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NEW SECTION WEB SITE: www.tex-app.org

Charles R. "Skip" Watson, Jr., Mullin, Hoard & Brown, L.L.P.

We are accelerating toward the Advanced Appellate Course, September 11 and 12, at its new home: The Four Seasons in Austin. Last year's course broke the attendance record set the year before. This year will do the same. Nina Cortell has assembled a remarkable program, including a live oral argument before the Supreme Court of Texas. The Court's willingness to accommodate the Section has been unprecedented, and is greatly appreciated.

The annual meeting of the Appellate Section will again be held at the Advanced Course immediately following the Thursday session. Our thanks go to the State Bar Board for again granting permission to meet in conjunction with the course, rather than at the Bar Convention. Cindy Timms has planned an excellent meeting. The reception following the meeting will provide us with an opportunity to make and renew the friendships that are the core of what makes our practice special.

This issue of the *Advocate* is the first under the direction of our new Editor, Kimberly Phillips of Houston. Kimberly was chosen from a field of truly exceptional candidates by our Editorial Board. Assistant Editor, Heidi Bloch of Austin, is joined by Todd Smith of Dallas. They will be primarily responsible for articles appearing the *Advocate*. We also thank those of you who share your expertise by contributing the articles that helped David and Heidi take the *Advocate* to the next level. David Coale has agreed to serve on the Editorial Board as "Editor Emeritus" with Co-Chairs, Kimberly and Heidi, together with Todd Smith and our newly appointed Assistant Editors for E-Publishing. We congratulate Kimberly and Todd while expressing our gratitude to David and Heidi.

The Section web site, www.tex-app.org, will now carry the current issue of the *Advocate*. David Hugin and Dana Livingston Cobb of Austin are the Assistant Editors for E-Publishing. They will explore opportunities to distribute the *Advocate* through the web site. When you see Mark Steiner, our outgoing web master, thank him for what he has created. Our goal is to build the web site into the exemplary aid to our practice that the *Advocate* has become. David, Dana, and Web Site Committee Co-Chairs, Scott Rothenberg of Bellaire, and Clint Sare of Amarillo, can use your ideas and assistance to make that happen.

The Appellate Road Show is bringing short, basic appellate CLE to local bar associations with the aid of local justices and practitioners. Mara Blatt has constructed an entertaining and instructive program that is ready-made for presentation by any local bar.

This Legislative session has focused our attention on the needs of our appellate courts. It has drawn the appellate bench and bar closer together. Individually, we can educate the representatives who write our laws about the needs of our courts and judges. It is my hope that as a Section, we can work with the courts to identify and address the needs of the co-equal third branch of government. Your assistance in these endeavors is vital.

Economic downturns affect more than the courts. Any member needing a scholarship to attend the Advanced Course should contact Pam Baron in Austin. We want every member to be able to attend.

Thank you for the opportunity you have given me to direct our collective efforts. It has been a pleasure and a true honor.

Interview of Chief Justice William Cornelius

Stacy Stanley, Chief Staff Attorney, Sixth Court of Appeals

Stanley: Justice Cornelius, thanks for taking the time to talk to us about this. I appreciate that.

Cornelius: Glad to do it.

Stanley: Moving back a little bit, when did you become a lawyer?

Cornelius: Let's see, I graduated from Baylor Law School in 1949.

Stanley: Okay. What was it that caused you to want to become an attorney? Was that something that you had wanted to do all your life or was it something that....

Cornelius: Off and on. I suppose I was motivated to become a lawyer mainly because of my family connections. I come from a family of lawyers. My father was a lawyer -practiced for, oh, probably sixty years and my two older brothers were lawyers, and since then, I've had - well, all three of my children are lawyers. (Stanley and Cornelius laugh), but there were times when I thought I wanted to do other things. At times, I wanted to be a chemical engineer, aeronautical engineer - I had aspirations to be a journalist, a writer and also a musician. But as I matured, and after I got in undergraduate school at college I felt the real urge to study law. So that's when I made my decision - when I was - I believe in the second year of college - undergraduate.

Stanley: That wasn't the absolute focus and driving force of your life from the beginning then?

Cornelius: No, it wasn't. Although my dad was a lawyer and I greatly admired him and his profession, there were times

as I was growing up that I thought I wanted to do other things and I finally settled on my decision to become a lawyer as I say in about the second year of college.

Stanley: In that case, since considering your dad's connection with it and the length of time that you've been around this - let me just kind of take a side tour for a moment - what sorts of changes have you seen or even ranging back from your childhood being around a family full of lawyers between what the practice of law was like then and what you see on it now?

Cornelius: I didn't see a lot of changes while I was growing up. It may be because I really didn't know that much about it. Although I came from a family of lawyers, I didn't know a whole lot about the law as a youngster. The biggest changes that I've seen have come since I myself have become a lawyer. And by far the biggest change that I have noticed since I've become a lawyer is that the law has become infinitely more complicated, infinitely more difficult and just crammed full of problems and solutions that never existed before I went to law school. As I look back on it now - it's scary to me to study to be lawyer. Because when I entered law school, it was so much simpler then.

Stanley: Things a bit more straight forward perhaps?

Cornelius: Yes, even the fields of the law. There are fields of the law now that are crammed full of problems and solutions and those fields didn't even exist when I went to law school.

Stanley: I hate to admit it - I've only been out of law school for fifteen years - sixteen years now and I'm even beginning to see that. There are areas of the law that simply didn't - if they did exist, they just barely did.

Cornelius: Well they didn't teach them in law school.

Stanley: No. No, they certainly....

Cornelius: They weren't there to teach. And of course the specialization has always been something that has grown, as they say, exponentially through the years. My father was a generalist. He always had a general practice. But just by reason of his location, he became somewhat of a specialist in land law and oil and gas law. But the structured scheme of specialists is a relatively recent thing and developed after I went to law school.

Stanley: Well after you got out, did you practice for your father for a while?

Cornelius: I did. It was difficult in those days to get a job as a lawyer. A lot of my classmates had to take jobs as landmen for oil companies, adjusters for insurance companies and various other jobs that were really - that really did not require them to be lawyers but were somewhat related to the legal field. So I had relatively few opportunities but really I never did focus on those opportunities because from the time I went to law school, my intention was when I graduated to return and practice law with my father.

Stanley: And which is for the listeners in the Pineywoods of East Texas in Jefferson.

Cornelius: Right. Dad had moved to Jefferson in 1935 mainly because of an oil boom that existed in Rodessa, Louisiana,

which is close to Jefferson and he was still practicing, of course, when I went to law school and also my older brother was practicing with him at that time. So when I got out of law school, I just came right back to Jefferson and joined the firm.

Stanley: Just a little bit in between - while you worked with your father until you joined the court or was that - did you have some....

Cornelius: With some interruptions. I went in with my father and practiced with him for I guess about four or five years. And during that time, I ran for and was elected county attorney of Marion County. So along with my law practice with him and my older brother, I was the county prosecutor for four years. Then when my term as county attorney was just about up, I decided not to run again because I had gotten a job offer from Hunt Oil Company and that was in their legal department. So my wife and I and our only child at that time, Bill, moved to Dallas and I was in Hunt Oil Company's legal department for a little less than two years.

Stanley: Okay.

Cornelius: At that time, I was asked to come back to Jefferson to become the general counsel of a small independent oil company that was headquartered in Jefferson. So I came back and worked for that oil company for, I'd say, close to two years and then I received an appointment from Governor Price Daniel to be district attorney of the 76th District.

Stanley: Okay.

Cornelius: The 76th District was composed of five counties in East Texas. Marion, Morris, Camp, Titus and Franklin Counties. I was district attorney

while still representing the oil company on a retainer basis. I left as a salaried employee and worked as district attorney for a couple of years and represented on a retainer basis the oil company. I decided not to run for district attorney and went back into law practice with my father after my term as D.A. expired.

Stanley: So you really had a pretty wide ranging variance of things that you did during that time period.

Cornelius: Yes. Pretty much and during all of that time, I continued really to practice as a generalist in civil law. Back then, you could - you could practice law and still be a prosecutor. You didn't have professional prosecutors then like you do now where you cannot practice law on the side.

Stanley: That's a substantial difference and also my observations are that people tend to start specializing earlier now than they did for a long time.

Cornelius: Yes.

Stanley: Is that an accurate observation? That's just what I had watched over the last....

Cornelius: I think so. I think what happens these days - the lawyer gets out of law school and he looks for a job and gets what he can get, but when he gets that job, he becomes locked into that particular area of the law that he practices. And just as a matter of course, he becomes a specialist in it and he generally stays in that field the rest of his career.

Stanley: What kind of differences did you - do you perceive between working in a small town environment like Jefferson and working in - well maybe between East Texas and the

rest of the state if there's any way you can find out like that?

Cornelius: I never did practice in anything but a small town environment. Now of course I was in a large town when I was with Hunt Oil Company's legal department but that was not really practicing law. That was in-house counsel. So I really don't know much about the differences. I do know that the income of the small town lawyer is and always has been considerably less than the big town lawyer and the area of expertise that you must develop is much larger in the small town than in the large town because you're a generalist in the small town. And it's kind of - practicing law in a small town is kind of like being on the court of appeals. Everything that comes to your office is different. You rarely ever see the same thing twice. So if you don't know what's involved in it, you have to learn. And so your area of expertise becomes much much larger if you're a small town lawyer.

Stanley: Sounds almost like that's the perfect training ground for somebody to go to court fields.

Cornelius: It is. As a matter of fact, it's a very good training ground for any kind of advancement in the law. I remember when I got an opportunity to go to work for Hunt oil company's legal department. They advertised for two lawyers and I saw that advertisement and responded to it. But the advertisement specified that the candidate must have several years experience as a small town lawyer. (Stanley laughs). They wanted somebody that had that broad range of experience and had dealt with every kind of legal problem conceivable.

Stanley: Instead of somebody that had an extremely narrow focus in....

Cornelius: And that's true with serving on the court of appeals with one exception: One thing we did not get much of as a small town lawyer was exposure to the appellate practice. I notice that one of your suggested questions here is did I practice in the court of appeals before I went on the court? The answer is yes. I did a good bit. But the average small town lawyer will not have much experience in the appellate practice. In fact, some of them never go to the appellate court.

Stanley: May go through an entire lifetime practicing law without ever having the need to.

Cornelius: That's right. That's right.

Stanley: What year did you join the court?

Cornelius: 73'.

Stanley: 1973?

Cornelius: Yes.

Stanley: And you were appointed to the court?

Cornelius: Yes.

Stanley: By Mark White?

Cornelius: No - Dolph Briscoe.

Stanley: Okay. One further back. I know that you've - I know the answer to this question because I've worked with you for a long time, but how many times did you have to run for your office? (Stanley and Cornelius laugh).

Cornelius: You know, I don't know exactly. I think it's about six times - either six or seven times. Of course, the terms were six years, you know. But I was appointed initially as an associate justice.

Stanley: Okay.

Cornelius: To take the place of Justice Matt Davis who died. And so I had to run immediately for his unexpired term, which was two years. So I ran for that and was elected. Incidentally, I've never had an opponent in all of my career as an appellate justice.

Stanley: And we hear every appellate judge in the state pounding his fist going "Why not me?" "Why not me?"

Cornelius: (laughs). I credit it to the fact that I was stuck out here in the sticks of East Texas and hardly anybody knew anything about us. (Stanley laughs). But at any rate, - I ran for the first unexpired term of two years - was elected and when I had served part of that two years, Judge Chadick was appointed to the Supreme Court and Governor Briscoe appointed me Chief Justice. And - so I had to run then for Judge Chadick's unexpired term. (Stanley and Cornelius laugh). Another short term as chief justice and I did run and was elected. So that's two elections in four years there. (Stanley laughs). From then on, I got to run every six years as chief.

Stanley: What was it like on the court of appeals when you first came in?

Cornelius: Well, it was much smaller and much less hectic back in those days than it is now. We had just the three judges. We had a clerk and we had one secretary and no briefing attorneys, no staff attorneys and one custodian. And - so it was a very collegial court and I wouldn't say that the atmosphere was relaxed necessarily, but it was considerably less hectic than it is now. I know I've - you've heard me tell this story before, but the first year I was on the court, I wrote twenty-three opinions. And as you

know now, our justices are each writing 150 to 180 a year. Of course, the staff does a lot of it. Back then, we had no staff and you had to do all of your research on your own, strictly on your own. We did not have computerized research so it was all looking it up in the Texas Digest and reading the cases out of the hardback books.

Stanley: With no assistance at all?

Cornelius: Right. And we had only one secretary to whom we could dictate our opinions or we would write our opinions out in longhand or we had dictating equipment when I came up here. And give them to this one secretary and she would type them. We didn't have a copy machine when I first came up here so she - the secretary had to type an original and carry nine copies - nine carbon copies. And as you know, that was a mess because if you made one mistake, you had to put that paper in between all copies and (laughs) and erase ten copies.

Stanley: I had forgotten how that worked.

Cornelius: Yes.

Stanley: That would be back - that would put a premium on doing things perfectly the first time.

Cornelius: That's right.

Stanley: Gosh.

Cornelius: But it was a good atmosphere. The judges knew each other, liked each other and worked well together and it was alright. We were just a little short on technical and logistical support.

Stanley: I understand. That's - just as a comparison at this point, the court has

a clerk and two deputy clerks and - no three deputy....

Cornelius: Three deputy clerks.

Stanley: Then the three justices and seven attorneys working for those three justices.

Cornelius: Seven attorneys and one custodian and one security officer.

Stanley: So it's....

Cornelius: So we have a staff of close to twenty now, I believe. Nineteen or something like that. Whereas when I came up here in '73 we had three - four - five - six total staff.

Stanley: By its very nature, that makes quite a difference all by itself.

Cornelius: Yes.

Stanley: You've watched thirty years of oral arguments in front of this court. Is there anything that you perceive that's different, or better or worse, or have any comments about the - about what has happened to oral argument over the years.

Cornelius: There's far - there's less of it by a long shot now than when I came up here. You have many more cases where argument is waived or the court simply denies argument.

Stanley: Right.

Cornelius: As you know, we now have the power to do that and that hasn't - we haven't had that power very long. So there used to be a lot more cases argued than are now. Argument used to be much longer than is allowed now. The quality of the argument is probably not much changed, but the method is changed and that's probably due to the time constraints. The lawyers used to take a lot more time arguing. They used to read more

from their briefs. (Stanley laughs). Now they don't have the luxury of doing that because they don't have time.

Stanley: Right.

Cornelius: So you get a much shorter argument these days and probably the quality of it is better than it formerly was simply because more people - more lawyers have appellate experience now than they did back in '73'.

Stanley: Most of what an appellate judge does has to do with - has to do with reading and writing effectively - the briefs, the law, then writing and coalescing what other people have handed him to do.

Cornelius: Exactly.

Stanley: Has that changed much as the years have gone by or is that pretty much remained the same? Now obviously, it was different when you had no - you had no staff to assist you in any form or fashion. You had to do everything yourself from scratch.

Cornelius: The biggest change, I think, has come in this respect because of the press of work and the increasing work load. Appellate judges have now become more editors than writers. The staff does the writing - most of the writing now as you know and the judges - about all they have time to do is just edit it. It's rare today for the appellate judge to write an opinion from scratch on his own. He generally takes a draft written by a staff attorney or law clerk and edits it to fit his style and to fit his view of the case. Other than that, I don't think there's a lot of difference except, one thing that I have noticed and that is that they have so many seminars and schools now for appellate judges and most of us go to

them pretty religiously. They all have courses on how to write and how to write better, and so I think the appellate judges of today are much more proficient in writing and editing than they were say twenty years ago. I've learned an awful lot, I know, since I've been on the appellate court - about writing and how to write, how to write with more clarity and how to write shorter opinions. (Laughs). I know the first opinion I wrote when I came on the court - it was intolerably long. (Stanley laughs). And that's the way it usually works - you know - the newer judges write much longer opinions, but as they get more experienced, their opinions get shorter and shorter.

Stanley: And this is my plug encouraging judges to take training of that sort--it filters down to the staff and to the law clerks that work for the judges.

Cornelius: Right.

Stanley: You learn how to - it's an outstanding post-graduate course for all of the staff in learning how to write.

Cornelius: Right.

Stanley: And how to think and a few other things as well, but it's a - it's quite good. So if you're interested in being a law clerk for the court of appeals, I would encourage you to put in an application. We're always looking for good writers.

Cornelius: There are some really good schools and nearly every seminar for appellate judges or appellate law clerks has one of those courses.

Stanley: Has - well as time has progressed along, have you seen any differences in the focus put on the preparation of the opinions? I guess what I'm thinking about specifically is it seems

to me that there has been a sea of change over the past - over the past fifteen years as the Legislature has become - has begun to put more and more pressure on courts to produce quantity of opinions. Is that an accurate perception on my part or is it always been there and I just didn't realize it when I first came in?

Cornelius: No, it has not always been there and it is an accurate assessment. The press of the ever increasing caseload has required the judges to spend less time and the staff less time on any given case. As you know, when we hire staff here, we always tell them that we simply don't have the luxury of spending all the time we want to spend on a case. You know, young lawyers - they like to get everything perfect if they can.

Stanley: Sure.

Cornelius: And if you let them, they would stick with a case for weeks because they want to get it right and that's good, but we simply don't have time to do it anymore. And that - that pressures the judges, as well as the staff. It trickles down to the staff and I know as chief justice, I have always had pressure from the Legislature to get more cases out faster and the faster you get them out, the more they send you. So you don't really make much progress. (Stanley and Cornelius laugh). But that's the way it works, and of course, the Legislature is simply trying to make the most out of spending a dollar. They want the largest amount of work they can get for the money they spend and rightly so. But that has put quite a pressure and it has - it has lessened the quality of most of the court's output.

Stanley: We've already touched on this just a little bit, but I have discovered that I

was extremely blessed in working here - to work with people who actually had a collegial attitude toward each other. Is that something that has carried down the years from at least when you started on the court?

Cornelius: Well, it certainly has been a hallmark of this court since I've been on it. Now before I came on it, they had disharmony to some extent on this court, but when I came on it, we kind of started a new era there because one of the judges who was part of that disharmony was no longer on the court. So this court has had a good record of collegiality and I think you could talk to almost any observer of this court and they would tell you that's true. Unfortunately, that's not true of all the other courts. In fact, judges, as you know, are hardheaded, opinionated....

Stanley: I would never say such a thing. (Cornelius and Stanley laugh).

Cornelius: Most people think that judges are arrogant people, and there seems to be a built in propensity for it.

(Tape cuts off and picks back up with Cornelius)

Cornelius: So I would say that we don't have as much collegiality today probably as we used to have, but I don't know - I don't have any empirical evidence of that except what I've observed on my court and on some of the sister courts here in Texas. I know you can tell by reading their opinions some of the dissents are quite strident....

Stanley: That's a good word....

Cornelius: And sometimes brings personality conflicts into existence, but here again, all of those schools I was talking to you about - they always emphasized that you should not bring personalities or personal views into

dissenting opinions - you know - and you should always show respect for your fellow judges. So maybe we're making some progress in that area. Another thing that promotes collegiality is small courts.

Stanley: Yes.

Cornelius: Because you're all close together. If you have a disagreement, all you have to do is step into the adjoining office and talk to your fellow judge and things are much less formal and stilted. So you just get along better. You're good friends, you go out and eat together and you socialize together. That's not true in a real large court. They correspond in writing for the most part and they don't have that opportunity for personal interaction that fosters good collegiality.

Stanley: And that does have a lot to do with the sheer physical proximity and the ability to simply walk down a very short hall, and sit down and talk to somebody would have play a major role in that, I would think.

Cornelius: When you're thrown together in so much personal interaction, you just naturally become friends unless there's just some personality conflict there that can't be overcome.

Stanley: The Legislature has a number of different proposals that come before it on a regular basis about changing the way that judges are selected or placed on the bench here. Would you care to comment on that? Is there any words on that you'd like to leave for posterity?

Cornelius: I'd be glad to comment on it. I think that we should have a system of merit selection. There are all kinds of compromise plans leading to merit selection. Some of them provide for

nominating commissions that recommend three or five candidates to the appointing authority and then the appointing authority selects one candidate for the appointment. The appointee then must run in the next election either in a partisan election or in a retention election. Those plans I think are good and I think that's what we ought to have - one or the other. I personally favor a system where the Governor appoints the judge initially to fill a vacancy and thereafter that judge must stand for election in a retention election. No opponent, just - it's submitted to the electorate as: shall Judge Cornelius be retained in office and you vote yes or no. I think we need to get rid of partisan election of judges for several reasons. The first is the name game. We have so many judges now that there's no way the electorate can know anything about them and so the electorate just votes for someone with a common name or some other illogical reason like whoever is first on the ballot or whoever is last on the ballot or whatever. I don't even think non-partisan election will solve the name game because the party doesn't have anything to do with it. It's just a common name - Smith, Jones, Houston, Crockett, whatever. But another reason I think we ought to have merit selection of judges, especially appellate judges, is because of the cost of running and the cost is just prohibitive and almost obscene, and yet the amount spent bears little relation to the results like we had in the recent election. One candidate for the Supreme Court spent \$900.00 and got elected. Another candidate for the Supreme Court spent a million dollars and got defeated. It was all due to the name. So although you had the corrupting influence of big money, you really didn't....

Stanley: Really didn't do it.

Cornelius: It really didn't decide the election. (Stanley laughs). So to get rid of the name game and big money, I think the only way you can do it is by merit selection. A lot of people propose non-partisan election, but non-partisan election is going to cost as much money as partisan.

Stanley: And you wouldn't have the party coffers to dip into so each judge would be....

Cornelius: That's right. You don't have any help.

Stanley: Each judge is on his own, and has to come up with his own money to finance his campaign.

Cornelius: So if you're going to have partisan elections, you really need to have the parties involved so they can help a candidate get his name and qualifications known. Another thing that merit selection would do, and this is a real problem in Texas right now because we're switching back and forth from a Democratic state to a Republican state, merit selection would do away with the problem of straight party sweeps. You know, there was a time in the - I don't know how many years ago it was, but it was in Fort Worth and Houston - egregious examples of this. The entire judiciary was swept out of office in an opposing party sweep and the only way you can get rid of that is - well non-partisan election would solve that, but it would not solve the name or the money problem. So, in a nutshell, I favor some sort of merit selection and retention elections.

Stanley: Any final thoughts you'd like to share about the court - where it's been and where it's going?

Cornelius: No. I would say this, I am proud of the Sixth Court. I believe in the last twenty or thirty years the Sixth Court has turned its reputation around. There was a time when the Sixth Court didn't have a very good reputation for scholarship or for even headed decision making, but I think we have definitely turned that around and right now I believe the Sixth Court enjoys a reputation for being one of the best courts of appeals in the state.

Stanley: Here - here.

Cornelius: We certainly have - we certainly have earned that as far as the volume of cases we've turned out because as you know, we have consistently been first or near first in the shortness of time between submission and disposition of cases, while at the same time, having as many or more dispositions per justice as even the big courts. So I think the Sixth Court is in a real good position right now and I'm proud to think that I may have had some part in doing that.

Stanley: I think there's no question about that. That's all that I've got. Thank you very much for talking to us and for letting me conduct this interview. I appreciate that.

Cornelius: Thank you. I enjoyed it.

Stanley: We've been talking with William J. Cornelius. I'm Stacy Stanley and good night.

Vance Wittie, Sedgwick, Detert, Moran and Arnold, Dallas

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The 2002 term of the United States Supreme Court has been marked by a lack of true blockbuster opinions. This year's theme is judicial restraint. Thus far, the Court has declared only one state statute unconstitutional, (and that only in part). The term has been devoid of any significant "new federalism" cases, but the Court has protected state legislation against challenges based on federal preemption. The Court generally deferred to the political branches and administrative agencies, upholding agency interpretations of federal statutes and finding the statutes themselves constitutional.

A secondary theme has been consensus. While the ideological cleavages on the Court have not disappeared, the Court has frequently been able to act on a unanimous or near-unanimous basis, even on hot-button issues such as abortion.

Certain trends continued. The Court continued to restrict removal and continued to favor arbitration. Criminal defendants again fared poorly – with the notable exception of two Texas cases that placed the state's criminal justice system on unflattering light.

PUNITIVE DAMAGES

***State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003).**

The Supreme Court returned again to the constitutionality of large punitive damages awards. A Utah jury had awarded \$145 million in punitive damages in an insurance bad faith case where it had assessed \$2.6 million in compensatory damages.

The Supreme Court determined that the award was excessive and violated the Due Process Clause of the Fourteenth Amendment. It evaluated the award under the "guideposts" of *BMW v. Gore*, 517 U.S. 559 (1996), examining the reprehensibility of the defendant's

misconduct, the disparity between actual or potential harm and the punitive damages award, and the difference between the punitive damages award and any civil penalty that might be assessed. While State Farm's conduct may have merited some punitive damages award, the Court erred in making the case a platform to punish State Farm's nationwide practices. Not only is a state constitutionally forbidden from punishing lawful conduct occurring within its borders, it may not punish conduct that does not bear a relationship to the plaintiff's harm. The award was disproportionate to the injury sustained by the plaintiffs.

Although State Farm's claim handling was suboptimal, it did not create a physical risk and a lesser punishment would have satisfied the state's legitimate objectives. Finally, the award was much larger than the maximum fine allowed for fraud under Utah law.

Notably, the court, although continued to avoid setting a maximum ratio between actual and punitive damages, it stated that in practice few awards exceeding a single-digit ratio would satisfy due process.

Justices Scalia, Thomas, and Ginsberg dissented. Scalia and Thomas believe that constitutional due process rights do not create protections against excessive punitive damages awards. Justice Ginsberg believes that the matter is best left to state legislative reform rather than federal constitutional jurisprudence.

Campbell's most likely long-term effect is to limit the scope of punitive damages proceedings. Punitive damages must be linked to conduct that harmed the plaintiff not on general corporate misconduct, especially misconduct occurring out-of-state.

ASBESTOS

Norfolk & Western Railway Co. v. Ayers, 123 S. Ct. 1210 (2003).

In this FELA case, the Supreme Court considered whether a railway worker with asbestosis may obtain damages for mental anguish resulting from the fear of developing cancer. It also addresses whether a railroad's liability may be reduced by the responsibility of third party tortfeasors, such as product suppliers.

The majority of the Court found that the fear-of-cancer claim raised by Ayers was not the kind freestanding mental anguish claim rejected by most courts. The claim was more akin to a common law claim for emotional distress arising from a present physical injury. So long as the plaintiff can show that his fear of cancer is genuine and serious, allowing recovery is consistent with the common law tort principles underlying FELA.

Chief Justice Rehnquist, writing for four dissenters worried that allowing fear of cancer recovery would deplete the resources available to compensate plaintiffs with present injury.

The Justices unanimously agreed that recovery under FELA against a railroad is not reduced because of the degree of responsibility of third parties. Any reduction of the worker's award is not authorized by the statute. The railroad must seek contribution in a separate action.

ARBITRATION

Howsam v. Dean Witter Reynolds, Inc., 123 S. Ct. 588 (2002).

The Supreme Court remained true to the principles enunciated in *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1, 24-25 (1983) (finding a strong liberal federal policy favoring arbitration), and reached a result that narrowed the role of the courts in interpreting arbitration issues.

Typically, a parties' agreement to arbitrate is binding and enforceable, just like any other

written agreement between two or more parties. But the Supreme Court has noted before that the question of whether the parties have submitted a particular dispute to arbitration, i.e., the *question of arbitrability* is an issue for the courts. In *Howsam*, the Court noted the limited scope of that question.

Karen Howsam claimed that Dean Witter Reynolds, Inc. misrepresented the nature of several investments to her between 1986 and 1994. The controversy fell within the standard Client Service Agreement's arbitration clause, and Howsam chose to arbitrate the controversy before the National Association of Securities Dealers ("NASD"). Dean Witter filed a lawsuit in Federal District Court seeking a declaration that the dispute was ineligible for arbitration. At issue was a NASD rule that provided that no dispute shall be eligible for submission to arbitration where six years have elapsed from the event giving rise to the dispute.

The Tenth Circuit Court of Appeals believed that application of the NASD rule presented a question of arbitrability, and thus a presumption arose that the issue should be decided by a court, not an arbitrator. The Supreme Court reversed and held that the matter was for the arbitrator. The Supreme Court's holding was based on the underlying notion that the "question of arbitrability" is far more limited in scope than the Tenth Circuit believed. According to the Court, the phrase is only applicable where contracting parties would likely have expected a court to have decided the gateway matter, e.g., a disagreement about whether an arbitration clause applies to a particular type of controversy. In addition, the Supreme Court found that the *procedural* questions that grow out of a dispute are presumptively not for the courts. Because this dispute centered on the application of a procedural NASD rule, a presumption existed that the arbitrator should decide the question of its application. Finally, the Supreme Court noted that the NASD arbitrators would be in a better position to apply their own rule in any event.

***PacifiCare Health Systems, Inc. v. Book*, 123 S. Ct. 1531 (2003).**

This short opinion again highlights the Supreme Court’s reluctance to invade the growing province of the arbitrator. A group of doctors sued a number of managed health care organizations, alleging that they failed to reimburse them for health care services provided to patients covered by the organizations’ plans. The doctors alleged, *inter alia*, that the organizations conduct violated the Racketeer Influenced and Corrupt Organizations Act (RICO).

The organizations moved to compel arbitration, claiming that their service contracts with the doctors provided for mandatory arbitration. The doctors opposed the motion - claiming that because some of the arbitration clauses at issue precluded the award of punitive damages they could not obtain “meaningful relief” in arbitration for their RICO claims, which provides for treble damages.

The Supreme Court held that the issue was not ripe because the courts would merely be speculating how a potential arbitrator would construe the relief-limiting contractual clauses together with the nature of the RICO damages award. The Court noted that an arbitrator might find the RICO treble damages award “remedial” in nature (not punitive) and, thus, authorized under the applicable service contracts. The Court relied heavily on its prior decision in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995) in reaching its result. Ultimately, the Supreme Court reversed the Eleventh Circuit and stated that the “proper course is to compel arbitration.”

JURISDICTION

***Dole Food Co. v. Patrickson*, 123 S. Ct. 1655 (2003).**

The Foreign Sovereign Immunities Act of 1976, allowed “instrumentalities of a foreign state” to remove an action to federal court. 28 U.S.C. § 1441(d). The provision is frequently employed by enterprises owned at least partially by foreign

governments. The question here was whether companies that were owned by parent corporations that were in turn owned by foreign governments qualify as “instrumentalities.”

Central and South American farm workers had sued Dole and a number of other entities alleging injury from exposure to dangerous pesticides. Among the defendants were a group of Israeli corporations known collectively as the Dead Sea Companies. They claimed that they were instrumentalities of the State of Israel within the meaning of the FSIA and entitled to remove the action to federal court. The Dead Sea Companies were not themselves owned by the Israeli Government but Israel owned the majority of stock in their parent corporations.

The court found that the entities were not instrumentalities of Israel. A corporation is distinct from its shareholders. The foreign state itself, not another corporation, must own the entity in order for it to be considered an “instrumentality” under the statute.

***Syngenta Crop Protection, Inc. v. Henson*, 123 S. Ct. 366 (2003).**

This case addressed whether federal courts have removal jurisdiction under the All Writs Act. The Act authorizes federal courts to issue “all writs” necessary or appropriate to aid in their jurisdiction. Some defendants in mass tort cases have removed cases to federal court under All Writs Act removal arguing that some mass tort cases where pending state court litigation threatened federally approved settlement agreements or case management orders.

In this case, related suits were pending in a Louisiana court and in a Federal District Court in Alabama. The federal court case settled with the stipulation that the Louisiana action be dismissed with prejudice. Nevertheless, the Louisiana state court allowed the case to proceed. Petitioners removed the case to federal court, asserting federal jurisdiction under the All Writs Act, 28 U.S.C. §1651 and the Supplemental Jurisdiction Statute, 28 U.S.C. § 1367. Respondents sought remand.

The Supreme Court held that the All Writs Act does not provide a basis for removal. Removal is purely a creature of statute and depends on the federal court having subject matter jurisdiction. The All Writs Act simply is not a jurisdictional statute.

***Ford Motor Co. v. McCauley*, 123 S. Ct. 584 (2002).**

Class action attorneys were eagerly awaiting this opinion. The key issue turned on whether the amount-in-controversy in an injunction case could be determined from the “defendant’s viewpoint” - the amount compliance would cost the defendant. If viewed from the plaintiff’s viewpoint, as most federal cases required, the amounts involved are almost always insufficient to permit federal diversity jurisdiction. Unfortunately, the court detected some jurisdictional flaw and, after hearing oral argument, dismissed the writ as improvidently granted.

FEDERAL-STATE RELATIONS

***Kentucky Association of Health Plans, Inc. v. Miller*, 123 S. Ct. 1471 (2003).**

This significant opinion limits the scope of ERISA preemption and upholds the power of states to legislate in the managed care arena. Kentucky enacted an “any willing provider” statute, which opens up health benefit plans to any health care provider who agrees to abide by its terms. Opponents of the statute contended that it was preempted by the Employee Retirement Income Security Act of 1974 (ERISA) which preempts state laws that “relate to any employee benefit plan.” 29 U.S.C. §1144(a). Kentucky relied upon a provision that saves from preemption state laws regulating insurance, banking or securities.

The Court found that the “any willing provider” statute was a law regulating insurance and hence not preempted - since it imposed its restrictions solely upon health insurance entities. It was not necessary the statute directly affect insurance practices. A valid state insurance statute could be

directed to the insurer-provider relationship. This may have been the court’s most significant public policy opinion of the term. It frees the states to regulate managed care so long as the regulation acts upon the insurer specifically.

***Jinks v. Richland County*, 123 S. Ct. 1667 (2003).**

In a tradition almost as old as the state itself, South Carolina refused to follow federal law – with predictable results. 28 U.S.C. § 1367 allows a federal court to exercise supplemental jurisdiction over state law claims properly joined to a federal claim. It also permits the court to decline to exercise such jurisdiction and remand the state claims. One provision of the statute requires state courts to toll limitations the period the supplemental claim was pending in federal court. A South Carolina court refused to apply the tolling provision, finding that the provision was unconstitutional because it exceeded Congress’ enumerated powers and because the statute should not be interpreted to abrogate a state’s immunity from suit.

The Supreme Court determined that the tolling provision was within Congress’ power. The Constitution authorizes Congress to constitute inferior tribunals to the Supreme Court and to assure that such tribunals could fairly and efficiently exercise the judicial power. The state law tolling provision of § 1367 is conducive to the administration of justice in federal courts by allowing them to shed unwanted state law claims without fear that the claim would be time-barred when it returned to state court. Further, a state may subject a municipality to suit in state court if it is done pursuant to a valid exercise of Congress’ enumerated powers. There is no violation of state sovereignty.

***Sprietsma v. Mercury Marine*, 123 S. Ct. 518 (2003).**

The Federal Boat Safety Act of 1971, 46 U.S.C. § 4301, et. seq., authorizes the Coast Guard to promulgate marine equipment regulations. It prohibits states from establishing differing laws and regulating standards but contains a “savings

clause,” providing that common law remedies would remain unaffected. The Coast Guard had considered, but ultimately rejected, a requirement for propeller guards for boat motors.

Petitioner, an injury victim, alleged that a motor was defective because it lacked a propeller guard. Mercury Marine defended on the basis of preemption.

The Supreme Court held that the statute’s express preemption requirement only precluded conflicting state “laws and regulations.” This term referred to positive enactments by the state, not common law claims. The “savings clause” reinforced this conclusion because Congress obviously intended that a body of common law litigation would remain.

The Coast Guard’s decision not to require propeller guards did not conclusively preempt petitioner’s claims. The decision not to regulate is consistent with an intent to preserve state authority, including common law claims.

Nor was there any implied preemption. The Act does not require the Coast Guard to regulate every aspect of boat safety and design and leaves the states free to act in areas that the Coast Guard does not occupy. The decision not to impose a regulation regarding propeller guards left state common law courts free to impose liability in the area.

BANKRUPTCY

Federal Communications Commission v. NextWave Personal Communications, Inc., 123 S. Ct. 832 (2003).

This opinion resolves a dispute about the scope of 11 U.S.C. § 525, which seeks to protect against the discriminatory treatment of debtors.

The FCC auctioned off licenses for broadband personal communication services to NextWave for approximately \$4.7 billion. NextWave made a down payment on the purchase price, signed promissory notes for the balance, and executed security agreements that the FCC perfected.

Unfortunately, NextWave experienced difficulty in obtaining financing for its operations, and ultimately filed for bankruptcy on June 8, 1998.

NextWave prepared a plan of reorganization, which called for a single lump-sum payment to satisfy the entire remaining obligation for the FCC licenses. The FCC objected to the plan, arguing that NextWave’s licenses had been cancelled automatically when it missed its first payment deadline. The FCC simultaneously announced that the NextWave licenses were available for auction. NextWave sought emergency relief, and the Bankruptcy Court declared the FCC’s cancellation null and void as a violation of the bankruptcy laws. The Second Circuit reversed, holding that because the re-auction decision was regulatory the bankruptcy court had no jurisdiction to invalidate the FCC’s actions.

NextWave then petitioned the FCC to reconsider the cancellation. Predictably, the FCC denied the petition, and NextWave appealed the case to the D.C. Circuit asserting that the decision to cancel the licenses was arbitrary and capricious and in violation of 11 U.S.C. § 525. The D.C. Circuit agreed, holding that the FCC violated 11 U.S.C. § 525, which prohibits government entities from revoking debtors’ licenses solely for failure to pay dischargeable debts. The FCC petitioned for certiorari.

In a relatively straightforward analysis, the Supreme Court applied the literal language of 11 U.S.C. § 525 and held that the FCC could not revoke NextWave’s licenses solely because they failed to pay a debt, which was dischargeable in bankruptcy. The Supreme Court rejected the FCC’s efforts to impose a “regulatory motive” exception to § 525, noting that the statute means “nothing more or less than that the failure to pay a dischargeable debt must alone be the proximate cause of the cancellation.” In addition, the Supreme Court rejected outright the FCC’s argument that NextWave’s obligations under the license arrangement were not properly classified as “debts.” The Court noted the expansive and broad definition applied to debts, and found that a

payment's characterization as a regulatory condition does not prevent it from being a debt under the bankruptcy code. The Supreme Court also noted that their interpretation of § 525 did not conflict with the Communications Act; rather, the FCC's interpretation of the Communications Act was nothing more than an "administrative preference," which could not form the basis of statutory conflict.

***Archer v. Warner*, 123 S. Ct. 1462 (2003).**

The Supreme Court construed the dischargeability provisions of the bankruptcy code in this case. 11 U.S.C. § 523(a)(2)(A) provides that a debt is non-dischargeable if it is "for money ... obtained by... false pretenses, a false representation, or actual fraud."

The issue was whether a settlement agreement that settled a creditor's earlier fraud claim be considered a non-dischargeable debt under the bankruptcy code. The Supreme Court said yes. The Court noted that § 523 of the bankruptcy code required the courts to look beyond the form of the debt to determine if it should be characterized as a fraud debt. The original language of the code's nondischargeability provision applied only to "judgments" sounding in fraud. Because Congress later changed the provision to apply to "liabilities" it evidenced Congress' intent that the bankruptcy court make the "fullest possible inquiry" into the nature of the debt. As a result, a party that settles a fraud debt, executes a full release, and agrees to pay a sum certain still is faced with a nondischargeable debt if he or she defaults on their settlement agreement and seeks bankruptcy protection.

IOLTA

***Brown v. Legal Foundation of Washington*, 123 S. Ct. 1406 (2003).**

In a 5-4 decision, the Supreme Court picked up where it left off in *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998). In *Phillips*, the Supreme Court determined that the interest income generated by funds held in IOLTA accounts is the private property of the owner of

the principal. The Court did not, however, address whether the income had been "taken" by the State or what amount of "just compensation" was due to the owner.

In *Brown*, Justice Stevens, writing for the Court, answers those two questions.

First, the Court found that a law requiring client funds that could not otherwise generate net earnings for the client be deposited into an IOLTA account is not a "regulatory taking." The Court held, however, that the transfer of the interest accumulating on the client funds to a different owner for a legitimate public use (here, providing legitimate legal services for the poor) could constitute a *per se* taking, which requires the payment of "just compensation" to the client.

Second, the Court held that the amount due the client under the Supreme Court's "just compensation" jurisprudence is zero. The Fifth Amendment requires that the compensation is measured from the owner's loss, and not the government's gain. Because the Washington law required that client funds, *which could not otherwise generate net earnings*, be deposited into an IOLTA account, the client's loss was zero. Thus, the Fifth Amendment did not require any compensation to the client.

The Supreme Court did note that the Washington law required lawyers to deposit client funds in non-IOLTA accounts whenever those funds could generate earnings for the client. To the extent earnings-generating funds were mistakenly deposited in an IOLTA account, the clients would be entitled to some form of compensation. But because the Washington law mandates such funds be placed into non-IOLTA accounts, the law does not constitute a taking that requires compensation. And, the mistakes of individual lawyers do not constitute state action, thus the Court found no basis for a constitutional violation.

Justices Scalia, Thomas, Kennedy, and Chief Justice Rehnquist dissented. The dissent argued that the majority ignored 80 years of Compensation Clause jurisprudence that requires

a taking to be valued according to fair market value. In addition, the dissent argued that this opinion did not remain true to the principles articulated in *Phillips* and is fundamentally at odds with the notions of “private property” found in *Phillips*.

REDISTRICTING

***Branch v. Smith*, 123 S. Ct. 1429 (2003).**

This complex redistricting case considered whether Mississippi’s failure to devise a redistricting plan triggered a 1929 statute that would have required the election of Mississippi Representatives on an at-large basis. The Court managed to sidestep applying this inconvenient statute.

Mississippi was due to lose a seat in Congress as the result of 2000 Census. Its legislature failed to adopt a redistricting plan and competing lawsuits were filed in the Mississippi Chancery Court and United States district court to compel redistricting. The federal court stayed its determinations to give the Mississippi state courts a first crack at fashioning a redistricting scheme. The state court did adopt a redistricting scheme but it appeared that there would be insufficient time for the state to pre-clear its plan with the Justice Department under the Voting Rights Act before the candidate qualification deadline. Ultimately the Federal District Court enjoined the state from implementing its plan and ordered the use of its own plan in the 2002 elections and until the state produced a constitutional plan that received pre-clearance.

The Supreme Court found that the federal district courts’ actions were proper. It did appear that the Mississippi state court plan could not be cleared in time for the election and thus the district court did not usurp the state’s right at a first shot at crafting a valid plan.

The question that divided the Justices was how to deal with a 1929 statute, 2 U.S.C. §2a(c)(5), providing for the at-large election of representatives where the state fails to devise an appropriate redistricting plan after losing a seat.

Justices Thomas and O’Connor would have applied this statute to require at-large election of the Mississippi Congressional delegation. Justices Stevens, Souter and Breyer would have held that the provision was impliedly repealed by a 1967 statute, 2 U.S.C. §2c requiring single-member districts. The plurality held that the old statute was not impliedly repealed but that it applied only where no entity, including the federal courts, were capable of administering a redistricting plan before elections could be conducted. Since the federal district court had intervened in a timely manner, there was no need to apply the constitutionally questionable at-large statute.

FAIR HOUSING

***City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*, 123 S. Ct. 1389 (2003).**

Justice O’ Connor, writing for a unanimous court, held that the City’s action, pursuant to its charter, of delaying the implementation of a low-income housing complex pending a referendum by the City’s voters did not violate the Equal Protection Clause or substantive due process rights under the 14th Amendment.

Initially, Cuyahoga Falls authorized a low-income housing complex. The project was opposed by a vocal citizen’s group, which filed a formal petition requesting the ordinance be repealed or submitted to a popular vote. According to Cuyahoga Falls’ charter, the project could not go forward until approved by the voters. Accordingly, the City Engineer denied a request for building permits.

Low-income housing advocates sued the City asserting that by submitting the plan to the voters, City officials violated their rights under the Equal Protection and Due Process clauses of the 14th Amendment. The Supreme Court disagreed. The Plaintiffs failed to show a discriminatory intent by the City when it merely allowed the election to go forward pursuant to its charter. In addition, Due Process was not violated because the initial refusal to grant the building permits was not

arbitrary. The City Engineer, relying upon the City's charter, was acting in a rational manner.

***Meyer v. Holley*, 123 S. Ct. 824 (2003).**

Justice Breyer delivered the opinion of a unanimous court holding that the Fair Housing Act did not apply unusually strict vicarious liability rules.

An interracial couple attempted to buy a house in California. It was alleged that the real estate salesman prevented them from completing the purchase for improper racial reasons. The Plaintiffs attempted to sue the president and sole shareholder of the real estate company that employed the discriminatory salesman. The Defendant argued that common law vicarious liability did not extend to reach an officer of the employing corporation, and that the Fair Housing Act did not create any special set of vicarious liability rules that would otherwise hold him liable.

The Supreme Court agreed and held that the Fair Housing Act incorporated traditional common law vicarious liability principles. Because Congress created the Act with the knowledge of traditional vicarious liability rules, and chose not to speak on the issue, the Court presumed that the Act incorporates those traditional rules. Moreover, the Department of Housing and Urban Development promulgated regulations that specify that ordinary vicarious liability rules apply in this area. Finally, the Supreme Court rejected an attempt to interpret the Fair Housing Act in a manner that would create a "non-delegable duty" in light of the Act's "overriding societal priority."

QUI TAM

***Cook County v. United States ex rel. Chandler*, 123 S. Ct. 1239 (2003).**

The False Claims Act, 31 U.S.C. § 5829 et. seq., allows a citizen to assert a claim on behalf of the federal government against a "person" filing of improper claims. The citizen is then entitled to a share in the recovery.

Chandler brought one of these "qui tam" actions against Cook County, contending that the county was violating the terms of a research grant. Cook County contended it was not a "person" under the statute. (The Supreme Court had previously ruled that states were not "persons." *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000)).

Justice Souter, writing for a unanimous court, held that a county was a "person" within the meaning of the False Claims Act. The term "person" was not defined in the False Claims Act. Consequently, relying upon very old case law, the court held that when the term is used it embraces municipal corporations as well as private ones.

INCOME TAX

***Boeing Co. v. United States*, 123 S. Ct. 1099 (2003).**

This is an obscure and complex income tax suit. The case involved the validity of Department of Treasury regulations concerning how corporate research and development expenses are allocated between a corporation and a type of subsidiary known as a "Domestic International Sales Corporation" (DISC). A DISC is not taxed on its retained earnings. By attributing its research and development costs by product lines, Boeing was able to shift its R&D costs so as to minimize its tax liabilities. The IRS utilized the Treasury Regulations to reallocate the tax burden back to Boeing.

The Supreme Court found that the regulations in question were a proper exercise of the Secretary of Treasury's rule making authority. The Code does not create an unqualified right to allocate R&D expenses in such a way to minimize taxes.

INDIANS

A pair of cases considered the circumstances under which Indian tribes could sue the federal government for mismanaging Indian resources.

In *United States v. Navajo Nation*, 123 S. Ct. 1079 (2003), the Court considered a claim that the federal government had mismanaged its leasing of tribal coal reserves thereby violating its fiduciary duties to the Tribe. The court found that the Indian Mineral Leasing Act did not provide a substantive right to recover. The Indian Tucker Act provides jurisdiction to consider claims against the United States but the plaintiff must still establish a right to recover under substantive law. Unlike statutes dealing with other natural resources, the IMLA does not make the U.S. a trustee on behalf of the Tribe. Thus, there is no basis for the underlying claim.

By contrast, in *United States v. White Mountain Apache Tribe*, 123 S. Ct. 1126 (2003), the Court held that the Apaches could maintain an action for a violation of a statute requiring the Government to rehabilitate the land formerly comprising the Fort Apache Military Reservation. The Court found that the statute could be reasonably interpreted to provide a right of action for breach of fiduciary duty.

INTELLECTUAL PROPERTY

Moseley v. V Secret Catalog, Inc., 123 S. Ct. 1115 (2003).

This David v. Goliath case construed the Federal Trademark Dilution Act of 1995, U.S.C. § 1125, David won again.

Petitioners were proprietors of a small shop known as “Victor’s Little Secret” in Elizabethtown, Kentucky. It sold lingerie and adult “novelties.” Victoria’s Secret sued the owners of the shop for trademark dilution. The lower courts had found that although Victoria’s Secret failed to present evidence that it had sustained actual damages as the result of the dilution of its mark, there was a likelihood that it would be harmed by the consumer’s mental

association of its famous brand name with the more questionable merchandise available at Victor’s Little Secret. Hence it was entitled to an injunction.

The Supreme Court, however, found that “dilution” within the meaning of the statute occurs only where actions tend to reduce the “distinctive quality of a trade name or trademark.” The statute requires actual, not threatened dilution. While this does not mean the plaintiff must establish monetary consequences of dilution such as lost profits, it is insufficient merely to show that consumers mentally associate the name with the famous mark. In this case, Victoria’s Secret did not show that consumers had a lower opinion of the mark as the result of the play on words caused by Victor’s Little Secret.

Eldred v. Ashcroft, 123 S. Ct. 769 (2003).

The Copyright Term Extension Act of 1998, 17 U.S.C. § 302, extended copyright protection from the creation of the work until 70 years after the author’s death. (The previous statutory period had been 50 years). Petitioners, who dealt in products within the public domain, attempted to enjoin the Attorney General from enforcing the statute. They contended that the longer term, at least as applied to works already in existence, violated the Constitutional requirement that copyright protection be for “limited times.” They also contended that the extended period violated the First Amendment.

The Court disagreed with the Petitioners’ contention that once a work exists, the time period for copyright protection becomes fixed. The Court found that there was no constitutional barrier to the Legislative expansion of protection to existing works.

Also, the extension did not violate the First Amendment. The limited monopoly afforded by copyright is consistent with free speech principles because it encourages authors. Further, the “fair use” doctrine ensures that facts and ideas contained within published works are available to the public.

EVIDENCE

Pierce County v. Guillen, 123 S. Ct. 720 (2003).

This case considered an unusual evidentiary privilege. Congress requires states to undertake a thorough evaluation of its public roads to eliminate highway hazards. 23 U.S.C. § 152. Because this evaluation could produce information that exposes the states to liability in traffic accident cases, Congress adopted Section 409, providing that materials “compiled” or “collected” for purposes of the survey are inadmissible in state and federal courts. Congress later extended the statute to preclude pretrial discovery of the material.

The Washington Supreme Court had ruled that whether documents were protected under Section 409 depended upon whether they were collected for the purposes of the Section 152 survey regardless of the identity of the custodian of those documents. The Washington Court found that the Section exceeded Congress’ power under the Spending, Commerce, and Necessary and Proper clauses.

The Supreme Court basically agreed with Washington’s interpretation, finding that the Section 409 privilege should be construed narrowly. Although the privilege applies regardless of the agency that collected it, it protects only information compiled or collected for purposes of the survey itself. It does not protect information gathered for other purposes and then subsequently collected by the survey. In short, the application of the privilege depends upon the document’s purpose not its source.

The Court held, however, that Section 409 was a proper exercise of the right of Congress to regulate interstate commerce. The underlying survey statute was adopted to assist state and local governments in reducing hazardous conditions in channels of commerce. Section 409 helps assure that states will be forthcoming in sharing information about highway hazards by reducing fears that developing the information will increase their liability.

MAGISTRATES

Roell v. Withrow, 123 S. Ct. 1696 (2003).

This opinion interprets the consent provision of the Federal Magistrates Act of 1979. Specifically, the Court held that a party’s consent to proceedings before a Magistrate Judge may be inferred from the parties’ conduct. That is to say, express written consent before the initiation of proceedings is not necessary under 28 U.S.C. § 636(c)(1).

In *Roell*, a Texas state prisoner brought a § 1983 action against two members of the prison’s medical staff. During a preliminary proceeding before a Magistrate Judge, the prisoner agreed orally to the Magistrate presiding over the case. The Defendants did not consent in writing or orally.

After a trial and jury verdict in favor of the Defendants, the Court of Appeals *sua sponte* remanded to the District Court to determine if the parties consented to the Magistrate presiding over the trial. At that point, the Defendants filed a letter of consent with the District Court. Nevertheless, the District Court ultimately found that consent cannot be implied by the conduct of the parties and that the Magistrate had lacked jurisdiction to hear the case. The Fifth Circuit affirmed.

The Supreme Court reversed and held that the parties’ conduct may imply the necessary consent. On balance, the Supreme Court believed that because allowing a party to simply not consent, allow a trial to proceed, and then later effectively vacate any adverse judgment by claiming non-consent was not worth imposing a bright line rule that required express consent.

FULL FAITH AND CREDIT

Franchise Tax Board of California v. Hyatt, 123 S. Ct. 1683 (2003).

This case addresses the extent to which a state must give full faith and credit to a sister state’s laws immunizing the sister state’s agencies and employees from liability.

The California state taxing authority conducted an investigation into the activities of the respondent, a Nevada resident. He alleged that the taxing board committed intentional torts in Nevada during the course of the investigation. The Nevada courts allowed the case to proceed although, under California law, the actors would have enjoyed sovereign immunity.

The Court held that full faith and credit did not require Nevada to apply California's immunity law. A state need not substitute the statute of other states for its own statutes in dealing with a subject matter upon which it is competent to legislate. Certainly Nevada was capable of legislating the effects of potential torts committed within its own borders. The Court rejected the plea that Nevada was bound to respect California's immunity laws because they touched upon its sovereign functions.

SOCIAL SECURITY

Washington State Department of Social and Health Services v. Guardianship Estate of Keffeler, 123 S. Ct. 1017 (2003).

In this social security case, the Court considered whether a state may lawfully use the social security benefits of children under its guardianship to reimburse itself for foster care costs.

Advocates for the children argued that the state's appropriation of the money violated anti-attachment provisions of the Social Security Act, which protect the benefits from "execution, levy, attachment, garnishment or other legal process." The Supreme Court held, however, that the state's self-reimbursement action did not fall within the statutory term. The Court placed heavy emphasis on the Social Security Commissioner's regulations that restrict the scope of the phrase "other legal process" to judicial or quasi-judicial actions, such as execution, levy, attachment, or garnishment. As a result, the self-reimbursement of state-incurred foster care costs by the representative payee of the social security benefits, which payee was appointed by the Social Security Commissioner, did not constitute "other

legal process" and the anti-attachment statute did not apply.

Moreover, the Court disagreed that allowing such reimbursement was antithetical to the child's best interest. Allowing the funds to accumulate in some sort of trust fund might actually lead the children to lose their eligibility for the benefits. Moreover, the administrative costs involved in running the state's foster care program might discourage states from acting as trustees for the children if there was no prospect of reimbursement.

Barnhart v. Peabody Coal Co., 123 S. Ct. 748 (2003).

This case involved the implementation of the Coal Industry Retiree Health Benefit Act of 1992. The Act addresses how benefits are to be paid to "orphan retirees," those whose original employers are no longer in business. Under the statutory scheme, these orphaned retirees are distributed among existing operating companies who are then responsible for funding their benefits. The statute set an October 1, 1993 deadline for assigning the retirees. Some designations were made after that date, however, and the operating companies disputed their responsibility for paying the late designated retirees.

The Supreme Court found that the late designations were nevertheless valid. The deadline did not deprive the Commissioner of the authority to make the designation. The Court relied on its prior opinion in *Brock v. Pierce County*, 106 S. Ct. 1834 (1986), to find that Congress' use of the word "shall" coupled with a time limit for agency action does not deprive the federal agency of power to act, even when that action may be statutorily tardy.

MOTOR CARRIERS

Yellow Transportation, Inc. v. Michigan, 123 S. Ct. 371 (2002).

The case involves fees charged by certain states to interstate motor carriers. Before 1994, the Interstate Commerce Commission ("ICC")

allowed states to charge interstate motor carriers registration fees up to \$10 per vehicle. In the Intermodal Surface Transportation Efficiency Act of 1991, Congress required the ICC to adopt a new system, the “Single State Registration System,” under which a carrier’s annual registration with one state satisfied a registration requirement of all other such states. The plan also capped state registration fees by directing the ICC to require each participating state to charge a fee that did not exceed that collected or charged on November 15, 1991. The ICC interpreted the provision to prevent a state from revoking any reciprocity agreements that it had made with other states before the adoption of the new system. Michigan contended, however, that the “reciprocity freeze” exceeded the scope of the statute.

The Supreme Court disagreed. It held that the ICC could reasonably interpret the statute to limit fees to those actually charged by the state on the applicable date. Thus, carriers from states with reciprocity with Michigan would still enjoy protection from the old arrangement. The case reaffirms the deference enjoyed by regulatory agencies in interpreting statutes they are charged with enforcing.

FIREARMS

***United States v. Bean*, 123 S. Ct. 584 (2002).**

Bean, a gun dealer, attended a gun show in Laredo, Texas. After the show, Bean and his associates drove across the Texas-Mexico border to eat dinner in Nuevo Laredo, Mexico. Mexican officials stopped Bean’s vehicle at the border and found approximately 200 rounds of ammunition in the back seat. Bean insisted that he instructed his associates to remove any firearms and ammunition from the vehicle, but this one box was overlooked. Bean was convicted in a Mexican court of importing ammunition into Mexico and sentenced to five years’ imprisonment.

Normally felons are disqualified from possessing, distributing or receiving firearms or ammunition. An individual may petition the ATF, however, for

relief from the prohibition. Bean requested such relief but the ATF returned the application unprocessed because its annual appropriation forbade it from expending any funds to investigate or act upon such applications. Since the petition process has a judicial review provision, Bean filed suit in district court asking it to conduct its own inquiry into his fitness to own a gun. The district court granted the requested relief and the Fifth Circuit affirmed.

The Supreme Court reversed. It held that an actual denial of the petition was necessary for judicial review. Because the ATF had simply returned Bean’s application, the ATF took no action that would give the courts something to review. The fact that no money had been appropriated for the ATF to process did not give the petitioner judicial review rights that he otherwise did not possess.

FIRST AMENDMENT

***Illinois, ex rel. Madigan v. Telemarketing Associates, Inc.*, 123 S. Ct. 1829 (2003).**

In what amounts to a relatively unremarkable First Amendment opinion, the Supreme Court held that fraud is not protected speech. No real surprises here.

The Illinois Attorney General sued Telemarketing Associates, Inc. for fraud, alleging that it made specific misleading statements in connection with solicitations for donations to a charitable organization. The Illinois Supreme Court held that the Telemarketing Associates, Inc. activities were protected speech under the First Amendment and affirmed the dismissal of the lawsuit. The Illinois Supreme Court relied on a trio of previous Supreme Court decisions that held state statutes barring fundraising fees in excess of a prescribed level effectively created prior restraints on charitable fundraising and were unconstitutional under the First Amendment.

The Supreme Court again reiterated the strength of those precedents, but ultimately determined that the Illinois Attorney General’s lawsuit was premised mainly on specific misrepresentations

(e.g., the solicited funds would be going to specific charitable activities, despite the solicitor's knowledge that this was false) and was not based on a presumption of fraud arising from the fact that only a small percentage of solicited funds actually made their way to the charitable organization. As a result, the Supreme Court reversed the Illinois Supreme Court.

IMMIGRATION

Immigration and Naturalization Service v. Orlando Ventura, 123 S. Ct. 353 (2002).

In this political asylum case, the Board of Immigration Appeals had determined that the respondent failed to qualify for asylum because any persecution he faced when he left Guatemala was not based upon his political opinions. The Ninth Circuit reversed this holding.

The Court of Appeals then considered an alternative argument that, regardless of any past discrimination, the conditions in Guatemala had improved to the point where there was no longer any threat of persecution. Although all parties asked the Ninth Circuit to remand the case to the Board of Immigration Appeals to consider this new argument, the Court of Appeals went on to consider and reject the argument itself.

The Supreme Court “summarily” reversed the Ninth Circuit, finding that the Ninth Circuit should have followed ordinary remand principles and in failing to do so “seriously disregarded” the BIA’s legally-mandated role.

Demore v. Kim, 123 S. Ct. 1708 (2003).

The Immigration and Nationality Act authorizes the Attorney General to take into custody any alien that is removable from the country because he has been convicted of certain crimes. A lawful permanent resident alien was convicted of a state court burglary offense and was subject to deportation under this provision. He contended that his detention pending deportation constituted a violation of his due process rights because there had been no determination that he posed a threat to society or posed a flight risk.

The Court found that the petitioner was entitled to attempt habeas corpus review. Nevertheless, the detention statute was constitutional. While aliens are entitled to due process during deportation proceedings, the brief detention while deportation proceedings are pending is constitutionally valid.

EMPLOYMENT DISCRIMINATION

Clackamas Gastroenterology Associates, P.C. v. Wells, 123 S. Ct. 1673 (2003).

This case concerned whether director-shareholder physicians in a professional corporation count as “employees” for the purposes of meeting the minimum employee requirements of the Americans with Disability Act. The court found that such persons who operate independently and manage the business and are not subject to the firm’s control, should not be counted as employees. The question is one of control.

CROSS-BURNING

Virginia v. Black, 123 S. Ct. 1536 (2003).

The Supreme Court held that a Virginia statute making it unlawful to burn a cross with “an intent to intimidate a person or group of persons” did not violate the First Amendment. The court found that cross burning was inextricably linked to the violent activities of the Ku Klux Klan. Thus, cross burning is not merely expressive conduct, but may convey threats or menace. First Amendment freedoms are not absolute and the state could legitimately prescribe expressive conduct that is threatening in nature. Further, the state was justified in singling cross burning as a particularly dangerous activity.

The Court found, however, that a provision of the Virginia law making the act of cross burning itself prima facie evidence of intent to intimidate was unconstitutional. The mere act of burning a cross may or may not mean that the actor intends to intimidate. Thus, the jury instruction based upon the prima facie provision could lead to the prosecution of conduct protected by the First Amendment.

HABEAS CORPUS

***Woodford v. Garceau*, 123 S. Ct. 1398.**

The court held that limitations on habeas corpus review found the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) applied to a prisoner's case even though he had been convicted prior to the adoption of the statute. In a prior opinion, the court had held that the amendments did not apply to cases pending in federal court on or before April 24, 1996. The prisoner had filed his application for habeas corpus review after that date. Consequently, the case was not "pending" on the deadline date and there was no impediment to applying the AEDPA.

***Clay v. United States*, 123 S. Ct. 1072 (2003).**

The Court considered the timeliness of a request for collateral review. Under 28 U.S.C. § 2255, a federal prisoner has a one year time limit to file a motion for post-conviction relief. The time begins to run on "the date on which the judgment of conviction becomes final." The court held that the judgment of conviction becomes final and the one year clock begins to run when the time expires for filing a petition for writ of certiorari contesting the appellate court's affirmation of conviction.

***Miller-El v. Cokerell*, 123 S. Ct. 1029 (2003).**

This case challenged a death penalty conviction from Dallas County on the basis of racial discrimination in the exercise of preemptory strikes. The court, in an opinion illuminating some very unsavory policies, found that petitioner's claim was potentially meritorious, deserving consideration from the Court of Appeals.

In a 1986 trial, Dallas County Assistant DAs had used their preemptory strikes to exclude 10 of the 11 African Americans eligible to serve on the jury. *Miller-El* contended that the pattern of preemptive strikes deprived him of a fair trial. He had not obtained any relief in the state appellate courts and the district court had rejected the habeas corpus petition.

The AEDPA requires prisoners attempting to collaterally attack their convictions to obtain a certificate of appeal in order to appeal an adverse district court ruling. The narrow question in the case was whether the Fifth Circuit Court of Appeals should have issued such a certificate of appeal under the guidelines. The Court found that even under the more restrictive collateral review required by the Act, the petitioner was entitled to obtain a certificate of appeal. He had satisfied the threshold requirement that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."

The Supreme Court found that the lower courts had granted too much deference to the prosecutor's race-neutral justifications for striking the potential jurors. The number of blacks struck were highly disproportionate to the number of eligible non-black jurors that were struck. Moreover, the voir dire questioning regarding ability to impose the death sentence was rather predominantly directed to the African American veniremen. The prosecutors use of the jury shuffle procedure also suggested racial animus.

Although state court fact finding is entitled to deference, this does not imply abandonment of federal judicial review of state court proceedings altogether. In this case the district court did not give full consideration of the substantial evidence provided by the petitioner and accepted without question the state court's evaluation of the demeanor of the prosecutors and jurors. Since the constitutional claim was at least debatable under the facts, the certificate of appeal should have been issued.

***Massaro v. United States*, 123 S. Ct. 1690 (2003).**

The case addressed whether a prisoner is barred from raising an ineffective assistance of counsel claim in a collateral proceeding under 28 U.S.C. § 2255 when such a claim was not raised on direct appeal. The Court found that such a claim could be raised collaterally. To require the claims to be brought up by direct appeal would mean the defendants might have to raise the issue before there was an opportunity to fully develop the facts

and would place the suit within a forum that was not well suited to address those facts. The § 2255 motion is preferable to direct appeal for addressing ineffectiveness claims because it allows the District Court to develop the factual record on the ineffectiveness claim.

***Woodford v. Visciotti*, 123 S. Ct. 357 (2002).**

This was another case arising from an ineffective assistance of counsel claim. Specifically, this opinion dealt with the limits of federal habeas corpus review. The petitioner had been convicted of murder and sentenced to death. The California Supreme Court affirmed the conviction, denying petitioner's claims that he had been denied ineffective assistance of counsel. On federal habeas review the Ninth Circuit Court of Appeals found that the California Supreme Court decision was contrary to the prevailing authority on ineffective assistance of counsel and also constituted an unreasonable application of that authority.

The Supreme Court reversed, holding that the Ninth Circuit had misread the California Supreme Court opinion, which had, in fact, followed the prior authority. Moreover, the Ninth Circuit did not use the proper standard of review. Under the federal habeas corpus statute (28 U.S.C. § 2254), the federal court may not issue a writ merely because it concludes that the state court applied a legal test incorrectly. The writ may only issue where the state court misapplies federal law in an objectively, unreasonable manner. The Supreme Court agreed that the California Supreme Court had given careful attention to the applicable standards and that its determination of the constitutional issue was not objectively unreasonable.

THREE STRIKES LAW

***Ewing v. California*, 123 S. Ct. 1179 (2003).**

A sharply divided court held that California's "three strikes" law did not violate the Eighth Amendment's prohibition against cruel and unusual punishment. Ewing, who had several prior convictions (although many years before)

was convicted of stealing golf clubs valued at less than \$400. He was sentenced to 25 years to life. The Supreme Court affirmed.

The Court held that the Eighth Amendment only forbids extreme sentences that are grossly disproportionate to the crime. The adoption of enhanced sentences for repeat offenders reflects a deliberate policy choice that individuals who have repeatedly engaged in criminal conduct should be isolated from society for an extended period of time. In evaluating the particular sentence at issue, courts should consider not only the current offense, but also the defendant's history of recidivism.

Lockyer v. Andrade, 123 S. Ct. 1166 (2003) was another three strike opinion. The Court found that the defendant who was sentenced to two 25 year to life sentences for separate incidents of stealing video tapes from stores was not entitled to federal habeas corpus review because the California courts had not committed a clear mistake of federal law and had not misapplied the clear federal precedence on the proportionality of punishment.

SEX OFFENDER STATUTES

***Smith v. Doe*, 123 S. Ct. 1140 (2003).**

In this case, the Supreme Court upheld Alaska's sexual offender registration statute against claims that it was an *ex post facto* law. The court held that the statutes, requiring registration and community notification were regulatory in nature, not punitive. Consequently, even those offenders who were convicted prior to the passage of the statute were legitimately subject to its terms. The mere fact that public notification provisions had a "shaming" effect did not render them necessarily punitive. Nor were the registration and notification requirements excessive given reasonable concerns about the recidivism of sex offenders.

***Connecticut Department of Public Safety v. Doe*, 123 S. Ct. 1160 (2003).**

This case upheld Connecticut's "Megan's Law" requiring persons convicted of sexual offenses to register with the Department of Public Safety upon their release and requiring the agency to post the registrant's names, addresses, photographs and descriptions on an internet website available to the public. The Supreme Court rejected the individual's argument that posting to the internet website amounted to an unconstitutional deprivation of liberty without due process of law because the statute did not allow a hearing to determine whether the individual was currently dangerous. The Supreme Court held that Connecticut could legitimately make its registry requirement depend upon previous conviction, not current dangerousness.

The Court did not reach the question of whether posting the internet information created a deprivation of liberty; rather, the Court found that the prior conviction constituted sufficient process for any such deprivation. The Court noted that proof of dangerousness was not a material fact under Connecticut's statute because the registration statute turned solely on prior sex offense convictions, a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest.

DOUBLE JEOPARDY

***Sattazahn v. Pennsylvania*, 123 S. Ct. 732 (2003).**

This capital punishment appeal graphically proves the dangers of a successful appeal. Under Pennsylvania law, the Court must impose a life sentence if the jury deadlocks on the death penalty issue. After this happened in Sattazahn's trial, he appealed and obtained a reversal of his conviction and a new trial. During the second trial the state sought the death penalty again. Not only was the Petitioner convicted but the jury returned a death sentence. Petitioner complained that the imposition of the death penalty violated the double jeopardy and due process clauses.

The Court disagreed. Jeopardy attaches in a death penalty proceeding only where the defendant is essentially acquitted of the necessary aggravated circumstances. The automatic imposition of the life sentence where the jury failed to agree did not qualify as such an acquittal. Nor did the second sentence violate the due process clause. The petitioner did not have a life or liberty interest in the results of the first trial.

RICO

***Scheidler v. National Organization for Women*, 123 S. Ct. 1057 (2003).**

This case involved the application of the Racketeer Influenced and Corrupt Organization Act ("RICO") to the activities of abortion protestors. A jury had found that the defendants had engaged in a pattern of racketeering activity including violation of the Hobbs Act, state extortion law, and the Travel Act.

The Supreme Court held that the RICO convictions had to be reversed. Petitioners did not commit extortion under the Hobbs Act because they did not *obtain* any property through coercion or threat. The Court found that disrupting another person's right to use their property or assets does not qualify as obtaining property through coercion or threat. It may constitute the crime of coercion, but it does not constitute extortion. Because the Hobbs Act omits the crime of coercion, and the underlying actions here could not qualify as extortion, there was no predicate act for the purposes of establishing a civil RICO violation.

This, of course, also means that state extortion statutes were not violated. And because the Travel Act claim also depended upon extortionate conduct, it had to fail as well. With no "predicate act," RICO was not violated. By basing its opinion upon the technical requirements of criminal statutes, the court was able to achieve near unanimity in this controversial abortion case. Only Justice Stevens believed that the term "extortion" was broad enough to encompass "the intangible right to exercise exclusive control over the lawful use of business assets."

SEARCH AND SEIZURE

Kaupp v. Texas, 123 S. Ct. 1843 (2003).

In this per curiam opinion, the Supreme Court reversed the conviction of the Petitioner because the police had obtained a statement as the result of an unlawful arrest.

Harris County Sheriff's deputies believed that Kaupp, a 17 year old, had been involved in a murder but lacked probable cause for an arrest. Five officers showed up at his house at 3:00 a.m., awakened him with a flashlight, and after identifying themselves indicated that "we need to go and talk." Petitioner agreed and he was led away handcuffed dressed in only his underwear. The Deputies took petitioner to the crime scene for a few minutes, then took him to the Sheriff's headquarters, removed the handcuffs and advised the petitioner of his *Miranda* rights. After interrogation, Kaupp admitted taking some part in the crime.

The Texas Court of Criminal Appeals had concluded that no arrest had occurred until after the confession. It stated that petitioner's agreement to accompany the Officers indicated consent. Even the act of handcuffing the petitioner did not transform the incident into an arrest. "A reasonable person in [petitioner's position] would not believe that being put in handcuffs was a significant restriction on his freedom of movement."

The Supreme Court strongly disagreed. The involuntary removal of a person from his home to a police station and the detention for investigative purposes must constitute an arrest. Just because Kaupp had agreed to go did not mean his presence

was voluntary. He had no obligation to resist the police "invitation." The circumstances of the case did not amount to voluntary cooperation, and because the state admitted there was no probable cause for the arrest, the confession had to be suppressed.

CONSPIRACY

United States v. Jimenez Recio, 123 S. Ct. 819 (2003).

This case involves the law of conspiracy. Nevada police had found a truck carrying illegal drugs and seized them. They decided to set up a sting. The truck drivers were directed to bring the truck carrying the illegal drugs to its original destination. The drivers then paged a contact who said he would call someone to pick up the truck. Respondent Jimenez Recio showed up to pick up the truck. He was arrested, charged and convicted with conspiracy to possess and distribute unlawful drugs. The Ninth Circuit overturned the conviction because the alleged distribution conspiracy had ended when the police initially seized the drugs.

The Supreme Court reversed holding that a conspiracy does not automatically end when the government defeats its object. The Court held that the Ninth Circuit was incorrect in its view that a conspiracy ends when the government intervenes, making the conspiracy's goals impossible to achieve, even if the conspirators do not know of the government's role. According to the Supreme Court, the *agreement to commit an unlawful act* is a "distinct evil" that may be punished irrespective of the substantive crime's success or failure.

Imagine the appeals, dissents and remandments, if lawyers had written 'The Ten Commandments.'

Harry Bender

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I. CIVIL / APPELLATE PROCEDURE

A. Untimely Notices of Appeal

***Hone v. Hanafin*, No. 02-0548, 2003 Tex. LEXIS 51 (Tex. May 1, 2003) (per curiam).**

To justify the late filing of a notice of appeal under Texas Rule of Appellate Procedure 26.3, an appellant does not have to concede untimeliness.

In this fraudulent inducement case, the defendant, Hanafin, answered by special appearance. After a February 21 hearing, the trial court advised the parties that it would sustain Hanafin's special appearance. Ten days later, the plaintiffs requested findings of fact and conclusions of law. The trial court signed an order sustaining Hanafin's special appearance on May 9 and issued findings of fact and conclusions of law on May 17. The plaintiffs allege that they did not receive notice of the May 9 order until May 31, when they received a faxed copy from Hanafin's counsel. On June 1, the plaintiffs filed their notice of appeal challenging the trial court's interlocutory order granting Hanafin's special appearance.

On appeal, Hanafin challenged the court of appeals' jurisdiction. Hanafin argued that because the plaintiffs filed their notice of appeal twenty-two days after the trial court's May 9 order, they failed to timely perfect their appeal. The court of appeals dismissed the appeal because it determined that the plaintiffs had not satisfied TRAPs 26.3 and 10.5(b) because they did not explain the reasons why their appeal was untimely. The court determined that the plaintiffs' explanations of the reasons the notice of appeal was *timely* were not sufficient to explain their failure to timely file.

The Texas Supreme Court reversed the court of appeals' decision and held that to satisfy rules 26.3 and 10.5(b) the appellant does not have to concede untimeliness. The court held that a liberal standard of review should be applied. Therefore, absent a finding that an appellant's conduct was deliberate or intentional, the court of appeals should accept the appellant's explanations as reasonable. The court further held that the plaintiffs could have plausibly assumed that their request for findings of fact and conclusions of law would extend the time for filing a notice of appeal under Rule 26.1(a)(4), but the court refused to address whether the trial court's findings of fact and conclusions of law could properly be considered by the court of appeals.

B. Law of the Case Doctrine

***Briscoe v. Goodmark Corp.*, No. 02-0498, 2003 Tex. LEXIS 33 (Tex. March 27, 2003).**

The law of the case doctrine permits a court of appeals to reconsider its first dismissal of an appeal and change that decision if it is clearly erroneous. In this case, the court of appeals should not have dismissed the second appeal for want of jurisdiction; instead, the court should have considered the merits of the first appeal.

In this case, the trial court rendered judgment against Michael Briscoe and in favor of Goodmark and others. In response, Briscoe filed his notice of appeal. In his notice, however, Briscoe pointed out that he did not think he had a final judgment. The El Paso Court of Appeals agreed, and dismissed the appeal for want of jurisdiction.

Back at the trial court, Goodmark moved for and obtained an order from the trial court declaring that its original judgment disposed of all parties and claims, and that the judgment was final and enforceable. Briscoe again appealed. This time, however, the court of appeals held that the original judgment was indeed final. So the court dismissed the second appeal because Briscoe's second appeal was untimely.

Based on the law of the case doctrine, the Texas Supreme Court reversed the appellate court's second dismissal, and instructed the court to consider the merits of Briscoe's first appeal. Generally, the law of the case doctrine confines a court of appeals to its initial decision if there is a subsequent appeal in the same case. However, this rule is not absolute. A court applies this doctrine within the discretion depending on the particular circumstances of a case. In this discretion, an appellate court may reconsider an earlier decision if that decision is clearly erroneous.

Here, the court of appeals had the authority to revisit its jurisdictional decision. Finding clear error in its first decision, the court should have overturned that decision in Briscoe's second appeal, and considered the merits. After all, Briscoe did everything he could have done to preserve his right to appeal. He should not lose this right because the court of appeals later found that its original decision was incorrect.

The concurring opinion notes the problems that "conditional" notices of appeal are having on judicial system. Such notices essentially request guidance from the court of appeals on a judgment's finality, without forcing the litigants to make that determination on their own. Moreover, conditional notices delay the appellate court's disposition of the merits of the case and threaten to disturb what, in this case, was already a final judgment.

The concurring opinion further notes the conduct of appellee Goodmark. In the first appeal, Goodmark should have responded to the court of appeals' invitation to explain why Briscoe's

appeal should not be dismissed. Goodmark filed nothing. Although courts should review judgments independently to determine their jurisdiction, the parties bear the burden of assisting the courts when requested to do so. Because Goodmark ignored the court of appeals' request for clarification, Briscoe should not be entirely faulted for the protracted course of events, and the merits of his appeal should be heard.

C. Appointment of Counsel for Indigent Parties

***Gibson v. Tolbert*, No. 02-0190, 2003 Tex. LEXIS 32 (Tex. March 27, 2003).**

An indigent inmate does not have a right to appointed counsel in a medical malpractice case merely because the inmate's suit is against an employee of the prison where the inmate is incarcerated.

James Tolbert was an indigent inmate who filed a pro se medical malpractice claim against Dr. Louis Gibson, a prison doctor who treated Tolbert. According to Tolbert, Gibson failed to assign him to light duty based on Tolbert's chronic back pain. In addition, after a back specialist placed Tolbert on light duty, Gibson ignored the diagnosis and returned Tolbert to farm work detail.

Upon filing suit, Tolbert filed a motion asking the trial court to appoint counsel for him. This motion was never granted. Nevertheless, at some point in the litigation, Gibson moved to dismiss the cause for, among other things, Tolbert's failure to file the required expert report. Eventually, the trial court dismissed the case.

On appeal, Tolbert argued that the trial court incorrectly failed to appoint counsel on his behalf. The Waco Court of Appeals reversed the dismissal and held that Tolbert's civil suit was an "exceptional case" requiring appointed counsel.

The Texas Supreme Court disagreed. Under the facts and circumstances of this case, the court held that an indigent inmate does not have a right to appointed counsel in a civil case just because the inmate's suit is against an employee of the prison where he is incarcerated.

The question here was whether the trial judge abused his discretion by failing to appoint counsel to represent Tolbert. Acknowledging that the Texas Legislature has statutorily provided for appointed counsel in other types of cases, the court noted that no such provisions were in place in medical malpractice cases. Accordingly, appointment of counsel in these types of cases is left to the court's discretion.

Ultimately, the court's analysis examined whether Tolbert's was an "exceptional case." Without determining whether the "exceptional case" standard was the correct standard by which to determine this issue, the court held that this case was not "exceptional." In fact, the court noted that this case was "an obvious example" of the many cases determined to be far less than "exceptional." Civil cases brought by prison inmates are common. And simply because a claimant is an inmate asserting a claim against an employee of the prison that houses him does not create "exceptional" circumstances. Finally, nothing prevented Tolbert from securing counsel on a contingent fee basis. Therefore, the trial court correctly dismissed Tolbert's suit.

D. Jury Charge Error

***Holubec v. Brandenberger*, No. 01-1214, 2003 Tex. LEXIS 64 (Tex. May 22, 2003).**

To assert the one-year bar to a nuisance claim under the Right to Farm Act a proper jury charge must ask whether the conditions or circumstances constituting the basis for the nuisance action existed for more than a year prior to the date the suit was filed.

This nuisance claim arose after David and Mary Holubec expanded their sheep operation in March

1997 by building a new feedlot that was located 160 feet from property owned by the Lees. The Brandenbergers' home is located on the Lees' property. In August 1997, the Brandenbergers began noticing foul odors, flies, dust and noise coming from the Holubecs' feedlot. In February 1998, the Holubecs added elevated lights to the feedlot to permit night work. On July 31, 1998, the Brandenbergers and Lees filed a nuisance suit against the Holubecs complaining about the foul odors, flies, dust, noise and light coming from the feedlot.

The Holubecs denied the allegations and asserted section 251.004(a) of the Texas Agriculture Code as a bar to all the plaintiffs' claims. Section 251.004(a) prohibits a nuisance suit brought against an agricultural operation that has lawfully been in operation for one year or more prior to the date on which the action is brought, if the conditions or circumstances complained of as constituting the basis for the nuisance action have existed substantially unchanged since the established date of operation.

The trial court submitted the issue of the Holubecs' defense by asking "Have the conditions or circumstances complained of as constituting the basis for the nuisance action. . . remained substantially unchanged since December 31, 1986?" The Holubecs objected to the submission of this question because it improperly included December 31, 1986 rather than July 30, 1997, which would have been one year before suit was filed. The Holubecs tendered a question asking "Do you find that the agricultural operation of [the Holubecs] had been in operation and existed substantially unchanged since on or before July 30, 1997?" The trial court overruled the Holubecs' objection and submitted the question as previously stated. The jury ultimately answered the question "no" and awarded damages to the Lees. The trial court entered judgment for the Lees, and the Holubecs appealed.

The court of appeals affirmed the trial court's decision and found that the Holubecs had not preserved error regarding the propriety of the jury question because they failed to explain why July

30, 1997 was the correct date rather than December 31, 1986. The court further observed that the Holubecs' requested question was not substantially correct because it asked about "agricultural operations" rather than the "conditions or circumstances complained of as constituting the basis for the nuisance action," as stated in the statute.

The Texas Supreme Court reversed the judgment of the court of appeals and remanded to the trial court because the jury charge should have inquired as to July 30, 1997 rather than December 31, 1986. The court held that the Holubecs' objection was sufficient to preserve this error because they specifically objected to the date submission. Although their requested submission was not specifically tied to the language in the statute regarding conditions or circumstances, they plainly sought the submission of their statutory defense. Because the question actually submitted was defective, the Holubecs did not have to submit their own substantially correct question.

E. Mootness in Condemnation Proceedings

Pinnacle Gas Treating, Inc. v. Read, No. 02-0169, 2003 Tex. LEXIS 48 (Tex. April 17, 2003) (per curiam).

When an appellate court's action in either affirming or reversing a trial court's order would affect substantial rights of the parties, there is a live issue in controversy, thus the case is not moot.

In this condemnation case, Pinnacle Gas Treating, Inc. sought to obtain a permanent utility easement and a temporary construction easement on property owned by Raymond and Mark Read. Pinnacle obtained a writ of possession for the easements and constructed a pipeline. Two years later, the trial court granted the Reads' motion to dismiss the condemnation proceeding, voiding the writ of possession and ordering the case to proceed to trial on the Reads' property code claim for damages for wrongful condemnation and

possession of their property. Pinnacle appealed, but the court of appeals dismissed the appeal for want of jurisdiction, concluding that it was interlocutory. Shortly before trial, Pinnacle instituted a second condemnation proceeding and obtained a second writ of possession for the easements. The Reads did not contest the second writ, which remains pending in district court. Meanwhile, a jury trial was held in the first condemnation proceeding and the trial court rendered judgment on the jury's verdict awarding the Reads \$110,183.36 in damages, expenses, attorney's fees and interest.

Pinnacle appealed the judgment in the first condemnation proceeding, contending that the trial court erred in dismissing that proceeding and voiding its original writ of possession. The court of appeals declined to reach the issue on mootness and equity grounds because proceeding with a second condemnation proceeding before the first one was resolved mooted the question of whether Pinnacle was entitled to possession of the easements and created a potential quagmire of legal difficulties.

The Texas Supreme Court reversed the court of appeals' decision and remanded for the court of appeals to consider Pinnacle's claims that the trial court erred in dismissing the first condemnation proceeding. The court held that the dismissal issue was not moot because the appellate court's decision in either affirming or reversing the trial court's order would affect substantial rights of the parties under the \$110,183.36 judgment.

Be sure to attend the next Annual Meeting of the Appellate Section in Austin on September 11, 2003, in conjunction with the Advanced Civil Appellate Practice Course.

F. Filing Suit under an Assumed Name

Sixth RMA Partners, L.P. v. Sibley, No. 02-0179, 2003 Tex. LEXIS 67 (Tex. May 22, 2003).

The correct legal name of a party may be substituted by filing either a motion requesting substitution or a pleading that substitutes the correct legal name for the assumed name. When a party seeks to substitute its correct legal name but does not intend to respond to the preceding pleading filed by the other party, the proper procedural vehicle for substitution is an amended pleading rather than a supplemental pleading. Nevertheless, when the other party does not specially except to a supplemental pleading which merely substitutes the correct legal name, it has waived its right to complain, and the substitution becomes effective.

Sixth RMA Partners, L.P. filed suit against Sibley for his failure to pay a note. Sixth RMA Partners, L.P. filed suit under its assumed name of RMA Partners, L.P. Sibley filed an original answer and affirmative defenses. Sixth RMA Partners, L.P. then filed a “supplemental petition” and “second supplemental petition” indicating its proper legal name. The supplemental petitions did not respond to Sibley’s pleadings but merely added facts establishing its proper legal name. The trial court rendered judgment for “Sixth RMA Partners, L.P. a/k/a RMA Partners, L.P.”

On appeal, Sibley asserted that Sixth RMA Partners, L.P. had failed to properly enter the proceedings as a party by joining in the filing of an amended petition, and therefore the trial court should have rendered judgment for him based on limitations. The court of appeals agreed, reversed the trial court’s judgment and rendered a take-nothing judgment for Sixth RMA Partners, L.P.

The Texas Supreme Court reversed the judgment of the court of appeals. Rule 28 of the Texas

Rules of Civil Procedure states that “any partnership . . . may sue or be sued in its partnership, assumed or common name for the purpose of enforcing . . . substantive right . . . but on a motion by any party or on the court’s own motion the true name may be substituted.” Whether Sixth RMA used the name RMA Partners, L.P. as an assumed name when collecting Sibley’s notes was a fact question for the trial court. The supreme court found that there was some evidence to support the implied finding of fact that Sixth RMA used the name RMA Partners, L.P. as an assumed name when collecting Sibley’s notes. Therefore, the original petition filed under the name RMA Partners, L.P. was effective to commence suit against Sibley on behalf of Sixth RMA.

Moreover, Rule 28 requires that the correct legal name be substituted, but it does not mandate the procedural method by which substitution may be accomplished. The correct legal name may be substituted by filing either a motion requesting substitution or a pleading that substitutes the correct legal name for the assumed name. In this case, the party substituted the correct legal name in a supplemental pleading. A supplemental pleading should be used to raise facts in response to the preceding pleading by the other party. Here, because the supplemental pleading was not in response to the other party’s preceding pleading, it was improper. The proper pleading to merely substitute the correct legal name was an amended petition. Nevertheless, because Sibley did not specially except or move to strike the supplemental petitions, he had waived the right to complain of this error. Thus, Sixth RMA’s procedural mistake did not render the factual allegations in the second supplemental pleadings void and of no effect. Therefore, Sixth RMA’s pleadings were sufficient to substitute the true party name and to support the trial court’s judgment. Thus, the court of appeals’ judgment was reversed.

Finally, the court held that Sibley waived the right to complain about Sixth RMA’s failure to file an assumed name certificate because he did not raise this issue in the trial court.

II. DISCOVERY / EVIDENCE

A. Sanctions

***Spohn Hosp. v. Mayer*, No. 02-0443, 2003 Tex. LEXIS 49 (Tex. April 24, 2003) (per curiam).**

Discovery sanctions continue to be governed by the standards in TransAmerican Natural Gas Corporation v. Powell, 811 S.W.2d 913 (Tex. 1991). Because the trial court imposed excessive sanctions — a jury instruction ordering that two facts be taken as true — and those sanctions probably caused the rendition of an improper judgment, the supreme court reversed and remanded for a new trial.

Plaintiffs Karen Mayer and Sandra Hilbrich sued Spohn Hospital and others for the wrongful death of their father, Raymond Hilbrich. Raymond was an 86-year-old patient at the hospital, and suffered from heart problems and dementia. Plaintiffs alleged that Spohn’s staff ignored four calls that Raymond made to the nursing desk requesting assistance. After a monitor indicated that Raymond was suffering from ventricular fibrillation, a nurse went to his room to discover that he was beside his bed with his restraint vest caught on the bed and wrapped around his neck. Despite resuscitation efforts, Raymond died a short time later.

During the discovery phase of the case, plaintiffs asked for all witness statements as part of the request for disclosure. Spohn produced the statements of two nurses, but withheld three others as “attorney work product.” Plaintiffs threatened to file a motion to compel, but never did. Then 31 days before trial, Spohn voluntarily produced the withheld statements, stating that recent case law persuaded it that the statements were discoverable. In response, plaintiffs moved for sanctions. The trial court ordered as sanctions that the jury take as established (1) that the patient’s four calls for assistance were ignored

and (2) that he was in the restraint without a physician’s order. Ultimately, the jury found in favor of plaintiffs and awarded more than \$1.3 million. The court of appeals affirmed, modifying only the award of pre-judgment interest.

The Texas Supreme Court reversed because the trial court’s sanction violated both prongs of the *TransAmerican* standard. *TransAmerican* set out a two-part test for determining whether a particular sanction is just. First, there must be a direct nexus among the offensive conduct, the offender, and the sanction imposed. Thus, the trial court must attempt to determine whether the offensive conduct is attributable to counsel only, to the party only, or to both. Here, the sanction was generally “directed against” the alleged abuse, but the record contained no evidence that the sanction was “visited on the offender.” In fact, neither the trial court nor the court of appeals discussed whether counsel or their clients were responsible for the discovery abuse. Therefore, this test was not satisfied.

Under the second test, just sanctions must not be excessive. In other words, a sanction imposed for discovery abuse should be no more severe than necessary to satisfy its legitimate purposes, which include securing compliance with discovery rules, deterring other litigants from similar misconduct, and punishing violators. Here, however, the sanction imposed gave an unwarranted and unfair advantage to plaintiffs. In fact, the trial court failed to consider less stringent measures before settling on the sanction imposed. Moreover, the record contained no explanation why this sanction was appropriate.

The type of discovery sanction imposed here are typically reserved to address a party’s flagrant bad faith or counsel’s callous disregard for the responsibilities of discovery under the rules. The trial court’s application of these more severe sanctions here was error. And this error resulted in harmful error. Indeed, the trial court’s jury instructions, in addition to distorting the facts presented in the late-produced witness statements, established those facts; the jury could not question them. Additionally, plaintiffs’ counsel used the

trial court's instruction in all parts of the trial: during voir dire to question potential jurors on their ability to "accept" the court's instructions, during opening statement to emphasize that the hospital "failed in its duty" by ignoring Hilbrich when he called four times for help, during testimony of their expert to challenge the assertion that Spohn met the standard of care, and during closing argument to assert that Spohn was inviting the jury to "violate the instructions that Her Honor" had given them. For these reasons, the instructions probably caused the rendition of an improper judgment. Accordingly, the supreme court reversed.

B. "Outcry" Exception to the Hearsay Rule

In the Matter of Z.L.B., No. 01-1209, 2003 Tex. LEXIS 29 (Tex. March 13, 2003) (per curiam).

In this case involving a juvenile's sex offenses, the court addressed which party had the burden of producing evidence of an earlier statement when the defendant claims that the prosecution's proffered outcry witness was not the "first person" to whom a sufficient statement was made. The supreme court held that once the prosecution has laid the initial predicate to establish an outcry witness, the burden shifts to the defendant to prove that the child made an earlier statement to another individual.

This case involves a juvenile accused of certain sex offenses. The five-year-old victim, J.M., told his daycare director, Gail Sullivan, that his twelve-year-old brother, Z.L.B. was molesting him. The daycare director then notified Children's Protective Services, who then called the police. The police ultimately secured a confession from Z.L.B.

The Dallas County District Attorneys Office later charged Z.L.B. with engaging in delinquent conduct through sexual contact with a child. At

trial, the prosecutor called Sullivan as a witness. The defense objected to Sullivan's outcry testimony on the basis that J.M. had made an earlier outcry to his mother. The prosecutor agreed that J.M. may have made an earlier statement to his mother, but argued that the mother would not be an appropriate outcry witness because she did nothing to remedy the situation and was adverse to the State. The judge allowed Sullivan to testify, but noted that if the defense could later prove that the statement was not an outcry, then the court would address that development.

The defense then took Sullivan on voir dire. Sullivan testified that she asked J.M. if he had told his mother about the molestation, and that J.M. confirmed that he had. She also asked J.M. whether his mother had done anything in response, to which J.M. replied that she had done nothing. This was the only evidence of an earlier outcry in the record. Ultimately, Z.L.B. was found delinquent, and was assigned to two years' intensive-supervision probation in his grandfather's custody, and to participate in community service and sex offender counseling. He was further prohibited from having contact with J.M. or other young children.

Z.L.B. appealed. The court of appeals reversed his conviction, holding that the trial court erred in permitting Sullivan to testify as the outcry witness. Specifically, the prosecutor should have countered the defense's objection with evidence showing that J.M.'s mother could not be the outcry witness. Thus, the State failed to meet its burden of establishing compliance with the outcry exception.

The Texas Supreme Court disagreed. Instead, the burden in this case lay with the defendant to show that the prosecution's purported outcry witness was incorrect. Stated differently, once the prosecution lays the initial predicate, the burden shifts to the defendant to prove the child made an earlier statement to another person.

Generally, the statements that J.M. made to Sullivan would be inadmissible hearsay at trial.

However, Texas law allows an exception to the hearsay rule. Specifically, the “outcry” exception makes admissible the first report of sexual abuse that the child victim makes to an adult.

Here, the defense’s voir dire examination of Sullivan produced some evidence that J.M. may have told his mother about the abuse, making her the appropriate outcry witness. However, the record failed to include what J.M. actually said to her. Without more information about J.M.’s statement to his mother, the trial court could not have known whether J.M.’s statement was vague or whether it included specific details of the abuse. Accordingly, because the defense failed to introduce evidence that J.M.’s statement to his mother was more than just a general allusion to abuse, the trial court did not abuse its discretion in allowing Sullivan to testify as the outcry witness.

C. Spoliation

***Wal-Mart Stores, Inc. v. Johnson*, No 01-0441, 2003 Tex. LEXIS 62 (Tex. May 22, 2003).**

To decide whether to give a spoliation instruction, a court must determine whether there is a duty to preserve the evidence. This duty arises only when a party knows or reasonably should know that a substantial chance exists that a claim will be filed and that evidence in its possession or control will be material and relevant to that claim. In this case, nothing in the incident would have put Wal-Mart on notice of a substantial chance of a claim. Therefore, the trial court abused its discretion by giving the jury a spoliation instruction.

While stocking merchandise, a Wal-Mart employee accidentally knocked one or more decorative reindeer from a high shelf. The reindeer hit Monroe Johnson’s head and arm, and his arm sustained a small cut. Phyllis McClane, a Wal-Mart supervisor, immediately reported to the scene and conducted an investigation. She took notes, photographed the reindeer, and obtained a

written statement from the employee who caused the accident. She recorded the results of her investigation on a Wal-Mart form entitled “Report of Customer Incident.” She also attached the photo and the employee’s statement, sending copies to the District Manager and claim management personnel. According to the incident report, Johnson neither threatened to sue nor indicated that Wal-Mart should pay any medical costs or other damages. After completing the report, McClane discarded her notes.

Johnson apparently sustained a severe neck injury. Still in pain six months after the incident, Johnson and his wife sued Wal-Mart. About seventeen months after the accident, a surgeon performed a cervical discectomy and fusion on Johnson’s neck.

During discovery, the Johnsons asked whether Wal-Mart still had the reindeer that fell on him. Wal-Mart did not, but offered to provide a “reasonable facsimile.” The Johnsons declined the substitute, and the trial court granted their motion in limine prohibiting Wal-Mart from introducing its “reasonable facsimile” of the reindeer.

At trial, the parties were sharply divided about the composition and weight of the reindeer. Johnson testified that they were made of wood, each weighing as much as ten pounds. Wal-Mart’s store manager countered that the reindeer were made of papier-mache, each weighing only five to eight ounces. Nevertheless, Wal-Mart was unable to produce the reindeer because they had all been sold or, if broken, thrown away. Only the photograph of the reindeer was introduced in evidence, but its quality was too poor to substantiate or rebut either party’s description.

Based on Wal-Mart’s failure to keep the reindeer, the Johnsons requested and obtained a spoliation instruction from the trial court. Ultimately, the jury found Wal-Mart negligent and awarded \$76,000 in damages. The Beaumont Court of Appeals, with one justice dissenting, affirmed.

The supreme court determined that the trial court abused its discretion by submitting the spoliation instruction against Wal-Mart. According to the court, the beginning and end of the spoliation analysis is whether the party had a duty to preserve the evidence in question. This duty arises only when a party knows or reasonably should know that a substantial chance exists that a claim will be filed and that evidence in its possession or control will be material and relevant to that claim.

Under this test, nothing about the investigation or circumstances surrounding this accident would have put Wal-Mart on notice of a substantial chance that Johnson would pursue a claim. Indeed, but for the cut on his arm, Johnson appeared unhurt. Moreover, Johnson never called Wal-Mart to say that he would be filing a claim. Thus, as a foundation for the submission of the spoliation instruction in this case, the Johnsons failed to show that Wal-Mart disposed of the reindeer after it knew, or should have known, that there was a substantial chance there would be litigation and that the reindeer would be material to it.

In addition, the spoliation instruction probably caused the rendition of an improper judgment. If a spoliation instruction should not have been given, the likelihood of harm from the erroneous instruction is substantial, particularly when the case is closely contested, like this one.

D. Discovery of Trade Secrets

***In re Bridgestone/Firestone, Inc.*, No. 01-1165, 2003 Tex. LEXIS 63 (Tex. May 22, 2003).**

In this tire defect case, the skim stock formulas were not discoverable because the plaintiffs failed to show how access to the formulas was necessary for a fair adjudication of their claims.

Plaintiffs in 150 cases alleging Firestone tire tread separations and Ford Explorer roll-overs sought discovery of Firestone's skim stock formulas,

which they concede are trade secrets. Although the plaintiffs contended that they could prove their tires were defective without knowing the skim stock formulas, they nevertheless argued that disclosure of the formulas was necessary for a fair adjudication of their claims. A pre-trial judge ordered production of the formulas and Bridgestone/Firestone, Inc. sought mandamus relief. The court of appeals denied the relief but the supreme court granted it.

The Texas Supreme Court held that just as a party who claims the trade secret privilege cannot do so generally but must provide detailed information in support of the claim, so a party seeking such information cannot merely assert unfairness but must demonstrate with specificity exactly how the lack of information will impair the presentation of the case on the merits to the point that an unjust result is a real, rather than a merely possible, threat. The court held that the plaintiffs' evidence did not meet this standard.

The plaintiffs did not challenge Firestone's assertion that a tire's physical properties can be tested without knowing the recipe for the skim stock compound. Moreover, the plaintiffs stated that even without the skim stock formulas they had presented evidence of a serious, pervasive deficiency with the skim stock manufactured. The court stated that this strongly suggests that the plaintiffs will not be hampered in their proof by not knowing Firestone's skim stock formulas. Also, plaintiffs conceded that tests on a finished tire would be more probative of defect than its skim stock formula because the skim stock components are chemically changed in the vulcanization and curing process so that it may not be possible to know from the recipe of components how the finished tire will perform. In addition, the plaintiffs acknowledged that they have no other skim stock formulas to compare to Firestone's. Finally, the supreme court held that the plaintiffs' evidence of unfairness in this case was essentially no different from the evidence in *In re Continental General Tire, Inc.*, 979 S.W.2d 609 (Tex. 1998), so it should similarly be excluded.

Justice O’Neill, joined by Justice Schneider, concurred in the majority opinion because it failed to fairly treat the plaintiffs’ contentions and offered little useful guidance to the bench and bar. Thus, the concurring opinion expanded upon the holding in *Continental General Tire* and set forth several guiding principles. These principles are: (1) trade secret information is general discoverable when not allowing discovery would significantly impair a party’s ability to establish or rebut a material element of a claim or defense; (2) a party’s ability is significantly impaired when the information is unavailable from any other source and no adequate alternative means of proof exist; (3) discovery is also necessary when the party seeking trade secret information could not knowledgeably cross-examine opposing witnesses without it, or when the party’s experts would be unable to formulate opinions supported by an adequate factual foundation. On the other hand, information that is merely cumulative is not necessary for a fair adjudication.

III. EMPLOYMENT

***Mission Petroleum Carriers, Inc. v. Solomon*, No. 01-0292, 2003 Tex. LEXIS 61 (Tex. May 15, 2003)**

In this case of first impression, the supreme court addressed whether an employer owes a duty to an at-will employee to exercise reasonable care in conducting a mandatory drug test that led to his dismissal. In a plurality opinion, the court refused to recognize a common law duty for employers collecting urine samples because federal Department of Transportation regulations adequately govern how samples are collected and processed, and provide a means by which an employee may challenge a false-positive test result.

Roy Solomon worked as a truck driver for Mission Petroleum Carriers, Inc. After taking a random drug test, Solomon tested positive for marijuana use. After a retest confirmed the initial

finding, Mission terminated Solomon. In response, Solomon sued Mission for defamation, business disparagement, and negligence. More specifically with regard to the negligence claim, Solomon alleged that Mission breached a common law duty by failing to exercise ordinary care in the manner in which it collected his urine specimen for testing.

Before trial, the court granted Mission’s summary judgment motion on the defamation and business disparagement claims. At trial, Solomon argued that Mission’s failure to follow certain Department of Transportation (“DOT”) protocols in collecting and processing his urine sample resulted in the “false positive” test result. Because this test result was permanently placed on his record in compliance with federal DOT regulations, he was unable to find employment as a truck driver.

The jury found that Mission’s negligence proximately caused Solomon’s injuries and awarded him more than \$800,000 in actual damages and \$100,000 in punitive damages. The court of appeals affirmed.

A majority of the supreme court reversed, holding that an employer does not owe its employees a duty of care when it collects urine samples for drug testing pursuant to DOT regulations. To resolve this issue, the court reviewed the DOT regulations, and noted that the regulations impose stringent rules for administering and disclosing drug test results and levy civil penalties for violating the rules. In addition, employees have significant avenues of redress when employers fail or refuse to follow DOT protocol in collecting urine samples. Although the regulations do not create a private cause of action, employees may compel compliance by invoking regulations already in place.

Rather than pursue a regulatory remedy, however, Solomon sought recourse in the courts of Texas. Because these regulations sufficiently protect and balance the interests of both the employer and employee, the court refused to create a new cause of action against employers who conduct their

own urine specimen collection under the DOT regulations.

As part of the court's plurality opinion, four justices agreed that three other bases supported the court's refusal to create this new cause of action. First, these justices pointed to the Court's holding in *SmithKline Beecham Corporation v. Doe*. 903 S.W.2d 347 (Tex. 1995). In *SmithKline Beecham*, the court held that an independent drug testing laboratory, hired by an employer to test prospective employees, did not owe a duty to warn those employees that certain substances, if ingested before a drug test, could cause a positive test result. If an employer conducts its own drug testing then, the *SmithKline Beecham* holding may apply by analogy to protect those employers.

Second, the justices examined the courts of other jurisdictions and noted that no other case had recognized the cause of action asserted by Solomon. And in the only case that was marginally close to these facts, an Ohio intermediate appellate court held that because the plaintiff was an at-will employee, his employer was entitled to discharge him whether or not he was subject to a drug test; therefore, the employer did not owe the employee a duty to perform the test in a competent manner.

As the third and final basis, the justices reviewed the employment-at-will doctrine itself. Although the doctrine was not directly implicated because Solomon did not sue for wrongful discharge, Solomon's complaint concerned the process by which Mission chose to terminate him, and therefore went to the core of at-will employment. After examining the doctrine and Solomon's proposed cause of action, these justices held that the exception proposed here "could quickly swallow the rule." Basically, an employer may discharge an employee for a reason based on incorrect information, even if that information was carelessly gathered. If a duty of care arose every time the harm to an employee transcended the employment agreement, then the employment-at-will doctrine would be undermined because an employer's basis for termination would have to be justified by a reasonable investigation, which

would be contrary to the doctrine. For this reason, Solomon's new cause of action was rejected.

In the concurring opinion penned by Justice Enoch, he agreed with the judgment and the majority's discussion about the federal mandate for drug testing. However, the court's opinion contained an unnecessary discussion of the employment-at-will doctrine that overestimated the damage that would be done to the doctrine if this new cause of action were recognized.

Finally, the concurring opinion by Justice Schneider argued that this new common-law duty would not disrupt the balance in policies underlying the federal regulations on drug testing.

IV. INSURANCE

***Progressive County Mut. Ins. Co. v. Sink*, No. 01-0534, 2003 Tex. LEXIS 57 (Tex. May 15, 2003).**

The Texas standard personal auto policy does not cover a temporary substitute vehicle that is used and taken without the owner's permission or at least a reasonable belief that the owner consented to its use. Here, the insured temporarily "borrowed" a car when his own broke down; he did not have the owner's permission or a reasonable belief that he could use the car. After colliding with another car, the other driver sued his insurer to recover damages. Construing unambiguous policy provisions, the court denied coverage because the "borrowed" car was not used with the owner's permission or a reasonable belief that the owner consented to its use.

Joshua McCauley worked at Alamo Rent-A-Car. While on the job, his pickup truck broke down. Without Alamo's permission or even a reasonable belief that he was entitled to use an Alamo vehicle, McCauley took a rental car in order to retrieve his tools and then try to fix his truck.

While returning to work in the Alamo car, McCauley was involved in an accident with Paul Sink.

Sink sued McCauley and got a favorable judgment that was later discharged when McCauley filed bankruptcy. Sink then sued McCauley's auto insurer, Progressive, under its policy insuring McCauley's truck. Sink claimed that he was a third-party beneficiary of McCauley's policy and sought benefits under that policy's liability coverage.

Although a jury was empaneled on to hear Sink's claim, the trial court dismissed the jury, concluding that there were no fact issues and only a question of law existed. Ultimately, the court held that Alamo's vehicle was not covered by the insurance policy issued for McCauley's truck. On appeal, the Texarkana Court construed the unambiguous policy provisions differently from the trial court and reversed the trial court's judgment.

Based on its own construction of the Progressive policy, the Texas Supreme Court reinstated the trial court's holding, albeit for different reasons. First, the court reviewed the salient provisions of the insurance policy. The liability coverage section of the policy provided that Progressive would pay "damages for bodily injury or property damage for which any covered person becomes legally responsible because of an auto accident." However, the policy contained a broad exclusion precluding coverage for any person who uses a vehicle without a reasonable belief that he or she is entitled to do so. In addition, the policy also stated that the exclusion did not apply to an insured who used "your covered auto," the definition of which included a "temporary substitute" vehicle used while the covered auto was "out of normal use" because of its breakdown, repair, servicing, or loss. The policy did not specifically define "temporary substitute" vehicle.

Distilled to its essence, the supreme court held that McCauley's use of the Alamo vehicle without permission took precedence over the fact that he

was using the Alamo vehicle as a substitute because his own had broken down. Basically, in order to fall under the policy's coverage, McCauley would have had to use the Alamo car *with permission*. Because he did not have permission or a reasonable belief of the owner's consent, the Alamo car was not covered under the policy.

Bolstering its holding, the court cited the definition of a "temporary substitute vehicle" in a former policy approved by the Texas Department of Insurance. This former policy form specifically required that the substitute vehicle be used with the owner's permission. In addition, the court determined that the deletion of this definition in the revised form did not signal a change in the policy's interpretation. Instead, the court held that the previous definition comported with the ordinary, everyday meaning of the words. Finally, the court's interpretation harmonized with the policy's exclusion language.

The three-justice dissenting opinion argued that the policy's plain language contained no qualifying provision requiring that the substitute vehicle be used with its owner's permission or at least a reasonable belief that the owner consented. Moreover, the dissent asserted that the Texas Board of Insurance removed the previously existing definition of "temporary substitute" to broaden coverage.

V. CLAIMS / ACTIONS

A. Intentional Infliction of Emotional Distress – "Extreme and Outrageous" Requirement

***Tiller v. McLure*, No. 02-0136, 2003 Tex. LEXIS 54 (Tex. May 8, 2003) (per curiam).**

Repeated threats, complaints and harassment by a customer to a contractor's wife did not rise to the level of "extreme and outrageous," despite that most of the customer's behavior was done when the contractor was near

death from a brain tumor, and for several months following his death. Accordingly, the evidence was legally insufficient to prove intentional infliction of emotional distress.

Billie Tiller contracted with Bill McLure's company for construction of several self-storage units on Tiller's property. Sometime after the project got under way, Bill McLure was diagnosed with a malignant brain tumor. Soon thereafter, Bill was no longer able to oversee his business. So his wife, Barbara, and their son, Jack, took over the business. Eventually, Bill died, and his wife and son took over full time.

Throughout this time, Barbara McLure was bombarded with complaints and threats from Tiller, although many of his complaints were unfounded. Specifically, from the time he learned of Bill McLure's illness in December 1997 until construction ceased in March 1998, Tiller called Barbara at home approximately sixty times regarding the project. Many of the calls occurred during non-business hours, including late in the evening, over the Christmas holidays, and once on a Sunday morning. In the numerous telephone calls, Tiller complained that on-site workers were unproductive and that the project was behind schedule. He repeatedly threatened to terminate the contracts and take over the project. Tiller's tone during the telephone calls was consistently rude, demanding, and curt. And when he learned that the construction site would be closed for Bill McLure's funeral, Tiller threatened to terminate the contracts, claiming again that the project was behind schedule. Despite repeated requests to do so, Tiller never asserted any of his complaints in writing. The telephone calls required Barbara McLure to make approximately twenty-five unnecessary trips to the construction site.

To top it all off, Tiller consistently slow-paid the McLure account, and refused to pay the final invoice of \$37,000, a portion of which was an improper charge by Tiller on the McLure business trade accounts. Tiller initially refused to meet with Barbara to discuss the final payment, and although he got an additional \$100,000 in

financing, Tiller refused to make any more payments to McLure, telling Barbara that, "Honey, there is not going to be any more money." As a direct result of Tiller's failure to pay the remaining balance due on the contracts, Barbara was forced to liquidate the corporation. Tiller's course of conduct left Barbara nervous, upset, crying, and shaking, and also caused her stomach problems, insomnia, and weight loss.

Barbara sued Tiller for intentional infliction of emotional distress. Although a jury found in her favor, the trial judge granted Tiller's j.n.o.v. motion. On appeal, the El Paso Court reversed, holding that there was some evidence of extreme and outrageous conduct because, despite his knowledge that Barbara was susceptible to emotional distress, Tiller "engaged in a course of conduct that a jury could have reasonably believed to be harassing, intimidating, bullying, and extreme."

Based on its previous opinions, the supreme court reversed and held that Tiller's conduct did not rise to the level of extreme and outrageous conduct. The court also rejected McLure's argument that, viewed as a whole, Tiller's entire course of conduct was extreme and outrageous. Despite that Tiller was often callous and insensitive, his conduct never involved physical threats or any other threats unrelated to the construction contract, nor was there severe verbal abuse or obscene language like that demonstrated in *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605 (Tex. 1999). Moreover, the court determined that Tiller's frequent telephone calls were not excessive on any one day, and were never repeatedly made at inappropriate times. Even though his complaints and threats were self-centered and often unprofessional, they were related to an ordinary, albeit contentious, commercial contract dispute and did not rise to the level required for an intentional infliction claim. Finally, even if Tiller breached the contracts by failing to pay the balance due, this breach of a duty does not, by itself, constitute "extreme and outrageous" conduct. Accordingly, McLure's intentional infliction claim failed as a matter of law.

B. Premises Liability – Duty to Licensee

***Wal-Mart Stores, Inc. v. Miller*, No. 01-1148, 2003 Tex. LEXIS 31 (Tex. March 27, 2003) (per curiam).**

In this premises liability case, the court conducted a legal sufficiency review of whether there was any evidence that a licensee lacked actual knowledge of a dangerous condition on Wal-Mart's premises. After its review, the court held that Wal-Mart owed no duty to the licensee to warn him of certain dangers because the record evidence conclusively established that the licensee perceived and appreciated the dangerous condition.

This is a premises liability case. Brian Miller, an employee of a plumbing company hired to install equipment at a Wal-Mart store — and a licensee — was injured when he tripped and fell while descending a stairway at the store. He sued Wal-Mart under a premises liability theory. In his petition, Miller alleged that Wal-Mart failed to make the stairway safe and failed to warn Miller about the dangerous condition — specifically, a slippery stairway with boxes stacked on it.

The accident happened while Miller was preparing to do plumbing work. Along with a coworker, Miller was escorted by a Wal-Mart employee to a storeroom that had a stairway leading to the water lines and shut-off valve. After entering the storeroom, Miller noticed that Wal-Mart employees in the nearby stockroom were unloading boxes from trucks and placing the boxes on the stairs. Miller led his coworker up the stairs, and on the way up, Miller noticed the stairs were slippery or slick, and that boxes were stacked along both sides of the stairway's middle section. Neither Miller nor his coworker used the stairway's handrail while ascending the stairs.

After looking at the water lines and shut-off valve, Miller and his coworker walked down the stairs. Miller's co-worker, who walked in front,

warned Miller to be careful because the stairs were slippery. Miller testified that he held onto the stairway's one handrail. However, about halfway down the stairs, Miller let go of the handrail to walk around some boxes. Miller's foot got caught on one of the boxes, and he slipped on a step and fell. Miller's coworker did not see the fall, but turned to see Miller after he was already on the ground.

At the trial of the case, the jury found Wal-Mart 70% negligent and Miller 30% negligent and awarded Miller damages. However, the trial court granted Wal-Mart's j.n.o.v. motion, which in part, asserted that Miller's actual knowledge of the dangerous condition barred his recovery. A divided Corpus Christi Court of Appeals, sitting *en banc*, reversed the j.n.o.v., holding that some evidence existed that Miller lacked knowledge of the danger.

The Texas Supreme Court reinstated the j.n.o.v., holding that the record evidence conclusively established that Miller perceived and appreciated the dangerous condition of which he complained. In so doing, the court rejected Miller's two-pronged argument: first, that even though he knew about the wet steps and boxes stacked on the stairway's sides, he did not know the danger that these conditions presented; and second, that he did not notice the stairway was slippery until he was halfway up the stairs, and he did not notice the boxes blocked the handrail until he was going down the stairs.

Basically, the court held that Miller knew and appreciated the danger. First, the evidence was undisputed that Miller knew that boxes blocked his path before he ascended the stairs. In addition, Miller knew about the slippery condition as he ascended the stairs. Finally, Miller, as he descended the stairs, noticed the boxes obstructed his access to the handrail. "He recognized all these factors — the very factors he alleges created a dangerous condition — before he fell on the stairs." Based on this conclusive evidence, the trial court correctly rendered a judgment notwithstanding the verdict.

C. Premises Liability – Causation Requirement

***Marathon Corp. v. Pitzner*, No. 01-0870, 2003 Tex. LEXIS 65 (Tex. May 22, 2003) (per curiam).**

Based on the facts of this case, the evidence of a premises defect was legally insufficient to show proximate cause. Primarily, the incident had no witnesses; not even the plaintiff could remember what happened. In addition, the plaintiff's expert opinions were based on speculation and inference. And the jury could only speculate as to the causation. Therefore, plaintiff's claims failed as a matter of law.

John Pitzner, an air conditioning repairman, sued Marathon, which leased a building where Pitzner was working on the roof. When he fell from the roof, no one saw the fall or what precipitated it. Pitzner's fall occurred on a summer day when the temperature was about ninety-nine degrees. A few hours after Pitzner began his work, the Marathon employees closed the building and left the premises. Pitzner knew the Marathon workers because of his previous service calls to that location. In any event, the Marathon workers did not tell Pitzner they were leaving, nor did Pitzner tell the Marathon employees that he would need access to the inside of the building.

About two hours later, Pitzner was found semi-conscious in the parking lot with severe head injuries. Although he had used a ladder to access the roof of the building, the ladder was gone when Pitzner was found. There was no other access to the roof. Also, a screwdriver with a burnt tip was found near Pitzner's body, but he had no burns or other indications of contact with electricity. Although he survived the fall, he suffered devastating permanent injuries to both the front and back of his head and to his lumbar spine.

At first, the occurrence was reported as an assault. Later, the investigating police officer surmised that Pitzner had fallen from the building. Because

of the severity and extent of his injuries, Pitzner does not recall what happened.

At trial, Marathon argued that Pitzner had become dizzy from the intense heat and from not having any water with him on the roof. Marathon also suggested that Pitzner had been the victim of foul play. On the other hand, Pitzner's witnesses opined that Marathon or the condition of its premises was responsible. An expert witness testified that, based on the injuries to Pitzner's skull and spine, he was traveling backwards when he left the roof, and his upper body struck the ground first. He also said that Pitzner received an electrical shock or "a sensation that surprised him," and that he reeled backwards, tripped over a gas line on the roof, and fell.

The jury found Marathon 100% liable for Pitzner's injuries, and the trial court rendered a judgment for over \$ 7 million, which the Corpus Christi Court of Appeals affirmed. On appeal to the supreme court, Marathon raises a number of issues, but the court only addresses the proximate cause issue — specifically, whether there was legally sufficient evidence to support that premises defects proximately caused Pitzner's injuries.

The court held that there was not legally sufficient evidence. First, the court acknowledged that the air conditioning units on which Pitzner was working were in violation of Dallas City Building and mechanical codes. Pitzner's experts testified that these violations caused Pitzner's fall. Specifically, because there was no electricity shut-off switch on the roof and because the space in which Pitzner was working was half the size specified in the code, Pitzner came into contact with a high voltage line. However, there was no evidence that Pitzner was electrocuted. And all experts agreed that the screwdriver with the burnt tip found near him was not evidence that he was electrocuted. In any event, there was no evidence of whether the power to the units had been shut off inside the building while Pitzner was working on them.

The court found that Pitzner’s experts based their opinions on speculation, not evidence: “The experts’ opinions that Pitzner sustained an electrical shock and fell off the roof because of premises defects pile speculation on speculation and inference on inference.” In order to make their conclusions, Pitzner’s experts had to postulate that:

- (1) the power to the air conditioning units had been shut off inside the building so that it was not possible to start the recharged unit by connecting low-voltage wires,
- (2) therefore, Pitzner must have attempted to reach into the access panel,
- (3) and therefore, he must have come into contact with a high-voltage wire,
- (4) which then shocked him, causing him to step back and stumble over a gas pipeline,
- (5) which then caused him to fall off of the roof,
- (6) all of which would not have happened if there had been an electrical disconnect on the unit or ten to twelve more inches of space between the two air conditioning units.

But there was no proof that the units had been shut off inside the building. Therefore, it was only speculation that Pitzner reached into the access panel, came into contact with a high-voltage wire, was shocked, stumbled back, and fell off of the building. Accordingly, the court reversed the judgment against Marathon.

D. Civil Forfeiture

Hardy v. State of Texas, No. 01-0779, 2003 Tex. LEXIS 40 (Tex. April 3, 2003).

The state must establish probable cause before initiating a forfeiture proceeding under article 18.18 of the Code of Criminal Procedure. The person found in possession of the seized property must appear at a show cause hearing and prove, by a preponderance of the evidence, that those machines are not gambling devices. Moreover, gift certificates, which reward the player with cash, even if that cash is only used to play another machine, are not excluded from the definition of gambling devices in Texas Penal Code section 47.01(4)(B).

This forfeiture case involved eight-liner machines that operate at least partially by chance. The object is to win tickets redeemable for cash or prizes. Winnings on the eight-liners are determined by matching symbols in one of eight lines- three horizontal, three vertical, and two diagonal. The tickets awarded are redeemable for Wal-Mart or Sam’s Club gifts certificates or for credits to play another machine. To exchange the tickets for re-play, the player had to present the tickets to an attendant who would then place a corresponding amount of money in another machine.

This dispute arose when the State executed a search warrant at Game Time Amusements and seized twenty eight-liner machines and gift certificates owned by the Hardys. The State sought forfeiture of these items under Texas Code of Criminal Procedure article 18.18. Following the seizure, the trial court held a hearing for the owners of the machines to show cause why the seized property should not be destroyed and the proceeds forfeited. At the conclusion of the hearing, the court found that the eight-liners were gambling devices and that the currency, gift certificates, were gambling paraphernalia or

proceeds. Thus, the machines and gift certificates were seized and forfeited to the state.

The Hardys appealed asserting that the evidence was factually and legally insufficient. The court of appeals affirmed the trial court's order and held that "the State bears an initial burden in an article 18.18 forfeiture hearing to show that the seized property is contraband subject to forfeiture. Once the state has met this burden, then the burden shifts to the claimant to prove that the seized property is not subject to forfeiture. The court held that the Hardys did not meet this burden and affirmed the trial court's decision. The Texas Supreme Court affirmed the court of appeals' judgment but disagreed that the State bears an initial burden at the forfeiture hearing.

First, the supreme court held that once the State has established probable cause to initiate a forfeiture proceeding, it has met its burden under article 18.18. At that point, the burden shifts to the claimant to prove that the property is not subject to forfeiture. Therefore, the burden at the show cause hearing is on the claimant not the State. Thus, the Hardys bore the burden at the hearing.

Regarding the eight-liners, the Hardys did not contend that they were not gambling devices under the general definition. Instead, they argued that the eight-liners were encompassed by the exclusion to the definition of a gambling device. Texas Penal Code section 47.01(4)(B) excludes from the definition of gambling devices, machines that reward players "exclusively with non-cash merchandise prizes, toys, or novelties, or a representation of value redeemable for those items." The court held that if the reward operates in the same manner as legal tender in a retail establishment, it does not qualify as a non-cash merchandise prize, toy or novelty item. The machines at issue did not award prizes, toys or novelties, but awarded tickets redeemable for gift certificates or cash to play other machines. The court held that the tickets operated in the same manner as legal tender so the exclusion did not apply. Moreover, the court held that once cash is awarded, it does not matter whether the player

deposited the cash directly into the machine or whether an attendant performed the task. If tickets are exchanged for cash, regardless of whether that cash is used to play another machine, the exclusion does not apply. Nevertheless, the court left open the possibility that additional play through some other method may not violate section 47.01(4).

***State of Texas v. One Super Cherry Master Video8-Liner Machine*, No. 01-0673, 2003 Tex. LEXIS 39 (Tex. April 3, 2003).**

Because this case involved eight-liner machines redeemable for cash used for additional play or gift certificates, the court applied its holding in *Hardy* and held that the machines and prizes should have been forfeited to the State.

E. Assignment of Claims

***Global Drywall Sys., Inc. v. Coronado Paint Co., Inc.*, No. 01-0535, 2003 Tex. LEXIS 18 (Tex. Feb. 27, 2003).**

The petition for review in this case was withdrawn, but Justice Enoch wrote a dissent in which Justices O'Neill and Schneider joined. The dissent stated that the assignment at issue was valid because (1) it was not a Mary Carter agreement because there was no "sham of adversity," and (2) it did not involve a joint tortfeasor as in International Proteins (the court refused to extend the holding in International Proteins to "joint wrongdoers").

In this case, the plaintiff, Bridgepoint, assigned all its causes of action against the non-settling defendants to Global, one of the three original defendants. Bridgepoint actually paid for the settlement, and Global realigned itself before trial as a co-plaintiff. Bridgepoint retained no financial stake in the outcome of the trial.

The court of appeals held that the assignment was void because it was an improper Mary Carter agreement. The court also held that the

assignment was void under the holding in *International Proteins Corp. v. Ralston-Purina Co.*, 744 S.W.2d 932 (Tex. 1988) in which the court held that a joint tortfeasor cannot take an assignment of a plaintiff's claim as part of a settlement agreement with the plaintiff and then prosecute that claim against a joint tortfeasor.

The dissenting opinion in the Texas Supreme Court disagreed with the court of appeals decision. It stated that the assignment at issue was not a Mary Carter agreement because the jury was aware that Global had a financial interest in holding the other two defendants liable, and it could assess Global's testimony accordingly. Therefore, there was no "sham of adversity" so the policies behind the prohibition of Mary Carter agreements were not violated in this case.

Moreover, the dissenting opinion stated that the holding in *International Proteins* did not apply because Global was not a joint tortfeasor. The dissenters refused to extend the holding of *International Proteins* to "joint wrongdoers."

VI. SOVEREIGN/GOVERNMENTAL IMMUNITY

A. Sovereign Immunity – Patient's Bill of Right

***Wichita Falls State Hosp. v. Taylor*, No. 01-0491, 2003 Tex. LEXIS 22 (Tex. March 6, 2003).**

In this case of first impression, the court addressed whether the Texas Legislature intended to waive the sovereign immunity of state psychiatric agencies who violated the "patient's bill of rights." The court held that the statutes contained in the patient's bill of right neither expressly nor impliedly authorized a waiver of sovereign immunity.

Terry Taylor was involuntarily committed to the Wichita Falls State Hospital for severe mental illness. Four days later, Taylor was discharged.

He returned home and committed suicide. His wife, Deborah Taylor, sued the hospital and Taylor's treating psychiatrist for wrongful death and survival. She alleged that defendants failed to properly diagnose and treat her husband's mental illness. Central to this suit, Taylor alleged that these acts of negligence violated the patient's bill of rights under Texas Health and Safety Code section 321.002.

The hospital moved to dismiss Taylor's suit based on sovereign immunity. In response, Taylor argued that the Legislature unambiguously waived the hospital's immunity by enacting section 321.003, which provides that a person who has been harmed by a violation of the patient's bill of rights "may sue" for damages. The trial court denied the hospital's motion to dismiss. The hospital appealed, but a divided Waco Court of Appeals affirmed and held that the Legislature clearly and unambiguously waived immunity from suit against state mental health facilities for violating the patient's bill of rights.

The Texas Supreme Court disagreed, holding that the Legislature's enactment of the patient's bill of rights was not intended to waive the sovereign immunity of a state mental health facility. Although a related statute expressly included state mental facilities as part of the institutions to which the bill of rights applied, the statutes contained no language waiving immunity, or even implying such a waiver. Accordingly, the court held that state mental facilities retain their sovereign immunity from suits alleging claims under the patient's bill of rights.

Sovereign immunity refers to the State's immunity from suit and liability. To waive immunity, the sovereign must consent to the waiver. In Texas, consent is usually found in a constitutional provision or legislative enactment. For the legislature to waive sovereign immunity, the statute must have "clear and unambiguous language" waiving the State's immunity.

Although some statutes contain language that eliminates all doubt as to the Legislature's intent to waive immunity, the statutes here have no such

language. Deborah Taylor argued that the Legislature expressly waived the hospital's sovereign immunity by providing that a patient "may sue" a "mental health facility" for damages and other relief caused by those violations. Taylor also argued that immunity was waived because the term "mental health facility" included the Texas Department of Mental Health and Mental Retardation. However, because these statutes did not have explicit language showing the Legislature's intent to waive sovereign immunity, the supreme court disagreed.

The court then turned its attention to whether the statutes waived immunity by necessary implication. Once again, the court found no waiver for several reasons. First, the patient's bill of rights achieves its stated objective of regulating private treatment facilities even if suit against the State is barred by sovereign immunity. Second, nothing in the patient's bill of rights requires joinder of the State or its agencies. Finally, the court noted that in many statutes waiving sovereign immunity explicitly, the Legislature appends a measure designed to protect the public treasury from the consequences of that waiver. Such was not the case here.

***Austin State Hosp. v. Fiske*, No. 01-0395, 2003 Tex. LEXIS 21 (Tex. March 6, 2003) (per curiam).**

This case mirrors the claims and issues as those in *Taylor, supra*. Here, plaintiffs Debbie Fiske and Raymond Rodriguez sued the Austin State Hospital, alleging that it negligently allowed Christopher Roy Rodriguez to commit suicide while in its care.

Applying the reasoning and analysis it used in *Taylor*, the court held that the Legislature's enactment of the patient's bill of rights was not intended to waive a state mental health facility's sovereign immunity.

***Central Counties Ctr. for Mental Health and Mental Retardation Servs. v. Rodriguez*, No. 01-0402, 2003 Tex. LEXIS 20 (Tex. March 6, 2003) (per curiam).**

Like *Fiske*, this case resembles the claims and issues in *Taylor*. In this case, Karen Rodriguez sued Central Counties Hospital. She alleged that the hospital negligently allowed a caseworker to sexually exploit her during outpatient treatment.

Relying on *Taylor*, the court again held that the Legislature's enactment of the patient's bill of rights was not intended to waive a state mental health facility's sovereign immunity.

B. Sovereign Immunity – "Waiver by Conduct" Exception

***Catalina Dev't, Inc. v. County of El Paso*, No. 02-0299, 2003 Tex. LEXIS 55 (Tex. May 8, 2003).**

A county does not waive its governmental immunity from suit when it forms a contract with a private citizen for the sale of real estate. Thus, contract formation alone is insufficient to waive governmental immunity from suit.

This case involves the failed sale of county-owned real estate to a private citizen. In 1993, the El Paso County Commissioners Court passed a motion to sell a 381.90-acre parcel of county land by sealed bids. Gregory Collins and Catalina Development, Inc. submitted the winning bid to the County. Along with the bid, Collins gave over a \$ 5,000 earnest money check. In late 1994, a majority of the commissioners court voted to accept Collins's bid. The County deposited the earnest money check, and Collins deposited \$ 2,554,961.72 with a title company to obtain title to the land.

Although the commissioners court placed a motion on the November 30th agenda authorizing the county judge to sign the deed over to Collins, several attempts to approve the sale fell through. First, the court tabled the motion for one week. Later, the motion failed and was again tabled. On December 14th, the commissioners voted to table the motion for six weeks. That same day, an

assistant county attorney sent Collins a warranty deed and affidavit, which were to be used to close the transaction. Collins signed the documents, and the county attorney placed the motion authorizing the deed's execution on the agenda for the court's next meeting. However, before that meeting took place, two commissioners and the county judge-elect filed suit to enjoin the court from approving the sale and signing the deed over to Collins. The district court issued a temporary restraining order on December 20th. When the newly elected commissioners court took office in early 1995, they refused to sign the property over to Collins.

Collins sued El Paso County for breach of contract and specific performance. However, the trial court granted the County's motion for summary judgment based on its immunity from suit. The El Paso Court of Appeals affirmed.

The supreme court also affirmed. The issue confronting the court was whether the County's conduct fulfilled the "waiver-by-conduct" exception to the sovereign-immunity rule. In this case, the county (1) solicited bids for buying a parcel of land, (2) accepted the highest bid, (3) deposited the tendered earnest money, and (4) sent the purported buyer a warranty deed and affidavit to be used to close the transaction. After this conduct, the county delayed taking action on the authorization to sign the deed, and a newly elected commissioners court refused to approve the sale. According to the court, this conduct is insufficient to waive the County's immunity from suit.

In addition, the court distinguished the holding in *Federal Sign v. Texas Southern University*, 951 S.W.2d 401 (Tex. 1997). In that case, the State was *the purchaser* of the commercial goods, but here El Paso County is *the seller* of real property. As opposed to the *Federal Sign* plaintiff, Collins was not trying to collect money on goods already conveyed. Instead, he wanted to force a sale that had not yet taken place. Although the court in *Federal Sign* suggested that some circumstances might warrant recognizing a waiver by conduct, the equitable basis for such a waiver here did not exist under these facts. Indeed, the facts

presented here illustrated a fundamental reason why immunity exists – to prevent governmental entities from being bound by the policy decisions of their predecessors. El Paso County, upon an electoral change in the commissioners court, determined that selling the property to Collins was a bad decision. Rather than lock the County's residents into a bad contract, the court acted within its discretion to protect the perceived interests of the public by rejecting the contract. In doing so, the County did not profit unfairly at Collins's expense.

In his dissent, Justice Enoch continues his disagreement with the court, which he believes is misleading the public by refusing to disavow its acknowledgment that a governmental unit can waive its immunity by conduct. The court's position also contradicts the majority of states on this issue. Essentially, both Collins and the County did everything it needed to do in order to close this sale. The only thing missing was the approval of the commissioners court, which it refused to give. Nevertheless, the County cashed and used the \$ 5,000 earnest money deposit, even though it had no intention of executing the warranty deed. And despite that the County eventually returned Collins' earnest money, it did so years later and after the suit had progressed to the summary judgment stage. According to the dissent, these facts warrant the waiver-by-conduct exception.

VII. AGENCY LAW

***Latch v. Gratty, Inc.*, No. 01-0773, 2003 Tex. LEXIS 17 (Tex. Feb. 27, 2003) (per curiam).**

The mere fact that Latch, the president and part owner of Fun Motors, signed an agreement without indicating his agency is no evidence that he acted individually for purposes of establishing his tortious interference with contract. Moreover, an agent cannot be held to have acted against the principal's interests unless the principal has objected.

On November 6, 1996, Louis Latch, as president and part owner of Fun Motors of Longview, Inc., signed an Asset Purchase Agreement with Gratty, Inc. conditioned upon Gratty obtaining financing and securing Kawasaki's approval to operate a dealership. The parties executed a second agreement on March 4, 1997. On April 1, 1997, Latch entered into an agreement to sell the Kawasaki franchise and assets to a different buyer, Zhorne. This agreement was also conditioned upon Zhorne's obtaining approval from Kawasaki to operate a dealership. The agreement did not mention Fun Motors by name, but was signed by Latch without any indication that he was anyone's agent. When the Texas Department of Transportation terminated Fun Motors' franchise, Gratty filed suit against Fun Motors for breach of contract and DTPA violations and sued Latch for tortious interference with contract.

The trial court determined that Latch's conduct interfered with the Gratty-Fun Motors contract. The court rendered judgment that Gratty take nothing against Fun Motors but awarded tort damages on the claims against Latch. The court of appeals upheld the trial court's finding of interference holding that Latch was acting in his individual capacity when he interfered with the Fun Motors-Gratty contract by signing the contract with Zhorne.

In the Texas Supreme Court, Latch argued that there was no evidence to support the trial court's finding of interference because there was no evidence either that he was acting solely for his own personal interests or that Fun Motors objected to his actions. The supreme court agreed and reversed the court of appeals' judgment and rendered judgment that Gratty take nothing. The court held that the mere fact that Latch did not indicate his agency when he signed the agreement was no evidence that he acted individually. An agent need not disclose his or her principal's identity in order to act on behalf of that principal. Rather an agent who signs a contract on behalf of an undisclosed principal is liable on the contract. Thus, because there is no evidence that Latch was

not acting as Fun Motors' agent, Gratty, Inc. cannot recover unless it can show Latch acted "so contrary to the corporation's interest that his or her actions could only have been motivated by personal interest." Because there is no evidence that Latch's actions were against the corporation's interest, Gratty was not entitled to judgment.

Moreover, an agent cannot be held to have acted against the principal's interests unless the principal has objected. But even such a corporate complaint is not conclusive evidence that the agent was acting for his or her personal interests. Nevertheless, Gratty produced no evidence that Fun Motors complained of Latch's conduct, and the trial court made no such finding. Thus the judgment was improper.

VIII. CONSTRUCTION LAW

A. Contract Liens under Chapter 53 of the Texas Property Code

Page v. Structural Wood Components, Inc., No. 01-1122, 2003 Tex. LEXIS 42 (Tex. April 3, 2003).

Under the Texas Property Code section 53.103, requiring a subcontractor to file an affidavit claiming a lien not later than the 30th day after the work is completed, "work" is defined in relation to the particular contract under which the subcontractor was hired. Therefore, when an owner terminates a contract with a general contractor, any subcontractors who were hired by the fired general contractor must file their liens within thirty days of termination regardless of when the work is completed by the new general contractor.

In this construction case, Page hired Sepolio as a general contractor. Sepolio hired several subcontractors including Structural Wood Components, Inc. Structural Wood provided labor and materials to Sepolio, and Page made periodic payments to Sepolio. But on April 14,

1998, before the project was finished, Page terminated the contract with Sepolio and hired new contractors to finish the work. Because Sepolio failed to pay in full for Structural Wood's labor and materials, Structural Wood filed an affidavit claiming a lien on the property on May 15, 1998. The new contractors completed the project on July 21, 1998.

Structural Wood filed suit to foreclose on its lien. The trial court held Sepolio and Page jointly and severally liable to Structural Wood and ordered foreclosure of the lien on Page's property. Page appealed and the court of appeals reformed the judgment to eliminate the foreclosure order, holding that no evidence supported the trial court's finding that Page had failed to retain ten percent of the contract price as required by section 53.101 of the Property Code. However, based on section 53.103, the court of appeals upheld the personal judgment against Page because Structural Wood would still be entitled to a lien on retained funds as long as the lien affidavit was timely filed. Under 53.103, to be timely filed, the affidavit had to be filed within thirty days of the date "after the work is completed." Because the work on the project was completed on July 21, 1998 and Structural Wood filed its affidavit on May 15, 1998, the court held that it was timely filed.

The issue in the supreme court was which date to use to establish when work is completed for purposes of satisfaction of the statute. The court held that when a contract is terminated or abandoned, the lien affidavit must be filed within thirty days of the contract's termination because the obligation is tied to the particular contract under which the subcontractor was bound. Because Structural Wood filed its affidavit thirty-one days after Page terminated the contract with Sepolio, it did not satisfy the lien statute. Thus, the court reversed the judgment of the court of appeals and rendered a take-nothing judgment against Page.

Justice Enoch wrote a dissenting opinion in which Justice Jefferson joined. This dissenting opinion asserted that the proper date is when the work

contemplated under the original contract was actually completed, July 21, 1998. The dissent criticizes the majority opinion for taking an unambiguous, ordinary phrase, and altering its meaning into a legal term of art. It reiterates that mechanics and materialmen's lien statutes are meant to protect the subcontractor, not the general contractor. It mentions that placing the burden of risk on the subcontractor to know if the contract has been terminated creates the potential for an unscrupulous owner to terminate the contract without notice to the subcontractor, let the thirty days run, and then contract the work out to someone else to finish, thereby relieving himself of the otherwise valid encumbrance.

B. Fund-trapping Liens

Page v. Marton Roofing, Inc., No. 02-0845, 2003 Tex. LEXIS 41 (Tex. April 3, 2003).

In this companion case to Page v. Structural Wood Components, the supreme court reiterated its holding that under Texas Property Code section 53.01, work must be defined in relation to a particular contract. In order to perfect a statutory retainage lien, a subcontractor must file its lien affidavit within thirty days of the time that the original contract is completed, terminated or abandoned. Moreover, a subcontractor cannot "trap" funds held by the owner that should be paid to a new contractor who has replaced the contractor who originally hired the subcontractor.

Like Structural Wood, Marton Roofing was a subcontractor hired by Sepolio and not paid after Sepolio was terminated. Because Marton Roofing filed its lien affidavit more than thirty days after termination, the supreme court reversed the judgment against Page. Moreover, Marton Roofing attempted to perfect a fund-trapping lien under Texas Property Code section 53.081(a) and 53.084(b). Section 53.081(a) states that an owner who receives notice from a subcontractor who has not been paid, "may withhold from payments to

the original contractor an amount necessary to pay the claim for which he receives notice.” In addition, 53.084(b) states that if the owner fails to withhold funds from the original contractor, then the owner is liable and the owner’s property is subject to a claim for any money paid to the original contractor after the owner was authorized to withhold funds. Marton Roofing argues that it is entitled to a lien on Page’s property because Page paid the new contractor after it received notice of its claims. The supreme court rejected this argument because the statute only applies to the original contractor, Sepolio. Thus, Page was not authorized to withhold funds from the new contractor.

Justice Enoch, joined by Justice Jefferson, dissented to the part of the opinion regarding the court’s prior holding in the *Structural Wood* case but concurred with the holding regarding the fund-trapping lien.

IX. MUNICIPAL UTILITY DISTRICTS

***N.P. Inc. v. Turboff*, No. 01-1167, 2003 Tex. LEXIS 66 (Tex. May 22, 2003).**

The holder of title to utility facilities is entitled to the construction costs reimbursement for those facilities from the Municipal Utility District that agreed to buy the facilities when constructed.

Developer, Turboff, entered into a contract with Municipal Utility District No. 36 to construct water, sewer and drainage facilities on a tract of land Turboff was developing in Houston. Under the terms of the contract, Turboff promised to build the utility facilities according to MUD approved plans. Turboff also agreed to convey the facilities to the MUD free of all liens. But before the utilities were completed and before conveyance to the MUD, Turboff lost title to the property when he defaulted on his loan and the bank foreclosed. The bank then sold the property including the utilities to another developer, N.P., Inc. N.P., Inc. then entered into its own contract with the MUD. Turboff then sued N.P., Inc.

seeking a declaratory judgment that Turboff, not N.P., Inc., was entitled to the MUD payments according to the terms of Turboff’s contract and forcing N.P., Inc. to convey title to the facilities to the MUD.

The trial court held that although N.P., Inc. owned the existing facilities, Turboff owned all sums due from the MUD. But the trial court held that Turboff had no right to compel N.P., Inc. to convey the facilities to the MUD. Both parties appealed and the court of appeals affirmed.

The supreme court reversed the court of appeals’ decision regarding the proper owner of the funds from the MUD and affirmed the court’s decision regarding Turboff’s ability to compel N.P., Inc. to convey the facilities. Regarding entitlement to the MUD funds, the supreme court held that the right to reimbursement of the construction costs passed to the current property owner and did not remain with the original developer, Turboff. Therefore, because N.P., Inc. held a property right and title to the utility facilities, N.P., Inc. was entitled to the MUD proceeds.

The content of a man’s character is not where he stands in times of comfort and convenience, but where he stands at times of challenge and controversy.

Martin Luther King, Jr.

Marcy Hogan Greer, Fulbright & Jaworski L.L.P., Austin
Kendyl Hanks Darby, Haynes and Boone, LLP, Dallas

ARBITRATION/APPELLATE JURISDICTION/WAIVER

***Cargill Ferrous International v. Sea Phoenix MV, et al.*, 325 F.3d 695 (5th Cir. 2003).**

Cargill Ferrous International (“Cargill”) and Western Bulk Carriers (“Western”) entered into a voyage charter, which included a mandatory arbitration clause, to transport Cargill’s steel coils. When the steel coils rusted on board the Sea Phoenix, Cargill sued Western, the owners and operators of the Sea Phoenix (“Owners”), and the Sea Phoenix *in rem*. The district court referred Cargill’s claims against Western to arbitration based on the voyage charter, but denied the Owners’ motion to compel arbitration and to stay litigation on the ground that the Owners were not parties to the voyage charter. The Owners appealed the district court’s denial of their motion to compel arbitration and to stay litigation. Cargill cross-appealed the district court’s order compelling arbitration between Cargill and Western. The Fifth Circuit reversed in part, vacated in part and dismissed the appeal in part.

With regard to the Owners’ appeal, Cargill argued that it was not bound to arbitrate with the Owners because the bill of lading, which expressly incorporated the charter’s arbitration clause, did not specifically identify Cargill as the charterer. Rejecting this argument, the Court held that the incorporation of the charter’s arbitration clause was sufficient to bind Cargill to arbitrate with the Owners. The Court distinguished *Cargill, Inc. v. Golden Chariot MV*, 31 F.3d 316 (5th Cir. 1994), which held that when cargo is sold to a third party that is not a party to the original voyage charter, the bill of lading becomes the contract of carriage, and if the charterer is not specifically named it is not incorporated. In this case, there was no third party: where the bills of lading remain in the hands of a party to the voyage charter, the *Golden*

Chariot holding does not apply. The Court also held that the Owners had not waived their right to compel arbitration by participating in the litigation and failing to press an interlocutory appeal. The dispositive question was not whether a party brought immediate appeal, but whether participation in the litigation was prejudicial to the other party. On the facts, the Court rejected the contention that proceeding with litigation prejudiced Cargill. Thus, the Court reversed the district court’s denial of the Owners’ motion to compel arbitration and vacated the district court’s damages judgment against the Owners.

Addressing Cargill’s cross appeal, the Court held that until the district court entered a final judgment as between Cargill and Western, the Court had no appellate jurisdiction under Federal Rule of Appellate Procedure 54(b) or the Federal Arbitration Act to consider the merits of the district court’s order compelling arbitration. Thus, the Court dismissed Cargill’s cross-appeal for lack of appellate jurisdiction.

Judge Emilio Garza concurred in part and dissented in part, disagreeing with the Court’s opinion on the questions of whether the bills of lading incorporated the arbitration agreement such that the Owners could compel Cargill to arbitrate, and whether the Court had subject matter jurisdiction under Federal Rule of Appellate Procedure 54(b) to determine whether it had subject matter jurisdiction under the Federal Arbitration Act.

CLASS ACTION/STANDING

***Grant v. Gilbert*, 324 F.3d 383 (5th Cir. 2003).**

Grant, a mentally retarded nursing home resident, sued three Texas state officers in their official capacities, alleging failure to adequately notify him of his community placement alternatives to

nursing home care options (or waiver programs), as required by the Nursing Home Reform Amendments, 42 U.S.C. § 1396r *et seq.* Grant claimed the notification he received was vague, and that pursuant to 42 U.S.C. § 1396n *et seq.*, the state was also required to provide him with this notification upon initially finding him eligible for nursing home care, which it did not. He sought relief in the form of information regarding community-based placements, a declaration of retroactive eligibility, and an injunction requiring the state to provide access to waiver services. Grant also moved for certification of a class of similarly situated individuals. The district court found that Grant lacked standing to bring his informational claims because he had never applied to the community-based waiver program. The district court further dismissed the case without prejudice as to re-filing if Grant applied for and was denied waiver services. The district court also determined that Grant had received adequate notice and denied class certification without reaching the merits. Prior to oral argument, Grant applied for and began receiving waiver services. On appeal, Grant conceded that because of his receipt of services, his individual claims of injury were moot, but asserted continued standing as a class representative for the class claims.

The Fifth Circuit first addressed whether Grant possessed standing on his informational claims when he sued. Stating that the district court's merits review of the adequacy of the information provided to Grant by letters from the state was "premature," the circuit court found that the district court erred in finding that Grant did not have individual standing to bring his 42 U.S.C. § 1396r informational claim at the time he brought suit. The Fifth Circuit found that in asserting he was unable to obtain information required to be disclosed by statute, Grant had sufficiently alleged an "injury in fact" that was "concrete and particularized" for his 42 U.S.C. § 1396r claim. The Fifth Circuit further found he was able to establish "continuing, present, adverse effects" sufficient to meet the "actual or imminent" standing requirement. Based upon the language of the statute, the Fifth Circuit found that Grant

did not have standing to bring his second informational claim at the time he brought suit. With regard to his claims for declaratory and injunctive relief, the Fifth Circuit determined that, because he could still be admitted to a waiver program at the time he sued, Grant did not suffer an injury redressable by a judicial determination of eligibility or an injunction requiring the state to provide him access to the program, and therefore did not have standing to bring these claims.

Moving to this issue of whether Grant could serve as a class representative for the based upon the one informational claim that he had standing to bring, the Fifth Circuit found that this issue was moot in light of the expiration of Grant's informational claim. Grant argued that as long as a plaintiff whose claims had expired had live claims at the time his class certification was denied, he could continue to litigate the class certification issue. Citing to *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980), which was relied upon by Grant, the circuit court found that Grant did not possess the required "personal stake" in certifying the class. The Fifth Circuit based its determination upon the fact that Grant never had standing to seek the declaratory and injunctive relief sought by the class, which it equated to never having moved for class certification on those issues. Grant's lack of standing to bring the "full claims" of the class negated his ability to serve as a class representative. Because Grant never had standing to bring the class claims, the Fifth Circuit found those claims were also moot and dismissed the entire appeal.

CLASS CERTIFICATION

***McManus v. Fleetwood Enterprises, Inc.*, 320 F.3d 545 (5th Cir. 2003).**

At issue in this case was the propriety of the district court's certification of a class of all persons who purchased certain motor homes. Plaintiffs alleged that the manufacturer, Fleetwood, had misrepresented the towing capacity of the motor homes. A door tag on the motor homes stated that it could tow a vehicle

weighing 3,500 pounds, and it further stated that a buyer should “consult owner’s manual for weighing instructions and towing guidelines.” As it turned out, the motor homes could safely tow a 3,500 pound vehicle only with the installation of supplemental brakes. Plaintiffs claimed this was a misrepresentation because stating the motor home could safely *tow* 3,500 pounds amounted to a representation that it could safely *brake* while towing 3,500 pounds. Fleetwood took the position that the door tag was accurate because it did not represent that the motor home could safely brake while towing that weight. The district court certified both a 23(b)(2) class (seeking injunctive relief to compel Fleetwood to provide each class member with information concerning the towing limitations, as well as supplemental braking equipment), and a 23(b)(3) class for money damages.

Fleetwood’s primary argument against class certification was that the class members’ claims were too dissimilar for class treatment, particularly with respect to their individual reliance upon the representations as to the door tag. Although the Fifth Circuit noted that the argument could be construed as a challenge to the Rule 23(a) requirements of commonality and typicality, Fleetwood did not challenge the district court’s conclusion that the 23(a) factors were met. The Court stated that the thresholds for commonality and typicality “are not high,” and that the same argument would apply to support an assertion that the “more exacting demands” of Rule 23(b)(3) and Rule 23(b)(2) had not been met.

Under Rule 23(b)(3), a district court may certify a class where it determines “that the question of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” Fleetwood asserted that because each of the plaintiffs’ claims requires a showing of reliance on the alleged misrepresentation, the district court abused its discretion in certifying a 23(b)(3) class. The plaintiffs claimed that the district court could

presume reliance because the same allegedly misleading information was given to all members of the class.

Rejecting earlier Texas appellate authorities indicating that they should “certify now and worry later” in the class action context, the Court cited the Texas Supreme Court cases of *Southwestern Refining v. Bernal*, 22 S.W.3d 425, 435 (Tex. 2000), and *Henry Schein, Inc. v. Stromboe*, 46 Tex. Sup. Ct. J. 103, 2002 WL 31426407 at *13 (Oct. 31, 2002), for the proposition that reliance may not be presumed under Texas law. *Id.* at 549. Accordingly, it found that the reliance issues were fatal to the 23(b)(3) class for the claims of fraudulent concealment, negligent misrepresentation and breach of express warranty, and the district court therefore abused its discretion in certifying a 23(b)(3) class on this basis. However, the Court affirmed the certification of the implied warranty claim because the relevant statute does not require a showing of reliance.

Finally, the Court rejected the lower court’s finding that a 23(b)(2) class action for injunctive relief was appropriate under the circumstances. First, the Court noted that the ordinary relief for breach of warranty is an award of money damages, not injunctive relief. Second, Fleetwood did not have an ongoing relationship with the purchasers of its motor homes. Third, Fleetwood would have had to provide *individual* relief, based on the model of motor home at issue, rather than a “uniform group remedy” as would be appropriate for a 23(b)(2) class.

***O’Sullivan v. Maynard*, 319 F.3d 732 (5th Cir. 2003).**

In another review of a class certification order, the Fifth Circuit reversed two lower courts’ certifications of classes of borrowers who had obtained different types of mortgage loans from Countrywide Home Loans, Inc. The two class cases brought against Countrywide were consolidated on appeal. The borrowers alleged that the lender had accepted kickbacks on document preparation fees in violation of the Real

Estate Settlement Procedures Act (RESPA). RESPA prohibits fee splitting for the rendering of a real estate service “other than for services actually performed.” Countrywide relied on this exception, contending that it was only reimbursed by the law firms for the reasonable value of services it actually provided to the law firms in connection with loan document preparation. The borrowers further contended that such conduct violated the provision of the Texas Unauthorized Practice of Law (UPL) statute prohibiting fee splitting with non-lawyers. The lower courts found Rule 23(b)(3) predominance existed concerning whether “the overall practice” of splitting the fees associated with loan document preparation violates RESPA, and certified the classes. Countrywide objected that significant loan-to-loan variations in the amount and type of work performed required an individual analysis of each transaction to determine the reasonableness of the reimbursed fee. The Fifth Circuit agreed, and while it found that the presence of the question whether the overall practice or policy of the reimbursements between the law firms and the lender violated the statute was indeed a common link, it rejected the notion that this was sufficient to satisfy predominance under Rule 23(b)(3). The Court concluded that certification was improper “because RESPA § 8 liability is established by making individual comparisons of compensation to actual services, not by presuming fire where there is smoke” The Court also found that the district courts had abused their discretion in certifying classes for the UPL claims, because although the propriety of the practices at issue for those claims could be determined on a class wide basis, the calculation of damages could not.

CLASS CERTIFICATION/RICO

Sandwich Chef of Texas, Inc. v. Reliance Nat’l Indemnity Ins. Co., 319 F.3d 205 (5th Cir. 2003).

In this case, the district court certified a nationwide Rule 23(b)(3) class in a RICO fraud action based upon alleged overcharges for workers’ compensation insurance premiums. The defendants took, and the Fifth Circuit accepted, an

interlocutory appeal pursuant to Rule 23(f), alleging that the district court abused its discretion in certifying a class because individual issues of reliance and causation defeated Rule 23(b)(3) predominance.

After addressing the issue of what evidence the court could consider upon appeal, the Fifth Circuit reviewed the merits, and reversed the district court’s class certification. Reviewing the district court’s class certification decision for abuse of discretion, the Fifth Circuit determined that the trial court would be required to try the issues of causation and reliance as to each plaintiff, thus precluding class certification. The trial court could not try these claims as a class action because defendants would be entitled to show individual defenses disproving each plaintiff’s reliance. The Fifth Circuit further rejected the argument that proximate cause could be established through the “target theory” by demonstrating that the class members were all injured by the regulators’ reliance on defendants’ misrepresentations and omissions. Finding the “target theory” inapplicable, the court based its reasoning on the fact that, except for a very narrow and inapplicable exception, proof of proximate cause in a RICO action required a direct relationship between the alleged conduct and the injury. Thus the argument that the regulators’ reliance was sufficient to meet the proximate cause requirements failed because “concealment of inflated premiums would not result in direct and contemporaneous injury to the policyholder without the additional act of billing.” Therefore RICO fraud cases must be tried individually and not as class actions.

DECLARATORY JUDGMENT/NECESSARY PARTY/TIMING OF MSJ PRACTICE

HS Resources, Inc. v. Wingate, 327 F.3d 432 (5th Cir. 2003).

This declaratory judgment action involves a dispute over royalty payments flowing from rights to a natural gas well. Wingate, the landowner, leased mineral rights to Interstate Oil Company (“Interstate”). Wingate in turn retained a 25%

royalty interest. The lease expressly granted Interstate the right to pool the leased land with adjacent tracts. In turn, Interstate assigned 50% of its interest under the lease to HSR (the drilling operator), 37.5% to Aspect Resources, LLC, and 12.5% to Esenjay Exploration, Inc.

HSR created a pooled area, described as the “HSR-Wingate Unit,” which only included 61.8% of Wingate’s property, thus reducing Wingate’s net royalty payment. Wingate sued in Texas state court asserting that the formation of the HSR-Wingate Unit was invalid under the terms of the lease. Under protest, HSR paid Wingate royalties as if 100% of his land were included in the pooled unit, and Wingate voluntarily dismissed the state suit. HSR then filed its own suit in federal court, seeking a declaratory judgment that the pooling was proper under the lease. Wingate did not file an answer, but moved to dismiss HSR’s suit for failure to join necessary parties—the other royalty owners—under Federal Rule of Civil Procedure 19. HSR moved for summary judgment on whether the HSR-Wingate Unit pooling was proper. The district court denied Wingate’s motion to dismiss and granted HSR’s summary judgment motion. *Sua sponte*, the district court held that HSR’s royalty payments to Wingate based on a non-pooled interest were voluntary and could not be recaptured. Both parties appealed. The Fifth Circuit affirmed in part, reversed in part, vacated in part and remanded.

The Court first held that the absent royalty owners were not necessary parties under Rule 19 because the leases they entered into with Interstate required that they be paid royalties on a pooled basis regardless of whether the pooled unit was valid or invalid as to any other owner. Thus, the outcome of the litigation would not adversely affect the rights of the other royalty owners and their presence was not necessary to resolve the dispute between Wingate and HSR.

Wingate next argued that the district court prematurely granted HSR’s motion for summary judgment because it was decided simultaneously with the denial of Wingate’s motion to dismiss, thus depriving Wingate of an opportunity to file

an answer to HSR’s original complaint. The Court rejected this argument, and noted that under Federal Rule of Civil Procedure 56 the filing of an answer is not a prerequisite to granting a summary judgment.¹ In addition, the Court held that Wingate had made an appearance in the suit by responding to HSR’s motion for summary judgment and appearing at the hearing. Thus, Wingate was not denied notice or an opportunity to be heard before the entry of a final judgment against him.

HSR’s appeal challenged the district court’s summary judgment timing with regard to the court’s *sua sponte* judgment that the royalty payments to Wingate were voluntary. Neither party had raised this issue, and it was mentioned only in passing at the summary judgment hearing. Citing Federal Rule of Civil Procedure 56 and *Celotex Corp v. Catrett*, 477 U.S. 317 (1986), the Court opined that the district court may *sua sponte* enter summary judgment as long as the losing party had notice and an opportunity to come forward with evidence. In this case, the district court had not afforded the parties notice that it intended to rule on whether HSR’s payments to Wingate were voluntary, and thus erred in rendering summary judgment on this issue.

EXPERT WITNESS

***Vargas v. Lee*, 317 F.3d 498 (5th Cir. 2003).**

In this case, the court of appeals addressed the issue of whether expert testimony regarding the musculoskeletal condition fibromyalgia was relevant and reliable and therefore admissible under the *Kumho Tire Co.* gatekeeping requirements. Applying the traditional *Daubert* factors to determine reliability, which include

¹ Compare FED. R. CIV. P. 56 (summary judgment may be rendered “at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party”) with TEX. R. CIV. P. 166a(a) (“A party seeking to recover upon on a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, *at any time after the adverse party has appeared or answered*, move . . . for a summary judgment . . .”).

whether the theory or technique that forms the basis of the expert's testimony: (1) can be and has been tested; (2) has been subjected to peer review and publication; (3) has a high known or potential rate of error and standards controlling its operation; and (4) is generally accepted within the relevant scientific or technical community, the appellate court determined the evidence was not reliable. The Fifth Circuit cited to its prior decision in *Black v. Food Lion, Inc.*, 171 F.3d 308 (5th Cir. 1999), in which it had held that the theory that trauma causes fibromyalgia did not satisfy *Daubert* or any other standard of reliability. Revisiting that decision in the instant case, and after reviewing two new studies submitted by plaintiff in support of the expert's testimony, the appellate court concluded the scientific understanding of fibromyalgia had not progressed sufficiently to admit expert testimony that trauma caused fibromyalgia under Rule 702. Although it found that admission of expert testimony on this issue was an abuse of discretion, the Court did leave the door open to future expert testimony on the topic: "we do not . . . purport to hold that trauma does not cause fibromyalgia syndrome or that the admission of expert testimony on that subject is permanently foreclosed . . . medical science may someday determine with sufficient reliability that such a causal relationship exists."

EXPERT WITNESS/JMOL/TRESPASS

***H. E. Stevenson v. E. I. DuPont de Nemours and Co.*, 327 F.3d 400 (5th Cir. 2003).**

A group of Texas landowners brought suit against DuPont for negligence, nuisance, and trespass, alleging that its petrochemical plant emitted heavy metal particulates which contaminated their nearby properties, affected their health, and the health of their animals. After a jury trial, the jury awarded damages on the trespass theory for diminished property value. DuPont moved for a new trial and judgment as a matter of law, which were denied. DuPont then appealed alleging that the jury verdict was based upon insufficient evidence.

The Fifth Circuit affirmed the district court's denial of DuPont's motion for judgment as a matter of law, reversed the jury's damage award, and remanded for a new trial on damages.

In affirming the denial of the motion for judgment as a matter of law, the Fifth Circuit found that the landowners were not required to show substantial damage to their property to make out a claim for trespass under Texas law. The Fifth Circuit further found that since Texas had not adopted a "direct and tangible" requirement to show trespass, Texas law permits recovery for airborne particulates.

On appeal, DuPont attacked the testimony of the landowners' experts on various bases. The appellate court found that, under *Daubert*, although DuPont had waived its challenges as to the admissibility of expert testimony during a hearing on that issue, it had not waived the right to challenge the sufficiency of expert testimony. Thus the Fifth Circuit determined that a defendant's waiver of challenges to the admissibility of expert testimony would not preclude a sufficiency of the evidence review on appeal. However, the court found that the jury's trespass finding was supported by sufficient evidence.

DuPont further argued that the evidence was insufficient to support the damages award. The Fifth Circuit rejected the argument that the landowners should have presented evidence that the trespass was permanent. However, the Fifth Circuit found that the landowners' expert had improperly calculated damages and the landowners had failed to present sufficient evidence of the market value property immediately before and immediately after trespass as required under Texas law. The Fifth Circuit vacated the damages award and ordered a new trial on damages.

FORUM NON CONVENIENS / ALL WRITS ACT/ANTI-INJUNCTION ACT

Vasquez v. Bridgestone/Firestone, Inc., 325 F.3d 665 (5th Cir. 2003).

Six Mexican nationals perished in an automobile accident in Mexico that was allegedly caused by a defective Firestone tire. Family members first sued defendants in federal district court in Brownsville, Texas for wrongful death and survival claims. This first suit was dismissed for lack of diversity jurisdiction. Plaintiffs then filed a second suit in Texas state court. Defendants immediately removed to federal district court, and the district court dismissed (with prejudice) the case on forum non conveniens (“f.n.c.”) grounds, concluding that the case should be heard in Mexico. The district court based its decision on the location of the accident, the sources of proof, the plaintiffs’ home, and the lack of local Texas interest. The district court also held that Mexican law applied.

After the f.n.c. dismissal, plaintiffs filed a third suit in state court joining additional defendants and plaintiffs. After removal of the third lawsuit to federal court, the district court from the second lawsuit entered a permanent injunction prohibiting the plaintiffs, their attorneys and their agents from bringing any suit or cause of action against the defendants in the state of Texas or in any district court in Texas. The basis for the permanent injunction was the All Writs Act, 28 U.S.C. § 1651(a) (authorizing federal courts to issue writs in aid of jurisdiction). Plaintiffs appealed the f.n.c. dismissal and the permanent injunction, and asserted that the district court’s injunction violated the Anti-Injunction Act because it did not fall within the relitigation exception (which, combined with the All Writs Act, allows a federal court to enjoin state court proceedings when necessary in aid of the federal court’s jurisdiction or to “protect or effectuate” its judgments). The Fifth Circuit vacated and remanded.

With regard to the f.n.c. issue, the Court first noted that an adequate alternative forum (Mexico)

was available to hear plaintiffs’ claims, and reiterated the rule that a severe damage caps do not render an alternative forum inadequate. The Court then considered the relevant private and public interest factors in determining whether the district court abused its discretion in dismissing the case. The Court held that these factors clearly point toward trial in Mexico:

- The plaintiffs, the driver, the car’s owner and all decedents were Mexican citizens.
- The accident occurred in Mexico.
- The vehicle’s trip occurred entirely in Mexico.
- The vehicle and tires were manufactured, purchased and maintained in Mexico.
- All physical evidence and medical reports were in Mexico and in Spanish, requiring translation for use in an American court.
- Federal courts have no subpoena power over Mexican citizens, which in this case included numerous fact witnesses.

The Court held that these same factors support the district court’s ruling that Mexican law applies under the “most significant relationship” choice-of-law test.

Even considering the fact that pertinent design information was located in the United States and would need to be translated to Spanish for use in a Mexican court, the Court held that these private factors supported the district court’s f.n.c. dismissal. Similarly, the public factors weighed in favor of f.n.c. dismissal. The Court opined that the plaintiffs’ argument that the wrongful act was the original design of the vehicle and the tires “reaches back too far in the accident’s causal chain,” and ignores the production, sale and failure of the product, all of which occurred in Mexico.

The court also stated, “If accepted, plaintiffs’ argument would curtail the rights of foreign governments to regulate their internal economies

and threaten to engulf American courts with foreign claims.”

Even though the district court properly applied the f.n.c. analysis in dismissing the case, the Court vacated and remanded because the district court failed to include a “return jurisdiction” clause in its dismissal order. The return jurisdiction clause would ensure that the plaintiffs could commence their suit in Mexico without undue inconvenience or prejudice, and would provide that if the defendant obstructs such reinstatement in Mexico, the plaintiffs may return to the American forum.

Turning to the All Writs Act issue, the Court noted that the test for whether the relitigation exception to the Anti-Injunction Act applies is the same test used to determine claim preclusion (*res judicata*). Concluding that an f.n.c. dismissal is not a decision on the merits, the Court directed the district court to modify its injunction to prevent the relitigation of only the choice-of-law determination, which was the district court’s only merits-based ruling. Therefore, the plaintiffs would not be barred from pursuing their claims in a Texas court as long as they brought only Mexican claims.

JURY CHARGE

***Broadcast Satellite International, Inc. v. National Digital Television Center, Inc.*, 323 F.3d 339 (5th Cir. 2003).**

This contract dispute presented the sole question of whether the district court improperly charged the jury on the plaintiff’s breach of contract claim. At issue were two agreements: (1) the Satellite Lease; and (2) the Fee Agreement. The assignee of rights under the Satellite Lease, National Digital Television Center (“NDTC”), failed to make payments under the Fee Agreement and was sued by assignor Broadcast Satellite International (“BSI”) for breach of contract. Prior to trial the district court considered cross motions for summary judgment. The district court declared that the Satellite Lease had terminated as a matter of law, but denied both summary judgments on the ground that there was a question of fact

regarding the reason behind the lease’s termination.

At trial, the jury received a narrow breach of contract special interrogatory: “Did NDTC terminate the [Satellite Lease] for the sole reason of avoiding its obligation under the [Fee] agreement?” Plaintiff BSI objected to this interrogatory and requested (1) predicate questions on whether termination had actually occurred, intent of the parties under the contract and waiver; or, in the alternative, (2) a broad form question from the Texas Pattern Jury Charges (PJC) on breach of contract. BSI appealed on the basis of this submission. The Fifth Circuit affirmed.

The Court first held that the district court impliedly—and properly—held at the summary judgment stage that the Satellite Lease terminated based on the unambiguous language of the agreements. Thus, predicate questions on termination and intent of the parties were properly withheld from the jury. The Court then held that a predicate question on waiver was not required because the jury had been properly instructed on all waiver issues for which there was a fact question.

Finally, the Court held that the district court did not err in refusing BSI’s alternative request for use of the Texas PJC breach question (“Did NDTC fail to comply with the payment obligation under the [Fee Agreement]?”) because the PJC question was overly broad. The Court noted the rule that, in a diversity case, while the substance of a jury charge is governed by state law, the form or manner of jury instructions is governed by federal law. Furthermore, the *Erie* doctrine does not compel the use of pattern state jury instructions. Thus, the district court was free to reject, and properly rejected, the Texas PJC breach of contract charge.

**PERSONAL INJURY/ERIE/
JUDICIAL ESTOPPEL**

***Hall v. GE Plastic Pacific PTE, Ltd.*, 327 F.3d 391 (5th Cir. 2003).**

Prior to the instant suit on appeal, Hall had filed a suit in state court alleging injuries caused in a fire started by an allegedly faulty electrical extension cord purchased at Wal-Mart. In the first suit, Hall alleged that only Woods had manufactured the cord and argued this position on summary judgment, through affidavit, and at a hearing before the court. The first case settled. Hall then filed a second suit against GE, asserting that GE had manufactured the faulty extension cord. GE moved for summary judgment on the bases of judicial estoppel. Applying federal law, the magistrate court recommended that summary judgment be granted. The district court adopted the recommendation and entered judgment for GE.

On appeal, Hall argued that Texas and not federal law concerning judicial estoppel should have been applied in this case and that GE did not meet the elements of judicial estoppel. Applying *Erie* analysis, the Fifth Circuit determined that the district court properly applied federal law because: 1) the application of federal law was not outcome determinative, as the result would have been the same under Texas law, and therefore application of federal law would not encourage forum shopping; and 2) a “federal court should have the ability to protect itself from manipulation” and this power should not vary in a diversity action because it is a matter of federal procedure, not a substantive issue.

The Fifth Circuit further affirmed the district court’s grant of summary judgment on the basis of judicial estoppel. The appellate court found that the party to be estopped had asserted clearly inconsistent positions in the two suits. Hall argued that statements made by his attorney, co-parties in affidavits, in the pleadings, or in the settlement agreement in the previous litigation were insufficient to satisfy the requirements of judicial estoppel, but the Fifth Circuit found that

statements made by Hall’s attorney were imputed to Hall and that judicial estoppel was not limited to the party’s own sworn statements. The Fifth Circuit further found that no “concession” requirement must be met before applying judicial estoppel based upon the statements of a party’s attorney. The Fifth Circuit also rejected Hall’s argument that his prior statements were not inconsistent with his present claims because the earlier statements concerned future actions and were not unequivocal. Finding Hall’s position to be “no more than ineffectual hair splitting,” the appellate court determined that “the manufacturer of the cord cannot be Woods in the first action but GE in the second.” Further, in the prior suit, the court had accepted and relied upon Hall’s prior position in deciding a summary judgment motion and a joinder motion. Thus, the appellate court found the district court did not abuse its discretion in finding judicial estoppel, as the prior position was inconsistent with the present.

**PERSONAL JURISDICTION/PERMANENT
INJUNCTION**

***ICEE Distributors, Inc. v. J&J Snack Foods Corp.*, 325 F.3d 586 (5th Cir. 2003).**

This trademark and breach of contract case concerns the right of defendant J&J Snack Foods Corp. (“J&J”) to distribute new ICEE squeeze-up tubes in the territory of other ICEE distributors. Plaintiff, who owned licenses to ICEE’s trademark beverage, beverage machines and cups, brought suit in the Western District of Louisiana. The district court granted summary judgment in favor of defendants on plaintiff’s trademark infringement claim, but based on a jury verdict finding trademark dilution and breach of contract, entered a permanent injunction barring the defendants from distributing the ICEE squeeze-up tube product. Defendants appealed the permanent injunction. The Fifth Circuit affirmed.

Defendant ICEE of America (“IOA”), a Texas corporation with its principal place of business in California, first claimed that the district court did not have personal jurisdiction over IOA because IOA had insufficient contacts with the state of

Louisiana. Plaintiffs responded that an assignment of trademark rights to IOA resulted in IOA's becoming a party to certain license agreements which were to be performed in Louisiana, thus rendering IOA subject at least to specific jurisdiction. Applying the "minimum contacts" test, the Court noted that contracting with a resident of the forum state does not alone support the exercise of jurisdiction over a defendant. Rather, the inquiry involves a number of factors indicating whether the defendant purposefully established minimum contacts with the forum. Citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), the Court held that exclusive license agreements over a region including Louisiana could not be viewed as "random or fortuitous," and thus it could have been reasonably anticipated that the assignee under the licenses would be haled into a Louisiana court. The "fairness" prong of the personal jurisdiction analysis—in particular Louisiana's interest in the litigation—also weighed in favor of finding personal jurisdiction. Thus, the district court properly exercised jurisdiction over defendant IOA.

Turning to the permanent injunction, the Court held that the district court erred in determining that the distributors were "owners" with standing to sue under the Federal Trademark Dilution Act. Therefore, the district court abused its discretion in issuing an injunction based in part on the plaintiff's dilution claim. However, the Court declined to reverse the grant of the injunction because it was independently sustainable as a remedy for breach of contract.

PREEMPTION

Wells Fargo Bank of Texas NA, et al. v. James, 321 F.3d 488 (5th Cir. 2003).

Plaintiff banks filed suit claiming that Texas Business & Commerce Code § 4.112 ("par value statute") was preempted by the National Bank Act, 12 U.S.C.S. § 21, *et seq.* (under which the banks were organized) and 12 C.F.R. § 7.4002(a) (which authorizes NBA banks to charge their customers non-interest charges and fees). The

Texas par value statute sought to prevent banks in Texas—including national banks—from charging a fee for cashing a check that is to be drawn against an account held by that bank. Texas enacted the par value statute as a consumer protection measure so that the working poor would receive the face value of their paychecks. The district court granted summary judgment in favor of the banks, holding that the Texas statute was preempted. The Fifth Circuit affirmed.

Citing *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25 (1996), the Fifth Circuit stated the rule that where a state statute interferes with a power which national banks are authorized to exercise, the state statute irreconcilably interferes with federal law and is thus preempted. The Court focused on whether Congress has authorized national banks to charge the same fee that is prohibited by the state statute. The Court rejected appellant's argument that it should prevail because Congress had not exhibited an intent to preempt state law. Rather, the proper focus is whether the fee is indeed authorized by Congress. In this regard, the Court noted that the National Bank Act has been interpreted by the Office of the Comptroller of the Currency ("OCC") to authorize the very same fees that the Texas par value statute prohibits. The Court found the OCC's interpretation controlling. Thus, because the National Bank Act authorizes national banks to charge the same fees that the Texas statute would have prohibited, the state statute was in irreconcilable conflict with federal law and was preempted.

99% of failures come from people who have the habit of making excuses.

George Washington Carver

**PRELIMINARY INJUNCTION/
“ERIE GUESS”**

Lake Charles Diesel, Inc. v. General Motors Corp., 328 F.3d 192 (5th Cir. 2003).

This case involves a dispute between an automotive parts manufacturer (“Delco”) and a Delco dealer (“LCD”), both parties to a Parts Agreement. Delco attempted to terminate the Parts Agreement with LCD by hand-delivering a letter notifying LCD that termination was effective 30 days after the delivery of the notice, but it did not identify a reason for the termination. Shortly after receiving the notice, LCD filed suit in state court, seeking an injunction against the termination of the agreement, and joined another Delco distributor as a co-defendant. Delco removed to federal court, asserting fraudulent joinder, and the district court denied LCD’s motion to remand.

LCD alleged in the district court that Delco’s termination of the Parts Agreement violated Louisiana’s Repurchase Act and Used Motor Vehicle Dealers and Marine Products Dealers Act (“Marine Act”). The district court held that the Marine Act was inapplicable, but that the Repurchase Act did apply to the Parts Agreement. Because the termination clause of the parts agreement (30-day notice, no-cause termination) directly contravened the Repurchase Act’s termination provision (90-day notice, good-cause termination), the district court held that the termination clause of the statute trumped. On this basis the district court entered a preliminary injunction, reasoning that LCD met the “likelihood of success” prong of the injunction test. Delco appealed. The Fifth Circuit reversed and remanded.

Applying *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), the Court employed an “Erie guess” to determine the appropriate Louisiana methodology for deciding whether the Repurchase Act applied to the Parts Agreement. Conducting a thorough analysis of the Louisiana statute, the Court found that, on the facts before it, the Repurchase Act could not be read to apply to the Parts Agreement.

Thus, LCD was not entitled to the protection of the Repurchase Act. Because LCD could claim no protection under the Repurchase Act, it could not satisfy the “likelihood of success” prong of the injunction test, and the grant of the preliminary injunction was improvident as a matter of law.

REMAND/FRAUDULENT JOINDER

Travis v. Irby, 326 F.3d 644 (5th Cir. 2003)

This case addresses the issue of the standard for fraudulent joinder of a non-diverse defendant. Plaintiff in this case was the mother of a man killed when his car was struck by a train at a rail crossing. Plaintiff sued in state court bringing claims against the railroad and the engineer, who was a citizen of Mississippi like the plaintiff. Relying on the plaintiff’s discovery responses, defendants removed to federal court alleging fraudulent joinder of the engineer.

Fraudulent joinder can be established in two ways: (1) actual fraud in the pleading of jurisdictional facts; or (2) inability of the plaintiff to establish a cause of action against the non-diverse party in state court. Acknowledging that the test has been stated differently in various 5th Circuit opinions, the court of appeals reaffirmed that the standard, as stated by *Great Plains Tr. Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 312 (5th Cir. 2002), effectively collapses the “no possibility” test with the “no reasonable possibility” iteration:

“The court determines whether that party has *any possibility of recovery* against the party whose joinder is questioned. If there is arguably a *reasonable basis* for predicting that the state law might impose liability on the facts involved, then there is no fraudulent joinder. This *possibility, however, must be reasonable*, not merely theoretical.”

To make this determination, the district court is not limited to the pleadings, but may consider summary judgment type evidence in the record,

and take all unchallenged factual allegations in the light most favorable to the plaintiff.

Finding that discovery was ongoing and that the plaintiff's discovery responses, which the district court had relied upon as admissions of inability to prove her case against the engineer were not determinative, the appellate court found that "in this circumstance, in which the defendant has the burden of establishing fraudulent joinder and the plaintiff can clearly state a claim upon which relief can be granted as to the non-diverse defendant, the [plaintiff's] lack of substantive evidence as to the non-diverse defendant does not support a conclusion that he was fraudulently joined." Having firmly established that the burden is on the party alleging fraudulent joinder, the Fifth Circuit found that the plaintiff's failure to produce evidence to prove her claim against the engineer was insufficient for defendants to establish that the engineer was fraudulently joined and remanded the case.

REMOVAL

Tedford v. Warner-Lambert Co., 327 F.3d 423 (5th Cir. 2003).

In this interlocutory appeal, as a matter of first impression the Fifth Circuit found an equitable exception exists to the one-year limitation on removal found in 28 U.S.C. § 1446(b). In this case the plaintiff, who alleged injuries sustained from ingestion of the defendant's drugs, engaged in various acts of forum manipulation. These included: naming a non-diverse defendant she could not state a claim against (her co-plaintiff's doctor); amending her complaint to add a non-diverse defendant only hours after learning of defendant's intent to remove; and signing and post-dating a non-suit of the non-diverse defendant prior to the expiration of the one-year period, without notifying the court or opposing counsel until after the expiration of the one-year period.

Recognizing that "the time limit for removal is not jurisdictional; it is merely modal and formal and may be waived," the Fifth Circuit likened

this case to one where the plaintiff failed to timely assert that a removal was procedurally defective and the court found he had waived his opportunity to contest removal, thereby creating an exception to strict removal requirements. Applying equitable principles in this case, the Fifth Circuit found that the plaintiff's attempted forum manipulation justified an equitable exception to the one-year limitation. The court recognized that strict application of the one-year limit would encourage plaintiffs to join non-diverse defendants for 366 days just to avoid federal court thereby "undermining the very purpose of diversity jurisdiction."

At least in part, the Fifth Circuit's determination was based upon the facts of the case in that defendant asserted its right to remove at every opportunity presented, and that the plaintiff engaged in tactics that the court found to be clearly aimed at thwarting removal.

SOVEREIGN IMMUNITY/WAIVER/SPENDING POWER

Pace v. Bogalusa City School Board, 325 F.3d 609 (5th Cir. 2003).

Travis Pace, a wheel-chair bound teenager suffering from cerebral palsy, brought suit against the Bogalusa City School Board, the Louisiana State Board of Elementary and Secondary Education, the Louisiana Department of Education, and the State of Louisiana alleging violations of the Individuals with Disabilities Education Act ("IDEA"), the Americans with Disabilities Act ("ADA") and § 5.04 of the Rehabilitation Act. The district court affirmed a State Level Review Panel's holding that the school system was in compliance with the IDEA by dismissing Pace's IDEA claims, and granted summary judgment in favor of the defendants on Pace's non-IDEA claims. Pace appealed both decisions. The Fifth Circuit affirmed in part, vacated in part and remanded.

Before addressing the merits of Pace's claims, the Court considered whether the claims were barred by state sovereign immunity under the Eleventh

Amendment, or whether one of two exceptions to sovereign immunity applied: (1) abrogation of immunity by Congress; (2) waiver by the state of its sovereign immunity. Finding that neither exception applied, the Court held that Pace's ADA, Rehabilitation Act and IDEA claims were barred by state sovereign immunity.

Citing its recent holding in *Reickenbacker v. Foster*, 274 F.3d 974 (5th Cir. 2001), the Court held that the first exception—"abrogation"—did not apply to Pace's ADA and Rehabilitation Act claims because Congress did not properly abrogate immunity in those statutes. In order to abrogate state sovereign immunity through the Fourteenth Amendment, Congress must (1) unequivocally express its intent to abrogate state sovereign immunity; (2) identify a pattern of unconstitutional action by the states; and (3) create rights and remedies that are congruent with, and proportional to, the injury. Although in the ADA and the Rehabilitation Act Congress clearly expressed an intent to abrogate state sovereign immunity, Congress failed to identify a history and pattern of unconstitutional discrimination by the states against the disabled. Thus, sovereign immunity was not properly abrogated. For similar reasons, the IDEA did not validly abrogate state sovereign immunity.

Addressing the second exception—"waiver"—the Court noted that even if the statute in question did not validly abrogate state sovereign immunity, Congress may, pursuant to the spending power,

validly condition the receipt of federal funds upon the state's waiver of sovereign immunity. The Court found such a condition with regard to the Rehabilitation Act, but noted that there is a

fundamental difference between a state's unequivocal and knowledgeable waiver of sovereign immunity and congressional intention that accepting federal funds be deemed waiver. Here, there was congressional intent that accepting federal funds would constitute waiver of sovereign immunity, but there was no knowledgeable waiver by the state upon accepting those funds because the law at the time was unsettled.²

The state's alleged violations occurred prior to the Fifth Circuit's holding in *Reickenbacker, supra*, which held that the ADA and Rehabilitation Act did not validly abrogate state sovereign immunity. Prior to *Reickenbacker*, the state defendants had little reason to doubt the validity of the abrogation Congress explicitly intended. Thus, the state defendants could not know that they retained any sovereign immunity to be waived when they accepted federal funds. The same conclusion applies to the IDEA claims: there was no reason to doubt the abrogation of state sovereign immunity under the IDEA until certain holdings in September of 1998. Thus, no knowing waiver of state sovereign immunity existed during the relevant time period, and Pace's ADA, IDEA and Rehabilitation Act claims were barred by state sovereign immunity.

² On this point the Court notes a split among the federal circuit courts.

Texas Courts of Appeals Update - Procedural

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I. SUMMARY JUDGMENTS

A. Requisites for a proper 166a(i) no-evidence motion.

***Keszler v. Memorial Med. Ctr.*, No. 13-01-024-CV, 2003 WL 1754087 (Tex. App.--Corpus Christi 2003, n.p.h.) (designated, but not released, for publication).**

In this case, involving a doctor's breach of contract claims against a hospital, the court gathers various courts' rulings on no-evidence summary judgments into one handy opinion. The court held: that in reviewing a no-evidence summary judgment, the court applies the same legal sufficiency standard as a directed verdict; that a no-evidence summary judgment is improper if the respondent brings forth more than a scintilla of probative evidence to raise a genuine issue of material fact; that where a summary judgment motion does not unambiguously state that it is filed under rule 166a(i) and does not strictly comply with that rule's requirements, it will be construed as a traditional summary judgment motion; and that when a rule 166a9i) motion fails to specify the elements as to which there is no evidence, does not specifically challenge the evidentiary support for an element of a claim, and is a conclusory or general no-evidence challenge to an opponent's case, the motion is incurably defective on its face.

The first prong of the hospital's motion for no-evidence summary judgment was based on an evidentiary privilege. The hospital asserted that because article 4495b prohibits the disclosure and dissemination of certain medical peer review committee documents, Keszler could not have any evidence to substantiate his claims. The court of appeals attacked this argument as inadequate on several grounds. First, the hospital had yet to

demonstrate to the trial court that the records were indeed privileged. Second, under common law the hospital is estopped from using the privilege offensively, to obtain a judgment against Keszler. Third, certain peer review committee documents are not privileged. Fourth, Keszler could avail himself of other methods of proof, not subject to confidentiality or privilege. The court thus found the summary judgment in favor of the hospital fatally flawed.

The court also set forth a new rule regarding no-evidence motions with respect to the second prong of the hospital's motion, that a no-evidence motion for summary judgment is "fundamentally flawed when used against an adverse party who would not have the burden of proof at trial on the element or issue raised." The defendant hospital asserted, and then moved for no-evidence summary judgment on, the affirmative defense that it is entitled to qualified immunity. Because Keszler did not have the burden of proof on the issue at trial, he was not obligated to bring forth proof against the affirmative defense. Further, the hospital did not bring forth any summary judgment evidence establishing that it is entitled to qualified immunity. The no-evidence summary judgment thus cannot be sustained, and the hospital's motion also fails as a "traditional or senior rule motion."

II. APPELLATE DEADLINES

A. Filing of a cost bond within the time for perfecting appeal invoked appellate court jurisdiction.

***Gregorian v. Ewell*, ___ S.W.3d ___, No. 2-03-010-CV, 2003 WL 1849132 (Tex. App.--Fort Worth Apr. 10, 2003, n.p.h.) (designated, but not released, for publication).**

In this case, the timeliness of the notice of appeal was at issue. The trial court rendered final judgment on September 10, 2002. Appellants filed a motion for new trial on October 8, extending the deadline for filing a notice of appeal to December 9. On October 30, appellants filed a cash deposit with the district court in lieu of a supersedeas bond. Both parties agreed to an order signed by the trial court on November 22 as to the cash deposit's sufficiency. Appellants did not file a notice of appeal until January 9, 2003, the date appellants' counsel claimed he mistakenly calendered as the due date.

The court of appeals noted that it has jurisdiction if a party files an improper instrument that is nevertheless a bona fide attempt to invoke appellate jurisdiction. Because appellants had filed a cash deposit within the deadline, the appellants had made a bona fide attempt to invoke the appellate court's jurisdiction and the appellees were not surprised or prejudiced by allowing the appeal to continue. Thus, the court of appeals held that jurisdiction had been invoked by the appellants.

B. Pro se filing of “formal request for the court to reconsider its ruling” extends the deadline for filing a notice of appeal.

***Milton v. Cockrell*, No. 07-03-0047-CV, 2003 WL 1876966 (Tex. App.--Amarillo Apr. 16, 2003, n.p.h.) (per curiam) (not designated for publication).**

In this proceeding, the appellant filed a motion to file a belated notice of appeal. The appellant wished to appeal the trial court's dismissal of his case, but a question was raised as to whether the appellant had filed his notice of appeal after the appropriate deadline. The trial court dismissed the action on October 10, 2002. On October 21, appellant, acting pro se, filed a “formal request for the Court to reconsider its ruling.” A motion to extend time for filing notice of appeal was filed on January 21, 2003.

The court of appeals determined that the “formal request for the Court to reconsider its ruling” was effectively a motion for new trial, and thus extended the time to file a notice of appeal to ninety days after the order was signed. Because the motion to extend time was within the permissible fifteen-day period after that deadline, the motion was granted.

C. Request for findings of fact does not extend time to perfect an appeal when the case was tried solely on stipulated facts.

***International Union, United Auto., Aerospace Agric. Implement Workers of Am.-UAW v. General Motors Corp.*, ___ S.W.3d ___, No. 2-02-027-CV, 2003 WL 853737 (Tex. App.--Fort Worth Mar. 6, 2003, n.p.h.) (designated, but not released, for publication).**

This case involved an appeal from a denial of unemployment benefits requested by workers involved in a labor dispute. The benefits were denied by the Texas Workforce Commission because the Commission determined their union dues helped finance the labor disputes. The workers appealed the Commission's decision to the trial court on stipulated facts. The trial court affirmed the decision. The workers requested findings of facts within thirty days of the decision, but did not file a notice of appeal until eighty days after the decision. Appellee moved to dismiss the appeal because it was not timely filed.

The court of appeals noted that “[a] request for findings of fact and conclusions of law does not extend the time for perfecting an appeal from a judgment rendered as a matter of law, where the findings and conclusion can have no purpose and should not be requested, made, or considered on appeal.” Because the entire case was submitted to the trial court on agreed stipulations and the record showed the trial court relied solely on those stipulated facts, findings of fact had no purpose and did not extend the thirty-day deadline for perfecting appeal. Consequently, the appeal

was untimely and dismissed for want of jurisdiction.

D. Amended motions for new trial, no matter how styled, must be filed within the original 30-day limit to be timely.

Ashley v. Harris County Risk Mgmt., No. 13-00-614-CV, 2003 WL 1923511 (Tex. App.--Corpus Christi Apr. 24, 2003, n.p.h.) (designated, but not released, for publication).

Summary judgment in this wrongful termination case was granted against Ashley on February 28, 2000. Ashley filed a “Motion to Vacate Judgment” on March 20, and a “Motion to Set Aside Summary Judgment” on April 17. The court did not rule on the motion to vacate, so it was overruled by operation of law on May 15. On June 1, the trial court granted the motion to set aside, but on July 7 granted the County’s motion to reinstate.

The court of appeals concluded that the trial court acted without authority in granting Ashley’s motion to set aside summary judgment, implicitly finding that the motion to set aside was actually an amended motion for new trial. Amended motions for new trial must be filed within the original thirty days after the judgment is signed, but Ashley’s amended motion was filed forty-five days after judgment. Thus, both the motion to set aside and the court’s order granting it are nullities.

Ashley’s notice of appeal was due on May 29, ninety days after the judgment was signed. The notice was not filed until August 24. The notice of appeal therefore did not invoke the jurisdiction of the court of appeals, so the cause was dismissed for want of jurisdiction.

III. BILL OF REVIEW

A. Only extrinsic fraud will support a bill of review.

Martindale v. Reno, No. 11-02-00256-CV, 2003 WL 21196506 (Tex. App.--Eastland May 22, 2003, n.p.h.) (not designated for publication).

Reno filed a petition for bill of review seeking relief from a judicial determination in a 1987 divorce that he and Martindale were the parents of TMR. Paternity was not a contested issue in the divorce. Martindale contested the bill of review, but the trial granted it and amended the divorce decree to reflect that Reno was not the father of TMR. The issue determined in the appeal is the propriety of a bill of review instituted in connection with paternity issues decided by a trial court years before. The court of appeals took pains to note that the issue is purely procedural, does not involve the validity or propriety of paternity testing, nor does it raise the question of whether Reno is the father of TMR.

The court noted that bills of review are to be granted only in exceptional circumstances, and that the party seeking review must allege and prove 1) a meritorious defense to the cause of action alleged to support the judgment 2) which the petitioner was prevented from making by fraud, accident, or wrongful act of the opposite party 3) unmixed with any fault or negligence of the petitioner. The court’s analysis centered on the issue of fraud.

Without ever actually explaining the nature of the fraud alleged by Reno, the court of appeals ruled that it was intrinsic, and not extrinsic. Extrinsic fraud, which is the only type that will support a bill of review, is conduct that prevents a real trial on the issues involved. Intrinsic fraud is inherent in the matter considered; the acts constituting intrinsic fraud could have been litigated in the underlying case but were not. Because the facts upon which Reno relied apparently could have been litigated in the original case, the trial court’s grant of the bill of review was improper.

IV. THE RECORD ON APPEAL

A. Incomplete reporter's record must have been timely requested in order to warrant a new trial.

Markowitz v. Markowitz, ___ S.W.3d ___, No. 14-00-01505-CV, 2003 WL 1888625 (Tex. App.--Houston [14th Dist.] Apr. 17, 2003, n.p.h.) (designated, but not released, for publication).

In this appeal from a final judgment in a contentious divorce proceeding, the appellant contended that he was entitled to a new trial because the court reporter failed to transcribe certain pre-trial proceedings. The court acknowledged that Texas Rule of Appellate Procedure 34.6(f) provides that an appellant is entitled to a new trial if a reporter's record has been timely requested but a significant portion is lost or inaudible. However, because the appellant failed to request the reporter's record until after the time to perfect appeal had passed, it was not timely requested and he was therefore not entitled to a new trial.

B. Implied findings of fact may be challenged for legal and factual sufficiency if the appellate record includes the reporter's and clerk's records.

Texas Dep't of Pub. Safety v. Nielsen, 102 S.W.3d 313 (Tex. App.--Beaumont 2003, no pet.).

Appellee was arrested on suspicion of driving while intoxicated, but refused to take a breathalyzer test. An administrative law judge authorized the suspension of Appellee's driver's license for failure to take the test. The state's attorney dismissed the criminal charges because it could not prove that Appellee was driving while intoxicated. After the dismissal of the criminal charges, Appellee appealed the administrative decision to the trial court, which ruled in his favor.

The court of appeals noted that in the absence of findings of fact by the trial court, it is inferred that the trial court found all of the facts necessary to support the judgment. "However, those implied findings may be challenged on appeal for legal and factual sufficiency where the appellate record includes the reporter's and clerk's records."

The court of appeals entertained an attack on the sufficiency of the evidence supporting the trial court's order reversing the suspension of the appellee's driver's license. Because the court of appeals found that there was more than a scintilla of evidence to support the administrative decision, the decision of the trial court had to be reversed and the suspension reinstated.

C. In order for a new trial to be granted based on errors in the reporter's record, appellant must demonstrate that the missing or erroneous portion of the record is necessary for resolution of the appeal.

Town of Flower Mound v. Teague, ___ S.W.3d ___, No. 2-00-193-CV, 2003 WL 1893480 (Tex. App.--Fort Worth Apr. 17, 2003, n.p.h.) (designated, but not released, for publication).

Former police officers brought a whistleblower action against the Town of Flower Mound based on their termination. The jury found in favor of the police officers.

On appeal, the town contended that it was entitled to a new trial because the reporter's record did not adequately reflect the proceedings. The court of appeals had previously abated the appeal and ordered correction of the record based on a previous motion by the town. After a new record was filed, the town still contended that some necessary corrections were not made and expressed concern about matters that were missing. The town requested a new trial due to an incomplete record.

The court of appeals, citing Tex. R. App. P. 34.6(f)(3), held that the town failed to explain

how the alleged errors were “necessary to the appeal’s resolution,” and thus overruled the issue. The court declined to apply the reasoning from *Gillen v. Williams Bros. Constr. Co.*, 933 S.W.2d 162, 164 (Tex. App.--Houston [14th Dist.] 1996, writ denied), which held that an incomplete record required a new trial, because *Gillen* dealt with former Rule 50(e), which lacked Rule 34.6’s consideration of whether correction of any errors was necessary to the appeal. Without explanation by Appellant as to why the correction of the errors was necessary to the appeal, the court of appeals held that the town was not entitled to a new trial.

V. INTERLOCUTORY APPEALS

A. Interlocutory appeal not available when intervention is struck for failure to establish proper venue.

Ramirez v. Collier, Shannon, Scott, PLLC, ___ S.W.3d ___, No. 01-01-00752-CV, 2003 WL 1889258 (Tex. App.--Houston [1st Dist.] Apr. 17, 2003, n.p.h.) (designated, but not released, for publication).

A Wisconsin attorney sought to intervene in a case brought by a Harris County attorney against a Washington, D.C. law firm. The trial court struck the intervention on August 6, 2001. Although the notice of accelerated interlocutory appeal referenced this order, the trial court modified its order on August 27.

Although the court of appeals found the notice to be premature, the court held that Texas Rule of Appellate Procedure 27.2 permits the filing of a notice of appeal prematurely. Thus, the court granted the appellant’s motion to amend the notice of appeal to reference the August 27 modified order.

The court of appeals then turned to the question of whether it had jurisdiction to hear an interlocutory appeal. Following Texas Civil Practices and Remedies Code § 15.003, the court stated that an interlocutory appeal was prohibited unless the

party either: (1) establishes proper venue under § 15.002; or (2) meets four factors in § 15.003.

The majority held that an interlocutory appeal was not available in the first situation, to determine whether intervention was proper based on establishing proper venue. A party would still be permitted to appeal this issue after a final judgment.

Additionally, the court held that § 15.003 clearly permitted an interlocutory appeal under subsection (2), to determine whether intervention was proper based on the four factors in § 15.003. Ultimately, however, the court affirmed the trial court’s order striking intervention because the appellant failed to meet any one of the factors in § 15.003(2).

VI. BRIEFING REQUIREMENTS

A. Failure to cite authority on an issue waives it for appellate review.

Couch v. Simmons, No. 07-02-0278-CV, 2003 WL 1698988 (Tex. App.--Amarillo March 31, 2003, n.p.h.) (designated, but not released, for publication).

In this medical malpractice action, the court granted Simmons’s motion to strike Couch’s expert, and then granted a no-evidence motion for summary judgment. Couch complained, inter alia, that the trial court erred in allowing Simmons to file his dispositive motions after the deadline for such motions had passed. Couch cited to authority to establish the standard of review--abuse of discretion, but not to any to support his request that the court of appeals interfere with the trial court’s management of its own docket. Specifically, he cited to no authority that either allows the court of appeals to set aside the trial court’s order granting an extension of time for Simmons to file the dispositive motions, or preventing the trial court from changing the deadlines for filing dispositive motions.

The court of appeals ruled that “[f]ailure to either cite authority, explain why no authority is cited,

or advance substantive analysis waives the issue on appeal.” The court considers citation to a single case for the standard of review to be insufficient citation of authority to comply with the mandate of TRAP 38.1(h), and so overruled the issue.

B. Court of appeals not obligated to perform own review of record.

Karbalai v. Solhjou, No. 01-01-00371-CV, 2003 WL 1848448 (Tex. App.--Houston [1st Dist.] Apr. 10, 2003, n.p.h.) (not designated for publication).

The owner of a mobile home park challenges the judgment following a bench trial in favor of the owner of an adjacent mobile home park over the

operation of a sewage treatment plant. In one issue, Karbalai contends that she was entitled to be awarded more actual damages on her counterclaim.

Karbalai’s argument, though, was conclusory and unsupported by any authority. The court notes that in such instances, the court of appeals will not perform an independent review of the record and applicable law to determine whether the error complained of has merit. Rather generously, the court went on to review the trial court’s findings of fact and conclusions of law and compare them to the record. The court, after conducting its independent review, found that the trial court’s judgment was indeed supported by the evidence.

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ARBITRATION CLAUSES IN ATTORNEY FEE CONTRACTS

Arbitration clauses in attorney's fee disputes and legal malpractice cases may be enforceable.

In Re Hartigan, Cause No. 04-03-00086-CV, 2003 WL 1824938 (Tex. App. – San Antonio, April 9, 2003)(designated, but not released, for publication).

Emily Hartigan originally retained a law firm to represent her in a divorce proceeding, but was forced to find new counsel when the original attorney was injured in an auto accident. Ms. Hartigan subsequently retained a second attorney to represent her, but the attorney's health problems forced Ms. Hartigan to hire a third attorney with the law firm of Higdon, Hardy, & Zuflacht.

Ms. Hartigan's contract with Higdon, Hardy, & Zuflacht contained an arbitration provision requiring the parties to settle any fee disputes through binding arbitration. No such arbitration provisions existed with respect to Ms. Hartigan's fee agreements with the first two attorneys.

After Ms. Hartigan's divorce became final, the first two attorneys filed suit against her to collect their respective attorney's fees. Ms. Hartigan filed a counterclaim against the attorneys for legal malpractice and then brought in the third attorney as a third party defendant. Emily Hartigan sought to void the arbitration agreement on three grounds: (1) fraudulent inducement; (2) failure to comply with requirements of section 171.002(c) of the Texas Civil Practice and Remedies Code; and (3) violation of Rule 1.08(g) of the Texas Disciplinary Rules of Professional Conduct. She also alleged that her legal malpractice claim falls outside the scope of the agreement.

The third attorney (as third party defendant) filed a claim for attorney's fees against Ms. Hartigan and moved to compel arbitration pursuant to the arbitration agreement. The court ordered the entire case to arbitration, even with respect to the attorneys who were not a party to the arbitration agreement. This mandamus proceeding followed.

The court of appeals granted mandamus relief, but only as to those attorneys not a party to the arbitration agreement, and denied mandamus with respect to the claims between Ms. Hartigan and Higdon, Hardy & Zuflacht. In denying mandamus with respect to claims against Ms. Hartigan's third attorney (HH&Z), the court of appeals held that the presence of an arbitration clause in her fee agreement did not violate Disciplinary Rule 1.08(g).

AUTOMOBILE ACCIDENT/REAR-END COLLISIONS

Directed verdict was appropriate against Plaintiff where she failed to introduce evidence that the damages claimed were proximately caused by a rear-end collision.

Smith v. Southwestern Bell Telephone Co., Cause No. 2-01-229-CV, 2003 WL 1090471 (Tex. App. – Fort Worth 2003, n.p.h.)(designated, but not released, for publication).

In August 1997, Ramona Smith was rear-ended by a vehicle driven by Steven Miller, a Southwestern Bell employee. After the accident, Ms. Smith was shaken-up, but did not appear to be injured. Her car sustained only minor damage. At the scene, Ms. Smith denied needing transportation to the hospital. However, several hours later, she went to the emergency room complaining of headaches and neck and upper back pain.

The appellate record demonstrated that, prior to the accident in issue, Ms. Smith suffered from virtually all of the ailments for which she sought medical treatment and compensation from the Defendants.

At trial, Ms. Smith offered no expert testimony to prove up causation between her complaints and the accident. She relied solely upon the argument that such knowledge was within a juror's common knowledge. Because there was no expert testimony, the court was forced to rely only on lay opinion testimony. Ms. Smith argued that the fact she was hit from behind, was shaken up and did not appear to be injured, and that her car sustained minor damage was within lay opinion testimony. She also claimed that the filing of medical affidavits conclusively established the amount of medical expenses she incurred. At the close of evidence, the trial court granted a directed verdict in favor of the defendant.

The court of appeals affirmed the entry of a directed verdict. In so holding, the court of appeals stated: "The lay testimony in this case—that Miller hit Smith's car from behind, that Smith was shaken up, but did not appear to be injured, and that her car sustained only minor damage—does not produce a strong logically traceable connection between the 1997 accident and Smith's injuries."

Jury verdict awarding zero damages in a rear-end collision case was reinstated after the trial court granted a judgment notwithstanding the verdict and awarded Plaintiff \$43,947.36.

***Walker v. Ricks*, Cause No. 13-01-00098-CV, 2003 WL 1341513 (Tex. App. – Corpus Christi 2003, n.p.h.)(designated, but not released, for publication).**

Catherine Ricks filed suit against Lois Walker as a result of a rear-end collision that occurred in McAllen, Texas. According to Ms. Walker, her attention was diverted immediately prior to the incident because a car just to the right of her had

honked. As a result, Ms. Walker said that she "bumped into the back end" of Ms. Ricks' car.

Immediately after the accident, Catherine Ricks was able to exit her car without problems and had no visible or objective signs of injuries. Walker's car sustained no damage and Catherine Ricks' car was only slightly damaged. The next morning, Catherine Ricks went to her family doctor complaining of neck and jaw pain. She was later diagnosed with whiplash, a TMJ disorder, and was diagnosed with a displaced disc in her jaw.

At trial, Catherine Ricks introduced a billing affidavit for medical treatment under section 18.001 of the Texas Civil Practice and Remedies Code. No controverting affidavits were filed and Ms. Ricks' physician testified, without any objection, that the medical expenses incurred were both reasonable and necessary as a result of the injury complained of by Catherine Ricks. However, Ms. Walker claimed that no proximate cause existed between the auto accident and the medical expenses.

The jury assessed Ms. Walker with liability, but assessed damages at \$0. After Catherine Ricks filed a JNOV complaining that the damage award was against the great weight and preponderance of the evidence, the trial court awarded Ms. Ricks \$43,947.36.

On appeal, the court of appeals noted that evidence presented in accordance with §18.001 of the Civil Practice & Remedies Code does not conclusively establish the amount of damages claimed nor does it establish a cause or connection between the accident and the expenses. Because the jury was entitled to believe or disbelieve a witness, even though the testimony was not contradicted, the finding of zero damages could not be reversed on appeal since there appeared to be more than a scintilla of evidence to support the finding (i.e., that Ms. Ricks had a pre-existing condition; that, immediately after the accident, she was able to ambulate without any problems; and that her car was not damaged in the accident.) Therefore, the court of appeals reversed the trial court's granting

of JNOV and reinstated the jury verdict of no damages.

BREACH OF CONTRACT/STATUTE OF FRAUDS

If contractual provisions falling within the statute of frauds are not severable from those provisions falling outside the statute, the entire contract is unenforceable unless it completely satisfies the statute of frauds.

Walker v. Tafraian, Cause No. 2-01-315-CV, 2003 WL 1563812 (Tex. App. – Fort Worth 2003, n.p.h.)(designated, but not released, for publication).

Gary Walker entered into purchase contracts for three separate properties. Soon thereafter, Walker asked Tafraian, who was also in the commercial real estate business, if Tafraian would loan him the money needed to purchase the “East Street” property. Tafraian originally agreed to loan Walker 80% percent of the total purchase price. Then, in a handwritten proposal, Tafraian agreed to finance 100% of the hard costs associated with the East Street property (up to \$150,000) and, in return, would receive 1% interest per month, plus 25% of the profits from the East Street property. Tafraian would also get an equal partnership in the other two properties.

The closings on two of the properties were filed on the same date; but Walker agreed to extend the closing on one property to a month later. When Tafraian learned that the closings would not occur simultaneously, Tafraian refused to finance Walker’s purchase of the East Street property.

Tafraian sued Walker for breach of contract. A jury returned a verdict in favor of Tafraian. Walker subsequently moved for JNOV on the basis that the statute of frauds barred Tafraian’s claims. The trial court denied the JNOV.

The court of appeals stated that part of the agreement between Walker and Tafraian (i.e., Tafraian’s loan to Walker for the “East Street” property) could have been performed in a year.

However, another part of the agreement (i.e., the term of the loan for the purchase of the “East Street” property was to be for four years) could not be performed in a year.

Because the sale terms for the two (2) separate properties was a package deal, the provisions relating to the one property (“East Street”) was not severable from the provisions relating to the other property (Stemmons project). Therefore, the court held that the entire agreement was unenforceable.

BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING

The “touchstone of bad-faith liability in Texas” remains the unreasonableness in processing of insurance claims. Accordingly, the court of appeals refused to extend the duty of good faith and fair dealing to claims involving the transfer of insurance policies.

Vandeventer v. All American Life & Casualty Company, Cause No. 02-01-145-CV, 2003 WL 1090486 (Tex. App. – Fort Worth 2003, no pet.)(designated, but not released, for publication).

This case involved an insurance dispute over an assumption agreement in which a block of disability policies were transferred and sold by the insurer that issued the policies to another insurer, who later cancelled them. The policies were sold to another insurance company without notice to the Plaintiff-policyholders. Subsequently, in July 1998, after collecting nine years of premiums, the new insurance company (All American Life) notified the Plaintiffs that it was canceling their policies and denying any return of premiums for that ten-year period.

Plaintiffs filed suit alleging four causes of action; (1) breach of contract; (2) unjust enrichment; (3) illusory contract; and (4) breach of the duty of good faith and fair dealing. The court granted the summary judgment in favor of the insurance company on all grounds.

On appeal, All American Life claimed that summary judgment was proper because a novation occurred when the Plaintiffs continued to make premium payments to the new insurance company. Therefore, no valid claims existed.

The court of appeals disagreed and reversed the granting of summary judgment on the basis that All American Life failed to establish a novation defense as a matter of law. However, the court affirmed summary judgment with respect to the bad faith claim on that basis that it did not wish to extend the breach of good faith and fair dealing claims to situations where an insurance company chooses to transfer contracts without informing its policyholders. Instead, the court of appeals noted that the key issue for establishing liability in bad faith litigation continues to be whether the carrier failed to demonstrate reasonableness in processing an insurance claims.

DISCOVERY/EXPERT DISCLOSURES

A disclosure providing a summary of expert opinions that essentially included only statements that an expert was familiar with the standard of care and would testify to the applicable standard of care for treatment whether any violations of the standard of care occurred was a “pitiful example” of an expert disclosure.

Mauzey v. Sutliff, Cause No. 03-02-00188-CV, 2003 WL 1882263 (Tex. App. – Austin, April 17, 2003, n.p.h.)(designated, but not released, for publication).

This is a medical malpractice action arising from the birth of Mikayla Mauzey who, at birth or soon thereafter, suffered from a respiratory disorder requiring 17 days of hospitalization. Mikayla’s parents filed suit against the health care providers. At trial, the court refused to strike the defendant’s expert based on an alleged inadequate disclosure by the defendant.

Prior to trial, the defendants had designated Dr. Sutliff as an expert witness, identifying the “general substance of the expert’s mental

impressions and opinions and summary of basis for them”. The disclosures contained only a brief summary of the expert’s opinions, which consisted of only that the doctor was familiar with the standard of care and would testify to the applicable standard of care for treatment, including whether any violations of the standard of care occurred.

Although the court of appeals stated that defendant’s expert designation was a “pitiful example” of an expert disclosure and fell short of satisfying the “spirit of full evidentiary disclosure,” the court held that the district court did not necessarily abuse its discretion by allowing him to testify with regards to standard of care. Specifically, the court held that because the Plaintiffs could have done more to determine the extent of Dr. Sutliff’s testimony prior to trial and the fact that a lot of his testimonial was cumulative, the trial court’s admission of such testimony was harmless error.

DISCOVERY/MOTION TO COMPEL PSYCHOLOGICAL EXAMINATION

The trial court abused its discretion by failing to order a psychological examination when the Plaintiff placed her mental condition in controversy by claiming severe mental anguish damage as a result of her wrongful termination.

In Re Transwestern Publishing Relators Company, L.L.C., 96 S.W.3d 501 (Tex. App. – Fort Worth 2002)(orig. proceeding).

Carol Wilkerson filed a wrongful termination lawsuit alleging sexual discriminatory conduct and retaliatory discharge. In her pleadings, Ms. Wilkerson claimed that, as a result of her employer’s conduct, she suffered mental anguish in the past and would continue to suffer mental anguish in the future. Ms. Wilkerson also sought exemplary damages.

In discovery responses, Ms. Wilkerson identified various health care providers and a psychologist who treated her for mental anguish. Ms.

Wilkerson also claimed that, because of her mental anguish, she was unable to work at various periods of time subsequent to her termination.

The Defendants filed a motion to compel for Ms. Wilkerson to submit to mental examination by a designated expert psychologist. The court denied the motion and a mandamus proceeding followed.

In granting mandamus, the court of appeals held that, because Ms. Wilkerson placed her mental condition in issue and even designated an expert to testify as to mental anguish damages, the Defendants demonstrated that Ms. Wilkerson's mental condition was in a controversy and that there was good cause for a compulsory mental examination under Rule 204.1 of the Texas Rules of Civil Procedure.

The court also distinguished Ms. Wilkerson's mental anguish and emotional distress claim from similar claims typically seen in personal injury actions. Specifically, the court noted that Ms. Wilkerson was seeking recovery for severe mental anguish damages, including claims for entitlement to punitive damages. Because Ms. Wilkerson's mental condition was in controversy and a mental examination by Defendants would likely lead to the discovery of relevant evidence regarding the nature and/or extent for mental anguish damages, and the fact that the Defendants would be unable to acquire the information by any other means, a motion to compel the examination was appropriate.

DISQUALIFICATION OF COUNSEL

A movant seeking to disqualify counsel based on an assertion of the joint defense privilege must show that confidential information was shared and that the matter in which the information was shared was substantially related to the in matter which the disqualification was sought.

In Re Skiles, Cause No. 09-03-030-CV, 2003 WL 1389060 (Tex. App. – Beaumont 2003)(designated, but not released, for publication).

This is a mandamus proceeding in which the trial court denied relators' motion to disqualify the law firm of Chambers, Templeton, Cashiola & Thomas from representing Brinton and Gidget Bridegam in the underlying lawsuit. Bridegam had originally sued Carl and Jennifer Skiles for failure to disclose certain defects with regard to a residence. Bridegam's attorney was George Bean. At the time the suit was filed, Bean was a solo practitioner, but later became associated with the Chambers law firm.

The Chambers law firm had previously represented Skiles' insurer in a related coverage suit brought by Skiles. Skiles originally provided notice to Farmers of Bridegam's DTPA suit. While Farmers tendered a defense, it reserved certain rights. To defend the suit, Skiles hired Snider & Morgan, a law firm that was not on Farmers' approved list. Farmers refused to pay Skiles' defense costs.

Skiles testified that his defense counsel during the pendency of the coverage suit had numerous discussions with Cashiola about defense counsel's mental impressions, strategies, and opinions regarding the underlying DTPA suit. Communications occurred for the dual purpose of: (1) reporting to Farmers about the status of the defense in the DTPA case, and (2) facilitating settlement of the coverage case.

There was no dispute that confidential information was shared and that the matter in which the information was shared was substantially related to the matter in which disqualification was sought. Therefore, court of appeals held that the motion to disqualify should have been granted and mandamus was conditionally issued.

DOG BITE/STRICT LIABILITY

The fact that a dog “viciously attacked” a bird prior to biting a child did not constitute evidence that the dog was abnormally vicious or constituted a dangerous animal capable of hurting a child.

Pfeffer v. Simon, Cause No. 5-02-01130-CV, 2003 WL 1545084 (Tex. App. – Dallas, March 26, 2003)(designated, but not released, for publication).

Jodi Pfeffer was bitten on the lip by a pet dog while she was at the Defendants’ home for a cookout. Ms. Pfeffer filed suit against the Defendants under theories of strict liability, negligence, and premises liability. Defendants filed a traditional and no-evidence summary judgment as to each cause of action asserted by Ms. Pfeffer. The court granted summary judgment without specifying the grounds.

The only summary judgment evidence offered by Ms. Pfeffer to show that the dog was dangerous was the deposition testimony from one of the Defendants stating that the dog had eaten a pet cockatiel bird for Thanksgiving. Jodi Pfeffer admitted that, as the dog approached her, it did not bark or growl and was wagging its tail.

The court held that the fact that the dog ate a bird prior to the incident was not sufficient evidence to suggest that the Defendants knew, or should have known, the dog was abnormally vicious and would cause harm to Jodi Pfeffer. Therefore, summary judgment was affirmed.

EVIDENCE/DEATH CERTIFICATES

Death certificate indicating that an unborn child survived a live birth is prima facie evidence that the child was indeed born live for purposes of bringing a wrongful death and survival claim on behalf of the child.

Hinojosa v. Columbia/St. David’s Healthcare System, L.P., Cause No. 03-02-00639-CV, 2003 WL 21024597 (Tex. App. – Austin, May 8, 2003)(designated, but not released, for publication).

Kelli and Rogelio Hinojosa, individually and as representatives of the estate of their son Bryan (who died during the labor and delivery process), filed suit against St. David’s d/b/a South Austin Hospital and their attending physician, Dr. Paul Locus, for negligent treatment during labor and delivery. The Hinojosas brought a medical malpractice claim for the treatment provided to Kelli Hinojosa, as well as a claim under the Texas wrongful death and survival statutes for the death of her child.

St. David’s and Dr. Locus filed a motion for partial summary judgment with respect to the wrongful death and survival claims on the basis that no such claim exists where the child does not survive the labor and delivery process. Among the summary judgment evidence produced by Mr. and Mrs. Hinojosa was the birth certificate signed by Dr. Locus, indicating that Bryan had survived birth and lived for 20 minutes. The court granted the Defendants’ summary judgment motion with respect to the wrongful death and survival claims.

In reversing the partial summary judgment order, the court of appeals held that, under section 191.052 of the Texas Health & Safety Code, once the state registrar certifies a death certificate, it becomes prima facie evidence of the facts stated in the certificate. Accordingly, the use of the death certificate as summary judgment evidence was sufficient to raise a genuine issue of material fact with respect to whether the child was born alive so as to permit the parents to bring a cause of action under the Texas wrongful death and survival statutes. The trial court, therefore, erred in granting summary judgment in favor of the Defendants.

EXPERT TESTIMONY

Expert was properly excluded when his theory had not been tested and he had insufficient personal experience to render his causation testimony reliable.

Couch v. Simmons, Cause No. 07-02-0278-CV, 2003 WL 1698988 (Tex. App. – Amarillo 2003, n.p.h.)(designated, but not released, for publication).

On January 19, 2000, Tessa Couch, a minor, was undergoing physical therapy following surgery on her right knee. After Ms. Couch developed a headache, weakness, confusion, tingling of her right arm and leg, and began vomiting, she was transported to Covenant Medical Center emergency room where she was seen by Dr. Kowaleski, an emergency room physician. Dr. Kowaleski ordered tests, requested a neurological consultation by Dr. Simmons, and admitted Tessa under the care of Dr. Simmons. Dr. Kowaleski's orders included neurological examinations every four hours.

The following morning, on January 20th, Tessa experienced weakness in her right leg, she was unable to squeeze with her right hand, and she would not respond verbally. Dr. Simmons was notified and ordered an EEG, which revealed abnormal test findings. He transferred Tessa to the pediatric intensive care unit and examined her shortly after noon. He then ordered administration of IV fluids and further studies. Studies indicated that Tessa had suffered an ischemic stroke of the brain, resulting in brain damage.

The negligence allegations against Dr. Simmons were supported by the testimony of a pediatric neurology professor, Dr. Snodgrass, who opined that Dr. Simmons failed to meet the appropriate standard of care by failing to timely administer intravenous fluids to Tessa. Dr. Snodgrass also said that, if I.V. fluids had been timely administered, the chances were "9 out of 10" that Tessa would have either had no stroke or suffered

a lesser stroke with a smaller amount of brain injury.

Dr. Simmons filed a *Robinson* motion seeking to strike Dr. Snodgrass's testimony with respect to the causal relationship between Dr. Simmons's failure to timely administer IV fluids and the effects of Tessa's stroke. Dr. Simmons also filed a no evidence summary judgment motion that hinged, in part, on the trial court's ruling as to the expert's testimony.

Dr. Snodgrass' causation opinion was questioned because, in Dr. Snodgrass' words, "the theory is that normalization of plasma volume by vigorous IV hydration improves stroke outcome." He said, "The concept had not been directly tested. Physicians are unwilling to deprive patients of IV fluids, as would be needed in the control group." However, the theory had been subjected to peer review and publication. Dr. Simmons attacked Dr. Snodgrass' testimony on the basis that several of the articles relied on by Dr. Snodgrass did not address the causal relationship between the failure to administer IV fluids and the effects of stroke. Further, while a couple of articles did address the question and concluded in part that the administration of fluids affects blood flow and hemodynamics to the brain, no specific beneficial relationship was established between administration of IV fluids and stroke outcome. Dr. Simmons also argued that Dr. Snodgrass had not established efficient personal experience in the effects of delayed IV administration to render his opinion reliable under *Gammill*.

The trial court excluded Dr. Snodgrass' testimony. The court of appeals affirmed the ruling and held that the trial court did not abuse its discretion when the causal relation between the lack of timely IV fluid administration and outcome of the stroke had not been tested and Dr. Snodgrass had insufficient personal experience to render his causation testimony reliable.

INSURANCE COVERAGE

An insurance purchasing requirement clause in a contract did not merely support the indemnity provision, but required Triple S to provide insurance for ATOFINA to the extent Triple S had insurance coverage. The indemnity insurance requirement was in addition to, and not exclusive of, other coverage under the excess policy.

ATOFINA Petrochemicals, Inc. v. Evanston Insurance Co., Cause No. 09-02-072-CV, 2003 WL 1835780 (Tex. App. – Beaumont, April 10, 2003, n.p.h.) (designated, but not released, for publication).

In this case, a Triple S Industrial Corporation employee was working at an ATOFINA facility when he drowned in a tank filled with fuel oil. The wrongful death beneficiaries sued ATOFINA as a result of the incident.

The general liability carrier for ATOFINA was Admiral Insurance Company, which tendered policy limits of \$1,000,000. ATOFINA also claimed insurance coverage as an “additional insured” under a commercial umbrella liability policy issued to Triple S by Evanston Insurance Company. Evanston denied the claim.

ATOFINA settled the wrongful death litigation for \$6.75 million and sued Evanston to recover \$5.75 million from the excess insurance policy. The trial court granted summary judgment in favor of Evanston and denied the summary judgment filed by ATOFINA.

ATOFINA appealed, asking the court of appeals to hold Evanston liable for the cost of settling the wrongful death litigation, as well as for violations of article 21.55 of the Texas Insurance Code. As part of its argument, Evanston claimed that, pursuant to the contract between ATOFINA and Triple S, ATOFINA was not entitled to insurance coverage beyond the scope of the indemnification provision. Evanston argued that Triple S agreed to indemnify or hold ATOFINA harmless except

to the extent that any such loss is attributed to the concurrent or sole negligence, misconduct, or strict liability of ATOFINA.

In this case, ATOFINA did not make a claim under the indemnity provision, but instead, relied on a contract provision requiring Triple S to list ATOFINA as an additional insured on Triple S’s insurance policies. Specifically, the contract required that (a) Triple S obtain comprehensive general liability insurance and excess liability insurance; (b) the comprehensive policy include coverage for Triple S’s indemnity obligations; and (c) a certificate be furnished to ATOFINA listing ATOFINA as an additional insured on Triple S’s insurance policies.

The trial court held that Triple S agreed to obtain insurance coverage for ATOFINA, but the agreement to purchase insurance was not limited to insuring only the indemnity obligation. Under Texas law, if a party agrees to provide liability insurance coverage for another solely to support an indemnity obligation, the insurance requirement is limited to that indemnity liability. But, where the additional insured provision stands separately from the indemnity provision, and is essentially a freestanding insurance purchasing requirement, the scope of the insurance requirement is not limited by the clause.

The court of appeals concluded that the insurance purchasing requirement clause in the Triple S/ATOFINA contract was not merely in support of the indemnity provision, but required Triple S to provide insurance for ATOFINA to the extent Triple S had insurance coverage. The indemnity provision insurance requirement was in addition to, not merely exclusive of, other coverage afforded under the excess policy. Because Evanston’s policy defines an insured as including a person or organization for which Triple S agreed to provide insurance, the court of appeals held that ATOFINA was an additional insured under the Evanston policy and was entitled to coverage for the wrongful death litigation.

MEDICAL MALPRACTICE/EXPERT REPORTS

The trial court abused its discretion by dismissing a medical malpractice lawsuit when the Plaintiffs demonstrated that a good faith effort was made to produce a report that provided a fair summary of the standard of care applicable to Defendants, how the standard of care was breached, and the cause of the relationship between the breach and the Plaintiffs' injuries.

Horsley-Layman v. Angeles, 90 S.W.3d 926 (Tex. App. – Fort Worth 2002, pet. denied).

This was the second mandamus proceeding arising out of the same case. Both proceedings involved a dismissal for failing to comply with the expert reporting requirements in article 4590i, section 13.01 of the Texas Medical Liability and Insurance Improvement Act.

On February 16, 1996, suit was filed against Dr. Fernando Angeles, and several other parties, alleging medical negligence in the care and treatment of Heidi Horsley-Layman, including the provision of gallbladder surgery. On June 29, 1996, Plaintiffs provided reports from two experts who were critical of one of the Co-Defendants, but did not mention Dr. Angeles. Dr. Angeles moved to dismiss the Plaintiffs' claims against him for failing to provide an expert report in accordance with article 4590i, section 13.01(d). In response to the original dismissal motion, Plaintiffs requested an extension of time to file a report pertaining to Dr. Angeles. The trial court denied the motion and dismissed the case against Dr. Angeles. On appeal, the Texarkana Court of Appeals reversed the dismissal order and remanded the case to the trial court, holding that the trial court abused its discretion by refusing to grant appellants' request for an extension of time to file their report.

Following remand, Dr. Angeles again moved to dismiss the lawsuit against him. This time, Dr. Angeles claimed the report of John Buxton, M.D., a general surgeon who was specifically critical of

Dr. Angeles, did not comply with section 13.01(d). The trial court granted the motion to dismiss.

On appeal, the Fort Worth Court of Appeals once again reversed the trial court's dismissal of the suit on the basis that Dr. Buxton's report constituted a good faith effort to comply with the requirements of section 13.01. Specifically, the court held that because Dr. Buxton's detailed three-page report provided a fair summary of the applicable standard of care, the manner in which Dr. Angeles failed to meet the standard of care, and the causal connection between the failure and the injury, the trial court again abused its discretion in dismissing suit.

MEDICAL MALPRACTICE/WRONGFUL DEATH OF UNBORN CHILD

The parents of a viable, unborn child have a wrongful death cause of action and survival claim against a health care provider who negligently provides treatment to the child. The mother of the unborn child may also have a cause of action for the loss of a child as "part of her own body."

Reese v. Fort Worth Osteopathic Hospital, Inc., 87 S.W.3d 203 (Tex. App. – Fort Worth 2002, pet. granted).

Tara and Donnie Reese, who were the biological parents of Clarence Reese, a viable unborn child who died in utero on May 12, 1998, filed suit against Craig Smith, Reid Culton, and Roberta Beals (treating physicians) and Fort Worth Osteopathic Hospital, with respect to the care and treatment provided to Tara Reese and her child, Clarence. The trial court granted summary judgment in favor of the Defendants as to all causes of action asserted by Tara and Donnie Reese on the grounds that the parents failed to assert a viable cause of action.

In reversing the entry of summary judgment, the court of appeals held that the denial of a right to recover for the wrongful death of a viable unborn

child denied Tara and Donnie Reese equal protection under the law. The court of appeals also held that Tara Reese could maintain an individual action against the defendants for medical negligence with respect to the treatment provided to her. However, the court declined to permit Donnie Reese's individual bystander claim for the negligent care provided to his wife.

MEDICAL PEER REVIEW/SUSPENSION OF PRIVILEGES

The commencement of a medical peer review process standing alone cannot constitute evidence of malice.

Ching v. Methodist Children's Hospital, Cause No. 07-02-0218-CV, 2003 WL 943740 (Tex. App. – Amarillo 2003, n.p.h.)(designated, but not released, for publication).

Dr. Ernesto Ching filed suit against Methodist Hospital of Lubbock for breach of contract, violation of Texas antitrust law, denial of civil rights, defamation, and due process violations arising from his suspension of hospital privileges to practice cardiothoracic surgery on children.

Dr. Ching's privileges were suspended following the investigation of several pediatric heart surgery patients exhibiting a high mortality rate. After extensive hearings and reviews, including reviews by pediatric cardiothoracic experts from Arkansas, Dr. Ching's privileges regarding patients aged 0-18 were suspended temporarily. Eventually, Dr. Ching's privileges were suspended indefinitely. In response to his suspension, Dr. Ching sued the hospitals. The trial court granted summary judgment in favor of the hospital based on statutory immunity.

In affirming summary judgment, the court of appeals held that section 160.010 of the Texas Occupation Code grants immunity from causes of action arising from credentialing activities so long as the hospital does not act with malice. The court specifically held that, because hospitals have a duty to conduct medical peer reviews and public policy favors such reviews, the

commencement of a peer review, standing alone, cannot constitute evidence of malice. The court also disregarded Dr. Ching's contention that the hospital's use of two physicians from Arkansas in the peer review process constituted evidence of malice.

PREMISES LIABILITY/NATURAL ACCUMULATION OF PRECIPITATION

A premises owner/operator does not have a duty to protect invitees from conditions caused by a natural accumulation of frozen precipitation on its parking lot because such an accumulation does not constitute an unreasonably dangerous condition.

Wal-Mart Stores, Inc. v. Surratt, Cause No. 11-02-00113-CV, 2003 WL 1857617 (Tex. App. – Eastland, April 10, 2003, n.p.h.)(designated, but not released, for publication).

Plaintiff, Linda Surratt, suffered a serious ankle injury when she slipped and fell in a Wal-Mart parking lot. At the time of the incident, the parking lot was covered by an accumulation of frozen precipitation caused by a recent ice storm.

At trial, Wal-Mart argued that it did not have a duty to protect invitees from conditions caused by the natural accumulation of frozen precipitation on its parking lot. Wal-Mart claimed that it owed no duty to Ms. Surratt because, as a matter of law, a natural accumulation of frozen precipitation does not constitute a condition that poses "unreasonable risk of harm." The jury determined that both Wal-Mart and Linda Surratt were negligent and assessed 70% of the responsibility on Wal-Mart and 30% on Ms. Surratt.

The court of appeals reversed the jury verdict and rendered judgment in Wal-Mart's favor. In so holding, the court of appeals noted that, "We are reluctant to require a premises owner/operator to expend a great deal of physical and financial effort to protect its invitees from a naturally occurring condition which usually disappears on its own in a short period of time." The court expressly limited its "no duty" holding to the

owner/operator's parking lot and specifically declined to extend its ruling to "natural accumulations of frozen precipitation occurring on sidewalks, entryways, and other areas intended for pedestrian traffic."

PRODUCTS LIABILITY/SEAT BELT RESTRAINT SYSTEMS

Plaintiffs failed to prove that there was a safer alternative design to a seatbelt restraint system.

Honda of America Manufacturing, Inc. v. Brian Norman, Cause No. 01-00-01263-CV, 2003 WL 253595 (Tex. App. – Houston [1st Dist.] 2003, n.p.h.)(designated, but not released, for publication).

The parents of a vehicle occupant filed suit against an auto manufacturer after an intoxicated occupant could not disengage her seatbelt from a vehicle that had backed down a boat ramp into Galveston Bay. Plaintiffs claimed that the vehicle's two-point passenger restraint system, which included an automatic seatbelt that was mechanically drawn up over the shoulder and supplemented with a manual lap belt, had failed. Specifically, the Plaintiffs claimed that the seatbelt was defectively designed because (1) the mouse was able to move even when the belt retractor was locked, allowing the seatbelt to pin an occupant in the seat; (2) the seatbelt, when fully extended, could not be released easily and rapidly by pressing the emergency release button; and (3) the emergency release button was improperly located, which prevented an occupant from getting out of the seatbelt easily and rapidly in situations that Honda knew would occur.

The jury assessed the occupant with 25 percent negligence, but still awarded the wrongful death beneficiaries \$60 million in actual damages and \$5 million to her estate. The trial court subsequently reduced the damages awarded to the parents.

In reversing and rendering judgment in favor of Honda, the court of appeals held that the Plaintiffs

failed to meet their threshold statutory burden in a product liability case because they failed to prove that there was a safer alternative design to the seatbelt restraint system. The court specifically held that: (1) the timer-controlled mouse suggested by the Plaintiffs was not a safer alternative design to the seatbelt system in the vehicle in issue; (2) there was no evidence to support a finding that the Toyota right hip release design (which the Plaintiffs' expert said should have been used) would have prevented or significantly reduced the risk of death without imposing an equal or greater risk of harm under all other circumstances; and (3) because the Plaintiffs' expert testified that his opinion of having two release mechanisms was not supported by an engineering opinion with respect to the design and that the expert said it was not technologically feasible, there was no basis to demonstrate that the two release button design was a safer alternative design. As a result, the court of appeals reversed the judgment and entered a take-nothing judgment in favor of the Defendants.

SPECIAL APPEARANCE

Specific jurisdiction does not occur by a company representative meeting in Texas to discuss a company's business plan. Likewise, the fact that interest in the company were sold to two Texas residents and that a company representative was registered as a broker in Texas did not support a finding of specific jurisdiction.

Lang v. Capital Resource Investments, Cause No. 05-02-01406-CV, 2003 WL 1908193 (Tex. App. – Dallas, April 22, 2003, n.p.h.)(designated, but not released, for publication).

Plaintiff was an investor in Capital Resource Investments ("CRI"). Plaintiff sued CRI and William Nicholson, a CRI director and employee. Plaintiff filed suit against Nicholson and CRI for breach of fiduciary duty and negligence with respect to the manner in which the company was run. Nicholson filed a special appearance, which was granted.

The court of appeals found that there was no general jurisdiction when Nicholson actually lived and worked in Illinois, had never maintained a residence or resided in Texas, never owned or leased property in Texas, or maintained an office, mailing address, or telephone number in Texas. In his individual capacity, Mr. Nicholson never entered a contract that was performable in whole or in part in Texas. His only appearance was in a professional capacity on behalf of his employer, CRI.

Under the circumstances, the court held that there was no general jurisdiction over Mr. Nicholson. Further, the court held that specific jurisdiction does not occur by a company representative conducting a meeting in Texas to discuss a company's business plan. Likewise, the fact that an interest in the company was sold to two Texas residents, and that a company representative was registered as a broker in Texas, did not support a finding of specific jurisdiction. Accordingly, the court held that the granting of Mr. Nicholson's special appearance was appropriate.

STATUTE OF REPOSE

The statute of repose did not begin running on a road construction project until the subcontractor had completed all of its work on a road-widening project.

Sanchez v. Mica Corporation, Cause No. 04-01-00643-CV, 2002 WL 31753555 (Tex. App. – San Antonio 2002, pet. dism'd).

Betty Sanchez, an employee of the downtown campus of the University of Texas at San Antonio, was electrocuted while walking to work on a downtown sidewalk. The incident occurred as she approached an area of a sidewalk on Pecos Street in which an electrical pull box was embedded. The pull box was designed for people to walk on as part of the sidewalk. However, an electrical fault existed that made it electrically live and extremely dangerous. When Ms. Sanchez stepped on it, she was electrocuted and killed.

The Sanchez family sued a number of contractors and subcontractors with respect to the incident. Mica Corporation, one of the Defendants working on the project, had completed its work on Pecos Street more than 10 years before the incident. However, Mica performed additional work on the project (though in another physical area), which was eventually completed within 10 years of the date of the incident. After settling with two of the defendants, the case went to trial and a jury returned a verdict in the amount of \$7.9 million, with 50% percent of responsibility for the incident being assessed to Mica.

Several issues were raised on appeal, including the court's denial of a request for a jury question on the statute of repose and the factual and legal sufficiency of the evidence. Mica claimed that it was entitled to a jury question on the statute of repose because its work with respect to the area where the incident occurred had been completed more than 10 years prior to the date of the incident.

The court of appeals recognized that, pursuant to §16.009(a) of the Civil Practice & Remedies Code, the statute of repose bars any claim against a person who constructs improvements to real property that is asserted more than ten years after the substantial completion of the improvement occurs. The time period begins running on the repose statute when the improvement is substantially completed, rather than when the cause of action accrues. The court acknowledged that the portion of the street where the incident occurred was completed more than ten years before the lawsuit was filed. However, because Mica had not substantially completed all of its work on the entire project until less than ten years prior to the time the suit was filed, the court held that Mica was not entitled to a statute of repose instruction.

The court also overruled all challenges to the legal and factual sufficiency of the evidence supporting the jury verdict.

Joel M. Androphy, Berg & Androphy, Houston
Thomas C. Graham, Berg & Androphy, Houston

The United States Supreme Court held that the False Claims Act term “person” included local governments when the statute was enacted, and the subsequent amendment did not redefine such liability. Further, the treble damages provision clearly served a remedial purpose in addition to punitive objectives, encouraged qui tam actions to compensate the government as well as the relator, and thus could not be deemed a disfavored implied repeal of longstanding local government liability under the FCA.

Cook County v. United States ex rel. Chandler, 123 S. Ct. 1239 (2003).

Dr. Janet Chandler ran a study as part of a \$ 5 million grant from the National Institute of Drug Abuse to Cook County Hospital, from September 1993 until the institute fired her in January 1995. The grant was subject to a variety of conditions, including the terms of a compliance plan meant to assure that the study would jibe with federal regulations for research on human subjects. In 1997, Chandler filed this qui tam action, claiming that the County and the institute had submitted false statements to obtain grant funds in violation of § 3729(a)(1). Chandler said that the defendants had violated the grant’s express conditions, had failed to comply with the regulations on human-subject research, and had submitted false reports of what she called “ghost” research subjects. Chandler also alleged that she was fired for reporting the fraud to doctors at the hospital and to the granting agency, rendering her dismissal a violation of both state law and the whistle-blower provision of the FCA, § 3730(h). The Government declined to intervene in the action.

The County moved to dismiss the claims against it, arguing, among other things, that it was not a “person” subject to liability under the FCA. The District Court denied the motion, reading the term “person” in the FCA to include state and local

governments. After *Vermont Agency of Natural Resources v. United States, ex. rel. Stevens*, 529 U.S. 765 (2000) came down, the District Court reconsidered the County’s motion and dismissed Chandler’s action. Although the court found “no reason to alter its conclusion that the County is a ‘person’ for purposes of the FCA,” it held that the County, like a State, could not be subjected to treble damages, which Stevens, described not as “remedial” but as “essentially punitive.” The Court of Appeals, in conflict with two other Circuits, distinguished Stevens and reversed.

The Supreme Court held that “local governments are ‘persons’ amenable to qui tam actions under the FCA.” While § 3729 does not define the term “person,” its meaning has remained unchanged since the original FCA was passed in 1863. There is no doubt that the term then extended to corporations. Essentially conceding that private corporations were taken to be persons when the FCA was passed in 1863, the County argues that municipal corporations were not so understood until six years later. The Court reasoned that the meaning of “person” recognized in previous holdings was only a presumptive one, but neither the history nor the text of the original FCA provides contextual evidence that Congress intended to exclude municipalities from the class of “persons” covered by the FCA in 1863.

In addition, the False Claims Amendments Act of 1986 did not repeal municipal liability. As part of an effort to modernize the FCA, the 1986 amendments raised the ceiling on damages recoverable under § 3729(a) from double to treble. The County argued that, even if municipalities were covered by the term “person” from 1863 to 1986, Congress’s adoption of a “punitive” remedy entailed the elimination of municipal liability in 1986. The Court stated that inferring repeal of municipal liability from the increase in the damages ceiling from double to triple would be difficult in the abstract, but it was

impossible given that the basic purpose of the 1986 amendments was to make the FCA a more useful tool against fraud in modern times. Even if this was not true in 1863, local governments now often administer or receive federal funds. The Court held that was simply not plausible that Congress intended to repeal municipal liability sub silentio by the very Act it passed to strengthen the Government's hand in fighting false claims.

The Third Circuit held that the Hobbs Act was constitutional as applied to crimes which had only a de minimis impact on interstate commerce. In addition, the district court did not err when it instructed the jury that it need only find that each robbery had a minimal effect on interstate commerce.

United States v. Clausen, __ F.3d __, 2003 WL 1550717 (3rd Cir. March 26, 2003).

Between February 7, 2000 and February 26, 2000, on a total of nine occasions, one or more of the appellants robbed or attempted to rob six businesses in Philadelphia and one business in New Jersey, all at gunpoint. Five of the businesses in Philadelphia were owned and staffed by Korean women and operated as houses of prostitution, health spas, or massage parlors. The sixth Philadelphia business was engaged in the scrap metal business and the business in New Jersey was a restaurant and bar. On December 12, 2000, following a jury trial, Joel C. Casa, Adam Bentley Clausen and Kenneth Scott Sternberg, were each found guilty of one or more counts of conspiracy to commit a Hobbs Act violation, of Hobbs Act robbery or attempted robbery, and of use of a firearm during and in relation to a crime of violence.

Appellants argued that the District Court erred when it instructed the jury that the Hobbs Act applies to robberies which have only a de minimis effect on interstate commerce, and argued as well that insufficient evidence was presented at trial to enable a reasonable juror to conclude that each charged robbery had the requisite impact on interstate commerce. The Third Circuit affirmed both the conviction and the sentences.

The Third Circuit highlighted that the long history of Hobbs Act decisions have consistently held that the Act was constitutional when applied to crimes which had only a de minimis impact on interstate commerce. The Third Circuit then turned to the appellants argument that robbing or attempting to rob health spas or massage parlors did not effect interstate commerce. Evidence showed that the employees of the massage parlors would travel to establishments in different states. In addition, clients would travel to parlors that were located in different states. The evidence also showed that the owners advertised in numerous states and accepted checks and credit cards from out of state banks. The court held that the robberies and attempted robberies clearly had a de minimis impact on interstate commerce.

The Fourth Circuit held that the defendants outbursts during sentencing constituted only a single offense under 18 U.S.C.A. § 401, and vacate two of his three contempt convictions and sentences.

United States v. Clausen, 326 F.3d 501 (4th Cir. 2003).

Murphy pleaded guilty to one count of distributing cocaine base and one count of using a firearm during a drug trafficking crime. At his sentencing hearing, the district court sentenced him to 130 months imprisonment--seven months less than the guidelines maximum--on the distributing cocaine count and a consecutive term of 60 months on the using a firearm during a drug trafficking crime count. After sentencing Murphy began to scream obscenities and cursing the judge. The only interruption to his cursing was the judge finding him in contempt of court three times. In a written order, the district court noted that Murphy initiated the exchange, shouting in a loud and agitated voice even as marshals attempted to remove him from the courtroom. The court found that Murphy's conduct constituted three separate instances of contempt, and sentenced him to three separate six-month terms to be served consecutively to the sentence he was already serving.

Murphy appealed arguing that his conduct constituted only a single offense under 18 U.S.C.A. § 401, not three separate actionable offenses. The court stated that to determine the correct number of offenses, the statutory language of § 401 had to be explored. Upon reading the

statute the Fourth Circuit held that the language was ambiguous, and had to be read with leniency toward Murphy. The court stated that their holding was consistent with numerous state courts that had addressed similar facts, and while they did not address federal contempt charges they were instructive.

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Alan Curry, Assistant District Attorney, Houston

I. TEXAS COURT OF CRIMINAL APPEALS

A document attached to a notice of appeal does not constitute evidence that can or should be considered by the court of appeals if it was not introduced into evidence at trial.

***Ramirez v. State*, ___ S.W.3d ___, No. 260-02 (Tex. Crim. App., Apr. 30, 2003) (not yet reported).**

When the defendant attached to his notice of appeal a document that allegedly revealed that he was a juvenile at the time of the commission of the charged offense, that document did not constitute evidence that the trial court lacked jurisdiction over the case. That document was not introduced into evidence at trial, and the trial court was not presented with that document until the court of appeals ordered a hearing to be held to determine if the defendant was entitled to be appointed an attorney on appeal. At that hearing, the trial court only had limited authority to proceed.

When a case is remanded to a court of appeals, the court of appeals has the authority to re-analyze the relevant point of error based upon grounds not required by the remand order, but also not foreclosed by it.

***Carroll v. State*, ___ S.W.3d ___, No. 919-02 (Tex. Crim. App., Apr. 2, 2003) (not yet reported).**

When the Texas Court of Criminal Appeals remands a case to the court of appeals, the court of appeals may re-analyze the relevant point of error based upon grounds not required by the remand order, but also not foreclosed by the remand order. *See Adkins v. State*, 764 S.W.2d 782 (Tex. Crim. App. 1988). *But cf. Williams v.*

State, 829 S.W.2d 216 (Tex. Crim. App. 1992) (which is overruled).

A juvenile defendant cannot seek relief by way of a post-conviction writ of habeas corpus from an adjudication of a juvenile delinquency.

***Ex parte Valle*, ___ S.W.3d ___, No. 74,108 (Tex. Crim. App., Apr. 30, 2003) (not yet reported).**

An adjudication that a juvenile defendant has engaged in delinquent conduct (for committing a felony offense) is not a final felony conviction for the purposes of Article 11.07 of the Texas Code of Criminal Procedure, even after the juvenile court has subsequently ordered that the juvenile defendant serve the remainder of his sentence in the Institutional Division of the Texas Department of Criminal Justice. Therefore, the juvenile defendant was not entitled to post-conviction relief by way of a writ of habeas corpus. “Because all juvenile adjudications—including appeals—remain on the civil side of our judicial system unless transferred to a criminal court, article 11.07 should not be used to transport juvenile cases to the criminal side for the single, specific proceeding of an application for writ of habeas corpus.” The Texas Court of Criminal Appeals notes that a juvenile defendant might be able to obtain post-conviction relief by way of a writ of habeas corpus pursuant to Article V, Section 8 of the Texas Constitution.

The great pleasure in life is doing what people say you cannot do.

Walter Bagehot

II. COURTS OF APPEALS

A court of appeals will suggest that a trial court's certification of appeal should be amended if it conflicts with the defendant's notice of appeal concerning permission to appeal.

Daniels v. State, ___ S.W.3d ___, No. 4-03-176-CR (Tex. App.—San Antonio, May 7, 2003) (not yet reported).

When the trial court files a certification of appeal under the recently adopted TEX. R. APP. P. 25.2(d) that states that a case is a plea bargain case with no right of appeal, and the defendant files a conflicting notice of appeal in which he states that he is appealing with permission of the trial court, the court of appeals will issue a notice under TEX. R. APP. P. 37.1, suggesting that the trial court's certification is defective. This will give the trial court time to amend its certification, showing that the defendant does in fact have permission to appeal. Otherwise, the court of appeals will be forced to dismiss the defendant's appeal.

A court of appeals will order a trial court's certification be amended to give the defendant permission to appeal if he is appealing the trial court's order revoking his probation.

Sanchez v. State, ___ S.W.3d ___, No. 4-03-186-CR (Tex. App.—May 7, 2003) (not yet reported).

If the defendant seeks to appeal from a trial court's revoking the defendant's community supervision or probation, but the trial court files a certification of appeal under TEX. R. APP. P. 25.2(d) that states the case is a plea bargain case with no right of appeal, the court of appeals will give notice under TEX. R. APP. P. 37.1 that the trial court's certification is defective. The trial court's certification was defective because the defendant should in fact have a right to bring an appeal from a trial court's order revoking the defendant's community supervision, even if the defendant had previously entered a plea of guilty

or no contest in accordance with a plea bargain with the State. That was the case under previous versions of the Texas Rules of Appellate Procedure. See *Feagin v. State*, 967 S.W.2d 417, 419 (Tex. Crim. App. 1998).

A defendant's appeal will be dismissed if the trial court refuses to amend its certification of appeal, in which it is stated that the defendant has no right to appeal.

Teel v. State, ___ S.W.3d ___, No. 9-03-40-CR (Tex. App.—Beaumont, Apr. 10, 2003) (not yet reported).

If a trial court does not take action to amend its certification of appeal under the newly adopted TEX. R. APP. P. 25.2(d), in which the trial court states that the defendant does not have a right to appeal, the court of appeals will dismiss the defendant's appeal. If such a defendant has legitimate issues to raise, but is prevented by the trial court from doing so, he may obtain relief by filing a writ of mandamus or a post-conviction writ of habeas corpus.

A court of appeals does not have jurisdiction to consider an appeal challenging the trial court's failure to reduce pre-trial bail.

Vargas v. State, ___ S.W.3d ___, No. 7-02-446-CR (Tex. App.—Amarillo, Apr. 22, 2003) (not yet reported).

A court of appeals does not have jurisdiction to consider a defendant's interlocutory appeal in which he attempts to challenge a trial court's refusal to lower the defendant's pre-trial bail. See *Benford v. State*, 994 S.W.2d 404, 409 (Tex. App.—Waco 1999, no pet.); *Ex parte Shumake*, 953 S.W.2d 842, 846-47 (Tex. App.—Austin 1997, no pet.). *But cf. Ramos v. State*, 89 S.W.3d 122, 124-26 (Tex. App.—Corpus Christi 2002, no pet.).

A trial court has the duty to issue a writ of habeas corpus if the defendant shows that he is entitled to a reduction of his pre-trial bail; however, the defendant cannot force the trial court to issue the writ by way of a writ of mandamus.

In re Piper, ___ S.W.2d ___, No. 10-03-42-CR (Tex. App.—Waco, Apr. 2, 2003) (not yet reported).

Generally, if a defendant shows that he is entitled to a reduction in his pre-trial bail, the trial court has a constitutional and a statutory duty to issue a writ of habeas corpus, in which the defendant raises that claim. However, if the trial court refuses to issue the writ of habeas corpus, the defendant cannot pursue relief by way of a writ of mandamus because he has an alternative and adequate remedy. He may file a petition for writ of habeas corpus in the Texas Court of Criminal Appeals, in any district or county court other than the one that had already refused to issue the writ.

A defendant preserves error with regard to a *Brady* violation if he raises it at the first opportunity.

Keeter v. State, ___ S.W.3d ___, No. 10-00-169-CR (Tex. App.—Waco, Apr. 3, 2003) (not yet reported).

The defendant's amended motion for new trial, and the affidavit attached to it, were sufficient to preserve error on the defendant's claim that the State withheld exculpatory information in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Furthermore, a single justice on the court of appeals also wrote that, when there is a trial, a defendant's claim that the State has violated *Brady v. Maryland* is a claim of the violation of an absolute right or a fundamental, systemic requirement that cannot be waived by the defendant in any event. *Cf. United States v. Ruiz*, 536 U.S. 622, 122 S. Ct. 2450, 153 L. Ed. 2d 586 (2002).

In a municipal court proceeding, a defendant's motion to quash is timely, even if it is presented on the date that the case was scheduled to go to trial.

State v. Sanchez, ___ S.W.3d ___, No. 5-02-717-CR (Tex. App.—Dallas, Apr. 10, 2003) (not yet reported).

In a municipal court proceeding, a defendant's motion to quash is timely in order to preserve error for the purposes of appeal, even if it is presented on the date that the case was *scheduled* to go to trial. *See* TEX. CODE CRIM. PROC. ANN. art. 45.019(f) (Vernon Supp. 2003) (requiring defendant to object to charging instrument "before the date on which the trial on the merits commences"). *Cf.* TEX. CODE CRIM. PROC. ANN. art. 1.14(b) (Vernon Supp. 2003) (containing same language); *Van Dusen v. State*, 744 S.W.2d 279, 279 (Tex. App.-Dallas 1987, no pet.) (construing art. 1.14(b)).

In a post-conviction writ of habeas corpus, a defendant may again present allegations of ineffective assistance of counsel that were presented in a prior direct appeal, if the defendant presents new evidence on those allegations.

Ex parte Nailor, ___ S.W.3d ___, No. 14-02-444-CR (Tex. App.—Houston [14th Dist.], Apr. 24, 2003) (not yet reported).

In a post-conviction writ of habeas corpus, a defendant may relitigate claims of ineffective assistance of counsel that were previously litigated in a direct appeal if new evidence is presented on those claims of ineffective assistance of counsel. In this case, this new evidence constituted an affidavit from the defendant's trial attorney. Although the defendant's trial attorney had originally testified at the hearing on a motion for new trial, the reporter's record of the trial proceedings had not been prepared by that time. Therefore, the defendant's attorney on appeal did not have that record available to him in order to develop the record on direct appeal.

A juvenile defendant is required to file a motion for new trial in order to bring a challenge to the factual sufficiency of the evidence.

***In re E.U.M.*, ___ S.W.3d ___, No. 9-02-371-CV (Tex. App.—Beaumont, April 24, 2003) (not yet reported).**

The requirements governing an appeal in a juvenile case are as in civil cases generally. Therefore, a juvenile defendant is required to file a motion for new trial in order to preserve a challenge to the factual sufficiency of the evidence for the purposes of appeal. *See In re D.T.C.*, 30 S.W.3d 43, 51 (Tex. App.—Houston [14th Dist.] 2000, no pet.). *Cf. In re M.R.*, 858 S.W.2d 365, 366 (Tex. 1993). *But cf. In re J.L.H.*, 58 S.W.3d 242, 246 (Tex. App.—El Paso 2001, no pet.).

The State is not entitled to a new trial in a bond forfeiture proceeding.

***MacDonald v. State*, ___ S.W.3d ___, No. 8-02-245-CV (Tex. App.—May 1, 2003) (not yet reported).**

The trial court may not grant the State a new trial in a bond forfeiture proceeding. Although Article 22.10 of the Texas Code of Criminal Procedure provides that a bond forfeiture proceeding is governed by the same rules that govern civil suits, such a proceeding is nevertheless still a criminal case. In criminal cases, a new trial may not be granted to the State. *See* TEX. R. APP. P. 21.1; *Robertson v. State*, 14 Tex. Ct. App. 211 (1883); *Perry v. State*, 14 Tex. Ct. App. 166 (1883). *But cf. Roberts v. State*, 749 S.W.2d 624 (Tex. App.—Fort Worth 1988, no pet.).

The State is not permitted to appeal a trial court’s ruling in a proceeding for post-conviction DNA testing.

***State v. Waller*, ___ S.W.3d ___, No. 5-02-1173-CR (Tex. App.—Dallas, Apr. 28, 2003) (not yet reported).**

The State is not authorized to appeal a trial court’s finding—under Chapter 64 of the Texas Code of Criminal Procedure—that post-conviction DNA testing was favorable to the defendant. While a proceeding for post-conviction DNA testing is a criminal case, and while the State is permitted to bring an appeal in a criminal case, Article 44.01 of the Texas Code of Criminal Procedure does not permit the State to bring an appeal from a trial court’s finding a proceeding for post-conviction DNA testing. *See State v. Patrick*, 86 S.W.3d 592, 594 (Tex. Crim. App. 2002). Authority for such a State’s appeal is also not provided by Article 64.05 of the Texas Code of Criminal Procedure.

To me, a lawyer is basically the person that knows the rules of the country. We’re all throwing the dice, playing the game, moving our pieces around the board, but if there is a problem, the lawyer is the only person who has read the inside of the top of the box.

Jerry Seinfeld

NOTES

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