By Stephen Gibson[1]

Finality of Judgments: **If an order recites that it is intended to be and is a final judgment disposing of all claims by all parties, then it *is* a final judgment even if the record shows that there are claims that were never actually adjudicated.**

To end disputes over the finality of judgments not resulting from a conventional trial, *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 192 (Tex. 2001), held that if "only one final and appealable judgment can be rendered, a judgment … is final … if *either* it actually disposes of all claims and parties… regardless of its language, *or* it states with unmistakable clarity that it is a final judgment." (Emphasis added). *In re Elizondo* questioned whether the line drawn in *Lehmann* for testing the finality of a judgment remained as bright when every other circumstance indicated that the case had not been resolved.

The Elizondos sued their home builder and placed a lien on the builder's property. Before the litigation was resolved, the builder prevailed on an interlocutory motion to remove the lien. All other relief sought in the litigation had, in fact, not been adjudicated. Nevertheless, the builder included a recitation in the order removing the lien that "[t]his judgment is final, disposes of all claims and all parties, and is appealable" and that "[a]ll relief not granted herein is denied." The Elizondos either did not notice this recital or did not appreciate its ramifications. Whatever the case, they did not timely file a motion to modify the order or for a new trial. More than thirty days after signing the order, the trial court signed a corrected order deleting the recitation about finality and appealability.

Was the later order valid? No. In a *per curiam* opinion, the court ruled the original order was a final judgment because it included the magic language from *Lehmann*. For this reason, it was *the* final order even though the record showed that recitation was, in fact, not true – i.e., the court had not actually addressed and disposed of all claims and all parties. Form triumphs over substance here.

No matter. The harm from applying *Lehmann* as a bright line finality test was, according to the opinion, outweighed by the harm that would result from uncertainty whether the order was a final judgment. After all, the finality recitation in the order was there in plain view for everyone to see. Had the Elizondos – or more precisely, their attorney – reviewed the order when it was entered, the problem of giving finality to an order not actually intended to be final could have easily been avoided by a timely motion bringing the matter to the trial court's attention.

The court further rejected the notion that the order was one that was a "clerical" error correctable at any time by *nunc pro tunc* order. Including the recitation of finality in the order – or more precisely, failing to recognize that the builder's lawyer had included it in the proposed order – was a judicial, not a clerical error.

Game over.

[1] The opinions expressed are solely those of the author. They do not necessarily represent the views of Munsch, Hardt Kopf & Harr, P.C. or its clients.

Morals of this story: 1. To bring an early end to litigation, play *Lehmann* language counter-bingo: sneak a finality recitation into every order and wait until your opponent *fails* to notice. 2. Promptly and carefully read every proposed order tendered by opposing counsel and especially those signed by the court to make sure the other side is not practicing according to moral number 1.

***Employment Law*: The Collective Bargaining Act allows counties to enter collective bargaining agreements with deputy constables because they are within the act's definition of "police officers."**

***Statutory Interpretation*: "The" does not necessarily imply a singular or exclusive selection among multiple options, and may simply be used generically to identify one of multiple valid alternatives.**

***Error Preservation*: The court can overlook failure to preserve a complaint in the trial court when the issue is important to the state's jurisprudence and is addressed by both parties.**

A collective bargaining agreement ("CBA") by the State or any political subdivision with employees other than fire fighters and police officers is void. Tex. Local Gov't Code §617.002(a). Even for fire fighters and police officers, a CBA is allowed only if the governmental entity adopted the Collective Bargaining Act. Texas Local Gov't Code §§174.023, .051, .052.

The issues in *Jefferson County v. Jefferson County Constables Ass'n* were whether Jefferson County's deputy constables were "police officers" so that the County could enter a CBA with them and, if so, whether an arbitration award under the CBA could be judicially enforced. During its appeal from the judgment enforcing the award, Jefferson County urged for the first time that the CBA was void. It reasoned that the Collective Bargaining Act invalidated the CBA with the deputy constables because they were neither "police officers" nor "fire fighters." The County relied on the holding of *Wolff v. Deputy Constables Ass'n of Bexar County*, 441 S.W.3d 362 (Tex. App.—San Antonio 2013, no pet.), that constables did not have standing to enforce §174.023's authorization of CBAs because constables were not "police officers." The County asserted that the issue was one of standing. According to the County, lack of standing would divest subject-matter jurisdiction and lack of jurisdiction cannot be waived even though the County did not raise the issue in the trial court.

A 7:2 majority of the Texas Supreme Court, however, in an opinion by Justice Lehrmann, ruled that the alleged illegality of the contract only affected whether the CBA could be enforced, not the deputy constable's *standing* to do so. The majority reasoned illegality of a contract is an affirmative defense that is waived if not timely pleaded. It distinguished *Wolff* because the deputy constables were not seeking to *enforce* an existing CBA, but trying instead to compel the county to *enter* into a CBA to begin with.

Standing was affected in *Wolfe* because only fire fighters and police officers may bargain collectively and, thus, have an interest distinct from the general public when complaining of the County's refusal to do so. Although the majority opinion gratuitously lays out a case for waiver by belated presentation of the argument, it reached the validity of the CBA. It justified reaching this question because both parties acknowledged its relevance and the constables did not press for resolution of the case on the basis of waiver. In other words, the majority believed it could address the issue merely because it was "of continuing importance to our jurisprudence."

At this point, it is understandable if the reader questions how that reasoning squares with the notion of judicial restraint and avoiding decision of issues unnecessarily. This writer would posit that reaching the applicability of the statutory exception was essential. If the CBA was void by statute, judicial enforcement of an agreement the Legislature deems void would be fundamental error directly and adversely affecting public policy as declared in the State's constitution or statutes. *Operation Rescue - National v. Planned Parenthood of Houston and Southeast Texas, Inc*., 975 S.W.3d 546, 569 (Tex. 1998). Under the public interest branch of the fundamental error doctrine, such violations are sufficiently "fundamental" to require correction, even if error is unpreserved. *E.g., City of Galveston v. Russo*, 508 S.W.2d 882, 885 (Tex. Civ. App. – Houston [14th Dist.] 1974, writ ref'd n.r.e.)(judgment contravened statutory prohibition against assessment of costs against city for performance of governmental functions). The public interest takes precedence over the rights of litigants. Accordingly, fundamental error may be raised at any time by the parties or on the court's own motion.

On the merits, without explicitly disapproving *Wolff*, the majority ruled that constables are "police officers" for purposes of the Collective Bargaining Act. The act defines "police officer" as a "paid employee who is sworn, certified, and full-time, and who regularly serves in a professional law enforcement capacity *in the police department of a political subdivision*." Tex. Loc. Gov't Code §174.003(3) (emphasis added). There was no serious dispute that constables met the first, unitalicized part of the definition. The disagreement was over whether the deputy constables served in "the police department" of the County. The sheriff's office is the primary law enforcement agency for the County and the deputy constables do not work for that department. However, after reviewing various statutes defining and regulating the role of constables and their deputies, the majority ruled constables were employed by an office that functioned as *a* police department even though the constable's primary responsibilities consisted of service of process, protective orders and the like.[2]

The majority was not persuaded that the statute was limited to those peace officers who provide "emergency" services. It reasoned that the reference to such services in the Collective Bargaining Act did not express a *condition* on the definition of "police officers" but only stated an assumption on which status as a police officer did not depend. The County further argued that statutory reference to "*the* police department" meant that a governmental entity could have but one such department – for counties, that was the sheriff's office. The majority rejected this argument, holding that in the context of §174.003 and its liberal construction mandate, "the" was used generically and did not imply exclusivity.

But, the majority also rejected the argument that any of the peace officers identified in article 2.12 of the Code of Criminal Procedure were "police officers" for purposes of the collective bargaining statute. Not all of the peace officers identified in article 2.12 work for organizations that would be considered a police department or a political subdivision of the state. In short, the majority refused to "stretch" the Collective Bargaining Act's use of "police officer" to all peace officers. It is, however, broad enough that counties may validly enter CBAs with deputy constables.

The majority then reached the substance of the arbitration. Jefferson County's budget cuts eliminated positions for eight deputy constables across six constable precincts. The constables objected that eliminating deputy positions according to precinct violated the CBA provision that layoffs would be according to seniority. The arbitrator found that the County violated the CBA by actions that affected positions regardless of seniority and ordered the County to reinstate with back pay the terminated deputy constables according to seniority. The County challenged this order, insisting that it had the authority to eliminate positions by budgeting – a process distinct from the seniority-governed "layoff." The majority rejected the challenge to the arbitrator's decision. "The arbitrator's analysis of the interplay between the CBA's provisions regarding layoffs and abolishing positions may or may not be correct, but it is precisely within the scope of his contractual authority…." An error in applying the law is not a basis under the common law for overturning the arbitrator's decision.

Justice Boyd, joined by Justice Johnson, dissented. They urged that authority to engage in collective bargaining belonged exclusively to the Legislature. Relying on the stated rationale of *Wolff*, the dissenters would have held that the deputy constables were not "police officers" under the Act and, therefore, the CBA should not have been enforced.

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2 Perhaps the simpler approach would have been simply to acknowledge that service of process and court order enforcement in civil cases is "law enforcement" just like investigation and apprehension is in criminal cases.

***Employment Law* and *Statutory Interpretation*: Open-enrollment charter schools are not local governmental entities to which the Texas Whistleblower Act applies.**

The Texas Whistleblower Act prohibits a "local governmental entity … [from] tak[ing] ... adverse personnel action against a public employee who in good faith reports [the employer's] violation of law … to an appropriate law enforcement authority." The statute also waives immunity from suit for a whistleblower's retaliation claims. Under the Texas Charter Schools Act (TCSA), chartered schools are deemed part of the "state public school system." However, if the charter recipient is tax-exempt, the TCSA says it is *not* considered a local governmental entity "unless the applicable statute specifically states that [it] applies to an open-enrollment charter school."

The Whistleblower Act contained no such specific statement. Therefore a majority in *Neighborhood Centers Inc. v Walker* deemed its protection unavailable to an open-enrollment charter school teacher. The teacher was fired after she complained to health authorities that mold and lack of cleanliness in her classroom was making her and students sick. The teacher's termination also followed her report to the Texas Education Agency that the school previously falsified test scores.

In a 7:2 opinion by chief Justice Hecht, the majority deciphered apparently conflicting provisions in the TCSA. In §12.1056(a), open-enrollment charter schools enjoy immunity from liability and suit "to the same extent as a school district." Two sections later, the TCSA says that such schools are not local governmental entities "unless the applicable statute specifically states that [it] applies" to such schools.

The legislature makes open enrollment charter schools governmental entities for specific protections, but did not make them governmental entities for all purposes. Thus, the question narrowed to the old debate of whether the numerous specific designations that they were to be a governmental entity for all purposes, or whether the specificity means that the legislature limited governmental entity status only to the specified instances. The majority adopted the latter approach.

It explained that §12.1058's declaration an open enrollment charter school is not a local governmental entity unless the "applicable statute specifically states" it applies to them. The charter school statute specifically says only that open-enrollment charter schools are *immune* from liability and suit to the same extent as a school district. But this did not mean that an open-enrollment charter school's liability is otherwise the same as a school district. Reading the statute this way would make all of the specific provisions meaningless, which is an impermissible interpretation. Because the whistleblower statute did not specifically state that it applied to open-enrollment charter schools, they could not be treated like a "public school district." Consequently, the teacher had no whistleblower protection against termination.

Justice Johnson filed a separate concurring opinion to point out that the majority opinion does not decide whether the legislature could confer governmental immunity on a private legal entity. According to Justice Johnson, resolution of that question would require specific and detailed briefing and analysis not presented by the majority in this case.

***Limitations and the Latent Occupational Disease "Discovery" Rule*: The discovery rule for "latent" occupational diseases does not apply when there is a known injurious event, even if all the consequences of or persons responsible for that event are unknown.**

The plaintiff in *Schlumberger Tech. Corp. v. Pasko* was exposed to fracking chemicals and sought immediate medical treatment. Four months later, plaintiff was diagnosed with cancer which he attributed to the chemical exposure. One day shy of two years after the exposure, plaintiff sued several defendants, but not Schlumberger. Plaintiff did not sue Schlumberger, however, until more than two years after the exposure, but only four months after his cancer diagnosis. The trial court ruled on summary judgment the claim against Schlumberger was time barred.

Plaintiff disagreed, urging that a special branch of the discovery rule applied to latent occupational diseases. Under this iteration of the discovery rule, a cause of action for a latent disease does not accrue until a plaintiff's symptoms manifest to the degree and duration that a reasonable person should have known of some injury that was likely work-related. The court rejected this argument in a *per curiam* opinion.

The court ruled the latent occupational disease discovery rule applied only if the *injury* was latent. Here, the injury was known. The only unknown was unknown was the cancer allegedly resulting from the exposure. Plaintiff's cause of action for *all* injuries resulting from that incident accrued when it occurred, even though he did not know its full ramifications or who was responsible for including the alleged carcinogen. The latent disease branch of the discovery rule applies only if there is no knowable "traumatic injury."[3]

The *per curiam* opinion also dismissed the novel argument that a non-movant's evidence cannot be used to support the granting of summary judgment because it is not served 21 days before the hearing. Citing the language of rule 166a itself, the opinion holds that otherwise relevant and admissible summary judgment evidence attached to a timely motion or response may be relied on to reach a decision on that motion.

***Employment Law*: Right of control is relevant to status as an employee, not "course and scope." Course and scope depends on general authorization to perform a task, not the right to or exercise actual control over the details of that task.**

Painter v. Amerimex Drilling I, Ltd. arose from an auto rollover accident while an employee was driving co-workers from a remote work site to employer-provided housing. The employer paid the driver additional compensation for this service. The injured co-workers and families of those killed sought to impose vicarious liability on the employer notwithstanding the general rule that course of employment does not generally include "coming and going" to work. The trial court granted the employer's summary judgment motion because it found no evidence the employer controlled the details of the particular "work" involved in driving the workers from the work site. The court of appeals agreed because nothing showed the employer tried to control factors that "reflect on the risk of the accident itself."

Vicarious liability as an employer requires that the actor be (1) an employee (2) acting within the employee's general or implicit authority "in furtherance of … and … accomplishment of the object for which the employee was hired" – that is, within the course and scope of employment.

Right of control is only relevant to status as an employee, not to whether an act is within the course and scope of employment. Only the right of control, not the exercise of actual control, is necessary to establish employee status.

In an 6:2 opinion by Justice Lehrmann, the court disapproved of decisions that "tie[] the right-to-control analysis to the course-and-scope element" by equating "control" with whether an act was in the course and scope. The right of control is a factor in deciding whether the actor is an employee, not whether his actions are in the "course and scope." Moreover, the opinion disapproved a narrowly focused "course and scope" analysis on whether the specific task was under the employer's control. The task-specific analysis is appropriate for deciding whether a worker is acting as an employee as opposed to an independent contractor, but not for whether the employee's conduct is within the course and scope. Here, there was no dispute that the driver had been tasked by the employer with driving his crew members to and from the worksite and was paid for that service as part of his responsibility to supervise his crew. Regardless of the degree of control the employer *actually* exercised, its contract with the employee gave it the *implicit right* to control the details of transporting the crew.

Acting within the "course and scope" of employment considers whether the activity generally furthers the employer's objectives, not whether the employer elects (or not) to control the specifics in which that objective is accomplished.

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3 The court adopts a bright-line "all or nothing" test much like it did in *Elizondo*. Such rules provide short term administrative convenience at the expense of a more sound longer-term policy. One can fairly question whether it is beneficial to compel the immediate investigation of every injury, no matter how seemingly inconsequential, at the risk of losing the right to sue should it later prove to have health consequences that should not have been anticipated. The hard-and-fast rule adopted in *Pasko* would encourage, not discourage, instigation of litigation in doubtful cases.

To be sufficiently within the "course and scope" necessary to impose vicarious liability, on the other hand, depends on "an *objective* assessment of whether the employee was doing his job" when the alleged tortious conduct occurred. Thus, the specific arrangement the employer had with the employee explicitly made co-worker transportation part of the employee's job. That agreement was sufficient to justify refusing to apply the general rule that "coming and going" are not part of employment without such an agreement. According to the opinion, the arrangement benefitted the employer by making sure that the rest of the crew's services would be available at the work site. The court was also unimpressed with the employer's argument that the contract with the driver only required him to take the crew *to* the work site, without obligating him to transport them *from* the work site to the temporary quarters. Understandably, the opinion barely concealed that the court deemed it silly to think the arrangement would permit the employee to strand the crew in the middle of nowhere at the end of each shift.

The "course-and-scope inquiry … involves an objective analysis … whether the employee was performing the tasks *generally* assigned to [the employee] in furtherance of the employer's business." (Emphasis added). As long as this authorization exists, the employer has the *right* of control. Whether the employer *actually* controls the details of and specifics for accomplishing the particular task out of which the injuries arose is of no moment. In this case, the employer's arrangement authorizing the employee to transport the rest of the crew was enough to raise a fact issue that the employee was within the course and scope when the accident occurred. The employer was not entitled, therefore, to a take-nothing summary judgment on vicarious liability.

Justice Green, joined by Justice Brown, dissented because they did not deem the employer's control over the employees and their transportation sufficient to support the imposition of vicarious liability on the employer. The dissent noted that the rest of the crew was not required to ride with the employee and that the accident occurred after the crew was "off the clock" when the employer had no right to control where they went or what they did. The dissent especially differs with the majority's refusal to examine the details of the right of control because it deemed the driver's employee status as unquestioned. According to the dissent, merely paying a transportation allowance did not create a right of control. Neither did the employer actually control the "after-hours" transportation activities. According to the dissent, the employer's vicarious liability should be task-specific based on whether it was "directing the details of the negligent actor's conduct when that negligence occurred," citing *Wingfoot Enters. v. Alvarado*, 111 S.W.3d 134, 146 (Tex. 2003) (emphasis added). Nonetheless, the dissent criticizes but acknowledges the majority holding makes "employment for one purpose is employment for every purpose" when it comes to vicarious liability. "By holding that a court need not even consider the question of control after the worker's shift had ended …, the Court essentially decides that it is impossible for a worker to be an employee while on the clock and an independent contractor for separate work done on his own time."