
SUPREME COURT OF TEXAS UPDATE
April 2022 through May 2023

Kelly Canavan
Staff Attorney

Martha Newton
Staff Attorney

Amy Starnes
Director of Public Affairs

Special thanks to all the Staff Attorneys and
Law Clerks at the Supreme Court of Texas
for their substantial contributions.

Table of Contents

I. SCOPE OF THIS PAPER.....	7
II. DECIDED CASES.....	7
A. ADMINISTRATIVE LAW.....	7
1. Enforcement.....	7
2. Jurisdiction	9
3. Texas Water Code.....	9
B. ARBITRATION.....	10
1. Arbitrability	10
2. Enforcement of Arbitration Agreement.....	12
C. ATTORNEYS.....	18
1. Fees	18
2. Liability to Non-clients.....	20
D. CLASS ACTIONS	21
1. Class Certification	21
E. CONSTITUTIONAL LAW	23
1. Abortion.....	23
2. Due Course of Law.....	24
3. Due Process.....	25
4. Property Interests.....	25
5. Retroactivity	27
6. Separation of Powers.....	28
7. Takings.....	28
F. CONTRACTS	29
1. Damages.....	29
2. Formation.....	30
3. Procuring-cause Doctrine	31
4. Releases and Reliance Disclaimers.....	32
5. Substantial Compliance	34
G. CORPORATIONS.....	36
1. Fiduciary Duties	36
H. DAMAGES	38

1.	Settlement Credits.....	38
I.	ELECTIONS.....	38
1.	Candidates	38
2.	Injunctive Relief.....	39
3.	Voting by Mail.....	40
J.	EVIDENCE.....	41
1.	Expert Testimony	41
2.	Medical Expense Affidavits.....	42
K.	EXPUNCTION OF ARREST RECORDS.....	42
1.	Statutory Requirements	42
L.	FAMILY LAW.....	43
1.	Investigation of Child Abuse.....	43
2.	Jurisdiction, Post-divorce Property Division.....	45
3.	Termination of Parental Rights	46
M.	FEDERAL LAW.....	47
1.	Regulatory Interpretation	47
N.	GOVERNMENTAL IMMUNITY	48
1.	Chapter 2400	48
2.	Condemnation Claims	50
3.	Contract Claims	51
4.	Texas Tort Claims Act	51
5.	Texas Whistleblower Act.....	55
6.	Tim Cole Act	58
7.	Ultra Vires Claims.....	59
O.	GUARDIANSHIP	62
1.	Service of Process.....	62
P.	INSURANCE	63
1.	Incorporation by Reference	63
2.	Insurer's Tort Liability.....	64
3.	Private Right of Action	66
4.	Rescission of Policy	66
5.	Texas Anti-Indemnity Act	67
Q.	INTENTIONAL TORTS	68

1.	Defamation.....	68
R.	JURISDICTION	70
1.	Eminent Domain.....	70
2.	Personal Jurisdiction.....	71
3.	Standing.....	72
4.	Subject Matter Jurisdiction	74
S.	MEDICAL LIABILITY.....	75
1.	Expert Reports.....	75
2.	Sufficiency of the Evidence.....	77
T.	MEDICAL MALPRACTICE.....	79
1.	Damages—Periodic Payments Statute.....	79
U.	MUNICIPAL LAW.....	79
1.	Drainage Fees.....	79
2.	Solid Waste Regulation	81
3.	State Law Preemption.....	82
V.	NEGLIGENCE	82
1.	Duty of Reasonable Care	82
2.	Premises Liability.....	83
3.	Vicarious Liability	86
W.	OIL AND GAS	87
1.	Covenants to Protect Against Drainage	87
2.	Deed Construction	88
3.	Force Majeure	89
4.	Leases.....	90
5.	Release Provisions	91
6.	Royalty Payments.....	93
X.	PROBATE: WILLS, TRUSTS, ESTATES, AND GUARDIANSHIPS ...	95
1.	Trust Modification Proceedings	95
2.	Will Construction.....	96
Y.	PROCEDURE—APPELLATE.....	96
1.	Appellate Deadlines.....	96
2.	Dismissal.....	97
3.	Interlocutory Appeals	98

4. Judicial Appointments	99
5. Jurisdiction	100
6. Permissive Interlocutory Appeals.....	101
7. Preservation of Error.....	102
8. Vacatur.....	103
Z. PROCEDURE—PRETRIAL.....	103
1. Compulsory Joinder.....	103
2. Discovery	104
3. Finality of Judgments	108
4. Mootness & Discovery Breadth.....	109
5. Responsible Third-Party Designation.....	109
6. Personal Jurisdiction.....	110
7. Standing.....	112
8. Statute of Limitations	113
9. Summary Judgment	114
10. Venue	115
AA. PROCEDURE—TRIAL AND POST-TRIAL	116
1. Batson Challenge.....	116
2. Error Preservation.....	116
3. Subpoenas	118
BB. REAL PROPERTY	119
1. Deed Restrictions.....	119
2. Eminent Domain.....	119
3. Subrogation.....	122
4. Trespass To Try Title	122
CC. STATUTE OF LIMITATIONS.....	123
1. Discovery Rule	123
2. Tolling	123
DD. TAXES	126
1. Premium and Maintenance Taxes	126
2. Property Tax	127
EE. TEXAS ALCOHOLIC BEVERAGE CODE	128
1. Permits	128

FF. TEXAS CITIZENS PARTICIPATION ACT	130
1. Interpretation and Application	130
GG. TEXAS TIM COLE ACT	130
1. Eligibility for Compensation	130
III. GRANTED CASES.....	132
A. ADMINISTRATIVE LAW.....	132
1. Judicial Review	132
B. ATTORNEYS.....	133
1. Attorney-Client Privilege	133
2. Escrow	133
C. CORPORATIONS.....	134
1. Corporate Governance	134
2. Veil-Piercing	134
D. DAMAGES	135
1. Non-Economic Damages	135
E. EMPLOYMENT LAW	135
1. Disability Discrimination	135
F. FAMILY LAW.....	136
1. Divorce Decrees	136
2. Termination of Parental Rights	137
G. GOVERNMENTAL IMMUNITY	139
1. Arm of the Government.....	139
2. Contract Claims.....	140
3. Texas Tort Claims Act	141
4. Ultra Vires Claims.....	141
H. JURISDICTION	142
1. Injunctions	142
I. MEDICAL LIABILITY.....	142
1. Expert Reports.....	142
J. MUNICIPAL LAW.....	143
1. Authority	143
K. NEGLIGENCE	144
1. Duty	144

2. Railroad Crossing	144
L. PROCEDURE—PRETRIAL.....	145
1. Discovery	145
2. Dismissal.....	146
M. PROCEDURE—TRIAL AND POST-TRIAL	146
1. Order Granting New Trial	146
2. Jury Instructions and Questions	147
N. REAL PROPERTY	147
1. Subrogation.....	147
O. STATUTE OF LIMITATIONS.....	148
P. STATUTE OF LIMITATIONS.....	149
1. Tolling	149
Q. TEXAS CITIZENS PARTICIPATION ACT	150
1. Applicability to Claims	150

I. SCOPE OF THIS PAPER

This paper surveys cases that the Supreme Court of Texas decided from April 1, 2022, through May 31, 2023. Petitions granted but not yet decided are also included.

The summaries do not constitute the Court's official descriptions or statements. Readers are encouraged to review the Court's official opinions for specifics regarding each case. The Court appreciates suggestions and corrections, which may be sent via email to amy.starnes@txcourts.gov.

II. DECIDED CASES

A. ADMINISTRATIVE LAW

1. Enforcement

- a) *Whole Woman's Health v. Jackson*, 642 S.W.3d 569 (Tex. Mar. 11, 2022) [22-0033]

This case answered a certified question from the United States Court of Appeals for the Fifth Circuit asking whether Texas law authorizes certain state officials to directly or indirectly enforce the state's abortion-restriction requirements.

The Texas Legislature passed Senate Bill 8 (labeled the "Texas Heartbeat Act") in 2021. Section 3 of the Act added a new subchapter H to chapter 171 of the Texas Health and Safety Code, which prohibits physicians from knowingly "perform[ing]" or "induc[ing]" an abortion unless they first perform an "appropriate" test and do not detect a "fetal heartbeat." The plaintiffs provide and fund abortions and support women who obtain them in Texas. They filed suit in federal court requesting a declaration that the Act

unconstitutionally restricts their rights and an injunction prohibiting the defendants from enforcing its requirements. The defendants include the executive directors and commissioners of various state agencies.

These state-agency executives moved to dismiss the lawsuit, asserting jurisdictional challenges, including that they are immune from the plaintiffs' federal suit because Texas law does not grant them any authority to enforce the Act's requirements. The federal district court disagreed and denied their dismissal motions. The United States Supreme Court also disagreed, affirmed the denial of the state-agency executives' dismissal motions, and remanded the case to the Fifth Circuit. At the state-agency executives' request, the Fifth Circuit then certified the following question to the Court:

Whether Texas law authorizes the Attorney General, [the] Texas Medical Board, the Texas Board of Nursing, the Texas Board of Pharmacy, or the Texas Health and Human Services Commission, directly or indirectly, to take disciplinary or adverse action of any sort against individuals or entities that violate the Texas Heartbeat Act, given the enforcement authority granted by various provisions of the Texas Occupations Code, the Texas Administrative Code, and the Texas Health and Safety Code and given the restrictions on public enforcement in sections 171.005, 171.207, and 171.208(a) of the Texas Health and Safety Code.

The Court concluded that Texas law does not authorize the state-agency executives to enforce the Act's requirements, either directly or indirectly. First, it determined that the statute's language unambiguously confirms that the state-agency executives cannot directly bring a civil action under that section to enforce the Act's requirements. The statute unequivocally provides that the Act's testing and no-heartbeat requirements may be enforced by a private civil action under section 171.208, and that no state official may bring or participate as a party in any such action.

The Court then concluded that the state-agency executives also cannot *indirectly* enforce the Act's requirements through "administrative and public civil enforcement actions" against Texas physicians, nurses, pharmacists, and other professional licensees. Those laws grant the state agencies broad authority to enforce other state laws through the professional-disciplinary process unless other laws provide otherwise, and the Heartbeat Act expressly provides otherwise. The Court reached this conclusion for three reasons. First is the Act's emphatic, unambiguous, and repeated provisions declaring that the civil action section 171.208 provides is the "exclusive" method for enforcing the Act's requirements.

Next, the Court considered the savings clause in section 171.207(b), which states that section 171.207(a) "may not be construed to . . . limit the enforceability of any other laws that regulate or prohibit abortion." The plaintiffs contended that the laws that authorize agencies to take disciplinary

actions against licensees who perform "criminal abortions" are laws that "regulate or prohibit abortion." The Court disagreed, reasoning that laws that "regulate or prohibit abortion" must do more than relate to or have an impact on abortions but must be specifically directed at abortions and must substantively control, forbid, preclude, or hinder them.

Finally, the Court considered the plaintiff's argument regarding the Act's statement that "[n]o enforcement of this subchapter, and no enforcement of Chapters 19 and 22, Penal Code, in response to violations of this subchapter, may be taken or threatened by" any government actor. The plaintiffs argued that to read the Act as broadly prohibiting all indirect enforcement actions would render this clause mere surplusage. The Court first stated that the clause is not surplusage because it confirms that although the Act is a civil statute, prosecutors cannot pursue criminal charges based on an abortion that violates the Act's requirements. But even if the clause were surplusage, such a redundancy would not alter the clear terms of the exclusive-enforcement provisions. The clause cannot be given the full effect the plaintiffs propose without rendering other language in the Act superfluous. The Court determined that to stay truest to all of the Act's language, it must conclude that the legislature included the clause not to prohibit indirect enforcement that would be permitted in the clause's absence but to emphasize and make it unmistakably clear that by prohibiting all enforcement methods other than a section 171.208 civil action, even criminal prosecutions. The Court therefore

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Texas Supreme Court Update

First appeared as part of the conference materials for the
33rd Annual Conference on State and Federal Appeals session
"Texas Supreme Court Update"