 2020 WL 5415228, at *7–8 (Tex. App.—Fort Worth Sept. 10, 2020, no pet. h.) (mem. op.) "Appellate complaints of improper jury argument must ordinarily be preserved by timely objection and request for an instruction to disregard, along with a ruling on the objection. Typically, a retraction of the argument or an instruction from the court can cure any probable harm, but in rare instances the probable harm cannot be cured. In such instances, the argument is incurable, and complaint about the argument may be made if preserved through a motion for new trial."

"The party claiming incurable harm must establish that, based on the record as a whole, the offensive argument was so extreme that a juror of ordinary intelligence could have been persuaded by that argument to agree to a verdict contrary to that to which he would have agreed but for such argument. The complaining party must establish that the argument by its nature and degree constituted such error that an instruction from the court or retraction of the argument could not remove its effects."

"Examples of incurable arguments may include appeals to racial prejudice; accusing the opposing party of manipulating a witness without evidence of witness tampering; comparison of opposing counsel to Nazis experimenting on the elderly; and other unsupported, extreme, and personal attacks on opposing parties and witnesses."

"But [n]ot all personally critical comments concerning opposing counsel are incurable. Indeed, less-than-galling attacks on the veracity of the other side's arguments are generally held to be curable. For example, one court held that there was no incurable jury argument when an attorney asked the jury, regarding opposing counsel, 'What kind of snake oil is he selling you?' Another court held that no incurable harm occurred when counsel accused the other side of 'fabrication' and said, '[T]hey can hide behind their lawyers, and they can hide behind their lie, but what they can't hide from is the truth.' In another case, counsel accused the other party of making up one of the key elements of its case at the behest of its attorneys, but the court nonetheless held this argument curable."

The complaint here regarding the characterization of the appellants' attorney's argument as being "dishonest as the day is long" fit in the category of "improper but curable remarks." Therefore, it "did not cause incurable harm," and the trial court "did not abuse its discretion by denying [the appellants]' motion for new trial."

JUROR MISCONDUCT

Wichman v. Kelsey-Seybold Med. Group, PLLC, No. 14-18-00641-CV, 2020 WL 4359734, at *3, 4 (Tex. App.—Houston [14th Dist.] July 30, 2020, no pet. h.) (mem. op.) Texas Rule of Civil Procedure 327(b) and Rule of Evidence 606(b) both provide that "jurors may not testify about statements or matters occurring during jury deliberations, but they may testify about an outside influence improperly brought to bear on a juror."

"[J]urors' discussion of improper matters during deliberations does not constitute the bringing to bear of an outside influence on a juror; thus, Rule 327(b) and Rule 606(b) prohibit a trial court from considering a juror's testimony as to such discussions."

In this medical malpractice case, "two jurors testified as to alleged juror misconduct by Juror 10—the alleged sharing with other jurors about her father's diverticulosis and his lack of symptoms until he woke up one day in 'excruciating pain.'" Both of the testifying jurors said that "Juror 10 told the other jurors that what happened to [the plaintiff] was 'going to happen no matter what.'" This testimony reflected that "during deliberations Juror 10 shared her personal experiences and inferences or conclusions about [the plaintiff]'s medical condition based on these experiences."

"[A]ll of this testimony concerned statements or matters occurring during jury deliberations, and none of this testimony addressed an outside influence brought to bear on a juror." The plaintiff "did not submit any evidence from a source other than a juror." Therefore the trial court "did not err in determining that the testimony from the two jurors did not address an outside influence and should not be considered, and the trial court did not err in denying [the plaintiff]'s motion for new trial."

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