ETHICS 2023

CHRIS SCHWEGMANN & DAVID COALE

Klemchuk PLLC, Annual Ethics Fest

April 21, 2023

LYNN PINKER HURST SCHWEGMANN

INTRO:
“ZEALOUS ADVOCACY”

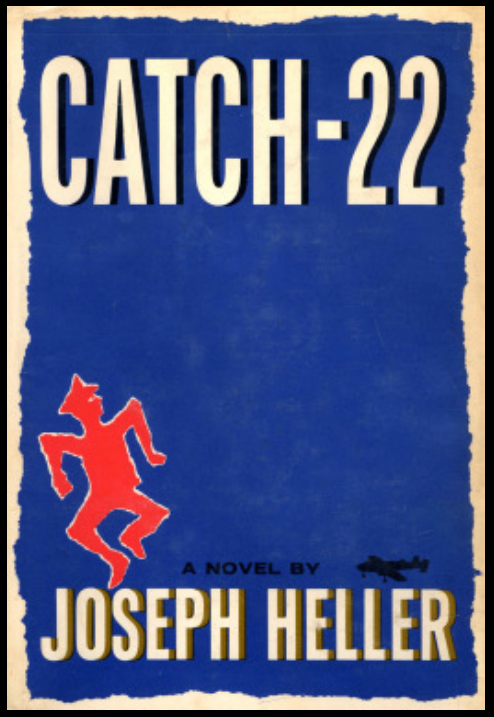
Branch v. Cemex, Inc.,
517 Fed. Appx. 276 (5th Cir. 2013)

"[Z]ealous is derived from 'Zealots,' the sect that, when besieged by the Roman Legions at Masada, took the extreme action of ***slaying their own families and then committing suicide*** *rather than surrendering or fighting a losing battle."*

1.
“THEIR MISBEHAVIOR COST MY CLIENT A LOT OF MONEY”

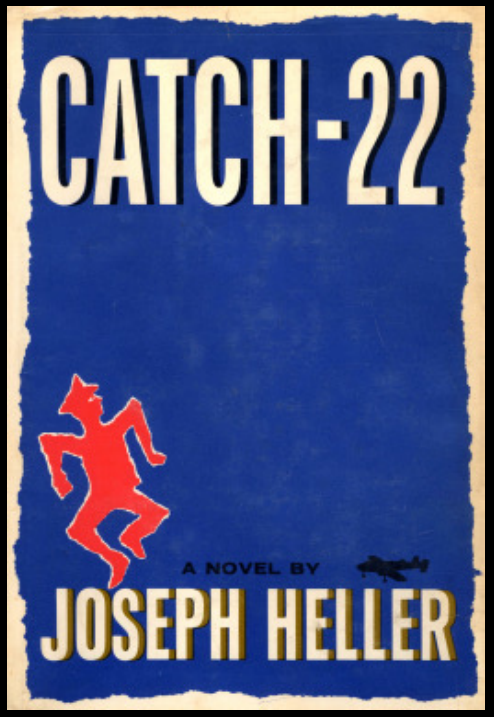
Allegheny Millwork v. Honeycutt, No. 05-21-00113-CV (Tex. App.—Dallas June 8, 2022, pet. denied)

"While Allegheny's counsel's failure to reconcile or even address that the case is disappointing, and thereby raises an issue of candor with the Court, we do not see it as sufficiently egregious to support a shifting of fees, and certainly not in the amount requested by NQS. Given this Court's familiarity with its own opinion in Ninety Nine Physicians*,* ***a brief reference to the case in response to the attorney's fee issue would have sufficed****."*



Ozmun v. Wood,
No. 19-50397 (5th Cir. March 24, 2022)

"'[T]he district court denied PRA['s] cross motion for summary judgment on the FDCPA claim which indicates [Appellant's] position was far from frivolous. In fact, ***it was so substantial that the district court thought it warranted a trial.'*** *Thus, Ozmun's claims brought under the TFDCPA were not a 'clear misuse of the TFDCPA' as the district court stated. They simply failed on summary judgment."*

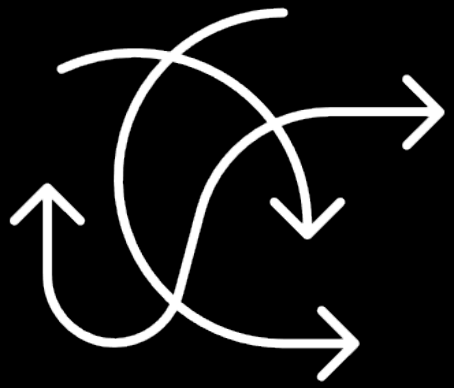


Boktor v. U.S. Bank, No. 05-19-01306-CV (Tex. App.—Dallas April 7, 2021, no pet.)

*"'[A]ppellants initiated the underlying suit and then essentially abandoned the proceedings they had set in motion. Appellants failed to participate in depositions even though the trial court and appellees attempted to make remote participation in the depositions possible. Not until appellees' **fourth motion to compel** did the trial court impose death penalty sanctions on appellants and strike their pleadings."*

2.
“THEY HAVE A LONG RECORD OF MISBEHAVIOR”

Allstate Property & Casualty Co. v. Ford,
No. 05-20-00463-CV (Tex. App.—Dallas Oct. 15, 2021, no pet)



1. ***Technical problems with a subpoena.*** *"**Incomplete preparation and service of the subpoena, however, is not evidence of Allstate's bad faith**, harassment, or improper purpose necessary to overcome the presumption that pleadings are made in good faith."*

2. ***Other litigation.*** *"ROSIT's allegations of sanctionable conduct rest on its contention that, based on a history of intentional noncompliance in other cases, Allstate intentionally failed to comply with the requirements for service of a subpoena and then filed the motion in bad faith … But Allstate's motion for sanctions with its attachments **was limited to ROSIT's noncompliance with service in this case.**"*

3. ***Discovery agreement.*** *"… ROSIT complained of Lexitas's 'repeated refusal to comply' with an alleged agreement regarding service of depositions on written questions … Although the trial court cited this failure in its findings, **no evidence of any such agreement was admitted**."*

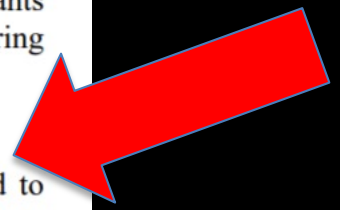
3.
“THEY PLAINLY VIOLATED THE ORDER”

In re Luther, 620 S.W.3d 715 (Tex. 2021, orig. proceeding)

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[.]



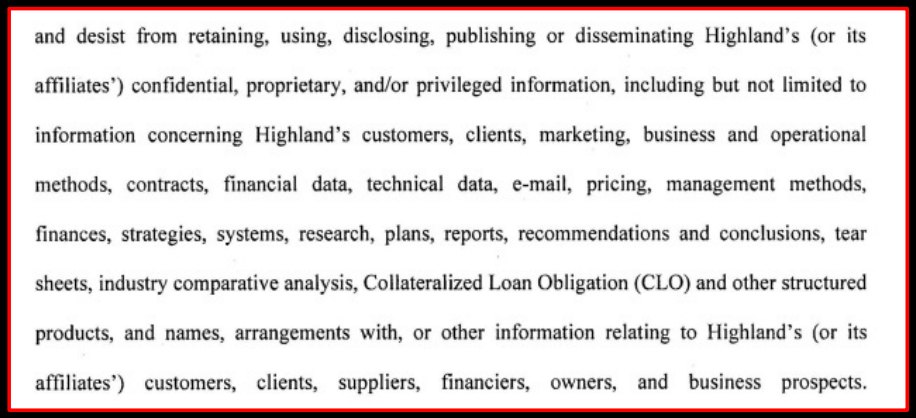
"[I]t nowhere specifies any particular state, county, or city regulation that Luther has violated, is threatening to violate, or is being commanded to stop violating. ***Nor does it describe with specificity which 'in-person services' were restrained****, such that performing them would cause Luther to violate the temporary restraining order …."*

In re Hilburn, No. 05-20-01068-CV
(Tex. App.—Dallas March 21, 2022, orig. proceeding)

"[T]he requirement that Hilburn surrender the child 'at the school in which the child is enrolled' became ***reasonably susceptible to more than one meaning*** *when the child's physical school closed, and the child moved to a virtual learning environment at his grandfather's house. Although the child was enrolled at a public elementary school, he did not attend the physical school building nor was he enrolled in classes held at the school itself."*

In re Daugherty, No. 05-17-01129-CV
(Tex. App.—Dallas June 19, 2018, orig. proceeding)

*"The trial court's determination that Daugherty disclosed confidential, proprietary, or privileged information to Terry during the three conversations is based on Highland's speculation and opinion that Daugherty must have disclosed information covered by the permanent injunction because Daugherty talked to Terry after sending the June 22, 2016 note. That s**peculation is insufficient** to establish that Daugherty actually engaged in conduct that violated the injunction."*


and desist from retaining, using, disclosing, publishing or disseminating Highland's (or its affiliates') confidential, proprietary, and/or privileged information, including but not limited to information concerning Highland's customers, clients, marketing, business and operational methods, contracts, financial data, technical data, e-mail, pricing, management methods, finances, strategies, systems, research, plans, reports, recommendations and conclusions, tear sheets, industry comparative analysis, Collateralized Loan Obligation (CLO) and other structured products, and names, arrangements with, or other information relating to Highland's (or its affiliates') customers, clients, suppliers, financiers, owners, and business prospects.

4.
“THEIR LAWYER IS JUST AS BAD AS THEY ARE”

Taylor v. Tolbert, 644 S.W.3d 637 (Tex. 2022)

"Under Texas law, attorneys are generally immune from civil liability to nonclients for actions taken within the scope of legal representation if those actions involve ***'the kind of conduct' attorneys engage in when discharging their professional duties*** *to a client. … When presented with the question, we have held that the immunity inquiry focuses on the function and role the lawyer was performing, not the alleged wrongfulness, or even asserted criminality, of the lawyer's conduct"*

IMMUNITY APPLIES

- ***Transactional work.*** *"Following the trial court's entry of a divorce decree, one of the divorce litigants sued opposing counsel for fraud and related claims in connection with the law firm's alleged preparation of a document to effectuate the transfer of personal property awarded to its client in the decree."*
  Cantey Hanger LLP v. Byrd, 467 S.W.3d 477 (Tex. 2015).

- ***Failed settlement.*** ***"****Youngkin's complained-of actions were part of his responsibility to his clients, even if done improperly. It would strain the very existence of settlement agreements if a party could hold an opposing attorney liable for subsequently taking an action or position at odds with that party's understanding of the agreement."*
  Youngkin v. Hines, 546 S.W.3d 675 (Tex. 2018).

- ***Allegations of criminality.*** *""[A]t bottom, Bethel takes issue with the manner in which Quilling examined and tested evidence during discovery in civil litigation while representing Bethel's opposing party."*
  Bethel v. Quilling Selander, 595 S.W.3d 651 (Tex. 2020).

IMMUNITY DOESN'T APPLY

- ***Overzealous publicity.*** *"An attorney who repeats his client's allegations to the media or the public for publicity purposes is not acting in the unique, lawyerly capacity to which Texas law affords the strong protection of immunity."*

  Landry's, Inc. v. Animal Legal Defense Fund, 631 S.W.3d 40 (Tex. 2021).

- ***Federal statutory claim.*** *"Taylor is entitled to summary judgment on Robbins's state wiretapping claims because the kind of conduct alleged in support of those claims falls within the scope of the attorney-immunity defense. But Taylor is not entitled to summary judgment on Robbins's claims under the federal wiretap statute because we are not convinced that federal courts would apply Texas's common-law attorney-immunity defense to that statute."*

  Taylor v. Tolbert, 644 S.W.3d 637 (Tex. 2022).

In re The Boeing Co.,
No. 21-40190 (5th Cir. July 29, 2021)

"The district court concluded that the contested documents were reasonably connected to the fraud based on one finding only—that the documents sought 'f[e]ll within the period Boeing admit[ted] to hav[ing] knowingly and intentionally committed fraud' in the DPA. However, ***a temporal nexus*** *between the contested documents and the fraudulent activity* ***alone is insufficient*** *to satisfy the second element for a prima facie showing that the crime-fraud exception applies."*

5.
“THAT’S COVERED BY THE PROTECTIVE ORDER”

Toyota Motor Sales v. Reavis, No. 05-19-00284-CV (Tex. App.—Dallas Feb. 4, 2021, vacated by agr.)

1. *"[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."*

2. *"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."*

Toyota Motor Sales v. Reavis, No. 05-19-00284-CV (Tex. App.—Dallas Feb. 4, 2021, vacated by agr.)

3. "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****."*

Orca Assets, G.P. v. JP Morgan Chase Bank, N.A., (Tex. App.—Dallas March 1, 2023) (order)

"On January 24, 2023, we transferred sealed volumes 9 and 10 of the clerk's record filed in appellate cause number 05-13-01700-CV into this appeal. ***We gave the parties an opportunity to obtain a sealing order in compliance with Texas Rule of Civil Procedure 76a*** *and cautioned that we would order the volumes unsealed should the parties fail to file either a sealing order or status report by February 23, 2022."*

6.
“OH, THE COURT SURELY KNOWS ALL THAT ALREADY”

Tex. Alliance for Retired Americans v. Hughs,
No. 20-40643 (5th Cir. June 30, 2021) (order on reh'g).

"We imposed sanctions because appellees' counsel violated their duty of candor and our local rules by filing a duplicative motion to supplement the record, without making any reference to the fact that ***a previous and nearly identical motion to supplement the record had already been denied****."*

7.
DON’T DO THIS

Ruffins v. State, ___ S.W.3d ___
No. PD-0862-20 (Tex. Crim. App. March 29, 2023)

[STATE]: "If you find beyond a reasonable doubt that David Hogarth is an accomplice to the crime of aggravated robbery, you must consider whether there is evidence corroborating the testimony of David Hogarth. The Defendant, Anthony Ruffins, cannot be convicted on the testimony of David Hogarth, unless that testimony is corroborated."

[DEFENSE COUNSEL]: I'm good.

COURT: Okay.

Sun Coast Resources, Inc. v. Conrad,
958 F.3d 396 (5th Cir. 2020)

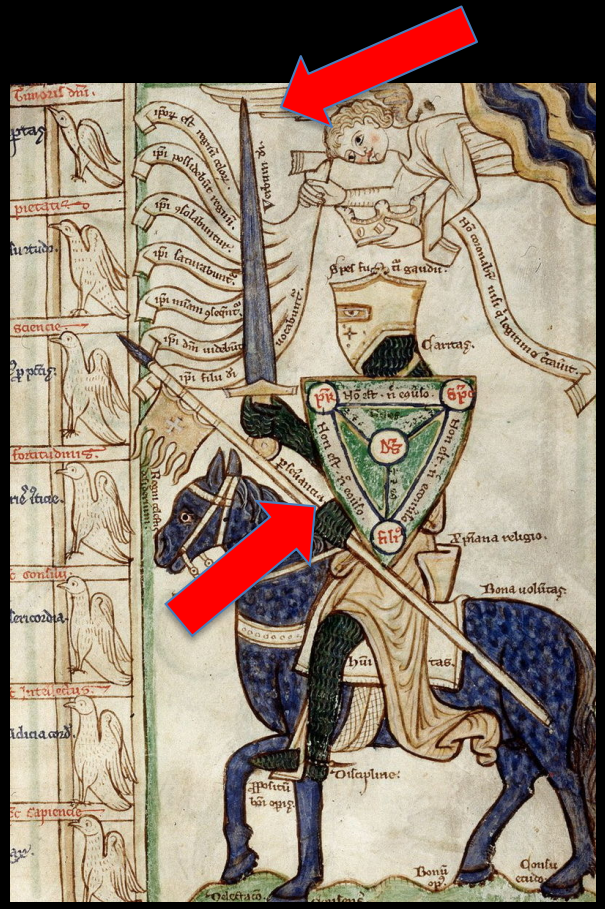
Movant:

1975), *as reprinted in* 67 F.R.D. 195, 254-55. Echoing Third Circuit Chief Judge John Biggs, Jr., the Hruska Commission expressed serious concern that were circuit courts to routinely disallow oral argument they would become akin to the "dispensing slots in the cafeteria, dispensing some kind of cafeteria justice." *Id.* at 253.

Court:

Dispensing with oral argument where the panel unanimously agrees it is unnecessary, and where the case for affirmance is so clear, is not cafeteria justice—it is simply justice. We affirm.[2]

Diana Convenience LLC v. Dollar ATM, LLC,
No. 05-20-00936-CV (Tex. App.—Dallas May 25, 2022, no pet.)



"[T]he decision by appellants Shark Phones and AMK Convenience to file ***a no-evidence motion for summary judgment based on the very evidence that appellee was seeking****—who signed the agreement and were they authorized to do so—supports the trial court's finding that appellants had a callous disregard for the rules of discovery."*

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