

**Bar Association of the Fifth Federal Circuit
2023 Appellate Advocacy Seminar**

**Summary of Issues for Oral Argument
On Tuesday, October 3, 2023**

East Courtroom

Eric Demond Lozano v. Bryan Collier (No. 22-40116)

Plaintiff is a prisoner in the Stringfellow Unit prison in Rosharon, Texas. He is a devout Sunni Muslim from the Hanafi school of thought. In a separate matter, the Fifth Circuit held last year that the Texas Department of Criminal Justice (TDCJ) violated his constitutional rights by denying him Kosher meals while giving those same meals to Jewish inmates. *See Lozano v. Schubert*, 41 F.4th 485, 492 (5th Cir. 2022).

Plaintiff brought this suit under the Religious Land Use and Institutionalized Persons Act (RLUIPA), contending his religious practice is substantially burdened by TDCJ's failure to provide (1) Muslim-only showers for religious showers, (2) adequate and uninterrupted space for prayer, and (3) a Muslim dorm or unit to facilitate Taleem and Quranic studies. Plaintiff also contends TDCJ violates the Establishment Clause by designating Jewish and Native American units but refusing to designate a Muslim unit and by establishing faith-based dorms that are practically Christian dorms. The District Court granted summary judgment for TDCJ and dismissed plaintiff's claims. Plaintiff appealed. After plaintiff filed a pro se brief, the Court appointed counsel, who filed a supplemental brief.

On appeal, plaintiff argues that the District Court misapplied the governing least-restrictive means standard articulated in *Holt v. Hobbs*, 574 U.S. 352, 369 (2015); held plaintiff to an incorrect evidentiary standard at the summary judgment phase; failed to draw all reasonable inferences in his favor on scant or no evidence; and overlooked genuine disputes of material fact. TDCJ counters that RLUIPA does not require it to offer plaintiff a Muslim-designated unit or dorm, private prayer space, or private showers. TDCJ further contends that its religious programming policies are the least restrictive means of furthering its compelling governmental interests and that its provision of religiously designated units and faith-based dorms does not unlawfully foster a particular religious view in violation of the Establishment Clause.

Mario Alejos-Perez v. Merrick Garland (No. 22-60555)

Petitioner seeks review of an order of the Board of Immigration Appeals. The briefs in this matter are restricted documents.

DL Markham, DDS, MSD Incorporated 401(k) Plan v. Variable Annuity Life Insurance Company (No. 22-20540)

Plaintiff is a dental practice that sponsors an employee pension benefit plan. It is the administrator and named fiduciary of the plan. Defendant is an insurance company that offers tax-qualified retirement plans. In May 2018 plaintiff entered into a contract with defendant to maintain the plan on defendant's retirement platform. The contract provided for a 5% surrender fee on transfers out of defendant's annuities on amounts contributed in the previous 60 months and also provided defendant could waive that fee. In January 2020 plaintiff informed defendant that it intended to terminate the contract and move to a different service provider. Plaintiff requested that it be allowed to withdraw the plan's assets without triggering the surrender fee. Defendant refused to waive the fee and ultimately retained about 4.5% (\$20,703) of the plan's assets on transfer.

Plaintiff filed a putative class action in the Eastern District of California against defendant, asserting two claims under ERISA. Count I alleged defendant knowingly participated in a transaction between the plan and a party in interest (defendant) for the "furnishing of goods, services, or facilities," in violation of 29 U.S.C. § 1106(a)(1)(C). Plaintiff further alleged the contract did not qualify for the reasonable compensation exemption under § 1108(b)(2). Count II alleged that by failing to waive the surrender charge, defendant breached its duty of loyalty to the plan in violation of § 1104(a)(1)(A) and engaged in self-dealing in violation of § 1106(b)(1). The case was transferred to the Southern District of Texas. Defendant moved to dismiss under Rule 12(b)(6). The District Court granted the motion, reasoning that because defendant was not yet providing services to plaintiff at the time of the contract containing the surrender-charge provision, defendant was not a party in interest, and thus the transaction did not violate ERISA's prohibited transaction rule. Plaintiff appealed.

On appeal, plaintiff seeks reversal of the dismissal. The Secretary of Labor filed an amicus brief in support of plaintiff, arguing that the District Court's interpretation, which would categorically exempt initial service contracts from ERISA's prohibited transaction provisions, is contrary to ERISA's text and purposes. Plaintiff also seeks leave to amend its complaint. The American Council of Life Insurers and the Chamber of Commerce of the United States each filed an amicus brief in support of defendant. They contend that a service provider does not act as a fiduciary in assessing a pre-agreed surrender charge and that a service provider is not a party in interest before contracting with a plan fiduciary or when collecting the negotiated charge.

En Banc Courtroom

United States v. Dwight Alexander (No. 21-30720)

A jury convicted defendant of conspiracy to distribute at least one kilogram of heroin and at least five kilograms of cocaine, two counts of distributing heroin, being a felon in possession of a firearm, and structuring to avoid bank reporting requirements. The District Court sentenced defendant to a total of 136 months in prison.

On appeal, defendant challenges the sufficiency of the evidence. He claims he is a businessman who sold legal products, including a product called Bonita. He argues the government failed to prove he knew that Bonita and other legal products he sold would be used by drug dealers to cut heroin and cocaine. Defendant also challenges the District Court's denial of a motion in limine to exclude evidence of defendant's testimony as a cooperating witness in the earlier criminal trial of Cornell Pendleton. That testimony was presented during defendant's trial. Defendant contends he believed the government offered him immunity to testify against Pendleton. He argues that the government did not clarify why he was brought to the Pendleton trial without his attorney and that the District Court erred in dismissing his motion in limine without a hearing.

The government counters that there was sufficient evidence demonstrating defendant's knowledge that drug dealers used his Bonita for drug trafficking, based on defendant's testimony at the Pendleton trial, his admissions at his own trial, and other testimony and physical evidence. The government also contends that the District Court did not abuse its discretion in denying the motion in limine, that defendant failed to establish he had immunity, and that the motion in limine did not compel an evidentiary hearing.

Shambaugh & Son, LP v. Steadfast Insurance Company (No. 23-50004)

Plaintiff is a Texas limited partnership doing business in Austin. Northstar Fire Protection of Texas is a division of plaintiff and falls within the corporate entity based in Austin. Defendant is incorporated in and maintains its principal place of business in Illinois. Defendant delivered certain Contractor's Protective Professional Indemnity and Liability Insurance Policies to plaintiff's parent company, EMCOR, a Connecticut-based corporation. Northstar was a named insured under the policies. Plaintiff contends it also qualified as a named insured under policy definitions. Plaintiff submitted a claim under the policies for payment of costs of more than \$1.7 million incurred in complying with a subpoena relating to *In re: Aqueous Film-Forming Foams Protection Liability Litigation*, pending in the District of South Carolina. Defendant denied the claim, and plaintiff filed this diversity suit in the Western District of Texas alleging defendant tortiously breached its duty of good faith and fair dealing, violated the Texas Insurance Code, and violated the Texas Deceptive Trade Practices-Consumer Protection Act.

Defendant filed a motion to dismiss for lack of personal jurisdiction and improper venue. The Magistrate Judge issued a report and recommendation of dismissal for lack of personal jurisdiction or, alternatively, improper venue. The District Court adopted the report and recommendation, granted defendant's motion to dismiss, and dismissed plaintiff's claims without prejudice. Plaintiff appealed. In the meantime, defendant filed suit against plaintiff and EMCOR in the District of Connecticut.

On appeal, plaintiff contends the District Court erred in concluding it did not have personal jurisdiction over defendant in Texas. Plaintiff argues it met its prima facie burden of showing personal jurisdiction based on the fact that the policies at issue named as insureds plaintiff and Northstar, both of which operated in Austin, and that defendant's denial of coverage was directed at its Texas insureds. Plaintiff argues it has shown sufficient minimum contacts with the state of Texas by defendant. Plaintiff further argues that venue is proper in the Western District of Texas and, alternatively, that the District Court should have transferred the case to Illinois.

Defendant responds that the District Court did not have general or specific personal jurisdiction over it. It explains that the policies at issue were negotiated, underwritten, and bound in New York and Massachusetts. It argues that the Texas contacts alleged by plaintiff are not relevant because they did not relate to the procurement and enforcement of the policies and that plaintiff's causes of action do not arise out of or result from those contacts. Defendant contends that the fact that the relevant policies, issued to a Connecticut corporation, may also have insured Texas entities, does not establish specific jurisdiction in Texas. Additionally, defendant's involvement in unrelated Texas litigation is insufficient to establish specific personal jurisdiction. Alternatively, defendant contends the District Court properly dismissed based on improper venue. Further, given the parties' lack of agreement on a proper alternative venue, the District Court did not abuse its discretion in dismissing plaintiff's claims instead of transferring them.

Christopher Grisham v. Rene Valenciano (No. 22-50915)

Plaintiffs Christopher Grisham and James Everard claim that on March 27, 2018, they were in the City of Olmos Park peacefully protesting the City's ordinance prohibiting the carrying of certain firearms. They contend that they were carrying firearms (a pistol and a rifle) in visible holsters as an act of First Amendment expression and that officers used excessive force against them and arrested them without probable cause. They further contend that the City had seized several peacefully protesting open-carry activists in prior weeks and that the chief of police and officers knew plaintiffs were open-carry activists engaged in First Amendment symbolic and political speech protesting the ordinance. Plaintiffs filed this suit under 28 U.S.C. § 1983 against the City, the police chief, and officers, alleging violation of their First, Fourth, and Fourteenth Amendment rights. The District Court granted summary judgment for defendants. Plaintiffs appealed.

On appeal, plaintiffs urge the Court to reverse the summary judgment, contending they were engaged in protected First Amendment activity when they were arrested. They argue that genuine issues of material fact exist regarding the officers' and chief's "squashing" of plaintiffs' right to engage in protected symbolic and political speech and as to whether the chief and his officers violated plaintiffs' clearly established rights. Plaintiffs contend that the City ratified the chief's policy to "squash the rebel," subjecting the City to municipal liability under *Monell*.

Defendants contend the District Court properly granted them summary judgment. In their view, plaintiffs orchestrated the March 27 incident, and officers arrived at the scene after citizens called in fear to report a man armed with an assault-style weapon standing on a street corner. According to defendants, probable cause existed to arrest plaintiffs for interfering with the public duties of a police officer, obstructing a passageway or roadway, and resisting arrest. They also allege that probable cause existed to arrest Everard for disorderly conduct and to arrest Grisham for assault of a public servant and that plaintiffs disobeyed the officers' reasonable commands to deescalate a situation involving rapidly evolving dangerous circumstances. Defendants argue the officers are entitled to qualified immunity because probable cause existed for the arrests, the use of force was objectively reasonable, there was no First Amendment violation, and the officers' conduct did not violate clearly established law. Defendants also deny any municipal liability under *Monell*.

West Courtroom

United States v. Adam Joseph Schultz (No. 22-11039)

Defendant pleaded guilty to conspiracy to commit wire fraud. The offense involved the theft or attempted theft of 19 vehicles between November 2020 and February 2021. Defendant and co-conspirators used counterfeit or stolen identification documents to procure vehicles from dealerships through an online vehicle exchange system for licensed car dealers. Defendant's PSR held him accountable for the total value of 19 vehicles, amounting to \$766,249, although 8 of the 19 vehicles were never actually stolen from the dealerships. Further, certain conduct underlying a state sentence was classified under the Guidelines as criminal history rather than relevant conduct. Specifically, defendant was arrested in April 2021 and found in a stolen vehicle with instruments of identity theft. He received criminal history points for that conduct under USSG § 4A1.2.

At sentencing, the District Court overruled defendant's objections as to the value of the thefts and the classification of conduct as criminal history. It found the applicable Guidelines sentencing range was 120-150 months and imposed a 120-month sentence, plus three years of supervised release. At the sentencing hearing, the District Court orally pronounced that the sentence would run concurrently with six pending state cases. However, the written judgment ordered the sentence to run consecutive to any future sentences in three of those cases and concurrent to anticipated sentences in the other three. Defendant appealed.

On appeal, defendant raises three issues. First, he argues that the District Court clearly erred when it classified the conduct underlying his April 2021 arrest as criminal history rather than relevant conduct. He contends that offense should have counted as the same course of conduct as the offense of conviction. Second, defendant argues the District Court clearly erred when it failed to give him a two-level reduction for a partially completed offense and held him accountable for the value of 19 vehicles although the theft of 8 of those vehicles was not completed. Third, defendant requests a remand for the District Court to conform its written judgment to its oral pronouncement.

The government responds that the District Court did not clearly err in finding defendant's April 2021 offense was not relevant conduct because the April 2021 conduct was not part of the same course of conduct as the instant conviction. Moreover, the government argues that any error was harmless. As to defendant's second claim, the government contends the District Court did not clearly err because the conspiracy participants completed every act necessary to complete all 19 wire fraud offenses. Further, the partially complete offense reduction is not applicable here because any disruption in completing the offense was due to intervention by the victims and law enforcement. The government concedes that the District Court's written judgment should be amended to comport to its oral pronouncement at sentencing.

Kaylee Lartigue v. Northside Independent School District (No. 22-50854)

Plaintiff is hearing impaired. Although she uses a hearing aid, she also requires interpretation services. From 2017 to 2019 she attended high school at Northside Independent School District's magnet John Jay Science and Engineering Academy, where she was the only hearing-impaired student. Although plaintiff's parents and the District developed an Individualized Education Plan that was designed to address plaintiff's needs, plaintiff contends the District persistently failed to properly accommodate her hearing impairment. She ultimately left the school in March 2019 to be homeschooled.

In May 2019 she and her parents filed a complaint with the Texas Education Agency contending the District failed to provide her a free appropriate public education (FAPE) as required by the Individuals with Disabilities Education Act (IDEA). The hearing officer concluded the District satisfied the IDEA by providing plaintiff with a FAPE. Plaintiff and her parents filed suit in federal court. They initially were part of a class action brought by parents of District students with hearing impairments, but ultimately opted out of the class to file an individual complaint. In plaintiff's third amended complaint, operative here, she claims the District's failure to accommodate her hearing impairment violated the Americans with Disabilities Act (ADA). The complaint seeks various forms of relief, including damages and attorney's fees, and does not assert a claim under IDEA. The District Court initially denied the District's motion for summary judgment but granted it on reconsideration and dismissed plaintiff's claim, reasoning that plaintiff does not have a valid, stand-alone claim under the ADA because the gravamen of her complaint is the denial of a FAPE. Plaintiff appealed.

On appeal, plaintiff argues that the District Court's dismissal of her ADA claim rested on a straightforward legal error based on an incorrect interpretation of *Fry v. Napoleon Community Schools*, 580 U.S. 154 (2017). She urges the Court to reverse summary judgment, contending that she has a valid claim under the ADA and that *Fry* does not preclude the claim. The Council of Parent Attorneys and Advocates, Inc. filed an amicus brief in support of plaintiff. It asserts that the ADA's anti-discrimination remedies are distinct from IDEA's FAPE requirement and that Congress has provided individuals with disabilities an independent right to equal access under the ADA, even when ADA and IDEA claims both concern the adequacy of a student's education.

The District argues in response that plaintiff's claim is based on the denial of a FAPE and that plaintiff exhausted and then abandoned that claim and should not be allowed to repackage the claim under the ADA. Further, the District suggests alternative grounds for dismissal of the claim. Specifically, the District argues plaintiff's claim is precluded because she received a FAPE and because she has no recoverable damages supporting a claim under the ADA.

United States v. Leonard Grigsby (No. 22-30764)

At issue is whether Leonard and Barbara Grigsby (the taxpayers) are eligible for a tax credit for increased research activities under § 41 of the Internal Revenue Code. The taxpayers are shareholders of Cajun Industries, an S corporation involved in various aspects of highly complex construction projects. In October 2016 the taxpayers filed a third amended 2013 joint federal tax return. They claimed a refund of \$576,756, which was a resulting flowthrough of research credits claimed on Cajun's amended federal tax return for the tax year ending September 30, 2013. The government ultimately issued a refund of \$671,071.38. In September 2019 the government filed this suit alleging it issued the refund in error and seeking return of the refund. The government asserts the taxpayers are not entitled to the claimed tax credit.

The parties used four sample projects to address whether Cajun's activities during tax year 2013 constitute "qualified research" under § 41. The four projects are: site preparation work for relocation of a methanol plant (Methanex project), civil works for expansion of a refinery (Chevron project), construction of an underground canal as part of a flood control system for the U.S. Army Corps of Engineers (Claiborne project), and construction of a floodwall around a wastewater plant for the Sewage and Water Board of New Orleans (East Bank project). After discovery and bifurcation of issues, the government filed a motion for summary judgment alleging Cajun's activities were not qualified research because none of the four projects had a business component, was technological in nature, had any activities constituting a process of experimentation, or had any uncertainty. It further alleged that even if the projects involved research, they were excluded from qualifying for the credit because they were funded. The government argued that Cajun did not retain any substantial rights to the results of any research for the Methanex, Chevron, and Claiborne projects and did not bear risk contingent on the success of the research for the East Bank project.

About a month prior to the scheduled trial, the District Court granted summary judgment for the government. It found that Cajun did not satisfy the business component requirement. The District Court precluded the taxpayers from relying on a new argument that Cajun performed research to develop new or improved construction processes, as opposed to products. Alternatively, the District Court held that any research Cajun may have performed was funded research, excluded from being qualified research under § 41(d)(4)(H). The taxpayers appealed.

On appeal, the taxpayers argue that the District Court improperly placed the burden of proof on them although the government moved for summary judgment and that whether Cajun satisfied the business component requirement is a fact issue for the jury. They further argue that the District Court erred in determining that any research on the four projects was funded and in completely ignoring guidance stating that the funding exclusion is not to be applied as a basis to deny a credit. The government reiterates its arguments that Cajun did not conduct qualified research as a matter of law because it did not satisfy the business component requirement of § 41(d)(1)(B) and, alternatively, that Cajun's alleged research was excluded because it was funded research under § 41(d)(4)(H).

Rubicela Rameriz v. James Killian (No. 22-10401 c/w No. 22-11060)

On June 20, 2016, defendant, a Collingsworth County deputy sheriff, responded to a domestic disturbance call at plaintiffs' home. When he arrived and entered the house, his body camera was off. According to defendant, he decided to enter the home because he heard "screaming and sounds like someone was getting beat." He radioed for backup, entered the house, and turned on his body camera. Using language laced with profanities, he ordered plaintiffs onto the ground, employed pepper spray, and shot two of their dogs, a German shepherd and a pit bull. He handcuffed plaintiffs and eventually moved them to a sofa. When the sheriff arrived, plaintiff Ramirez stood up, and defendant grabbed her by the hair and threw her to the ground. At that point his body camera became disconnected. Ramirez alleges defendant also slammed her head into the ground. According to plaintiffs, as a result of the incident, defendant pled guilty to a charge of criminal oppression and received a "deferred adjudication."

Plaintiffs filed suit alleging unreasonable search and seizure and excessive force. The District Court granted partial summary judgment finding defendant was entitled to qualified immunity as to all claims except the one involving shooting plaintiffs' pit bull. A jury trial was held as to whether defendant was entitled to qualified immunity when he shot that dog. The jury found for plaintiffs and awarded \$150 for the value of the dog and \$100,150 in punitive damages. The District Court entered judgment. Defendant moved for judgment as a matter of law under Federal Rule of Civil Procedure 50. The District Court granted his motion, concluding he was entitled to qualified immunity and noting plaintiffs did not even attempt to present evidence that a reasonable officer in defendant's situation would not have shot the dog. Plaintiffs appealed the partial summary judgment and the judgment as a matter of law.

On appeal, plaintiffs argue that most of the summary judgment evidence, including defendant's testimony as to why he entered the house without a warrant, involved credibility determinations. Plaintiffs contend evidence from defendant's body camera contradicts his testimony. They further contend that defendant used excessive force when he pepper-sprayed Ramirez and banged her head on the floor and that the summary judgment was based on an unreasonable and inaccurate interpretation of the facts. Plaintiffs also take issue with the District Court's excluding a Texas Ranger report from their summary judgment evidence. They also urge the Court to reverse the judgment for defendant on the pit bull claim, arguing defendant was not entitled to a Rule 50 determination because they established a conflict in substantial evidence as to both prongs of the qualified immunity test. Plaintiffs also raise questions about the role of jury and judge when the issue of qualified immunity goes to trial.

Defendant urges the Court to affirm both judgments. He contends plaintiffs failed to meet their burden to overcome the qualified immunity defense on the warrantless entry and search claim as well as on the excessive force claim and that the District Court did not abuse its discretion in excluding the Texas Ranger report. As for the judgment as a matter of law, defendant argues plaintiffs failed to overcome their burden of proof on qualified immunity because they did not present trial evidence that no reasonable officer could have believed defendant's act of shooting the pit bull was lawful.

Lillian King v. William King (No. 22-30660)

Plaintiffs are sisters Lillian King, Frances Hansen, and Mary Nell Sinai. They are the daughters of Charles King, who died in 1992. Before his death, Charles and his three siblings, William King, Alvin King, and Virginia King Ayres, were co-trustees of “The Voris King Trust,” established in 1969 by their parents. When Charles died, plaintiff Lillian King became a successor co-trustee of the Trust. Plaintiffs also are principal and income beneficiaries of the Trust and the legatees of Charles’s succession and, through it, his indivisible 25% share in the succession of Voris King and legacies of other family successions. Plaintiffs brought this suit against their uncles and other trustees seeking a declaration of the scope and nature of their rights in the successions, the Trust, and a separate 1994 “Voris King Trust;” to obtain accountings and records; and to recover damages for mismanagement, fraud, and breach of fiduciary duties. After pleadings were amended and discovery conducted, defendants filed a motion to exclude evidence of damages under Federal Rule of Civil Procedure 37, claiming plaintiffs never provided a calculation of their damages. Defendants also filed a motion for summary judgment. Plaintiffs opposed the motions and provided a damages estimate of about \$37 million.

The District Court granted both motions and dismissed plaintiffs’ claims. It held that by failing to provide their calculation of damages prior to the discovery deadline, plaintiffs violated the requirements of Rule 26. The District Court considered the factors for exclusion under Rule 37 and found exclusion was warranted. It pointed out that plaintiffs had failed to designate an expert to substantiate their \$37 million claim. It found summary judgment warranted because the requests for declaratory relief were barred by the doctrines of equitable estoppel, ratification, and mootness. It ruled that the accounting claim was moot due to the extensive discovery conducted. As for the damages claims, the exclusion of evidence meant dismissal as a matter of law was warranted. Further, the claims were prescribed. Plaintiffs appealed.

On appeal, plaintiffs characterize the District Court’s ruling on evidence of damages as a “litigation ending” sanction and urge the Court to reverse it. They argue that this sanction was imposed without the required finding that plaintiffs or their counsel engaged in bad faith or willfully abused the judicial process. They further argue that genuine issues of disputed material fact exist regarding estoppel and ratification, including issues regarding whether Lillian King signed a consent form and attended trustee meetings. They contend the District Court should have granted their request for a declaratory judgment and compelled defendants to render a full accounting as to both trusts and the successions.

Defendants argue the District Court did not abuse its discretion in granting their motion to exclude evidence of damages and point out that the ruling was not a “litigation ending” sanction because other claims remained. They also contend summary judgment was warranted because the succession claims were waived, moot, and barred by plaintiffs’ inability to prove damages and because the trust claims were prescribed and/or preempted as a matter of law.