DALLAS COMMERCIAL CASES 2020-21

DAVID S. COALE

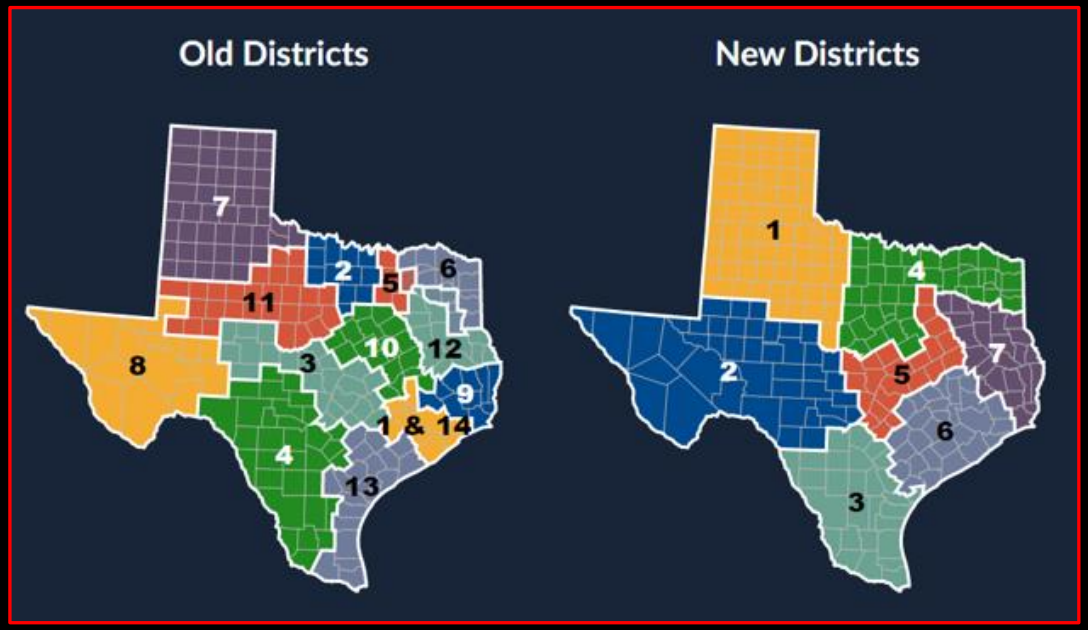
Dallas Bar Association

Appellate Law Section

June 17, 2021

Webb County App. Dist. v. New Laredo Hotel, Inc., 792 S.W.2d 952, 544 (Tex. 1990).

"It must be presumed that the legislature would not do a useless act."



Fifth District Dec. 2018

Fifth District June 2021

JURY SELECTION

In re Commitment of Barnes,
No. 05-19-00702-CV (Aug. 5, 2020) (mem. op.)

If you are presented with evidence by an expert that the diagnosis of a person is pedophilic disorder, are you going to automatically assume that that person has a condition that by [a]ffecting the emotional or volitional capacity predisposes the person to commit a sexually violent offense to the extent that they become a menace to the health and safety of another person?

"Barnes's questions here sought to answer whether jurors would stop listening to evidence regarding the 'behavioral abnormality' prong of the applicable statutory framework after hearing only the State's evidence. Jurors may be asked to ***commit to follow law*** *and statute, and render 'a true verdict according to the law and to the evidence.'"*

Murphy v. Mejia Arcos,
615 S.W.3d 676 (2020, pet. filed)

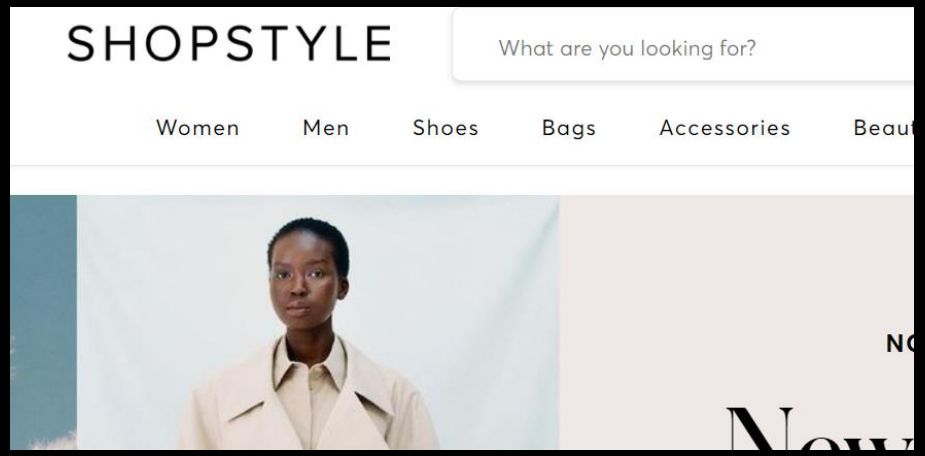
Error: *"A prospective juror's inability to accept an official interpretation of testimony has been accepted as a race-neutral reason by both the Supreme Court and this Court. Thus, because Murphy provided a race-neutral explanation, the trial court was* ***required to accept the explanation*** *at 'face value' and proceed to step three to determine whether the reason was pretext for discrimination." (citations omitted).*

But: ***"[T]he topic of Spanish testimony[] being translated into English was not raised*** *by anyone during their questioning of the venire panel, most importantly not by Murphy. … As a result, no prospective jurors had the opportunity to volunteer they might have difficulty doing so or to ask questions for clarification of their duty."*

PERSONAL JURISDICTION

Shop Style, Inc. v. rewardStyle, Inc.,
No. 05-19-00736-CV (July 21, 2020, no pet.)

"Basing personal jurisdiction on the ownership or maintenance of a website alone, even one accessible in the forum state, without requiring some form of ***interaction between the website owner and consumers in the forum state****, would create universal jurisdiction over any person or company that maintains a website—a view most courts reject."*



Chen v. Razberi Techs., Inc.,
No. 05-19-01551-CV (April 28, 2021)

"The trial court's entry of a final summary judgment in the plaintiff's favor moots the defendant's pending interlocutory appeal from a prior order denying the defendant's special appearance because ***the prior order merges*** *into the final judgment."*

TEMPORARY INJUNCTIONS

In re Luther, No. 20-0363, (Tex. April 9, 2021).

It clearly appears from the facts set forth in Plaintiff's Original Petition that unless Defendants are immediately ordered to cease and desist from operating the Salon A La Mode business for in-person services located at 7989 Belt Line Road, Ste. 139-1C, Dallas, Texas in violation of State of Texas, Dallas County, and/or City of Dallas emergency regulations related to the COVID-19 pandemic, that Defendants will continue to commit the foregoing acts before notice can be given and a hearing is set on Plaintiff's motion for temporary injunction.

. . .

IT IS THEREFORE ORDERED that Defendants are immediately ordered to cease and desist from operating the Salon A La Mode business for in-person services located at 7989 Belt Line Road, Ste. 139-1C, Dallas, Texas in violation of State of Texas, Dallas County, and City of Dallas emergency regulations related to the COVID-19 pandemic[.]

*"[The order] nowhere specifies **any particular state, county, or city regulation** that Luther has violated, is threatening to violate, or is being commanded to stop violating. Nor does it describe with specificity **which 'in-person services'** were restrained …."*

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Retail Services WIS Corp. v. Crossmark, Inc., No. 05-20-00937 (May 4, 2021) (mem. op.)

- *"The Court further finds that the CROSSMARK Confidential Information and Trade Secrets and other **confidential** and **proprietary business information** of CROSSMARK and business relationships of CROSSMARK are assets belonging solely to CROSSMARK."*
- *"For purposes of this Temporary Injunction, 'Covered Clients and Customers' means those persons or entities that CROSSMARK provided services to and that the Former Employees either had contact with, supervised employees who **had contact with**, or received proprietary information about within the last twenty-four (24) months period that they were employed by CROSSMARK."*
- *A ban on recruiting "any persons formerly or currently employed by or **associated with** Crossmark."*
- *"directly or **indirectly . . . taking any steps** to cause any **current client or customer** of CROSSMARK, including [Client X and Client Y], to divert, withdraw, curtail or cancel any of their business with CROSSMARK."*
- *Deletion of data about "existing or **prospective** customers or clients of CROSSMARK, as well as **"CROSSMARKinformation"** and "**other digital storage devices**."*

Wimbrey v. World Ventures, No. 05-19-01520-CV (Dec. 17, 2020) (mem. op.)

- *"Paragraph 3 merely includes a list of items that the court found the covenants were intended to protect. By **failing to define, explain, or otherwise describe what constitutes WorldVentures's 'confidential information,'** the order leaves appellants to speculate about what particular information or item would constitute 'confidential information' and thus fails to provide necessary notice as to how to conform their conduct."*

- ***But see*** *McCaskill v. National Circuit Assembly, No. 05-17-01289-CV, 2018 WL 3154616 (Tex. App.—Dallas June 28, 2018, no pet.) (mem. op.) ("Reading the court's order as a whole, it is clear that 'confidential information' as used in paragraph 21 is to have the meaning ascribed to it in paragraph 3, which sets out the pertinent terms of the parties' agreement. The definition in paragraph 3 contains five subparts and is much more specific than the definition in [another case]. **It includes specific terms** like 'computer or mobile application code' and 'unpublished promotional materials.' And when less specific terms are used, there is **more context** given for them ….").*

City of Dallas v. Stamatina Holdings LLC,
No. 05-20-00975-CV (May 7, 2021) (mem. op.)

"The temporary injunction before us does not include an ***order setting the case*** *for trial on the merits with respect to the ultimate relief sought. Therefore, the order does not comply with [Tex. R. Civ. P. 683], is void, and must be dissolved."*

Kaufman v. AmeriHealth Lab,
No. 05-20-00504-CV (Oct. 30, 2020) (mem. op.)

"Kaufman voluntarily appeared through counsel at the TRO hearing, succeeded in modifying the TRO based on counsel's arguments, and argued he was not a signatory to the consulting agreement thereby challenging AmeriHealth's breach of contract claim. By stepping outside the role of observer or silent figurehead and participating in the hearing, counsel's actions were inconsistent with the assertion that the trial court lacked jurisdiction over Kaufman. Instead, counsel not only actively participated in the hearing but also ***sought and received affirmative relief from the trial court****."* (citations omitted).

DISCOVERY

F 1 Constr. v. Banz, No. 05-19-00717-CV (Jan. 20, 2021) (mem. op.)

RULE 194. REQUESTS FOR DISCLOSURE

194.1 Request.

A party may obtain disclosure from another party of the information or material listed in Rule 194.2 by serving the other party - no later than 30 days before the end of any applicable discovery period - the following request: "Pursuant to Rule 194, you are requested to disclose, within 30 days of service of this request, the information or material described in Rule [state rule, *e.g.*, 194.2, or 194.2(a), (c), and (f), or 194.2(d)-(g)]."

"Construction offered no evidence to demonstrate the absence of unfair surprise or prejudice. Indeed, there is nothing to suggest that Defendants had enough evidence to reasonably assess settlement, avoid trial by ambush, or prepare rebuttal to expert testimony."

SUMMARY JUDGMENT

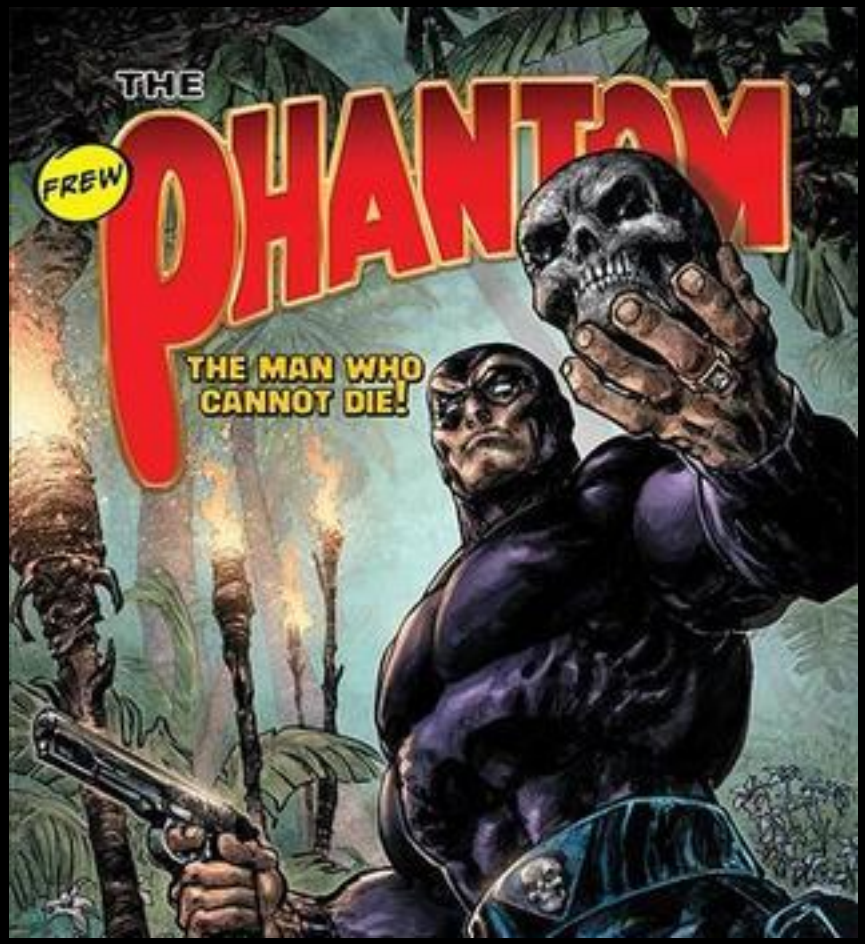
JLB Builders, L.L.C. v. Hernandez,
No. 20-0368 (Tex. May 7, 2021)

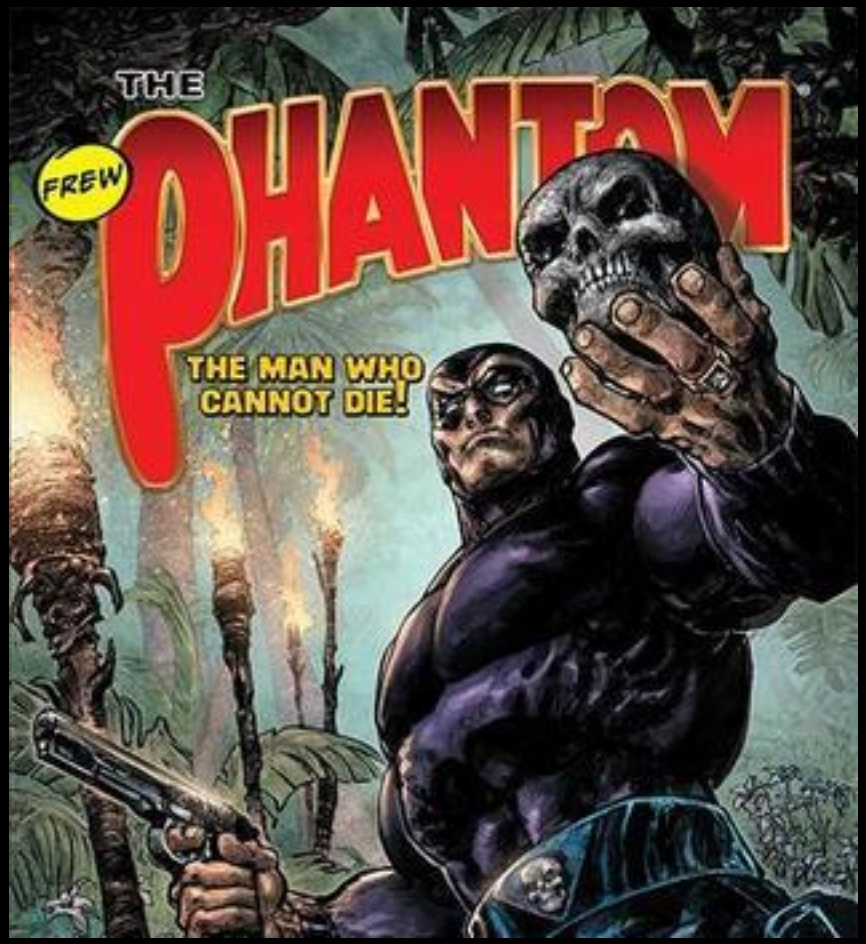
"The court of appeals held that a fact issue exists as to whether the general contractor exercised sufficient control to give rise to a duty of care, reversing the trial court's summary judgment in the contractor's favor. We agree with the trial court that no genuine issue of material fact exists regarding the existence of a duty and ***reverse the court of appeals****' judgment."*

FINDINGS OF FACT

In re: AEJ,
No. 05-20-00340-CV (Aug. 31, 2020)

"Texas Rule of Civil Procedure 299a provides that a trial court's findings of fact following a bench trial "shall not be recited in a judgment," but that if they are, separately filed "findings of fact made pursuant to Rules 297 and 298 will control" to the extent of any conflict between the two. We acknowledge we have not been consistent in our interpretation of rule 299a. For example, in R.S. v. B.J.J., we concluded that ***findings in the body of a judgment 'are inappropriate*** *and may not be considered on appeal.' … Other courts are in accord with this view. More recently, however, we have said that '[b]ecause the record does not contain any additional findings of fact or conclusions of law, the* ***findings in the judgment have probative value and will be treated as valid*** *findings.'"* (citations omitted).


THE
FREW
PHANTOM
THE MAN WHO CANNOT DIE!



BRIEFING

Herczeg v. City of Dallas, No. 05-19-01023-CV (March 29, 2021) (mem. op.)	*Ziehl v. Tornado Bus*, No. 05-19-00901-CV (April 22, 2021) (mem. op.)
*"[U]ntimeliness and failure to exhaust administrative remedies **are independent** of the City's other grounds, which focused on the merits of Herczeg's claims."*	*"Following the supreme court's mandate, we conclude that, **fairly subsumed in** Ziehl's briefing, is the challenge to the trial court's judgment awarding contribution to all parties who failed to secure a statutorily required jury instruction."* (citations omitted).

CONFIDENTIALITY

Toyota Motor Sales v. Reavis, No. 05-19-00284-CV (Feb. 4, 2021) (mem. op.)

"Beyond Toyota's blanket assertions that a total seal is necessary and redaction would be meaningless, Toyota did not offer any additional testimony or ***evidence regarding whether the Toyota documents could be redacted or otherwise altered while still protecting its interest****. Toyota also contends on appeal that it showed sealing was the least restrictive means to protect its interest here because it sought to seal 'just four exhibits from a trial involving over 900 exhibits and [covering] pages of closed-courtroom testimony from more than 3,200 pages of trial transcripts.' This argument misses the point. … No matter how many exhibits a party seeks to seal, that party must still meet the requirements of the rule."*

Toyota Motor Sales v. Reavis, No. 05-19-00284-CV (Feb. 4, 2021) (mem. op.)

- *"[E]ven assuming the court records contain trade secrets, the **existence of trade secrets standing alone is insufficient** to overcome the presumption of openness and allow the records to be permanently sealed."*

- *"Because Toyota did not take **adequate steps during trial** to protect the exhibits and related testimony from public disclosure and did not seek an instruction prohibiting the jury and other non-parties from discussing the documents beyond the setting of the trial, we conclude any interest Toyota had in maintaining secrecy of the records does not "clearly outweigh" the presumption of openness."*

In re: Cook,
No. 05-20-00205-CV (April 28, 2021)
(Smith, J., concurring)

"

When filed in this Court, the Paxton deposition was subject to the trial court's amended protective order and there was a pending motion to seal the deposition under rule 76a. Thus, we issued a temporary sealing order pending resolution of the 76a motion. More than a year later, that 76a motion remains pending. … In a situation like this, the appellate court finds itself faced with ***multiple unsatisfactory alternatives****."* (citations omitted).

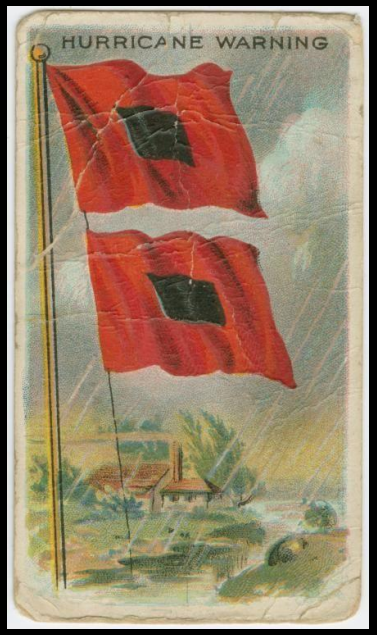
MISREPRESENTATION

Mundheim v. Lepp,
No. 05-19-01490-CV (May 13, 2021) (mem. op.)

"[T]he specific misrepresentations about which Amy complains, that Paul said he was walking away from the title business but was actually accepting a bonus and a well-paid position with Alamo, ***were not referenced in the agreement and were not disclosed*** *to Amy. Thus, we reject the Mundheims' argument that the disclaimer-of-reliance provision in the agreement was binding to preclude Amy from asserting she relied on the Mundheims' misrepresentations when she entered the agreement."*

BBVA Compass v. Bagwell,
No. 05-18-00860-CV (Dec. 14, 2020) (mem.op.)

"Our law charges these parties with exercising care to protect their own interests, and a failure to do so is not excused by mere confidence in the honesty and integrity of the other party. Thus, Bagwell—as an experienced businessman, and borrower, in this field—was required to establish that when he relied upon Meade's oral representations, he was ***reasonably protecting*** *his multimillion-dollar interest in the transaction." (citations omitted).*



"Justifiable Reliance" and the PJC

PJC 105.2 Instruction on Common-Law Fraud—Intentional Misrepresentation

Fraud occurs when—

1. a party makes a material misrepresentation, and

2. the misrepresentation is made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion, and

3. the misrepresentation is made with the intention that it should be acted on by the other party, and

4. the other party relies on the misrepresentation and thereby suffers injury.

← 2018

2020 →

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3. the misrepresentation is made with the intention that it should be acted on by the other party, and

4. the other party [*justifiably*] relies on the misrepresentation and thereby suffers injury.

ARBITRATION

Baby Dolls Topless Saloons, Inc. v. Sotero,
No. 05-19-01443-CV (Aug. 21, 2020) (mem. op.)

"On this record, we conclude the trial court could have properly determined the parties' minds could not have met regarding the contract's ***subject matter and all its essential terms*** *such that the contract is not an enforceable agreement. Consequently, the trial court did not abuse its discretion by denying the motions to compel arbitration." (citations omitted)*

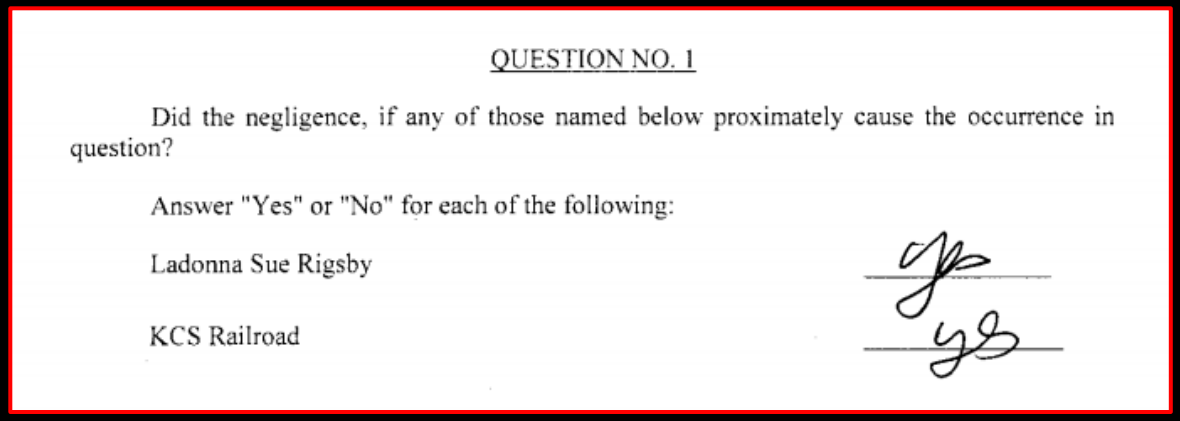
Dissent: *"Because the record fails to show a viable defense to* ***the arbitration agreement itself*** *(e.g., that Sotero didn't sign the contract, she lacked the capacity to do so, or any other defense that might vitiate the arbitration agreement apart from the rest of her contract), her successors are bound by her arbitration agreement—including her delegation to the arbitrator the authority to decide the scope issue."*

Aerotek v. Boyd,
No. 20-2090 (Tex. May 28, 2021)

"It may be that the use of electronic contracts already exceeds the use of paper contracts or that it will soon. The [Texas Uniform Electronic Transactions Act] does not limit the ways in which electronic contracts may be proved valid, but it specifically states that ***proof of the efficacy of the security procedures used in generating a contract can prove that an electronic signature is attributable to an alleged signatory.*** *An opposing party may, of course, offer evidence that security procedures lack integrity or effectiveness and therefore cannot reliably be used to connect a computer record to a particular person. But that attribution cannot be cast into doubt merely by denying the result that reliable procedures generate."*

JURIES

Kansas City Southern Ry Co. v. Horton,
No. 05-19-00856-CV (March 11, 2021) (mem.op.)



QUESTION NO. 1

Did the negligence, if any of those named below proximately cause the occurrence in question?

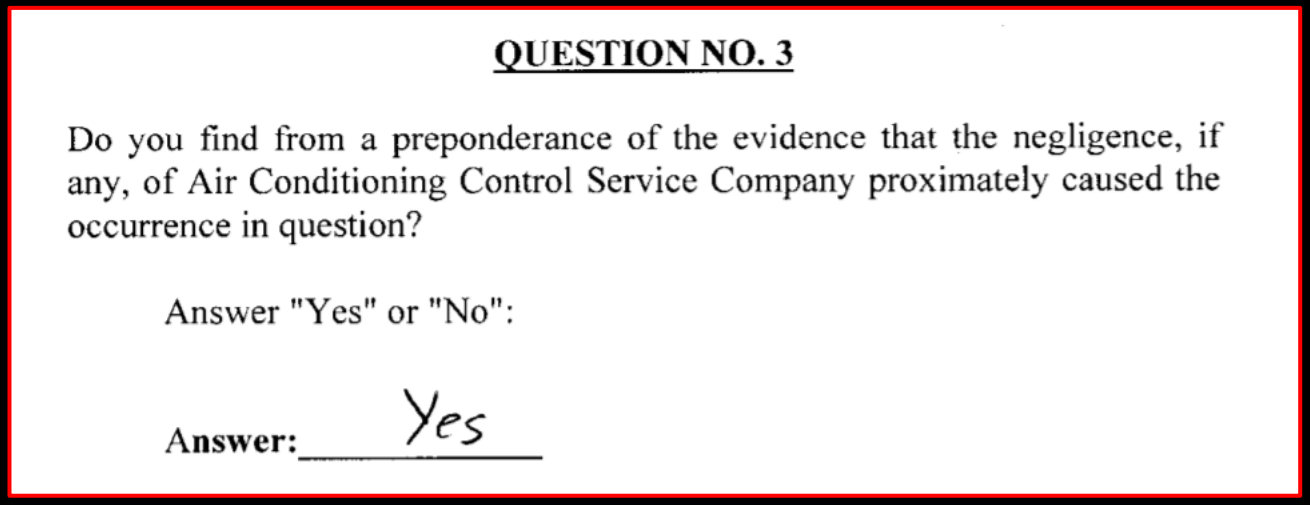
Answer "Yes" or "No" for each of the following:

Ladonna Sue Rigsby Yes

KCS Railroad Yes

"We cannot determine whether the jury rested its liability determination on appellees' preempted humped crossing theory, which should not have been submitted, or the missing yield sign theory. Accordingly, we follow Casteel's holding."

EYM Diner LP v. Yousef,
No. 05-19-00636-CV (Nov. 24, 2020) (mem. op.)



QUESTION NO. 3

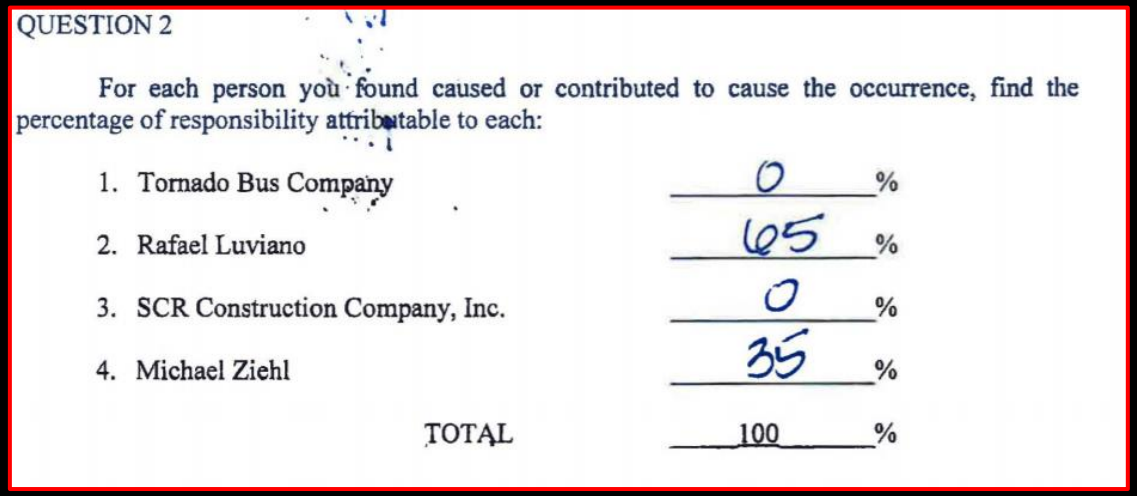
Do you find from a preponderance of the evidence that the negligence, if any, of Air Conditioning Control Service Company proximately caused the occurrence in question?

Answer "Yes" or "No":

Answer: Yes

*"ACCSC's reliance on United Scaffolding is misplaced because Yousef pleaded a **general negligence** claim against ACCSC and obtained a liability finding from the jury based on **general negligence** at trial. In United Scaffolding, the plaintiff, James Levine, pleaded one theory (premises liability) and obtained a jury finding on a different theory (general negligence)."*

EYM Diner LP v. Yousef, No. 05-19-00636-CV (Nov. 24, 2020) (mem. op.)



QUESTION 2

For each person you found caused or contributed to cause the occurrence, find the percentage of responsibility attributable to each:

1.	Tornado Bus Company	0 %
2.	Rafael Luviano	65 %
3.	SCR Construction Company, Inc.	0 %
4.	Michael Ziehl	35 %
	TOTAL	100 %

"Using the word 'shall' three times in [CPRC] section 33.016(c), the Legislature ***specifically and clearly imposed*** *an obligation on the trier of fact to make a separate finding of the percentage of responsibility for each contribution defendant."*

In re PlainsCapital Bank, No. 05-20-00765-CV (May 13, 2021, orig. proceeding) (mem. op.)

***"[R]eal parties expressly renounced their contractual right to a nonjury trial when they repeatedly demanded a jury and paid the jury fee**. Having done so, they cannot ask this Court to enforce that contractual right by mandamus. Relator was entitled to rely upon real parties' conduct. And the record establishes that relator did rely on real parties' conduct: relator never objected to real parties' jury demands, and when real parties first indicated the possibility of asserting their contractual right by filing the Notice, relator immediately filed its own jury demand and fee."*

Toyota Motor Sales v. Reavis,
No. 05-19-00075-CV (June 3, 2021).

"At the heart of this case, like many product liability cases, was a battle of the experts. Plaintiffs' experts examined physical evidence, performed tests, reviewed data, performed calculations, criticized Toyota Motor's experts, and concluded the vehicle was defective. Toyota Motor's experts did the same and concluded the vehicle was not defective. ***The jury properly exercised its prerogative to resolve this conflicting evidence and believed the plaintiffs' experts.*** *This Court may not second guess the jury's decision."*

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