Opinion Summaries
February 11, 2022

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Opinions

ADMINISTRATIVE LAW
Judicial Review

Tex. Comm'n on Env't Quality v. Maverick Cnty., — S.W.3d —, — WL — (Tex. Feb. 8, 2022) [19-1108]

The Texas Commission on Environmental Quality ("TCEQ") granted Dos Repúblicas Coal Partnership ("DRCP") a permit to discharge wastewater from its surface mining operations. Several local governments, environmental groups, and landowners (collectively "Permit Contestants") challenged the permit. The central issue in this case was whether DRCP is the mine's "operator" and thus the proper permit applicant.

DRCP owns a coal mine in Maverick County. It hired a contractor to run the day-to-day operations at the mine. DRCP needed a permit to discharge wastewater from the mine. TCEQ regulations require the mine's owner and operator apply for the permit (unless they are the same entity). 30 TEX. ADMIN. CODE § 305.43(a). The rules further define "operator" as—"[t]he person responsible for the overall operation of a facility." *Id.* § 305.2(24). Permit Contestants challenged the application, so TCEQ referred the application to the State Office of Administrative Hearings. The assigned Administrative Law Judges held a contested case hearing, after which they issued a Proposal for Decision finding that DRCP is the mine's operator and recommending that TCEQ approve DRCP's application with additional environmental requirements. TCEQ accordingly approved the permit but modified the proposal's environmental suggestions. Permit Contestants challenged the permit in district court, arguing that DRCP was not the mine's operator and that the TCEQ erred on other technical issues. The district court reversed TCEQ's finding that DRCP was the mine's operator but affirmed TCEQ's modifications. The court of appeals affirmed on the operator issue, but it held that it lacked jurisdiction to reach the other issues. So the court of appeals

vacated the district court's judgment on those issues. TCEQ and DRCP petitioned for review in the Supreme Court.

The Supreme Court reversed. The Court held that the plain text of TCEQ's definition of operator and not the court of appeal's previously determined definition of "operator" from *Heritage on San Gabriel Homeowners Association v. Texas Commission on Environmental Quality*, 393 S.W.3d 417 (Tex. App.—Austin 2012, pet. denied), applied. Under the plain text of the rule, there was substantial evidence to support TCEQ's finding that DRCP was the mine's operator.

The Court further held that the court of appeals had jurisdiction to address the remaining issues even after it affirmed reversal of the permit on the operator issue. The Court explained that a court's prudential decision to decline to reach certain issues not necessary to the disposition of a case is not the same as the constitutional prohibition on advisory opinions.

The Court declined to address the remaining issues without the court of appeals having addressed them first. Accordingly, the Court reversed and remanded the case for further proceedings consistent with the opinion.

INSURANCE
Policies/Coverage

Pharr–San Juan–Alamo Indep. Sch. Dist. v. Tex. Pol. Subdivisions Prop./Cas. Joint Self Ins. Fund, — S.W.3d —, 2022 WL — (Feb. 11, 2022) [20-0033]

At issue in this insurance-coverage dispute is whether a golf cart is covered under an automobile liability policy. The Pharr-San Juan-Alamo Independent School District had an automobile-liability insurance from the Texas Political Subdivisions Property/Casualty Joint Self Insurance Fund. The policy required the Insurance Fund to indemnify and defend the School District for damages "caused by an accident and result[] from the ownership, maintenance or use of a covered auto." The policy defined "auto" as "a land motor vehicle . . . designed for travel on public roads."

After Alexis Flores was thrown from a golf cart driven by a School District employee during a school program, she sued the sued the School District. While that suit was pending, the School District requested a defense and indemnity from the Insurance Fund under its automobile policy. The Insurance Fund refused, asserting that the policy did not provide coverage because a "golf cart" is not designed for travel on public roads and thus is not an "auto." The Insurance Fund filed this suit seeking a declaratory judgment that it had no duty to defend the School District. The School District filed a counter-claim for declaratory judgment that the policy required the Insurance Fund to defend and indemnify the School District. Meanwhile, Flores won a $100,000 judgment against the School District.

Both the Insurance Fund and the School District moved for summary judgment. With its motion, the School District attached additional documents, including print-outs of portions of the website of E-Z-Go, a golf-cart manufacturer, and a Wall Street Journal article on electric vehicles. The trial court determined as a

matter of law that the policy requires the Insurance Fund to defend and indemnify the School District. It entered a final judgment requiring the Insurance Fund to pay the School District the costs it incurred in defending Flores's suit and the $100,000 it paid to satisfy the judgment in that suit, plus post-judgment interest.

The Insurance Fund appealed, and the court of appeals reversed, holding that neither party was entitled to summary judgment on either the duty to defend or the duty to indemnify. The appellate court first held that, in an exception to the eight-corners rule that prohibits the consideration of extrinsic evidence in insurance cases like this, it could consider extrinsic evidence because the evidence was relevant only to the insurance-coverage dispute and not relevant to the merits of Flores's claims against the School District. Next, the court concluded that the School District's extrinsic evidence established that "the term 'golf cart' has an expanded meaning in today's lexicon," such that it may include vehicles that are designed for travel on public roads. But the court concluded that the trial court erred by granting the School District's summary-judgment motion because the extrinsic evidence raised a fact question about the design of the golf cart from which Flores was thrown. On the duty to indemnify, the court of appeals also held that the evidence created a genuine issue of fact regarding whether the golf cart was an "auto" covered by the policy.

The School District petitioned the Supreme Court for review, but the Insurance Fund did not. The Supreme Court affirmed the court of appeals' judgment reversing the trial court's judgment, but for different reasons. As to the duty to defend, the Court first noted that in a separate case decided the same day as this one, the Court approved an exception to the eight-corners rule that allows consideration of extrinsic evidence in certain conditions. *See Monroe v. BITCO*, — S.W.3d —, 2022 WL —, at *— (Tex. Feb. 11, 2022). The Court concluded that the *Monroe* exception did not apply to this case. The *Monroe* exception requires a "gap" in the plaintiff's petition that leaves the Court unable to determine whether coverage exists by applying the eight-corners rule. In this case, there was no "gap" in the petition's recitation of facts that needed to be filled. And based on the facts alleged, the petition in this case did not state a claim that could trigger the duty to defend under the eight-corners rule.

The Court held that the common, ordinary, and generally accepted meaning of "golf cart" did not include vehicles "designed for travel on public roads," as the insurance policy defined "auto." The Court looked to dictionary and statutory definitions, determined that the extensive legislation permitting golf carts to be operated on public roads under limited circumstances showed that golf carts are not normally designed for public-road use, and noted that courts from other jurisdictions have consistently used and construed the term "golf cart" to refer to a vehicle not designed for travel on public roads. Second, the Court held that even if it could consider the School District's extrinsic evidence, that evidence did not support a finding that golf carts are "designed for travel on public roads."

As to the duty to indemnify, the Court held again that the evidence conclusively established that the vehicle from which Flores was thrown was not "designed for travel on public roads." The evidence showed that the golf cart was "an older model, electric type [golf cart] commonly seen on golf courses," was a "normal

golf cart you would see at a golf course," and was "not street legal," even if it may have been used on public roads for brief periods. Thus, no evidence established that the golf cart was a "covered auto" under the policy. Finally, the Court noted that its analysis would entitle the Insurance Fund to summary judgment. But because the Insurance Fund did not file a petition for review, the Court could not render judgment in its favor and instead remanded to the trial court.

NEGLIGENCE
Public Utilities

CenterPoint Energy Res. Corp. v. Ramirez, ___ S.W.3d ___ (Tex. Feb. 11, 2022) [20-0354]

The issue of first impression in this personal-injury case is whether a limitation of liability provision in a utility tariff approved by state regulators bars the utility's liability for damages suffered by a residential customer's houseguests. Other issues include whether the tariff's liability limitations (1) violate the Texas Constitution's open courts guarantee or (2) conflict with local ordinances and are rendered inoperative because the tariff expressly resolves all conflicts in favor of other laws and regulations.

In 2011, Adrian and Graciela Castillo purchased a new home. Over the next three years, Graciela's parents, Fernando and Minerva Ramirez, were frequent visitors and guests at the home. During these visits, the Ramirezes used the home's gas services for daily living activities. In 2015, while Fernando was attempting to repair the Castillos' electric clothes dryer, he inadvertently opened the valve on an unused gas line behind the dryer. Escaping gas accumulated to combustible levels and ignited, resulting in an explosion that damaged the home and seriously injured Fernando.

The Ramirezes sued the homebuilder, the plumber, and the utility for personal-injury damages under negligence and gross-negligence theories. They alleged that all three defendants had breached a duty to plug or seal the unused gas line. The plumber settled; the trial court directed a verdict for the defendants on the gross-negligence claims; and after finding all of the defendants negligent as alleged, the jury apportioned responsibility 60% to the homebuilder, 34% to the utility, and 6% to the plumber.

The utility filed a motion for judgment notwithstanding the verdict, urging that the regulator-approved and filed utility tariff precludes liability for any portion of the Ramirezes' damages. The tariff provides that, "[u]nless otherwise expressly stated," it applies to "all Consumers regardless of classification." The tariff further states that the terms "'Consumer, Customer and Applicant' are used interchangeably" and broadly defined to "mean a person or organization *utilizing* [the utility's] services or who wants to utilize [the utility's] services." The tariff then provides, without exception, that the utility "shall not be liable for *any* damage or loss caused by the escape of gas from Consumer's housepiping or Consumer's appliances"

and defines "housepiping" as "[a]ll pipe and attached fittings which convey gas from the outlet side of the meter to the Consumer's connection for gas appliances." That is precisely how the houseguests were injured, but the parties disputed whether the tariff applies to anyone other than the utility's customers and whether the specific provision at issue applies regardless of the Ramirezes' "consumer" or "customer" status. They also disputed the applicability of another liability limitation that was subject to an exception the Ramirezes claimed to have established.

The trial court denied the utility's motion and rendered judgment on the jury's verdict, awarding the Ramirezes more than $6.9 million in actual damages. On appeal, the homebuilder settled, and the court of appeals affirmed the judgment against the utility. Although the court acknowledged that the tariff's terms broadly apply to any person "utilizing" the utility's gas services, it nonetheless determined that the tariff did not apply to a customer's houseguests and that, as a general proposition, a tariff only governs the relationship between the utility and its customer. The court further resolved the utility's jury charge and evidentiary challenges in favor of the jury's verdict.

The Supreme Court reversed and rendered judgment for the utility because (1) the tariff's terms expressly apply to "all consumers," (2) as active users of the utility's gas services, the houseguests met the tariff's definition of that term, and (3) their damages were caused by an excluded peril. The Court explained that a tariff approved by a regulatory body is not a "mere contract" and instead carries "the force and effect" of law. Accordingly, the houseguests were bound by the tariff's terms because, as consumers, the tariff applied to them and, like any other law, neither assent nor actual knowledge is required to enforce its terms as written. While opinions of the Court have used words to the effect that a tariff is binding on a customer, that does not mean that it is not binding on a noncustomer notwithstanding tariff language that makes it so. Such statements arose in cases involving the tort claims of customers and are but a truism, not a rule of limitation. Tariff provisions remain amenable to challenge for reasonableness or want of regulatory authority, but neither were at issue here.

The Court also found no conflict between the tariff's liability limitation and the local ordinances. An ordinance imposing a duty is not inconsistent with a tariff provision limiting liability for damages; to the contrary, they are correlated with one another because a liability limitation only comes into play if the utility could be liable for violating some duty or obligation imposed by law or contract. Finally, assuming the open-courts provision was implicated, the Court held that enforcement of the liability limitation did not infringe the Ramirezes' constitutional rights because the tariff did not withdraw all remedies or avenues of redress or make a remedy by due course of law contingent on an impossible condition.

INSURANCE
Duty to Defend

Monroe Guar. Ins. Co. v. BITCO Gen. Ins. Corp., — S.W.3d —, 2022 WL — (Tex. Feb. 11, 2022) [21-0232]

At issue in this case is whether Texas law permits consideration of extrinsic evidence to determine whether a liability insurer owes a duty to defend when the plaintiff's pleading is silent about a potentially dispositive coverage fact.

David Jones sued 5D Drilling & Pump Service for damages resulting from 5D's negligence while drilling an irrigation well. Jones alleged that he contracted with 5D in 2014 and that 5D stuck a drilling bit in the bore hole, rendering the well useless. The petition alleges that Jones's land was damaged but is silent as to when any alleged damage occurred.

Monroe Guaranty Insurance Co. and BITCO General Insurance Corp. each provided commercial general liability coverage to 5D, but at different times. 5D demanded a defense from both insurers, but Monroe refused to defend, contending that any covered property damage occurred before its policy period began. The underlying lawsuit settled, and BITCO sued Monroe in federal district court, seeking contribution for its defense costs. Monroe and BITCO stipulated that 5D's drill bit stuck in the bore hole "in or around November 2014," which was before Monroe's policy began in October 2015.

Applying the "eight-corners rule" and considering only Jones's petition and the Monroe policy, the district court held that Monroe owed a duty to defend because the property damage could have occurred anytime between the formation of the drilling contract in 2014 and the filing of Jones's lawsuit in 2016. Monroe appealed, and the Fifth Circuit certified two questions to the Court: (1) whether the exception to the eight-corners rule articulated in *Northfield Insurance Co. v. Loving Home Care, Inc.*, was permissible under Texas law; and (2) when applying such an exception, whether a court may consider extrinsic evidence of the date of an occurrence.

The Court held that extrinsic evidence may be considered in duty-to-defend cases under certain circumstances. The eight-corners rule remains the initial inquiry to be used. But if the underlying petition states a claim that could trigger the duty to defend, and the application of the eight-corners rule, due to a gap in the plaintiff's pleading, is not determinative of whether coverage exists, Texas law permits consideration of extrinsic evidence provided the evidence (1) goes solely to an issue of coverage and does not overlap with the merits of liability, (2) does not contradict facts alleged in the pleading, and (3) conclusively establishes the coverage fact to be proved.

The Court's standard is similar to that in *Northfield*, with minor refinements. First, the threshold inquiry is: does the pleading contain the facts necessary to resolve the question of whether the claim is covered? Second, there is no requirement that the extrinsic evidence goes to a "fundamental" coverage issue. And third, the proffered extrinsic evidence must conclusively establish the coverage fact at issue.

In response to the Fifth Circuit's second certified question, the Court concluded that evidence of the date of an occurrence may be considered if it meets the other requirements for consideration of extrinsic evidence. In this case, the stipulation's use as urged by Monroe would overlap with the merits of liability, so it cannot be considered in determining whether Monroe owes a duty to defend.