



## **A Brief History of the Tenth Court of Appeals**

By Chief Justice Frank G. McDonald, Retired (Deceased)  
(Updated by Chief Justice Tom Gray)

When the McLennan County Courthouse was built in 1901, County Judge J.N. Gallagher (later the first Chief Justice of the Tenth Court of Appeals) foresaw that the Legislature might in the future create a Court of Civil Appeals for Central Texas to sit in Waco. Consequently, he caused the fourth floor of the courthouse to be built, but left unoccupied, to later house an appellate court.

In 1923 the Legislature created the Tenth Supreme Judicial District to be composed of twelve counties: Bosque, Brazos, Coryell, Falls, Freestone, Hamilton, Hill, Leon, Limestone, Madison, McLennan, and Robertson. The Legislature added Johnson, Navarro, Somervell, and Hood Counties in 1927; removed Hood County in 1929; added Ellis County in 1932; and added Burt and Walker Counties in 2005.

The Court of Civil Appeals for the Tenth Supreme Judicial District met for its first regular session in the 74th District Courtroom of the McLennan County Courthouse at 10:00 a.m. on June 30, 1923. Associate Justices James M. Robertson of Meridian and G.W. Barcus of Waco constituted the first court. They appointed D.W. Stallworth of Marlin as the Clerk of the Court, set the first six cases for submission on the first Thursday in October, and adjourned until the first Monday in October 1923.

Governor Pat M. Neff originally tendered the appointment of Chief Justice to District Judge W.C. Davis of Brazos County. Judge Davis, however, visited Waco to look the situation over, returned to Bryan, and declined the appointment. Meanwhile, Associate Justice Robertson, who never moved to Waco from Meridian, decided he would rather stay in Meridian and resigned on September 30, 1923. J.W. Spivey of Falls County succeeded him as Associate Justice on October 1, 1923. Governor Neff also appointed the Honorable J.N. Gallagher, a member of the Commission of Appeals of the Supreme Court, to serve as the court's first Chief Justice. Chief Justice Gallagher took the oath of office on November 1, 1923.

The enabling legislation provided that "if said court is located in Waco, the citizens thereof will furnish, provide and equip a suitable room or rooms for said court and the members thereof, without cost or expense to the State." The City of Waco initially fulfilled this requirement by contracting the County to furnish the fourth floor of its courthouse. The Waco Law Library Corporation (composed of Waco lawyers) donated its books to become the court's library.

In 1981 the Courts of Civil Appeals were renamed Courts of Appeals and were granted appellate jurisdiction "in all criminal cases except those in which the death penalty has been assessed." The title of Associate Justices was changed in 1985 to Justices. In 1987 the Legislature changed all references to Supreme Judicial Districts to Courts of Appeals Districts. The Tenth Court of Appeals was granted the authority to sit in any county within the Tenth Court of Appeals District in 1991.

Among the Justices of the Tenth Court of Appeals were Associate Justice James P. Alexander (1931-40), who was elected Chief Justice of the Texas Supreme Court in 1940; Associate Justice Frank Wilson (1959-71), who had taught Practice Court at Baylor Law School since 1947; Chief Justice Frank G. McDonald (1953-88), who held the longest tenure as Chief Justice; and Chief Justice Bob L. Thomas (1982-1996).

The current court consists of Chief Justice Tom Gray of Waco, Justice Matt Johnson of Waco, and Justice Steve Smith of College Station. Chief Justice Gray had previously served as municipal judge of Rice and practiced in Central and East Texas before his election to the Court in 1998. He received a BBA, cum laude, from Sam Houston State University in 1978, an MBA from Texas A&M University in 1979, and his JD degree, cum laude, from Baylor University School of Law in 1985. He was appointed Chief Justice in December 2003, elected in 2004, and reelected in 2006, 2012, and 2018. Justice Matt Johnson was elected to the Place 2 position in the 2020 election. Justice Johnson received his Bachelors Degree in Business Administration from Baylor University and his Juris

Doctorate from Oklahoma City University School of Law. Justice Johnson is a recipient of a State Bar of Texas Presidential Commendation and a graduate of the Texas College for Judicial Studies. He has served on the McLennan County Historical Commission and is currently a director on the Heart of Texas Regional History Fair Board. Justice Smith was appointed to the Court by Governor Abbott on August 6, 2021 and took the oath of office on September 1, 2021. Prior to joining the Court, Justice Smith served as Judge of the 361<sup>st</sup> District Court for Brazos County, County Court at Law No. 1, and as a Municipal Judge. Justice Smith received his BA from Abilene Christian University magna cum laude in 1974 and his JD degree from the University of Texas in 1977. Justice Smith is a Sustaining Life Fellow of the State Bar of Texas and the American Bar Association. He holds a Certificate in General Jurisdiction Trial Skills from the National Judicial College and has served as a faculty member since 2002.

### **Justices of the Tenth Court of Appeals**

#### **CHIEF JUSTICES**

Jesse N. Gallagher – 11/1/1923 to 12/31/1940  
Ben H. Rice, Jr. – 01/01/1941 to 10/15/1945  
Giles P. Lester – 10/18/1945 to 12/31/1952  
Frank G. McDonald – 01/01/1953 to 12/31/1988  
Bob L. Thomas – 01/01/1989 to 02/20/1996  
Rex D. Davis – 05/31/1996 to 08/04/2003  
Tom Gray – 12/10/2003 to present

#### **JUSTICES – Place 2**

James M. Robertson – 06/30/1923 to 09/30/1923  
John W. Spivey – 10/01/1923 to 12/31/1924  
J.A. Stanford – 01/01/1925 to 12/31/1930  
James P. Alexander – 01/01/1931 to 12/31/1940  
Joseph W. Hale – 01/01/1941 to 04/15/1959  
Frank M. Wilson – 04/16/1959 to 04/24/1971  
John A. James, Jr. – 05/25/1971 to 3/31/1982  
George Chase – 04/01/1982 to 12/14/1982  
Bob L. Thomas – 12/15/1982 to 12/31/1988  
Terry Means – 01/01/1989 to 12/31/1990  
Bill Vance – 01/01/1991 to 12/31/2008  
Rex D. Davis – 01/01/2009 to 12/31/2020  
Matt Johnson – 1/01/2021 to present

#### **JUSTICES – Place 3**

George W. Barcus – 6/30/1923 to 12/31/1932  
J.A. Stanford – 01/01/1933 to 12/31/1937  
Ballard W. George – 7/15/1937 to 11/15/1939  
Jake Tirey – 11/21/1939 to 12/31/1968  
Vic Hall – 01/01/1969 to 11/30/1990  
Bobby L. Cummings – 12/01/1990 to 12/31/1998  
Tom Gray – 01/01/1999 to 12/09/2003  
Felipe Reyna – 01/05/2004 to 12/31/2010  
Al Scoggins – 01/01/2011 to 01/07/2019  
John E. Neill – 02/20/2019 to 5/31/21  
Steve L. Smith – 09/01/21 to present

Thank you for attending oral argument in these proceedings. If you want to track the development of the proceedings that are being argued, proceed as follows:

Go to the Court's Web Site: <http://www.txcourts.gov/10thcoa>

On the web site, along the left side of the page under "Case Information," you will see "Case Search."

Click on "Case Search."

That should take you to a screen that will ask you for certain information. Enter a case number in the spaces provided and click "search." This will take you to a docket sheet on the case that will describe what has happened in the case. Near the top left hand part of the case screen will be the caption "case mail," which is a great tool.

If you click on "case mail," it will take you to a log-in screen and ask you to register a name and password. If you enter the information requested, each time something happens in that case you will receive an email notice and a link that will take you back to the docket sheet for that case. With a little effort and practice, you will be able to track what is happening in each proceeding. You can sign up for "case mail" for as many proceedings as you want to track. You will use the same name and password for all proceedings that you are tracking and when you log back into case mail you will be provided a listing of all cases that the system shows that you are tracking.

If you have any problems or question, please call the clerk's office at 254-757-5200 and they will be happy to assist you.

The Court's You Tube channel may be found at:

<https://www.youtube.com/channel/UC8g5Mv6iLOnuGFCgSVXjOO>

***NOTE: Summaries were prepared by the parties and edited by Court staff. These summaries will not be filed with the papers in the case and cannot be used as an admission.***



**IN THE TENTH COURT OF APPEALS**

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**No. 10-20-00066-CV**

**JENNIFER KORCZYNSKI,**

**Appellant**

**V.**

**COWBOY UP RANCH FURNITURE, LLC,**

**Appellee**

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**From the 82<sup>nd</sup> District Court  
Robertson County, Texas  
Trial Court No. 18-03-20513-CV**

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**S U M M A R Y**

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This lawsuit arises from Jennifer Korczynski's trip and fall down a set of stairs in the Cowboy Up Ranch Furniture store in Calvert, Texas. Cowboy Up is a Texas/Western themed, interior design and furniture store housed in 100-year-old building on Calvert's main street. In one portion of the building, there is a set of stairs leading up to a second floor and balcony area where art for sale is kept.

While returning to her Houston area home after visiting Waco, Ms. Korczynski and a friend stopped at Cowboy Up to shop for home decor. Ms. Korczynski asked a store employee for help looking at the artwork on the second floor. Ms. Korczynski, her friend, and the employee walked up the stairs. When Ms. Korczynski began walking back down the stairs, she tripped and fell, sustaining multiple injuries. Ms. Korczynski was transported by ambulance to a local hospital and was released later that day. She later underwent surgery for her injuries.

After Ms. Korczynski filed this lawsuit, Cowboy Up moved for summary judgment arguing that the disputed facts actually established that Ms. Korczynski was not entitled to recover on her claims. The trial court agreed with Cowboy Up and entered a judgment for Cowboy Up. The court clerk emailed a copy of its Order and Judgment to all of the attorneys, but Ms. Korczynski's lead attorney did not receive the judgment and order because the email went to his junk email folder.

If the appeal was not filed timely, the Court of Appeals does not have jurisdiction to consider Ms. Korczynski's appeal and must dismiss her appeal. The issues on appeal are whether the trial court made the proper determination that the disputed facts demonstrated that Ms. Korczynski could not recover on the claims she filed against Cowboy Up and whether the fact that the email containing the trial court's ruling landed in Ms. Korczynski's attorney's junk email folder excuses Ms. Korczynski's otherwise late filing of her appeal.



IN THE TENTH COURT OF APPEALS

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No. 10-21-00285-CV

IN RE THE STATE OF TEXAS

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From the 414<sup>th</sup> District Court  
McLennan County, Texas  
Trial Court No. 2021-2775-5

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SUMMARY

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This Petition for Writ of Mandamus concerns the abatement (or postponement) of a lawsuit filed in McLennan County to allow a similar lawsuit previously filed in Travis County to proceed without the two courts potentially reaching conflicting decisions. The background and facts of the case are as follows:

In early 2020, the COVID-19 pandemic began to spread across the world and the State of Texas. In response to the pandemic, governments began to issue emergency orders and other policies to help prevent the spread of the disease. Among those policies at both the state and local level were requirements for individuals to wear facemasks in public places. On July 29, 2021, Governor Abbott issued Executive Order GA-38 which prohibited government officials from requiring any person to wear a facemask. On August 12, 2021, several school districts across the state filed suit in Travis County against Governor Abbott, the Attorney General, and the State of Texas arguing that the prohibition on facemask requirements exceeded the Governor's authority under the Texas Disaster Act and that certain provisions of the Disaster Act were unconstitutional. That suit sought to enjoin defendants from enforcing the portions of GA-38 which prohibited local governments from mandating facemasks.

In the last week of August 2021, Waco Independent School District and LaVega Independent School District mandated students, employees, and visitors wear facemasks on school property. On September 13, 2021, the Attorney General filed suit in McLennan County on behalf of the State of Texas against Waco ISD and LaVega ISD arguing that their facemask mandates violated GA-38. In response, Waco ISD and LaVega ISD filed a Plea in Abatement arguing that the McLennan County suit should be abated pending resolution of the Travis County lawsuit. The issues were whether venue in both suits is proper in Travis County and whether the two lawsuits are inherently interrelated. The trial court agreed and abated the case.

The State of Texas, as *Relator*, now brings this Petition for Writ of Mandamus asking the Court of Appeals to order the McLennan County trial court, as *Respondent*, to vacate the abatement and proceed with the case. The State argues that the trial court abused its discretion by abating the case because the law required the State to bring suit against Waco and LaVega ISDs in McLennan County and the two lawsuits are not inherently interrelated. The State contends the two suits are not interrelated because the Travis County lawsuit regards a challenge to Executive Order GA-38, the Texas Disaster Act, and the Governor's authority while the McLennan County lawsuit regards a challenge to the Waco and LaVega ISD facemask mandates and the authority of the school district officials.

Waco and LaVega ISDs, as *Real Parties in Interest*, ask the Court of Appeals to deny the requested relief because the trial court did not abuse its discretion by abating the McLennan County suit because the State's suit against them is inherently interrelated with the already pending suit in Travis County. The ISDs contend that the two suits are inherently interrelated because the State's suit against them could have been joined to the Travis County case and because both cases revolve around the same question of whether GA-38 validly prohibits school districts from requiring facemasks.



**IN THE TENTH COURT OF APPEALS**

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**No. 10-21-00181-CR**

**MICHAEL TODD AUSTIN,**

**Appellant**

**V.**

**THE STATE OF TEXAS,**

**Appellee**

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**From the 85<sup>th</sup> District Court  
Brazos County, Texas  
Trial Court No. 19-02612-CRF-85**

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**S U M M A R Y**

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Michael Todd Austin was convicted by a jury of aggravated sexual assault of a child. Although the complainant, J.J.L., a neighbor and friend of Austin, testified that Austin abused him from the time he was between eight and ten years old, J.J.L. did not make outcry for almost 30 years. On cross-examination, Austin questioned whether the offense had taken place given J.J.L.'s delayed outcry. The jury assessed Austin's punishment at 63 years in the penitentiary.

During its case-in-chief over Austin's objection, the State was permitted to introduce evidence of Austin's sexual abuse of J.J.L.'s brother, J.L., during the approximate time within which Austin abused J.J.L., and in the same manner. Over Austin's objection, the State was also permitted to introduce evidence during its case-in-chief of Austin's 1998 guilty plea to the offense of indecency with a child involving a third-party for which he received, and successfully completed, six years community supervision-deferred adjudication.

On appeal, Austin claims that the trial judge erroneously permitted the State to introduce evidence of both Austin's abuse of J.L. and of his guilty plea to the offense of indecency with a child in 1998 because the probative value of this evidence was substantially outweighed by the danger of its unfair prejudice.

Austin also claims that the trial court erroneously denied his motions for mistrial, believing that the prosecutors improperly argued matters outside the record during their final argument in the punishment stage and struck at him over his counsel's shoulders during their final argument at the guilt-innocence stage of the trial. He seeks a new trial or punishment hearing.