By Stephen Gibson
(c) 2021

Product Liability: *A sales facilitator that provides a marketplace and distribution services to product manufacturers is not a "seller" for purposes of strict product liability unless the facilitator receives title to the goods.*

In addition to selling its own products through its online marketplace, Amazon.com provides fulfillment services to third-party sellers. These include collecting payment, filling orders, and arranging shipping for the third-party sellers' products. Under the Texas products liability statute, a "seller" is "a person . . . engaged in the business of distributing or otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption a product or any component part thereof." Tex. Civ. Prac. & Rem. Code § 82.001(3). A "seller" who is not also the manufacturer is ordinarily not liable for harm the product causes unless the seller is insolvent or not "subject to the jurisdiction of the court." Tex. Civ. Prac. & Rem. Code § 82.003(a)(7).

In *Amazon.com v. McMillan*, the manufacturer sold its product through Amazon's online marketplace and fulfillment service. The plaintiff sued both manufacturer and Amazon for product liability, but the federal district court determined the manufacturer was not subject to the court's *in personam* jurisdiction, leaving Amazon potentially liable if it was a "seller" under the Texas products liability statute. *Gartner v. Amazon*, 433 F. Supp. 3d 1034, 1039-40. The district court denied Amazon's take-nothing summary judgment.

In Amazon's interlocutory appeal from that ruling, the Fifth Circuit certified the following question:

> Under Texas products-liability law, is Amazon a "seller" of third-party products sold on Amazon's website when Amazon does not hold title to the product but controls the process of the transaction and delivery through Amazon's Fulfillment by Amazon program?

1. The Majority's Reasoning

According to Justice Busby's opinion for a 5:2[1] majority, Amazon is not a "seller" for purposes of Chapter 82 product liability because it never acquired title to the product. The statutory definition of "seller," however, says nothing about title. Instead, seller status depends on "distributing or otherwise placing" a product in the stream of commerce. Tex. Civ. Prac. & Rem. Code § 82.001(3).

a. The Legislature intended to import common law requirements for "seller" status in the § 82.001(3) definition.

The majority reasoned that the addition of "otherwise placing" to the statutory "seller" definition meant the Legislature intended to import the common law meaning of that phrase in *all* transactions, not just sales. Thus, non-sale transactions include commercial actors such as "lessors, bailors and those who provide products . . . as a means for promoting . . . [the product's] use or consumption . . . or some other commercial activity." Thus, an actor can be a "seller" for purposes of common law strict products liability without *providing* the product through a conventional sale.

b. Seller status includes sales and non-sale transactions, but at common law both required the "seller" to have title to the product.

At common law, however, one could not be liable as a "seller" unless the actor "at a minimum, … *hold*[s] *or relinquish*[es] title in a product's distribution chain." (Emphasis added.) The person who holds or relinquishes title to a product is a seller because that person is "in the same position as one making a sale." Based on decisions from other jurisdictions, the majority concluded "seller" status under chapter 82 turned on whether the product provider held title. If not, the person who might otherwise provide the product was not a "seller" for statutory products liability. However, making seller status depend on having title to the product is neither universal nor necessarily consistent with the policies behind common-law strict products liability.

c. Amazon could not be a chapter 82 "seller" because it never had title to the product.

The majority was unpersuaded by the Amazon's boilerplate conditions of service that said Amazon transferred title to the purchaser on delivery to the shipper. The majority reasoned this only specified *when* title transferred. It did not specify from *whom* the title was transferred. The majority concluded "because . . . Amazon did not hold or relinquish title at any point in the [product]'s distribution chain, Amazon was not 'engaged in the business of distributing or otherwise placing' the remote into the stream of commerce." Thus, it could not be a "seller" under chapter 82, regardless of the services it provided as part of its fulfillment program.

2. The Dissent's Critique

Justice Boyd, joined by Justice Devine, dissented. They thought they "need not guess at the meaning of . . . 'seller' … because" the court was obliged to use the commonly understood meaning of statutorily undefined terms like "distributing" and "otherwise placing." They reasoned these were commonly understood as dispersing or delivering goods in an orderly manner as the goods move from manufacturers to consumers. The dissent reasoned Chapter 82's definition *broadened* the common law definition of "seller" by including anyone who "otherwise plac[es]" a product in the stream of commerce for "*any* commercial purpose." (Emphasis in original). The dissent concludes, therefore, "Amazon.com is unquestionably a seller when a customer purchases a third party's product through the Fulfillment by Amazon . . . program." They reasoned "Amazon.com does not merely transport the product on behalf of its seller, [but i]nstead, . . . completely "controls" the entire 'process of the transaction' as well as the 'delivery' of the product to the ultimate consumer."

---

[1] Justice Blacklock did not participate in this decision handed down after Justice Guzman's resignation.

The dissent welcomed the bright-line test based on the transfer of title to determine whether a person is a seller for common-law products liability, but rejects this test's application to the product liability statute. The dissent especially objected to the idea implicit in the majority's analysis that the Legislature, when it passed chapter 82, could have prophetic foreknowledge of how the courts would interpret that statute in cases decided years in the future.

3. Statutory Construction Divides the Court . . . Again

Although all the Justices claim to be textualists, the division between majority and dissent in *Amazon* reflects the ongoing differences among the Justices over exactly what textualism requires. In particular, the Justices are divided over acceptable tools for interpreting statutes. This split carried over to the interpretation of PURA discussed in a previous edition of *The Update*. Stay tuned because the court is nowhere near resolving this dispute. Even some Justices are inconsistent in their approach on this issue.[2]

Personal Jurisdiction: *When a manufacturer serves a market for a product in a State that causes injury in that State to one of its residents, the State's courts may entertain the resulting suit.*

Title to the product is essential to seller status for purposes of strict product liability, but Justice Devine's unanimous opinion in *Luciano v. SprayFoamPolymers.com* makes clear that *where* title is transferred has no bearing on minimum contacts for personal jurisdiction over a non-resident products liability defendant. In *Luciano*, Texas homeowners sued the foam insulation manufacturer for personal injuries allegedly sustained from exposure to chemicals in the foam.

A Texas-based company installed the insulation. It was manufactured in Connecticut and all orders were approved from there. The manufacturer sold the foam through an "independent contractor sales representative" over whom it denied any right of control. The manufacturer denied selling or advertising any of its products in Texas. Instead, it claimed it outsourced logistics services to Texas through a Colorado company. In this case, the "independent contractor sales representative" inspected plaintiff's home after the insulation's installation. In response to the manufacturer's special appearance, plaintiffs adduced evidence the ""independent contractor sales representative['s]" website claimed he was the manufacturer's regional sales representative, the Texas installer sold the manufacturer's product and the manufacturer used a distribution center in Grand Prairie.

The court ruled it is not enough the manufacturer might anticipate that a product placed in the stream of commerce might end up in the forum for the manufacturer to purposefully availing itself of the protections of a forum's law and thereby establish minimum contacts. Instead, "Texas courts require conduct showing 'intent . . . to serve the market in the forum State' . . . directly or indirectly." Such conduct may include advertising in the forum or controlling the distribution system that carried the product to the forum.

Here, the manufacturer contacted the Colorado logistics company to secure product storage and distribution in Texas from which its products were shipped. Its sales agent facilitated sales in Texas. Passage of title to the product outside Texas and the lack of control over the sales agent's methods had no bearing on whether the manufacturer could, consistent with due process, be subject to personal jurisdiction in Texas. Personal jurisdiction depended on whether the manufacturer targeted Texas as a market. If so, specific jurisdiction exists. But mere knowledge a product may be destined for delivery in Texas does not necessarily make Texas a targeted market. In this case, however, the totality of the manufacturer's actions to market and distribute products to Texas made its Texas contacts more than a "mere fortuity" based on where plaintiffs resided.

The court then examined whether plaintiff's suit was sufficiently related to those contacts to empower a Texas court to entertain it. The issue was whether there must be a "strict" causal connection between the litigation and the defendant's Texas activity. The court relied on the recently-decided *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021), to reject a requirement the litigation must result from the defendant's in-state activities. The opinion pointed out that Ford was subject to personal jurisdiction due to its marketing activities in the forum state even though the particular vehicles involved in the plaintiff's suit were not designed, manufactured or sold there. It was sufficient for purposes of personal jurisdiction consistent with due process that Ford served a market in that state with the product that caused injury to one of that state's residents.

---

[2] Chief Justice Hecht, for example, adhered to a strict textualist view in the PUC jurisdiction cases, but decided to join the majority's decision in *Amazon* to allow in the guise of statutory interpretation the wholesale importation of the perceived common law into the definition of "seller" under chapter 82.

Based on that precedent, it was only necessary for the plaintiff's suit to arise from or relate to the manufacturer's Texas contacts. The court concluded it did because the plaintiffs' injuries arose out of exposure to the product in plaintiffs' Texas home. The product was sold in Texas. The sale was not an isolated event. Without a "strict" connection requirement, whether the product installed in plaintiffs' home was shipped from a Texas warehouse was irrelevant to specific jurisdiction. The court distinguished between the "actionable conduct" that subjects the defendant to liability and the "additional conduct" that makes appropriate specific jurisdiction over the defendant to impose that liability.

Concerning whether the exercise of specific jurisdiction is consistent with fair play and substantial justice, the court reiterated the considerations originally espoused two decades ago in *Guardian Royal China*: (1) burden on the defendant; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution; and (5) the shared interest of several states in furthering fundamental substantive social policies. In *Luciano*, all these factors favored holding the manufacturer amenable to personal jurisdiction in Texas.

Federal Gun Control Act Products Liability Pre-emption: *When the federal Gun Control Act particularly defines "firearm" to exclude a necessary component part, the statute does not apply to the component even when packaged with and sold with a weapon.*

Appellate Procedure: *Denial of a summary judgment motion may be challenged by a petition for writ of mandamus when proceeding to trial on the merits defeats the substantive right the summary judgment motion sought to uphold.*

Negligent Entrustment: *Under Texas law, negligent entrustment is not actionable against donors or sellers of chattels because the sale or gift relinquishes control over the manner in which the chattel is used by the donee or purchaser.*

The Protection of Lawful Commerce in Arms Act ("PLCAA") prohibits certain lawsuits against retailers and manufacturers of firearms and related products seeking damages arising out of a third-party's criminal conduct. 15 U.S.C. §§ 7902(a), 7903(5)(A). The PLCAA does not, however, prohibit suits against a seller for negligent entrustment or for a transaction the seller knows violates a law regulating the sale.

In re Academy, Ltd. involved a petition for writ of mandamus following the trial court's refusal to grant a seller's motion for a take-nothing summary judgment under the PLCAA. In the underlying suit, plaintiffs sued the seller for damages when the purchaser used the weapon sold to shoot 46 people, 26 fatally, at the Sunderland Springs First Baptist Church. Plaintiffs urged the PLCAA did not apply because the of the statutory exceptions for negligent entrustment and for sales that knowingly violated state or federal law. The seller sought mandamus relief after the trial court denied seller's summary judgment motion and refused to allow seller to pursue a permissive interlocutory appeal.

Mandamus is appropriate mechanism to re-examine the interlocutory denial of summary judgment when further proceedings undermined the right on which the motion sought to vindicate.

Ordinarily, the cost in time and money of litigating a case does not make the appeal after a final judgment an inadequate legal remedy. Consequently, a denial of summary judgment is not usually reviewable by mandamus. Justice Lehrmann's majority opinion relies on the exception to this general rule which arises when proceeding to trial effectively defeats the substantive right the mandamus seeks to vindicate. In this case, that right was to be exempt under the PLCAA from the civil justice system entirely.[3] Accordingly, the court decided that mandamus was appropriate to reconsider an otherwise unreviewable interlocutory ruling by the trial court.

[3] Depending on the Legislature's preference for the objective of the litigation, laws that remove claims from the civil justice system or expand the civil justice system are troubling. They suggest that litigation is so onerous that it is

The exception for violation of a predicate statute did not apply due to narrow interpretation of the GCA that eliminated magazines from the definition of a firearm even when the magazine was a component part of the seller's "packaged" product.

On the merits, the court decided unanimously that the so-called "predicate exception" to the PLCAA did not permit the suit to proceed. The "predicate exception" allows suits against firearms manufacturers, importers and dealers who knowingly violate a predicate "State or Federal statute applicable to the sale or marketing of the product." Applicability of the statute in question depends on the circumstances of the particular sale.

Here, Academy sold a combination Ruger semi-automatic rifle packaged with an aftermarket Magpul detachable thirty-round magazine. The buyer also purchased a separate Magpul thirty-round magazine. The buyer was a Colorado resident, who bought the combination in person at an Academy store in San Antonio. Plaintiffs maintained the federal Gun Control Act ("GCA") prohibited this sale because it did not comply with the laws of both the state where the sale occurred, Texas, and the state where the purchaser resided, Colorado. Plaintiffs claimed the sale violated a Colorado statute that forbade sale or possession of magazines with a more than fifteen round capacity. Academy responded the GCA's restrictions on sales to out-of-state residents did not apply to the magazine and the Colorado statute limiting magazine sales based on capacity did not apply outside Colorado.

The GCA makes it unlawful for a dealer to sell to a person known or reasonably believed to reside in another state any firearm unless, among other things, the firearm is a rifle or shotgun and "the sale, delivery, and receipt fully comply with the legal conditions of sale in both such States." The GCA defines a "firearm" as "any weapon … which … is designed to or may readily be converted to expel a projectile by … an explosive; … the frame or receiver of any such weapon; … any firearm muffler or … silencer; or (D) any destructive device." This definition has been construed to *exclude* a magazine standing alone. The plaintiffs urged, however, that the packaged sale of the rifle including the thirty-round magazine was a "firearm" for purposes of the GCA and that this sale would have been prohibited under the Colorado statute prohibiting the sale of the thirty-round magazine.

The court ruled plaintiff's contention disregarded the "clear distinction" between the treatment of firearms as statutorily defined and magazines. It pointed out the GCA's restriction on out-of-state sales only applied to "firearms" which the GCA did not define to include ammunition magazines. However, a federal tax regulation treated as a single item a firearm and its components when packaged and sold as a single item. The court was not persuaded, however, that this regulation required it to ignore judicial interpretation of "firearm" for purposes of the GCA that exclude magazines. Under the GCA, a rifle is explicitly a subset of "firearm" which is defined to exclude a magazine. Thus, under the GCA, it was only necessary for the sale of the rifle itself, and not the magazine, to comply with Colorado law. The Colorado statute, the court reasoned, specifically referred to *magazines*, not rifles, and therefore, did not apply to Academy's sale.

The negligent entrustment exception did not apply because Texas law does not permit the imposition of liability for negligent entrustment on a seller or donor because those persons no longer control the injury-causing instrumentality.

The court was also unanimous in its decision that the PLCAA's negligent entrustment exception did not apply, but Justice Boyd differed from the rest of the court concerning why that was true. The majority ruled that the negligent entrustment exception did not apply because Texas law recognized no such liability unless the entrustor retained ownership of the injury-causing instrumentality. The rationale of the necessity of retained ownership rests in the continuing right of control over the instrument. When there is a sale or a gift, the transferor retains no ownership and no further right of control. Therefore, under Texas law, the seller or donor has no post-transfer liability for

---

either an intolerable burden on favored undertakings or an appropriate penalty for disfavored ones. Unless the exempted litigation is the implementation of a fundamental right or a freedom that "depend[s] on the outcome of no election[]," to borrow a phrase from Justice Robert H. Jackson, such laws turn a solution into a problem. These laws thereby undermine public confidence in our civil justice system as an appropriate solution to private disputes.

negligent entrustment. Without potential liability under Texas law, the majority reasoned, the negligent entrustment exception in the PLCAA could not apply.

Justice Boyd states in his concurring opinion that he disagreed with the majority's reasoning that the PLCAA's language concerning "negligent entrustment" was what doomed plaintiff's suit. Instead, he maintained the suit failed under the PLCAA solely because the negligent entrustment action was not valid under state law.

After reading the majority and the concurring opinions several times, this writer has been unable to identify precisely where the reasoning of the majority departs from Justice Boyd's concurrence. Possibly, the concurring opinion addressed a prior version of the majority opinion that was later corrected to conform to Justice Boyd's concurrence.

Federal Social Media Liability Statutory Pre-emption: *§230 of the Communications Decency Act bars the imposition of purely passive common-law liability on social platforms for omissions and failures to protect users, but it does not prohibit the imposition of statutory liability based on allegations of active participation in human trafficking.*

In re Facebook, Inc., and Facebook, Inc. d/b/a Instagram was a petition to mandate dismissal of three tort suits alleging the online service provided the forum where, as minors, plaintiffs became sex trafficking victims. Plaintiffs sued for negligence, gross negligence, products liability, and statutory liability under §98.002 of the Civil Practice & Remedies Code for intentionally or knowingly benefiting from sex-trafficking. Facebook urged dismissal of these suits under §230(e)(3) of the Communications Decency Act ("CDA") which provides that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with [the policies of] this section" generally promoting and protecting interactive computer services. Facebook specifically relied on paragraph (c)(1)'s provision that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

Justice Blacklock, in a unanimous, 6:0[4] opinion, began by quoting the Ninth Circuit's declaration that §230 disallows suits to hold a platform liable for its user's postings. In this regard, §230 is like the protection afforded firearms manufacturers under the PLCAA involved in *In re Academy* from liability based on the actions of third parties. According to the opinion, §230 grants operators the *option* of policing user postings without incurring liability for failing to do so. According to the opinion, §230 is to be construed "broadly in favor of immunity" for the operator, notwithstanding less-than-pellucid statutory language.

The court observed that Section 230 provides "dual protections" to interactive computer services by "ensuring that a website is not discouraged by tort law from policing its users' posts, while at the same time protecting it from liability if it does not." It also observed that it is not clear from statutory text exactly what Congress intended, but the Texas Supreme Court found abundant authority, including two legislative expansions of the statutory protection, that favored construing the provision "broadly in favor of immunity" to preventing "legal[]responsib[ility] for information created . . . by third parties." "Imposing a tort duty … to warn of or protect against malicious third-party postings would in some sense 'treat' the platform 'as a publisher' … by assigning … editorial or oversight duties" web platforms generally do not have. Nevertheless, the opinion borrows from the Ninth Circuit's reasoning that §230 does not "create a lawless no-man's-land on the Internet" barring liability suits when the platform knowingly or intentionally participates in human trafficking.

Given the legislative and judicial treatment of §230, the court concluded §230 insulated Facebook from liability as a "publisher or speaker" with respect to injurious third-party communications for which it served as a passive intermediary. Indeed, the opinion noted that courts had previously held that §230 did not allow imposition of alleged duties to provide protection by restricting availability of accounts, providing warnings and removing allegedly dangerous posts. For this reason, §230 required dismissal of the state common-law negligence and products liability claims. This analysis is generally consistent with the rule often discussed in the *Update* that negligence which only creates the opportunity for a third-party's wrongdoing is generally not a substantial factor in causing the harm resulting from the third-party's conduct.

But the court reached a different conclusion about the statutory claim because liability under Civil Practice & Remedies Code §98.002 requires *active* participation, not merely a passive failure to act. The opinion bases its distinction by referring, as it often does, to the dictionary to point out that participation requires one "[t]o be active or involved in something; take part." With the textualist's favorite tool bolstered by numerous precedents, the court pointed out that many of the plaintiff's pleadings acted overtly encouraged sex traffickers to use its platforms. Specifically, plaintiffs averred Facebook created "a breeding ground for sex traffickers to stalk and entrap survivors" and did so "knowingly aid[ing], [and] facilitate[ing] … the sex trafficker[s] who recruited" the plaintiffs. The plaintiffs further alleged Facebook used the "detailed information it collects … to direct users to persons they likely want to meet" which "identifies" and connects traffickers with their "targets."

[4] Justices Busby and Huddle did not participate in the decision.

These facts, if true, asserted more than the mere passive liability for third-party conduct that §230 was enacted to prevent. There was an allegation of more than an omission or failure to act. Instead, these pleadings asserted that Facebook's liability arose out of its own volitional and active conduct. This, the opinion noted, was precisely the distinction that Congress drew when it passed the Allow States and Victims to Fight Online Sex Trafficking Act. That awkwardly named bill specifically recognized §230 should not be construed to limit or impair relief for acts of sex trafficking.

The tantalizing part of the opinion is the opportunity it creates for creative and thoughtful pleading that carries a course of conduct over the vague and non-descript dividing line between affirmative acts and passive omissions. This is reminiscent of previous efforts to expand the scope of the Tort Claims Act by pleadings that creatively injected the use of tangible property into the governmental entity's alleged liability. As they used to say on late night TV, there's surely "more to come, so stay tuned."

State Regulatory Pre-Emption: *The PUC's jurisdiction is limited to prospective regulatory authority over the provision of electrical services and does not include retrospective adjudications of liability for matters that were merely incidental to the regulated activity.*

In 2018, *Oncor Electric Delivery Co. v. Chaparral Energy, LLC* decided the Public Utility Commission's exclusive jurisdiction under the Public Utility Regulatory Act (PURA) for an electric utility's "rates, operations and services" included issues underlying a customer's breach of contract claim. That claim was based on a regulated utility's failure to timely provide electrical services.

In two opinions issued June 25, 2021, the court decided that PURA's delegation of original jurisdiction to the PUC did not include the alleged acts or omissions made the basis of alleged tort liability. *In re Oncor Electric Delivery Company, LLC* arose out of a personal injury plaintiff's claim that he was electrocuted when he came in contact with high voltage lines while clearing tree limbs obstructing the electrical drop line that serviced his home. According to plaintiff, Oncor refused his request to trim the trees away from the line, telling him that doing so was his responsibility. The issue was whether this alleged refusal related to the utility's "rates, operations and services" that required plaintiff to first submit his claim to the PUC.

In a 7:2 opinion by Justice Bland, the court tips its result in the opening paragraph. "Regulation is the government's prospective ordering of marketplace conduct; tort lawsuits are retroactive case-by-case correctives." Consequently, the utility's alleged liability did not require resolution in the first instance by the PUC because the claimant did not complain of the utility's rates or its electrical services. The majority's reasoning was partly based on the geographic division of regulatory authority between municipalities within their territory and the PUC in unincorporated areas and the limitation of *municipal* regulatory authority to "provide fair, just, and reasonable rates and adequate and efficient services." This limitation was omitted from the PUC's authority in the 1997 recodification.

Here, the majority departs from the court's usual strict adherence to textualism. "Statutory interpretation relies on the context and framework of an entire statute, not just on the definitions of words in isolation. That framework is no less instructive after it *inadvertently* has been dismantled." (Emphasis added). The majority assumes the omission was inadvertent because the recodification was not supposed to be substantive. The majority sharply divides regulation from adjudication. "The Legislature's decision to regulate … is not coextensive with a wholesale disruption of the adjudication of private disputes touching on that issue. While regulations may inform liability under the common law, they do not inherently create private rights of action or adjudicatory forums" unless the Legislature clearly expresses that intent. The majority points to a line of decisions where an electric utility's tort liability was resolved without requiring the plaintiff to first have the regulatory authority decide liability.

Chief Justice Hecht joined by Justices Boyd and Blacklock parted company with the majority over the applicability of *Chaparral Energy*. They reasoned deciding when and where to run a power line was part and parcel of providing electrical services. As such, the dissent saw no meaningful distinction between a contract claim for failure to timely provide electric service and the assertion of tort liability arising from line location and maintenance. To the dissent, both involved the operations of electric utility over which the PUC had exclusive jurisdiction. The majority essentially responds that the PUC itself recognized that its authority was limited to regulatory matters and that such

matters were distinct from liability adjudications. The majority was persuaded that assertion of a regulatory standard as a defense was no more sufficient to vest the PUC with original adjudicatory jurisdiction than a federal question presented as a defensive matter was sufficient to confer federal jurisdiction.

In re Texas-New Mexico Power Co. involved a suit by homeowners against the utility for flooding during Hurricane Harvey. The homeowners maintained the flooding occurred when heavy equipment mats blocked storm drains because one of the utility's contractors failed to secure them. In a unanimous opinion, the court denied mandamus relief from the trial court's refusal to dismiss the case for want of jurisdiction. The court reasoned the homeowner's claim was not within the PUC's exclusive jurisdiction because their complaint was not grounded in the utility's rates, or the way it provided electrical services. Instead, the fact that the mats were used in the utility's operations was mere coincidence and that the use of the mats could have occurred in any construction project meant the failure to secure the mats was not within the PUC's exclusive jurisdiction.

Interestingly, the decision in *Texas-New Mexico Power* was unanimous. There was no dispute the case involved a matter subject to the PUC's original jurisdiction. The location of the dividing line between the June 25 decisions and *Chaparral Energy* should be fertile ground for future disputes.

> **Employment Law – Reasonable Accommodation:** *Refusal to extend FMLA leave for surgical recovery was sufficiently asserted a potential violation of the Texas Commission on Human Rights Act when the request would not have imposed extraordinary or undue harm on the employer. The request was for a reasonable accommodation request even though not made in the form the employer required.*
>
> **Employment Law – Retaliation:** *However, the employee failed to state a claim for retaliation because the employee did not assert facts sufficient to show the requested accommodation is sufficient to alert the employer the employee contends disability discrimination was an issue.*

The central issue in *Texas Department of Transportation v. Lara* was whether a reasonable accommodation request opposed a discriminatory practice that triggered protections under the Texas Commission on Human Rights Act ("TCHRA") embodied in the Texas Labor Code. Lara was a long-term TxDOT employee who exhausted his unpaid leave and two extensions under the federal Family and Medical Leave Act ("FMLA") to recover from intestinal surgery. TxDOT notified Lara that he was to be administratively separated so the department could hire a needed full-time replacement.

Lara sued TxDOT alleging denial of additional leave violated Texas Labor Code §21.128 and claiming administrative separation was in retaliation for his FMLA extended unpaid leave request. Lara asserted both were violations of Labor Code §21.055. TxDOT moved to dismiss, urging that Lara failed to allege statutory violations essential to effectively waiving sovereign immunity. In a unanimous opinion by Chief Justice Hecht, the court held Lara presented a viable claim for failure to accommodate his disability and that he pleaded a viable disability-discrimination claim under §21.0515. However, it ruled the alleged administrative separation was not the kind of discriminatory practice necessary to support a retaliation claim.

§21.128(a) makes it unlawful for an employer to "fail or refuse to make a reasonable workplace accommodation to a known physical . . . limitation of an otherwise qualified … employee . . . unless the [employer] demonstrates … the accommodation would impose an undue hardship …." The first issue tackled by the court was whether Lara's request for a third extension of leave without pay was one for a reasonable accommodation. TxDOT argued there was no valid request because the employee did not submit the memo required under TxDOT's policy. The court was nonplussed by this contention, noting that a valid request can be made orally and need not refer to discrimination laws or "reasonable accommodation." Here, the evidence showed Lara communicated to his supervisor that he wanted to remain employed after his leave expired and that Lara kept the supervisor apprised of the status of his recovery and projected return date.

The court also rejected TxDOT's contention that Lara's request was effectively for an indefinite duration and, for that reason, not reasonable. The majority reasoned that whether a request is reasonable turns on the particular

facts and circumstances of the case. It rejected adopting a bright-line rule because it perceived such an arbitrary standard inconsistent with the policies underlying TCHRA and its federal analog found in the ADA. The court was especially swayed by the fact that the TxDOT policy did not mandate an "either/or" approach of either granting the extension or filling the employee's extension. The opinion pointed out that TxDOT had several persons with the same position as Lara and that it commonly assigned these personnel to work locations that required travel within the district. Thus, there was nothing in granting Lara's request that would have imposed an undue hardship on the department. Moreover, the court rejected TxDOTs' arguments the moving dates for the employee's ability to return to work made the requested extension practically indefinite. Indeed, the opinion pointed out that the request provided TxDOT with the doctor's estimate of when Lara would be able to return to work.

However, the Texas Supreme Court agreed with the employer that there can be no proscribed retaliation under §21.055 unless the requested accommodation is sufficient to alert the employer the employee contends disability discrimination was an issue. Recently, in *Alamo Heights Independent School District v. Clark*, the court held that triggering TCHRA's anti-retaliation protection required the employee to bring to the employer's attention that the request was based on a belief that the requested accommodation was in response to perceived discrimination. Lara failed that test. The court determined that none of his communications requesting a reasonable accommodation alerted TxDOT that the request was related to disability-based discrimination. Without that notice, the employee's accommodation request was not an act in opposition to a proscribed discriminatory practice.

Lastly, the court ruled that the employee's pleadings provided fair notice of a §21.051 discrimination claim so that that the court of appeals should have addressed TxDOT's challenge to the trial court's failure to dismiss that claim. It deemed sufficient the allegation that the petition cited to discrimination under §21.051 to which TxDOT actually responded by challenging that claim by motion to dismiss. If TxDOT was able to respond with a motion to dismiss, the pleading was sufficient to give the necessary "fair notice" required under Texas' pleading rules.

> **Employment Law – Proof of Proscribed Retaliation:** *Liability for proscribed retaliation for protected conduct requires proof of but-for causation that the employer's adverse employment conduct would not have occurred when it did* but for *the employee's protected activity so that the employee cannot engage in protected conduct as a means of insulation from termination on legitimate grounds.*

Because there is usually no direct evidence of an employer's motives for employment-related decisions, proof that an employer's adverse employment decisions were the result of an employee's protected conduct or circumstances must usually depend on circumstantial evidence. In *Apache Corporation v. Davis*, the evidence showed the plaintiff was a middle-aged female legal assistant whose services had been found satisfactory for several years until the employer tightened its flexible hours policy. Plaintiff used the benefits of this erstwhile flexible hours policy to drive her daughter to and from college courses during working hours. The employer decided to more strictly enforce its working hours policy so that employees were required to work mostly within the company's stated working hours.

Plaintiff failed to comply with the employer's request that all employees submit a proposed working schedule that complied with this directive. She continued to request that she be permitted to leave during working hours to transport her daughter to college classes. Plaintiff also continued to work overtime without the necessary prior authorization. As a result of an ongoing series of conflicts over these and other tensions with her supervising attorney, plaintiff ultimately submitted an e-mail jeremiad to her employer.

In it, she generally complained about being treated in an hostile manner because of her resistance to the working hours policy change. The email also accused her supervisor of setting her up for termination and included a passing suggestion that the series of events was part of the supervisor's "plan to circumvent legal challenges to … 'age discrimination' and 'woman discrimination'" and "the Company's pervasive negative attitude toward advancing or recognizing the contributions or accomplishments of its female employees."

In previous cases, the courts of appeals developed a five-factor test for the sufficiency of circumstantial evidence to prove the causal connection between the protected conduct and the adverse employment decision: whether the decision maker 1) knew of the protected activity; 2) expressed a negative attitude about the employee's condition

or participation in that activity; 3) failed to comply with company policies; 4) treated similarly-situated employees differently from the plaintiff; and 5) stated false reasons for the adverse employment action.

As the causation jurisprudence developed in the context of these circumstantial evidence cases, this five-factor test effectively supplanted the *Hinds* but-for causation test. In the unanimous opinion authored by Chief Justice Hecht, the court in In *Apache Corporation v. Davis* reiterated the holding in *Hinds* that proof of causation for impermissible reasons requires showing "the employee's protected conduct [is] such that, without it, the employer's prohibited conduct would not have occurred when it did." The reason for this requirement is that without it an employee for whom legitimate grounds for an adverse employment decision existed could effectively forestall that decision by engaging in the protected conduct.

In doing so, the opinion rejected each item of circumstantial evidence on which the court of appeals relied to impose liability. The court was unconvinced that the proximity of Davis's termination to her email was probative of causality because her termination also closely followed in time the insubordinate behavior for which she was ostensibly terminated. Though the opinion did not explicitly rely on it, this reasoning is consistent with the rule that circumstantial evidence is not probative to prove a particular instance if the circumstances support more than the inference necessary to support the judgment.

Likewise, the court decided that the trier of fact could not infer causation from the fact the supervisor was aware of the email and expressed a "negative attitude" about Davis. The evidence showed that the email, the purported protected activity, referenced the supervisor's extant dissatisfaction. In addition, the opinion stated the evidence showed supervisor had almost terminated her for the insubordination alone. The opinion ventured that the supervisor's "was at least as likely due to the many insubordinate accusations repeated in her email as to the single sentence vaguely alleging Apache's 'negative attitude' toward its female employees." It concluded that following through on that "employment decision" was no evidence of causation. This appears to be another invocation of the rule that equally plausible inferences are no evidence due to the opinion's recitation the supervisor's decision was "at least as likely due to the many insubordinate accusations repeated in her email."

The evidence concerning the reasons for Davis's termination showed that the motives changed over time. Davis was informed that she was being terminated because she continued to work unauthorized overtime. Davis had suggested that she was unable to get her work done in the allotted time, but there was no evidence that this was the case. Previously, the supervisor had stated that he was near deciding to terminate because Davis was frequently late and had failed to submit a work schedule that complied with more strict working hours policies. The court was unpersuaded that Davis had been singled out for disparate treatment because other employees had arrived late and falsified time cards about their arrival time was not comparable in all respects to Davis's conduct.

There was other evidence that the supervisor strongly disapproved of comments Davis had made in the workplace and that the situation had devolved to the point that Davis told the human resources attorney she no longer wanted to work with her supervisor. Though the final decision to terminate Davis was not announced until after she sent the email, the opinion pointed out that the pattern of the employer's conduct was consistent with progressive discipline for other transgressions and not necessarily but for the email's protected complaint about gender discrimination. There can be multiple causes of an employment action, but Davis was still required to prove that *but for* her email, she would not have been terminated for insubordination. The court determined that there was *no evidence* the protected gender discrimination complaint in Davis's email, instead of her repeated insubordination, was the cause-in-fact for the termination.

Family Law – Parental Termination: *Parental termination defendants represented by* retained *counsel may assert ineffective assistance of counsel in a post-termination appeal.*

Ineffective Assistance of Counsel: *The right to effective assistance of counsel applies to parental terminations. Establishing ineffective assistance of counsel requires proof: 1) the performance involved errors so serious that the attorney was not functioning as "counsel" guaranteed by the Sixth Amendment and 2) the errors deprived the defendant of a trial in which the result was reliable.*

In re D. T. involved a proceeding by the Texas Department of Family and Protective Services to terminate a mother's parental rights. Although the mother was entitled to court-appointed counsel, she was represented by retained counsel. In the appeal from the termination of her parental rights, mother alleged that she was ineffectively assisted by her retained counsel. In an opinion authored by Justice Huddle, a five-Justice majority ruled that the right to effective assistance of counsel applicable to indigent termination defendants represented by appointed counsel also applied to termination defendants represented by *retained* counsel.

Before 2015, an indigent termination defendant was entitled to appointed counsel by statute. This entitlement carried with it the right to effective counsel due to the fundamental liberty interest of the defendant in the relationship with the child. In 2015, Texas Family Code section 107.013 was amended to require trial courts to notify *all* termination defendants of their right to be represented by counsel regardless of whether the parent was indigent. This statutory extension of the notice of the right to counsel carried with it, the majority reasoned, the concomitant right for such representation to be effective as measured by the criteria of *Strickland v. Washington,* 466 U.S. 668, 687 (1984): 1) the performance involved errors so serious that the attorney was not functioning as "counsel" guaranteed by the Sixth Amendment and 2) the errors deprived the defendant of a trial in which the result was reliable.

After extending the obligation of retained counsel to provide effective assistance to termination defendants, the majority determined that counsel's assistance was not ineffective. The mother's complaint centered on counsel's failure to file timely a witness list and failure to review the Department's witness list. The majority noted the trial court never excluded any of the four witnesses called on mother's behalf. It also noted that none of the witnesses included in the Department's witness list were previously undisclosed or unexpected and that counsel's cross-examination of any of these witnesses was in in any way ineffective or deficient. As a result, the majority concluded counsel's alleged deficiencies in mother's representation did not render the outcome of the trial unfair or unreliable.

Justice Boyd wrote a concurring opinion joined by Chief Justice Hecht and Justice Lehrmann takes the majority to task for announcing a right to effective assistance of retained counsel in parental termination cases. It reasoned such a declaration was unnecessary because there was no question that the mother had received effective assistance from her retained counsel. The concurrence also questioned the majority's determination that section 107.013 of the Family Code reflects "the Legislature's intent to afford all parents appearing in opposition to state-initiated parental-rights termination suits the right to effective counsel regardless of whether counsel is appointed or retained." For the concurring Justices, the majority goes a step too far in holding that the necessity of informing a non-indigent defendant of the right to counsel carries with it the right to counsel or the follow-on right that such representation be effective.

Proof of Reasonable Medical Expenses under CPRC § 18.001: *Mandamus relief is appropriate when a trial court's order sustaining a challenge to counter-affidavits severely compromises or eliminates the proponent's ability to challenge reasonableness or necessity of medical expenses.*

The trial court granted an order that not only struck counter-affidavits necessary under § 18.001 to challenge the reasonableness and necessity of medical expenses but it also prohibited the proponents from introducing evidence or argument the medical expenses were either unreasonable or unnecessary. In a *per curiam* opinion, this ruling was held impermissible under the courts' recent decision *In re Allstate Indemnity Co.* that deemed it an abuse of discretion for the trial court to hamstring the proponent's ability to otherwise question at trial the reasonableness and necessity of medical expenses.