LEHOTSKY KELLER

SUPREME COURT OF TEXAS

2020-2021 TERM BUSINESS ROUNDUP

AUGUST 2021

ABOUT LEHOTSKY KELLER LLP

Lehotsky Keller LLP is a national litigation boutique with offices in Austin, Washington DC, and Denver.

Lehotsky Keller's attorneys have broad experience in complex litigation across industries and deep experience litigating in state and federal appellate courts.

Founding Partner Scott Keller is the former Solicitor General of Texas. He has argued 12 cases in the Supreme Court of Texas, 11 cases in the U.S. Supreme Court, and many others in courts throughout the nation. He presented oral argument in two Supreme Court of Texas cases this term: *Amazon.com, Inc. v. McMillan* and *In re Facebook, Inc.*

Partner Matt Frederick is the former Deputy Solicitor General of Texas. He has argued more than 25 appeals in state and federal courts, including the Supreme Court of Texas.

Partner Todd Disher is the former Deputy Chief of the Special Litigation Unit of the Texas Attorney General's Office. He has litigated many trials to verdict in state and federal courts.

A LOOK AHEAD TO THE 2021-2022 TERM

After recently completing its 2020-2021 term, the Supreme Court of Texas has already begun setting oral arguments for the 2021-2022 term in cases that could be particularly important to the business community. For example, the Court will consider the contours of the implied-revocation doctrine in Texas contract law. And the Court will consider a claim alleging a conspiracy to restrain trade in violation of the Texas Business and Commerce Code. As the Court grants additional petitions for review, there will be more cases affecting Texas's business community.

Since the 2017-2018 term, the composition of the Court has changed substantially. All of Governor Abbott's four total appointments thus far have been made in the last three-and-a-half years. And with Justice Guzman's departure, Governor Abbott will have the opportunity to appoint his fifth Justice to the Court. Not only will the 2021-2022 term involve a new Justice, but it will also be the last full term before the 2022 elections, when Justices Lehrmann and Huddle and Governor Abbott's forthcoming appointment will be on the ballot.

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Products Liability – Cabining Strict Products Liability for Online Marketplaces

Amazon.com, Inc. v. McMillan*, 2021 WL 2605885 (Tex. June 25, 2021)

- **Vote:** 5-2. Justice Busby wrote the majority opinion. Justices Devine and Boyd dissented. Justice Blacklock did not participate.

Amazon.com, Inc. v. McMillan cabined strict products liability. The Court held that businesses are not "sellers" for purposes of strict products liability under the Texas Products Liability Act—when a sale has occurred—unless they transfer, or otherwise relinquish, title to allegedly defective products. The Court confirmed that "when a product-related injury arises from a transaction involving a sale, sellers are those who have relinquished title to the allegedly defective product at some point in the chain of distribution."

Background. McMillan sued Amazon.com for strict products liability for an allegedly defective product purchased on Amazon.com's online marketplace. This product was sold by a third-party seller and not Amazon.com itself. That third-party seller also used Amazon.com's fulfillment services. The federal district court concluded that Amazon.com could be held liable as a "seller" of the defective product and, on interlocutory appeal, the Fifth Circuit certified that question to the Supreme Court of Texas.

Decision. The Supreme Court of Texas held that companies are not "sellers" under Texas's strict products liability law—when a sale has occurred—if the companies do not transfer, or otherwise relinquish, title to the allegedly defective product. The Court explained that when an "ordinary sale" takes place, the "seller" is the person who transfers title to the product.

Consequently, it did not matter to the Court's analysis that Amazon.com individually or collectively (1) hosted an online platform for the third party to host a product page; (2) advertised the product; (3) stored the product in its warehouse; (4) accepted payment for the product; and (5) shipped the product to the customer. Because Amazon.com never held title to the sold product, it could not be liable as the "seller."

** Lehotsky Keller LLP's attorneys submitted amicus curiae briefs in this matter in both the Supreme Court of Texas and the Fifth Circuit. Lehotsky Keller LLP partner Scott Keller presented oral argument in the Supreme Court of Texas as amicus curiae in support of Amazon.com's position.*

Products Liability – Design Defect Jury Instructions

***Emerson Elec. Co. v. Johnson*, 2021 WL 1432226 (Tex. Apr. 16, 2021)**

- **Vote:** 9-0. Justice Bland wrote the opinion of the Court.

Emerson Electric Co. v. Johnson held that the Texas Pattern Jury Charge for design-defect claims are likely sufficient—though practitioners may include additional factors from the Supreme Court's caselaw to insulate the jury charge from appellate reversal. Specifically, the Court held that a trial court does not need to instruct a jury on "*Grinnell* factors" if the factor a party wants to instruct the jury on is subsumed in the jury charge. The *Grinnell* factors are five factors from the Supreme Court's precedents specifying the kinds of evidence that are relevant to whether a product is unreasonably dangerous. *Am. Tobacco Co., Inc. v. Grinnell*, 951 S.W.2d 420 (Tex. 1997). The Court reserved the question whether it is ever necessary to include *Grinnell* factors.

Background. Johnson was an HVAC technician injured by a compressor made by Emerson Electric. He sued Emerson, and the trial court instructed the jury based on the Texas Pattern Jury Charge for design defects. The jury instructions did not include any *Grinnell* factors. The jury found for Johnson, and the court of appeals affirmed.

Decision. The Supreme Court affirmed, holding that trial courts have wide latitude to construct jury charges, and the trial court's failure here to include the *Grinnell* factors did not lead to an improper verdict. The Court reasoned that the *Grinnell* factor Emerson identified—"the utility of the product to the user and to the public as a whole weighed against the gravity and likelihood of injury from its use"—was subsumed within the part of the Pattern Jury Charge that asked the jury to "tak[e] into consideration the utility of the product and the risk involved in its use." The Court did observe, however, that a trial court can permissibly include the *Grinnell* factors for design defect in its jury charges.

Arbitration – Limiting Pre-Arbitration Discovery

***In re Copart, Inc.*, 619 S.W.3d 710 (Tex. 2021) (per curiam)**

In re Copart, Inc. limited pre-arbitration discovery, holding that a party seeking pre-arbitration discovery must provide a "colorable basis or reason to believe that the discovery would be material in resolving any disputed issues of arbitrability."

Background. The plaintiff in an employment discrimination and retaliation case sought discovery—including a deposition of a human-resources employee—based on her assertions that the arbitration agreement she signed was unenforceable. The trial court ordered discovery, and the court of appeals denied mandamus relief.

Decision. The Supreme Court granted mandamus relief after concluding that the plaintiff did not meet her burden to obtain pre-arbitration discovery. The Court explained that the plaintiff failed to present a "colorable basis or reason to believe" that discovery would aid the court in resolving the issue of arbitrability. The general rule is that a trial court may only order discovery if the court "cannot fairly and properly make its decision on the motion to compel [arbitration] because it lacks sufficient information regarding the scope of an arbitration provision or other issues of arbitrability." *In re Houston Pipe Line Co.*, 311 S.W.3d 449, 451 (Tex. 2009).

The plaintiff presented three factual allegations that the Supreme Court found insufficient for pre-arbitration discovery. *First*, a party cannot simply make the conclusory assertion that an arbitration agreement is defective. Here, the plaintiff did not dispute that she (1) received; (2) signed; (3) acknowledged receipt of and sent; and (4) continued working after being provided with the arbitration agreement. *Second*, the plaintiff did not dispute the authenticity of any document provided by the defendant in favor of compelling arbitration—including the arbitration agreement itself. *Third*, the plaintiff's assertion that the arbitration agreement lacked consideration did not merit discovery because the plaintiff failed to explain why her argument required looking beyond the four corners of the arbitration agreement itself.

Arbitration – Assigning Arbitration Agreements to Non-Signatories

***Wagner v. Apache Corp.*, 2021 WL 1323413 (Tex. Apr. 9, 2021)**

- **Vote:** 8-0. Justice Busby wrote the opinion of the Court. Justice Huddle did not participate.

Wagner v. Apache Corp. held that arbitration agreements will often persist after a party assigns its rights and liabilities. Specifically, the Court held that contract assignees may be bound by an assignor's agreement to arbitrate even if the underlying assignment agreement does not include "express words of assumption."

Background. Wagner purchased assets from Apache, subject to a mandatory arbitration provision. Wagner then assigned its assets to a set of third-party assignees (1) "subject to all terms, provisions, and conditions"; and (2) whereby "Assignees assume and agree to be bound by . . . all obligations imposed upon Assignor" in the agreement between Wagner and Apache. Following a lawsuit by a separate set of third parties against Apache, the assignees sued Apache for a declaratory judgment regarding their duty to indemnify Apache. Apache moved to compel arbitration. The trial court denied Apache's motion, and the court of appeals reversed on interlocutory appeal.

Decision. The Supreme Court affirmed, holding that the third-party assignees assumed Wagner's obligations to arbitrate under the following contractual language: plaintiffs (as assignees) "[1] assume and [2] agree to be bound by and perform their proportionate parts" of "*all obligations* imposed upon Wagner Oil." The contract did not otherwise qualify this assumption of "all obligations," so the contract included Wagner's obligations to arbitrate.

The Court explained that state and federal courts have recognized that traditional agency and contract principles apply to determine whether a non-signatory is bound to an arbitration agreement, including incorporation by reference and assumption. The Court confirmed that, under those normal principles, a party may be bound by an assignor's agreement even if the assignment does not expressly address arbitration.

Contracts – Enforceability of Electronic Signatures

***Aerotek, Inc. v. Boyd*, 624 S.W.3d 199 (Tex. 2021)**

- **Vote:** 8-1. Chief Justice Hecht wrote the majority opinion. Justice Boyd dissented.

Aerotek, Inc. v. Boyd explained the broad conditions under which businesses can rely on now-ubiquitous electronic signatures in a wide range of contracts. Specifically, the Court considered (1) how litigants may demonstrate that an electronic signature is attributable to a signatory to satisfy the Texas Uniform Electronic Transactions Act; and (2) whether someone can simply deny being an electronic signatory to create a question of fact as to whether that person provided her electronic signature. The Court held that once the signature has been attributed to a person, that person cannot simply deny providing her electronic signature to avoid attribution.

Background. Aerotek used an electronic hiring application that required electronic signatures. Plaintiffs were former employees who putatively signed arbitration agreements as part of their electronic application. The plaintiffs later sued for racial discrimination and retaliation, and Aerotek moved to compel arbitration—which the trial court denied after a hearing, and the court of appeals affirmed.

Decision. The Supreme Court reversed, concluding that Aerotek had conclusively proven the electronic signatures on the arbitration agreements complied with the Act. The Act provides that an electronic signature is attributable to a person if the party seeking to enforce the signature can demonstrate the "efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable." Tex. Bus. & Com. Code § 322.009(a). The security features the Court identified include: (1) each applicant had "a unique identifier, a user ID, a password, and security questions, all unknown to Aerotek"; (2) the "application recorded and timestamped the candidate's every action"; (3) "the application could not be submitted until all steps were completed and all required signatures provided"; (4) once "a candidate submitted his application, Aerotek could not modify its contents"; and (5) the signed agreements were "marked with timestamps identical to those in its database records showing each [employee's] progress through the application."

Once Aerotek had demonstrated that its safety procedures were sufficient, the plaintiffs could not overcome the presumption simply by denying under oath that they ever signed the arbitration agreement.

Contracts – Implied Warranty of Merchantability

***Northland Indus., Inc. v. Kouba*, 620 S.W.3d 411 (Tex. 2020)**

- **Vote:** 8-0. Justice Guzman wrote the opinion of the Court. Justice Bland did not participate.

Northland Industry, Inc. v. Kouba held that asset-purchase agreements do not convey implied warranties of merchantability. Thus parties who acquire other companies through asset-purchase agreements enjoy a non-liability rule extending to implied warranties of merchantability—unless they expressly agree to assume those liabilities.

Background. JHTNA purchased Northland (a treadmill manufacturer) and assumed Northland's liabilities and obligations only "as specifically identified" in the asset-purchase agreement. Northland then dissolved. The plaintiff was injured on a treadmill that Northland sold. The plaintiff sued JHTNA for negligence, strict liability, and breach of the implied warranty of merchantability. The trial court granted summary judgment to JHTNA in relevant part, and the court of appeals reversed.

Decision. The Supreme Court reversed and held that JHTNA did not assume any implied warranties under the asset-purchase agreement. The Court reasoned that generally such asset acquisitions do not convey these implied warranties absent contractual language to the contrary, and the parties' contract expressly omitted any implied warranties. JHTNA only assumed "specifically identified" liabilities and obligations, including written warranties enumerated in the sale—not the implied warranties at issue in plaintiff's lawsuit.

Torts – Websites With User-Generated Content

In re Facebook, Inc.*, 2021 WL 2603687 (Tex. June 25, 2021)

- **Vote:** 6-0. Justice Blacklock wrote the opinion of the Court. Justices Busby and Huddle did not participate.

In re Facebook, Inc. held that Section 230 of the federal Communications Decency Act, 47 U.S.C. § 230, grants websites broad immunity for the unlawful actions of third parties on the websites—except when the website takes its own volitional act that is contrary to law.

Background. Plaintiffs brought three separate lawsuits alleging that Facebook was liable for common-law torts, products liability, and violations of Texas's anti-sex-trafficking statute. The plaintiffs contended that Facebook failed to (1) warn users of the risk of sex trafficking; and (2) otherwise implement safeguards against sex traffickers on their websites. The trial court denied Facebook's motion to dismiss, and the court of appeals declined to issue mandamus relief.

Decision. The Supreme Court granted mandamus relief in part. The Court held that Section 230 confers broad "immunity from suit" on interactive websites like Facebook for any claim that seeks to treat the website as the publisher or speaker of third-party communications. The Court therefore agreed with the "uniform view of federal courts" that Section 230 "requires dismissal of claims alleging that interactive websites like Facebook should do more to protect their users from the malicious or objectionable activity of other users"—notwithstanding the precise way plaintiffs plead such claims. In this case, the Court concluded that plaintiffs' claims for negligence, gross negligence, negligent undertaking, and products liability all sought to subject Facebook to liability for its immunized decisions to monitor, screen, or delete third-party content.

But at the motion to dismiss phase in this case, the Court permitted the state statutory sex-trafficking claims to proceed because plaintiffs pleaded Facebook's active "participation" in the trafficking "venture." The Court concluded that Section 230 "does not withdraw from the states the authority to protect their citizens from internet companies whose own" affirmative, volitional acts "amount to knowing or intentional participation in human trafficking." But the Court expressly noted that it was bound to take plaintiffs' allegations as true, so it expressed "no opinion" on the "viability" of plaintiffs' claims.

** Lehotsky Keller LLP's attorneys submitted an amicus curiae brief in the Supreme Court of Texas, and Lehotsky Keller LLP partner Scott Keller presented oral argument as amicus curiae in support of Facebook's position.*

Civil Procedure – Sealing Under Trade Secrets Act

***HouseCanary, Inc. v. Title Source, Inc.*, 622 S.W.3d 254 (Tex. 2021)**

- **Vote:** 8-0 in the judgment. Justice Busby wrote the majority opinion. Chief Justice Hecht and Justice Bland concurred in the judgment. Justice Huddle did not participate.

HouseCanary, Inc. v. Title Source, Inc. held that parties seeking to raise protections under the Trade Secrets Act in a motion to seal still must comply with the *procedural* requirements set forth in Texas Rule of Civil Procedure 76a.

Background. Title Source sued HouseCanary, and the parties conducted the litigation according to a protective order for the sensitive trade secrets at issue. The jury found for HouseCanary, which later moved to seal certain trial exhibits. Title Source opposed the motion to seal, arguing in relevant part that HouseCanary's request did not comply with Rule 76a. After denying HouseCanary's initial request, the trial court agreed to seal certain exhibits after HouseCanary moved for reconsideration based solely on the Trade Secrets Act. The court of appeals reversed.

Decision. The Supreme Court affirmed in part, holding that the Trade Secrets Act "displaces some provisions of Rule 76a but does not provide an independent, self-contained pathway for sealing court records." The Court reasoned that, although the Act displaces some of Rule 76a's *substantive* standards for sealing, the Act does not displace Rule 76a's *procedural* requirements. Litigants therefore must comply with those procedural requirements when seeking to seal trade-secret material, so the trial court erred by granting the motion for reconsideration without reference to Rule 76a's requirements.

Notably, the Court did not conclude that the Trade Secrets Act necessarily displaces *all* of Rule 76a's substantive standards for sealing. Specifically, the Court recognized that Rule 76a(1)(b)'s requirement "that a movant show no less restrictive means will adequately and effectively protect its interest in secrecy" is compatible with the Act.

Employment Law – Age-Based Employment Discrimination

***Texas Tech Univ. Health Scis. Ctr.-El Paso v. Flores*, 612 S.W.3d 299 (Tex. 2020)**

- **Vote:** 9-0. Justice Boyd wrote the opinion of the Court.

Texas Tech University Health Sciences Center-El Paso v. Flores broadened the set of circumstances under which plaintiffs can make a prima facie case of employment discrimination under the Texas Human Rights Act. Specifically, the Court held that an employment-discrimination plaintiff can make a prima facie case of "replacement" by a younger employee if she provides evidence that: (1) she was removed from her position; (2) her position was not filled; and (3) the employer gave an existing employee a new position; (4) that only includes *some* of the plaintiff's former job duties.

Background. Plaintiff was removed from her position and "reclassified" into a different position with a lower salary. Her employer did not fill plaintiff's previous position and instead gave some of plaintiff's former duties to a younger coworker. Plaintiff sued for age discrimination. The trial court concluded that issues of material fact precluded the employer's plea to the jurisdiction, and the court of appeals affirmed.

Decision. The Supreme Court reversed, holding that no reasonable juror could conclude that plaintiff was "replaced" under the facts the plaintiff presented. Notably, however, the Court held that plaintiff's general allegations could be sufficient to plead a prima facie case of "replacement." Generally, Texas courts engage in a holistic evaluation of the plaintiff's and her putative replacement's job duties to evaluate whether a plaintiff was "replaced by someone significantly younger." So when a plaintiff alleges she "was removed from her position, that position was not filled, an existing employee was given a new and different position, and the existing employee was assigned some but not all of the plaintiff's former duties," the Court concluded that could be enough to make a prima facie case. At the burden-shifting stage, however, the plaintiff must provide facts that the plaintiff and her "replacement" had "similar duties," such that a reasonable jury could conclude that the existing employee took the plaintiff's former job or position.

Employment Law – Worker's Compensation

***Berkel & Co. Contractors, Inc. v. Lee*, 612 S.W.3d 280 (Tex. 2020)**

- **Vote:** 7-0. Justice Bland wrote the opinion of the Court. Justices Lehrmann and Busby did not participate.

Berkel & Co. Contractors, Inc. v. Lee reaffirmed that employers cannot be sued for workers' compensation outside of the exclusive remedies of the Texas Workers' Compensation Act, except under one narrow exception: when an injured employee demonstrates that the employer believed its actions were "substantially certain to result in a particular injury to a particular employee." The Court therefore rejected an alternative, and more permissive, "localized-area" test that would have expanded this exception to the Texas Workers' Compensation Act's exclusive remedies.

Background. Berkel's employees caused an accident that injured Lee's leg. Afterward, Lee received workers' compensation and disability benefits from his employer (a separate company). Lee sued Berkel for negligence and gross negligence, alleging that Berkel's employees intentionally injured him. The jury found for Lee. The court of appeals remanded for a new trial to apply a different "intentional injury" standard: whether a Berkel employee "believed that his conduct was substantially certain to bring about harm to a particular victim, or to someone within a small class of potential victims within a localized area."

Decision. The Supreme Court reversed and rendered judgment for Berkel. The Court reiterated that, generally, the Act is the "exclusive remedy for a covered employee who seeks recompense for injury claims against the employer," and thus the Act displaces claims for grossly negligent conduct. The Court further held that Lee did not trigger the sole exception to this rule, which would have required Lee to prove that Berkel's employee "specifically intended that his conduct injure Lee, or knew with substantial certainty that his conduct would injure Lee." The Supreme Court thus rejected the court of appeals' "localized-area" test, as it did in *Mo-Vac Service Co., Inc. v. Escobedo*, 603 S.W.3d 119 (Tex. 2020).

Insurance – Common-Law Failure-to-Settle Claims

***In re Farmers Texas County Mut. Ins. Co.*, 621 S.W.3d 261 (Tex. 2021)**

- **Vote:** 9-0, in relevant part. Justice Busby wrote the opinion of the Court.

In re Farmers Texas County Mutual Ins. Co. narrowed the liability insurers face in certain circumstances, foreclosing common-law claims for an insurer's negligent failure to settle ("*Stowers* claims") in the absence of a judgment or settlement exceeding policy limits.

Background. Plaintiff sued her insurer after the insurer agreed to settle a claim for an automobile accident. The insurer required the plaintiff to contribute over one-third of the settlement amount, even though the total settlement amount was below the insurance policy limit. The trial court denied the insurer's motion to dismiss, and the court of appeals, in relevant part, concluded on mandamus review that plaintiff's *Stowers* claim for negligent failure to settle was not foreclosed by existing precedent.

Decision. The Supreme Court granted mandamus relief in relevant part, holding that claims for negligent failure to settle require a judgment or settlement exceeding policy limits—which plaintiff's claim lacked. The Court observed that, under the common law, insurers have an obligation to settle claims when it is reasonably prudent to do so. The Court further explained that this duty only arises when "(1) the third party's claim against the insured is within the scope of coverage; (2) the settlement demand is within policy limits; and (3) the terms of the demand are such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment."

Thus, the Court concluded that its precedent requires a plaintiff's total liability (whether because of a judgment or settlement) to exceed policy limits to bring a common-law claim for negligent failure to settle. Here, total liability was within the insurance policy limits, and the Court declined to extend its *Stowers* precedents beyond situations in which liability exceeds policy limits.