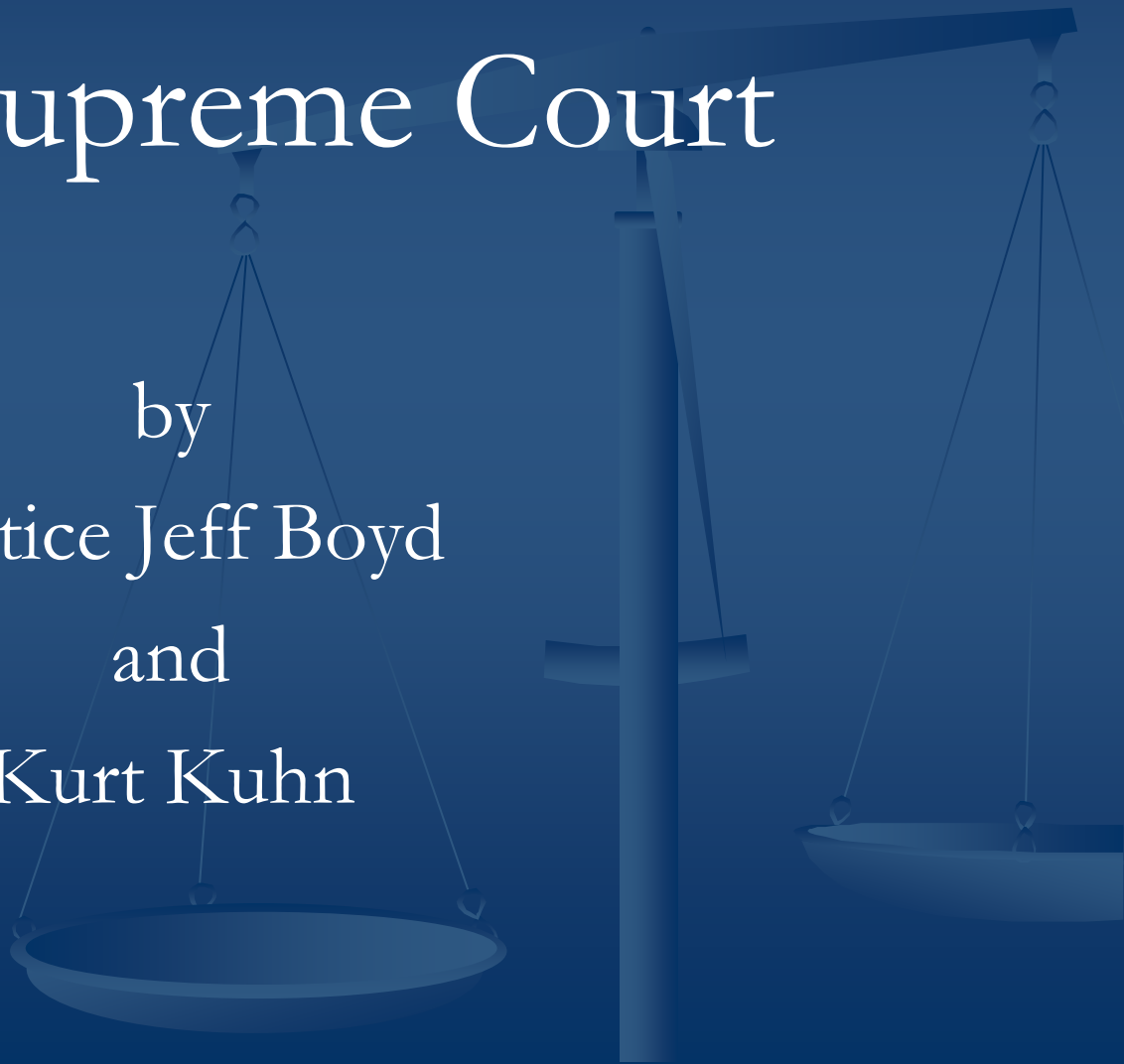
Update on the Texas Supreme Court

by
Justice Jeff Boyd
and
Kurt Kuhn



By the Numbers

SCOTX Decisions
(as of 6/8/18)

	2017-18
TOTAL	81
Per Curiam	24
Unanimous	47
Split	10
Pending post OA	13

SCOTX Decisions

(as of 6/8/18)

	'13-14	**'14-15**	**'15-16**	**'16-17**	**'17-18**
TOTAL	83	93	92	81	81
Per Curiam	23	36	28	16	24
Unanim.	42	39	45	53	47
Split	18	18	19	12	10
Pending post-OA	4	0	0	0	13

SCOTX Split Decisions

(as of 6/8/18)

	2013-14	2014-15	2015-16	2016-17	2017-18
8-1/7-1	3	5	3	1	0
7-2/6-2	1	1	4	3	6
6-3/5-3	4	5	7	3	2
5-4	9	5	4	4	2
5-1-3	0	1	0	0	0
4-2-1-2	0	1	0	0	0
4-1-4	1	0	1	0	0
(sep. con./dis.)	(7)	(8)	(13)	(14)	(4)

SCOTX Affirmance Rate

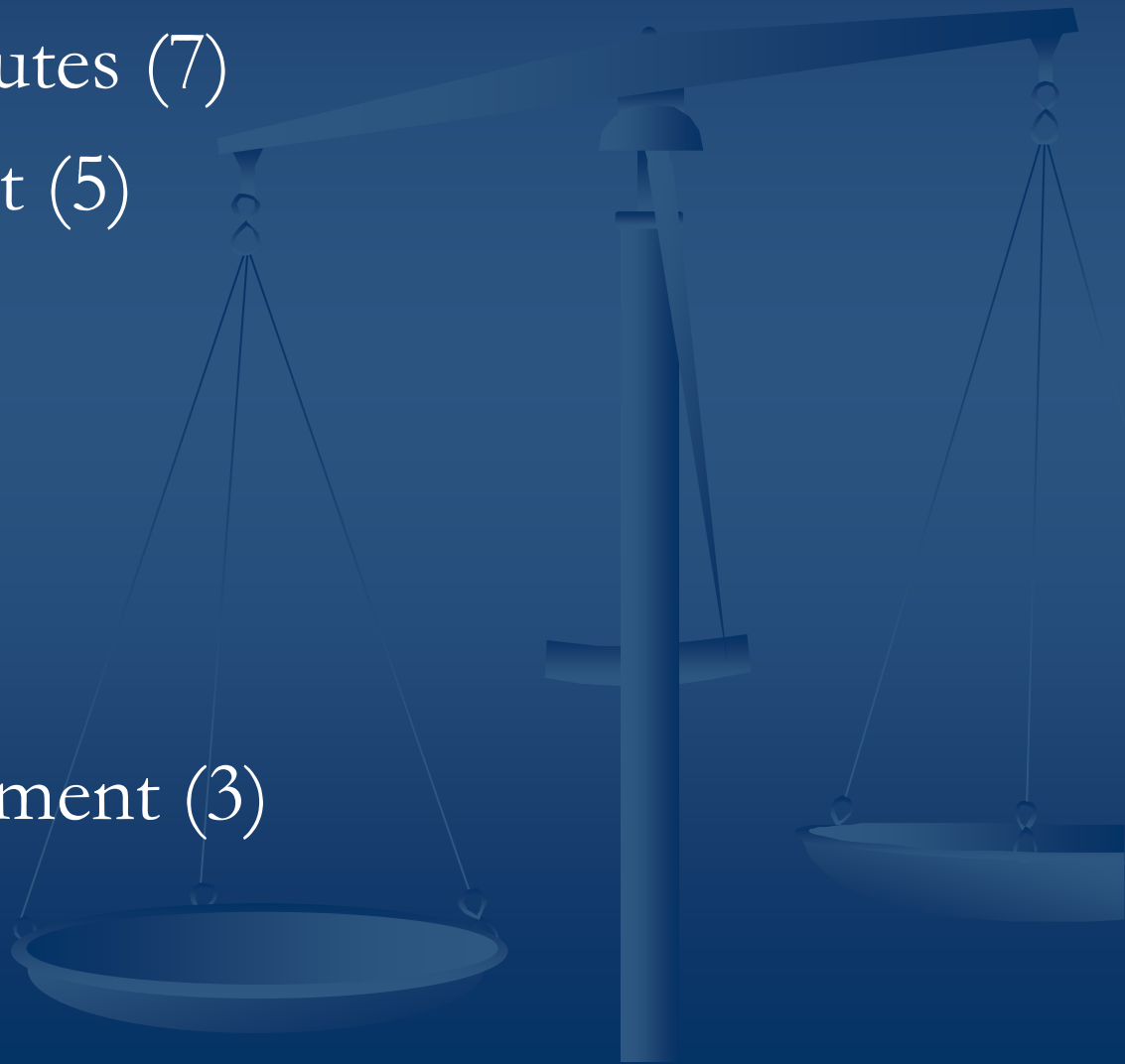
(as of 6/8/18)

	2014-15	2015-16	2016-17	2017-18
Reversed	60 (65%)	58 (63%)	53 (65%)	54 (67%)
Mandamus granted	8 (9%)	10 (11%)	7 (9%)	7 (9%)
Affirmed	18 (19%)	15 (16%)	20 (25%)	16 (20%)
Mandamus denied	4 (4%)	1 (1%)	1 (1%)	3 (4%)
Certified Question	3 (3%)	4 (4%)	0	0
Abated	0	4 (4%)	0	0
Vac/Dism'd	0	0	0	1 (1%)

SCOTX Decisions: Controlling Law
(as of 6/8/18)

	2014-15	2015-16	2016-17	2017-18
Construction of law	49 (53%)	58 (63%)	33 (41%)	43 (53%)
Construction of contract	10 (11%)	8 (9%)	15 (18%)	14 (17%)
Common law / Evidence	34 (37%)	26 (28%)	33 (41%)	24 (30%)

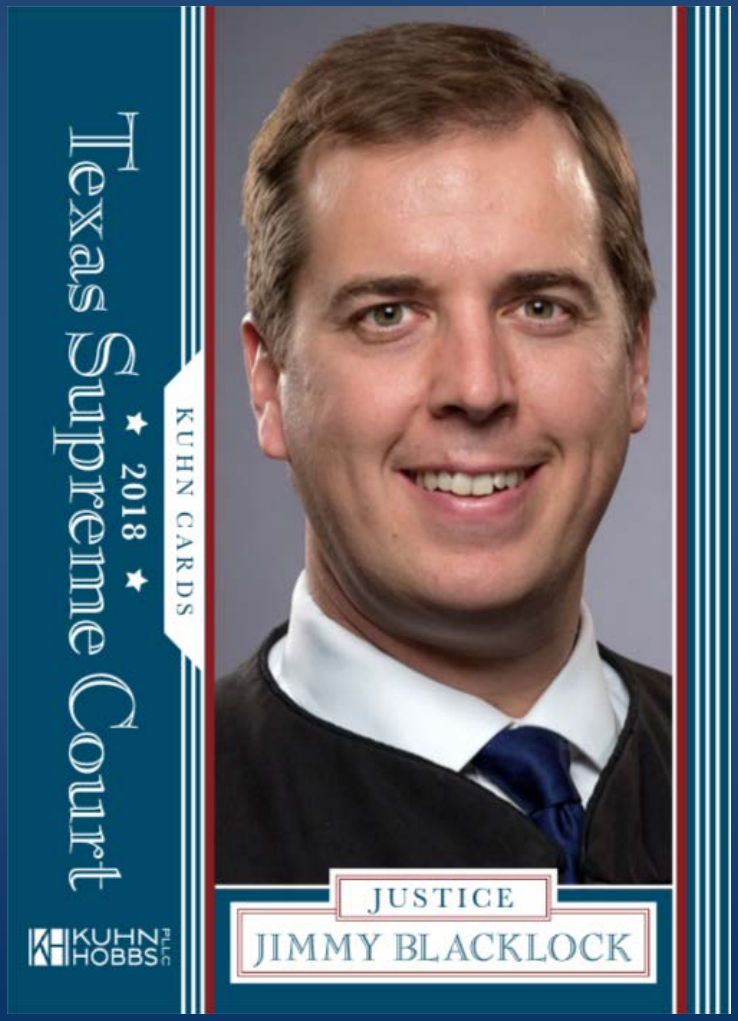
2017-18 SCOTX Decisions: Subject Matter
(as of 6/8/18)



- Oil & Gas disputes (7)
- Tort Claims Act (5)
- Family law (5)
- TCPA (3)
- Ultra vires (3)
- Discovery (3)
- Finality of judgment (3)

Top Cases

Lujan v. Navistar, Inc., No. 16-0588 (Apr. 27, 2018)



Lujan v. Navistar, Inc.

Sham Affidavit Rule

If a party submits an affidavit that conflicts with the affiant's prior sworn testimony and does not provide a sufficient explanation for the conflict, a trial court may disregard the affidavit when deciding whether the party has raised a genuine fact issue to avoid summary judgment.

Lujan v. Navistar, Inc.

Examination of the nature and extent of the contradiction is essential. "Most differences between a witness's affidavit and deposition are more a matter of degree and details than direct contradiction. This reflects human inaccuracy more than fraud." "If the differences fall into the category of variations on a theme, consistent in the major allegations but with some variances of detail, this is grounds for impeachment . . . . If, on the other hand, the subsequent affidavit clearly contradicts the witness's earlier testimony involving the suit's material points, without explanation," then the sham affidavit rule applies.

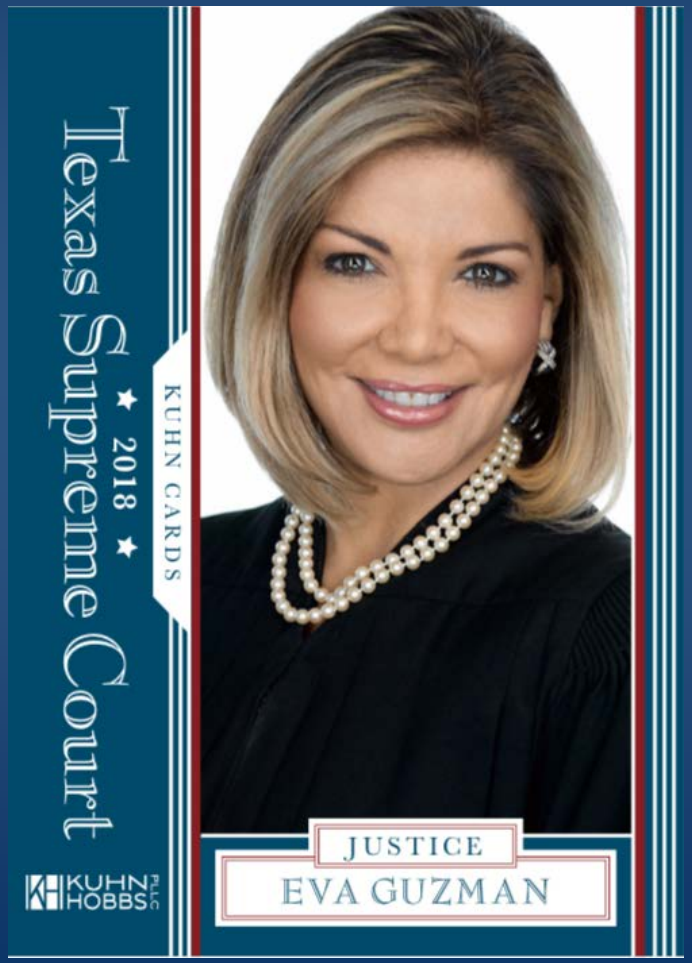
Lance v. Robinson
No. 16-0323 (Mar. 23, 2018)

Lance v. Robinson

Our rules require a trial court to grant a summary-judgment motion if the evidence "on file at the time of the hearing, or filed thereafter and before judgment with permission of the court," establishes that the movant is "entitled to judgment as a matter of law."

TEX. R. CIV. P. 166a(c)

Diamond Offshore Servs. Ltd. v. Williams
No. 16-0434 (Mar. 2, 2018)



Diamond Offshore Servs. Ltd. v. Williams

The primary issue we address today is whether the trial court erred in excluding the surveillance video without first viewing it. We hold that, except in rare circumstances not present here, when the admissibility of a video is at issue, the proper exercise of discretion requires the trial court to actually view video evidence before ruling on its admissibility.

Diamond Offshore Servs. Ltd. v. Williams

While trial courts have discretion in making evidentiary rulings, we cannot defer to discretion that was not actually exercised.

Diamond Offshore Servs. Ltd. v. Williams

Because the video was crucial to the defensive theories of exaggeration and dishonesty, the video's exclusion probably caused the rendition of an improper judgment and was, therefore, harmful error.

In re Elizondo

No. 17-0197 (Apr. 13, 2018) (per curiam)

In re Elizondo

"This judgment is final, disposes of all claims and all parties, and is appealable. All relief not granted herein is denied."

In re Elizondo

" . . . whether a judicial decree is a final judgment must be determined from its language and the record in the case."

Lehmann v. Har–Con Corp.

In re Elizondo

[A] reviewing court confronting an order that includes a finality phrase cannot look at the record. Instead, it must take the order at face value. That makes sense. If it were otherwise, finality phrases would serve no purpose. That is, if both of *Lehmann's* tests allow a reviewing court to look at the record, then a reviewing court may always look at the record. That would distill *Lehmann's* joint tests into a simple rule: when there has not been a conventional trial on the merits, a court must look to the record to determine whether the judgment is final. That is not *Lehmann's* rule. Had it lacked the finality phrase, the original order in this case would not have disposed of all claims and parties. However, since the original order included a finality phrase, it was clear and unequivocal.

In re Elizondo

Elizondo had thirty days to examine the one-page order and notice that it included a finality phrase. Even if he disagreed that the order was final, he should have treated it as though it was. Had he examined the order within the thirty-day window, he could have sought an amended order or pursued an appeal. Since Elizondo waited more than thirty days to contend that the order improperly disposed of his other claims, he has lost them. Though jarring for Elizondo, this outcome reflects *Lehmann's* reasoning and comports with this Court's subsequent application of *Lehmann's* finality tests.

City of Magnolia 4A Econ. Dev. Corp. v. Smedley
No. 16-0718 (Oct. 27, 2017) (per curiam)

City of Magnolia 4A Econ. Dev. Corp. v. Smedley

May 2015 – Motion to Dismiss & Plea to the Jurisdiction

June 15, 2015 – Order Granting in Part, Denying in Part

June 24, 2015 – No-Evidence and Traditional MSJ

July 27, 2015 – Order Denying MSJ

City of Magnolia 4A Econ. Dev. Corp. v. Smedley

A party may appeal an interlocutory order that grants or denies a plea to the jurisdiction by a governmental unit.

TEX. CIV. PRAC. & REM. CODE §51.014(a)(8).

City of Magnolia 4A Econ. Dev. Corp. v. Smedley

A pleadings challenge argues that the plaintiff has not alleged facts that, if proven true, constitute a valid claim over which there is jurisdiction. This is a different proposition than arguing that the discovered evidence fails to prove or even affirmatively negates the plaintiff's claim.

City of Magnolia 4A Econ. Dev. Corp. v. Smedley

May 2015 – Motion to Dismiss & Plea to the Jurisdiction

June 15, 2015 – Order Granting in Part, Denying in Part

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State Office of Risk Mgmt. v. Martinez
No. 16-0337 (Dec. 15, 2017)

State Office of Risk Mgmt. v. Martinez

The Labor Code limits the trial court's review of an appeals panel's decision to "issues decided by the appeals panel and on which judicial review is sought."

TEX. LAB. CODE §410.302(b).

State Office of Risk Mgmt. v. Martinez

"Issues" eligible for judicial review:

- In Chapter 410, the term "issue(s)" refers to the "disputed issues" that the review officer identifies at the benefit review conference.
- Chapter 410, "issues" are different from "issues" in the appellate context. Labor Code "issues" cannot be points of error because Labor Code issues begin in the benefit review conference, at which point no error can yet have occurred.
- Under the dictionary definition, "issue" is a term that stands in useful contrast to "argument." That is, if the parties offer a certain point as an argument on a particular issue, that point will not normally be an issue itself.

State Office of Risk Mgmt. v. Martinez

Throughout the administrative review process, the parties in this case disputed the same two points: whether Martinez was injured in the course and scope of her employment and whether she was disabled.

State Office of Risk Mgmt. v. Martinez

The Labor Code limits the trial court's judicial review to those "issues decided by the appeals panel." TEX. LAB. CODE §410.302(b). . . . [A] split exists in the appellate courts "on whether the term 'issues' encompasses each factual finding of a hearing officer at a contested case hearing, thereby requiring a party to appeal each adverse factual finding to avoid forfeiture of judicial review."

State Office of Risk Mgmt. v. Martinez

The Labor Code makes clear that a hearing officer's incorrect findings of fact are "errors" but not "issues." While issues require individual appeal, errors do not. Accordingly, a party need not appeal every finding related to an issue in order to preserve the issue for judicial review. Because the trial court conducts review under the modified de novo standard, there is no requirement that it defer to the hearing officer's factual findings. Thus, a party's failure to challenge a factual finding does not preclude a trial court from reviewing the issue that the finding purportedly supports.

Miller v. JSC Lake Highlands
No. 16-0986 (Dec. 12, 2017) (per curiam)

Miller v. JSC Lake Highlands

A trial court may read several reports in concert in determining whether a plaintiff has made a good faith effort to comply with the Act's requirements.

Miller v. JSC Lake Highlands

The court of appeals found Dr. Naegar's opinion insufficient because he stated only that the failure to timely remove the foreign body "can" lead to aspiration, which "can" be deadly. But that reading fails to credit the entirety of Dr. Naegar's report.

Miller v. JSC Lake Highlands

The court of appeals' real concern appears to be the *believability* of Dr. Albright's articulated standards of care, not the manner in which she stated them. Our inquiry is not so exacting.

Miller v. JSC Lake Highlands

We remain mindful that an "adequate" expert report "does not have to meet the same requirements as the evidence offered in a summary-judgment proceeding or at trial."

Miller v. JSC Lake Highlands

The defendants argue that Miller cannot respond with arguments regarding the reports that she did not make in the trial court. We disagree. Miller defended the adequacy of the reports in the trial court, and we may address her arguments on that issue.

Dudley Construction v. ACT Pipe & Supply

No. 16-0651 (Apr. 6, 2018)

Dudley Construction v. ACT Pipe & Supply

"Cross-points" are the rules-prescribed method for fulfilling this requirement and preserving such alternative arguments against the jury's original verdict. But we have never required rigid technical compliance with these rules. Nor do these rules themselves mandate use of particular labels; a party need not name its arguments "cross-points" to avoid waiver.

Dudley Construction v. ACT Pipe & Supply

If an appellee makes a substantive argument that would, if accepted, vitiate the jury's original verdict or prevent an affirmance of the judgment had one been rendered in harmony with the jury's verdict, it has presented a cross-point sufficient to avoid waiver.

Dudley Construction v. ACT Pipe & Supply

Whenever possible, we reject form-over-substance requirements that favor procedural machinations over reaching the merits of a case.

In re K.S. L.
No. 16-0558 (Dec. 22, 2017)

In re K.S. L.

The court may order termination of the parent-child relationship if the court finds by clear and convincing evidence:

(1) that the parent has: . . . .

(K) executed before or after the suit is filed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by this chapter; . . . . and

(2) that the termination is in the best interest of the child.

TEX. FAM. CODE §161.101(b)

In re K.S. L.

A direct or collateral attack on an order terminating parental rights based on an unrevoked affidavit of relinquishment of parental rights or affidavit of waiver of interest in a child is limited to issues relating to fraud, duress, or coercion in the execution of the affidavit.

TEX. FAM. CODE §161.211(c)

In re K.S. L.

We cannot say that the Legislature, in setting out these detailed procedures that are intended to ensure that terminations are knowing and voluntary, while also addressing the need for finality and promptness in these proceedings, has imposed a procedure that violates federal due process.

Texas Supreme Court

2018

KUHN CARDS

KUHN HOBBS PLLC