



Case Summaries May 5, 2023

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OPINIONS

GOVERNMENTAL IMMUNITY

Texas Whistleblower Act

Tex. Health & Hum. Servs. Comm'n v. Pope, ___ S.W.3d ___, 2023 WL ___ (Tex. May 5, 2023) [[20-0999](#)]

The main issue in this case is whether two employees reported violations of law by their “employing governmental entity or another public employee” under the Texas Whistleblower Act when they reported violations of law by a private company that contracted with their employer.

Two employees of the Health and Human Services Commission, Dimitria Pope and Shannon Pickett, served as directors of a program that provides Medicaid beneficiaries with non-emergency transportation to and from medical providers. Federal and state law require that children who are Medicaid beneficiaries be accompanied by a parent or another authorized adult to receive transportation services and for the Commission to receive federal Medicaid reimbursement for providing the transportation. The employees reported to law enforcement that a private company the Commission contracted with to provide the transportation was transporting children without a parent or authorized adult.

After the employees were fired, they sued the Commission under the Whistleblower Act, alleging that they were terminated in retaliation for reporting violations of law by the Commission to law enforcement. The trial court denied the Commission’s plea to the jurisdiction, and the court of appeals affirmed.

The Supreme Court reversed and rendered judgment for the Commission. The main issue before the Court was whether the employees’ reports against the private contractor satisfied the Whistleblower Act’s requirement that an employee report a violation of law by the “employing governmental entity or another public employee.” The employees argued that their reports against the contractor were impliedly against the Commission too because of the structure of Medicaid’s federal reimbursement scheme. The Court rejected that argument and held that the Act only protects express reports that unambiguously identify the employing governmental entity as the violator.

PROCEDURE—PRETRIAL

Personal Jurisdiction

State v. Volkswagen Aktiengesellschaft and *State v. Audi Aktiengesellschaft*, ___ S.W.3d ___, 2023 WL _____ (Tex. May 5, 2023) [[21-0130](#), [21-0133](#)]

In this civil-enforcement action, German automobile manufacturers challenged specific personal jurisdiction in Texas on claims arising from their scheme to embed illegal emissions-beating technology during post-sale service at Texas dealerships. The appeal presented two issues: (1) whether the manufacturers purposefully availed themselves of the privilege of conducting activities in Texas by deploying defeat-device software to Texas vehicles through intermediaries and instrumentalities under their contractual control, and (2) whether purposeful availment is lacking because the manufacturers targeted vehicles nationwide.

After an affiliated, Virginia-based distributor independently sold more than half a million illegal vehicles nationwide, hardware failures prompted the German manufacturers to develop and deploy defeat-device software updates. Without disclosing the software’s true purpose, the German manufacturers initiated voluntary recall and service campaigns, which enabled dealerships nationwide to install the software on manufacturer-targeted vehicles. Importer agreements between the German manufacturers and the U.S. distributor required the distributor and all local dealers to perform recall and service campaigns when, as, and how the manufacturers’ directed. Although the German manufacturers deployed the software updates in Germany, the distribution system “automated” downstream delivery to the local dealerships, including those in Texas. When targeted vehicles were presented for service or recall work in Texas, the software was “transmit[ted]” to those vehicles via the manufacturers’ proprietary diagnostic system. The dealers slated to receive the software updates, including those in Texas, were known to the manufacturers.

The State of Texas sued the German manufacturers, the U.S. distributor, and other American entities, seeking civil penalties and injunctive relief under state environmental laws. The trial court denied the German manufacturers’ special appearances, but on interlocutory appeal, a divided court of appeals reversed and dismissed the State’s claims. The appeals court held that the manufacturers’ post-sale tampering activities were directed toward the United States as a whole, not Texas specifically.

The Supreme Court, with two justices sitting by commission of the Texas Governor, reversed and remanded. After exploring the evidence in detail, the Court held that the German manufacturers could reasonably anticipate being haled into a Texas court because they knowingly and purposefully leveraged a distribution system under their contractual control to bring the tampering software to Texas. The Court explained that the outcome would be the same whether the German manufacturers’ purposeful actions were characterized as direct contacts effectuated through instrumentalities or indirect contacts effected through intermediaries. The Court observed that (1) controlling the distribution scheme that brought a product to the forum state is a recognized “plus factor” under a stream-of-commerce purposeful-availment analysis; (2) actions taken through a “distributor-intermediary” or an agent acting as the defendant’s “boots on the ground” “provides no haven from the jurisdiction of a Texas Court”; and (3) the dissent’s conclusion that purposeful-availment was lacking misfocused on contacts related to initial vehicle sales in Texas and was contrary to the applicable standard of review.

The Court also held that the purposefulness of the forum contacts was not diminished by the pervasiveness of the tampering scheme because personal jurisdiction is a forum-specific inquiry. Accordingly, a defendant's contacts with other states—whether more, less, or exactly the same—do not affect the jurisdictional force of purposeful contacts with Texas.

Justice Huddle dissented, joined by Chief Justice Hecht and Justice Bland. The dissent would conclude that asserting personal jurisdiction here is contrary to the Court's precedents, which require additional conduct evidencing a nonresident defendant's purposeful targeting of Texas. The dissent would hold that the Texas-specific contacts of VW America and the local dealers cannot be imputed to the German manufacturers under an agency or other theory because there is insufficient evidence that the German manufacturers controlled the means and details of the recall process. The dissent would also hold there is no evidence the German manufacturers purposefully targeted Texas specifically as opposed to the United States as a whole. According to the dissent, in the absence of properly imputed contacts or conduct purposefully targeting Texas, the exercise of personal jurisdiction over the German manufacturers eviscerates the "plus factor" requirement the Court has recognized in stream-of-commerce cases.

PROCEDURE-PRETRIAL

Discovery

In re Sherwin-Williams Co., ___ S.W.3d ___, 2023 WL ___ (Tex. May 5, 2023) (per curiam) [[22-0559](#)]

The issue in this mandamus proceeding is whether the trial court abused its discretion by denying the defendants' motion under Texas Rule of Civil Procedure 204.1 to conduct a medical examination of the plaintiff.

Marcos Acosta alleges that he was injured in a car accident caused by the negligence of Roberto Hernandez and that Hernandez's employer, the Sherwin-Williams Company, was vicariously liable. Acosta designated two physicians who had examined him to opine on his medical treatment and inability to return to work. Sherwin-Williams and Hernandez designated Dr. Anton Jorgensen to testify as their expert and moved to compel a medical examination of Acosta. After a hearing on the motion, Sherwin-Williams filed a supporting affidavit from Dr. Jorgensen stating the tests he would perform and why they were necessary to opine on Acosta's injuries. The trial court denied the motion, and the court of appeals denied mandamus relief.

The Supreme Court conditionally granted mandamus relief in a per curiam opinion. The Court first held that, because the order denying the motion stated that the trial court had considered all of the pleadings on file, Dr. Jorgensen's affidavit was properly before and considered by the trial court.

The Court next held that the affidavit sufficiently established good cause under Rule 204.1. The Court reasoned that the affidavit showed that, without conducting his own exam, Dr. Jorgensen could not fully opine on Acosta's injuries and would be at a disadvantage in front of the jury. Thus, the Court held that the exam would be the least intrusive means of discovery available. After concluding that Sherwin-Williams and Hernandez lacked an adequate remedy by appeal, the Court directed the trial court to withdraw its order denying the motion to compel and enter an order requiring Acosta to submit to an examination.