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ORDER OF THE SUPREME COURT OF TEXAS IN THE WACO CASE DENYING PETITION FOR REVIEW (SEPTEMBER 28, 2018) AND MOTION FOR REHEARING (DECEMBER 21, 2018)

IN THE SUPREME COURT OF TEXAS
MCLENNAN COUNTY, 10TH DISTRICT

COLIN SHILLINGLAW

v.

BAYLOR UNIVERSITY

No. 18-0661

SEPTEMBER 28, 2018

Petitioner's petition for review, filed herein in the above numbered and styled case, having been duly considered, is ordered, and hereby is, denied.

DECEMBER 21, 2018

Petitioner's motion for rehearing of petition for review, filed herein in the above numbered and styled case, having been duly considered, is ordered, and hereby is, denied.

★★★★★★★★★★

I, BLAKE A. HAWTHORNE, Clerk of the Supreme Court of Texas, do hereby certify that the above is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and

styled as above, as the same appear of record in the minutes of said Court under the date shown.

It is further ordered that petitioner, COLIN SHILLINGLAW, pay all costs incurred on this petition.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this the 21st day of December, 2018.

Blake A. Hawthorne, Clerk

By Monica Zamarripa, Deputy Clerk

ORDER OF THE SUPREME COURT OF TEXAS IN THE DALLAS CASE DENYING PETITION FOR REVIEW (SEPTEMBER 14, 2018) AND MOTION FOR REHEARING (DECEMBER 7, 2018)

IN THE SUPREME COURT OF TEXAS
DALLAS COUNTY, 5TH DISTRICT

COLIN SHILLINGLAW

v.

BAYLOR UNIVERSITY, DR. DAVID E. GARLAND in His Official Capacity as INTERIM PRESIDENT OF BAYLOR UNIVERSITY, ET AL.

No. 18-0709

SEPTEMBER 14, 2018

Petitioner's petition for review, filed herein in the above numbered and styled case, having been duly considered, is ordered, and hereby is, denied.

DECEMBER 7, 2018

Petitioner's motion for rehearing of petition for review, filed herein in the above numbered and styled case, having been duly considered, is ordered, and hereby is, denied.

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I, BLAKE A. HAWTHORNE, Clerk of the Supreme Court of Texas, do hereby certify that the above is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appear of record in the minutes of said Court under the date shown.

It is further ordered that petitioner, COLIN SHILLINGLAW, pay all costs incurred on this petition.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this the 7th day of December, 2018.

/s/ Blake A. Hawthorne
Clerk

By

Monica Zamarripa
Deputy Clerk

MEMORANDUM OPINION
OF THE FIFTH COURT OF APPEALS
(JUNE 21, 2018)

IN THE COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS

COLIN SHILLINGLAW,

Appellant,

v.

BAYLOR UNIVERSITY, DR. DAVID E. GARLAND in his Official Capacity as INTERIM PRESIDENT OF BAYLOR UNIVERSITY, REAGAN RAMSOWER, JAMES CARY GRAY, RONALD D. MURFF, DAVID H. HARPER, DR. DENNIS R. WILES, AND PEPPER HAMILTON, LLP,

Appellees.

No. 05-17-00498-CV

On Appeal from the 116th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-17-01225

Before: Justices BRIDGES, MYERS, and SCHENCK

Opinion by Justice Schenck

Colin Shillinglaw appeals the trial court's orders dismissing his claims against appellees and awarding them their attorney's fees pursuant to the Texas

Citizens' Participation Act (TCPA). In his first issue, Shillinglaw contends the dismissal orders should be reversed because the case should have been sent to arbitration. In his second issue, Shillinglaw urges the Federal Arbitration Act (FAA) preempts the TCPA because, as applied here, the TCPA discriminated against arbitration. In his third issue, Shillinglaw argues the trial court erred by ordering him to pay unreasonable attorney's fees to appellees under the TCPA. We affirm the trial court's judgment. Because all issues are settled in law, we issue this memorandum opinion. Tex. R. App. P. 47.4.

BACKGROUND

In 2008, appellee Baylor University (Baylor) hired Shillinglaw to be its Director for Football Operations. In 2015, Baylor hired appellee Pepper Hamilton to perform an investigation of the handling of reports of sexual assault and harassment at Baylor. Pepper Hamilton's investigation included interviewing Shillinglaw. In May 2016, Pepper Hamilton presented its findings to Baylor's Board of Regents. Baylor suspended and later terminated Shillinglaw's employment.

On January 31, 2017, Shillinglaw sued Baylor, Dr. David E. Garland as interim president of Baylor, Dr. Reagan Ramsower,[1] James Cary Gray, Ronald D. Murff, David H. Harper, Dr. Dennis R. Wiles,[2] and Pepper Hamilton, in Dallas County asserting claims of libel, slander, tortious interference with existing

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[1] Appellee Dr. Ramsower was head of Baylor's Department of Public Safety and responsible for handling any student complaints.

[2] Appellees Gray, Murff, Harper, and Dr. Wiles are members of the Board of Regents of Baylor.

contract, aiding and abetting, conspiracy, ratification, and retraction. In March, appellees filed separate motions to dismiss Shillinglaw's claims pursuant to the TCPA and to recover their court costs, attorney's fees, and litigation expenses. On April 3, ten days before the hearing set on appellees' motions to dismiss, Shillinglaw moved to continue the hearing. Days later, Shillinglaw moved to non-suit his claims in the trial court, which issued an order granting his nonsuit, leaving only appellees' claims for costs, attorney's fees, and other defense expenses related to their motions to dismiss.

On April 10, Shillinglaw filed a separate suit in McLennan County asserting similar claims against Baylor alone. Shillinglaw requested that the McLennan County court order the parties to arbitration pursuant to an arbitration agreement in his employment contract with Baylor. Meanwhile, in the Dallas County case, Shillinglaw filed a response to appellees' motions to dismiss, in which he referenced (and to which he attached) the McLennan County petition and argued the McLennan County court should be permitted to compel arbitration. He did not, however, request that the Dallas County trial court compel arbitration.

On April 13, the Dallas County trial court conducted a hearing on appellees' motion to dismiss, at which Shillinglaw confirmed he had not filed a written request to compel arbitration. The trial court granted the motions to dismiss and dismissed Shillinglaw's claims against appellees with prejudice and set another hearing to receive evidence regarding the award of costs and reasonable attorney's fees. Before the hearing on costs and attorney's fees, Shillinglaw filed a motion to reconsider, in which he requested the trial

court reconsider its orders granting the motions to dismiss, award Shillinglaw court costs and reasonable attorney's fees, and refer the case to arbitration. Following the hearing on costs and attorney's fees, the trial court denied Shillinglaw's motion to reconsider and awarded appellees attorney's fees. This appeal followed.[3]

DISCUSSION

I. Arbitration

A. Compelling Non-Signatories to Arbitration

In his first issue, Shillinglaw contends the Dallas County trial court erred by failing to order the claims to arbitration. In his second issue, Shillinglaw urges the FAA preempts the TCPA because, as applied here, the TCPA discriminated against arbitration. As part of his first and second issues, Shillinglaw urges that although only Shillinglaw and Baylor are signatories to the arbitration agreement at issue, the remaining non-signatory appellees should also be compelled to arbitration.

We begin with the foundational principle that arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute that he has not agreed so to submit. *AT & T Techs., Inc. v. Commc'ns. Workers of Am.*, 475 U.S. 643, 648 (1986). A party seeking to compel arbitration under the FAA

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[3] Shillinglaw appealed the trial court's orders dismissing his claims against appellees. In a separate notice of appeals, he appealed the trial court's orders, inter alia, denying his motion to reconsider and awarding appellees their attorney's fees. On a joint motion from appellees, this Court consolidated the two appeals.

must establish (1) the existence of a valid, enforceable arbitration agreement and (2) that the claims at issue fall within that agreement's scope. *VSR Fin. Servs., Inc. v. McLendon*, 409 S.W.3d 817, 827 (Tex. App.—Dallas 2013, no pet.).

The United States Supreme Court has repeatedly emphasized that arbitration is a matter of consent, not coercion, that the FAA does not require parties to arbitrate when they have not agreed to do so, and its purpose is to make arbitration agreements as enforceable as other contracts, but not more so. *Roe v. Ladymon*, 318 S.W.3d 502, 510 (Tex. App.—Dallas 2010, no pet.) (citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293 (2002); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967)).

As in other contracts, non-signatories are normally not bound by arbitration agreements with others. *Id.* at 511. But non-signatories to a contract containing an arbitration clause may be allowed or required to arbitrate if rules of law or equity would apply the contract to them generally. *Id.* Accordingly, we will now examine whether any rules of law or equity would bind any of the non-signatory appellees to Shillinglaw's employment contract.

Shillinglaw argues the non-signatory appellees were bound in their capacities as employees or agents of Baylor under the doctrine of *respondeat superior*. He urges that Baylor's interim president Dr. Garland and its senior vice president and CFO Dr. Ramsower had or have a "close connection to Baylor" that means that the claims against them are intertwined such that arbitration is appropriate. Shillinglaw avers the

appellee members of the Baylor Board of Regents have an even closer relationship than that of employer and employee, that they are the human agents through which the university acts. Shillinglaw urges that Pepper Hamilton was acting as Baylor's agent when it carried out the acts and omissions complained of by Shillinglaw and argues the doctrine of *respondeat superior* should apply here to bind Pepper Hamilton.

Under the doctrine of *respondeat superior*, an employer or principal may be vicariously liable for the tortious acts of any employee or agent acting within the scope of his or her employment or agency, even though the principal or employer did not itself commit a wrong. *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 541-42 (Tex. 2002). It is the right of control that justifies imposing liability on the employer for the actions of the employee or agent. *See id.* at 542. Shillinglaw, however, urges that the non-signatories are employees or agents who must be bound by the actions of their employer, rather than employers who must be bound by the actions of their agents or employees. Thus, we find his arguments regarding *respondeat superior* inapposite. *See id.* We next address his arguments regarding the non-signatory appellees as agents of signatory Baylor.

Shillinglaw relies on an opinion from another court of appeals for the proposition that when the principal is bound under the terms of a valid arbitration clause, its agents, employees, and representatives are covered by that agreement. *Amateur Athletic Union of the U.S., Inc. v. Bray*, 499 S.W.3d 96, 104 (Tex. App.—San Antonio 2016, no pet.). However, the *Bray* decision is distinguishable because the San Antonio Court of Appeals held that the individual defendants could

compel arbitration against the plaintiff where all individual parties had signed membership applications, in which each applicant agreed to be bound by an organization's policies, which included a binding arbitration provision. *See id.* The *Bray* decision does not suggest that the plaintiff could have compelled arbitration against the defendants merely because they were employed as agents of the signatory organization. *C.f. id.*

Shillinglaw further cites authority applying principles of equitable estoppel to argue that his claims against the non-signatories are so factually intertwined with his claims against Baylor as to subject them to arbitration.[4] To be sure, estoppel principles may require a non-signatory to arbitrate if it seeks through its claim to obtain a direct benefit from the contract containing the arbitration clause. *Ladymon*, 318 S.W.3d at 520. Conversely, allowing willing non-signatories to compel arbitration with a party to the arbitration agreement simply precludes a signatory from avoiding arbitration with a party when the issues the non-signatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed. *See, e.g.*, *In re Vesta Ins. Grp., Inc.*, 192 S.W.3d 759, 762-63 (Tex. 2006) (per curiam) (signatory plaintiff

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[4] *See Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524, 527 (5th Cir. 2000) (discussing the Eleventh Circuit's application of equitable estoppel to allow a non-signatory to compel arbitration against a signatory); *Cotton Commercial USA, Inc. v. Clear Creek Indep. Sch. Dist.*, 387 S.W.3d 99, 107 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (holding non-signatory contractor could compel arbitration against signatory school district where non-signatory contractor purchased signatory contractor and signatory school district sued non-signatory contractor under contract with signatory contractor).

resisted arbitration while non-signatory defendants sought to hold signatory plaintiff to agreement to arbitrate). In that situation, all parties to the requested arbitration have agreed to forego their right to a judicial forum. Reversing the situation, as Shillinglaw proposes, to require an unwilling non-signatory to arbitrate is no small matter of procedural convenience. It would carry serious constitutional implications and undermine the core consensual nature of the federal arbitration act. *E.g.*, *Volt Info. Scis., Inc.*, 489 U.S. at 479; *Ladymon*, 318 S.W.3d at 520 (holding evidence that non-signatory defendant signed contract as an agent was insufficient to permit signatory plaintiff to "estop" non-signatory defendant from refusing to arbitrate because there was no evidence non-signatory defendant ever agreed to arbitrate).[5]

The present case illustrates the "reverse" situation where the non-signatories appellees do not want to arbitrate Shillinglaw's claims against him individually, and there is no evidence they agreed to do so in the employment contract containing the arbitration agreement, by conduct claiming rights under it, or in the course of this proceeding. *See Ladymon*, 318 S.W.3d at 520. Put simply, there is no basis to estop the non-signatories from resorting to the judicial forum because they never agreed to arbitrate, nor did they assert any claims arising from the employment contract. *See id.*; *Thomson–CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d

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[5] The federal constitution assures the right to petition the government for redress of grievances in the First Amendment. *See Ryland v. Shapiro*, 708 F.2d 967, 972 (5th Cir. 1983) (recognizing access to courts protected by First Amendment right to petition for redress of grievances); *see also* Tex. Const. art. I, § 27 (right to petition for redress of grievances).

773, 780 (2d Cir. 1995) (applying FAA and rejecting right to compel non-signatories to arbitration); *c.f. MiCocina, Ltd. v. Balderas-Villanueva*, 05-16-01507-CV, 2017 WL 4857017, at *4 (Tex. App.—Dallas Oct. 27, 2017, no pet. h.) (mem. op.) (non-signatory employee signed acknowledgement of receipt of agreement to arbitrate, thus establishing valid agreement to arbitrate); *Carlin v. 3V Inc.*, 928 S.W.2d 291, 295 (Tex. App.—Houston [14th Dist.] 1996, no writ) (non-signatory's claims arose out of agreement containing arbitration clause and non-signatory would have no claim but for underlying agreement).

We conclude the non-signatory appellees could not be compelled to arbitration on this record. We now address whether the trial court erred by failing to order Shillinglaw's claims against signatory Baylor to arbitration.

B. Shillinglaw Waived Arbitration

In his first issue, Shillinglaw contends the Dallas County trial court erred by failing to order the claims to arbitration.

Baylor urges that the record in this matter establishes Shillinglaw pursued litigation and waited to invoke the arbitration agreement in his employment contract until it was clear he faced not only dismissal with prejudice of his claims but also an award of attorney's fees. After appellees filed motions to dismiss seeking attorney's fees, Shillinglaw non-suited his claims, informing the Dallas County court that this act extinguished the case or controversy. When appellees responded that Shillinglaw's non-suit had no effect on their motions to dismiss and right to attorney's fees and sanctions, Shillinglaw attempted to

invoke the arbitration agreement, but he did so by filing a new suit against Baylor in McLennan County.[6] It was not until a week after the Dallas County trial court dismissed his claims with prejudice that Shillinglaw filed a motion to reconsider, in which he—for the first time—made a written request that the Dallas County court compel arbitration. This first written request thus arrived after Shillinglaw chose to file suit in Dallas, resisted merits dismissal, filed suit in McLennan County and sought arbitration there, and terminated the Dallas case on its merits by filing a non-suit.

The FAA requires a party to file a written motion to the trial court to compel the parties to arbitration, as well as notice to the parties. *See* 9 U.S.C. § 4, 6. Shillinglaw urges that by attaching to his responses to appellees' motions to dismiss a copy of his petition in McLennan County—that explicitly requested that the court in McLennan County (not the trial court in Dallas County) order the parties to arbitration—he made a written request to the Dallas County court for arbitration. In fact, in his response, Shillinglaw took the position that the Dallas County court "is not in a position any longer to make a legal award—the McLennan County District Court (which is the proper venue for arbitration) is the court with jurisdiction to order the parties to arbitration." Thus, Shillinglaw opposed the Dallas County court proceeding at all and

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[6] *See Duchouquette v. Prestigious Pets, LLC*, 05-16-01163-CV, 2017 WL 5109341, at *3 (Tex. App.—Dallas Nov. 6, 2017, no pet.) (mem. op.) (holding plaintiff's nonsuit will not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief such as a defendant's TCPA motion to dismiss").

did not make a written request for an order from the Dallas County court to refer the case to arbitration.[7]

At the hearing on appellees' motions to dismiss, Shillinglaw made an oral request to refer the case to arbitration, not a written motion required by the FAA.[8] *See* 9 U.S.C. § 4, 6. In fact, the first time Shillinglaw made a written motion requesting the Dallas County court compel arbitration was in his motion to reconsider, which he filed after he non-suited his claims and after the trial court signed orders granting appellees' motions to dismiss his claims with prejudice. Therefore, by the time Shillinglaw requested that the trial court compel his claims to arbitration, he had already voluntarily non-suited his claims against appellees and thus the trial court lacked jurisdiction to compel those claims to arbitration. *See City of Dallas v. Albert*, 354 S.W.3d 368, 375 (Tex. 2011) (jurisdiction as to claim lost when claim timely non-suited); *Patton Boggs LLP v. Moseley*, 394 S.W.3d 565, 572 (Tex. App.—Dallas 2011, no pet.) ("Because the only proceeding before the trial court was a rule 202 petition, the trial court had no jurisdiction to grant a motion to compel arbitration absent an agreement between the parties that the motion should be granted."). He also failed to seek arbitration in the trial court until after an adverse result. *See Haddock v. Quinn*, 287 S.W.3d 158, 180 (Tex. App.—Fort Worth

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[7] Further, we note his request in the McLennan County case was limited to his claims against Baylor because that is the only party he sued in the McLennan County case.

[8] In Shillinglaw's sur-reply to appellees' reply to his response to their motions to dismiss, he prayed the trial court stay the proceedings in Dallas County and allow arbitration to proceed in McLennan County.

2009, pet. denied) ("Indeed, failing to seek arbitration until after proceeding in litigation to an adverse result is the clearest form of inconsistent conduct and is inevitably found to constitute substantial invocation of the litigation process resulting in waiver.").

We overrule Shillinglaw's first issue.

In his second issue, Shillinglaw urges the FAA preempts the TCPA because, as applied here, the TCPA discriminated against arbitration. Because Shillinglaw failed to effectively present his request for arbitration to the Dallas County court, we need not address Shillinglaw's second issue. *See* Tex. R. App. P. 47.4.

II. Reasonableness of Appellees' Attorney's Fees

In his third issue, Shillinglaw complains the trial court's award of attorney's fees to appellees was unreasonable.

The TCPA requires an award of reasonable attorney's fees to the successful movant. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.009(a) (mandating award of court costs, reasonable attorney's fees, and other defense expenses incurred, as well as sanctions trial court determines sufficient to deter plaintiff from bringing similar actions); *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016). A "reasonable" attorney's fee is one that is not excessive or extreme, but rather moderate or fair. *Id.* That determination rests within the court's sound discretion, and its judgment will not be reversed on appeal absent a clear abuse of discretion. *Avila v. Larrea*, 506 S.W.3d 490, 494 (Tex. App.—Dallas 2015, pet. denied).

At the hearing on attorney's fees, counsel for Baylor, Dr. Garland, and Dr. Ramsower (Baylor appellees), Gray, Murff, Harper, and Wiles (Regents), and Pepper Hamilton presented evidence of their fees, costs, and expenses in the form of testimony by their attorneys and their affidavit. All the appellees also provided the trial court with their attorneys' time records for the work performed. Their attorneys' affidavits each asserted the work "was reasonable and necessary in the defense of the lawsuit against" the appellees. The trial court made the following awards: $133,989.50 to the Baylor appellees;[9] $143,100 the Regents;[10] and $48,621.04 to Pepper Hamilton.[11]

In support of his challenge to the awards to appellees, Shillinglaw does not challenge the sufficiency of the evidence of attorney's fees, the qualifications of the attorney witnesses, or the rates charged. Instead, he argues the fees were excessive because the evidence reflects the appellees' attorneys participated in joint strategy sessions and conferences. Shillinglaw urges, "It is unconscionable to expect that, when any of Appellees' attorneys have a telephone conference with co-counsel, the trial court would rule that such fees are reasonable and that Shillinglaw should pay for both (or, in some cases multiple) attorneys' time." He also points to the short duration of the litigation—approximately two months—and limited number of

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9 Although the Baylor appellees requested $165,257.50, the trial court only awarded $133,989.50.

10 Although the Regents requested $236,775, the trial court only awarded $143,000.

11 The trial court awarded to Pepper Hamilton the amount it requested.

filings by appellees' counsel as reasons why the fee awards should be reversed as excessive.

Shillinglaw's argument that the trial court should not have awarded any amounts related to joint strategy sessions or conferences between appellees' attorneys relies on the opinion of *El Apple I, Ltd. v. Olivas*, in which the supreme court held that charges for duplicative, excessive, or inadequately documented work should be excluded. 370 S.W.3d 757, 762 (Tex. 2012). However, Shillinglaw's argument ignores the fact that the conferences were between counsel for different clients. Shillinglaw has not offered, and we have not found, any authority that litigants represented by separate counsel should not be awarded their own attorney's fees. Nor do we find any support for Shillinglaw's argument in the text of the statute where the statute provides for an award to the moving party, as well as sanctions against the party who brought the legal action. *See* Civ. Prac. & Rem. § 27.009(a).[12]

As for Shillinglaw's arguments regarding the short length of litigation and few filings by appellees' counsel, we note that, as detailed below, appellees' counsel were required to respond to numerous filings by

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[12] If the court orders dismissal of a legal action under this chapter, the court shall award to the moving party:

(1) court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require; and

(2) sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.

Civ. Prac. & Rem. § 27.009(a).

Shillinglaw, and, in the case of the Baylor appellees and the Regents, to represent multiple clients. The attorneys representing all appellees performed defensive work for them, including the following:

- Investigated Shillinglaw's claims;
- Answered Shillinglaw's petition;
- Filed their motion to dismiss pursuant to the TCPA;
- Responded to Shillinglaw's motions for limited discovery;
- Attended the hearing on their motion to dismiss;
- Filed a motion for protection and to quash subpoenas for attendance at the hearing on attorney's fees; and
- Attended the hearing on attorney's fees.

In addition to the foregoing defensive work, the Baylor appellees' attorneys filed a reply in support of their motion to dismiss, responded to Shillinglaw's motion to reconsider, and responded by letter to Shillinglaw's letter regarding the recent opinion from the Supreme Court on whether the FAA preempted the TCPA. The Regents' attorneys also prepared for and attended a hearing on Shillinglaw's request for a temporary order enjoining the Regents and their attorneys from discussing the lawsuit publicly; filed a reply in support of their motion to dismiss; and responded to Shillinglaw's motion to reconsider.

We conclude Shillinglaw has failed to establish—and that record does not show—the trial court abused its discretion in its award of attorney's fees, court

costs, and litigation expenses to appellees. Accordingly, we overrule Shillinglaw's third issue.

CONCLUSION

We affirm the trial court's judgment.

/s/David J. Schenck
Justice

JUDGMENT OF THE FIFTH COURT OF APPEALS (JUNE 21, 2018)

IN THE COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS

COLIN SHILLINGLAW,

Appellant,

v.

BAYLOR UNIVERSITY, DR. DAVID E. GARLAND in his Official Capacity as Interim President of Baylor University, ET AL.,

Appellee.

No. 05-17-00498-CV

On Appeal from the 116th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-17-01225

Before: Justices BRIDGES, MYERS, and SCHENCK

Opinion by Justice Schenck

In accordance with this Court's opinion of this date, the judgment of the trial court is AFFIRMED.

It is ORDERED that appellees BAYLOR UNIVERSITY, DR. DAVID E. GARLAND IN HIS OFFICIAL CAPACITY AS INTERIM PRESIDENT OF BAYLOR UNIVERSITY, REAGAN RAMSOWER, JAMES CARY GRAY, RONALD D. MURFF, DAVID H.

HARPER, DR. DENNIS R. WILES, AND PEPPER HAMILTON, LLP recover their costs of this appeal and the full amount of the trial court's judgment from appellant COLIN SHILLINGLAW and from the cash deposit in lieu of supersedeas bond. After the judgment and all costs have been paid, the District Clerk of Dallas County is directed to release the balance, if any, of the cash deposit in lieu of supersedeas bond to COLIN SHILLINGLAW.

Judgment entered this 21st day of June, 2018.

ORDER ON DEFENDANT PEPPER HAMILTON LLP'S APPLICATION FOR ATTORNEYS' FEES AND COSTS UNDER THE TEXAS CITIZENS PARTICIPATION "ANTI-SLAPP" ACT (MAY 12, 2017)

116TH DISTRICT COURT
DALLAS COUNTY, TEXAS

COLIN SHILLINGLAW,

Plaintiff,

v.

BAYLOR UNIVERSITY, DR. DAVID E. GARLAND in his Official Capacity as INTERIM PRESIDENT OF BAYLOR UNIVERSITY, REAGAN RAMSOWER, JAMES CARY GRAY, RONALD D. MURFF, DAVID H. HARPER, DR. DENNIS R. WILES, and PEPPER HAMILTON, LLP,

Defendants.

Cause No. DC-17-01225

Before: Hon. Tonya PARKER

On May 11, 2017, the Court conducted a hearing to determine Defendant Pepper Hamilton LLP's attorneys' fees, costs and expenses consistent with Texas Civil Practice and Remedies Code § 27.009. After considering the pleadings and the evidence presented, the Court finds and orders as follows:

IT IS ORDERED that reasonable attorneys' fees and other expenses incurred by Defendant Pepper Hamilton LLP in defending against the claims asserted against it by Plaintiff Colin Shillinglaw are awarded to Defendant Pepper Hamilton LLP to be paid be Colin Shillinglaw in the amount of $48,621.04.

IT IS FURTHER ORDERED that should there be any proceeding in any court appealing or attacking the judgment rendered in this cause, additional reasonable attorneys' fees and other expenses shall be awarded against Plaintiff Colin Shillinglaw, as follows:

(A) In the event an appeal to the Court of Appeals is made but unsuccessful, the sum of $30,000 to Defendant Pepper Hamilton LLP;

(B) In the event a Petition for Review is filed in the Supreme Court of Texas, the sum of $15,000 to Defendant Pepper Hamilton LLP;

(C) In the further event of full merits briefing being requested by the Texas Supreme Court, the further sum of $20,000 to Defendant Pepper Hamilton LLP.

(D) In the event a Petition for Review is granted by the Supreme Court of Texas, the further sum of $18,000 to Defendant Pepper Hamilton LLP.

An award of fees for each of the appellate steps (A)–(D) would be conditioned on Pepper Hamilton, LLP prevailing at that step of an appeal.

All taxable costs of court are assessed against the Plaintiff Colin Shillinglaw.

This order, together with the other orders dismissing the case with prejudice and awarding fees and expenses, disposes of all claims and parties in this cause, and is final and appealable.

Execution may issue on all sums awarded.

SIGNED this 12th day of May, 2017.

/s/ Tonya Parker
Judge Presiding

ORDER GRANTING DEFENDANTS J. CARY GRAY, RONALD D. MURFF, DAVID H. HARPER AND DENNIS WILES ATTORNEYS' FEES PURSUANT TO TEXAS CITIZENS' PARTICIPATION ACT (MAY 12, 2017)

IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS 116TH JUDICIAL DISTRICT

COLIN SHILLINGLAW,

Plaintiff,

v.

BAYLOR UNIVERSITY, DR. DAVID E. GARLAND in his Official Capacity as INTERIM PRESIDENT OF BAYLOR UNIVERSITY, REAGAN RAMSOWER, JAMES CARY GRAY, RONALD D. MURFF, DAVID H. HARPER, DR. DENNIS R. WILES, and PEPPER HAMILTON, LLP,

Defendants.

Cause No. DC-17-01225

Before: Hon. Tonya PARKER

The Court, having considered Defendants J. Cary Gray, Ronald D. Murff, David H. Harper, and Dennis Wiles's request for attorneys' fees pursuant to the Texas Citizens' Participation Act, Texas Civil Practice and Remedies Code section 27.009, the response to

that request, and the evidence, affidavits, and objections, and having heard the arguments of counsel, is of the opinion that the request should be and hereby is GRANTED.

It is, therefore, ORDERED that Plaintiff Colin Shillinglaw pay Defendants J. Cary Gray, Ronald D. Murff, David H. Harper and Dennis Wiles reasonable attorneys' fees, court costs, and other expenses incurred in defending against the above-numbered legal action in the amount of $143,100.

It is FURTHER ORDERED that if Colin Shillinglaw unsuccessfully appeals to the Court of Appeals, he shall pay Defendants J. Cary Gray, Ronald D. Murff, David H. Harper and Dennis Wiles reasonable attorneys' fees that will be incurred in defending against the legal action in the amount of $30,000.

It is FURTHER ORDERED that if Colin Shillinglaw unsuccessfully files a Petition for Review in the Texas Supreme Court, he shall pay Defendants J. Cary Gray, Ronald D. Murff, David H. Harper and Dennis Wiles reasonable attorneys' fees that will be incurred in defending against the legal action in the amount of $20,000.

It is FURTHER ORDERED that if Colin Shillinglaw unsuccessfully appeals to the Texas Supreme Court he shall pay Defendants J. Cary Gray, Ronald D. Murff, David H. Harper and Dennis Wiles reasonable attorneys' fees that will be incurred in defending against the legal action in the amount of $25,000 at full merits briefing stage and $25,000 in the event a Petition for Review is granted.

SIGNED this 12th day of May, 2017.

/s/ Tonya Parker
Judge Presiding

ORDER GRANTING DEFENDANTS BAYLOR UNIVERSITY, DR. DAVID GARLAND, AND DR. REAGAN RAMSOWER ATTORNEYS' FEES AND EXPENSES PURSUANT TO THE TEXAS CITIZENS' PARTICIPATION ACT (MAY 12, 2017)

IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS 116TH JUDICIAL DISTRICT

COLIN SHILLINGLAW,

Plaintiff,

v.

BAYLOR UNIVERSITY, DR. DAVID E. GARLAND in his Official Capacity as INTERIM PRESIDENT OF BAYLOR UNIVERSITY, REAGAN RAMSOWER, JAMES CARY GRAY, RONALD D. MURFF, DAVID H. HARPER, DR. DENNIS R. WILES, and PEPPER HAMILTON, LLP,

Defendants.

Cause No. DC-17-01225

Before: Hon. Tonya PARKER

The Court, having considered the request for attorneys' fees of Defendants Baylor University, Dr. David Garland, and Dr. Reagan Ramsower ("Baylor Defendants") pursuant to the Texas Civil Practice and Remedies Code Section 27.009, the response to that

request, and the evidence, affidavits, and objections, and having heard the arguments of counsel, is of the opinion that the request should be and hereby is GRANTED.

It is, therefore, ORDERED that the Baylor Defendants are awarded reasonable attorneys' fees, court costs, and other expenses incurred in defending against the above-numbered legal action through the trial court of $133,989.50.

It is FURTHER ORDERED that if Plaintiff unsuccessfully appeals to the Court of Appeals, the Baylor Defendants are awarded reasonable attorneys' fees in the amount of $30,000.

It is FURTHER ORDERED that:

(1) if a Petition for Review is filed in the Supreme Court of Texas, the Baylor Defendants are awarded reasonable attorneys' fees in the amount of $20,000;

(2) in the event full merits briefing is requested by the Supreme Court of Texas, the Baylor Defendants are awarded reasonable attorneys' fees in the amount of $25,000; and

(3) in the event a Petition for Review is granted by the Supreme Court of Texas, the Baylor Defendants shall further be entitled to reasonable attorneys' fees in the amount of $25,000

An award of fees for each of the appellate steps listed above in (1)-(3) is conditioned on the Baylor Defendants prevailing at that step of an appeal.

SIGNED this 12th day of May, 2017.

/s/ Tonya Parker
Judge Presiding

ORDER GRANTING DEFENDANTS J. CARY GRAY, RONALD D. MURFF, DAVID H. HARPER, AND DR. DENNIS R. WILES, AND THEIR COUNSELS' MOTION FOR PROTECTIVE ORDER (MAY 11, 2017)

IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS 116TH JUDICIAL DISTRICT

COLIN SHILLINGLAW,

Plaintiff,

v.

BAYLOR UNIVERSITY, DR. DAVID E. GARLAND in his Official Capacity as INTERIM PRESIDENT OF BAYLOR UNIVERSITY, REAGAN RAMSOWER, JAMES CARY GRAY, RONALD D. MURFF, DAVID H. HARPER, DR. DENNIS R. WILES, and PEPPER HAMILTON, LLP,

Defendants.

Cause No. DC-17-01225

Before: Hon. Tonya PARKER

The Court, having considered Defendants J. Cary Gray, Ronald D. Murff, David H. Harper, and Dr. Dennis R. Wiles, and Their Counsels' Motion for Protective Order and any responses, and having heard the arguments of counsel, is of the opinion that the Motion should be and hereby is GRANTED. It is, therefore,

ORDERED that the subpoenas issued by Plaintiff Colin Shillinglaw to J. Cary Gray, Ronald D. Murff, David H. Harper, Dr. Dennis R. Wiles, Rusty Hardin, Lara Hollingsworth, Derek Hollingsworth, Naomi Howard and Stella Jares are QUASHED.

SIGNED this 11th day of May, 2017.

/s/ Tonya Parker
Judge Presiding

ORDER GRANTING BAYLOR UNIVERSITY, DR. DAVID GARLAND, DR. REAGAN RAMSOWER, STEPHEN DILLARD, GABRIEL KAIM, MICHAEL MCTAGGART, AND JOHN HERRING'S MOTION FOR PROTECTION AND TO QUASHING THE SUBPOENAS ISSUED BY THE PLAINTIFF (MAY 11, 2017)

IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS 116TH JUDICIAL DISTRICT

COLIN SHILLINGLAW,

Plaintiff,

v.

BAYLOR UNIVERSITY, ET AL.,

Defendants.

Cause No. DC-17-01225

Before: Hon. Tonya PARKER

The Court has considered Baylor University, Dr. David Garland, Dr. Reagan Ramsower, Stephen Dillard, Gabriel Kaim, Michael McTaggart, and John Herring's motion for protection and to quash the subpoenas issued by Plaintiff Colin Shillinglaw.

The Court Orders that the Motion is GRANTED.

The Court further Orders that the subpoenas issued by Plaintiff Colin Shillinglaw to Dr. David

Garland, Dr. Reagan Ramsower, Stephen Dillard, Gabriel Kaim, Michael McTaggart, and John Herring are quashed.

Signed May 11, 2017.

/s/ Tonya Parker
Judge Presiding

ORDER GRANTING PEPPER HAMILTON, LLP'S MOTION FOR PROTECTIVE ORDER (MAY 11, 2017)

116TH JUDICIAL DISTRICT
DALLAS COUNTY, TEXAS

COLIN SHILLINGLAW,

Plaintiff,

v.

BAYLOR UNIVERSITY, DR. DAVID E. GARLAND in his Official Capacity as INTERIM PRESIDENT OF BAYLOR UNIVERSITY, REAGAN RAMSOWER, JAMES CARY GRAY, RONALD D. MURFF, DAVID H. HARPER, DR. DENNIS R. WILES, and PEPPER HAMILTON, LLP,

Defendants.

Cause No. DC-17-01225

Before: Hon. Tonya PARKER

The Court has considered Defendant Pepper Hamilton, LLP's Motion for Protective Order with respect to the subpoena issued by Plaintiff's counsel and directed to "Thomas E. Zemaitis, Representative of Defendant, Pepper Hamilton LLP."

The Court Orders that the Motion is GRANTED.

SIGNED this 11th day of May, 2017.

/s/ Tonya Parker
Judge Presiding

ORDER GRANTING BAYLOR UNIVERSITY, DR. DAVID GARLAND, AND DR. REAGAN RAMSOWER'S MOTION TO DISMISS PURSUANT TO THE TEXAS CITIZENS PARTICIPATION ACT (APRIL 14, 2017)

IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS 116TH JUDICIAL DISTRICT

COLIN SHILLINGLAW,

Plaintiff,

v.

BAYLOR UNIVERSITY, ET AL.,

Defendants.

Cause No. DC-17-01225

Before: Hon. Tonya PARKER

The Court, having considered Defendants Baylor University, Dr. David Garland, and Dr. Reagan Ramsower's motion to dismiss pursuant to the Texas Citizens Participation Act and the response to that Motion, grants the Motion.

It is ordered that:

1. All of Plaintiff Colin Shillinglaw's claims against Defendants Baylor University, Dr. David Garland, and Dr. Reagan Ramsower

in this lawsuit are dismissed with prejudice to refiling;

2. The Court will separately award Defendants Baylor University, Dr. David Garland, and Dr. Reagan Ramsower their reasonable attorney's fees and expenses after a hearing on that issue which shall be set to occur on May 11, 2017 @ 1:45pm; and

3. The Court hereby enters a dismissal with prejudice as the mandatory CPRC § 27.009 sanction against Plaintiff Colin Shillinglaw.

Signed April 14th, 2017.

/s/ Tonya Parker
Judge Presiding

ORDER GRANTING DEFENDANTS J. CARY GRAY, RONALD D. MURFF, DAVID H. HARPER AND DR. DENNIS R. WILES' FIRST AMENDED JOINT MOTION TO DISMISS BASED ON THE TEXAS CITIZENS' PARTICIPATION ACT (APRIL 14, 2017)

IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS 116TH JUDICIAL DISTRICT

COLIN SHILLINGLAW,

Plaintiff,

v.

BAYLOR UNIVERSITY, DR. DAVID E. GARLAND in his Official Capacity as INTERIM PRESIDENT OF BAYLOR UNIVERSITY, REAGAN RAMSOWER, JAMES CARY GRAY, RONALD D. MURFF, DAVID H. HARPER, DR. DENNIS R. WILES, and PEPPER HAMILTON, LLP,

Defendants.

Cause No. DC-17-01225

Before: Hon. Tonya PARKER

The Court, having considered Defendants J. Cary Gray, Ronald D. Murff, David H. Harper and Dr. Dennis R. Wiles' First Amended Joint Motion to Dismiss Based on the Texas Citizens' Participation Act, the

response to that Motion, and the evidence and affidavits, and having heard the arguments of counsel, is of the opinion that the Motion should be and hereby is GRANTED. It is, therefore,

ORDERED that:

1. All of Plaintiff Colin Shillinglaw's claims against Defendants J. Cary Gray, Ronald D. Murff, David H. Harper and Dr. Dennis R. Wiles in this lawsuit are hereby DISMISSED WITH PREJUDICE to refiling of same;

2. The Court will separately award Defendant J. Cary Gray, Ronald D. Murff, David H. Harper and Dr. Dennis R. Wiles their reasonable attorneys' fees and expenses after a hearing on that issue which shall be set for hearing on May 11, 2017@1:45pm; and

3. The Court hereby enters a dismissal with prejudices as the mandatory CPRC § 27.009 sanction against Plaintiff Colin Shillinglaw.

SIGNED this 14th day of April, 2017.

/s/ Tonya Parker
Judge Presiding

ORDER DISMISSING CLAIMS AGAINST DEFENDANT PEPPER HAMILTON LLP WITH PREJUDICE AND AWARDING ATTORNEYS' FEES AND COSTS UNDER THE TEXAS CITIZENS PARTICIPATION "ANTI-SLAPP" ACT (APRIL 14, 2017)

116TH JUDICIAL DISTRICT
DALLAS COUNTY, TEXAS

COLIN SHILLINGLAW,

Plaintiff,

v.

BAYLOR UNIVERSITY, DR. DAVID E. GARLAND in his Official Capacity as INTERIM PRESIDENT OF BAYLOR UNIVERSITY, REAGAN RAMSOWER, JAMES CARY GRAY, RONALD D. MURFF, DAVID H. HARPER, DR. DENNIS R. WILES, and PEPPER HAMILTON, LLP,

Defendants.

Cause No. DC-17-01225

Before: Hon. Tonya PARKER

On April 13, 2017, the Court considered the Motion to Dismiss filed by Defendant Pepper Hamilton LLP pursuant to Chapter 27 of the Texas Civil Practice and

Remedies Code, and conducted a hearing. After considering the pleadings, and the evidence presented, the Court finds and orders as follows:

Pursuant to Chapter 27 of the Texas Civil Practice and Remedies Code, all of Plaintiff Colin Shillinglaw's claims asserted against Defendant Pepper Hamilton LLP should be dismissed with prejudice.

Pursuant to Chapter 27 of the Texas Civil Practice and Remedies Code, including § 27.009(a)(1), the Court finds that Defendant Pepper Hamilton LLP is entitled to an award of its court costs, reasonable attorneys' fees, and other expenses incurred in defending the above referenced legal action.

IT IS THEREFORE ORDERED that as the mandatory CPRC § 27.009 sanction all claims asserted against Defendant Pepper Hamilton LLP by Colin Shillinglaw are dismissed with prejudice.

IT IS ORDERED that reasonable attorneys' fees and other expenses incurred by Defendant Pepper Hamilton LLP in defending against the claims asserted against it by Plaintiff Colin Shillinglaw to be determined at a hearing on May 11, 2017 @1:45pm.

SIGNED this 14th day of April, 2017.

/s/ Tonya Parker
Judge Presiding

ORDER OF THE 116TH JUDICIAL DISTRICT COURT DENYING PLAINTIFF COLIN SHILLINGLAW'S MOTION FOR RECONSIDERATION (MAY 11, 2017)

IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS 116TH JUDICIAL DISTRICT

COLIN SHILLINGLAW,

Plaintiff,

v.

BAYLOR UNIVERSITY, ET AL.,

Defendants.

Cause No. DC-17-01225

Before: Hon. Tonya PARKER

The Court has considered Plaintiff Colin Shillinglaw's Motion for Reconsideration.

The Court Orders that Plaintiff Colin Shillinglaw's Motion for Reconsideration is DENIED.

Signed May 11, 2017.

/s/ Tonya Parker
Judge Presiding

MEMORANDUM OPINION
OF THE TENTH COURT OF APPEALS
(JUNE 6, 2018)

IN THE TENTH COURT OF APPEALS

COLIN SHILLINGLAW,

Appellant,

v.

BAYLOR UNIVERSITY,

Appellee.

No. 10-17-00259-CV

From the 170th District Court
McLennan County, Texas
Trial Court No. 2017-1189-4

Before: Chief Justice GRAY, Justice DAVIS,
and Justice SCOGGINS

Colin Shillinglaw filed suit against Baylor University for breach of contract, libel, slander, tortious interference with existing contract, and retraction. Baylor filed a motion for summary judgment, and the trial court granted Baylor's motion for summary judgment. We affirm.

BACKGROUND FACTS

Shillinglaw was employed by Baylor in the Athletic Department. After complaints on Baylor's handling of allegations of sexual assault and sexual harassment, Baylor hired the Pepper Hamilton law firm to conduct an investigation. Pepper Hamilton presented its findings to the Baylor Board of Regents, and Shillinglaw was subsequently suspended from his employment with Baylor in May 2016.

On January 31, 2017, Shillinglaw filed suit in Dallas County against Baylor, two Baylor employees, four members of Baylor's Board of Regents, and the Pepper Hamilton law firm for libel, slander, tortious interference with existing contract, aiding and abetting, conspiracy, ratification, and retraction. Shillinglaw claimed Baylor, its employees, and its agents made defamatory statements about him concerning his involvement with the sexual assault scandal. On March 2, 2017, the defendants filed a motion to dismiss Shillinglaw's claims under the Texas Citizens Participation Act (TCPA). The trial court set a hearing on the motion to dismiss for April 13, 2017. On April 6, 2017, Shillinglaw filed a notice of nonsuit without prejudice as to all the claims in the Dallas County case. The following day, the defendants in the Dallas County case informed the trial court by letter that the nonsuit did not affect their pending motion to dismiss pursuant to the TCPA.

On April 10, 2017, Shillinglaw filed suit in McLennan County only against Baylor University for breach of contract, libel, slander, tortious interference with existing contract, and retraction. Included in the petition was a request for arbitration pursuant to the

employment contract between Shillinglaw and Baylor. Shillinglaw then responded to the motion to dismiss pending in Dallas County and asked the trial court to stay the proceedings in that case so that McLennan County could compel arbitration. After the hearing on the motion to dismiss, the trial court in Dallas County granted the defendants' motion to dismiss pursuant to TCPA, dismissed Shillinglaw's claims with prejudice, and awarded the defendants attorney's fees. On May 12, 2017, Shillinglaw appealed the Dallas County trial court judgment to the Dallas Court of Appeals.

On June 9, 2017, Baylor filed a motion for summary judgment in the McLennan County cause of action based on res judicata. On July 7, 2017, the trial court held a hearing on Baylor's motion for summary judgment and Shillinglaw's motion to compel arbitration and motion for sanctions. On July 18, 2017, the trial court entered an order granting Baylor's motion for summary judgment and denying Shillinglaw's motion to compel arbitration and motion for sanctions.

STANDARD OF REVIEW

We review de novo a trial court's grant or denial of a traditional motion for summary judgment. *See Creditwatch, Inc. v. Jackson*, 157 S.W.3d 814, 816 n.7 (Tex. 2005). In reviewing a traditional motion for summary judgment, we must consider whether reasonable and fair-minded jurors could differ in their conclusions in light of all of the evidence presented. *See Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007). The movant carries the burden of establishing that no material fact issue exists and that it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *M.D. Anderson Hospital & Tumor Institute. v.*

Willrich, 28 S.W.3d 22, 23 (Tex. 2000). In reviewing a traditional motion for summary judgment, we must consider all the evidence in the light most favorable to the nonmovant, indulging every reasonable inference in favor of the nonmovant and resolving any doubts against the motion. *See Goodyear Tire & Rubber Co.*, 236 S.W.3d at 756.

RES JUDICATA

In two issues on appeal, Shillinglaw argues that the trial court erred in ordering that his claims were barred under the theory of res judicata. Res judicata prevents the relitigation of a claim or cause of action that has been finally adjudicated, as well as related matters that, with the use of diligence, should have been litigated in the prior suit. *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 628 (Tex. 1992). The party claiming res judicata must prove (1) a prior final determination on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims as were or could have been raised in the first action. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010).

Shillinglaw stated in his petition in the Dallas County case that jurisdiction and venue are proper in Dallas County. The Dallas County trial court had jurisdiction to enter judgment after Shillinglaw's nonsuit.

Under Texas law, parties have an absolute right to nonsuit their own claims for relief at any time during the litigation until they have introduced all evidence other than rebuttal evidence at trial. Tex. R. Civ. P. 162; *Villafani v. Trejo*, 251 S.W.3d 466, 468-69 (Tex. 2008); *Rauhauser v. McGibney*, 508 S.W.3d 377,

381 (Tex.App.—Fort Worth 2014, no pet.), *disapproved on other grounds*, *Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017). Although a plaintiff decides which of its own claims to pursue or to abandon, that decision does not control the fate of a nonmoving party's independent claims for affirmative relief. Tex. R. Civ. P. 162; *Rauhauser v. McGibney*, 508 S.W.3d at 381. A defendant's motion to dismiss that may afford more relief than a nonsuit affords constitutes a claim for affirmative relief that survives a nonsuit. *Rauhauser v. McGibney*, 508 S.W.3d at 381. The defendants in the Dallas County suit's motion to dismiss survived Shillinglaw's nonsuit. *See Rauhauser v. McGibney*, 508 S.W.3d at 383.

Shillinglaw argues that the trial court did not have authority to enter the order of dismissal because it was required to order the parties to arbitration. Shillinglaw's arguments go to the merits of the Dallas County trial court's judgment. That is not before this Court. Shillinglaw has appealed the trial court's order dismissing the claims to the Dallas Court of Appeals. In a supplemental brief, Shillinglaw argues that the trial court did not have authority to impose non-monetary sanctions under the TCPA. Again that issue should be raised in the Dallas Court of Appeals. The Dallas trial court's dismissal with prejudice was a final determination on the merits by a court of competent jurisdiction. *See Mossler v. Shields*, 818 S.W.2d 752, 754 (Tex. 1991). The finality of that order is not affected by the appeal to the Dallas Court of Appeals. *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 6 (Tex. 1986).

There is no dispute that the identities of the parties are the same in the Dallas County case and the

McLennan County case. Therefore, we will next consider whether the McLennan County action was based upon the same claims as were or could have been raised in the Dallas County action.

Texas follows the "transactional" approach to res judicata barring a subsequent suit if it arises out of the same subject matter of a previous suit and which through the exercise of diligence, could have been litigated in a prior suit. *Barr v. Resolution Trust Corp.*, 837 S.W.2d at 631. A final judgment on an action extinguishes the right to bring suit on the transaction, or series of connected transactions, out of which the action arose. *Id.*

The petition in McLennan County alleges nearly identical causes of action as the Dallas County petition. The McLennan County petition adds the additional cause of action for breach of contract. The factual summary in each petition is also nearly identical. The dispute arises over Baylor suspending Shillinglaw after the Pepper Hamilton findings on the handling of allegations of sexual assault. Under the transactional approach we give weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a trial unit conforms with the parties expectations or business understanding or usage. *See Hill v. Tx-An Anesthesia Management, LLP*, 443 S.W.3d 416, 425 (Tex.App.—Dallas 2014, no pet.). Shillinglaw's breach of contract claim arises from the same facts as those for libel, slander, tortious interference with existing contract, and retraction which were alleged in the Dallas County case. Based on the evidence, we conclude that Shillinglaw's claims for breach of contract arose out of the same subject matter

involved in the Dallas County suit, and through the exercise of due diligence, could have been litigated in that suit. *See id.* We find that the trial court did not err in granting Baylor's motion for summary judgment because Shillinglaw's claims were barred by res judicata. We overrule the first and second issues on appeal.

CONCLUSION

We affirm the trial court's judgment.

Al Scoggins
Justice

PLAINTIFF'S NOTICE OF APPEAL (AUGUST 16, 2017)

IN THE 170TH DISTRICT COURT
MCLENNAN COUNTY, TEXAS

COLIN SHILLINGLAW,

Plaintiff,

v.

BAYLOR UNIVERSITY,

Defendant.

Cause No. 2017-1189-4

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Plaintiff Colin Shillinglaw, and files this Notice of Appeal, and would show the Court as follows:

1. Plaintiff desires to appeal from the Court's Final Judgment, attached hereto as Exhibit A. The Final Judgment was signed and entered on July 18, 2017 in the case styled *Colin Shillinglaw v. Baylor University*, Cause No. 2017-1189-4 in the 170th Judicial District Court of McLennan County, Texas.

2. Plaintiff appeals to the Tenth Court of Appeals sitting in Waco, Texas. This is not an accelerated appeal.

Respectfully submitted,

West, Webb, Allbritton & Gentry, P.C.
1515 Emerald Plaza
College Station, TX 77845-1515
Telephone: (979) 694-7000
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By:

/s/ Gaines West
Gaines West
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John "Jay" Rudinger, Jr.
State Bar No. 24067852
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Attorneys for Plaintiff

FINAL JUDGMENT
[EX. A TO NOTICE OF APPEAL]
(JULY 18, 2017)

IN THE DISTRICT COURT OF 170TH JUDICIAL DISTRICT MCLENNAN COUNTY, TEXAS

COLIN SHILLINGLAW,

Plaintiff,

v.

BAYLOR UNIVERSITY,

Defendant.

Cause No. 2017-1189-4

Before: Hon. Jim MEYER

On July 7, 2017, the Court heard and considered the following Motions: (1) Defendant Baylor University's Motion for Summary Judgment; (2) Plaintiff Colin Shillinglaw's Motion to Compel Arbitration; and (3) Plaintiff Colin Shillinglaw's Motion for Sanctions.

Defendant Baylor University's Motion for Summary Judgment is granted.

Plaintiff Colin Shillinglaw's Motion to Compel Arbitration and Motion for Sanctions are denied.

This judgment disposes of all claims asserted by all parties and is a final and appealable judgment.

Signed July 18, 2017.

/s/ Jim Meyer
Judge Presiding

ORDER DENYING PLAINTIFF COLIN SHILLINGLAW'S MOTION TO COMPEL ARBITRATION (JULY 17, 2017)

IN THE DISTRICT COURT OF 170TH JUDICIAL DISTRICT MCLENNAN COUNTY, TEXAS

COLIN SHILLINGLAW,

Plaintiff,

v.

BAYLOR UNIVERSITY,

Defendant.

Cause No. 2017-1189-4

Before: Hon. Jim MEYER

The Court, having considered Plaintiff Colin Shillinglaw's Motion to Compel Arbitration and response, DENIES that Motion.

Signed July 17, 2017.

/s/ Jim Meyer
Judge Presiding

ORDER OF THE 170TH JUDICIAL DISTRICT COURT (JULY 7, 2017)

170TH DISTRICT COURT

Before: Jim MEYER, Judge

Hon. Jay Rudinger
Hon. Gaines West
Hon. Katherine Mackillop
Hon. Stephen Dillard
(via e-mail)

Re: Cause No. 2017-1189-4; *Colin Shillinglaw vs. Baylor University*; in the 170th District Court of McLennan County, Texas

Dear Counsel:

From our hearing on July 7, 2017:

Baylor's Motion for Summary Judgment is granted.

Plaintiff's Motion's before the Court are denied.

If Mr. Dillard will please prepare and present an Order which has been approved as to form by Counsel.

This memorandum ruling shall not be considered as an order or findings of fact and conclusions of law, but shall have the same effect as if orally pronounced in open court.

Sincerely,

/s/Jim Meyer
Judge
170th District Court

ORDER GRANTING BAYLOR UNIVERSITY'S MOTION FOR SUMMARY JUDGMENT (JULY 7, 2017)

IN THE DISTRICT COURT OF 170TH JUDICIAL DISTRICT MCLENNAN COUNTY, TEXAS

COLIN SHILLINGLAW,

Plaintiff,

v.

BAYLOR UNIVERSITY,

Defendant.

Cause No. 2017-1189-4

Before: Hon. Jim MEYER

The Court grants Baylor University's Motion for Summary Judgment.

Baylor University is granted a take nothing judgment. This is a final judgment.

Signed July 7, 2017.

/s/ Jim Meyer
Judge Presiding

CONTRACT FOR EMPLOYMENT OF COLIN SHILLINGLAW AS ASSISTANT ATHLETICS DIRECTOR OF FOOTBALL OPERATIONS AT BAYLOR UNIVERSITY (JANUARY 19, 2016)

This Employment Agreement is between BAYLOR UNIVERSITY, a Texas non-profit corporation ("Baylor"), and COLIN SHILLINGLAW ("Shillinglaw").

I. Term of Contract

Notwithstanding the date of execution of this contract, Baylor agrees to employ Shillinglaw and Shillinglaw agrees to be employed by Baylor on the following terms and conditions from January 1, 2016 through May 31, 2017, unless terminated earlier pursuant to Article IV.

II. Position and Duties

A. During the period in which Baylor employs Shillinglaw as an Assistant AD of Baylor's intercollegiate football program, Shillinglaw agrees to undertake and perform properly, efficiently, to the best of his ability, and consonant with the standards of Baylor, all specific duties and responsibilities attendant to the position of Assistant AD as directed by the Head Coach, or as set forth in a job description for the position.

Shillinglaw shall work under the immediate supervision of the Head Football Coach and shall confer with the Head Football Coach on all matters requiring administrative and technical decisions. If necessary, Shillinglaw and the Head Football Coach may confer with the Vice President and Athletics Director ("AD")

or his designee if a problem cannot otherwise be resolved. Shillinglaw acknowledges that the Head Football Coach has supervisory authority including the authority to recommend termination to the AD.

B. Shillinglaw agrees that he:

(1) will at all times be current in his knowledge of the policies and procedures of Baylor and the Bylaws or other rules and regulations of the National Collegiate Athletic Association ("NCAA"), the Big 12 Conference (and any other athletic association or conference with which Baylor may be associated from time to time) ("Conference") that pertain to the conduct of intercollegiate football and the performance of his duties,

(2) has in fact made himself knowledgeable of said policies and procedures and Bylaws, rules and regulations,

(3) will comply with all of said policies and procedures and Bylaws, rules and regulations,

(4) will report to the Head Football Coach and AD, or to the senior administrator of Baylor's Compliance Office, as directed by the AD, any violation of said Bylaws, policies and procedures and rules and regulations by Baylor or any football coach, other employee, student, alumnus, or "representative of the athletics interests" of Baylor as that term is defined in Article 13 of the Bylaws of the NCAA,

(5) will fully cooperate in any investigation by Baylor, the NCAA or the Conference when information is sought from him;

(6) that he will support and promote to the best of him ability the admissions and financial policies of Baylor as those policies apply to the intercollegiate football program at Baylor, and

(7) that he will assist Baylor in maintaining compliance with Title IX of the Education Amendments of 1972 and other laws relating to nondiscrimination.

In everything pertaining to the conduct and operation of the affairs of the intercollegiate football program at Baylor, Shillinglaw is charged with the responsibility for: (a) all matters about which he has actual knowledge; and (b) those matters about which a reasonable person with his assigned duties and with knowledge of and experience in intercollegiate athletics should have known under the same or similar circumstances.

C. Shillinglaw understands that Baylor is a Christian institution of higher education that is controlled by a majority-Baptist Board of Regents. He also understands that Baylor is affiliated with the Baptist General Convention of Texas, a Texas non-profit membership corporation whose members represent cooperating, but autonomous Texas Baptist churches. Shillinglaw is aware that the welfare of Baylor is largely dependent upon preserving the goodwill and support of Texas Baptists, both individually and as a group. In particular, Shillinglaw shall ensure that he treats all persons associated with Baylor and the athletics department with respect and shall refrain from the use of profanity or other language that would reflect poorly on Baylor's Christian witness. At any time during the term of this contract Shillinglaw is guilty of personal conduct that in

a serious and material manner reflects unfavorably upon Baylor or Texas Baptists, then in that event, Baylor may terminate this contract for cause as provided for under Article IV hereof.

D. Shillinglaw agrees and understands that the intercollegiate football program and Shillinglaw's performance and conduct are subject to review at any time by any or all of the following: the Head Football Coach, the AD and the President. Shillinglaw agrees to use good faith efforts to resolve performance, conduct and program performance issues relating to Shillinglaw in a timely manner.

III. Compensation

A. In consideration of the services, Shillinglaw agrees to perform those services under the terms and conditions of this contract, Baylor promises to pay to Shillinglaw, subject to any necessary and authorized withholdings:

(1) An annual base salary of $189,000.00, payable in equal monthly installments. This Base Salary is subject to annual review by Baylor for merit increases during the term of this contract.

(2) Contributions to the Baylor University Income Retirement Plan in accordance with the Personnel Policies, as amended from time to time, pertaining to Executive Personnel.

B. In no event may Shillinglaw accept or receive directly or indirectly any monies, benefits, or any other gratuity whatsoever from any person, corporation, university booster club or alumni association or other benefactor if such action would violate the legislation

or the constitution, bylaws, rules and regulations as now or hereafter enacted, or interpretations thereof, of the NCAA or the Conference. Changes of such legislation, constitution, bylaws, rules and regulations or interpretations thereof automatically apply to this contract without the necessity of a written modification. Shillinglaw must also comply with the letter and spirit of Baylor's Conflict of Interest Policy (BU-PP 800).

C. Baylor shall pay Shillinglaw supplemental pay for team performance in accordance with Athletics Department Bonus Policy, as amended from time to time by Baylor. Such Bonus Policy may be amended by Baylor at any time before such supplemental pay is earned by Shillinglaw. The current Bonus Policy is attached to this contract.

D. All other matters pertaining to the compensation of Shillinglaw must be negotiated directly and exclusively with the Head Football Coach. The Head Football Coach will make recommendations to the AD who will make recommendations to the President or his designee, whose decision is final.

IV. Termination

A. Termination by Shillinglaw

Shillinglaw may terminate this contract without cause by providing at least 30 days written notice to the AD of Shillinglaw's intention to terminate this agreement and the effective date of termination. The parties may mutually agree to a shorter time if done so in writing.

Following termination of the contract by Shillinglaw, no further compensation, employment benefits, or other sums are due and payable by Baylor to him under

this contract, except as otherwise required by this contract, by law, rule or regulation, or by arbitration decision in accordance with Article VI.

B. Termination by Baylor for Cause

(1) If, during the term of this contract, the AD reasonably determines that:

(a) Shillinglaw has failed to comply with any term of this contract, or

(b) Shillinglaw has engaged in personal-conduct that in a serious and material manner reflects unfavorably upon Baylor or Texas Baptists, or

(c) Shillinglaw has violated the policies and procedures of Baylor in a matter related to the Baylor intercollegiate football program, such that termination of employment in accordance with the Baylor University Personnel Policy Manual would be warranted as if an employee had committed the violation, or

(d) Shillinglaw has committed a Level I or Level II violation, or its equivalent [including infractions considered "major" prior to 2013 rule changes, and multiple Level III or Level IV violations (or, if prior to the 2013 rule changes, "secondary infractions") which, in accumulation are considered to be a Level I or Level II violation] of the Bylaws, rules or regulations of the NCAA or the Conference, or

(e) Shillinglaw has committed an infraction of NCAA Bylaws which results in the Head

Football Coach being suspended as a penalty for Shillinglaw's actions; or

(f) Shillinglaw has violated the laws of the State of Texas, or of the United States, that provide for punishment by incarceration for one year or more in a matter related to the Baylor intercollegiate football program, or

(g) Shillinglaw either:

(i) knew; or

(ii) should have known

of the commission by any member of the intercollegiate football program of an intentional violation, Level I, II, III or IV or its equivalent, of any Bylaw, rule, regulation, constitutional provision, or interpretation of the NCAA or the Conference, and either

(i) did not act to prevent the violation; or

(ii) did not report the violation within a reasonable time after he knew or should have known of the intentional violation; or

(h) Shillinglaw has refused or failed to perform any duty that is reasonably related to his position as Assistant AD and that is consistent with his position and stature in the community of NCAA Division I football coaches; or

(i) determines that either Shillinglaw's performance or conduct, or program performance relating to Shillinglaw, is unsatisfactory to Baylor after review by the Head Football

> Coach, AD or the President in accordance with Article II.D.;

then the AD may terminate this contract or impose any lesser sanction that in his sole judgment and discretion is warranted. Shillinglaw may, however, appeal the sanction to the President, whose decision is final. Additionally, pending investigation of or inquiry into grounds for termination or imposition of a lesser sanction, or pending the determination of grounds for termination or imposition of a lesser sanction in accordance with Article IV.B.(2), the AD also has the authority, in his sole judgment and discretion, to suspend Shillinglaw from his duties with pay.

The AD has the right to proceed with his determination independently of a determination by any third party, including a third party that administers the law, Bylaws, rules or regulations involved. Furthermore, the AD's determination is independent of any determination by any such third party and can differ from the determinations of such third party. The AD's determination is, however, subject to arbitration in accordance with Article VI below.

(2) Prior to a determination by the AD that grounds for termination or imposition of a lesser sanction exist under Article IV.B.(1), the AD, after providing Shillinglaw with evidence of any such grounds for termination or imposition of a lesser sanction, shall provide Shillinglaw with the opportunity, no less than fourteen days after Shillinglaw has received such evidence, to present to the AD for his information and consideration, such facts and other evidence as Shillinglaw believes may bear on the issue(s) of claimed grounds for termination or imposition of a lesser sanction.

C. Automatic Termination

This contract terminates automatically when and if Shillinglaw dies or becomes unable to perform his duties as determined under Baylor's personnel policies regarding disability

D. It is understood and agreed that if this contract is terminated by Shillinglaw in accordance with Article IV.A or by Baylor for cause or automatically, all obligations of Baylor to make further payments or to provide any other consideration to Shillinglaw hereunder cease as of the effective date of such termination. Accordingly, there is no obligation of Baylor to pay any unearned salary or benefits, including the loss of any accrued but unused vacation pay, remaining under the contract after termination, except as otherwise required by this contract, by law, rule or regulation, or by arbitration decision in accordance with Article VI.

In no case may Baylor be liable to Shillinglaw for the loss of any collateral business opportunities or any of the benefits, perquisites, or income resulting from activities such as but not limited to camps, clinics, media appearances, apparel or shoe contracts, consulting relationships, or from any other sources that may ensue as a result of the termination of this contract.

E. No termination of this contract by Shillinglaw or by Baylor affects any of Shillinglaw's rights that have become vested under any Baylor employee benefit program as of the date of termination.

V. Baylor's Educative Purpose

Baylor and Shillinglaw agree that, although this contract is sports-related, the primary purpose of Baylor, and accordingly, of all its legal arrangements,

including this contract, is educative. Thus, the educative purpose of Baylor has priority in the various provisions of this contract. Examples of how this purpose is to be applied are set forth below.

It is recognized by Shillinglaw and Baylor that a student-athlete may be declared ineligible for competition because: (1) of academic reasons; (2) Baylor believes he would not be an appropriate representative of Baylor; (3) of disciplinary sanction under Baylor's Student Disciplinary Policy; or (4) Baylor believes that he is not eligible according to the rules for athletic competition specified by the NCAA or the Conference. In no event may such an action by Baylor be considered a breach of this contract.

VI. Agreement to Arbitrate

A. Shillinglaw and Baylor agree that if a dispute of any nature arises out of this contract or otherwise arises between them involving any transaction or event during the term of this contract, including but not limited to claims of discrimination in violation of federal or state law and breach of contract under Article IV, and if said dispute cannot be settled by negotiation and by internal dispute resolution procedures, if any, they agree first to try to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Rules, before resorting to arbitration.

B. If the dispute is not resolved by mediation, Shillinglaw and Baylor agree that the dispute must be resolved by its submission, by either of them, to arbitration according to the rules of the American Arbitration Association. The Arbitrator shall be a member of the

National Academy of Arbitrators and only one arbitrator is required. If either party submits a statutory dispute or defense to arbitration, the Arbitrator must be an attorney. The decision of the Arbitrator shall be final and binding on both Shillinglaw and Baylor.

C. Shillinglaw and Baylor intend for the agreement to arbitrate to be enforceable under the Federal Arbitration Act. In the event that the agreement to arbitrate is not enforceable under the Federal Arbitration Act, then they intend for the agreement to arbitrate to be enforceable under the Texas General Arbitration Act.

D. The agreement to arbitrate remains in full force and effect notwithstanding the expiration or termination of this contract.

E. Shillinglaw and Baylor shall each pay his or its costs of arbitration as appropriate. The parties do not intend, however, to limit the availability of any remedies available to either party. Accordingly, the arbitrator may assess costs of arbitration as may otherwise be required by the law.

VII. Miscellaneous

A. Shillinglaw is entitled to participate in those benefit plans and programs of Baylor that are currently and hereafter offered to other Executive Personnel of Baylor, including specified vacation time.

B. No less frequently than monthly, Shillinglaw shall submit business expense vouchers in accordance with Baylor policy for all expenses which are properly chargeable to Baylor and Baylor shall reimburse Shillinglaw therefore.

C. Although it is understood that from time to time Shillinglaw may have social contact with Baylor officers and members of the Board of Regents at fundraisers, media events, receptions or other social functions, Shillinglaw agrees to refrain from contacting directly or indirectly any officer or regent of Baylor, or otherwise engage in any direct or indirect communication with them about items relating to administration of Baylor's football program, administration of Baylor's athletic program, or this contract, or other matters related to his employment at Baylor. All discussion of items of concern or problems with the football program and other athletic programs or Shillinglaw's employment at Baylor must be handled in accordance with established Baylor procedures within supervisory channels.

D. Neither Shillinglaw nor Baylor intend to create any third-party beneficiaries to this contract, whether creditor, donee, or incidental beneficiaries.

E. Amendment of the terms and provisions of this contract may be accomplished only by a written instrument executed by Baylor and Shillinglaw.

F. THIS CONTRACT OF EMPLOYMENT AND THE PROVISIONS OF THE BAYLOR UNIVERSITY PERSONNEL POLICY MANUAL, AS AMENDED BY BAYLOR FROM TIME TO TIME, CONTAIN THE ENTIRE AGREEMENT BETWEEN SHILLINGLAW AND BAYLOR WITH RESPECT TO HIS EMPLOYMENT AT BAYLOR AND, WHERE THERE IS CONFLICT BETWEEN THIS CONTRACT AND THE PERSONNEL POLICY MANUAL, THE TERMS OF THIS CONTRACT PREVAIL.

SHILLINGLAW AND BAYLOR ACKNOWLEDGE THAT NO REPRESENTATIONS, INDUCEMENTS, PROMISES, OR AGREEMENTS, ORALLY OR OTHERWISE, HAVE BEEN MADE BY EITHER PARTY, OR BY ANYONE ACTING ON BEHALF OF EITHER PARTY, WHICH ARE NOT EMBODIED HEREIN, AND THAT NO OTHER AGREEMENT, STATEMENT, OR PROMISE NOT CONTAINED IN THIS CONTRACT IS VALID OR BINDING.

G. If any provision of this contract is held to be illegal, invalid, or unenforceable under present or future laws effective during the term of this contract, such provision is fully severable and this contract must be construed and enforced as if such illegal, invalid, or unenforceable provision never comprised a part of this contract; and the remaining provisions of this contract remain in full force and effect and may not be affected by the illegal, invalid, or unenforceable provision or its severance from this contract. Furthermore, in lieu of such illegal, invalid, or unenforceable provision, there is added automatically, as part of this contract, a provision as similar in its terms to such illegal, invalid, or unenforceable provision as is possible and be legal, valid, and enforceable.

H. This contract is construed and interpreted according to the laws of the State of Texas, except as otherwise provided in Article VI regarding the Federal Arbitration Act. Shillinglaw acknowledges that he has read this contract and understands the terms and conditions of his employment including the provisions describing his duties and termination, and by the execution of this contract, agrees to be fully bound by its terms and conditions.

I. In the event that the employment of Shillinglaw by Baylor continues beyond the term of contract provided in Article I, Shillinglaw shall be an employee-at-will unless a new written agreement is signed by both parties. However, either party may in that party's sole discretion decide not to enter into a new written agreement.

J. Shillinglaw authorizes Baylor to deduct part of his wages at any time for any amounts that he owes Baylor for any reason, specifically including but not limited to overpayment of travel reimbursements or failure to properly account for expenses or return excess funds from travel advances.

EXECUTED in duplicate at Waco, Texas on January 19, 2016.

Baylor University

/s/ Colin Shillinglaw

By:

/s/Reagan Ramsower
Senior Vice President for Operations and Chief Financial Officer

Reviewed and Recommended

/s/ Ian Mccaw
Vice President and Athletics Director

Attest:

/s/ Marsha J. Duckworth
Assistant Secretary

BONUS POLICY

Assistant AD

Baylor agrees to pay the Assistant AD supplemental compensation upon the occurrence of the following conditions, if and only if the Assistant AD is a(n) Assistant AD of the listed Baylor University intercollegiate team at the time of the occurrence of the condition, and in the amount indicated for each condition met:

Intercollegiate Football

Team Performance	**Bonus**
Big 12 Conference Regular Season Champions	6%
Participate in Post-Season Bowl Game *(excludes College Football Playoff (CFP) Bowls, Semi-final and Final Games)*	8%
Participate in a Non Semi-final CFP Bowl Game *(i.e. in 2014-15 this includes Cotton, Fiesta, Orange, or Peach Bowl)*	10%
Participate in Semi-final CFP Bowl Game *(i.e. in 2014-15 this includes Sugar or Rose Bowl)*	12%
Win Post-Season Bowl Game *(excludes CFP National Championship Game)*	5%
Win CFP National Championship	9%

The percentages are applied to the annual Base Salary of the Assistant AD at the time of the occurrence. The maximum payment under this Amended Bonus Policy that may be earned in any one season is 32% of the annual Base Salary.

LETTER TO THE DALLAS TRIAL COURT (MAY 19, 2017)

WEST, WEBB, ALLBRITTON & GENTRY
A PROFESSIONAL CORPORATION
Established in 1982

Honorable Tonya Parker
116th Judicial District Court
George L. Allen, Sr., Courts Bldg.
600 Commerce St.
6th Floor, New Tower
Dallas, TX 75202

Re: Cause No. DC-17-01225; Colin Shillinglaw vs. Baylor University, Dr. David E. Garland in his official capacity as Interim President of Baylor University, Reagan Ramsower, J. Cary Gray, Ronald Dean Murff, David Harper, Dr. Dennis R. Wiles, and Pepper Hamilton, LLP; In the 116th District Court of Dallas County, Texas

Dear Judge Parker:

On May 12, 2017, you signed an order denying Plaintiff's Motion to Reconsider and Motion for Costs and Attorneys' Fees. Defendants' argued that arbitration had not been previously invoked by Plaintiff, that the arbitration provision in question was not applicable, and that the claims under Chapter 27 of the Texas Civil Practice and Remedies Code could not be arbitrated.

Contrary to Defendants' assertions, Plaintiff's Motion for Reconsideration detailed how there was a proper request before this Court for arbitration and that the arbitration provision in Shillinglaw's contract

was applicable to all "dispute[s] of any nature" and to all parties involved.[1] The United States Supreme Court issued an opinion on May 15, 2017 that specifically addressed the arbitrability of a statutory claim under the Federal Arbitration Act ("FAA"). For the Court's convenience, a copy of the slip opinion of *Kindred Nursing Centers L.P. v. Clark*, 581 U.S. ___ (2017) is attached to this letter.

In *Kindred Nursing Centers L.P. v. Clark*, the Supreme Court was faced with a decision by the Kentucky Supreme Court that held arbitration agreements invalid in two properly executed power of attorney forms. *Kindred Nursing Centers L.P.*, 581 U.S. ___ (2017) (slip op., at 3-4). The Kentucky Supreme Court reasoned that the principal's right of access to the courts was sacred; therefore, an agent could only deprive the principal of such right through an express provision in the power of attorney permitting the agent to enter into an arbitration agreement for the principal. *Id.*

The United States Supreme Court rejected this reasoning. The Supreme Court reiterated that the FAA makes arbitration agreements, valid, irrevocable, and enforceable. *Id.* at 4. Moreover, the Supreme Court ruled

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[1] The arbitration provision in Shillinglaw's contracts with Baylor each state:

> "Shillinglaw and Baylor agree that if a dispute of any nature arises out of this contract or otherwise arises between them involving any transaction or event during the term of this contract . . . the dispute must be resolved by its submission . . . to arbitration."

In addition, the parties "intend for the agreement to arbitrate to be enforceable under the Federal Arbitration Act."

that the FAA preempts any state rule discriminating on its face against arbitration or that covertly discriminates against contracts that have the defining features of arbitration agreements. *Id.* at 4-5.

In the instant case, Defendants argue that Chapter 27 of the Texas Civil Practice and Remedies Code is unarbitrable because arbitration would deny Defendants their substantive rights and remedies. But *Kindred Nursing Centers L.P.*, and the cited authority therein, point to the opposite conclusion. If this Court construes Chapter 27 as a bar to arbitration, the FAA (according to the Supreme Court in *Kindred*) would preempt it and still require that the claims be sent to arbitration. Consequently, as applied to Plaintiff, Chapter 27 would act as a violation of Plaintiff's constitutional rights.

The cases cited in Plaintiff's Motion for (and the United States Supreme Court's most recent opinion in *Kindred Health Centers, L.P.* on Monday of this week, May 15, 2017) further bolster Plaintiff's Motion for Reconsideration and Plaintiff believe merits your consideration of these issues once again since neither Plaintiff nor this Court had the *Kindred* opinion to consider. Rather than ruling as this Court did on Defendants' motions to dismiss, this Court should have sent Defendants' claims to arbitration. Accordingly, Plaintiff urges this Court to reexamine Plaintiff's Motion for Reconsideration in light of the United States Supreme Court pronouncement this week concerning the preemption by the FAA.

I have drafted and attached a proposed order for your consideration.

Sincerely,

/s/Gaines West
gaines.west@westwebblaw.com

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