



The Appellate Advocate

State Bar of Texas Appellate Section Report

Vol. XVI, No. 4

Winter 2004

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

NOTES

Lori Meghan Gallagher, Andrews & Kurth, L.L.P., Houston

WELCOME NEW MEMBERS!

In November, we were fortunate to have newly inducted attorneys join the ranks of our Appellate Section. Through our membership drive and the hard work of Mike Truesdale, our Members Services Committee Chair, we offered free membership to the first 100 attorneys to sign up. Welcome! We are pleased to have you as a part of the Appellate Section. For all of those newly licensed attorneys out there, now is your chance to join your friends as members in one of the most active sections of the State Bar of Texas.

Why join the Appellate Section? Attorneys around the state (newly licensed and those who have been licensed) should join our Section because we offer our members great rewards:

● ***The Appellate Advocate Newsletter:*** Our newsletter is published four times a year. Each issue contains 50 to 60 pages of interesting articles on state and federal appellate procedure as well as substantive law. The *Advocate* also highlights the work of our committees, such as an article in the Spring 2003 issue on the Post Conviction Project, which is a collaboration of the University of Texas Law School and attorneys who assist battered women in prison with preparation of their parole requests. The *Advocate* also publishes interviews with retired and active appellate court justices, which is a project of our History and Heritage Committee, such as the one published in the Winter 2003 issue on Chief Justice William Cornelius of the Sixth Court of Appeals. Become involved by writing an article for the *Advocate*. Contact our *Advocate* editor, Kimberly Phillips, at kphillips@gardere.com.

● ***The Appellate Roadshow:*** We endeavor to bring more continuing legal education to our members than is available only through our Advanced Course. This effort is made through our Appellate Roadshow, which we plan to extend to Amarillo, Dallas, Fort Worth, Laredo, Corpus

Christi, Beaumont, Eastland and Texarkana. The Appellate Roadshow provides approximately one and one-half to two hours of CLE over the noon hour through a moderator and panel of experienced appellate practitioners using a question and answer format. Topics of discussion include (1) how to preserve error; (2) how to make objections that survive appeal; (3) how to avoid appellate procedure traps; and (4) how to avoid charge error. Attendees receive free as part of the program an "Ultimate Appellate Library" CD created last year by the Appellate Section. The committee works with appellate court judges, court attorneys and practicing attorneys in the roadshow locations. The Roadshow already has been to El Paso (2002), Waco (June 2003), Austin (October 2003) and Tyler (November 2003). The next Roadshow is scheduled for San Antonio on February 20, 2004.

● ***Advanced Appellate Practice Course:*** The Advanced Appellate Practice Course is scheduled for September 8-10, 2004, at the Four Seasons in Austin, to be held in conjunction with our Annual Meeting. For a second year, the course has been expanded to include a Nuts and Bolts portion on the 8th and the Advanced Course on the 9th and 10th. We will have a planning committee meeting in January. Our September 2003 course was very well attended, with an overflow room required, plus many attendees viewed the course from their rooms. Through need-based scholarships, the Section successfully assisted an additional 9 people in attending the course, who otherwise might not have been able to attend due to the cost of the course. Additionally, for several years the Section has facilitated a scholarship program with the State Bar Professional Development Program to enable court attorneys to attend the Advanced Course at a reduced rate. David Coale, our former editor of *The Appellate Advocate* and a Council member, will be our 2004 Course Director.

●**The Appellate Section Website:** We have expanded our Website Committee to update and improve our Website to make it more user-friendly and accessible. Let us know what you would like to see on the Website and what changes you would like made to enable you to do your work better. Contact the new Chairs of our Website Committee with your ideas: Marcy Greer at mgreer@fulbright.com or Clint Sare at Clint.Sare@courts.state.tx.us. Check out the Website at www.tex-app.org.

●**Committee Involvement:** Join a committee and become involved in the Section. Our committees include: Advanced Appellate Practice Course, Annual Meeting, Appellate Advocate Board, Appellate Roadshow, Appellate Rules and Legislation, Bench Bar Liaison, Contributions, Heritage and History, Local Bar Liaison, Long Range Planning, Pro Bono, Professionalism, Publications, Texas Association of Appellate Court Attorneys, and Website.

●**Membership Drive:** I challenge all members of the Section to assist us in a broad-reaching membership drive. Encourage other attorneys in your firms and at the courts to join

our Section. We work hard and we have fun together. Be a part of something positive!

If you are one of the attorneys who was recently licensed in November and did not yet sign up for free membership, contact Kathy Casarez at kcasarez@texasbar.com. If you are an attorney who was licensed before November 2003 and would like to join the Section, please make your check for \$25 payable to the State Bar of Texas, indicate on the memo line that the check is for Appellate Section dues and mail the check to the following address:

State Bar of Texas
Attn: Sections Department
Post Office Box 12487
Austin, Texas 78711-2487

Thank you! I also would like to extend a heartfelt thank you to all of our Committee Chairs, who tirelessly work for free in their rare “spare time” to make the Appellate Section better for all of us. Good job! Thanks for making our Section one of the very best the State Bar of Texas has to offer its members!

****ATTENTION NEW ATTORNEYS**
LICENSED IN NOVEMBER 2003**

**Free Appellate Section Membership Is Available
For The First 100 Attorneys
Licensed in November 2003
Who Sign Up
By March 1, 2004
(Free membership lasts until May 31, 2004
and is a value of \$25)**

**Newly licensed attorneys
seeking to join the Appellate Section should
send the form below to the following address:**

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Attn: Sections Department
Post Office Box 12487
Austin, Texas 78711-2487

Name: _____

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License Date: _____

Telephone Number: _____

Fax Number: _____

Jennifer Tillison, Alexander Dubose Jones & Townsend llp

This article considers whether the recent legislative changes to the judgment interest rules, which affect all cases “subject to appeal” on the effective date, have any impact on cases already on appeal at that time. It concludes that the legislation may apply to cases in which a notice of appeal may be timely filed after the effective date. It does not apply to appeals that were already pending when the legislation went into effect.¹

Money judgments in Texas must specify a postjudgment interest rate.² The rate for judgments (other than on a contract)³ is set forth in section 304.003 of the Finance Code.⁴ House Bills 2415 and 4 changed the manner of computing that rate.⁵ Because two versions of this Amendment were passed in the Legislature on the same day, June 1, 2003, with both adopting corrections on the same day, June 2, 2003, there may be some question about which bill is the law. These amendments contain the same substantive language, but different effective dates (June 20 and September 1, respectively). Thus, depending on which bill controls, there is a 71-day difference in which a party could receive the benefit or consequence of the new rate.

Which Bill Applies?

When two amendments to the same statute are passed in the same session of the legislature without reference to each other, “the amendments shall be harmonized, if possible, so that effect may be given to each. If the amendments are irreconcilable, the latest in date of enactment prevails.”⁶ Since the substantive content of article 6 of HB 4 and HB 2415 is identical, they may be harmonized simply by making the amendment effective June 20, 2003 and again on September 1, 2003.

In the event the different effective dates are deemed to create an irreconcilable conflict, the effective date turns on the date of enactment, which is “the date on which the last legislative vote is taken on the bill enacting the statute.”⁷ If the legislative records fail to disclose the order in which the votes were taken, the date of enactment, in order of priority, is: “(1) the date on which the last presiding officer signed the bill; (2) the date on which the governor signed the bill; or (3) the date on which the bill became law by operation of law.”⁸

The House and Senate Journals reflect the following chronology:

- (1) on June 1, 2003, the House first voted on HB 2415, which passed by a super-majority; later in the day, the House voted on HB 4, which also passed;⁹

¹ See *Columbia Med. Ctr. v. Bush*, 2003 WL 22725001 (Tex. App.—Fort Worth Nov. 20, 2003, no pet. h.).

² TEX. FIN. CODE § 304.001.

³ The postjudgment interest rate for contract cases has not changed; it remains the lesser of the rate specified in the contract or 18%. *Id.* § 304.002.

⁴ *Id.* § 304.003.

⁵ Postjudgment Interest Rate Act, 78th Leg., R.S., ch. 676, 2003 Tex. Sess. Law Serv. ch. 676 (Vernon) (codified at TEX. FIN. CODE § 304.003(c)) (“House Bill 2415”); Reform of Certain Procedures and Remedies in Civil Actions Act, 78th Leg., R.S., ch. 204, art. 6 § 6.01, sec. 304.003(c), 2003 Tex. Sess. Law Serv. ch. 204 (Vernon) (“House Bill 4”).

⁶ TEX. GOV'T CODE § 311.025(b).

⁷ *Id.* §311.025(d).

⁸ *Id.* § 311.025(e).

⁹ H.J. of TEX., 78th Leg., R.S. 5644, 6041 (2003). While the Journals reflect the order in which events occurred in the House or in the Senate, they do not state the time of day. Thus, it is not possible to know whether a certain vote in the *House* preceded or followed a vote in the *Senate* on the same day. Likewise, the Journals do not disclose the order in which bills signed on the same day were signed or which house signed it first.

- (2) on June 1, 2003, the Senate first voted on HB 4, which passed; and then voted on HB 2415, which passed by a super-majority;¹⁰
- (3) on June 2, 2003, the House approved the technical amendments to HB 4, before those for HB 2415 (both by non-record votes);¹¹
- (4) on June 2, 2003, the Senate approved the technical amendments to HB 2415, before those for HB 4 (both by non-record votes);¹²
- (5) on June 2, 2003, both bills were signed in both houses;¹³
- (6) on June 11, 2003, HB 4 was signed by the Governor;¹⁴
- (7) on June 20, 2003, HB 2415 was signed by the Governor.¹⁵

Because the legislative records do not disclose which vote was the last taken by which house, or which bill was signed last in either house, the enactment date is determined by the date each bill was signed by the Governor. HB 2415 is therefore the later-enacted provision, and the effective date of the amendment is June 20, 2003.

History of Judgment Interest Legislation

Previously, the judgment interest rate was calculated by reference to the “auction rate quoted on a discount basis for 52-week treasury bills issued by the United States government as most recently published by the Federal Reserve Board before the date of computation.”¹⁶ The reason for

the amendment was that the Treasury Department no longer issues 52-week T-bills.¹⁷ Accordingly, after some debate and compromise between competing House and Senate proposals, the following new language was adopted:

(c) The postjudgment interest rate is:

(1) the prime rate as published by the Federal Reserve Bank of New York on the date of computation;

(2) five percent a year if the prime rate as published by the Federal Reserve Bank of New York described by subdivision (1) is less than five percent; or

(3) fifteen percent a year if the prime rate as published by the Federal Reserve Bank of New York described by subdivision (1) is more than fifteen percent.¹⁸

The immediate effect of that change was to reduce the postjudgment interest rate from 10% to 5%.¹⁹ The effect of this rate change is magnified by the fact that in most instances, prejudgment interest is awarded at the same rate as the statutory postjudgment interest.²⁰

¹⁰ S.J. of Tex., 78th Leg., R.S. 5008, 5038 (2003).

¹¹ H.J. of TEX., 78th Leg., R.S. 6616, 6659 (2003).

¹² S.J. of TEX., 78th Leg., R.S. 5088, 5094 (2003).

¹³ H.J. of TEX., 78th Leg., R.S. 6665 (2003), S.J. of TEX., 78th Leg., R.S. 5115 (2003).

¹⁴ H.J. of TEX., 78th Leg., R.S. 6671 (2003).

¹⁵ H.J. of TEX., 78th Leg., R.S. 6672 (2003).

¹⁶ TEX. FIN. Code § 304.003 (Historical and Statutory Notes).

¹⁷ HOUSE COMM. ON FIN. INSTS., BILL ANALYSIS, H.B. 2415, 78th Leg., R.S. (2003). The last auction of 52-week treasury bills was held on February 27, 2001. Deputy Assistant Secretary of the Treasury for Federal Finance Michael J. Paulis Remarks at the February 2001 Treasury Quarterly Refunding, *available at* <http://www.treas.gov/press/releases/pol15.htm>. The last auction rate published by the Federal Reserve Board was apparently in June 2000. The postjudgment rate in Texas has been frozen at 10% since that time, despite falling interest rates in the market.

¹⁸ TEX. FIN. CODE § 304.003.

¹⁹ See 28 Tex. Reg. 8412 (2003) (“The judgment ceiling as prescribed by Sec. 304.003 for the period of 10/1/03 - 10/31/03 is 5%”); Tex. Office of Consumer Credit Comm’r Current Judgment Rate, *avail. at* www.occc.state.tx.us/pages/int_rates/Index.html.

²⁰ See TEX. FIN. CODE § 304.103 (wrongful death,

Sadly, given the complexity of this issue already, a future amendment to this statute will probably be required because, effective August 1, 2003, the Federal Reserve Bank of New York stopped publishing a prime rate.²¹ The Board of Governors of the Federal Reserve Bank actually establishes the prime rate. The historical rate for each day since August 4, 1955 is available at their website.²²

Issue for the Appellate Courts

Both bills state, “The changes in law made by this Act apply in a case in which a final judgment is signed *or subject to appeal* on or after the effective date of this Act.”²³ The question is which cases will be considered “subject to appeal” after the effective date of the statute. One view is that “subject to appeal” is equivalent to “appealable” or “capable of being appealed.” The other view is that the phrase “subject to appeal” also means “pending on appeal.”

Statutory Construction - Plain Language

The Code Construction Act requires that “[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage.”²⁴ Words that have acquired a particular technical usage, by statutory definition or otherwise, are construed in accordance with that definition.²⁵ Since there are no statutory or other technical definitions of the phrase “subject to appeal,” it should be interpreted in accordance with common usage.

personal injury and property damage cases); *Johnson & Higgins of Texas, Inc. v. Kenneco, Inc.*, 962 S.W.2d 507, 532 (Tex. 1998) (equitable postjudgment interest at common law).

²¹ See www.newyorkfed.org/aboutthefed/faq.html (rates/releases).

²² See www.federalreserve.gov/releases/h15/data/d/prime.txt.

²³ House Bill 2415 § 2(a) (emphasis added); House Bill 4 § 6.04 (substitutes the word “article” for the word “Act”) (emphasis added).

²⁴ TEX. GOV’T CODE §311.011(a).

²⁵ *Id.* § 311.011(b).

In *Columbia Medical Center of Las Colinas v. Bush*, the Court reviewed several cases that examined the finality of an underlying order or judgment to determine whether it was “subject to appeal.”²⁶ It concluded that, in the context of the amendment to Finance Code section 304.003(c), that language is used to describe a judgment that “fully and finally disposes of all parties and all issues before the trial court and is therefore capable of being appealed.”²⁷ The Court held:

Thus, giving the statutory language its plain meaning, the amendments to finance code section 304.003(c) apply to cases where a judgment is signed on after [sic] the effective date of the Act and to cases where a judgment becomes subject to appeal, i.e., capable of being appealed, on or after the effective date of the Act.²⁸

A number of statutes use the phrase “subject to appeal.” Most of these simply recite that a particular decision of an administrator or court is or is not “subject to appeal.” That language had not been interpreted by the courts.²⁹ The most instructive statute relates to the enforceability of a foreign judgment “that is final and conclusive and enforceable where rendered, even though an appeal is pending or the judgment is subject to appeal.”³⁰ The use of the disjunctive “or” would suggest that a judgment “subject to appeal” is something different from one where “an appeal is pending.” No cases have interpreted this language.

The *Columbia Medical Center* case and the use of identical language in other statutes suggests that the plain language of the phrase “subject to appeal” means “capable of being appealed.”

²⁶ 2003 WL 22725001, at *24 (Tex. App.—Fort Worth Nov. 20, 2003, no pet. h.). This is the only case to interpret the 2003 amendment to section 304.003(c) as of December 1, 2003.

²⁷ *Id.*

²⁸ *Id.*

²⁹ See, e.g., TEX. CIV. PRAC. & REM. CODE § 172.054(d); TEX. BUS. & COMM. CODE § 17.62(c); *id.* § 15.10(j).

³⁰ TEX. CIV. PRAC. & REM. CODE § 36.002(a)(1).

Statutory Construction - Entire Statute

The Code Construction Act creates the presumption that the entire statute is intended to be effective.³¹ Accordingly, the amended provision, section 304.003(c) of the Finance Code, should be read in conjunction with the rest of section 304.

In addition to the method of calculation, section 304.003 requires that money judgments, including costs and prejudgment interest, earn postjudgment interest.³² It also says the following:

(b) On the 15th day of each month, the consumer credit commissioner shall determine the postjudgment interest rate to be applied to a money judgment *rendered during the succeeding calendar month.*³³

The consumer credit commissioner is directed to send the rate to the secretary of state and the secretary of state is directed to publish it in the Texas Register.³⁴ Courts are directed to take judicial notice of the published postjudgment interest rate.³⁵ These additional provisions, which were not amended by House Bill 2415 or House Bill 4, strongly suggest that the new judgment interest rate was *not* intended to apply to cases “in the pipeline,” but, rather, only to new judgments.

The Consumer Credit Commissioner, who is charged with establishing and publishing the postjudgment interest rate for the State of Texas, takes the following position:

The date the rate is computed by the agency is not changed. Section 304.003(b) of the Texas Finance Code directs the consumer credit commissioner to determine the

postjudgment interest rate on the 15th day of each month; that rate is applied to a money judgment rendered by a Texas court during the succeeding calendar month. This subsection was not amended during the 78th Regular Legislative Session. The bill was signed after the fifteenth of June. Therefore, the first computation of the new postjudgment rate occurs July 15, 2003, for the month of August 2003. The postjudgment interest rate remains at the long-standing 10% through July 31, 2003.³⁶

Under the Consumer Credit Commissioner’s interpretation, the amended statute, while effective June 20, 2003, could not apply to judgments entered prior to August 1, 2003.

House Bills 2415 and 4 merely changed the method by which the Consumer Credit Commissioner must calculate the postjudgment interest rate, not the additional provisions that control the application of that rate to money judgments. An interpretation that makes the amendments applicable to all judgments already pending on appeal would render section 304.003(b) of the Finance Code (which was not amended) meaningless.

Statutory Construction - Just and Reasonable Result

The Code Construction Act also recognizes the presumption that in enacting a statute, a just and reasonable result was intended.³⁷ If the phrase “subject to appeal” in the amendments to Finance Code section 304.003(c) is interpreted to mean “pending on appeal,” Pandora’s Box truly will be opened. As the Court points out in the *Columbia Medical Center* case, such an interpretation “would mandate a recalculation of postjudgment interest in every single civil case involving a

³¹ TEX. GOV’T CODE § 311.021(2).

³² TEX. FIN. CODE § 304.003(a).

³³ *Id.* § 304.003(b) (emphasis added).

³⁴ *Id.* § 304.004.

³⁵ *Id.* § 304.007.

³⁶ *New Postjudgment Rate Calculation*, pub. by Office of Consumer Credit Comm’r, available at http://www.occc.state.tx.us/pages/int_rates/judg.html.

³⁷ TEX. GOV’T CODE § 311.021(3).

money judgment pending on appeal in all fourteen courts of appeal as of June 20, 2003.”³⁸

In the absence of any specific legislative history, it must be presumed that the Legislature did not intend to add a new, unpreserved issue to every case involving a money judgment pending before every Texas court of appeals, the Texas Supreme Court, and federal courts applying Texas law. The court would have to determine when the new interest rate was to become effective for that case: when the parties raise the issue on appeal, or when the final judgment was entered below, or on the effective date of the amendment, or some other time. The court or the parties would have to research the appropriate rate given the date of application. This would involve motions, hearings and evidence in every case. The consequence would be appellate gridlock — surely an unreasonable result not intended by the Legislature.

Statutory Construction - Prospective v. Retrospective

The Texas Constitution has a specific prohibition against retroactive laws.³⁹ Accordingly, a Texas statutory enactment is “presumed to be prospective in its operation unless expressly made retrospective.”⁴⁰

Texas law militates strongly against the retroactive application of laws. . . . Amendments are also presumed not to apply retroactively. Doubts as to retroactivity are resolved *against* the retroactive application of a statute.⁴¹

While an argument could be made that the phrase “subject to appeal” imposes some degree of retroactivity, it does not appear to be an “express”

³⁸ 2003 WL 22725001, at * 25.

³⁹ TEX. CONST. art. I § 16.

⁴⁰ TEX. GOV’T CODE § 311.022.

⁴¹ *Pace v. Jordan*, 999 S.W.2d 615, 619 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (emphasis added) (citations omitted).

statement to the effect that all cases pending on appeal are subject to a recalculation of their judgment interest rates..

There is a wrinkle in the presumption against retroactivity. Changes in statutes affecting remedies or procedure *may* be applied retroactively.⁴² Although postjudgment interest is remedial, this exception to the presumption should not come into play in the case of pending appeals. In an exhaustive opinion on the topic, the Supreme Court said:

[R]etroactive laws have been upheld when no vested substantive right has been impaired but only the procedure or remedy has been changed. In such cases, the change *will not affect or invalidate steps previously taken in pending litigation*, but all subsequent proceedings will be governed by the new statute or rule as of its effective date, provided a reasonable time is afforded in which to act upon the new law.⁴³

Thus in situations where postjudgment interest at the 10% rate was awarded and an appeal was perfected before section 304.003(c) was amended, that award should not be invalidated under this authority.

Statutory Construction - Legislative Intent

In construing a statute, a court is permitted to consider, among other things, the legislative history.⁴⁴ The legislative intent as to both HB 4

⁴² *City of Tyler v. Likes*, 962 S.W.2d 489, 502 (Tex. 1997) (laws affecting remedies, such as the statute of limitations, are not unconstitutionally retroactive unless the remedy is entirely taken away, as long as the party has a reasonable time or fair opportunity to preserve her rights); *Holder v. Wood*, 714 S.W.2d 318, 319 (Tex. 1986); *Tex. Water Rights Comm’n v. Wright*, 464 S.W.2d 642, 648–49 (Tex. 1971) (retroactive laws may be upheld if the change is a remedy, not a right).

⁴³ *Ex parte Abell*, 613 S.W.2d 255, 260 (Tex. 1981) (emphasis added).

⁴⁴ TEX. GOV’T CODE § 311.023(3).

and HB 2415 is clear: the amendment is intended to be prospective in application.⁴⁵

Statutory Construction - General Savings Clause

Texas has a general savings statute that applies whenever a statute is enacted, amended or appealed.⁴⁶ Under this savings statute, the amendment of a statute does not affect “(1) the prior operation of the statute or any prior action taken under it; or (2) any . . . right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred under it; or . . . (4) any . . . proceeding, or remedy concerning any privilege, obligation, liability . . . and the proceeding, or remedy may be instituted, continued, or enforced . . . as if the statute had not been . . . amended.”⁴⁷ When the trial court has entered a final, appealable judgment before a statutory amendment goes into effect, that constitutes action taken under the prior law, so section (a)(1) of the general savings statute bars application of the amended law to the case.⁴⁸

Changes in Law/Preservation of Error

In the case of common law changes to the applicable law during the pendency of an appeal, there are two familiar doctrines of appellate review. First, under *Blair*, it is generally the rule that “[w]hen the applicable law changes during the pendency of the appeal, the court of appeals must render its decision in light of the change in the law.”⁴⁹ Second, the *Allright* case holds that

⁴⁵ See SEN. COMM. ON STATE AFFAIRS, BILL ANALYSIS, C.S.H.B. 4; 78th Leg., R.S. (2003) (“Section 6.04 [m]akes application of the changes in law made by this article prospective.”); SEN. COMM. ON JURISPRUDENCE, BILL ANALYSIS, C.S.H.B. 2415; 78th Leg., R.S. (2003) (“Section 2.(a) [m]akes application of this Act prospective.”).

⁴⁶ TEX. GOV’T CODE § 311.031(a).

⁴⁷ TEX. GOV’T CODE § 311.031(a); see also *Quick v. City of Austin*, 7 S.W.3d 109, 133 (Tex. 1999) (opinion on motion for rehearing).

⁴⁸ See *Bates v. Tesar*, 81 S.W.3d 411, 428 (Tex. App.—El Paso 2002, no pet.).

⁴⁹ *Blair v. Fletcher*, 849 S.W.2d 344, 345 (Tex. 1993).

failure to preserve error on this point will preclude appellate review or “correction.”⁵⁰

Interestingly enough, the *Allright* case dealt with the application of the prejudgment interest rule set forth in *Cavnar v. Quality Control Parking*⁵¹ to a case “in the pipeline” when it was decided. The Court said:

The prejudgment interest rule in *Cavnar* is applicable to all future cases as well as those still in the judicial process. However, this court did not modify the procedural rules *nor did we dispense with the requirement of preserving errors*. Pearson did not complain to the trial court of its failure to award prejudgment interest nor did she assign a point of error or crosspoint in the court of appeals on this issue. Pearson waived any claim for prejudgment interest by failing to preserve her point of error on appeal.⁵²

However, the *Blair* rule ordinarily does not apply in the context of statutory changes.⁵³ Rather, the presumptions of the Code Construction Act

⁵⁰ *Allright, Inc. v. Pearson*, 735 S.W.2d 240, 240 (Tex. 1987) (unpreserved error is not before the appellate court and it is error for the court of appeals to consider unassigned points of error).

⁵¹ 696 S.W.2d 549 (Tex. 1985).

⁵² *Allright*, 735 S.W.2d at 240 (emphasis added).

⁵³ See, e.g., *Cash Am. Int’l Inc. v. Bennett*, 35 S.W.3d 12, 17 n.3 (Tex. 2000) (*Blair* inapposite because it did not involve a statute); *Pace v. Jordan*, 999 S.W.2d 615, 620 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (*Blair*, which involved the common law, does not apply in this statutory amendment case). *But see Am. Home Shield of Tex., Inc. v. Kortz*, 2000 WL 1262617, at *5 (Tex. App.—Houston [1st Dist.] Sept. 7, 2000, pet. dismissed) (not designated for publication) (applying a statutory amendment over objection on the authority of *Blair*); cf. *Phifer v. Nacogdoches County Cent. Appraisal Dist.*, 45 S.W.3d 159, 166–67 (Tex. App.—Tyler 2001, pet. denied) (applying statutory amendment explicitly made applicable to all pending actions pursuant to *Blair* rule).

should govern the application of statutory changes to pending cases.⁵⁴

To the extent that a preservation requirement does apply, it is unlikely that this issue could be reviewed under a fundamental error theory. The longstanding rule on fundamental error in civil cases was set forth in an election law case, *Ramsey v. Dunlop*.⁵⁵ In that case, the Court held that, despite an amended statute requiring that error be preserved, it could still review “fundamental errors” that had not been assigned.⁵⁶ It defined fundamental error as “an error which directly and adversely affects the interest of the public generally, as that interest is declared in the statutes or Constitution of this state.”⁵⁷ However, the Supreme Court drastically restricted the fundamental error doctrine in civil cases in *In re B.L.D.*⁵⁸ There the Court went to great lengths to explain the strong policy considerations favoring its preservation of error rules, pointing out that, in light of those rules, it has previously called fundamental error a “discredited doctrine.”⁵⁹ The Court recognized only two situations in which it considered the fundamental error doctrine viable: subject matter jurisdiction issues and juvenile delinquency cases, because they are quasi-

criminal.⁶⁰ The Court therefore refused to find fundamental error in a charge issue that resulted in the termination of parental rights.⁶¹ It is, therefore, highly unlikely that the Court would extend fundamental error doctrine to “correct” the purely economic consequences of a remedial rule that, while properly applied at the time of judgment, has since been modified for practical reasons.

Conclusion

The amendments to article 304.003(c) of the Finance Code should only apply prospectively. Judgments that were signed after June 20, 2003 (or perhaps after August 1, 2003 according to the Office of Consumer Credit Commissioner), or judgments that were capable of being appealed after the effective date are subject to the new postjudgment interest rate calculation. The amendment should not be applied to modify the postjudgment interest rate in cases that already were pending on appeal when the new rate went into effect.

⁵⁴ *Cash America*, 35 S.W.3d at 17 n.3 (Code Construction Act governs construction of Finance Code, including question of retroactivity); *see also Columbia Med. Ctr.*, 2003 WL 22725001, at *25.

⁵⁵ 205 S.W.2d 979 (Tex. 1947).

⁵⁶ *Id.* at 983. The Court was clearly concerned that its failure to reach the issue presented might result in the election of a candidate who had not received a majority of the popular vote in clear violation of the public policy declared by the Texas Constitution. It therefore justified its decision by saying, “If our courts, in whom is imposed the judicial power of this state, cannot act of their own motion in such a situation, only because litigants whose personal interests are adverse to that public policy have waived the error, then the government of this state is indeed impotent.” *Id.*

⁵⁷ *Id.*

⁵⁸ 113 S.W.3d 340 (Tex. 2003).

⁵⁹ *Id.* at 350 (citing *Cox v. Johnson*, 638 S.W.2d 867, 868 (Tex. 1982)).

⁶⁰ *Id.* at 350–51. The Court was considering the doctrine only in the civil context because different rules and considerations apply in criminal cases. *Id.* at 351 & n.10.

⁶¹ *Id.* at 352.



I. The Mediation Process.

Mediation is an alternative form used to resolve conflicts. It promotes “two interests: first, the conservation of “public and private resources otherwise expended on litigation”; and second, it empowers the parties to privately seek “better justice than would occur in litigation.”¹

II. Mediation on Appeal.

A. Cases that should not be mediated on appeal. There are a few cases that should not be mediated on appeal.² Mediation should not be attempted where there is a need to resolve an unsettled legal issue, as in the interpretation of a statute, the interpretation of a widely used contract, or a decision on matters of policy, that can only be resolved by establishing precedent in the appellate courts. Additionally, where matters of great public interest are involved, as in controversial cases, with wide-spread interest or political impact, mediation does not seem to be advisable.³

B. Who can serve as a mediator? Anyone can serve as a mediator. There is a myth in Texas that there are such things as “certified” mediators. It is only a myth. There is no provision for certification of lawyers or non-lawyers in Texas. The closest thing to a training requirement for mediators is contained in § 154.052 of the Civil Practice and Remedies

Code⁴, which requires 40 hours of training (plus an additional 24 hours of training in disputes relating to the parent-child relationship) for those appointed in court-annexed mediations.⁵

Even in court-annexed mediations, the training requirement is qualified, since it can be waived by the appointing court.⁶

C. Who should be selected as a mediator of appellate disputes? Finding the proper mediator for appellate disputes is more difficult than in other forms of disputes. In addition to being a trained mediator/negotiator, the person selected to mediate the appellate case should be trained in the appellate process. That person (or persons) must be familiar with appellate procedure, standards of appellate review, sufficient general substantive law to understand and test the arguments of the parties, and the appellate process itself. The appellate mediator should be prepared to read the briefs, if any, of the parties before the mediation, and may well have to do independent research. It may be necessary for the mediator to review parts of the record, or abstracts of the record, before, or during the mediation. In addition to this, the mediator should be well-trained in people skills,⁷ negotiation techniques (both cooperative and competitive),⁸ as well as trial and appellate

⁴ Tex. Civ. Prac. & Rem. Code § 154.052.

⁵ Tex. Civ. Prac. & Rem. Code § 154.052

⁶ Tex. Civ. Prac. & Rem. Code Ann. § 154.052(c).

⁷ See, for example: Rick Brinkman & Rick Kirschner, *DEALING WITH PEOPLE YOU CAN’T STAND* (1994); Madelyn Burley-Allen, *LISTENING, THE FORGOTTEN SKILL* (1995). Robert Bolton, *PEOPLE SKILLS* (1979, reprint 1986); Dale Carnegie, *HOW TO WIN FRIENDS AND INFLUENCE PEOPLE* (1936); Thomas K. Cornnellan, *BRINGING OUT THE BEST IN OTHERS* (2003); Roger Dawson, *SECRETS OF POWER PERSUASION* (1999); Daniel Goleman, *EMOTIONAL INTELLIGENCE* (1995).

⁸ Charles B. Craver, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* (2003); Donald G. Gifford, *LEGAL NEGOTIATION THEORY AND PRACTICE*. (1989); Larry L.

¹ S. Kristina Starke, *Exceptional Circumstances Justifying Vacatur When Lower Court Decision Mooted By Settlement: Repeat Litigants Slide Into Home With Second Circuit*, 1999 J. Disp. Resol. 97 (199), discussing *Major League Baseball Properties, Inc. v. Pacific Trading Cards, Inc.*, 150 F.3d 149 (2d Cir. 1998).

² See generally, Robert H. Mnookin, *When Not To Negotiate: A Negotiation Imperialist Reflects On Appropriate Limits*, 74 U. Colo. L. Rev. 1077 (2003).

³ Nicole E. Lucy, *Mediation of Proposition 187: Creative Solution To An Old Problem? Or Quiet Death For Initiatives?*, 1 *Pepd. Resol. J.* 123 (2001).

procedure, and be knowledgeable about the decisional record, and trends in the various courts.

Expect to pay more for an appellate mediation than for a pre-verdict mediation. As a general rule of thumb, the appellate mediator should be an appellate attorney, who is as competent, or more so, than the attorneys handling the appeal. The fee for the mediator should represent the fee that one of the attorneys would expect to charge for a full day of work, divided equally between the parties.⁹

III. Mediators.

A. A mediator's job includes:

1. Helping the parties review and analyze their case.. The mediator helps the parties understand their interests, options, alternatives (including BATNAs-Best Alternatives To A Negotiated Agreement and WATNAs-Worst Alternatives To A Negotiated Agreement), the need for communications, on-going relationships, the use of legitimate standards, and the commitment to a resolution of the conflict.¹⁰ In doing this, the mediator helps the parties determine whether there is a bargaining zone that will allow a settlement to be reached.¹¹ Ideally, the mediator will assist the

Teply, *LEGAL NEGOTIATION* (1992); E. Wendy Trachte-Huber and Stephen K. Huber, *MEDIATION AND NEGOTIATION: REACHING IN LAW AND BUSINESS* (1998).

⁹ Many mediators compute their mediation fees by taking their hourly rate, multiply by eight (or any other number representing the number of hours they expect a mediation to take), and divide by the number of parties involved in the mediation, although some mediators charge by the hour, or select an arbitrary rate.

¹⁰ For a full understanding of the concept of cooperative or ethical bargaining, see Roger Fisher and William Ury, *GETTING TO YES* (2d Ed. Patton, Editor) (1992); Tom Rusk, M.D., *THE POWER OF ETHICAL PERSUASION* (1993); William Ury, *THE THIRD SIDE: WHY WE FIGHT AND HOW WE CAN STOP* (2000).

¹¹ Convincing the parties that a bargaining zone (a zone of settlement) exists, may be the single most significant act of the mediator. The writer has experienced mediations where parties have said, as many as twenty-four times, that they have reached their final offer, and desire to stop the

parties in value creation, which will enhance the ultimate settlement to the benefit of both parties.¹²

2. Bridging the gap of inexperience.

“There is evidence that lawyers have trouble focusing on the most essential issues in a case These reasons, plus the lack of trial [appellate] experience . . . highlight the need for an experienced mediator who may, in effect, bridge the gap created by a lack of trial and/or negotiating experience.”¹³

3. Helping the parties focus on a settlement point. Mediators can guide the parties to a focal point or deal point, which will result in settlement.

4. Performing reality testing to arrive at reasonable expectations.¹⁴ Parties often come to mediations with unreasonable expectations. It is the mediator's job to assist in risk analysis, determining the strengths and weaknesses of a case. The mediator becomes the tester of reality for both the appellate lawyer and the client.

5. Helping the parties cooperate. Additionally, lawyers are unfamiliar with, or uncomfortable in dealing with, the “prisoner's dilemma,”¹⁵ that is the danger of acting cooperatively, when the other party may benefit

mediation, only to have the case settle at the end of the day.

¹² Richard W. Painter, *Symposium: Business Lawyering and Value Creation for Clients; Afterword: Contractarian and Cultural Perspectives on Value Creation. By Business Lawyers*, 74 Oregon L. Rev. 327 (1995).

¹³ 3 Nev. L. J. 195, 208-209, citing to Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 Ohio St. J. on Disp. Resol. 235 (1993). See also: Robert H. Mnookin, Scott R. Peppet and Andrew S. Tulumello, *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (2000).

¹⁴ Michael L. Moffitt, *Will This Case Settle? An Exploration of Mediators' Predictions*. 16 Ohio St. J. on Disp. Resol. 38 (2000).

¹⁵ See: Robert Axelrod, *THE EVOLUTION OF COOPERATION*, 27-47 (1984); Russell Korobkin, *NEGOTIATION THEORY AND STRATEGY*, 221-242 (2002).

from acting competitively, thus causing each to act competitively. In this situation, the mediator can serve to ensure that both parties will act cooperatively, and reach an agreement that is beneficial to both sides – for there can be no rational agreement unless the interests of both sides are met.¹⁶

B. How mediators facilitate communication between the parties:

1. Listening and watching.

Generally, lawyers prefer to talk, rather than to listen, and have a tendency to plan what they are going to say when another is talking. A good mediator will be a trained listener,¹⁷ who will also make sure that each party has heard, and understands what the other is saying.¹⁸ This may involve determining whether the participant communicates better verbally, visually, or kinesthetically.¹⁹ The mediator should also be trained to watch for, and understand non-verbal communications.

2. Reducing the “noise” of negotiation – dealing with difficult people.

In this context, the mediator must deal with the “noise” (the hassling between parties, the struggle with deadlines, etc.) of negotiation. As Stephen N. Subrin²⁰ suggests the lack of civility that has

appeared in the legal profession, as it has multiplied five-fold in the last sixty years,²¹ and the diversity of lawyers “makes it more difficult to build up the trust or experience with the other side sufficient to engage in negotiation, without outside help.”²² Thus, the mediator must be trained in dealing with difficult people.²³ Lawyer incivility also makes it harder to commence a negotiation or sustain one.”²⁴

3. Venting and sponging.

Venting, is one of the principle benefits of any mediation. It may be particularly necessary in an appellate mediation where the client and the lawyer have different agendas, or where there has been a tactical, strategic, or legal error committed in the lower court.²⁵ By asking probing questions, the mediator may bring these problems, often unrealized, to the surface, and diffuse them. Venting satisfies the need of the parties, and often the attorneys, to be heard by a person in authority, before they can let go of the dispute.²⁶

4. Filtering information.

Part of the communication process is the filtering of information. Mediators, in Texas litigation cases, including appellate cases, generally use the caucus model, separating the parties, and shuttling between them. The mediator is thus able to hear,

¹⁶ David A. Anderson (Editor), *DISPUTE RESOLUTION: BRIDGING THE SETTLEMENT GAP* (1996);

Kenneth Arrow, Robert H. Mnookin, Lee Ross, Amos Tversky, and Robert Wilson, *BARRIERS TO CONFLICT RESOLUTION* (1995); William Ury, *GETTING PAST NO, NEGOTIATING YOUR WAY FROM CONFRONTATION TO COOPERATION* 1993).

¹⁷ Michael P. Nichols, *THE LOST ART OF LISTENING* (1995); Madelyn Burley-Allen, *LISTENING, THE FORGOTTEN SKILL* (1995).

¹⁸ John Barkai, *Teaching Negotiation and ADR: The Savvy Samurai Meets the Devil*, 75 Neb. L. Rev. 704, 737 (1996); James H. Stark, *Preliminary Reflections On The Establishment Of A Mediation Clinic*, 2 Clinical L. Rev. 457

¹⁹ John W. Cooley, *Mediation Magic: Its Use and Abuse*, 29 Loy. U. Chic. L. J. 1, 55-56 (1997).

²⁰ *A Traditionalist Looks At Mediation: It's Here to Stay and Much Better Than I Thought*, 3 Nev. L. J. 196 (Winter 2002/2003).

²¹ Mark Hansen, *Incivility a Problem, Survey Says*, 77 A.B.A. J. 22 (1991); Marvin E. Aspen, *The Search for Renewed Civility in Litigation*, 28 Val. U. L. Rev. 513 (1994)

²² Carrie Menkel-Meadow, *supra n.3*.

²³ Douglas Stone Bruce Patton Sheila Heen, *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* (1999); Rick Brinkman & Rick Kirschner, *DEALING WITH PEOPLE YOU CAN'T STAND* (1994).

²⁴ 3 Nev. L. J. 196, 208.

²⁵ Robert H. Mnookin, Scott R. Peppet and Andrew S. Tulumello, *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (2000); Robert H. Mnookin, Lawrence E. Susskind (Editors), *NEGOTIATING ON BEHALF OF OTHERS* (1999).

²⁶ Neil H. Katz and John W. Lawyer, (1992); David Keirse, *PLEASE UNDERSTAND ME* (1998); Richard H. Lucas and K. Byron McCoy, *THE WINNING EDGE, EFFECTIVE COMMUNICATION AND PERSUASION TECHNIQUES FOR LAWYERS* (1993).

filter, and present hostile communications in a way that avoids damaging the negotiation.

5. Eliminating information asymmetry – to convince the parties to share information. Another prime function of mediators is the elimination of the danger of information asymmetry, or the possession of different information, which each party is reluctant to share with the other, but which, if shared, might assist in the resolution of the conflict.²⁷ Here, the ability to gain confidential information from both sides, and to then convince the parties to share information, is something only mediators can do.

6. “Floating” ideas. Sometimes it is necessary for the mediator to find ways for parties to make offers without committing themselves to the offers. This can be done with the “single-text” format, with the use projected settlements through assumed numbers, and by allowing the mediator to “float” ideas as the mediator’s ideas, to see if they can be accepted by the other side.

7. Keeping the parties honest, by never believing anything is “final.” As strange as it may seem, one of the prime functions of the mediator is to never believe anything that the parties say. This is not to say that mediators should assume that the parties are lying. Rather, it is to say that mediators should assume that the parties have not yet determined their own truth—particularly when it comes to whether they have reached their “final offer.”

8. Keeping the process going. This is just another way of saying that the best thing that a mediator can do is have faith in the process of mediation. It works, if the mediator and parties have enough patience. The least effective mediators are those who too quickly decide that no settlement is possible. The most effective mediators are those who assume that there is a

²⁷ Robert H. Gertner, *Asymmetric Information, Uncertainty, and Selection Bias in Litigation*, 1993 *U. Chi. L. Sch. Roundtable* 75, 87-91.

settlement some where, it is just a matter of finding it.

9. Evaluating and formulating negotiation strategies. While mediators are not to give legal advice, it is acceptable for them to give negotiation advice. In fact, that is one of the main functions of the mediator: to serve as a negotiation adviser. Thus, the mediator can assist in avoiding such problems as reactive devaluation, where one party distrusts, and, therefore, rejects a settlement option that is offered by the opposing side.²⁸ The mediator can assist the parties in avoiding extreme distributive tactics, and show the parties the benefits of cooperation. In this context, *one of the hardest things for lawyers to understand, is that it is not possible to reach a compromise settlement agreement, unless the interests of both parties are met adequately.*²⁹ All too often, the parties concentrate on attempting to devalue the other party’s case. Ultimately, however, some option must be found, which will be better than either party’s alternative (BATNA) to settlement.

C. Types of mediators: evaluative or facilitative.

1. The focus or goals of mediators. Parties will be much more satisfied with mediation, particularly on the appellate level, if they understand that not all mediators have the same goals. Most evaluative mediators (sometimes called “strong-arm”) mediators, are interested in a settlement, and are willing, literally, to badger parties into a settlement.³⁰ The

²⁸ Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution, in Barriers to Conflict Resolution* (Kenneth J. Arrow et al. eds., 1995; George Loewenstein, et al., *Self-Serving Assessments of Fairness and Pre-Trial Bargaining*, 22 *J. Legal. Stud.* 135, 155-156 (1993)

²⁹ William Ury, *GETTING PAST NO, NEGOTIATING YOUR WAY FROM CONFRONTATION TO COOPERATION* (1993); Roger Fisher and William Ury, *GETTING TO YES* (2d Ed. Patton, Editor) (1992).

³⁰ There are legal and ethical problems with the “strong-arm” mediators, who give legal evaluation of cases. Michael Moffitt, *Ten Ways To Get Sued: A guide For Mediators*, 8 *Harv. Neg. L. Rev.* 81, 102 (2003). See Sarah

mediations conducted in this fashion are what Riskin, in his *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*,³¹ would refer to as "Litigation Outcome" mediators, who have a narrow focus, and a primary goal of settling the matter in dispute, focusing on the strengths and weaknesses of each side's case."

The facilitative mediators, however, look beyond the immediate case, if it is called for, (as where there are business concerns or on-going relationships), and attempts to resolve the underlying conflict, as well as the immediate case. Riskin refers to this type of mediation as mediations that attend to issues that a court could not reach, and which would satisfy business interests.

2. The different roles played by evaluative and facilitative mediators. Riskin's second continuum deals with the mediators' role; whether the mediator is facilitative or

evaluative³², or a combination of both. On this continuum Riskin initially describes four strategies or techniques used by mediators. Two of the techniques are evaluative and two are facilitative. The *evaluative* tend to "cut to the chase," and direct the outcome of the mediation. The facilitative mediators tend to use questions rather than statements, and assist the parties in finding the solution of the case, rather than imposing it upon them.³³ The evaluative mediators are, in effect, non-binding arbitrators, or directive mediators.³⁴

The *facilitative* mediator is one who helps the parties identify their underlying interests, to generate their own options, and to evaluate and choose among those options, in part by helping the parties recognize the strengths or weaknesses of their alternatives, (those things that they can do without the assistance of the other party). These mediators will help the parties educate themselves, and focus, not only upon the case involved, but the underlying conflict between the parties.

Those who lean towards the facilitative type of mediation have to recognize that appellate mediation calls for a slight modification of technique. In the ordinary mediation, facilitative mediators will not give legal advice or opinions. In appellate mediations, however, the mediator

Cole et al., *MEDIATION: LAW, POLICY, PRACTICE* § 11:3 (1994); Michael Moffitt, *Loyalty, Confidentiality and Attorney-Mediators: Professional Responsibility in Cross-Professional Practice*, 1 Harv. Negotiation L. Rev. 203 (1996); Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 Notre Dame L. Rev. 775, 826 (1999); *The Sultans of Swap: Defining the Duties and Liabilities of American Mediators*, 99 Harv. L. Rev. 1876 (1986).

³¹ 1 Harv. Negotiation L. Rev. 7 (1996). See also: Joseph B. Stullberg, *Facilitative Versus Evaluative Mediator Orientations: End Piercing the "Grid" Lock*, 24 Fla. St. U. L. Rev. 985, 1002-03 (1997); Leonard Riskin, "Mediator Orientations, End Strategies and Techniques," 12 Alternatives 111 (Sept. 1994); James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation?"*, 19 Fla. St. U. L. Rev. 47 (1991); Dwight Golann, *Variations in Mediation: How - and Why - Legal Mediators Change Styles in the Course of a Case*, 2000 J. Disp. Resol. 41; Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role*, 24 Fla. St. U. L. Rev. 949 (1997); John Bickerman, "An Evaluative Mediator Responds," 14 Alternatives to the High Cost Litig. 70 (1996); Critics suggest that this approach represents a legalistic approach to mediation. See, e.g., Murray S. Levin, *The Propriety of Evaluative Mediation: Concerns About the Nature and Quality of an Evaluative Opinion*, 16 Ohio St. J. on Disp. Resol. 267, 269 (2001)

³² Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 Fla. St. U. L. Rev. 937 (1997); Kimberlee K. Kovach & Lela P. Love, *Evaluative Mediation Is an Oxymoron*, 14 Alternatives to the High Cost of Litigation 31 (1996)..

³³ Leonard L. Riskin, in his article, *Who Decides What? Rethinking the Grid of Mediator Orientations*, Disp. Resol. Mag. (Winter 2003), has effectively withdrawn the use of evaluation in the mediation process, at least where it interferes with self-determination.

³⁴ K. Kressel, *LABOR MEDIATION: AN EXPLORATORY SURVEY* 13 (1972). Peter J.D. Carnevale & Rebecca A. Henry, *Determinants of Mediator Behavior: A Test of the Strategic Choice Model*, 19 J. Applied Soc. Psychol. 481, 482-84 (1989). Debra Shapiro et al., *Mediator Behavior and the Outcome of Mediation*, 41 J. Soc. Issues 101, 111-14 (1985); Deborah M. Kolb, *To Be a Mediator: Expressive Tactics in Mediation*, 41 J. Soc. Issues 11, 20-23 (1985).

must be prepared to, at least, ask questions based upon knowledge of the law.

V. What becomes of a case settlement on appeal?

The disposition of cases following settlement on appeal has led to much discussion in the federal courts, with the federal courts³⁵ “refusing to vacate under certain circumstances when the cause becomes moot on appeal. Texas procedural law is to the contrary. See *Panterra Corp. v. American Dairy Queen*, 908 S.W.2d 300, 300-01 (Tex.App.—San Antonio 1995, no writ)” *Weatherford Intern., Inc. v. Baker Hughes, Inc.*, 2001 WL 665584 (Tex.App.—Hous. (1 Dist.), opinion not published). Subsequently, in *Caballero v. Heart of Texas Pizza, L.L.C.*,³⁶ however, the San Antonio Court of Appeals, recognizing the changes to the Texas Rules of Appellate Procedure, rejected the reasoning found in *Panterra*, and found there ways to dispose of a case settled while on appeal:

“We may still grant a motion to dismiss in accordance with an agreement signed by the parties or their attorneys and filed with the clerk—the rule is renumbered but unchanged. See Tex.R.App. P. 42.1(a)(1). Under the current rule governing disposition of appeals, however, there are now two additional ways to dispose of an appeal. We may “vacate the trial court's judgment and dismiss the case.” Tex.R.App. P. 43.2(e). Or, we may simply “dismiss the appeal.” Tex.R.App. P. 43.2(f).”

³⁵ *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71-72, 117 S.Ct. 1055, 1071 (1997); U.S. *Bancorp Mort. Co. v. Bonner Mall Partnership*, 513 U.S. 18, 28-29, 115 S.Ct. 386, 393 (1994); *Goldin v. Bartholow*, 166 F.3d 710, 719 (5th Cir.1999).

³⁶ *Caballero v. Heart of Texas Pizza, L.L.C.*, 70 S.W.3d 180 (Tex. App. — San Antonio, 2001, no pet.).

The El Paso Court, in *Creech v. Pendergrass*,³⁷ indicated that if a trial court has lost plenary power, the appellate court could not dismiss the appeal and remand the matter to the lower court, although they could remand, if the appeal was interlocutory.

“Even though we are unable to comply with the parties' request that we dismiss the appeal and remand for further proceedings, we believe that is not an obstacle to dismissal of the appeal and settlement of the dispute. In cases where the parties have reached a settlement and seek to undo the effects of a final judgment in order to implement the settlement agreement, reversal or vacation of the trial court's judgment by the appellate court is required due to the trial court's loss of plenary power.”³⁸

Other courts of appeal, however, have not expressly recognized the reasoning of *Caballero*, and, generally hold that if the case is settled while on appeal, the cause becomes moot,³⁹ and all previous orders must be set aside, and the cause dismissed.⁴⁰ Other courts of appeal, however, have acceded to the parties' requests to reverse

³⁷ 2002 WL 536296 (Tex.App.—El Paso 2002, not reported).

³⁸ *Id.*

³⁹ See *Panterra Corp. v. Am. Dairy Queen*, 908 S.W.2d 300, 300 (Tex. App.—San Antonio 1995, no writ), citing *Freeman v. Burrows*, 141 Tex. 318, 171 S.W.2d 863, 863 (1943); *Johnson v. Gest*, 1996 WL 627387, 1 (Tex. App.—Austin Oct. 30, 1996, ordered not published pursuant to TEX. R. APP. P. 47.7).

⁴⁰ See *Speer v. Presbyterian Children's Home & Serv. Agency*, 847 S.W.2d 227, 228 (Tex. 1993); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hughes*, 827 S.W.2d 859, 859 (Tex. 1992); *Freeman v. Burrows*, 171 S.W.2d 863, 863 (Tex. 1943); *Toothman v. Bexar County Hosp. Dist.*, 1997 WL 13645, *1 (Tex. App.—San Antonio Jan. 15, 1997, ordered not published pursuant to TEX. R. APP. P. 47.7); *Paracelsus Healthcare Corp v. Radler Enterprises Texas, Inc.*, 1999 WL 548230, 1 (Tex. App.—Houston [14th Dist.] July 29, 1999, ordered not published pursuant to TEX. R. APP. R. 47.7); *Ewell v. Ewell* 2003 WL 1738885 (Tex.App.—Hous. (14 Dist.), not reported)

and remand to the trial court for entry of an order of dismissal,⁴¹ or to reverse and remand for entry of an agreed judgment,⁴² or for proceedings “not inconsistent with this opinion.”⁴³ The nature of the question involved is best illustrated by the majority and dissenting opinions in *Panterra Corp. v. American Dairy Queen*.⁴⁴

Conclusion

When going to any mediation, particularly an appellate mediation, the parties should be aware that there are three important factors that are necessary to a successful mediation: Enough time; proper authority; and good faith.

Select your mediator with care. As the old saying goes, ‘you get what you pay for.’ Even if you think the only issue is money and the disposition of the case before you, make sure your mediator is broadly trained in people and negotiation skills. Watch out for the “strong-armed” mediator, who fails to head the ultimate commandment of mediation “do no harm.” Finally, be confident that appellate mediation works, and utilize the process well. Trust in the process of mediation. It works!

Those who are not looking for happiness are the most likely to find it because those who are searching forget that the surest way to be happy is to seek happiness for others.

Dr. Martin Luther King, Jr.

⁴¹ See *Nat'l Union Fire Ins. Co. v. Apache Corp.*, 1996 WL 404033, 1 (Tex. App.—Houston [1st Dist.] July 18, 1996, ordered not published pursuant to TEX. R. APP. P. 47.7); *Alloju v. Townwest Homeowners Ass'n*, 1996 WL 434185, 1 (Tex. App.—Houston [1st Dist.] Aug. 1, 1996 (ordered not published pursuant to TEX. R. APP. P. 47.7)); *Comprehensive Investigations & Sec. v. Perry*, 1999 WL 649118, 1 (Tex. App.—Houston [14th Dist.] Aug. 26, 1999, ordered not published pursuant to TEX. R. APP. P. 47.7); *Sensinger v. Sensinger*, 2003 WL 61226 (Tex.App.-Corpus Christi, not reported).

⁴² See *State v. Stone*, 1996 WL 680114, 1 (Tex. App.—Houston [1st Dist.] Nov. 21, 1996 (ordered not published pursuant to TEX. R. APP. P. 47.7)); *Qing v. Yu ex rel. Jade King, Inc.*, 2002 WL 31008559 (Tex.App.-Hous. (14 Dist. 2002, not reported)), *Jahner v. Jahner*, 2003 WL 21939830 (Tex.App.-Austin 2003, not reported).

⁴³ See *Nat'l Union Fire Ins. Co. v. Apache Corp.*, 1996 WL 404033, *1 (Tex. App.—Houston [1st Dist.] July 18, 1996 (ordered not published pursuant to TEX. R. APP. P. 47.7)).

⁴⁴ See *Panterra Corp. v. Am. Dairy Queen*, 908 S.W.2d 300, 300 (Tex. App.—San Antonio 1995, no writ).

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ELECTIONS

McConnell v. Federal Election Commission, No. 02-1674 (Dec. 10, 2003).

In these cases, the Court struck down a few provisions of the Bipartisan Campaign Reform Act (BCRA), but rejected First Amendment and other constitutional challenges to the key provisions of the Act. Different portions of the Court's lengthy opinion were written by Chief Justice Rehnquist and Justices Stevens, O'Connor, and Breyer.

Writing for a five-member majority, Justices Stevens and O'Connor first upheld the ban on unlimited "soft money" contributions to political parties. The Court applied the less rigorous standard of review from *Buckley v. Valeo*, 424 U.S. 1, 25 (1976), reasoning that contribution limits only marginally restrict free communication. Under this standard, it held that a governmental interest in preventing actual and apparent corruption justified the contribution limits. Importantly, the Court concluded that this anti-corruption interest encompasses more than simply prohibiting exchanges of cash for votes. It also extends to eliminating the sale of access to officials, which can give rise to an undue influence or an appearance of undue influence on their judgment.

The Court next held that various BCRA provisions designed to prevent circumvention of the contribution limits were closely drawn to match the Government's anti-corruption interest. These provisions include: a prohibition on state and local parties using soft money to affect

federal elections, either directly or by funneling donations through non-profit organizations; a prohibition on federal officeholders raising or spending soft money for federal elections, and limits on their ability to do so for state and local elections; and a prohibition on state and local officeholders raising or spending soft money to fund communications promoting or attacking federal candidates. In addition, the Court rejected arguments that these rules exceed Congress' authority to regulate federal elections, violate federalism principles, and violate equal protection by discriminating against political parties while allowing special interest groups to continue raising and using soft money.

The second major section of the Stevens-O'Connor opinion upheld BCRA's rules for "electioneering communications," which include radio and TV ads that refer to a clearly identified candidate for federal office within 30 days before a primary or 60 days before a general election. BCRA includes significant disclosure requirements for persons funding these communications, and requires corporations and labor unions to fund such communications only through their political action committees (which are subject to contribution limits). The challengers argued that these provisions go beyond the regulation of issue advocacy allowed in *Buckley* and impermissibly regulate express advocacy. The Court rejected this argument, holding that the First Amendment does not erect a constitutional barrier between issue and express advocacy. It then held that interests in deterring corruption, informing the electorate, and gathering data to enforce electioneering restrictions justified the disclosure requirements. As to the rules regulating corporate- and union-funded electioneering communications, the Court rejected an overbreadth argument that they improperly covered ads without an electioneering purpose, and an underinclusiveness argument that

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they improperly failed to cover internet and print ads.

Finally, the Stevens-O'Connor opinion struck down BCRA's rule that after a candidate is nominated, his political party must choose between making limited expenditures coordinated with the candidate or making unlimited independent expenditures. The Court held that this choice placed an unconstitutional burden on the party's First Amendment right to make unlimited independent expenditures.

Another portion of the Court's opinion, written by Chief Justice Rehnquist and joined in full by four other Justices and in part by the whole Court, held that plaintiffs lacked standing to challenge the following provisions of BCRA: a provision that broadcast stations are not required to sell a candidate low-rate airtime unless he either certifies that the ad will not refer to another candidate or personally appears in the ad to state his approval of it; a provision increasing certain contribution limits and indexing them for inflation; and "millionaire" provisions that raise limits on contributions to a candidate if his opponent spends a certain amount of personal funds.

In addition, the Chief Justice's opinion struck down BCRA's ban on contributions from minors to candidates and political parties. The Court held that this ban infringed minors' freedoms of expression and association, that scant evidence supported the Government's asserted interest in protecting against corruption in this context, and that in any event the ban was overinclusive.

In a final portion of the opinion, written by Justice Breyer and joined by four other Justices, the Court rejected a facial First Amendment challenge to BCRA's rules requiring broadcasters to keep records of the following: broadcast requests made by or on behalf of any candidate, requests by anyone to broadcast messages about a federal candidate or election, and requests by anyone to broadcast messages related to important legislative and political matters. The Court held that these requirements served various

government interests, including: verifying compliance with BCRA; verifying compliance with broadcasters' obligations to allow candidates equal time and sell that time at the lowest unit charge; and making the public aware of how much candidates spend on broadcast messages.

EMPLOYMENT DISCRIMINATION

***Raytheon Co. v. Hernandez*, 124 S.Ct. 513 (2003).**

This case addresses the distinction between disparate-impact and disparate-treatment claims of employment discrimination. Hernandez, who had been fired from Raytheon based on his drug use, applied to be rehired more than two years later. Raytheon rejected his application, citing its policy of not rehiring employees terminated for workplace misconduct. Hernandez brought a disparate-treatment claim under the Americans with Disabilities Act, arguing that Raytheon decided not to rehire him because of his drug use. The Ninth Circuit held that Raytheon's policy was unlawful as applied to rehabilitated employees fired for using drugs.

The Supreme Court vacated the judgment, holding that the Ninth Circuit improperly applied a disparate-impact analysis to a disparate-treatment claim. In a unanimous opinion, Justice Thomas explained that disparate-treatment liability depends on whether a protected trait actually motivated an employer's action, while disparate-impact liability can be based on a facially neutral policy that falls more harshly on a protected group. Because Hernandez brought a disparate-treatment claim, the neutral policy provided a legitimate, non-discriminatory reason for Raytheon's action. On remand, the court was directed to consider whether Hernandez offered sufficient evidence that Raytheon actually based its decision on his disabled status despite the proffered explanation.

HABEAS CORPUS

***Mitchell v. Esparza*, 124 S.Ct. 7 (2003) (per curiam).**

This case concerns whether a failure to instruct the jury on one of the statutory elements of a capital crime is subject to harmless-error analysis. Under Ohio law, a defendant who commits aggravated murder in the course of a robbery is eligible for the death penalty only if he was the principal offender in the murder or acted with prior calculation and design. Esparza's indictment did not charge him as a principal offender, and his jury was not instructed on that requirement. The Ohio courts held that this error was harmless, reasoning that the jury necessarily found Esparza was a principal offender because he was the only one charged. The federal district court granted Esparza habeas relief from his death sentence and the Sixth Circuit affirmed, concluding that harmless-error review was inappropriate because it would be equivalent to dispensing with the reasonable doubt requirement.

In a unanimous *per curiam* opinion, the Supreme Court summarily reversed without hearing argument. It emphasized the standard that habeas relief may only be granted if a decision is contrary to or an unreasonable application of clearly established federal law. Under this standard, the Court found no clear federal authority precluding harmless error analysis of a trial court's failure to instruct the jury on all of the elements of a capital offense. Therefore, Esparza was not entitled to habeas relief.

***Yarborough v. Gentry*, 124 S.Ct. 1 (2003) (per curiam).**

In this case, the Ninth Circuit granted habeas relief based on Gentry's claim that his counsel rendered ineffective assistance in closing argument. The Supreme Court summarily reversed. After quoting counsel's closing in full, the Court held that the state court's rejection of the ineffective assistance claim was not contrary to or an unreasonable application of clearly established federal law. Although the closing did

not highlight certain pieces of exculpatory evidence and contained other flaws, the Court cited various advocacy experts to illustrate that these choices could be defended. Thus, it was reasonable for the state court to conclude that Gentry failed to rebut the presumption that counsel acted for tactical reasons.

ORIGINAL JURISDICTION

***Virginia v. Maryland*, No. 129 Orig. (Dec. 9, 2003).**

In this original jurisdiction case, Virginia asked the Supreme Court to declare that it did not need a permit from Maryland to build a system for withdrawing water from the Potomac River. Interpreting the 1785 Compact between these states and an 1877 arbitration award, the Court agreed with Virginia by a 7-2 vote.

Writing for the Court, Chief Justice Rehnquist noted that the Compact granted each state's citizens full property rights in the river shore and the privilege of building improvements from the shore. Yet the Compact did not grant Maryland the right to regulate the exercise of this privilege by Virginia's citizens. While the arbitration award later granted Maryland sovereignty over the river, it also confirmed Virginia's right to use the river without suggesting this use was subject to Maryland's regulation. Therefore, the Court held that Virginia had sovereign authority to build improvements and withdraw water from the river without regulation by Maryland. It also rejected the defense that Virginia had acquiesced to Maryland's regulation.

SEARCH AND SEIZURE

***United States v. Banks*, 124 S.Ct. 521 (2003).**

In this case, the Court interpreted the exigent circumstances exception to the requirement that officers knock and announce before entering to execute a search warrant. Here, the police knocked and announced, waited 15-20 seconds, and then entered to search for cocaine. The Ninth Circuit held that there were no exigent

circumstances, and that forced entry was permissible only after more time had passed.

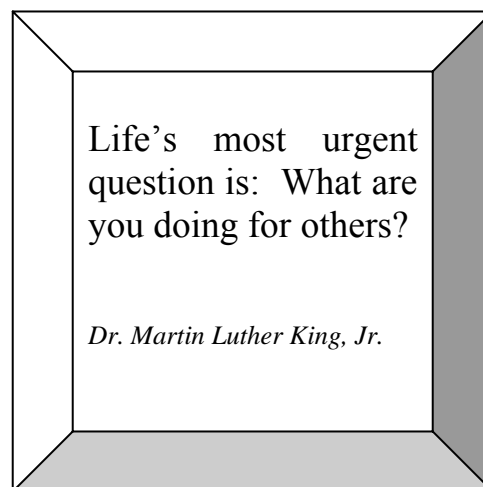
The Supreme Court reversed in a unanimous opinion by Justice Souter. The Court observed that the knock-and-announce requirement gives way if officers reasonably expect, for example, that evidence will be destroyed instantly upon knocking. When officers do knock, the Court held that a similar standard applies to determine when they can enter. The facts known to the officers are used to determine a reasonable waiting time, and here there was no indication that the officers knew Banks was in the shower when they knocked. In addition, the relevant enquiry is how long it would take the suspect to destroy the evidence, not how long it would take him to reach the door. Here, officers could fairly have suspected that Banks would flush away the cocaine if they waited more than 15-20 seconds to enter after knocking.

STATUTORY INTERPRETATION

***Barnhart v. Thomas*, 124 S.Ct. 376 (2003).**

In an opinion by Justice Scalia, a unanimous Court deferred to an agency’s interpretation of a statutory provision. The statute at issue states that a person may qualify for disability benefits if “he is not only unable to do his previous work but cannot ... engage in any other kind of substantial gainful work which exists in the national economy.” Under the Social Security Administration’s interpretation, the first question is whether a person is able to do his *previous* work, and only if not will it ask the second question whether he can engage in *other* work that exists in the national economy.

Based on this interpretation, the agency found that Thomas was not disabled because she was able to do her previous work as an elevator operator, regardless of whether that work still existed in the national economy. The Supreme Court reversed the *en banc* Third Circuit, upholding this interpretation as reasonable. The Court observed that the interpretation follows the grammatical rule of the last antecedent by reading “exists in the national economy” to modify only the other work inquiry, not the previous work inquiry.



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ARBITRATION

***In re First Texas Homes, Inc.*, 47 Tex. Sup. Ct. J. 97, 2003 WL 22681323 (Nov. 14, 2003) (per curiam).**

The issue in this case is whether a broad arbitration agreement applying to “[a]ll disputes” between the parties includes claims that arose after the parties entered into the agreement. The Court determined that it did and therefore granted the writ of mandamus.

The Greenes entered into a contract with First Texas Homes to purchase and build a home. The contract included the following arbitration clause:

All disputes between [First Texas] and [the Greenes] shall be submitted to binding arbitration governed by the procedures of the Federal Arbitration Act.... As used herein, the term "dispute" shall mean all claims, demands, disputes, controversies, and differences that may arise between the parties to this Contract of whatever kind or nature, including without limitation, disputes: (1) as to events, representations, or omissions which pre-date this Agreement; (2) arising out of this Agreement or other action performed or to be performed by the Seller or the Buyer pursuant to this contract; (3) as to repairs arising under the terms of this Contract; and/or (4) as to the cost to repair or replace any defect covered by this Contract.

A dispute arose and the Greenes sued First Texas Homes. The Greenes asserted several claims, including claims of discrimination, violations of the Texas and Federal Fair Housing Acts, and intentional infliction of emotional distress. First Texas Homes moved to compel arbitration. The trial court granted the request in part, but did not compel arbitration on the federal and state Fair Housing Act claims nor the intentional infliction of emotional distress claims. The trial court

reasoned that the acts and omissions that allegedly gave rise to these claims occurred after the parties signed the arbitration agreement.

First Texas Homes petitioned the court of appeals for mandamus, but its request was denied (without explanation). First Texas Homes then filed a petition for writ of mandamus in the Texas Supreme Court. The Greenes did not seek mandamus relief regarding the trial court’s additional findings (i.e., the arbitration clause was valid, it was not procured by fraud, and the claims against First Texas Homes’ president in his individual capacity were subject to arbitration).

In granting mandamus relief, the Court began by noting that the clause applies to “all” disputes between the parties, and “all” means all. Next, the Court noted that the clause was not limited to conduct occurring prior to the execution of the agreement. Thus, regardless of when the conduct giving rise to the dispute occurred, the arbitration clause applied. Accordingly, the Court granted the writ of mandamus and required all of the Greenes’ claims to be submitted to arbitration.

Interestingly, the Court noted that the Greenes presented additional arguments suggesting that none of the claims need to be arbitrated. However, because the Greenes did not petition the Court for affirmative relief, the Court did not address those arguments.

APPELLATE PROCEDURE

***Naaman v. Grider*, 47 Tex. Sup. Ct. J. 60, 47 Tex. Sup. Ct. J. 73, 2003 WL 22495753 (Oct. 31, 2003) (per curiam).**

The issue in this case is whether the time to file a notice of appeal runs from the signing of a final judgment or the signing of an order granting a motion for judgment. The Court held that the

time period begins to run after the final judgment is signed.

After a trial on the merits, the jury found in favor of the defendant. Four weeks after trial, the defendant moved for judgment on the verdict. A few weeks later, the plaintiff filed a motion for new trial. While these motions were pending, on May 3, the trial court signed a final judgment. Nevertheless, the trial court then held a hearing on the two motions. Shortly thereafter on June 1, the trial court signed an order granting the motion for judgment on the verdict and denied the motion for new trial. The court's order did not modify the final judgment that had already been signed and the court did not sign a second judgment.

The plaintiff filed a notice of appeal. If the timetable for filing the notice ran from the signing of the final judgment on May 3, the notice was untimely. The plaintiff, however, argued that it ran from the signing of the June 1 order granting the motion for judgment on the verdict and denying the motion for new trial. The court of appeals agreed with the plaintiff and held that the June 1 order constituted a rendition of judgment. The Supreme Court, however, disagreed.

The Court held that “[a]n order that merely grants a motion for judgment is in no sense a judgment itself. It adjudicates nothing. The only judgment in this case was signed on May 3.” The Court then rejected the plaintiff's argument that the final judgment was changed by the denial of her motion for new trial. Such a denial left the judgment undisturbed. Accordingly, the notice of appeal was untimely and the court of appeals lacked jurisdiction. Thus, the Supreme Court granted the petition for review, reversed the court of appeals' judgment, and dismissed the appeal for want of jurisdiction.

DISCOVERY REQUESTS

***In re CSX Corp.*, 47 Tex. Sup. Ct. J. 24, 2003 WL 22272604 (Oct. 3, 2003) (per curiam).**

The issue in this case is whether the trial court abused its discretion in compelling a party to

answer certain interrogatories. The Supreme Court concluded that the trial court abused its discretion because the interrogatories were overbroad, and that Relator did not have an adequate remedy on appeal. Accordingly, the Court granted mandamus relief.

The plaintiff worked for National Marine Services from 1972 to 1977. National Marine Services was acquired in 1998 by American Commercial Barge Line, the Relators' parent corporation. Plaintiff sued American Commercial Barge Line and Relators claiming that he was injured by exposure to benzene and other carcinogenic chemicals.

The plaintiff propounded several interrogatories on Relators (the subsidiary companies of the company that acquired the plaintiff's former employer), asking Relators to produce the name, address, and phone number of all of the subsidiaries' safety and hygiene employees and corporate physicians for 30 year time period. Relators objected that the requests were overbroad, harassing, and sought information that was not relevant nor lead to the discovery of admissible evidence. The trial court modified the request to exclude purely clerical workers, but then permitted the plaintiff to seek the remaining information. Relators sought mandamus relief at the court of appeals, but were denied. Relators then sought relief before the Texas Supreme Court.

Relators argued that the interrogatories were overbroad for two reasons. First, Relators never employed the plaintiff. Relators are merely subsidiaries of the corporation that acquired the company that did employ the plaintiff. Thus, even Relators' parent corporation did not employ the plaintiff. Accordingly, the identity of Relators' safety personnel and physicians is not relevant. Second, the plaintiffs request information spanning a 30 year time period, 25 years of which the plaintiff was not employed by National Marine Services. The plaintiff countered that he was entitled to discover information from Relators because he is permitted to acquire information on barge industry custom.

Ultimately, the Court agreed with Relators. The Court reasoned that the request could have been more narrowly tailored and that allowing the plaintiff to request the identity of all safety employees who worked for Relators for over 30 years when the plaintiff did not even work for Relators or for the parent corporation for that length of time, was a fishing expedition. The Court acknowledged that “[a]lthough [plaintiff] may discover evidence of industry custom at the time [plaintiff] was employed, the interrogatories at issue here impermissibly request information for twenty-five years beyond the applicable time period.” Thus, because the trial court’s order was overbroad, it abused its discretion.

Lastly, the Court determined that Relators did not have an adequate remedy on appeal. Specifically, when a discovery order compels production of patently irrelevant documents, there is no adequate remedy by appeal because the order imposes a burden on the producing party that far outweighs any benefit obtained by the production. Accordingly, the Court conditionally granted the writ of mandamus.

TEXAS TORT CLAIMS ACT

***Murk v. Scheele*, 47 Tex. Sup. Ct. J. 88, 2003 WL 22594233 (Nov. 7, 2003) (per curiam).**

The issue in this case is whether a physician that exercises independent judgment in the treating of patients is considered an employee as defined by the Texas Tort Claims Act. The Court held that he was.

The plaintiff was seriously injured when he fell off of a horse. He was taken to University Hospital, which is owned and operated by Bexar County Health District and staffed with medical faculty, residents, and students of the University of Texas Health Science Center. He was treated by Drs. Flangas and Murk. When he left he was unable to walk. A few months later, a different doctor performed a spinal decompression on the plaintiff, which improved the plaintiff’s condition. Plaintiff then sued UT and Drs. Flangas and Murk alleging that they should have performed the

decompression surgery when he first arrived at the hospital.

UT filed a motion for summary judgment asserting governmental immunity under the TTCA. The trial court granted it. The doctors then filed summary judgments based on section 101.106. It provides that a judgment under the Act “bars any action involving the same subject matter by the claimant against an employee of the governmental unit whose act or omissions gave rise to the claim.” An employee is further defined as a person who is in the “paid service” of the governmental unit, but does not include “a person who performs tasks the details of which the governmental unit does not have the legal right to control.” The trial court granted the doctors motions as well.

On appeal, the court of appeals reversed the summary judgments because it concluded that neither doctor had shown themselves to be “employees” of UT. First, the court concluded that Flangas was not in UT’s “paid service.” And second, because Murk exercised independent judgment in treating patients, UT had no legal right to control the details of his work.

The Supreme Court affirmed in part and reversed in part. As to Dr. Flangas, the Court agreed that he was not in “paid service of UT.” Rather, he was paid by the Bexar County Health District. Thus, he was not an employee of UT and the court of appeals properly reversed summary judgment.

However, as to Dr. Murk, the Court concluded that he was employee. The Court dismissed the notion that just because he exercised independent judgment in treating patients that UT did not control the details of his work. To the contrary, the Court noted that Dr. Murk’s treatment of patients was “still subject to the regimens prescribed by UT (such as required daily rounds), faculty supervision and review, and in some instances, veto by UT’s senior faculty.” Thus, the necessity of having to exercise some independent judgment in performing your job does not, by itself, vitiate an employer’s right of control over

the details of the practice. Accordingly, Dr. Murk was an employee of UT and summary judgment in his favor was appropriate.

TERMINATION OF PARENTAL RIGHTS

***In the Interest of L.M.I. and J.A.I.*, 46 Tex. Sup. Ct. J. 1164, 2003 WL 22145240 (Sept. 18, 2003).**

This is a parental termination case. The issues in this case involve (1) whether the father, Ricardo Duenas, waived various his complaints about the alleged voluntary relinquishment of his parental rights, (2) whether the mother, Sylvestre Inocencio, waived various her complaints about the alleged voluntary relinquishment of his parental rights and (3) if preserved, whether there is sufficient evidence to support the termination of the parents' rights. In a splintered opinion, the Supreme Court affirmed the termination of parental rights as to both parents.

COURT'S OPINION, DELIVERED BY JUSTICE O'NEILL

I (Justice O'Neill, joined by Justices Enoch, Schneider, Smith, and Wainwright) (majority opinion)

Inocencio was fifteen years old at the time of the children's birth. She was not married to Duenas nor living with him at the time. After the children were five months old, the mother's sister, Esther Gonzalez, contacted a police detective that had befriended Inocencio and asked that he help in placing the children for adoption. He did so by arranging for his sister-in-law and brother-in-law, the Monteguts, to adopt the boys.

Initially, when Gonzalez informed Inocencio that the Monteguts wanted to adopt the children, Inocencio refused. However, she was ultimately persuaded that it was in the children's best interest to allow the adoption. Thus, she, her mother, her sister, and Duenas went to the Montegut's attorney's office. At the office, Inocencio and Duenas signed irrevocable affidavits of voluntary relinquishment of parental rights. Duenas

testified that he did not understand English and that the affidavit was not translated for him. Thus, he claims that he did not understand its import. Inocencio testified that the attorney explained the affidavit to her and informed her not to sign it if she had any reservations. Inocencio refused to sign at first, but after the Monteguts promised to periodically send pictures and information about the boys, she changed her mind.

A few days after signing the affidavits and giving the children up, Inocencio changed her mind. The Monteguts filed a petition to terminate the parent/child relationship and Inocencio filed a motion to revoke her affidavit. Duenas then answered the petition, filed a counter-petition for voluntary paternity, and a filed his own motion to revoke his affidavit.

After a hearing, the trial court found that the affidavits were voluntarily executed. The court also found that Duenas was not the presumed father and that the legal parent-child relationship did not exist when he executed the affidavit. The trial court finally concluded that it was in the best interest of the children to terminate the parental rights. Thus, the court awarded the Monteguts custody of the children.

II (Justice O'Neill, joined by Justices Enoch, Schneider, Smith, and Wainwright) (majority opinion)

In his petition for review, Duenas presented one issue, whether the signature on his affidavit was procured in a manner that violated his due process rights. The Court, however, determined that Duenas did not preserve this issue before the trial court. Specifically, the Court noted that in his answer to the petition to terminate and his is counter-petition he does not cite any constitutional authority. He had an extensive evidentiary hearing and he did not discuss a constitutional claim. The trial court did not discern any constitutional challenges either because it specifically noted that Duenas was seeking to set aside the affidavit based on issues of fraud, duress, and overreaching. Thus, Duenas

did not raise any legal arguments nor seek any findings regarding a constitutional claim.

The Court began by reiterating that under the Rules of Appellate Procedure, “a party must present to the trial court a timely request, motion, or objection, state the specific grounds therefore, and obtain a ruling.” Next, the Court reasoned that allowing appellate review of unpreserved error would undermine the Legislative intent that cases involving parental termination be quickly resolved to promote the child’s best interest in a final decision. Consequently, the Court determined that Duenas waived his due process argument. Because this was the only issue Duenas presented before the Court, the Court refused to review whether there was clear and convincing evidence of a statutory ground for reversal, and affirmed the court of appeals’ judgment as to Duenas.

III (Justice O’Neill, joined by Justices Enoch, Schneider, and Smith) (concurring opinion)

In this section, Justice O’Neill was not writing for a majority of the Court. Here, she reviewed two of Inocencio’s arguments for revocation of the affidavit. First, Inocencio claimed that she only agreed to relinquish her rights because the Monteguts promised to provide periodic information and pictures. Yet, pursuant to *Vela*, Inocencio alleged that this promise was unenforceable. Accordingly, she argued that she was fraudulently induced her into signing the affidavit. And second, Inocencio asserted that because the police detective, his wife, and Inocencio’s sister did not meet the statutory requirements for being adoption intermediaries, their actions amount to undue influence in her decision to sign the affidavit. Thus, the affidavit should be set aside. Justice O’Neill, however, did not reach the merits of these arguments. Instead, she concluded that Inocencio waived them because she did not present them to the trial court and did not receive a ruling on them.

IV. A. (Justice O’Neill, joined by Justices Enoch, Schneider, Smith, and Wainwright) (majority opinion)

In this section, again speaking for the majority of the Court, Justice O’Neill took issue with the dissenting justices’ depiction of the facts. The Court claimed that the dissents second-guess the trial court and improperly reweigh the evidence. It then stated that in reaching certain factual conclusions, the dissents relied on evidence that is disputed and that the trial court could have easily rejected as not credible. In particular, the Court discussed in detail the dissents failure to credit the evidence showing that Duenas understood English.

IV. B. (Justice O’Neill, joined by Justices Enoch, Schneider, and Smith) (concurring opinion)

In a continued attack on the dissenters, Justice O’Neill (not speaking for the majority on this point), questioned the assumption that Duenas’s “mere biological relationship with the twins” afforded him fundamental and constitutional rights. Citing *Lehr v. Robertson*, Justice O’Neill argued that a mere biological relationship does not confer a protected liberty interest. In cases involving putative fathers, it is the full commitment to the responsibility of parenthood that confers protection under the due process clause. In this case, Justice O’Neill noted that the trial court found that Duenas was not the presumptive father. Evidence shows that he was not involved with raising the boys and did not live with Inocencio. Duenas did not attempt to assert any type of parental rights until two months after signing the affidavit. Thus, she questions what constitutional rights Duenas had.

JUSTICE WAINWRIGHT, CONCURRING

Justice Wainwright joined the Court’s opinion in finding that Duenas did not preserve error. However, as to Inocencio, he joined Judge Owen in finding that Inocencio had preserved error and thus a legal sufficiency review of Inocencio’s issues was required. He agreed with Justice Owen’s result—that there was legally sufficient

evidence to support the termination. He wrote separately to discuss what and who has the burden of proof when a party is challenging a voluntary relinquishment affidavit.

Justice Wainwright noted that Inocencio argued that she had the burden to prove by a preponderance of the evidence that the affidavit was executed as a result of fraud, duress, coercion, etc. And, several courts of appeals have applied this standard. Justice Owen though applied a different standard. Based on the Texas Constitution and Family Code, Justice Owen determined that the ultimate burden of proof lie with the party seeking to terminate the parental relationship and that it had to be shown by clear and convincing evidence. Justice Wainwright opined that when a “voluntary” relinquishment affidavit is the sole ground for termination, requiring the parent to set aside the affidavit “may run afoul of constitutional and statutory mandates for the burden of proof and quantum of evidence necessary to terminate parental rights.” He continued, however, by noting that this issue was not briefed and not decided by the courts below. He finally concluded that under either approach Inocencio’s appeal is unsuccessful and thus it is not necessary to reach the issue in this case.

JUSTICE OWEN, CONCURRING IN PART AND DISSENTING IN PART (JOINED BY CHIEF JUSTICE PHILLIPS IN ALL PARTS)

Justice Owen and Chief Justice Phillips would have reversed the court of appeals’ opinion regarding Duenas on the basis that there was not sufficient evidence that Duenas voluntarily relinquished his parental rights. As to Inocencio, however, they would affirm because there was sufficient evidence to support the termination of parental rights.

I (Justice Owen, joined by Chief Justice Phillips) (concurring opinion)

Justice Owen set out some additional factual information. In particular, she discussed the procedural history. About a week after the affidavits were signed, Inocencio sought to revoke

her affidavit. Her mother supported these efforts and continued with her previously filed proceedings to be appointed managing conservator. Nevertheless, the Monteguts filed suit requesting the court to terminate Inocencio and Duenas parental rights. At this time, Duenas sought to revoke his affidavit as well. The trial court consolidated the Monteguts suit with Inocencio’s mother’s suit. The affidavits were only irrevocable for 60 days, and thereafter became revocable. The trial court denied Inocencio’s motion for continuance and proceeded with a bench trial just days before the affidavits became revocable.

II (Justice Owen, joined by Chief Justice Phillips) (dissenting opinion)

Justice Owen asserted that while the due process claim was not preserved, the basis of Duenas claim has always been that there was no clear and convincing evidence that he knowingly and voluntarily executed the relinquishment affidavit. She noted that Duenas focus throughout these proceedings has been that he did not understand English and that the affidavit was not translated into Spanish for him. He argued that because of this, there is not clear and convincing evidence that he knowingly and voluntarily executed the affidavit thereby terminating his rights. Justice Owen cautioned that, particularly in cases involving termination of parental rights, the Court should avoid dismissing substantive arguments on overly technical procedural grounds. Accordingly, she would have decided Duenas’s petition based on the complaint that there is legally insufficient evidence that his execution of the affidavit was knowing and thus voluntary.

III (Justice Owen, joined by Chief Justice Phillips, and Justices Hecht and Jefferson) (dissenting opinion)

Next, Justice Owen discussed the proper burdens of proof in termination of parental right cases involving alleged voluntary relinquishment affidavits. Inocencio and Duenas asserted that they were required to prove by a preponderance of the evidence that they did not knowingly and

voluntarily sign the affidavits. Nevertheless, Justice Owen disagreed with this assertion, and she advocated that the burden of proof constantly remain with the party seeking to terminate the parental rights.

Texas law requires a party that is seeking to terminate parental rights to provide clear and convincing evidence that the parents executed unrevoked or irrevocable affidavits of relinquishment. The affidavit can be prima facie proof that it was knowingly and voluntarily executed. If, however, the parent challenges the affidavit, Justice Owen argued that only the burden of production shifts to the parent to come forward with evidence that the affidavit was not executed knowingly or voluntarily. The ultimate burden of proof based on clear and convincing evidence remains with the party seeking to terminate the parental rights.

IV (Justice Owen, joined by Chief Justice Phillips) (dissenting opinion)

Justice Owen concluded that there was insufficient evidence that Duenas understood the import of the affidavit that he signed. She based this on the evidence that he did not read English, the affidavit was not in Spanish, and there was limited evidence about what he was told in Spanish about the affidavit. Accordingly, she would hold that there is not clear and convincing evidence that Duenas knowingly and voluntarily relinquished his parental rights.

V (Justice Owen, joined by Chief Justice Phillips) (dissenting opinion)

In this section, Justice Owen responded to Justice O’Neill’s suggestion that Duenas may have waived his constitutional rights by failing to maintain a closer relationship with the boys. Justice Owen argued that there is no evidence that Duenas is not the father and that there is some evidence that Duenas had some relationship with this children.

VI (Justice Owen, joined by Chief Justice Phillips) (dissenting opinion)

Justice Owen further notes that there are no additional grounds to support the termination of Duenas parental rights. The trial court did not make any findings of fact or conclusions of law regarding such; but instead, based the termination solely on the affidavit of relinquishment.

VII (Justice Owen, joined by Chief Justice Phillips and Justice Wainwright) (majority opinion as to Inocencio’s preservation of error)

While Justice Owen agreed with the termination of Inocencio’s parental rights, she disagreed with Justice O’Neill’s concurring opinion that Inocencio did not preserve her arguments for appeal. Once again, Justice Owen found that the basis of Inocencio’s complaints before the Court was the lack of legally sufficient evidence to support the termination of her parental rights. Importantly, she further notes that a majority of the Court (Chief Justice Phillips and Justices Owen, Wainwright, Hecht, and Jefferson) agreed that this was sufficient to preserve error.

In reviewing whether there was legally sufficient evidence, Justice Owen concluded that based on the evidence “a reasonable trier of fact could have formed a firm belief that they did not induce or unduly influence Inocencio to sign her affidavit.” Accordingly, Justice Owen found that there was legally sufficient, clear and convincing evidence to support the trial court’s finding that Inocencio voluntarily relinquished her parental rights.

JUSTICE HECHT, DISSENTING (JOINED BY JUSTICE JEFFERSON IN ALL PARTS)

Justice Hecht began his dissent in a fiery fashion. He took extreme issue with the length of time in which it took the court to render a decision in this case. He claimed that, contrary the Court’s assertion that review was hampered by the “indistinct” and “shifting” focus of the issues in the case, that the delay was caused by a disagreement over whether “the parents’ rights to their children could be terminated some technical

way without having to address the merits.” He then posited that the case is not about appellate procedure or delay, but instead about the process for taking children away from their parents and how the Texas system threatens people who do not speak English.

I. A. (Justice Hecht, joined by Justice Jefferson)(dissenting opinion)

In this section, Justice Hecht further detailed the facts surrounding the signing of the affidavits of relinquishment.

I. B. (Justice Hecht, joined by Justice Jefferson)(dissenting opinion)

In this section, Justice Hecht further detailed the proceedings in the trial court to terminate Duenas and Inocencio’s parental rights.

II. A. (Justice Hecht, joined by Justice Jefferson)(dissenting opinion)

Justice Hecht agreed that the Duenas has not preserved a constitutional due process claim for review on appeal. However, he argued that Duenas has consistently throughout the entire process argued that there is insufficient evidence that he voluntarily relinquished their parental rights. Duenas has always argued that he did not understand the affidavit because it was written in English, that it was not translated for him, and that he did not voluntarily relinquish his rights. Hecht then alleges that “to miss the simple arguments that these parents make, one would seemingly have to understand as little English as [Duenas] does.” Yet, the Court took a restrictive view on the parents’ briefing. This, he contended, is contrary to the Court’s previous mandate to liberally construe briefs to obtain just, fair and equitable adjudication of parties’ rights. Moreover, the Court is obliged by rule to treat issues as covering every subsidiary question that is included. Applying these mandates, Justice Hecht concluded that Duenas’s brief can be fairly read to raise broader concerns that constitutional due process and Justice Hecht believes that the

Court should have considered the substance of his argument.

II. B. (Justice Hecht, joined by Justice Jefferson)(dissenting opinion)

Likewise, Justice Hecht believed that Inocencio argued before the Court that she was unduly influenced to sign the affidavit based on kindness of those involved in the process and the unenforceable promises made by the adoptive parents. Justice Hecht disagreed with the Justice O’Neill’s conclusion that Inocencio did not ask the trial court to find the promises unenforceable. To the contrary, Justice Hecht asserted that the trial court expressly stated in its judgment that Inocencio raised issues of fraud, duress, and overreaching. He then contended that there is no authority requiring a trial court to rule on the subsidiary question of whether the promises were unenforceable. Accordingly, he would consider the substance of Inocencio’s arguments.

III. A. (Justice Hecht, joined by Justice Jefferson)(dissenting opinion)

Justice Hecht reiterated that in legal sufficiency reviews of a parental termination case, the Court will “look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief of conviction that its finding was true.” Applying this standard, after a detailed analysis of the evidence in the case, Justice Hecht concluded that there was no clear and convincing evidence that Duenas understood a word of the affidavit. Accordingly, Justice Hecht would reverse the termination of Duenas’s parental rights.

III. B. (Justice Hecht, joined by Justice Jefferson)(dissenting opinion)

In this section, Justice Hecht responded to the Court’s criticism of his factual review of the case. He stated that he appropriately recites the additional facts of the case and that the Court cannot convincingly point to any evidence in the record showing the Duenas had the knowledge

required by the Family Code to voluntarily relinquish his parental rights.

III. C. (Justice Hecht, joined by Justice Jefferson)(dissenting opinion)

Because Inocencio signed her affidavit of relinquishment based on the promises made by the adoptive parents, Justice Hecht would hold that she did not voluntarily relinquish her parental rights.

IV. (Justice Hecht, joined by Justice Jefferson)(dissenting opinion)

In this section, Justice Hecht took issue with Justice O’Neill’s opinion raising the possibility that Duenas may not have a constitutional right to the boys. In particular, Justice Hecht derided Justice O’Neill for injecting the possibility that Duenas is not the father, when until now, has not been a disputed point.

COURT’S JUDGMENT

Ultimately, a majority of the Court agreed that the court of appeals’ opinion should be affirmed as to both Duenas (Justices O’Neill, Enoch, Schneider, Smith, and Wainwright concluded that he did not preserve error) and Inocencio (Justice O’Neill, Enoch, Schneider, and Smith concluded that she did not preserve error, and Chief Justice Phillips and Justices Owen and Wainwright concluded that there was legally sufficient evidence to support the termination).

Legal Point	Number of Justices
Duenas did not preserve error	5
Insufficient evidence to support termination as to Duenas	4
Inocencio did not preserve error	4
Insufficient evidence to support termination as to Inocencio	3
Sufficient evidence to support termination as to Inocencio	2
Affirming termination as to Duenas	5
Affirming termination as to Inocencio	7

CONTRACT CONSTRUCTION

Universal Health Services, Inc. v. Renaissance Women’s Group, P.A., ___ S.W.3d ___, 47 Tex. Sup. Ct. J. 20 (Tex. 2003).

In this contract construction case, the Court construed a lease and a series of accompanying letter agreements between a group of obstetricians and a hospital company. The parties agreed to participate in a project under which the hospital would build a two-story facility in Austin called the Renaissance Center, the first floor of which would house a hospital owned and operated by the hospital company and dedicated exclusively to women’s health care, while the second floor would be leased by the obstetricians for their offices. After the Renaissance Center was built and opened, the obstetricians were very successful, but the hospital was not. After two

years, the hospital company decided to shut down the hospital. The obstetricians sued to keep the hospital open, but eventually agreed that the hospital could close and they would sue instead for damages.

The trial court concluded that the letter agreements and lease were ambiguous regarding whether the hospital company had an obligation to operate the hospital on the first floor for the term of the second-floor lease (fifteen years), and submitted the issue to the jury. The jury found that the hospital company did have such an obligation and that the obstetricians were entitled to damages for the hospital company's breach of that obligation. The court of appeals agreed that the agreements were ambiguous and affirmed.

But the Texas Supreme Court concluded that the agreements were unambiguous and that they did not require the hospital company to keep the hospital open for the term of the lease. The Court examined several provisions of the letter agreements and found that none of them imposed any obligation of the hospital company to operate the hospital for the term of the lease. The Court also refused to consider whether the agreements created an implied covenant that the hospital would be kept open, concluding that the obstetricians failed to preserve that issue for appellate review.

INSURANCE COVERAGE

American Manufacturers Mut. Ins. Co. v. Schaefer, ___ S.W.3d ___, 47 Tex. Sup. Ct. J. 40 (Tex. 2003).

In this first party auto insurance coverage case, the Texas Supreme Court held that the Texas Standard Personal Auto Policy does not obligate an insurer to compensate a policy holder for a vehicle's diminished market value when the car has been damaged but adequately repaired. Schaefer, the plaintiff, filed a class action against his insurer, American, when it refused to compensate him for the market value he claimed his car lost after it was damaged and subsequently repaired. Schaefer did not dispute the adequacy

of the repairs, but instead asserted that he was entitled to recover the difference between the market value of his car had it never been damaged and repaired and its value having been damaged and repaired.

Before deciding whether a class should be certified, the trial court granted summary judgment for American on the coverage issue, holding that the policy did not obligate American to pay for diminished value. The court of appeals reversed, concluding that it did.

The Texas Supreme Court noted that there existed a conflict among the court of appeals on this issue. After describing the policy provisions that each party relied on, the court concluded that the term "repair or replace" does not encompass payments for lost value. The court noted that the policy's "Limitation of Liability" section obligates the insurer to reimburse the insured for either the "actual cash value" of the vehicle, or the amount needed to "repair or replace" the vehicle, whichever is less. The court concluded that the only reasonable meaning this section could have is that the insurer may choose either to pay for the actual value of the car or repair the car to its pre-accident condition. Since, according to the court, the plain and ordinary meaning of "repair" does not include payment for lost value, the policy does not require insurers to pay diminished value damages.

PATERNITY/PRO SE INMATES

In re Z.L.T., J.K.H.T., and Z.N.T., ___ S.W.3d ___, 47 Tex. Sup. Ct. J. 113 (Tex. 2003).

In this pro se inmate case, the Texas Supreme Court concluded that the trial court did not abuse its discretion in implicitly denying the inmate's request for a bench warrant allowing him to be present at a hearing during which his paternity of three children was established and he was ordered to pay support. The trial court proceeded to trial without expressly ruling on the request for a bench warrant. The court of appeals held that the trial court abused its discretion because there was no indication that the trial court weighed the

various factors that figure into the decision whether or not an inmate should be allowed to appear in person at a hearing. But the Texas Supreme Court reversed, holding that because the inmate's request for a bench warrant contained no information regarding why his physical appearance at the hearing was necessary, the trial court did not abuse its discretion in failing to go beyond the request and undertake an independent inquiry into what facts might support the inmate's request. The court expressly disapproved any court of appeals' decision implying that trial courts have a duty to inquire about facts not asserted in a request for a bench warrant.

MALICIOUS PROSECUTION

***King v. Graham*, ___ S.W.3d ___, 47 Tex. Sup. Ct. J. 85 (Tex. 2003).**

In this malicious prosecution case, the court held that, to recover on a malicious prosecution claim in which the discretion whether to prosecute was left to someone other than the defendant, the plaintiff must present evidence not only that the defendant provided false information to the prosecutor, but also that the prosecutor acted based on the false information and but for the false information the decision to prosecute would not have been made. In other words, according to the court, "a person who knowingly provides false information to the grand jury or a law enforcement official who has the discretion to decide whether to prosecute a criminal violation cannot be said to have caused the prosecution if the information was immaterial to the decision to prosecute." Applying this standard, the court concluded that the plaintiffs in this case could not maintain a malicious prosecution case, because they presented no evidence that any of the allegedly false information the defendants provided to the prosecutor in any way affected the prosecutor's decision. Moreover, the other information provided to the prosecutor was sufficient to preclude any inference that the false information must have caused the prosecution.

NEGLIGENCE/MEDICAL BATTERY

***Miller v. HCA, Inc.*, 118 S.W.3d 758 (Tex. 2003).**

In this tragic case, the Texas Supreme Court held that the parents of a prematurely born infant could bring neither a battery nor a negligence claim based on the circumstances surrounding their child's birth.

Mrs. Miller was admitted to the hospital in premature labor. An ultrasound suggested that the fetus had a gestational age of around 23 weeks. It was then discovered that Mrs. Miller had an infection that could require her physicians to induce labor to save her life. The Millers were informed that, in such an event, there was little chance the baby would be born alive and even if it were, it would probably suffer from severe impediments. The Millers instructed two physicians that they did not want any heroic measures performed on their infant, and a notation of this was made in their medical chart. Hospital staff later met to discuss the situation and made the decision that a neonatologist should be present at the birth to evaluate the infant's condition before any decision was made regarding life-saving efforts. Mr. Miller was told this, but he refused to sign a consent form allowing the hospital to undertake resuscitation. Later that evening, the doctors were forced to induce labor, and the Millers' daughter was born alive. The attending neonatologist, believing that the baby had a reasonable chance of living based on her condition, immediately began resuscitative efforts. The baby was relatively healthy for a few days, then suffered a hemorrhage which left her with severe physical and mental impairments. At the time of trial, she was seven years old but could not walk, talk, feed herself, or sit up on her own. She was blind and suffered from severe mental retardation, cerebral palsy, and seizures, among other things. She required 24-hour-a-day care, and the evidence demonstrated that her condition would never improve.

The Millers sued the hospital (but none of the treating physicians) for battery and negligence. They claimed that, in addition to the resuscitative efforts immediately after their daughter was born, the hospital performed experimental procedures and administered experimental drugs, without which, in all reasonable medical probability, the infant would not have survived. They also alleged that the treating physicians acted as the hospital's agents and that the parent company that owned the hospital acted as a single business enterprise with the hospital such that the parent was liable for the hospital's conduct. The jury found in the Millers' favor and the trial court rendered judgment for the Millers for \$29.4 million in actual damages for medical expenses, \$17.5 million in prejudgment interest, and \$13.5 million in punitives. The court of appeals reversed and rendered a take-nothing judgment, which the Texas Supreme Court affirmed.

The court first noted that parents have primary responsibility for decisions regarding medical care for their children, including the right to refuse treatment. However, this broad right is not without limits. The state has the authority to prevent child abuse, and a corollary to this power is the authority to intercede in parental medical decisions when such decisions would be so detrimental to the child's interests as to amount to neglect and abuse.

The court then noted the general rule in Texas common law that a physician who provides treatment without consent commits a battery, but further noted that this rule has some exceptions, including that a physician may treat a child over the parents' refusal to consent when "emergent circumstances" exist, that is, when death is likely to result to the child if the physician fails to treat.

The court then held that a physician who is confronted with "emergent circumstances" and provides life-sustaining treatment to a minor child is not liable for not first obtaining parental consent. This is because the harm from failing to treat - death - outweighs the harm from treating - going against the parents' wishes.

The Millers argued that liability should still exist here because no "emergency" ever happened - they were told the risks almost 12 hours before their daughter was born and they chose repeatedly to withhold treatment. Thus, the Millers asserted, there was no emergency during which it was not possible to obtain consent before acting - the likely outcome and consequences had been discussed and weighed and the parents had made their choice. The court rejected this argument, concluding that the evidence demonstrated that the infant's true condition could not be evaluated until she was born. Thus, any decision by the Millers before her birth could only be based on speculation.

OIL AND GAS/FRANCHISE TAXES

***Southern Union Co. v. City of Ediburg*, ___ S.W.3d ___, 2003 Tex. Sup. Ct. J. 60 (Tex. 2003).**

In this case, the Texas Supreme Court considered several issues regarding a gas franchise agreement between the City and Valero, which sold its rights under the agreement to Southern Union. The court first concluded that the City was not entitled to 4% franchise taxes on all gas sold to consumers within the City regardless of whether Southern Union was involved in the sale itself. The court rejected the City's argument that the agreement extended the tax to all gas transported through the pipeline owned by Southern Union. The court next rejected the City's argument that the 4% tax applied to sales by any entity affiliated with Valero and then Southern Union. The City contended that various Valero companies were operated as a single business enterprise and that Southern Union perpetuated this practice when it acquired the rights under the agreement. But the court held that: (1) no jury submission supported any such finding as to Southern Union; and (2) article 2.21 of the Texas Business Corporation Act applies to any attempt, including that of the City in this case, to impose liability on related corporate entities solely because the alleged bad acts of one of them are attributable to all of them, and there is no evidence to support any finding, necessary before liability can be imposed under

article 2.21, that any of the Valero entities perpetrated an actual fraud on the City. Next, the court rejected the City's contention that it should have been awarded damages based on Valero's assignment to Southern Union, claiming that such assignment was made without consent. The court agreed with the trial court that no evidence supported any damage award under this theory.

The court next held that the City's tortious interference claims were without merit because the entities that sold gas to consumers within the City had the legal right to do so. The court then rejected the City's fraud claims, concluding that there was no evidence of any false statement by any Valero entity to the City.

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PROFESSIONAL RESPONSIBILITY / RULE 11 SANCTIONS / JUDGMENT EXECUTION

Whitehead v. Food Max of Mississippi, Inc., 332 F.3d 796 (5th Cir. 2003).

In this *en banc* decision, the Fifth Circuit reviewed a district court's Rule 11 sanction against an attorney who obtained a writ of execution for an "improper purpose." The Fifth Circuit applied a "very deferential abuse of discretion standard" and affirmed.

After obtaining judgment for approximately 3.4 million dollars against Kmart Corporation and waiting only three days after Kmart's motion for new trial was denied, the attorney attempted to execute the judgment at a local Kmart. The attorney entered the Kmart with two U.S. Marshals and media representatives in tow and attempted to seize cash from the registers and vault. While at Kmart, the attorney made "extremely hyperbolic, intemperate, and misleading comments" to the media.

The Fifth Circuit approved the district court's determination that Kmart was protected by an automatic stay under Federal Rule of Civil Procedure 62(f). Rule 62(f) provides that in states where a judgment is a lien upon the property of the judgment debtor, the debtor is entitled to a stay of execution, if allowed under state law. Mississippi law provided for a ten day automatic stay after the execution of a judgment. Thus, Kmart was entitled to a ten day stay.

The Court held the two prongs of Rule 11(b) – first, that a document may not be submitted for an improper purpose, and second that legal contentions must be warranted – were separate obligations and that both obligations must be satisfied. Further, the attorney's conduct is

measured by an objective, not subjective, standard.

The Court explained its review was "very deferential" for two reasons. First, "the district court is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11." Second, "the district judge is independently responsible for maintaining the integrity of judicial proceedings in his court and concomitantly, must be accorded the necessary authority." Under this standard, the district court would abuse its discretion if its ruling was based on an erroneous view of the law or on a clearly erroneous assessment of the evidence.

The Court held the media event orchestrated by the sanctioned attorney constituted objective evidence of his improper purpose in obtaining the writ. In addition, the attorney had been sanctioned at trial, after violating the district court's instructions and warning. Thus, the attorney's improper conduct was part of a pattern of improper activity.

The attorney raised First Amendment considerations, for the first time, before the *en banc* Court. The Court summarily rejected the attorney's new constitutional argument, saying: "No authority need be cited for the rule that, because the record does not reflect that [the attorney] raised these points in [the] district court, we will not consider them on appeal."

The attorney was ordered to pay Kmart approximately \$8,000 – the amount of attorneys' fees for opposing the execution. Kmart also requested a public apology; however, the district court determined publication of the sanctions opinion would suffice.

Chief Judge King and Justices Jerry E. Smith and Benavides dissented.

BANKRUPTCY / UNDUE HARDSHIP

In re Gerhardt, 348 F.3d 89 (5th Cir. 2003).

In a case of interest to those many individuals who are still being tracked down to pay their student loans, the Fifth Circuit held that, to be entitled to “undue hardship” discharge of a student loan, the debtor must satisfy the three-part test set forth by the Second Circuit in *Brunner v. New York State Higher Educ. Serv. Corp.*, 831 F.2d 395 (2d Cir. 1987). *Brunner* requires showing: (1) that the debtor cannot maintain, based on current income and expenses, a “minimal” standard of living for himself and his dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period; and (3) that the debtor has made good faith efforts to repay the loan.

Based on this test, and applying a *de novo* standard of review to such cases (an issue of first impression), the Court found that Gerhardt, a healthy, well educated 43 year old with no dependents was not entitled to an undue hardship discharge, even though he was not earning enough at his current job (as principal cellist for the Louisiana Philharmonic Orchestra and as a part-time cello teacher) to permit repayment. The court noted that Gerhardt controlled his ability to perpetuate his present inability to pay his loan, and distinguished this from reasons beyond a debtor’s control, such as psychiatric problems, lack of usable job skills, or severely limited education.

Were the law otherwise, and discharge could be obtained for self-imposed financial distress, noted the Court, “it is difficult to imagine a professional orchestra musician who would not qualify for an undue hardship discharge.”

DAMAGES / EXPERT TESTIMONY / REMITTITUR

Vogler v. Blackmore, 2003 WL 22790811 (5th Cir. Nov. 25, 2003).

In this double-death case, the Fifth Circuit found testimony from a “grief expert” to be relevant and admissible, but applying its “maximum recovery” rule, affirmed some of the damages awarded while rejecting others.

Becky Vogler and her daughter, Kallie, were hit by a tractor-trailer rig driven by Blackmore. Both Voglers were dead by the time they were removed from the car. Frank Vogler, the decedents’ husband and father, sued for damages and presented testimony from an expert in thanatology, and recovered both individually and as a representative of both estates. The estates of Becky and Kallie were each awarded \$200,000 for pain and mental anguish prior to their deaths. Mr. Vogler was awarded \$400,000 for his past pecuniary loss, loss of companionship and society, and mental anguish because of the death of Mrs. Vogler, and \$1,500,000 for this same loss in the future. Mr. Vogler also was awarded \$200,000 for mental anguish and loss of companionship and society in the past because of Kallie’s death, and \$1,300,000 for his future suffering for the loss of his daughter.

The Court held the thanatology testimony to the same standard applied to all expert testimony, *i.e.*, that enunciated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993). Noting that the Fifth Circuit “treads lightly upon jury verdicts,” the Court upheld the relevancy of such testimony and found that, regardless, its admission was harmless because the tragic nature of the loss was readily apparent.

The Court then turned to application of its “maximum recovery” rule, which allows the Court, in determining the maximum amount a reasonable jury can award, to “apply a multiplier of fifty percent to past similar awards, so long as no multiplier was used in calculating those past awards.” Applying this rule to this case, the

Court explained why this case was in many respects unique, saying that it involved loss of both wife and child, and a jury verdict that separated past and future loss of companionship and mental anguish. Based on this and the expert testimony, the Court upheld Mr. Vogler's damage award for the death of Mrs. Vogler and, regarding recovery for the child's death, the Court found "no factually similar case in the relevant jurisdiction" so that "the maximum recovery rule is not implicated" and remittitur is not required.

The Estates did not fare as well. The Court found the jury had the discretion to find Mrs. Vogler suffered mental anguish, but only for a few seconds. Distinguishing cases with larger awards as involving longer periods of suffering, and invoking the maximum recovery 50% multiplier, the Court ordered a remittitur from \$200,000 to \$30,000. Finally, the Court held that Kallie's estate should not have been awarded any of the \$200,000 because there was no evidence to suggest that a three year old, secured in her child seat behind her mother, would have been aware of the impending collision or suffered conscious mental anguish in the milliseconds between the time the driver's seat was hit and her portion of the car was crushed.

REMOVAL / FRAUDULENT JOINDER

***Ross v. Citifinancial, Inc.*, 344 F.3d 458 (5th Cir. 2003).**

Plaintiffs sued Citifinancial and other defendants in state court. The defendants removed to federal court, claiming diversity jurisdiction and that the individual defendants had been fraudulently joined. The district court agreed and denied the plaintiffs' remand motions. Specifically, it found most claims against the individuals were time-barred and there was no reasonable basis for predicting liability of the individuals on the other claims. The plaintiffs brought interlocutory appeals from the remand denials under 28 U.S.C. §1292(b) (permissive appeal of order involving controlling question of law).

The Court began by noting fraudulent joinder is established by showing: (1) actual fraud in pleading jurisdictional facts; or (2) inability of the plaintiff to establish a cause of action against a non-diverse party. The appeal addressed the analytical standard to be applied to the second method of establishing fraudulent joinder. The Court held district courts must determine whether there is arguably a reasonable basis for predicting that state law might impose liability. "This means that there must be a *reasonable* possibility of recovery, not merely a *theoretical* one."

Although the burden for establishing fraudulent joinder is heavy, district courts may "pierce the pleadings" and consider summary judgment-type evidence. Unchallenged factual allegations must be considered in the light most favorable to the plaintiff and ambiguities of state law must be resolved in favor of the non-removing party. The Fifth Circuit affirmed the remand- denials because there was no arguably reasonable basis for predicting the individual defendants could be liable.

RULE 68 OFFER OF JUDGMENT

***Basha v. Mitsubishi Motor Credit of America, Inc.*, 336 F.3d 451 (5th Cir. 2003).**

Plaintiff accepted an offer of judgment from three defendants. After the district court entered judgment, the Plaintiff moved to collect attorney's fees and costs. The district court concluded that the Rule 68 offer settled all of the Plaintiff's claims, including attorney's fees. Plaintiff also accepted an offer of judgment from a fourth defendant, but that offer did not quantify the amount of actual damages. The district court refused to enter the judgment between the Plaintiff and the fourth defendant. Plaintiff appealed.

Because a determination of whether an offer satisfies Rule 68 is an issue of law, the Fifth Circuit applied a *de novo* standard of review. However, factual circumstances under which Rule 68 offers and acceptances are made are reviewed for clear error.

The Fifth Circuit applied general contract principles to interpret the Rule 68 agreement. The Court held that the circumstances, if not the text of the agreement, strongly supported the view that the Plaintiff and the three defendants intended to settle all claims, including attorney's fees. As to the fourth defendant, the Fifth Circuit noted: "The plain purpose of Rule 68 is 'to encourage settlement and avoid litigation.'" (Quoting *Marek v. Chesny*, 473 U.S. 1, 7 (1985)). The Fifth Circuit held the district court properly refused to enter the judgment with the fourth defendant because it purported to settle all claims, yet failed to quantify damages.

FIRST AMENDMENT / PRIOR RESTRAINT

***Chiu v. Plano Indep. Sch. Dist.*, 339 F.3d 273 (5th Cir. 2003).**

A Plano ISD policy required students, parents and community members to submit their non-school materials for approval by school officials before materials could be distributed on school property. The Fifth Circuit found this to be an invalid prior restraint on protected speech under the First Amendment. The Court went on to hold that the administrators' enforcement of the policy was objectively unreasonable, so that they were not entitled to qualified immunity.

The dispute began over a new math curriculum, the Connected Math Program (CMP). Plaintiffs were parents of students who opposed CMP. Plano ISD held a series of meetings to introduce parents to CMP. Plaintiffs attended these events, initially bringing with them flyers critical of CMP and a petition requesting that PISD halt implementation of CMP pending further evaluation. Plaintiffs were prohibited by Plano ISD from distributing the flyers and petitions on school property at the initial meeting. At a second meeting, they were prohibited from carrying a sign into the meeting stating his request for a conventional math choice and asking those interested to see him. At a third meeting, Plaintiffs began distributing materials listing the CMP materials as "approved" but

"nonconforming." PISD told Plaintiffs they could not distribute the materials on school property.

PISD policy required written materials to be submitted for pre-approval by school officials. All sides agreed that the Plaintiffs' activities were protected by the First Amendment. The Court held that "even in schools there exists a clearly established right to be free of prior restraints except where they are designed to maintain discipline or to prevent school disruption and are narrowly drawn to achieve that goal." Although recognizing that some limits would exist on such speech, and that it could not decide if "viewpoint discrimination" was also involved, the court found an impermissible prior restraint on "a parent's fundamental liberty interest in directing his or her child's education," particularly since these activities occurred after school hours and no evidence was presented that there was a reasonable probability of disruption of normal school operations.

The Court also held that this prior restraint was objectively unreasonable since "a school speech policy must be justified on the basis of maintaining order and discipline," and because relatedly the officials could not show how PISD policies advanced the educational environment. Therefore the officials were not entitled to qualified immunity, regardless of their subjective intent.

RIPENESS / DUE PROCESS

***Monk v. Huston*, 340 F.3d 279 (5th Cir. 2003).**

Landowners sued officials of the Texas Commission on Environmental Quality ("TCEQ") for alleged due process violations. Specifically, the landowners alleged the TCEQ had no ascertainable standards to guide its decision whether to approve an application for a Class I solid waste landfill near their property. The TCEQ filed a motion to dismiss, contending the matter was not ripe. The Fifth Circuit reviewed the ripeness issue *de novo* and agreed with the TCEQ.

Under the ripeness doctrine, the Court is required to dismiss “abstract or hypothetical” cases. In the Fifth Circuit, “[a] case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is required.” In other words, “[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.” (Quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)).

In analyzing the ripeness issue, the Court noted the constitutional right to due process is not “an abstract right to hearings conducted according to fair procedural rules.” Rather, “it is the right not to be deprived of life, liberty, or property without such procedural protections.” The Court held the landowners’ suit was not ripe because the landowners had not suffered any deprivation since the TCEQ permitting process had not run its course.

FIRST AMENDMENT / SEXUALLY ORIENTED BUSINESSES / INTERMEDIATE SCRUTINY

***N.W. Enters., Inc. v. City of Houston*, 2003 WL 22792244 (5th Cir. Nov. 25, 2003).**

The City of Houston enacted ordinance 97-75 in 1997. It was the latest in a series of ordinances regulating sexually oriented businesses (SOBs) which had been passed following a federal district court striking down a 1977 ordinance and the Fifth Circuit affirming as constitutional a 1985 ordinance. The new, 1997 ordinance, inter alia, a) increased from 750 feet to 1,500 feet the distance between a SOB and a protected land use, b) added public parks to the list of protected land uses, c) set standards for SOB signage and physical structures, and d) required licenses of managers and entertainers.

The Court recognized that the overarching issue on appeal was “whether strict or intermediate scrutiny governs the constitutional analysis of the Ordinance.” To decide this, the Court distinguishes between ordinances intended “to regulate secondary effects of SOBs” and those

that “seek to censor the expression itself.” In this case, the city council had stated concerns with secondary effects, and the Court accepted those concerns as (at least provisionally) legitimate. This resulted in “intermediate scrutiny” review.

In reviewing the 1,500 foot distance requirement, the court initially noted that a court’s review should be of the location provisions collectively, not separately. It then noted that some deference is required because “legislators cannot act, and cannot be required to act, only on judicial standards of proof.... Imposing a level of intermediate scrutiny, in cases like this, requires more conviction of the connection between legislative ends and means than does the rational basis standard, but only in the sense of ‘evidence ... [that] is reasonably believed to be relevant’ to the secondary effects in question.” The Court then went on to state that, viewed from this perspective, the City’s “hypothesizing” that adverse secondary effects would decrease by dispersing SOBs was acceptable. The Court went on to state that the City did not necessarily need to “narrowly tailor” its buffer zone as much as possible since cities are “entitled to experiment with distance regulations.” The Court then recognized that, although there was evidence a larger buffer zone would not prevent SOB activity altogether, further proceedings were needed on that precise issue.

In other rulings, the Court upheld some challenges to the sign requirements but rejected others which involved no substantial change. An ordinance requirement that entertainment rooms be free from doors was challenged because an essential element of erotic dance expression is musical accompaniment, and each room sought a different musical ambience, which would be impossible without a door to minimize ambient noise. However, the City prevailed under intermediate scrutiny analysis, because it was shown that separate rooms, even large ones, can be used for prostitution. Likewise, the Court upheld employee licensing requirements, which required extensive personal information, imposed a 10 day processing period, limited applications to three days a week from 8am to noon, and required

managers to wear identification while working. All satisfied the intermediate scrutiny test, although some aspects of these rules seemingly survived only because the Fifth Circuit let stand the trial court's ruling that certain aspects of the permit application were confidential.

Other rulings of the court included that Article I, Section 8 of the Texas Constitution does not afford broader free speech rights to SOBs than does the federal Constitution; and that the ordinance involved was not a "zoning regulation" subject to additional requirements.

COMITY / STANDARD OF REVIEW

***Int'l Transactions, Ltd. v. Embotelladora Agral Regiomontana, S.A. de C.V.*, 347 F.3d 589 (5th Cir. 2003).**

International Transactions, Ltd. (ITL) filed suit in federal court to confirm an arbitration award against several of the "Agral Companies." The district court held that ITL lacked standing to enforce or collect the arbitration award because a Mexican bankruptcy court had previously held that ITL's representative, Sharp Capital, Inc. (Sharp), had assigned the award to a third party. The district court ruled that the decision of the Mexican bankruptcy court was entitled to comity, requiring dismissal of ITL's claims. However, the Fifth Circuit concluded that the Agral Companies failed to show that ITL/Sharp had adequate notice and opportunity to be heard in the Mexican court, and therefore vacated the judgment and remanded.

More specifically, the Fifth Circuit held that although ITL was on notice of the bankruptcy proceeding generally, ITL was entitled to specific notice of specific actions because it had filed a bankruptcy claim. Here, no such notice was given. Therefore, even though a district court's decision is reviewed only for abuse of discretion, accepting comity under these facts was an abuse of discretion. Justice Jerry Smith filed a dissent, arguing that although the majority might be right to reverse if the appellate court were applying a

de novo standard, the trial court did not abuse its discretion.

DISTRIBUTOR TERMINATION / NO EVIDENCE STANDARD OF REVIEW

***Coburn Supply Co., Inc. v. Kohler Co.*, 342 F.3d 372 (5th Cir. 2003).**

This case involves the alleged wrongful termination of an at-will, non-exclusive wholesale distributor of plumbing products. The distributor alleged the manufacturer breached an obligation to provide reasonable notice before terminating the relationship and made negligent misrepresentations regarding the stability of the business relationship.

The manufacturer challenged the legal sufficiency of the evidence in support of the jury's finding that 105 days of advance notice was not reasonable notice. The Court reviewed the legal sufficiency challenge under the "especially deferential" standard. Thus the controlling question on appeal was whether considering the evidence, drawing all reasonable inferences and resolving all credibility determinations in the light most favorable to the terminated distributor, that no reasonable jury could arrive at the conclusion that 105 days was not reasonable notice.

The Court held that Texas Business & Commerce Code § 2.309(c), modeled on the Uniform Commercial Code, controlled and required reasonable notice of termination. However, cases from other jurisdictions and U.C.C. comment 8 provide that notice is reasonable if the terminated party has a reasonable time to seek a substitute arrangement. The undisputed evidence showed that the distributor entered a relationship with another major plumbing manufacturer approximately two months before its relationship with Kohler ended. Thus, the Court held "no reasonable jury could have arrived at the conclusion that the 105 days' notice here is unreasonable."

The Court also held the distributor's negligent misrepresentation claims failed, saying, "[a]s a matter of law, the at-will, non-exclusive distributor relationship between Coburn and Kohler is not the kind of confidential or fiduciary relationship that would give Kohler a duty to disclose to Coburn its negotiations with another distributor or its plans to terminate the at-will, non-exclusive distributorship relationship. The Court relied on *Bradford v. Vento*, in which the Texas Supreme Court held that it had never adopted § 551 of the Restatement (Second) of Torts because "as a general rule, a failure to disclose information does not constitute fraud unless there is a duty to disclose information". 48 S.W.3d 749, 755 (Tex. 2001). The Court also cited *Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171, 177 (Tex. 1977) ("[M]ere subjective trust does not, as a matter of law, transform arm's length dealing into a fiduciary relationship.")

The Court further held there was "no evidence which supports the jury's finding of justifiable reliance" and noted the record was "replete with evidence that Coburn management was fully aware of Kohler's plan in 1999 to review all distributors to find out whether it was 'positional with the right horse.'"

Because there was no evidence on either of the distributor's claims, the Court reversed and rendered judgment for the manufacturer.

AGE DISCRIMINATION / DISPARATE IMPACT

Smith v. City of Jackson, Mississippi, 2003 WL 22671061 (5th Cir. Nov. 13, 2003).

In this case the Fifth Circuit took on the issue whether disparate impact will be a recognized theory of liability under the Age Discrimination in Employment Act (ADEA), with two (Chief Judge King and Justice Higginbotham) of the three justices deciding that it is not (Justice Stewart, dissenting).

City police officers and public safety dispatchers who were all over 40 years of age brought suit

against the city and police department of Jackson, Mississippi. They claimed that a performance pay plan granted substantially larger salary increases to those under 40. The trial court granted summary judgment for Defendants, finding that disparate impact is not cognizable under ADEA, and also found no evidence of disparate treatment. Plaintiffs appealed, claiming that disparate impact is recognized and that the disparate treatment ruling was premature because of pending discovery.

The Fifth Circuit first looked at the ruling of other circuits on the disparate impact theory, finding a split based primarily on differing views of the degree of similarity between the language in ADEA and Title VII. Eventually the Fifth Circuit held "the ADEA was not intended to remedy age-disparate effects that arise from the application of employment plans or practices that are not based on age." However, the Court reaffirmed that a disparate treatment action does exist under the ADEA, and allowed Plaintiff additional discovery to pursue those claims.

Justice Stewart dissented from the portion of the majority's dismissal of the disparate impact claim, arguing that the language in the ADEA and Title VII is "virtually the same," and that the legislative history of the ADEA supports a disparate impact claim.

MALICIOUS PROSECUTION / § 1983

Castellano v. Fragozo, 2003 WL 22881590 (5th Cir. Dec. 5, 2003).

An *en banc* court unanimously agreed that there is no constitutional right to be free from a malicious prosecution such as will support a §1983 claim, but was divided on numerous other issues, such as the majority's holding that the manufacturing of evidence and use of perjured testimony at trial in order to obtain a wrongful conviction deprives a defendant of his right to a fair trial secured by the Fourteenth Amendment due process clause, and is actionable under §1983.

Chris Fragozo, a San Antonio police officer, aided Maria Sanchez in altering tape recordings offered against Alfred Castellano, which were critical to Castellano's arson conviction. On Castellano's third habeas attempt, the Texas Court of Criminal Appeals set aside the conviction because Castellano in fact had no knowledge of the arson. Castellano brought a §1983 suit claiming defendants were guilty of malicious prosecution and denied him rights secured by the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments. Following removal to federal court, the magistrate judge concluded that malicious prosecution could proceed only under the Fourth Amendment.

In recognizing the §1983 due process claim, the majority acknowledged that "our precedent governing §1983 malicious prosecution claims is a mix of misstatements and omissions which leads to the inconsistencies and difficulties astutely pointed to in Judge Barksdale's dissent from the panel opinion.... Other circuits have traveled uneven paths as well...." The majority decided to set the "markers of the new path," holding that "We cannot agree that the [due process clause] claims under the Fourteenth Amendment were properly dismissed" under these facts.

This holding became all the more important when the Court majority rejected the Fourth Amendment as a permissible basis for *all* the damages in this case because "the Fourth Amendment, broad and powerful as it is, casts its protection solely over the pretrial events of a prosecution." The Court did allow the parties to amend their pleadings to distinguish between trial and pretrial events.

Justice Barksdale authored the minority opinion, concurring in part and dissenting in part, on behalf of herself and Justice Emilio Garza. The minority concurred with "finally proscribing a claim under 42 U.S.C. §1983 for malicious prosecution," but thought the majority "improperly creates, *sua sponte* no less, a new federal law remedy," i.e. a Fourteenth Amendment due process claim under §1983 for pretrial evidence fabrication and perjury, "to replace the now torpedoed §1983 malicious

prosecution claim." The minority further maintained that these claims were procedural due process claims barred by the *Parratt* doctrine (if state law provides an adequate post-deprivation remedy, a plaintiff is barred from claiming through §1983 a procedural due process remedy), and not substantive due process claims.

The Court further split on whether Castellano had waived some of his claims by failing to cross-appeal on that basis, the majority finding no waiver, and on whether he should now be allowed to plead a state claim of malicious prosecution, with the majority holding yes. In the end, the Court majority remanded the case for a new trial of Castellano's federal and state claims under the Fourth and Fourteenth Amendment, as well as any other state claims.

An individual has not started living until he can rise above the narrow confines of his individualistic concerns to the broader concerns of all humanity.

Dr. Martin Luther King, Jr.

Texas Courts of Appeals Update - Procedural

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APPELLATE JURISDICTION AND FILING THE NOTICE OF APPEAL

***Wilhelm v. Flores*, -- S.W.3d --, 2003 WL 22479211 (Tex. App.--Corpus Christi Oct. 30, 2003, no pet. h.) (not released for publication).**

Flores's decedent died from an anaphylactic shock reaction from bee stings he received while helping a beekeeper to move hives. He received the stings while taking a break to relieve himself in some nearby brush. The jury found liability against two defendants, including Wilhelm, and awarded damages. The trial court entered judgment on December 18, 1997.

Wilhelm filed his notice of appeal on February 2, 1998. In response to a motion filed that same day by Wilhelm, the trial court found that neither Wilhelm nor his attorney received notice of the judgment until January 29, 1998. Wilhelm appealed on several bases.

On appeal, Flores argued that Wilhelm's appeal was untimely despite the trial court's finding under TRCP 306a. Flores argued that the order did not sufficiently establish lack of notice because it did not specify when co-counsel for Wilhelm received notice of the judgment. The court of appeals held the appeal was timely. Because TRCP 8 requires notice to be sent to the attorney-in-charge, any notice provided only to co-counsel was inadequate. The court concluded that the evidence was legally and factually sufficient to support the trial court's finding as to when Wilhelm's counsel received notice.

On the merits, the court of appeals affirmed the portion of the judgment awarding damages for negligence but reversed and rendered as to gross negligence based on a lack of evidence of conscious indifference.

***McDowell v. Walt*, -- S.W.3d --, 2003 WL 22333346 (Tex. App.--Amarillo Oct. 13, 2003, no pet. h.) (*per curiam*) (op. on reh'g).**

In this case Appellant had previously filed a notice of appeal, which had been dismissed as untimely. Appellant contended that because neither he nor his attorney were aware of the final judgment, TRAP 4.2(a)(1) and TRCP 306a(5) in combination extended the deadline by which he had to perfect an appeal. Appellant asserted that since his notice of appeal was filed before that deadline, it was timely. The trial court, however, concluded that it had no jurisdiction to rule on whether the deadline had been extended because Appellant had failed to file a motion requesting a finding of delayed notice of judgment until after the allegedly postponed deadline had passed.

The appeals court agreed with the trial court, explaining that the application of the extensions set forth in TRCP 306a(5) and TRAP 4.2(b) are limited in several respects. Specifically, when a party fails to acquire notice or knowledge of the judgment within 20 days of its execution, the lack of notice simply postpones commencement of the remaining period in which the trial court retains jurisdiction over the issue. Normally, and unless extended through a timely motion for new trial or to modify the judgment, that period is 30 days from the date the judgment is signed. Here, because the Appellant did not extend the period by filing a motion for new trial or another post judgment argument to extend the period, the period had expired 30 days after appellant had become aware of the judgment. Consequently, the plenary power of the trial court expired and it had no power to rule on a motion asserting that the deadline for filing a notice of appeal had been

extended. Without such a ruling the deadline for filing a notice of appeal could not be extended.

***Moore Landrey, L.L.P. v. Hirsch & Westheimer*, -- S.W.3d --, 2003 WL 22382799 (Tex. App.--Houston [1st Dist.] Oct. 16, 2003, no pet. h.) (not released for publication).**

In this attorney fee dispute, the court of appeals addressed the length of time that a trial court has to resolve a TRCP 306a motion filed after its plenary power has otherwise expired. The trial court entered a final judgment for the defendants on April 9, 2002. Because no party moved to modify the judgment, the trial court lost plenary power 30 days later, on May 9, 2002.

On June 12, Moore Landrey filed a motion under TRCP 306a in which it presented prima facie proof that it had not received notice of the judgment until May 15. But Moore Landrey did not set a hearing on its motion until December 9, and the trial court did not enter its order finding May 15 as the date of notice until December 16.

The court of appeals declared the December 16 order void and dismissed the appeal for want of jurisdiction. The issue presented was how long, once reinvoked under TRCP 306a, the trial court's plenary power lasts. The court stated that under TRCP 329b(d), the trial court's reinvoked plenary power lasted for 30 days, unless another motion was filed that extended the period (which none was). The trial court's plenary power thus expired on June 14, only two days after Moore Landrey filed its motion. The court rejected as inapplicable Moore Landrey's analogy to a motion to correct a judgment under TRCP 316, which a trial court may properly grant after its plenary power expires, because a TRCP 306a order does not correct a judgment.

***Rasmusson v. LBC Petrounited, Inc.*, -- S.W.3d --, 2003 WL 22769993 (Tex. App.--Houston [14th Dist.] Nov. 25, 2003) (not released for publication), *opinion supplemented*, 2003 WL 22996917 (Tex. App.--Houston [14th Dist.] Dec. 23, 2003, no pet. h.).**

Rasmusson sued his former employer, LBC, alleging fraud and breach of contract. LBC counterclaimed for specific performance of the contract's arbitration clause and for attorney fees. The trial court granted LBC's motion to compel arbitration. After finding for LBC, the arbitration panel referred the matter of LBC's costs to compel arbitration back to the trial court. Rasmusson filed a notice of nonsuit as to his claims, and LBC moved for judgment on its attorney fees claim. In February 2002, the trial court entered an order awarding LBC its attorney fees. Not until September 2002, however, did the court sign a final judgment. Rasmusson then appealed the attorney fee award.

On appeal, LBC argued that Rasmusson's appeal was untimely because the February attorney fee award was a final judgment that started the appellate timetable. The court disagreed, holding that the February order was not a final judgment because it did not dispose of Rasmusson's claims. The court observed that it is an *order* of nonsuit, rather than a *notice* of nonsuit, which starts appellate timetables. Not addressed by the court is the question whether a nonsuit that does not terminate an action requires an order to be effective or, if it does not, why the February order was not a final judgment.

Addressing the merits, the court reversed the attorney fee award. The court held that the affidavit of LBC's attorney, which merely stated that "reasonable costs of \$403.71 have been incurred" was insufficient to support a summary judgment because it provided no information by which the court could review the assertion of reasonableness. The court rejected LBC's argument that Rasmusson waived error by failing to raise the issue in the trial court, observing that a summary judgment nonmovant is not required to

respond in the trial court to contend on appeal that the movant's proof is inadequate.

***Chavez v. Tex. Dep't of Public Safety*, -- S.W.3d --, 2003 WL 22506549 (Tex. App.--Dallas Nov. 5, 2003, no pet. h.) (mem. op.).**

A handgun licensee appealed the decision of the County Court at Law revoking his license. The trial court's final order was dated August 14, 2002, and appellant requested findings of fact and conclusions of law on September 3. A notice of appeal was filed on November 7.

The court of appeals held that, although a request for findings of fact and conclusions of law can extend the filing deadline for a notice of appeal from 30 to 90 days, such a request does not extend the time for perfecting appeal of a judgment rendered as a matter of law. Because there were no contested fact issues in the case, the court of appeals determined that the trial court rendered judgment as a matter of law and that, therefore, findings of fact would not be useful to resolve the appeal. The court of appeals held that the licensee's request for findings of fact and conclusions of law did not operate to extend the normal 30-day deadline to file a notice of appeal and the notice was therefore untimely.

***In re D.K.P.*, -- S.W.3d --, 2003 WL 22175937 (Tex. App.--Amarillo Sep. 17, 2003, no pet. h.).**

The Office of the Attorney General (OAG) brought an accelerated appeal from an adverse decision of the County Court at Law in a termination of parental rights matter. The deadline for filing a notice of appeal in an accelerated appeal is 20 days from the date the judgment is signed. The OAG filed its notice of appeal almost 90 days after the judgment was signed. The OAG also filed a motion for new trial and a request for findings of fact and conclusions of law. The court of appeals directed the OAG to inform the court why the cause should not be dismissed as untimely filed. The OAG asserted that, because it filed a motion for new trial and a request for findings of fact and

conclusions of law, the deadline was extended to 90 days from the date the judgment was signed.

The court held that, although filing a motion for new trial and a request for findings of fact and conclusions of law would have served to extend the 30 day deadline for filing a notice of appeal, it did not serve to extend the 20 day deadline for filing a notice of accelerated appeal. The court stated that such an extension is not authorized by the rules of procedure and would thwart the policy underlying an accelerated appeal that certain matters are deserving of rapid attention by an appellate court.

***In re Gillespie*, -- S.W.3d --, 2003 WL 22410065 (Tex. App.--Houston [14th Dist.] Oct. 20, 2003, no pet. h.) (*en banc*) (not released for publication).**

Relator sought a writ of mandamus ordering the trial court to vacate its order setting aside a divorce decree because it lacked plenary power. The trial court entered a final divorce decree on September 20. Relator filed a timely request for findings of fact and conclusions of law, and on October 22, the trial court signed its findings and conclusions. The trial judge subsequently ordered that a judgment *nunc pro tunc* be prepared and set for entry. Thereafter, relator's counsel advised the judge that the perceived error in the original judgment was not a clerical error, but rather a judicial error. The relator also informed the trial court that its plenary power expired before the alteration to the judgment. Subsequently, on its own motion, the trial court set aside the previous judgment and granted a new trial. Relator sought mandamus on the basis that the trial court's plenary power expired before the alteration of the judgment and the court's order setting aside the judgment.

Relying on TRAP 26.1 and Texas case law, the court of appeals held that the trial court's plenary power had expired. The court explained that a trial court's plenary power is extended only by the timely filing of: (1) a motion for new trial; (2) motion to vacate, modify, or correct the judgment; or (3) any motion seeking a substantive

change in the court's judgment. The court noted that, although a request for findings of fact and conclusions of law extends the deadline to file a notice of appeal, it does not extend the plenary power of the trial court.

Because findings of fact and conclusions of law do not vacate or change the judgment, but merely explain the reasons for the judgment, a court's plenary power is not extended. To this extent, this decision overruled the holding in *Elec. Power Design, Inc. v. R.A. Hanson Co.*, 821 S.W.2d 170 (Tex. App.--Houston [14th Dist.] 1991, no writ). The trial court further explained that a trial court may enter findings of fact and conclusions of law even after plenary power has expired because findings and conclusions do not vacate or change the judgment.

The court held that the trial court's plenary power expired thirty days after it signed the judgment and the order granting a new trial was therefore void. However, because the court had relied upon binding precedent in making its decision, it did not abuse its discretion. Mandamus relief was thus denied without prejudice. The trial court, however, was encouraged to reconsider its order in light of the court of appeals' opinion.

INTERLOCUTORY APPEALS

***Zamarron v. Shinko Wire Co.*, -- S.W.3d --, 2003 WL 22012618 (Tex. App.--Houston [14th Dist.] Aug. 26, 2003, reh'g pending) (not released for publication).**

This case presents issues of the necessary proof and the proper standard of review in cases where a special appearance is granted in light of the Texas Supreme Court's ruling in *BMC Software Belgium, N.V. v. Marchand*, 83 SW3d 789 (Tex. 2002). The Court of Appeals employed the factual sufficiency standard of review announced in *BMC Software* for cases in which a special appearance is denied, holding that the ruling of the trial court was not so against the great weight and preponderance of the evidence as to be manifestly unjust. The plaintiff, Zamarron, had asserted that in cases where the special

appearance is granted, the Court of Appeals should employ *de novo* standard of review, thus preserving the presumption of jurisdiction at the appellate level, when the appellate court has the same record as did the trial court when the challenge to personal jurisdiction was granted.

Zamarron asserted personal jurisdiction over Shinko Japan, a Japanese corporation, on both general and specific grounds. Zamarron based his specific jurisdiction allegations in large part on the testimony of Louis Rivera. Rivera testified that until the plant was sold in 1997, he complained to Shinko Japan engineers about the safety of a D-102 wire drawing machine and asked them to place guarding on the back of D-102, but he was told that it would be too expensive to do so.

Shinko Japan brought forth the testimony of Mervin Coppinger, the plant manager, who claimed that before 1997, when the plant was sold to American Spring Wire, it was Shinko America, not Shinko Japan, who was responsible for the safety of the equipment, including D-102. Coppinger stated that there was no set schedule for Shinko Japan's engineers to visit the plant, but that they sometimes came 2 to 3 times a year, staying up to 3 weeks, but some years they did not visit the plant at all. Coppinger was not aware of any Shinko Japan performing any maintenance on D-102.

Employing a factual sufficiency standard of review, the Court of Appeals determined that the order granting the special appearance was not so against the great weight and preponderance of the evidence as to be manifestly unjust. The trial court resolved the disputed fact issues in favor of Shinko Japan, and the appellate court did not disturb them. With the application of the factual sufficiency standard of review, the presumption of jurisdiction disappears, and the appellate court resolves all questions of fact in favor of the judgment. The question raised by this appeal is whether the holding in *BMC Software* regarding the applicable standard of review should control. In that opinion, the Texas Supreme Court specifically stated that the factual sufficiency

standard is applicable when a special appearance is denied. While it is appropriate to employ a factual sufficiency standard of review to the *denial* of a special appearance, thus preserving the presumption of jurisdiction, it is not fair to apply this standard when the special appearance is *granted*, because then the presumption disappears. Rather, since the appellate court and trial court had the exact same record to review, a *de novo* standard of review is appropriate and the appellate court should then begin with the presumption of jurisdiction.

***Wyeth v. Hall*, 118 S.W.3d 487 (Tex. App.--Beaumont 2003, no pet. h.).**

Hall intervened in a pending case against Wyeth in Jefferson County. Wyeth objected to the intervention and moved to transfer. These issues were presented to the trial court only after all other claimants were dismissed. The trial court denied the relief Wyeth sought. Wyeth filed an interlocutory appeal under § 15.003 of the Texas Civil Practice & Remedies Code.

The court of appeals had little difficulty in concluding that Hall failed to meet the joinder requirements. Most of the opinion pertained to Hall's procedural challenges to the appeal. Hall first argued that the court of appeals lacked jurisdiction because the court did not render its decision within the 120-day period specified by § 15.003. The court disagreed. Because the statute does not prohibit a court from rendering a decision outside of the 120-period or any penalty for failing to comply with that deadline, the statutory period is directory rather than jurisdictional.

The court of appeals also rejected Hall's argument that Wyeth's appeal was from a venue ruling, which would not be subject to interlocutory appeal. The decision necessarily involved the joinder issues of § 15.003 because joinder was the only basis for venue Hall asserted. Adopting a functional, rather than formalistic, approach, the court concluded that it had jurisdiction because the venue determination was predicated on the propriety of joinder under § 15.003.

The court also rejected Hall's argument that Wyeth waived error by failing to timely raise the issue in the trial court. Unlike venue, however, joinder motions are not subject to a diligence requirement. The court applied the general rule that a complaint about misjoinder must be made before submission of the case to the trial court.

Finally, Hall argued that the trial court's decision could not have been a joinder decision because there were no other claimants with whom she could join. The court held that an improper joinder issue did not become irrelevant simply because there was no longer a lawsuit to join. The court sensibly reasoned that it would be a strange interpretation of the statute to say that an improper joinder became unchallengeable when there is nothing left in which to intervene.

***B.C. v. Rhodes*, 116 S.W.3d 878 (Tex. App.--Austin 2003, no pet. h.).**

The Austin Court of Appeals revisited an issue it had earlier reserved. In *Bilyeu v. Bilyeu*, 86 S.W.3d 278 (Tex. App.--Austin 2002, no pet. h.), the court held that a family-violence protective order rendered in the context of a divorce proceeding was interlocutory and non-appealable. The court reserved the question of whether that rule would extend to situations where if the order was rendered post-divorce or in the absence of a pending divorce. This case involved the latter.

B.C. and T.L.R. were classmates at Texas School for the Deaf. T.L.R. considered B.C. her boyfriend. The action arose from an unwanted (by B.C.) sexual encounter between them. After the incident, T.L.R.'s father sought and obtained on her behalf a final protective order requiring, among other things, that B.C. not go within 25 feet of T.L.R. B.C. appealed.

The court of appeals held that a family violence protective order that disposes of all parties and issues can be appealed despite the trial court's continuing jurisdiction to modify the order. In so holding, the court indicated that it was joining the unanimous trend of Texas courts of appeal. The court reasoned that it is the disposition of all

parties and issues--not the court's retention of jurisdiction--that makes the order appealable.

THE RECORD ON APPEAL

***Johnson v. Alcon Labs., Inc.*, -- S.W.3d --, 2003 WL 22700786 (Tex. App.--Fort Worth Nov. 13, 2003, no pet. h.) (not released for publication).**

Johnson filed an appeal *pro se*. He requested and paid for a partial reporter's record and provided proper notice to Alcon. After the record was prepared and Johnson filed his brief, Alcon requested that the reporter include additional matters in the record and that Johnson pay for them. Johnson moved to strike the additions or to have Alcon pay for them.

The court concluded that Alcon should bear the initial cost for the additions. The court reached its conclusion based on how the timing of the request relates to TRAP 34.6. It reasoned that under TRAP 24.6(c)(2), an appellant who requests a partial record must bear the costs of any additions requested by another party. But under TRAP 34.6(d), a party who requests a supplemental record must bear the initial cost. The court reasoned that a designation made before the record is prepared is an "addition" under TRAP 34.6(C)(2). On the other hand, a designation made *after* the initial record is prepared is a "supplement." Because Alcon's designation was made after the initial record is prepared, it was a supplement, for which Alcon bore the initial cost.

MANDAMUS

***In re Dunn*, -- S.W.3d --, 2003 WL 22657816 (Tex. App.--Texarkana Nov. 12, 2003, no pet. h.) (not released for publication).**

Petitioner sought mandamus against the district clerk of Bowie County to order her to perform her ministerial duty and issue citation in the petitioner's *pro se* lawsuit. The clerk had advised petitioner by letter that the suit had been filed, that a copy had been provided to the trial judge, and that the clerk's office would take no further action except by order of the trial court.

The court held that the legislature had not given it the authority to issue a writ of mandamus against a district clerk. The court reasoned that Tex. Gov't Code Ann. § 22.221(b) (Vernon Supp. 2004) only grants the court of appeals jurisdiction to issue a writ of mandamus against "a judge of a district or county court in the court of appeals district," not a district clerk.

***Tandem Energy Corp. v. State*, -- S.W.3d --, 2003 WL 22349032 (Tex. App.--Houston [14th Dist] Oct. 16, 2003, no pet. h.) (per curiam) (mem. op.)**

Tandem appealed from an order granting a request to take depositions before suit under TRCP 202. The court of appeals initially concluded that it lacked jurisdiction because there is no authority for an appeal of a TRCP 202 order.

The court also observed that Tandem had concurrently filed a petition for writ of mandamus seeking relief from the same order. In that proceeding, the court issued an opinion in which it denied mandamus relief on the merits, concluding that Tandem failed to establish that the trial court abused its discretion. Having ruled on the merits, the court here concluded, Tandem's appeal was moot.

Texas Courts of Appeals Update - Substantive

Joseph W. Spence, Shannon, Gracey, Ratliff, and Miller, L.L.P.

Chris Nickelson, Shannon, Gracey, Ratliff, and Miller, L.L.P.

SOVEREIGN IMMUNITY

***City of Mexia v. Tooke*, 115 S.W.3d 618 (Tex. App.–Waco 2003, pet. filed).**

This case presents the question of whether § 51.075 of the Texas Local Government Code provides a waiver of immunity from suit for home-rule municipalities. Section 51.075 of the Local Government Code provides that a home-rule municipality “may plead and be impleaded in any court.” The Waco Court of Appeals notes that Texas appellate courts are divided on this question. The Fort Worth and El Paso courts of appeals have concluded that this language waives a home-rule municipalities immunity from suit, while the Dallas Court of Appeals has reached the opposite conclusion. The Waco court notes that immunity from suit can be waived only by legislative consent or constitutional amendment and that the waiver must be expressed “by clear and unambiguous language.” Notably, statutory language providing that a political subdivision “may sue or be sued” provides the requisite clarity to establish a waiver of immunity from suit. However, the Waco court concludes that the language that a home-rule city “may plead and be impleaded in any court” is not to be construed to have the same meaning as “sue and be sued.” The Waco court concludes that the term “plead and be impleaded” as found in Local Government Code § 51.075 does not constitute a “clear and unambiguous” waiver of a home-rule municipality’s immunity from suit. The Waco court also concludes that the city did not waive immunity from suit by partially performing under the contract. Finally, the Waco court held that the city’s contract with appellee for curbside collection of brush and leaves involved a governmental function as opposed to a proprietary function.

UNDOCUMENTED ALIEN LABORERS RIGHT TO RECOVER DAMAGES FOR LOST EARNING CAPACITY

***Tyson Foods, Inc. v. Guzman*, 116 S.W.3d 233 (Tex. App.–Tyler 2003, no pet.).**

This case revisits the question of whether an undocumented alien worker may recover personal injury damages for lost earning capacity. Plaintiff, Gustavo Guzman was injured when a Tyson Foods employee ran into him with a forklift. Guzman was not a United States citizen and was not otherwise authorized to work in the U.S. Guzman recovered \$280,000 for past and future lost earning capacity in his lawsuit against Tyson. Texas law generally does not require citizenship or the possession of immigration work authorization permits as a prerequisite to recovering damages for lost earning capacity. However, Tyson argued that the recent United States Supreme Court case of *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137 (2002) set forth a national public policy that militates against any award of wages as damages to undocumented alien laborers. *Hoffman* dealt with an NLRB award of back pay to an undocumented alien worker, Jose Castro, who was laid off for supporting a union-organizing campaign at Hoffman Plastic Compounds, Inc. It was ultimately disclosed in the NLRB proceedings that Castro had never been legally admitted to, or authorized to work in, the United States. Castro also admitted that he obtained employment based on fraudulently obtained documents. The United States Supreme Court noted that congress expressly made it criminally punishable for an illegal alien to obtain employment with false documents or for an employer to knowingly hire an undocumented alien worker. Thus, the U.S. Supreme Court held that an award of back pay by the NLRB to illegal aliens would “unduly trench upon explicit statutory prohibitions critical to federal

immigration policy” as expressed in the Immigration Reform & Control Act of 1986. The Tyler Court of Appeals rejected Tyson’s argument that *Hoffman* was controlling. The Tyler Court of Appeals noted that *Hoffman* only applies to an undocumented alien worker’s remedy for an employer’s violation of the National Labor Relations Act and does not apply to common-law personal injury damages. The Tyler court further reaffirmed that Texas law does not require citizenship or the possession of immigration work authorization permits as a prerequisite to recovering damages for lost earning capacity.

FEDERAL PREEMPTION

***Bryceland v. AT&T Corp.*, 114 S.W.3d 552 (Tex. App.–Dallas 2002, no pet.).**

This is a case of first impression on whether the Federal Communications Act of 1934, 47 U.S.C. § 332(c)(3)(A) preempts state law claims brought by subscribers against their wireless service providers. Plaintiffs, subscribers to AT&T’s digital PCS wireless and Digital One rate service, sued AT&T for fraud in the inducement, negligent misrepresentation, deceptive trade practices, and breach of contract. AT&T moved for summary judgment alleging that the plaintiff’s claims were preempted under the Federal Communications Act. AT&T conceded that § 332 does not preempt all state law claims for damages against wireless service providers, but that § 332 preempted the plaintiff’s cause of action because any award of damages on the plaintiff’s claims would amount to prohibited “indirect” rate regulation. AT&T claimed that the plaintiff’s claims would require the factfinder to determine the quality of services provided and, in doing so, the factfinder would necessarily determine if AT&T had adequate infrastructure to operate wireless service and value of the provided services. AT&T argued that this would be tantamount to the trial court deciding whether AT&T properly entered into the market, determining the reasonableness of AT&T’s rates, and setting prospective charges for AT&T services - all activities preempted by § 332. The Dallas Court of Appeals noted that they had found

no Texas case holding that § 332 of the Act preempts state law. The Dallas Court of Appeals ultimately concluded that state law claims will be preempted depending on the issues which a jury must determine. If the plaintiff’s factual allegations would require the factfinder to prescribe, set, or fix wireless rates in connection with adjudicating the plaintiff’s claims, then § 332 would preempt the plaintiff’s claim. However, if the factfinder is not required to prescribe, set, or fix wireless rates to adjudicate the claim, then § 332 does not preempt a plaintiff’s claim. This determination is made by reviewing the specific facts alleged and the damages sought for each claim asserted. In this case, the Dallas court determined that the factfinder would not have to prescribe, set, or fix a reasonable previous or prospective rate for AT&T’s future services in order to adjudicate the plaintiff’s claims. Rather, the court will determine the difference between the value of what AT&T promised and what the plaintiff received. As such, the plaintiff’s claims were not preempted by § 332.

CONSTITUTIONAL LAW

***National Collegiate Athletic Assoc. v. Yeo*, 114 S.W.3d 584 (Tex. App.–Austin 2003, rule 53.7(f) motion filed).**

This case presents a question of first impression of whether a student engaging in intercollegiate athletics, who already has an established athletic reputation prior to college, has a recognizable property interest in her athletic career which is entitled to due course of law protection. Joscelyn Yeo is from Singapore. She is a world-class swimmer who competed in two Olympic games before ever participating in intercollegiate competition in the United States. Through no fault of her own, the University of Texas determined that Yeo was ineligible for certain NCAA competition. It is undisputed that Yeo was given no notice of the decision and no opportunity to participate in its making. Yeo sued UT-Austin for injunctive relief to prevent the school from retroactively declaring her ineligible, claiming that her due process rights had been violated. The issue of first impression was

whether Yeo had a property or liberty interest which is protectable by due process. UT-Austin relied on Texas Supreme Court decisions that “students do not possess a constitutionally protected interest in their participation in extracurricular activities.” UT-Austin further relied on a line of cases from the 1970's and '80's establishing that high school students have no protected interest in athletic participation. However, the Austin Court of Appeals noted that UT-Austin's reliance on these cases was misplaced because it mischaracterized Yeo's primary complaint. While Yeo had an obvious desire to participate in intercollegiate athletics, her Texas constitutional claim was premised upon her already-established athletic reputation. Yeo maintained that UT-Austin's decision to declare her ineligible without any due course of law protection prevented her from protecting her interest in her athletic career. Yeo contended that the issue was not her right to participate in intercollegiate athletics generally, but rather the right to protect her reputation and good name that would be adversely affected by a declaration of ineligibility made without an opportunity to be heard. The trial court's findings of facts supported Yeo's theory that her athletic reputation and the accompanying potential income was established before she ever began competing under NCAA regulations. Yeo had competed in two Olympic games before attending college and had been named sportswoman of the year and Olympic flag bearer for her native country, Singapore. Thus, while the Austin Court of Appeals reaffirmed that there is no constitutionally protected interest in extracurricular participation per se, Yeo nonetheless had a protected interest in her athletic career that was entitled to due course of law protection. The Austin court specifically noted that their holding, under the facts of this case, should not be read as extending that same protection to every other intercollegiate athlete. Finally, the Austin court concluded that because important decisions regarding her eligibility were made by UT-Austin without notice that a problem existed and with no opportunity for Yeo to advocate her own position, Yeo's due process rights were compromised.

CONVERSION

***Robinson v. National Autotech, Inc.*, 117 S.W.3d 37 (Tex. App.–Dallas 2003, rule 53.7(f) motion filed).**

This case re-visits the issue of what “intent” is necessary to support a claim for conversion. Robinson sued his employer, National Autotech, Inc. (“Autotech”), alleging that Autotech converted Robinson's property when it released Robinson's toolbox to an imposter. Autotech had been holding Robinson's toolbox while he was out on medical leave. Autotech's store manager, Skaggs, and employee, Schaefer, had never met Robinson before and assumed the imposter was Robinson. Skaggs and Schaefer helped the imposter load Robinson's toolbox into the imposter's truck. The trial court granted summary judgment in favor of Autotech on Robinson's conversion claim. The Dallas Court of Appeals held that a conversion plaintiff must prove that the defendant intended to assert some right in the property in order to recover. The court explained that the “intent” need not be an intent to assert a right of ownership or title; it can be an intent to assert the right of possession. The court affirmed, holding that Robinson failed to produce any evidence that Autotech intended to exercise dominion or control over Robinson's property. Evidence that Autotech employees, simply as an accommodation, unwittingly assisted the imposter in physically carrying the toolbox from the garage to a truck constituted no evidence that Schaefer and Skaggs intended to assert any right, possessory or otherwise, over the property.

CAUSE-IN-FACT/CRIMINAL ACTS OF A THIRD PARTY

***JoJos Restaurants, Inc. v. McFadden*, 117 S.W.3d 279 (Tex. App.–Amarillo 2003, pet. denied).**

This case addresses the causal relationship between the criminal acts of a third party and a premises owner's acts or omissions in maintaining law and order on its premises. The McFaddens sued JoJos claiming that the restaurant negligently

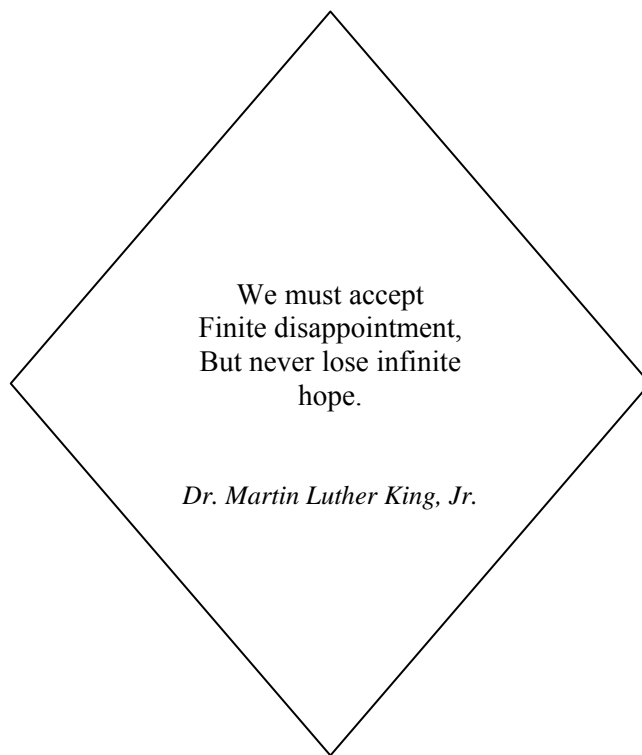
failed to place a security guard outside its restaurant during the “bar rush” (a several hour period beginning around the time that area bars closed). The McFaddens were injured in the parking lot of JoJo’s Restaurant when a third party fired a shotgun into the car they were riding in as passengers. The McFaddens claimed that the presence of a security guard would have prevented the shooting. The trial court entered judgment on a jury verdict in favor of the McFaddens. Relying on *East Texas Theatres v. Rutledge*, 453 S.W.2d 466 (Tex. 1970), the Amarillo Court of Appeals reversed and rendered a take nothing judgment against the McFaddens. The court held that the McFaddens failed to prove the lack of security guards was the cause-in-fact of their injury. The court concluded that there was no evidence permitting a rational trier of fact to infer that had security personnel been assigned to the parking lot, the shooting would not have occurred. At most, JoJos created a condition which allowed the injury to occur. The court concluded that this was not the same as causing the injury in fact.

STANDARD OF CARE/HOSPITALS

***Reed v. Granbury Hosp. Corp.*, 117 S.W.3d 404 (Tex. App.–Fort Worth 2003, no pet.).**

This case addresses the type and quality of evidence needed to establish the standard of care for a hospital. The Reeds sued the hospital for negligence in the medical treatment received by Mr. Reed. At issue was whether the hospital had enacted adequate policies and procedures for diagnosing and administering a clot-busting drug, t-PA, to stroke victims. The hospital moved for summary judgment. It also moved to strike the testimony of the Reeds’ medical experts claiming that the experts were not qualified to render opinions on the standard of care. The trial court granted both motions and the Fort Worth Court of Appeals affirmed. First, the court noted that the Reeds could only show a violation of the standard of care by producing evidence that The Hospital did not act as a hospital of ordinary prudence would have (under the same or similar circumstances) in drafting its policies and

procedures. The Fort Worth court held that the Reeds failed to meet their burden because none of their experts established what protocols, policies or procedures a hospital of ordinary prudence, with the Granbury Hospital’s capabilities, would have had in place at the time of Mr. Reed’s treatment. The court concluded that the Reeds’ medical experts possessed specialized knowledge regarding the policies, protocols and procedures of the hospitals they worked at in California; however, the court concluded that the Reeds’ experts had no specialized knowledge regarding what protocols, policies, or procedures a hospital of ordinary prudence, with the Granbury Hospital’s capabilities, would have had in place on the date of Mr. Reed’s treatment. The court observed that hospitals in Waxahachie, Irving, Richardson, Weatherford, Plano, Stephenville, Kaufman, Decatur, and Paris, Texas had no t-PA protocols for stroke patients at the time of Mr. Reed’s treatment. Accordingly, the court held that the Reeds presented no evidence establishing the standard of care.



Joel M. Androphy, Berg & Androphy, Houston
Lance Leisure, Berg & Androphy, Houston

SEARCH WARRANTS

***United States v. Bridges*, 344 F.3d 1010 (9th Cir. September 24, 2003).**

Defendant Bridges owned a tax consulting business, where he advised clients to declare themselves “non-resident aliens” in order to avoid paying federal income tax. After an investigation, the Government submitted an application for a search warrant, supported by the affidavit of an Internal Revenue Service special agent. Although the affidavit set forth in great detail the bases of the Government’s allegations, the subsequent warrant failed either to incorporate the affidavit by reference or to physically attach the affidavit. Further, the warrant authorized seizure of a long list of items “including but not limited to” virtually everything one would expect to find in any medium-sized office. Defendant moved to suppress the items seized by the warrant. The motion was denied and Defendant was found guilty of conspiracy, making false claims, and mail fraud.

On appeal, the ninth circuit reversed the denial of the Motion to Suppress and vacated the conviction. The Court first examined the scope of the warrant in relation to the items to be seized and found it to be overly broad. Next, the Court looked at the failure of the warrant to specify what criminal activity was being investigated. Neither the broad language describing the search items, nor the general nature of the criminal activity alleged placed any meaningful limits on the scope of the agents’ search. When viewed together, these deficiencies combined to render the warrant unconstitutional.

HEALTH CARE FRAUD

***United States v. Baldwin*, 277 F.Supp.2d 67 (D.C. Cir. August 14, 2003).**

In this case of first impression, the Court rejected a Motion to Dismiss premised on the theory that 18 U.S.C. § 1347 does not reach fraud committed against a non-profit HMO (Kaiser Foundation). Although the primary intent of HIPAA was to combat fraud against reimbursement systems such as Medicaid and Medicare, Congress intended to combat health care fraud without limitation. The statute forbids false representations in connection with the delivery or payment of health care benefits, items and services. In a plain reading of the statute, submission of false invoices to a health care benefits program for medical items fits within this definition. Therefore, Defendants’ submission of four false invoices to a non-profit HMO for dental chairs totaling \$275,000 subjected them to criminal liability for health care fraud.

WORK PRODUCT PRIVILEGE

Defendant Martha Stewart wrote an e-mail containing her version of the facts relevant to her sale of ImClone stock. After sending the e-mail to her attorneys, Stewart forwarded a copy of the e-mail to her adult daughter. Charges were later filed against Stewart for insider trading related to the sale of that stock. In the course of discovery, Stewart declared the e-mail privileged as work product. The government argued that the document was not work product, and even if it was Defendant waived the privilege.

The Southern District of New York held that the document is covered by the attorney work product doctrine and that Stewart did not waive the work product privilege. The work product doctrine is broad enough to cover the e-mail, even though it was composed by Defendant rather than her attorneys, and even though charges had not yet been filed when it was composed. Because the document was produced in anticipation of litigation it falls within the scope of the privilege.

Next, the court applied two separate tests to determine whether the privilege had been waived. The court held that the disclosure to a close family member had not substantially increased the opportunity for the other side to obtain the protected information. Alternatively, the court applied a fairness analysis and determined that neither side's interests was affected by Defendant's forwarding of the e-mail.

MAIL FRAUD / WIRE FRAUD

***United States v. Hausmann*, 2003 WL 22171689 (7th Cir. September 22, 2003).**

Defendant Hausmann, a personal injury lawyer, referred his clients to Co-Defendant Rise, a chiropractor, for chiropractic services paid out of insurance settlements. In return, Rise paid twenty percent of the fees he collected from Hausmann's referrals to third parties at the direction of Hausmann. In most cases, Hausmann either had a business interest in or had received services from these third party recipients. After denial of pretrial motions to dismiss, both defendants pleaded guilty to conspiracy to commit mail and wire fraud. Each then appealed the denial of his motion to dismiss.

As to Hausmann, the Court held that he had deprived his clients of the "intangible right of honest services" in violation of 18 U.S.C. § 1346. The Court listed three factors necessary to state a claim under an intangible rights theory: the defendant must breach a fiduciary duty, for his gain, at the expense of the party to whom the duty is owed. Hausmann argued that the last element was not met because his clients had not been

harmed by the kickback payments. The Court found, however, that the kickbacks amounted to a discount off of the chiropractor's fee. This discount should have inured to the benefit of the clients', not the attorney.

Next the Court addressed Rice's motion to dismiss. Rice argued that he was not culpable because he was not aware that Hausmann was defrauding his clients. The Court quickly dismissed this argument by holding that when Rice knowingly paid an illegal kickback he acted in furtherance of the conspiracy.

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TEXAS COURT OF CRIMINAL APPEALS

***Shankle v. State*, 119 S.W.3d 808 (Tex. Crim. App. 2003).**

When the parties consent to an extraneous offense being taken into account in assessing the defendant's punishment—under Section 12.45 of the Texas Penal Code—the sentence for the offense is a “punishment recommended by the prosecutor,” for the purposes of Rule 25.2(a)(2) of the Texas Rules of Appellate Procedure. Therefore, a defendant is not permitted to bring an appeal, unless he is appealing the trial court's ruling on a pre-trial motion, or unless he is appealing with the trial court's permission.

***Mizell v. State*, 119 S.W.2d 804 (Tex. Crim. App. 2003).**

Because a court of appeals—on its own or otherwise—may notice an illegal sentence and rectify that error, the State is not obligated to file a notice of appeal when bringing a cross-point of error on that issue under Article 44.01(c) of the Texas Code of Criminal Procedure. The Texas Court of Criminal Appeals specifically does not decide whether the State must generally file a notice of appeal before it can raise a cross-point of error under Article 44.01(c).

***Wolfe v. State*, ___ S.W.3d ___, No. 74,522 (Tex. Crim. App., Nov. 12, 2003) (not yet reported).**

When a defendant has made a request for post-conviction DNA testing under Chapter 64 of the Texas Code of Criminal Procedure, he may not bring an appeal in which he challenges the trial

court's denial of his request for an independent expert. The defendant filed his request for post-conviction DNA testing before the effective date of the amendment to Chapter 64, which now more generally permits appeals under that chapter. The Texas Court of Criminal Appeals does not express an opinion as to whether such an appeal would be permitted under the amended statute.

***Willis v. State*, ___ S.W.3d ___, No. 1704-01 (Tex. Crim. App., Nov. 19, 2003) (not yet reported).**

If the trial court gives permission to appeal rulings that the trial court made on pre-trial motions, the defendant's waiver of his right to appeal—included in the form on which he entered his plea of guilty—is not effective. *See Alzarka v. State*, 90 S.W.3d 321 (Tex. Crim. App. 2002). It does not matter that the judge who gave the permission to appeal was different from the judge who received the defendant's plea of guilty, in which he purportedly waived his right to appeal. The Texas Court of Criminal Appeals found that the failure to cross out the language waiving the defendant's right to appeal in the plea forms was an oversight.

COURT OF APPEALS

***Beeler v. State*, ___ S.W.3d ___, No. 7-03-206-CR (Tex. App.—Amarillo, Oct. 17, 2003) (not yet reported).**

While the filing of a notice of appeal invokes the jurisdiction of the court of appeals, the trial court does not lose jurisdiction over the case until the

appellate record has been filed. Therefore, before the appellate record has been filed, the trial court has the jurisdiction to grant a defendant's motion for new trial (which was otherwise timely filed). See TEX. R. APP. P. 25.2(g); *Green v. State*, 906 S.W.2d 937 (Tex. Crim. App. 1995). If the trial court grants the defendant's motion for new trial in such a situation, the defendant's appeal will be dismissed.

Stowe v. State, ___ S.W.3d ___, No. 8-03-282-CR (Tex. App.—El Paso, Oct. 2, 2003) (not yet reported).

When a trial court certifies that a defendant does not have the right to appeal, the court of appeals is authorized, if not required, to notify the defendant of the court's intent to dismiss the appeal, unless any defect in the trial court's certification is corrected. If a defendant waives his right to appeal when he enters a plea of guilty, and is placed on "deferred adjudication" probation, that waiver of the appeal would not prevent him from appealing errors occurring in the sentencing hearing after an adjudication of guilt. If a trial court certifies that the defendant does not have the right to appeal in such a situation, that certification is defective, and an amended certification must be filed.

Escobar v. State, ___ S.W.3d ___, No. 7-03-105-CR (Tex. App.—Amarillo, Nov. 17, 2003) (not yet reported).

When a defendant's attorney files an *Anders* brief, in which he asserts that the defendant's appeal is frivolous. However, until the court of appeals determines that the appeal is in fact frivolous and grants the attorney's motion to withdraw, that attorney remains the attorney of record and is bound to act zealously in his client's behalf and to promptly comply with

reasonable requests for information. Therefore, especially since the defendant had made a *pro se* request to the court for access to the appellate record, the defendant's attorney had the responsibility to procure a copy of the appellate record for the defendant to review in preparation of his *pro se* response to the *Anders* brief.

Waters v. State, ___ S.W.3d ___, No. 14-03-183-CR (Tex. App.—Houston [14th Dist.], Dec. 9, 2003) (not yet reported).

When the defendant entered a plea of guilty with an agreed "cap" on punishment and with the agreed dismissal of another case, and when the defendant's guilty plea form included a waiver of the defendant's right to appeal, the court of appeals would view the appeal as a plea bargain case—for the purposes of TEX. R. APP. P. 25.2(a)(2)—and dismiss the defendant's appeal. The defendant was not attempting to appeal the trial court's ruling on a written pre-trial motion, and he was not appealing with the trial court's permission. This holding would stand, even though the trial court's certification of the defendant's appeal reflected that the case was not a plea bargain case and that the defendant had the right to appeal.

Threadgill v. State, ___ S.W.3d ___, No. 1-03-288-CR (Tex. App.—Houston [1st Dist.], Oct. 9, 2003) (not yet reported).

When the parties agreed to a "cap" on punishment, and the defendant entered a plea of guilty based upon that agreement, the court of appeals would view the appeal as a plea bargain case—for the purposes of TEX. R. APP. P. 25.2(a)(2)—and dismiss the defendant's appeal. The defendant was not attempting to appeal the trial court's ruling on a written pre-trial motion, and he was not appealing with the trial court's permission. The

appeal would be viewed as a plea bargain case, even though both the clerk's record and the reporter's record state in various places that the plea was "without a recommendation" or "without an agreed recommendation."

***State v. Aguilera*, ___ S.W.3d ___, No. 8-01-159-CR (Tex. App.—El Paso, Sept. 17, 2003) (not yet reported).**

The State was permitted to bring a State's appeal under TEX. CODE CRIM. PROC. ANN. art. 44.01(b) (Vernon Supp. 2004), when the trial court initially assessed the defendant's punishment at 25 years confinement, but then changed the defendant's punishment to 15 years confinement. The State contended that the trial court did not have the authority to re-sentence the defendant, and the State could, therefore, appeal the alleged illegality of that sentence.

***State v. Blankenship*, ___ S.W.3d ___, No. 3-03-287-CR (Tex. App.—Austin, Oct. 16, 2003) (not yet reported).**

Even if a county attorney consents to an appeal being prosecuted by a city attorney or an assistant city attorney—as permitted by Article 45.201 of the Texas Code of Criminal Procedure—the county attorney must still sign the State's notice of appeal, as required by Article 44.01 of the Texas Code of Criminal Procedure.

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