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SECTION WEB SITE: www.tex-app.org

Calling All Appellate Haiku Poets!

The Appellate Section is pleased to announce its second **Appellate Haiku Contest**. A haiku is a Japanese poem of three lines, containing five, seven, and five syllables, respectively. Here are a few examples from the last Haiku contest:

No reason no word like a migratory bird your case is transferred		Only seventeen syllables and, yet, Garner could make it shorter
Tarzan, J., concurs: Result good; reasoning bad Ah-o-wah-o-wah		Mandamus standard Clear abuse of discretion Squashy banana

Prizes will include gift certificates for State Bar CLE programs, appellate books, and CLE materials. Of course, the real reward is the chance to have your name announced and your haiku read to the thousands in attendance at the Appellate Section Annual Meeting, not to mention being published and read by millions on the Section website and in *The Appellate Advocate*.

Appellate Haiku Contest Rules

1. All entries must comply with the structural requirements of a Haiku (3 lines, 5-7-5 syllables), and the content must relate in some loose fashion to appellate law, appellate courts, or the appellate community.
2. No more than five entries may be submitted per contestant.
3. All entries must be received by 3:00 p.m. on Thursday, August 31, 2006, by e-mail to ben.mesches@haynesboone.com.
4. By submitting an entry, contestants: (a) certify that the submitted work is original, and (b) grant a non-exclusive license to the Appellate Section to read, use and publish entries in any form of oral, print, or electronic medium.
5. Any entrant who is not a dues-paid member of the Appellate Section on September 1, 2006 is ineligible to win prizes. Any Appellate Section officer, member of the Annual Meeting Committee, or Appellate Haiku Contest Judge is ineligible to win prizes. Persons who are ineligible to win prizes may still submit entries, which may be read at the awards ceremony and printed thereafter.
6. Winners will be announced with much hoopla at the Appellate Section Annual Meeting on September 7, 2006 in Austin. The choice and number of prizes will be within the unfettered discretion of the judges. Decision of the judges is final and unappealable. Need not be present to win. Offer void where prohibited by law.

Warren W. Harris, Bracewell & Giuliani LLP, Houston

I am pleased to report on a new project recently completed. The Texas Access to Justice Commission requested that the Appellate Section organize, structure, and conduct a comprehensive appellate training program specifically designed to enhance the writing and advocacy skills of legal aid lawyers. The goal was to enhance the skills and capabilities of these lawyers to more effectively represent poor and low-income Texans.

The Appellate Section and the Commission recently conducted the 2006 Motions and Appellate Advocacy Academy featuring individualized instruction and critiques on writing persuasive motions and briefs and presenting oral arguments. In advance of the training, students were required to submit a brief. Each participant also received individual writing critique sessions. The program was, by any measure, a smashing success.

The appellate academy featured instructors who are top appellate practitioners and members of the Appellate Section. The course director was Bill Boyce of Fulbright & Jaworski in Houston. Instructors were Heidi Bloch (Brown McCarroll); Mike Truesdale (Diamond McCarthy Taylor Finley Bryant & Lee); Phil Durst (Deats, Durst, Owen & Levy); and Elana Einhorn (Law Offices of Deborah Hankinson) of Austin and Robert Dubose (Alexander Dubose Jones & Townsend) of Houston. Special guest speaker was Justice David Medina (Supreme Court of Texas). Special thanks also go to Melissa Shearer (State Bar of Texas) for coordinating the event. The section wants to express its appreciation to Bill Boyce who designed, organized, and supervised the entire program.

The appellate academy was held on April 20-21, 2006 in Austin at The University of Texas Law School. The 23 legal aid attorneys in attendance came from such organizations as Advocacy, Inc., Lone Star Legal Aid, Texas RioGrande Legal Aid, Inc., Children's Legal Services, Women's Advocacy Project, Legal Aid of Northwest Texas, and Texas Civil Rights Project.

The Texas Bar Foundation provided funding for the appellate academy. The Texas Access to Justice Commission, chaired by Jim Sales of Fulbright & Jaworski in Houston, was created in 2001 by the Supreme Court of Texas to develop and implement policy initiatives designed to expand access to and enhance the quality of justice in civil legal matters for low-income Texans.

If you have not already done so, I encourage you to renew your membership in the Appellate Section. For your \$25 in annual dues, you receive a number of valuable benefits. Section members receive *The Appellate Advocate* quarterly newsletter, receive a \$25 discount on the registration fee for the annual Advanced Civil Appellate Practice Course (this benefit alone pays the cost of dues), and also have the opportunity to serve on section committees with judges and experienced appellate attorneys.

I hope to see you at the Appellate Section's annual meeting and judicial reception. It will be held on September 7, 2006 at 5 pm at the Four Seasons Hotel in Austin. If you have an idea how the section can better serve you, please contact me or any member of the section council.

An Interview with Retired Chief Justice Austin O. McCloud

Donald M. Hunt, Mullin Hoard Brown LLP, Lubbock

Donald M. Hunt (DH)

Retired Chief Justice Austin O. McCloud (AM)

DH: Austin McCloud, Retired Chief Justice of the Eastland Court of Appeals, is with me today to be interviewed for the Heritage Committee of the Appellate Section of the State Bar. Thank you Judge for coming.

AM: Thank you.

DH: Let me begin with the obvious. Tell me something about your background.

AM: I was born in East Texas in 1929. My parents moved to Lubbock in 1939. I went to school in Lubbock and graduated from Lubbock High, the only high school in Lubbock at that time.

DH: Where did you go for your college education?

AM: Texas Tech.

DH: Did anything important happen to you at Texas Tech?

AM: Yes. I met my wife, Mary Anne. We later married after she graduated.

DH: After Tech, you went into service for the Korean War?

AM: During the Korean War, correct.

DH: What happened after service?

AM: After the Korean War ended, I enrolled in Baylor Law School on the GI Bill.

DH: When did you graduate?

AM: 1957.

DH: Did you take a first job somewhere then?

AH: I did. I started with the firm of Fulbright, Crooker, Freeman, Bates & Jaworski in Houston.

DH: Did you continue on with them for a number of years or did you change?

AM: I changed. I was very fortunate at that time to get a position with the Fulbright Crooker firm. I had wonderful experiences there and met great lawyers and people that I have enjoyed knowing throughout my career. But I decided that I wanted to live in West Texas again. So, after about a year and a half, I moved back to West Texas.

DH: To where?

AM: Colorado City.

DH: You practiced law there, I guess?

AM: I practiced law there with Harry Ratliff. The firm's practice consisted mostly of oil and gas in those days. I was a general practitioner and handled anything that came in the office.

DH: Go back a little bit in time and recall for me why you decided to become a lawyer?

AM: I had not seriously considered being an attorney until I was a senior at Tech. My favorite courses were business law courses. During the four years I spent in the Air Force, I had a lot of time to think. Mary Anne and I were married, and I realized that there were things I wanted to do. During this time, I actually read law books, treatises, and things of that nature. I realized I enjoyed the law—I liked recognizing problems and solving them.

DH: So along that line, you must have developed an interest in politics because I know when I first met you, you were a district judge. When did you become a district judge?

AM: In 1963. Eldon Mahon, who later became a well-known federal judge, was the district judge at that time. He decided to resign. All of a sudden, I had an opportunity to become a district judge. John Connally was governor, and he appointed me in 1963.

DH: Since John Connally appointed you in 1963, that means you were a Democrat?

AM: I guess I was. If you go back to those days, particularly out in West Texas, we didn't see many Republicans in 1963. I didn't think much about whether I was a Democrat or a Republican to tell you the truth. I just wanted to be a judge.

DH: Of what court were you the judge?

AM: The 32nd Judicial District.

DH: Covering what area?

AM: Nolan, Fisher and Mitchell counties. The principal cities were Colorado City, Sweetwater and Roby.

DH: How long did you serve as district judge?

AM: Seven years. An opportunity came for me to run for the Eleventh Court of Appeals in Eastland. Chief Justice Clyde Grissom had been on that court for 36 years and decided that he would not seek reelection. So, I ran. It was the only political race I ever had. I was successful and became Chief Justice of that court in 1971.

DH: How long did you remain on that court?

AM: Twenty-four years as an active judge. I still sit as a Senior Appellate Judge. I've been on the court 10 years as a Senior Appellate Judge helping when needed.

DH: What prompted you to be a judge?

AM: I had not thought about being a judge—not seriously thought about it because as I have said, Eldon Mahon was the judge and he was not that much older than I was. I figured he would be there for a lifetime. I enjoyed reading opinions and analyzing what the courts were saying. In law school, I was Editor of the Law Review. I knew that I liked that type of work. When the opportunity came, I said, “Yes, I think I will try to do this.” I knew that, after having served as a district judge for 7 years, I really would enjoy the appellate level better and I have.

DH: Tell me a little bit about the Eastland Court of Appeals, Judge.

AM: I will be glad to. The Eastland court was established in 1925. It's been in existence for 80 years. During that period of time we have had only 19 judges to serve and only 7 chiefs. One interesting aspect of it is the present Chief Justice, Jim Wright, is the only person from Eastland County who has ever served on the court.

DH: Judge, now that you are semi-retired, what do you do?

AM: I still occasionally sit as Senior Appellate Judge, and I mediate cases which I enjoy very much. I have done quite a few, mostly in the West Texas area.

DH: Looking back over your career as a judge, both at the district court and at the court of appeals, what cases or lawyers stand out for you?

AM: I have often thought about that and I don't immediately think of a particular case or a particular lawyer. Many excellent lawyers have appeared in all of those years. I have had interesting, fascinating cases. I look at whatever case that I am working at the time on as the most important case that I have because I know it is the most important case to the parties.

DH: Judge, that raises a question about judicial philosophy. Commentators often say that a judge has a particular judicial philosophy. Did you develop one and if so, what is it?

AM: I have never thought of myself as having a particular judicial philosophy. I tend to be a more conservative individual in my views. What I try to do is, every time I look at a case, determine what the law is in that case. Of course, I am mostly interested in what our Supreme Court or Court of Criminal Appeals has said on the subject.

DH: Tell me if you would, Judge, something about how your life in the law and the law has changed since 1957?

AM: That's an interesting question. I am not sure that my life has changed that much from the standpoint of the law. The law is always changing some, and I don't see that there have been many great changes during my service as a judge to be quite frank about it. The pendulum tends to swing back and forth. Particularly on an intermediate court, we try to determine what the Texas Supreme Court, Court of Criminal Appeals, or U.S. Supreme Court are saying. Sometimes we have difficulty in doing that. In the last few years, the Texas Legislature has had a significant impact in the law, particularly in the areas of medical malpractice and tort reform.

DH: In all these years you have served at Eastland, have you ever considered taking a step to a higher court, the Supreme Court of Texas or federal bench?

AM: I have never seriously considered it. I have had certain opportunities where I was a person under consideration. I have not pursued that. I have been extremely happy in Eastland. I served during a period of time—an interesting period of time—where most of the chief justices in Texas were extremely satisfied in doing the work that they were doing. I don't know if any of them ever thought about moving up to the Supreme Court. They were satisfied where they were and tried to do the job that they were supposed to be doing. That may have changed some in the last few years; I'm not sure about that. It would be interesting to see.

DH: You have remained in Eastland all these years, where most of the judges who have sat on that court have lived in Abilene or other places around the district. But you seemed to have found a home there.

AM: I think you hit it exactly when you said "found a home." I live four blocks from the courthouse in a lovely, old white two-story home that was built by the founder of the town. It has a state historical marker on it. It has been a great way to live. Also, as you know, the Eastland court receives transfer cases. I have sat in every court of appeals in Texas except one as a judge. I have traveled around the state. It's nice to travel and go into the city and then come home to a quiet place and do my work. I've enjoyed that lifestyle very much.

DH: Judge, we are almost through. Tell me about anything memorable in your life in the law that you want the readers to know about.

AM: I have served on several committees that helped write our civil and criminal appellate rules. I was appointed by the Texas Supreme Court and the Court of Criminal Appeals to a committee that sought to harmonize the civil and criminal appellate rules. Two great court of appeals

judges, Clarence Guittard and Max Osborn, often served with me on those committees.

DH: I have noticed that you have acquired some honors over the years, and you have not mentioned any of those. Would you tell us about the occasions that you have been honored in the legal profession in various ways?

AM: I have served as President of the National Council of Chief Judges. That was a very interesting experience. I worked with the chief judges from state courts from around the nation. I was very active in that organization. Also, I was honored as The Outstanding Jurist of the Year by the Texas Bar Foundation. I was very proud to have received that honor.

DH: You have also written a few exams, haven't you?

AM: Yes, I have written some exams. I spent 6 years working with a committee of five people. Most of the members of the committee were law professors from various law schools around the country. We wrote the real property questions for the Multi-State Bar Exam. This was extremely difficult work but very rewarding. Now that I no longer do that, I can look back and say I did enjoy it very much.

DH: Judge, is there any last thought you would like to leave us with?

AM: I think not, other than to say that it has certainly been an honor to serve the people of Texas, both as a trial judge and as an appellate judge. I hope that I have done a good job; I have certainly tried to do that.

DH: Thank you, Judge.

AM: Thank you.

Questions/Answers From Past Appellate Chair Mike Hatchell

JoAnn Storey, JoAnn Storey, P.C., Houston

Karen Precella, Haynes and Boone, LLP, Fort Worth

Questions by **JoAnn Storey**

Answers by **Mike Hatchell**, Locke Liddell & Sapp LLP, Austin

Q: Let's start with your personal background.

A: I was born in Longview, Texas, in 1939, a third generation lawyer.

Q: Where did you go to law school?

A: The University of Texas.

Q: When you got out of UT, what did you do?

A: I served a year with the Supreme Court of Texas as a briefing clerk for Judge Meade F. Griffin. He was an old-time lawyer that had ridden horses in West Texas chasing outlaws, and then became a District Attorney, and then ultimately was appointed to the Supreme Court of Texas. He had also been a judge in the Nuremberg war trials. During that time, I also became life-long friends with Chief Justice Robert W. Calvert.

Q: After you were a briefing attorney with the Supreme Court, what did you do?

A: I looked for a job. A briefing attorney's take-home pay in 1964 was \$295.61. Starting salaries in Austin, Texas, were \$350 and, as incredible as it may seem, they were paying \$500 per month in East Texas. There was a law firm out there that was looking for somebody to do appeals, and I had decided during my time on the court that I'd like to devote my life practice to appellate work. There were probably only half a dozen people throughout the state that did appellate work. But there were lots of small appeals. So Ramey, Brelsford, Hull and Flock in Tyler, Texas,

decided that they needed somebody to do appeals to free the trial lawyers to do what they do best. I took that position and the early part of my practice was dealing with internally generated appeals of a relatively small nature. I stayed with that firm for about 35 years.

Q: Then you went on your own?

A. Molly [Hatchell] and I formed our own firm in 2001. When we finally merged that practice with a larger firm, we were handling 30 appeals just between the two of us, and while it was fun, it was pretty intense. We didn't have an awful lot of spare time.

Q: What was your involvement in the beginning of the Appellate Section of the State Bar?

A: Over the years, a number of us who did appellate work were in touch with each other—Rusty McMains, Royal Brin, Jack Pugh, Marvin Sloman, Don Hunt, and many others across the state. A number of us, including Ralph Brock and Marvin Sloman, got together in a bar in New Orleans at one of the Fifth Circuit seminars to discuss the growing appellate practice. Because there was an established procedure for starting a section, we divided up responsibilities. Marvin was particularly good at working with the Bar. Ralph had some experience in that as well. I think I had to do the bylaws.

Ralph was really one of our leading lights. He really had the enthusiasm to get out there and do it, so he kind of kept everything together. Ultimately, everything fell into place. We got the petitions done, we got the bylaws done, and

we got passed through the Bar's Board of Directors to create a section.

Q: You were the second chair of the State Bar Appellate Section. Tell us about anything that you feel a particular sense of accomplishment about during your year as chair.

A: My year as chairman, I was glad to be able to hold it all together. It was just picking up momentum of its own. Everything had been put together so well by Ralph Brock and others that I just got on the rock that was rolling downhill and kept it all together. We were benefited by being able to get the Appellate Advocate publication done for free. I also was pleased with the paths we began to open with judges so that there was a much more understanding relationship there.

The section now is doing good programs to advance education. It's had a great impact. It has led to a lot of collegiality and contact. That's one of the things for those of us who do this that is very, very important because it is a very special community.

Q: Why do you think there is a lot of collegiality among appellate lawyers?

A: I think there are a number of reasons. First, the personality that is attracted to appellate practice is a little less combative and a little more collegial in nature. Second, we are not pitted against each other in the highly adversarial way that trial lawyers are. Another thing that is very helpful is that over time the ability to trap your opponent with little technicalities and impose waiver has diminished considerably so that there's not all kinds of gamesmanship that goes on between us. As a result, there is a considerable amount of maturity in our practice.

Q: How do you teach a young lawyer to be an appellate practitioner?

A: By being a mentor to do the best that you can. I try to involve young lawyers in major cases. The other thing we do is approach appeals differently than other people. We think of it as analysis, research, writing and editing. It's in the analytical process that the young lawyers benefit the most. We spend equally as much time on the analysis aspect of an appeal, and we spend an enormous amount of time really honing and polishing to make the document a powerful force just from the standpoint of its own language.

Q: Who was your mentor?

A: My mentor was Judge Calvert. You know we didn't have computers, and he would handwrite notes. He was always sending me notes about this case or that case. What he taught me more than anything was the value of keen analysis of legal situations because he was one of the absolute best legal analysts I have ever seen. He could pick out of a complex legal problem the exact point where the case was going to turn and then proceed from that point forward. He was just amazing.

Q: How did you begin to get appeals from outside the firm and develop a state-wide reputation for handling appeals?

A: What I did was get on the speaking circuit. I got an opportunity early on to give a speech to the local bar association on brief writing and then from there it was at the state bar level back in the 1970s. So it mushroomed into a state-wide reputation. But I'll tell you that it's very, very hard to do and it's a long process. It was probably between 15 and 20 years before it went statewide.

Q: Tell us about either your most complicated appeal or one that gave you a great sense of accomplishment.

A: We've been so fortunate in the kinds of cases and clients we've had. I was involved in the *Texaco/Pennzoil* litigation, and that was interesting from the standpoint of seeing how it ought not to be done. *du Pont v. Robinson*, concerning expert witness standards, changed the face of Texas practice. And probably the most gut-wrenching case we ever had was the Baby Miller case in which the question was whether parents had the right to issue what, in effect, was a Do Not Resuscitate order prior to the birth of the child. The court ultimately decided the case in our favor on the basis of the emergency doctrine. One of the more interesting cases that I worked on has been the *King Ranch* cases, which involved supposed frauds that occurred in the mid- to late 1800s that affected title to the property. Those are fascinating cases because they bring you in touch with a lot of Texas folklore and history.

Q: What do you do for fun when you're not analyzing issues and writing briefs?

A: I'm a rare book seller. I have a little company called Carrousel Booksellers. I enjoy my time with Molly; she's both my law partner and my partner in life. We're playing tennis. We travel a good bit, and I enjoy reading mysteries.

Q: If you didn't practice law, what would you do instead?

A: The answer to that question would have been different at different stages in my life. Today, I would probably be a rare print dealer. Probably in the beginning of my practice I would have said a professional golfer because I'm an old Harvey Penick student, and I was pretty good back then.

Q: Thank you very much for spending the time.

A: Thank you for having me.

**STATE BAR OF TEXAS
APPELLATE SECTION**

Annual Meeting

**Thursday, September 7
5:00 p.m.**

brief business meeting,
haiku contest winners announced,
cocktail reception,
cool appellate paraphernalia

immediately following the
Advanced Civil Appellate Practice Course

at the
**The Four Seasons Hotel
Austin, Texas**

<http://www.tex-app.org>

Should the Abuse of Discretion Standard in Child Custody Cases be Re-Examined?

Jimmy Vaught, McCullar ★ Vaught, P.C., Austin

Should the standards currently used in making and reviewing orders that have the effect of limiting a parent's access to his or her children be re-examined? The current standards are contrary to the legislative mandate regarding parental access and fail to adequately address the potential to profoundly impair the fundamental interests of parents and children in the parent-child relationship. The abuse of discretion standard should be altered so that trial courts are required to justify any deviation from maximum feasible time with both parents by clear and convincing evidence and make factual findings so that appellate courts may carefully review and scrutinize those findings. See *In re J.R.D.*, 169 S.W.3d 740 (Tex. App.—Austin 2005, pet. denied) (Puryear, J., concurring); see also *In re L.M.M.*, 2005 WL 2094758 (Tex. App.—Austin 2005, no pet.) (Puryear, J., concurring). The author has extracted liberally from Judge Puryear's concurring opinion in *In re J.R.D.*

The current standard of review of a trial court's determination of conservatorship, possession of and access to a child, and child support is abuse of discretion. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990). The test for abuse of discretion is whether the trial court acted without reference to any guiding rules or principles, *i.e.*, whether it acted arbitrarily and unreasonably. *Worford*, 801 S.W.2d at 109. Under the abuse of discretion standard, the legal and factual sufficiency of the evidence are not independent grounds of error, but are merely relevant factors in assessing whether the trial court abused its discretion. *Doyle v. Doyle*, 955 S.W.2d 478, 479 (Tex. App.—Austin 1997, no pet).

Undoubtedly, custody and possession determinations can severely limit the parent-child relationship and have the potential to profoundly impair the fundamental liberty interest of parents and children in the parent-child relationship. The abuse of discretion standard allows a trial court

ruling severely curtailing parental rights to stand so long as there is some evidence upon which to base its findings and an appellant does not show that the trial court failed to follow any guiding rules or principles. This standard is inconsistent with the constitutional nature and weighty import of the rights and interests of parents, children and the State, as well as the legislature's mandate concerning parental access and presents a significant risk of erroneous deprivation of the liberty interests of parents and children.

CONSTITUTIONAL DIMENSIONS OF PARENT-CHILD RELATIONSHIP

The right to the companionship, care, custody, and control of one's own child is a fundamental liberty interest far more precious than any property right. *In re M.S.*, 115 S.W.3d 534, 547-48 (Tex. 2003). Thus, "the relationship between parent and child is constitutionally protected." *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 2060-2061 (2000) (citing *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S.Ct. 549 (1978)). See *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985) (The natural right existing between parents and their children is of constitutional dimensions.). Parents have the responsibility and the right to direct the upbringing and education of their children. *Troxel*, 530 U.S. 57, 65-66, 120 S.Ct. 2054, 2060. In fact, "[i]t is cardinal...that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 442 (1944).

It has been firmly established that the Due Process Clause of the Fourteenth Amendment to the United States Constitution protects the fundamental rights of parents to make decisions concerning the care, custody, and control of their children. *Troxel*, 530 U.S. 57, 66, 120 S.Ct. 2054, 2060. "[T]he Due Process Clause does not permit

States to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a ‘better’ decision could be made.” *Id.* at 72-73, 120 S.Ct. at 2064.

Children also have a substantial interest in the proceedings that determine their custody and the direction of their lives. *See M.S.*, 115 S.W.3d at 547. Both parent and child have a weighty interest in the accuracy and justice of a decision affecting their ability to have a relationship with one another. *Id.* The State also has an interest in protecting the welfare of its children, which “must initially manifest itself by working toward *preserving* the familial bond” between a parent and child unless that parent will not provide a safe, stable environment. *Id.* at 548 (citing *Santosky v. Kramer*, 455 U.S. 745, 766-67, 102 S.Ct. 1388 (1982)).

While the grant of custody to another or the limitation of a parent’s access to a child is not tantamount to absolute termination of parental rights, the State must tread very carefully when it infringes upon a parent’s ability to participate in child rearing. *See Troxel*, 530 U.S. at 72-73, 120 S.Ct. 2054. Even when it does not terminate rights, a court that infringes on a parent’s ability to rear his or her children may also violate the United States Constitution. *Id.* at 67, 120 S.Ct. 2054. In addition, the Texas Supreme Court has recognized that custody determinations between fit parents can risk a significant deprivation similar to termination of the relationship. *See Lewelling v. Lewelling*, 796 S.W.2d 164, 168 n. 8 (Tex. 1990). The weighty interests of parents, children, and the State in a just and accurate decision mandate that “*any* significant risk of erroneous deprivation is unacceptable.” *M.S.*, 115 S.W.3d at 549 (emphasis added). Our government respects fit parents’ abilities to act in the best interests of their children by applying a presumption that they do so. *Troxel*, 530 U.S. at 68, 120 S.Ct. 2054. The United States Supreme Court has recognized that, in accord with this presumption, so long as a parent is “fit,” there is normally no reason for the State to inject itself between parent and child or disturb that parent’s rearing of his or her children. *Id.* at 68-69, 120

S.Ct. 2054. In other words, court interference with the right of a fit parent to bring up his or her own child potentially impacts a fundamental right and may violate the Due Process Clause.

PUBLIC POLICY TO ENCOURAGE FREQUENT CONTACT BETWEEN A CHILD AND EACH PARENT

It is undisputed that the policy of the State of Texas is “to encourage frequent contact between a child and each parent for periods of possession that optimize the development of a close and continuing relationship between each parent and child.” TEXAS FAMILY CODE §153.251(b); *see* TEXAS FAMILY CODE §153.001(a). The legislature has implemented this policy by directing courts that “[t]he terms of an order that denies possession of a child to a parent or imposes restrictions or limitations on a parent’s right to possession of or access to a child *may not exceed* those that are *required* to protect the best interest of the child.” TEXAS FAMILY CODE §153.193 (emphasis added).

In order to protect children’s abilities to have a meaningful relationship with their parents, the legislature determined that the standard possession order would set a presumptive *minimum* amount of time for possession of a child by a joint managing conservator parent. TEXAS FAMILY CODE §153.137 (emphasis added). Thus, the legislature has determined that it is in the child’s best interest to have the minimum amount of time with *any* reasonably safe parent, and it makes no sense, nor is it authorized, to blindly apply that same minimum amount of time to a parent who is not merely safe but is an interested and active influence in his or her child’s life without regard to the degree of emotional engagement or bonding between the parent and child. Whatever latitude courts have in setting possession periods, they do not have the discretion to automatically adopt the minimum amount of time and ignore the legislature’s explicit directive in §153.193 to allow maximum feasible time with both parents unless doing otherwise would impair the children’s interests.

Unfortunately, it is not uncommon for trial courts to automatically adopt the minimum amount of time outlined in the standard possession order without considering whether that order will impose limits upon possession and access in excess of those necessary to protect the best interests of the children. Courts have a responsibility to do more than automatically adopt a standard minimum amount of time.

THE ABUSE OF DISCRETION STANDARD FALLS SHORT AND SHOULD BE RE-EXAMINED

The abuse of discretion standard allows a trial court ruling severely curtailing parental rights to stand so long as there is some evidence upon which to base its findings and an appellant does not show that the trial court failed to follow any guiding rules or principles. This standard is inconsistent with the constitutional nature and weighty import of the rights and interests of parents, children and the State, as well as the legislative mandate regarding parental access and presents a significant risk of erroneous deprivation of the liberty interests of parents and children.

The abuse of discretion standard falls short of showing proper respect to the legislature's deliberate policy decisions commanding Texas courts to support and cultivate relationships between children and their parents so long as those parents are fit and to implement maximum parent-child contact to actively preserve parent-child relationships. Considering the importance of and the risk to the fundamental rights and interests of parents, children and the State and the legislature's clear mandates that courts take measures to protect this most sacred of relationships, the standards by which decisions that limit a parent's access to or possession of a child are made and reviewed need to be carefully re-examined. The abuse of discretion standard should be altered so that trial courts are required to justify any deviation from maximum feasible time with both parents by clear and convincing evidence and make factual findings, and so that appellate courts may carefully review and scrutinize those findings.

Save The Date: Appellate CLE and Annual Meeting

The State Bar's Advanced Civil Appellate Practice Course has been scheduled for **September 7-8, 2006**, at the Four Seasons in Austin. The Section's annual meeting will be held at 5:00 pm on September 7 at the Four Seasons. The haiku contest winners will be announced at the meeting, which will be followed by a cocktail reception. An Appellate Boot Camp will be held on September 6.

Most appellate lawyers my age were raised in the age of “20 pages/20 minutes.” Gone were the days where oral argument might last the better part of a day (or longer). We were trained that judges were busy folk who might have (at most) fifteen minutes to read our briefs and twenty minutes to listen to oral argument. Briefs now have word and page limits, enforced by rigid rules about fonts, margins, spacing, etc. Because space is at a premium, furious wars over citation format are waged. Oral argument is rationed to only the most deserving; not a few lawyers have uttered their names and “May it please the court . . .” only to see a flashing red light.

All that was then- this is now. Our teenage children have developed a literary style of IM’s or text messages over cell phones and WiFi’d laptops. Here are some ingenious acronyms commonly used:

FWIW = for what it’s worth
LOL = laughing out loud (or lots of love)
TTYL = talk to you later
RUUP4IT = are you up for it
AFAIC = as far as I’m concerned
CUL8R = see you later
IOH = I’m out of here
IANAL = I’m not a lawyer
CSL = Can’t stop laughing
BTDT = Been there done that

There is every reason to think that today’s law students and young attorneys are communicating in the same way. Soon a whole generation of lawyers will communicate in the acronyms spawned by cramped fingers on the tiny keypads of cell phones and laptops. Twenty-first Century briefs and opinions in the 21st Century will soon be written in “IM.”

Because appellate lawyers are desperate to write the short brief that still “says it all,” here are some proposed IM acronyms for the brief of tomorrow:

ASSA = assuming arguendo
WADR = with all due respect
MIPC = May it please the Court
THJTC = The Honorable Justices of This Court
OFG = Open the flood gates
2SL = slippery slope
ATC = all things considered

¹ Mr. Hughes had his sense of humor surgically removed before graduating in 1977 from the University of Texas School of Law. His lack of drollery lead directly to being board certified in Civil Appellate Law by the Texas Board of Legal Specialization. He can be found puzzling over witticisms and *double-entendres* at Adams & Graham, L.L.P., in Harlingen, Texas. He wishes to thank contributions from his colleagues whose humor is not similarly impaired: Don Wittig, Doug Alexander, Roger Townsend, Scott Clark, and the editors.

BNF, NBNF = basis in fact, no basis in fact
AFB = at first blush
XF = exercise in futility
LMC = landmark case
WSA = well settled authority
F2F = Oral Argument is Requested [Face to face]
LAQ = Inapposite citation [Lame A** Quote]
GMTA = Respected authority says . . [Great Minds Think Alike]

Being lawyers, we may well succumb to RAS (Redundant Acronym Syndrome). In RAS, a word with the acronym phrase is added to crease a phrase (*e.g.*, “HIV virus,” “PIN number,” “IM message”, etc.). Severe cases result in longer phrases, called “RAP” (Redundant Acronym Phrases) or “RAP Phrases.”

Possibly the IM brief will induce tech-savvy justices to issue the “IM opinion,” one short enough to be sent direct to cell phones. Counsel will not have to read “between the lines” because the opinion will contain only one line. For example, some IM opinions or rulings could be shortened to:

Aff’d NNuH = affirmed, nothing new here
Aff’d UKY = affirmed, you know why
Aff’d EDNSU = affirmed, error did not screw you
Aff’d ULBLoGOI = affirmed, you lost below get over it
Aff’d PC NWPI = affirmed per curiam, names withheld to protect the innocent
Aff’d WVR/CYA = affirmed, issue waived, call your insurer
Rev’d WOE = reversed without explanation
Rev’d 2\$\$ = reversed, too much money awarded
Rev’d GEx2 = reversed, *Golden Eagle* granulation error
PRIG = petition for review ignored
PRJD = petition for review denied, rough justice was done
PRTNJ = petition for review denied, there’s no justice
PRNOP = petition for review denied, not our problem
PRD CURM = petition for review dismissed, can’t you read *Mafridge*?
NOQT = memorandum opinion [do not quote us]

Perhaps this will lead some older judges to impose AFZs (“Acronym Free Zone”) by local rule.

ANTITRUST

Illinois Tool Works v. Independent Ink, Inc., 126 S. Ct. 1281 (2006).¹

In this tying case, the Court reconsidered the presumption that a seller of a patented product has market power. Illinois Tool Works (ITW) manufactures a patented printhead and unpatented ink, which it sells to printer makers who agree they will purchase ink only from ITW. Independent Ink, which had developed a chemically identical ink, sued ITW under the Sherman Act for illegal tying. The district court granted summary judgment for ITW, rejecting Independent's argument that ITW necessarily had market power in the printhead market by virtue of its patent. The Federal Circuit reversed, concluding that Supreme Court precedent established a presumption of market power.

The Supreme Court vacated and remanded in an opinion by Justice Stevens, holding that the mere fact that a tying product is patented does not support a presumption of market power. The Court originally endorsed the presumption that a patent confers market power as part of the misuse defense to patent infringement claims, and it later imported that presumption into antitrust law. Yet Congress eventually eliminated the presumption in the patent context, the Court's historical disapproval of tying had substantially diminished, and the antitrust enforcement agencies and most economists had recognized that patents do not necessarily confer market power. Accordingly, the Court abandoned the presumption, holding that a claim that tying arrangements involving patented products violate the Sherman Act requires proof of power in the relevant market. Because Independent had relied on Supreme Court precedent in moving for summary judgment without offering evidence of market power, the Court remanded to give it an opportunity to develop and present such evidence.

¹ Note: The author's firm represented Illinois Tool Works.

Texaco, Inc. v. Dagher, 126 S. Ct. 1276 (2006).

This case addressed whether price setting by a joint venture is illegal *per se*. Texaco and Shell formed a joint venture to refine and sell gasoline in the western United States under the companies' original brand names. When the joint venture set a single price for both brands, service station owners sued, alleging that the joint venture had violated the Sherman Act's *per se* rule against price fixing. The district court applied the rule of reason and granted summary judgment for the companies. The Ninth Circuit reversed, holding that the price-fixing prohibition applied and refusing to create an exception.

The Supreme Court reversed in a unanimous opinion by Justice Thomas, holding that it is not illegal *per se* for a lawful, economically integrated joint venture to set prices. Although "horizontal" price fixing between competitors is illegal *per se*, here Texaco and Shell were not competing in the market for gasoline in the western United States. Instead, they participated jointly in that market through their investments in the joint venture. When otherwise-competing firms pool their capital and share profits and losses, they are regarded as a single firm competing with other sellers in the market. The Court saw no reason to treat this joint venture differently just because it sold gasoline under two different brands at the same price. The Court also concluded that the ancillary restraints doctrine—which governs the validity of a joint venture's restrictions on non-venture activities—did not apply here because the challenged pricing practice involved core activity of the joint venture.

CRIMINAL LAW

Hartman v. Moore, 126 S. Ct. 1695 (2006).

This case addressed the elements of proof in a retaliatory-prosecution action. After Moore lobbied the Postal Service to adopt certain technology, postal inspectors investigated him for alleged kickbacks. A federal prosecutor brought

charges at the inspectors' urging, but the district court acquitted Moore, finding a complete lack of evidence of any wrongdoing. Moore then filed a *Bivens* claim alleging that the inspectors engineered the prosecution in retaliation for his lobbying efforts and seeking damages. The inspectors moved for summary judgment, arguing that they were entitled to qualified immunity because the criminal charges were supported by probable cause. The district court denied the motion, and the D.C. Circuit affirmed.

The Supreme Court reversed and remanded in an opinion by Justice Souter. It observed that the First Amendment prohibits officials from taking retaliatory action against an individual for speaking out. To recover damages, the individual must prove that retaliatory animus was the but-for cause of the injurious action. In the retaliatory-prosecution context, this requirement means that a plaintiff must plead and prove the absence of probable cause for pressing the underlying criminal charges. Such proof suggests that the prosecution would not have occurred absent a retaliatory motive. Moreover, an absence of probable cause helps to show that the retaliatory animus of the defendant investigator influenced the injurious action of the prosecutor. Though not necessarily dispositive, proof that probable cause is absent and that the investigator urging prosecution has a retaliatory motive provides a reasonable basis for suspending the presumption of regularity behind the charging decision. The Court concluded that such proof is also enough for a *prima facie* inference that unconstitutionally-motivated inducement by the investigator infected the prosecutor's decision to bring the charge.

Justice Ginsburg (joined by Justice Breyer) dissented, arguing that the burden should be on the inspectors to show that even if they had not urged prosecution with a retaliatory motive, the prosecutor nonetheless would have pursued the case.

***Scheidler v. Nat'l Org. for Women*, 126 S. Ct. 1264 (2006).**

This case clarified that conduct violating the Hobbs Act must relate to robbery or extortion. Groups supporting legal abortion filed a class action under the Hobbs Act and RICO alleging that abortion opponents engaged in a nationwide conspiracy to shut down abortion clinics through violence. The Hobbs Act makes it a crime to affect commerce by robbery, extortion, or committing or threatening physical violence "in furtherance of a plan or purpose to do anything in violation of this section." 18 U.S.C. §1951(a). The district court initially dismissed the complaint, holding that RICO did not require proof that criminal acts were motivated by an economic purpose, but the Supreme Court reversed. On remand, the jury found that the opponents violated the Hobbs Act and RICO, and the Seventh Circuit affirmed a judgment and injunction for the class. The Supreme Court again reversed, holding that the opponents did not commit extortion under the Hobbs Act. On remand, the Seventh Circuit held that the RICO judgment might be sustained based on instances or threats of violence unrelated to extortion and remanded for further proceedings.

The Supreme Court reversed in a unanimous opinion by Justice Breyer. It rejected the class's argument that the Hobbs Act reaches violence in furtherance of a purpose that affects commerce. Rather, it concluded that the phrase "anything in violation of this section" referred to robbery and extortion. Thus, the Court held that the Hobbs Act only reaches acts or threats of violence in furtherance of a plan or purpose to engage in robbery or extortion. It observed that this construction was consistent with the Hobbs Act's predecessor statutes, avoided federalizing much of ordinary criminal behavior, and did not render the physical violence clause superfluous.

***Zedner v. United States*, 126 S. Ct. 1976 (2006).**

This case holds that a defendant cannot prospectively waive the timing requirements of the Speedy Trial Act. The Act requires a federal criminal trial to begin within 70 days after a defendant is charged or initially appears, but it excludes continuances if the judge finds that the ends of justice supporting a continuance outweigh the public's and defendant's interests in a speedy trial. When defendant Zedner requested a continuance to gather evidence, the district court suggested that he waive application of the Act "for all time," which he agreed to do. The court then granted the requested continuance and a later continuance without making any findings. Four years later, Zedner moved to dismiss the indictment for failure to comply with the Act, but the district court denied the motion based on the waiver. Zedner was tried and convicted. On appeal, the Second Circuit affirmed, reasoning that Zedner had contributed to the delay and that the district court could have granted an ends-of-justice continuance.

The Supreme Court unanimously reversed in an opinion by Justice Alito, holding that Zedner's waiver was ineffective. It observed that the Act is a comprehensive scheme with several express exceptions. A defendant's waiver by agreement is not among them, however, and recognizing such a waiver would make other exceptions surplusage. The Court also held that Zedner was not estopped from challenging the exclusion of the continuances, reasoning that his request for more time to gather evidence was not clearly inconsistent with the position that this time would still be counted under the Act. Finally, it held that although harmless-error review generally applies, it was not appropriate here because the Act unequivocally requires a trial within 70 days and prohibits exclusion of continuances unless the court makes contemporaneous ends-of-justice findings. Counting the continuances, Zedner's trial came too late and the Act required dismissal of the charges against him. The Court remanded for the district court to determine whether the dismissal should be with or without prejudice. Justice Scalia concurred in part, arguing that the

Court should not have relied on legislative history.

DUE PROCESS

***Jones v. Flowers*, 126 S. Ct. 1708 (2006).**

This case concerned the steps a State must take to provide notice to a homeowner before selling his property to pay back taxes. After Jones separated from his wife and moved out of his house, the property taxes went unpaid. An Arkansas state official sent a certified letter to the house, stating that the property would be subject to sale if not redeemed. The letter was returned unclaimed. Two years later, the official published a notice of public sale in the newspaper and sent another certified letter, which was also returned unclaimed. Flowers bought the house from the official and delivered an unlawful detainer notice to the property, which Jones's daughter forwarded to him. Jones filed suit in state court, alleging that the State's failure to provide adequate notice resulted in a taking of his property without due process. The Arkansas courts rejected his claim, but the Supreme Court reversed and remanded in an opinion by Chief Justice Roberts.

In a prior case, the Court had found notice sufficient if it was reasonably calculated to reach the intended recipient when sent. Here, it held that when the government becomes aware prior to the sale that its notice attempt has failed, it must take additional reasonable steps to provide notice to the owner if it is practicable to do so. The Court reasoned that the government must consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case. Thus, although the constitutionality of a notice procedure is assessed *ex ante*, it is proper to consider what the State does with any additional information the procedure reveals about the effectiveness of the attempted notice. The Court concluded that the official's efforts here did not provide due process because additional reasonable steps were available. For example, he could have resent the notice by regular mail or posted notice on the door, though he was not required to conduct an open-ended

search of phone listings and government records. The Court rejected the official's argument that no additional steps were required because Jones had a legal obligation to provide an updated address, concluding that a party's ability to safeguard its own interests does not relieve the government of the obligation to provide adequate notice.

Justice Thomas (joined by Justices Scalia and Kennedy) dissented, arguing that because due process does not require actual notice, the government is not required to take additional steps when it becomes aware that its attempt at notice has failed.

ENVIRONMENT

S.D. Warren Co. v. Maine Bd. of Env. Protection, 126 S. Ct. 1843 (2006).

A federal agency licensed Warren to operate hydroelectric dams subject to conditions imposed by Maine under §401 of the Clean Water Act, 33 U.S.C. §1341. Warren challenged the conditions, arguing that its dams did not cause a "discharge" triggering §401. The Maine courts rejected this argument.

The Supreme Court affirmed in a unanimous opinion by Justice Souter, holding that dams raise a potential for discharge. It rejected Warren's argument that the addition of a pollutant is required to trigger the statute, observing that the statute does not fully define discharge and that its common meaning is broader than pollution. The Court also noted that Congress defined pollution to include altering the integrity or quality of water, which is a risk inherent in limiting river flow and releasing water through turbines.

EVIDENCE

Holmes v. South Carolina, 126 S. Ct. 1727 (2006).

In Holmes' murder trial, the prosecution relied on forensic evidence that strongly supported his guilt. Holmes sought to offer evidence that another man had admitted to the crimes or acknowledged Holmes' innocence, but the trial court excluded the evidence. The South Carolina

Supreme Court affirmed, holding that where there is strong forensic evidence of guilt, proffered evidence of a third party's alleged guilt does not raise a reasonable inference of the defendant's innocence.

In the first opinion written by Justice Alito, the Supreme Court vacated and remanded. It held that although governments have broad latitude to establish rules excluding evidence, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. If a rule infringes on a weighty interest of the defendant and is either arbitrary or disproportionate to the purposes it is designed to serve, it is unconstitutional. Under this test, rules that permit judges to exclude evidence if its probative value is outweighed by prejudice, confusion, or potential to mislead are widely accepted as constitutional. The Court observed that South Carolina's rule originally seemed to have been of this type, but that state courts later extended it so that judges no longer focused on the probative value or potential adverse effect of third-party guilt evidence. Instead, he evaluated the strength of the prosecution's case alone, a one-sided approach that the Court found arbitrary.

FIRST AMENDMENT

Garcetti v. Ceballos, 126 S. Ct. 1951 (2006).

In this case, which was reargued after the retirement of Justice O'Connor, a 5-4 majority narrowly defined protected speech by public employees. Ceballos, a supervising district attorney, concluded that a police officer had made serious misrepresentations in an affidavit used to obtain a critical search warrant and wrote a memo recommending that the prosecution be dismissed. Allying that his superiors retaliated against him for the memo in violation of the First Amendment, Ceballos sued under 42 U.S.C. §1983. The district court granted summary judgment for the employer, holding that the memo was not protected speech because Ceballos wrote it pursuant to his employment duties. The Ninth Circuit reversed, concluding that the memo addressed a matter of public concern.

The Supreme Court reversed and remanded in an opinion by Justice Kennedy, holding that a public employee's statements pursuant to official duties are not constitutionally insulated from employer discipline. Surveying its precedent, the Court noted that no First Amendment claim arises if the employee is not speaking as a citizen on a matter of public concern. Here, Ceballos was not speaking as a citizen because the expressions in his memo were made pursuant to his official responsibilities. The Court recognized that exposing governmental misconduct is a significant matter and is protected by statutes such as whistle-blower laws, but it found no support in its precedent for a constitutional cause of action. The Court remanded for consideration of whether speech by Ceballos other than his memo was entitled to protection.

Justice Souter (joined by Justices Stevens and Ginsburg) dissented, arguing that even when speech on matters of public concern is made in the course of job duties, it should be protected if public and private interests in addressing official wrongdoing or safety threats outweigh the government's interest in efficient implementation of policy. Although he found no justification for categorically denying protection to speech within the scope of job responsibilities, he did recognize the government's substantial interest in regulating official communications. Thus, he concluded that such speech should not be protected unless the employee addressed a matter of unusual importance and satisfied high standards in doing so. Justice Breyer also dissented, arguing that First Amendment protection applies to employee speech that is required by professional canons and constitutional principles.

***Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 126 S. Ct. 1297 (2006).**

A unanimous Supreme Court held that the Solomon Amendment, which provides that an institution of higher education will lose certain federal funds if it denies military recruiters access equal to that given other recruiters, did not infringe the petitioner law schools' First Amendment freedoms of speech and association. Because the Court concluded that Congress could

apply the equal access requirement to schools directly, it did not consider the unconstitutional conditions doctrine.

In an opinion by Chief Justice Roberts, the Court first concluded that the Solomon Amendment would not allow a school simply to use the same nondiscrimination policy it applies to other recruiters to limit the access of military recruiters. The Court then noted that it gives great deference to Congress concerning legislation regarding military affairs, even when Congress chooses (as in this case) to act through the Spending Clause. While the required recruiting assistance included "elements of speech," the Court found that those elements were merely incidental to the regulated conduct. In addition, the Court held that because recruiting activities lack the expressive quality of a parade, a newsletter, or an editorial page, speech by military recruiters on campus would not violate the compelled speech doctrine by affecting the content of the schools' messages.

The Court also rejected the Third Circuit's suggestion that the Solomon Amendment was unconstitutional even as a regulation of conduct, holding that the conduct regulated was not inherently expressive. Because the Solomon Amendment was a neutral regulation and promoted a substantial governmental interest that would be achieved less effectively absent the regulation, its incidental burden on speech was permissible.

Finally, the Court concluded that the Solomon Amendment did not violate law schools' freedom of expressive association because recruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students – not to become part of the schools' expressive association.

HABEAS CORPUS

Day v. McDonough, 126 S. Ct. 1675 (2006).²

This case addressed whether the one-year statute of limitations for filing a habeas petition is an affirmative defense and, if so, whether it is error for a court to dismiss a petition as untimely after the defense has been forfeited. Day filed his habeas petition a few days after the limitations period (as calculated under Eleventh Circuit precedent) had expired. In its answer, however, Florida did not plead a limitations defense and expressly conceded that Day's petition was timely. Several months later, a magistrate judge recommended *sua sponte* that the petition be dismissed as untimely, and the district court agreed. The Eleventh Circuit affirmed, holding that the district court could dismiss the petition *sua sponte* despite Florida's concession.

The Supreme Court affirmed in an opinion by Justice Ginsburg. It concluded that the statute of limitations is an affirmative defense but declined to apply the Federal Rules of Civil Procedure, which recognize that affirmative defenses are forfeited if not asserted in an answer or amended answer. Instead, the Court held that district courts may dismiss an untimely petition *sua sponte* if doing so would serve the interests of justice. It observed that the same rule applied to other defenses in habeas cases. It also noted that district courts must give parties fair notice and an opportunity to be heard prior to dismissal, and must assure itself that the petitioner is not significantly prejudiced by the dismissal. Here, the Court concluded that the State's concession of timeliness was merely an inadvertent error and that dismissal was not an abuse of discretion.

Justice Stevens (joined by Justice Breyer) dissented from the judgment, arguing that the Court should postpone the entry of judgment until it decided a recently-granted case that could determine whether Day's petition was in fact timely. Justice Scalia (joined by Justices Thomas and Breyer) dissented, arguing that the forfeiture

² Note: The author argued the case for Mr. Day.

principles of the Rules of Civil Procedure applied because nothing in habeas statutes, rules, or practices contradicted them.

HEALTH CARE

Ark. Dep't of Health & Human Servs. v. Ahlborn, 126 S. Ct. 1752 (2006).

This case addressed the proper scope of a Medicaid lien. Federal law requires participating States to ascertain the liability of third parties for medical care provided to a Medicaid recipient and to enact laws giving states the right to collect payment from liable parties. Under Arkansas law, when a Medicaid recipient obtains a tort settlement, a lien automatically attaches to the settlement in an amount equal to Medicaid's costs even if they exceed the portion of the settlement allocated to medical expenses. Here, an Arkansas agency paid over \$200,000 for Ahlborn's medical care following a car accident. When she settled her tort suit regarding the accident for \$550,000, the agency intervened to assert its lien. Ahlborn then sued the agency in federal court, arguing that the lien violated federal law because its satisfaction required depletion of her compensation for injuries other than medical expenses. The parties stipulated that approximately \$35,000 of the settlement was compensation for medical expenses. The district court granted summary judgment for the agency but the Eighth Circuit reversed, holding that the agency could recover only the portion of the settlement representing medical expenses.

In a unanimous opinion by Justice Stevens, the Supreme Court affirmed. It held that federal law implicitly limits the right acquired by the agency to "payment for medical care." 42 U.S.C. §1396k(a)(1)(A). Moreover, Arkansas' statute conflicted with the anti-lien provision of federal Medicaid law, which prohibits States from imposing liens on the property of recipients on account of medical assistance payments. The Court recognized the potential for manipulating a settlement to allocate away the State's interest in medical reimbursement, but it left open the possibility of obtaining the State's advance

agreement to an allocation or submitting the matter to a court for decision.

***Sereboff v. Mid Atlantic Med. Servs., Inc.*, 126 S. Ct. 1869 (2006).**

The Sereboffs' health plan required them to reimburse their insurer, Mid Atlantic, for benefits paid on account of injuries caused by a third party if they later recovered for the injuries. Here, Mid Atlantic paid the Sereboffs' medical bills for a car accident. When the Sereboffs settled with the responsible third parties, Mid Atlantic sued for equitable relief under ERISA §502(a)(3), 29 U.S.C. §1132(a)(3), to recover the benefits it had paid. The district court found for Mid Atlantic and the Fourth Circuit affirmed.

The Supreme Court affirmed in an opinion by Chief Justice Roberts, holding that the relief requested by Mid Atlantic was equitable. It distinguished a recent case that denied recovery where the funds had been placed in trust, noting that here Mid Atlantic sought identifiable funds within the Sereboffs' possession and control. In equity, a party's agreement to convey part of a recovery before it was acquired gives rise to an equitable lien or constructive trust on that part as soon as the recovery is identified. The Sereboffs argued that the strict tracing rules for equitable restitution at common law had not been met here, but the Court concluded that no such rules apply to equitable liens imposed by agreement.

IMMUNITY

***Northern Ins. Co. of N.Y. v. Chatham County*, 126 S. Ct. 1689 (2006).**

After a boat insured by Northern Insurance collided with a malfunctioning Chatham County drawbridge, Northern filed an admiralty suit seeking damages from the County. The district court granted the county summary judgment, holding that sovereign immunity extends to counties exercising delegated State power. The Eleventh Circuit affirmed, reasoning that a common-law residual immunity protects political subdivisions such as the County from suit.

In an opinion by Justice Thomas, the Supreme Court unanimously reversed. Because pre-constitutional sovereignty is the source of immunity from suits authorized by federal law, only States and arms of the State possess such immunity. Thus, the Court held that the County was not immune unless it operated the bridge as an arm of the State. Given the County's concession below that it was not entitled to Eleventh Amendment immunity and its acknowledgment in the question presented that it was not an arm of the State, the Court presumed that to be the case. The Court also rejected the County's argument for a distinct sovereign immunity protecting a county's exercise of core state functions in admiralty cases, concluding that ordinary immunity principles apply in admiralty.

INTELLECTUAL PROPERTY

***eBay Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837 (2006).**

The Supreme Court unanimously rejected the Federal Circuit's "general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances," holding instead that the traditional four-factor test must be applied. Thus, to obtain an injunction, a plaintiff must demonstrate that: (1) it has suffered an irreparable injury; (2) remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) the public interest would not be disserved by a permanent injunction. The Court noted that this approach is consistent with its treatment of injunctions under the Copyright Act. While rejecting the Federal Circuit's broad pro-injunction ruling, the Court also rejected the district court's apparent suggestion that a plaintiff's willingness to license its patents and its lack of commercial activity in practicing the patents would be sufficient to establish a lack of irreparable harm.

Chief Justice Roberts, joined by Justices Scalia and Ginsburg, concurred, noting that courts have historically granted injunctive relief in the vast

majority of patent cases, and suggesting that this treatment is appropriate given the difficulty of protecting a right to exclude through monetary remedies that allow an infringer to use an invention against the patentee's wishes.

Justice Kennedy, joined by Justices Stevens, Souter, and Breyer, filed a separate concurrence stating that trial courts should bear in mind that in many instances the nature of the patent being enforced (for example, business method patents) and the economic function of the patent holder (as a licensing entity rather than the producer of any goods) present considerations quite unlike earlier cases.

JURISDICTION

DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854 (2006).³

In this case, the Court rejected taxpayer standing for state tax and spending decisions. A group of Toledo, Ohio residents challenged a state tax credit and local property tax exemptions used to entice DaimlerChrysler to expand its Toledo operations. They contended that the tax breaks disproportionately burdened them in violation of the Commerce Clause by reducing the funds available to the city and State. The district court found that plaintiffs had municipal taxpayer standing and rejected their challenge on the merits. The Sixth Circuit reversed in part, holding the state tax credit unconstitutional.

The Supreme Court vacated and remanded in an opinion by Chief Justice Roberts, holding that plaintiffs lacked standing to challenge the state tax credit. The Court had previously denied federal taxpayers standing to object to government payments because their interest in the Treasury is minute and shared, and the effect of particular payments on future taxes is remote and uncertain. It concluded that this rationale applied equally to state taxpayers. It distinguished taxpayer standing for Establishment Clause challenges, observing that rights under

constitutional provisions that constrain government taxing and spending are fundamentally unlike the right not to contribute any money to support a religious establishment. The Court also concluded that plaintiffs' standing as municipal taxpayers to enjoin illegal uses of local funds could not be leveraged into standing to challenge the state tax credit decision. It specifically rejected Plaintiffs' argument that courts could exercise supplemental jurisdiction over the state credit claim, stating that it had never permitted a federal court to exercise supplemental jurisdiction over a claim that did not itself satisfy the requirements of Article III.

Marshall v. Marshall, 126 S. Ct. 1735 (2006).

In this case, the Court narrowly interpreted the probate exception to federal court jurisdiction. Vickie Lynn Marshall (a.k.a. Anna Nicole Smith) and Pierce Marshall asserted competing claims to the property of the late J. Howard Marshall, Vickie's husband and Pierce's father. While the estate was subject to ongoing litigation in Texas probate court, Vickie filed for bankruptcy in California. When Pierce filed a proof of claim in the bankruptcy for defamation, Vickie counterclaimed, alleging that Pierce had tortiously interfered with a gift in the form of a trust that she had expected from J. Howard. Treating the claims as an adversary proceeding, the bankruptcy court granted summary judgment for Vickie on the defamation claim and, after trial, entered judgment for Vickie on her counterclaim. Pierce filed a post-trial motion to dismiss based on the probate exception to federal jurisdiction, arguing that Vickie's tortious interference claim could be tried only in the Texas probate proceedings. The bankruptcy court denied the motion. Exercising *de novo* review, the district court agreed with the bankruptcy court that the probate exception did not reach Vickie's counterclaim because it would not interfere with probate proceedings. The Ninth Circuit reversed, holding that the probate exception includes questions ordinarily decided by a probate court in determining the validity of an instrument (including tortious interference) and that the Texas probate court's ruling that it had

³ Note: The author's firm represented DaimlerChrysler.

exclusive jurisdiction over Vicki's claims was binding on the federal courts.

The Supreme Court reversed and remanded in an opinion by Justice Ginsburg. It held that the probate exception only prohibits federal courts from disturbing or affecting the possession of property in the custody of a state court. Here, Vicki's counterclaim did not involve the administration of an estate or probate of a will, and she did not seek to reach a *res* in the probate court's custody. Instead, she sought an *in personam* judgment against Pierce. Thus, the probate exception did not apply. The Court also rejected the notion that the probate court's jurisdictional ruling bound the federal courts, relying on an old case holding that federal jurisdiction cannot be impaired by subsequent state legislation creating probate courts.

RACKETEERING

***Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006).**

This case further defines the causation element of a civil RICO claim. Ideal and National (owned by the Anzas) are competitors in the sale of steel mill supplies. Ideal sued National and the Anzas, alleging that they engaged in a pattern of failing to charge New York state sales taxes in order to lower prices, committed mail and wire fraud by submitting fraudulent tax returns, and used the tax savings to open a competing business location. Ideal alleged that the Anzas violated 18 U.S.C. §1962(c), which prohibits participating in an enterprise's affairs through a pattern of racketeering activity, and that all defendants violated §1962(a), which makes it unlawful to use income derived from racketeering. The district court dismissed the case, concluding that Ideal had not shown reliance on defendants' misrepresentations. The Second Circuit vacated the dismissal, holding that an allegation that racketeering activity gave the defendant a competitive advantage adequately pleaded causation.

In an opinion by Justice Kennedy, the Supreme Court reversed in part, vacated in part, and remanded. It held that Ideal's §1962(c) claim

failed because it had not alleged proximate cause—*i.e.*, a direct relation between the injury asserted (Ideal's lost sales) and the conduct alleged (defendants' tax scheme). Here, the direct victim of the alleged RICO violation was New York, not Ideal. In addition, National could have lowered prices for reasons unrelated to the tax fraud, and Ideal's lost sales could have resulted from other factors as well. The Court concluded that a RICO plaintiff cannot circumvent the proximate-cause requirement simply by alleging that the defendant's aim was to increase market share at its competitor's expense. It did not reach the question whether reliance was also a required element of Ideal's §1962(c) claim. The Court remanded for the court of appeals to analyze whether Ideal adequately pleaded proximate cause with respect to its §1962(a) claim.

Justice Thomas dissented from the Court's §1962(c) holding, observing that prior cases had only found causation lacking where a defendant's injury to a third person resulted in damages to the plaintiff. Here, however, it was defendants' own conduct in underpaying taxes and thereby lowering their prices—not New York's injury—that damaged Ideal's business. In addition, he noted that the Court's holding would preclude recovery for competitive injury from organized crime, which was Congress's objective in enacting RICO. Finally, he concluded that reliance is not a required element. Justice Breyer also dissented in part, arguing that both claims should be dismissed because RICO does not apply when a competitor's legitimate activity (*e.g.*, charging lower prices) is the immediate cause of the plaintiff's injury, even if the competitor's business has been financed by unlawful predicate acts.

SEARCH AND SEIZURE

***Brigham City v. Stuart*, 126 S. Ct. 1943 (2006).**

This case addressed the scope of the emergency aid exception to the warrant requirement. Police responded to a report of loud noise and found juveniles drinking outside a house. Looking through a window and screen door, they saw a group of adults restraining another juvenile. The

juvenile broke free and hit one of the adults, causing him to spit blood. One officer opened the door and announced his presence, but none of the occupants heard him. Only after the officer entered the house and cried out again did the altercation subside. The officers arrested the occupants, but the trial court granted their motion to suppress evidence from the house on the ground that the warrantless entry violated the Fourth Amendment. The Utah Supreme Court agreed, holding that the emergency aid exception to the warrant requirement did not apply because the adult's injury was not sufficiently serious and the officers' motive for entering was to enforce the law, not assist the adult.

The Supreme Court reversed and remanded in an opinion by Chief Justice Roberts. The Court found the entry reasonable because knocking during the fray would have been futile. In addition, police had an objectively reasonable basis for believing that the injured adult might need help and that the violence was just beginning. The Court observed that the officers' subjective motivation was irrelevant and that ongoing violence within a home is serious enough to justify a warrantless entry. It also held that the officers' manner of entry did not violate the knock-and-announce requirement because the first announcement was equivalent to a knock on the screen door and the officers were free to enter after it had been made.

***Georgia v. Randolph*, 126 S. Ct. 1515 (2006).**

Randolph refused to consent to a police search of his house for drugs, but his estranged wife gave consent. Following Randolph's indictment for cocaine possession, the trial court denied his motion to suppress the evidence as the fruit of an illegal search. The Georgia appellate courts reversed, concluding that consent to a search by one occupant is not valid when another occupant is physically present and refuses.

The Supreme Court affirmed in an opinion by Justice Souter. It observed that the Fourth Amendment allows a warrantless search when police obtain the voluntary consent of an occupant

reasonably believed to share authority over the property. To determine the effect of a present co-occupant's refusal to consent, the Court looked to widely shared social expectations about the authority co-inhabitants may exercise in ways that affect each other's interests. A prior case had recognized an overnight guest's legitimate expectation of privacy in his temporary quarters based on the unlikelihood that the host would admit someone over the guest's objection. The Court reasoned that co-inhabitants have an even stronger claim to this customary expectation, as no sensible person would enter shared premises based on one occupant's invitation when another occupant said to stay out. Accordingly, the Court held that a disputed invitation to conduct an evidentiary search gives an officer no better claim to reasonableness in entering than he would have absent any consent. It noted that this holding did not prohibit police from entering to protect an occupant from domestic violence. The Court also harmonized its holding with prior decisions by drawing a bright line: one occupant's consent is sufficient when a co-occupant is nearby but not part of the colloquy with police but is not sufficient when the co-occupant is present and objects.

Justice Stevens concurred, observing that while an approach to constitutional interpretation based on original understanding would consider only the husband's consent, societal changes have led the Court to conclude that male and female are equal partners with rights that may be independently asserted or waived. Justice Breyer also concurred, emphasizing the fact-specific nature of the Court's holding.

Chief Justice Roberts (joined by Justice Scalia) dissented, arguing that people who share places or things assume the risk that the other person will grant access to the government. He also criticized the Court for basing its rule on assumptions about shifting social expectations and on whether the co-occupant happens to be present and to object. Justice Scalia also dissented, responding to Justice Stevens' concurrence by pointing out that what has changed regarding women's rights is not the

Fourth Amendment but the law of property to which it refers. Justice Thomas filed a separate dissent, arguing that no Fourth Amendment search had occurred because the suspect's spouse voluntarily led police to evidence of his wrongdoing.

***United States v. Grubbs*, 126 S. Ct. 1494 (2006).**

This case addressed the constitutional requirements for an anticipatory search warrant. A Magistrate Judge issued an anticipatory warrant for a search of Grubbs' house based on a federal officer's affidavit, which explained that the warrant would not be executed until Grubbs received a parcel containing child pornography. When the search commenced, Grubbs was given a copy of the warrant but not the affidavit. Officers seized the pornography and arrested Grubbs. He filed a motion to suppress, arguing that the warrant failed to list the triggering condition. The district court denied the motion, and Grubbs pleaded guilty. The Ninth Circuit reversed, concluding that the warrant failed to comply with the Fourth Amendment's particularity requirement.

The Supreme Court reversed and remanded in an opinion by Justice Scalia. It first held that anticipatory warrants do not categorically violate the Fourth Amendment's probable cause requirement. To meet this requirement, the magistrate issuing the warrant must determine that it is now probable that the triggering condition will be satisfied when the warrant is executed. Here, the affidavit established probable cause to believe that pornography would be delivered to Grubbs' house. The Court also held that the warrant complied with the particularity requirement because it particularly described the place to be searched and the persons or things to be seized. It concluded that the particularity requirement does not include the conditions precedent to a warrant's execution. Justice Souter (joined by Justices Stevens and Ginsburg) concurred in the judgment, arguing that failure to state the triggering condition in the warrant is unwise and could have untoward consequences.

SECURITIES

***Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 126 S. Ct. 1503 (2006).**

In this case, the Court held that the Securities Litigation Uniform Standards Act (SLUSA) preempts large state-law holder class actions. Dabit sued Merrill Lynch in federal court on behalf of a class of its former brokers, pleading claims under Oklahoma law. He alleged that the firm disseminated misleading research to boost the prices of certain stocks, which damaged the brokers and their clients by causing them to hold onto the overvalued stocks. Merrill Lynch moved to dismiss the complaint under SLUSA, which prohibits state-law class actions alleging fraud "in connection with the purchase or sale" of a nationally-traded security if the class has more than 50 members. The district court granted the motion but the Second Circuit vacated and remanded, concluding that claims by holders do not allege fraud in connection with a stock purchase or sale.

The Supreme Court vacated and remanded in a unanimous opinion by Justice Stevens. It reasoned that because Congress imported the phrase "in connection with the purchase or sale" from Section 10(b) of the Securities Exchange Act and Rule 10(b)-5, it intended to adopt the broad interpretation the Court had given that phrase in prior cases. Under those cases, it is enough for the alleged fraud to "coincide" with a securities transaction by the plaintiff or someone else. Thus, the fraudulent manipulation of stock prices alleged here qualified as fraud in connection with the purchase or sale of a security. The Court observed that this interpretation was consistent with SLUSA's purpose and would avoid wasteful, duplicative litigation. It distinguished cases holding that a plaintiff must be a purchaser or seller to bring a private damages action under Rule 10(b)-5, noting that this restriction was based on policy considerations, not on the "in connection with" phrase.

**** Appellate Section Need-Based Scholarship Program ****

The Appellate Section will make available a limited number of need-based scholarships for the Appellate Boot Camp and the Advanced Civil Appellate Practice Course to be held in Austin on September 6-8, 2006. The scholarships will reduce tuition for the Boot Camp to \$50 and tuition for the Advanced Course to \$100, although applicants with significant financial need may request a full scholarship. Scholarships are open to all members of the Texas Bar, although preference will be given to Section members. The Section will award no more than 10 scholarships to each course. Applicants should submit a scholarship request no later than August 4 and scholarship awards will be announced no later than August 18. Scholarship recipients would pay the reduced tuition directly to the Section no later than September 5.

Applicants requesting a scholarship should submit a signed letter containing the following: (1) the applicant's name, address, phone number, bar number, and e-mail address; (2) whether the applicant is a member of the Appellate Section; (3) the course or courses for which a scholarship is requested; (4) a statement that the applicant is unable to attend the course in the absence of a scholarship; (5) a brief explanation of the basis for financial need (legal-aid lawyer, new lawyer, sole practitioner, recent illness, etc.); and (6) a brief description stating how the course would benefit the applicant in his or her practice and how it would benefit the practice of appellate law in the state.

Applicants may submit a signed request to Daryl Moore, Moore & Kelly, P.C., 1005 Heights Boulevard, Houston, Texas 77008.

Richard B. Phillips, Jr., Thompson & Knight LLP, Dallas

Patrice Pujol, Forman Perry Watkins Krutz & Tardy LLP, Houston

APPELLATE JURISDICTION

***Marshall v. Housing Authority of the City of San Antonio*, No. 04-0147, 2006 WL 508635, 2006 Tex. LEXIS 193, 49 Tex. Sup. Ct. J. 399 (March 3, 2006).**

This forcible detainer case presents two appellate jurisdiction issues: (1) the effect of the tenant's failure to post a supersedeas bond; and (2) whether the action is moot when the tenant is no longer in possession of the premises and the lease has expired. In an opinion by Justice Johnson, the Supreme Court dismissed the case as moot and vacated the underlying judgment.

Marshall leased a federally-subsidized apartment for a term ending on January 31, 2003. Following a shooting at the apartment, the Housing Authority gave notice of eviction and filed a forcible detainer action. The trial court entered judgment awarding the Housing Authority (1) possession of the apartment; (2) court costs; and (3) post-judgment interest. On Marshall's motion, the trial court set a supersedeas bond amount. Marshall filed an appeal, but did not post the bond. She also vacated the apartment.

By the time she filed her brief in the court of appeals, the lease term had expired. The court of appeals determined that the appeal was moot and dismissed the appeal, but did not vacate the trial court's judgment.

The Supreme Court first held that although a supersedeas bond is required to stop eviction, it is not necessary to preserve the right to appeal.

Even though she did not assert any right to possession of the apartment, Marshall asserted three reasons that the appeal was not moot: (1) she could be entitled to money damages if she prevailed; (2) she would suffer adverse collateral consequences from the judgment; and (3) the

judgment awarded court costs and post-judgment interest to the Housing Authority.

The Supreme Court rejected each of these arguments. First, the Court noted that Marshall would not be able to recover her alleged damages in the forcible detainer action. The Court also noted that the trial court's judgment should be vacated as moot, and that the vacatur would eliminate the adverse collateral consequences and Marshall's liability for costs and interest. The Court therefore dismissed the appeal as moot and vacated both the trial court's and the court of appeals' judgments.

***Thomas v. Long*, No. 03-0204, 2006 Tex. LEXIS 280, 2006 WL 1043429, 49 Tex. Sup. Ct. J. 532 (April 21, 2006).**

In this case involving an interlocutory appeal of a trial court's denial of a plea to the jurisdiction, the Supreme Court addressed two issues: (1) whether the court of appeals had subject matter jurisdiction, and (2) whether the trial court had jurisdiction to issue a declaratory judgment interpreting an order of the Civil Service Commission ("CSC"). The Court held that the court of appeals had jurisdiction, but that the trial court did not.

The underlying dispute concerns the interpretation of an order issued by the CSC. Jeanne Long was a jailer with the Harris County Sheriff's Department ("the Department"). She was fired for violating the employee manual. Long appealed her firing to the CSC, which, over a year later, decided that her firing was improper and ordered that she be reinstated with no loss of seniority or benefits. Neither party appealed that decision. In two letters, the Department told Long that, because of her absence for more than one year, she would be required to complete a physical ability test before returning to work, as required by the Department's employee manual.

Long refused. The CSC's order did not mention the test. A week later after the second letter was sent, Long sued Harris County Sheriff Tommy Thomas and the Department (collectively "Thomas") seeking a declaration that she was entitled to return to work with no loss of seniority or benefits, without taking any tests, without re-applying for employment, but with back pay dating from the Commission's order. She also sought a writ of mandamus compelling Thomas to comply with the Commission's order, and a temporary restraining order and temporary injunction allowing her to return to work immediately with no loss of seniority or benefits and without undergoing additional testing. Finally, Long asserted a retaliation claim.

Long moved for partial summary judgment on the declaratory judgment and mandamus actions, and Thomas filed a cross-motion for summary judgment on the same actions. He argued that the trial court lacked subject matter jurisdiction over those claims, and alternatively asked the court to decline exercising jurisdiction over the matter because the CSC had primary jurisdiction. Thomas also argued that even if the court had jurisdiction, he was entitled to judgment as a matter of law. The trial court granted a partial judgment for Long, holding that the CSC's order did not require any tests to return to work. The court also granted Thomas's motion for partial summary judgment in part, dismissed Long's request for mandamus relief, and entered an order identifying Long's claims for retaliation, attorney's fees, and back pay as the only remaining claims before the court.

Thomas filed a notice of an interlocutory appeal to challenge the court's denial of his plea to the jurisdiction. His notice acknowledged that his appeal included all three orders because they related to his argument disputing the trial court's jurisdiction. The court of appeals dismissed the appeal for two reasons: (1) there was no order denying Thomas's plea to the jurisdiction, and (2) §51.014(a) of the Texas Civil Practice and Remedies Code did not include an appeal of the

denial of a summary judgment based on lack of subject matter jurisdiction.

The Supreme Court reversed, holding that the court of appeals had jurisdiction to hear Thomas's interlocutory appeal under §51.014(a)(8). An interlocutory appeal is permitted when a trial court denies a governmental unit's challenge to subject matter jurisdiction, irrespective of the procedural vehicle used. Accordingly, Thomas's use of a summary judgment motion to challenge the trial court's jurisdiction was immaterial. In addition, the absence of a specific order denying Thomas's plea to the jurisdiction was immaterial. The trial court's rulings on the merits of some claims for which Thomas argued the trial court lacked subject matter jurisdiction constituted an implicit rejection of Thomas's jurisdictional challenges. Therefore, the trial court necessarily denied Thomas's challenge to the court's jurisdiction.

The Supreme Court also held that the trial court did not have subject matter jurisdiction. Under the legislative scheme governing reinstatement claims, the CSC is authorized by statute to regulate employment matters in the Department. Although the statute authorizing the creation of the CSC did not contain the words "exclusive jurisdiction," it authorized the CSC to extend specific rights to employees that are not available at common law. The Court held that once the employees of a department elect to create a commission, and the commission's rules create rights employees would not have at common law, the commission obtains exclusive jurisdiction over those matters. Here, Long exercised her rights under the scheme when she appealed her termination to the CSC. Although Long got a favorable decision on the reinstatement, the law required her to exhaust her administrative remedies by getting a CSC decision on Thomas's refusal to let her to return to work without a physical ability test. She failed to do this. Therefore, the trial court did not have subject matter jurisdiction over Long's reinstatement claims.

***Brittingham-Sada de Ayala v. Mackie*, No. 04-0160, 2006 Tex. LEXIS 525, 2006 WL 1579636, 49 Tex. Sup. Ct. J. 706 (June 9, 2006) (April 21, 2006 opinion withdrawn; motion for rehearing denied).**

In this case involving an ancillary probate proceeding, the Texas Supreme Court held that the court of appeals did not have jurisdiction because the trial court's order was interlocutory. Thus, the Court reversed the court of appeals' ruling and dismissed the appeal.

Maria Cristina Brittingham-Sada de Ayala ("Ayala") is a surviving daughter of a Mexican national, Juan Roberto Brittingham McLean ("Brittingham"). Brittingham died testate in Mexico in 1998, and his will was admitted to probate in a Mexican court. That matter is currently on appeal in Mexico.

In August 2000, Brittingham's widow filed an application to have her late husband's will admitted to probate in Texas. She alleged that he owned personal property (described as bank deposits, portfolio investments, and claims against third parties) in Webb County. Later that month, the trial court issued ancillary letters testamentary to Ms. Brittingham, naming her the independent executor of Brittingham's estate (the "Estate"). On behalf of the Estate, she sued Brittingham's daughters (including Ayala) and grandchildren and accused them of raiding the Estate's assets. (These defendants were the beneficiaries of 95% of his residuary estate, pursuant to the will.) In response, Ayala moved to dismiss the ancillary probate proceeding for lack of subject matter jurisdiction or, alternatively, to have Ms. Brittingham removed as executor. The trial court denied the motion, and Ayala appealed. Although Brittingham argued that the San Antonio Court of Appeals did not have appellate jurisdiction, the court concluded that it did. On the substantive issues, the court of appeals confirmed both the admission of the will to probate and the appointment of Ms. Brittingham as executor, but ultimately held that she should be removed as executor because of a conflict of interest.

The Supreme Court held that the court of appeals did not have jurisdiction over Ayala's appeal, even though Brittingham apparently no longer contested that jurisdiction. Probate proceedings are an exception to the "one final judgment" rule; in such cases, "multiple judgments final for purposes of appeal can be rendered on certain discrete issues." The need to review "controlling, intermediate decisions before an error can harm later phases of the proceeding" has been held to justify this rule. But determining whether an otherwise interlocutory probate order is final enough to qualify for appeal has been difficult. In the past, courts relied on the "substantial right" test to decide whether an ostensibly interlocutory probate order had sufficient attributes of finality to confer appellate jurisdiction. Under that standard, once the probate court adjudicated a "substantial right," the order was appealable. Applying the analysis used in the Court's earlier decision in *Crowson v. Wakeham*, the trial court's order was interlocutory because it did not dispose of all parties or issues in a particular phase of the proceedings.

In addition, the Court examined whether the trial court's failure to remove Ms. Brittingham as executor was immediately appealable as an order that "overrules a motion to vacate an order that appoints a receiver or trustee" under TCPRC §51.014(a)(2). The Court held that two types of orders were not the same for purposes of §51.014(a)(2). The language of that statute was not intended to confer appellate jurisdiction over orders refusing to remove estate executors. Moreover, an executor is not always equal to a trustee for all purposes.

ARBITRATION

***In re Dillard Dep't Stores, Inc.*, No. 04-1132, 2006 Tex. LEXIS 196, 2006 WL 508629, 49 Tex. Sup. Ct. J. 411 (March 3, 2006) (per curiam).**

This mandamus proceeding involves the enforceability of an arbitration clause in the context of an at-will employment relationship. The Texas Supreme Court held that the clause

was enforceable and not “illusory” as argued by former employee, and as such, the trial court should have compelled arbitration.

Delia Garcia worked as a sales associate at a Dillard store in El Paso. In August 2000, Dillard adopted an arbitration policy covering most employment disputes, including retaliatory discharge. In 2002, six months after requesting workers’ compensation benefits, Garcia was fired. She sued Dillard, claiming retaliatory discharge. When Dillard moved to compel arbitration, Garcia alleged that she never agreed to the arbitration policy, and even if she had, the agreement would be unenforceable because Dillard retained the right to modify the policy at any time, rendering its promise to arbitrate illusory. Siding with Garcia, the trial court refused to compel arbitration and the El Paso Court of Appeals denied Dillard’s mandamus petition.

The Texas Supreme Court granted Dillard’s mandamus petition, concluding that the trial court abused its discretion in finding that Garcia did not receive the arbitration policy. The evidence showed that Dillard presented the policy to all its employees at a mandatory meeting. Those present received a packet of materials, including an acknowledgment form explaining the arbitration policy, its effective date, and that employees were deemed to accept the policy by continuing their employment. Because Garcia continued to work at Dillard, if she received the acknowledgment form, then she agreed to arbitrate her claims. The Court held that despite her arguments to the contrary, Garcia’s own affidavit acknowledged her presence at the employee meeting and that she read the form explaining the policy. Although Garcia argued that she refused to sign the acknowledgement form because she “did not agree to be bound by terms of the agreement,” that argument was irrelevant because her continued employment, not her signature on the form, meant that she accepted the terms of the policy.

The Court also rejected Garcia’s claim that the arbitration agreement was illusory because Dillard retained the right to unilaterally modify or terminate the arbitration policy at any time. The promise to arbitrate did not depend on continued employment. On the contrary, the policy clearly stated that its purpose was to resolve claims arising with the employee’s termination. Therefore, Garcia’s at-will employment status did not render the arbitration agreement illusory.

***In re Vesta Ins. Group, Inc.*, No. 04-0141 (and four other cases), 2006 WL 662335, 2006 Tex. LEXIS 220, 49 Tex. Sup. Ct. J. 445 (March 17, 2006) (per curiam).**

In these consolidated mandamus proceedings, the Supreme Court again addressed the enforcement of arbitration clauses in disputes with non-signatories.

James Cashion, the plaintiff in the underlying case, was an agent for States General Insurance Company. The contract was terminable by either party with 180 days notice. They agreed to arbitrate any dispute “under or with respect to” the contract.

Vesta Insurance Group purchased all of the shares of States General and States General terminated its relationship with Cashion. Cashion then sued Vesta, two of its corporate officers, the agent who replaced him, and two of his affiliates for tortious interference with his contract with States General.

The defendants moved to compel arbitration and the trial court denied the motion. None of the parties moving to compel arbitration was a signatory to the arbitration agreement.

The Supreme Court noted that non-signatories must arbitrate “if liability arises from a contract with an arbitration clause, but not if liability arises from general obligations imposed by law.” But the Court also noted that claims for tortious interference “do not fall comfortably into either category.”

After considering the nature of tortious interference claims and the public policy favoring arbitration of disputes, the Court concluded that “tortious interference claims between a signatory to an arbitration agreement and agents or affiliates of the other signatory arise more from the contract than general law, and thus fall on the arbitration side of the scale.”

The Court also rejected Cashion’s claim that some of the defendants had waived their right to compel arbitration. The Court concluded that Cashion had not shown that these defendants had substantially invoked the judicial process to Cashion’s detriment.

The Court therefore conditionally granted the writ of mandamus directing the trial court to compel arbitration.

DEFAULT JUDGMENT

***Fidelity & Guaranty Ins. Co. v. Drewery Construction Co., Inc.*, 186 S.W.3d 571 (Tex. 2006) (per curiam).**

This default judgment case addresses both service errors and the *Craddock* factors. After a default judgment was entered, Fidelity filed a motion for new trial. The trial court denied the motion and the court of appeals affirmed.

The Supreme Court first held that partial omission of Fidelity’s full name on the citation was no basis for granting a new trial, because there was no assertion that the omission caused Fidelity not to answer.

The Court also rejected Fidelity’s argument that it was not served with the plaintiff’s amended petition before the default judgment was entered. The only difference between the two petitions was an amendment to allow long-arm service on a co-defendant through the Secretary of State. The Court held that the amended petition did not seek a “more onerous judgment than prayed for in the original pleading.”

The plaintiff conceded that Fidelity had met two of the three *Craddock* factors, but argued that Fidelity did not show that the default was the result of accident or mistake. Fidelity attached four affidavits to its motion for new trial. The affidavits explained the agent’s system for delivering papers to its clients. They also explained what likely happened to the papers in this case.

The court of appeals held that the affidavits were insufficient because they did not explain how the citation was lost. The Supreme Court reversed noting that “people often do not know where or how they lost something—that is precisely why it remains lost.” The Court held that the affidavits detailed the procedures for handling service papers in general and what was known about the citation to Fidelity. Because the affidavits showed the agent’s “efforts to establish a system that would avoid precisely what happened,” there was no evidence of intent or indifference. The Supreme Court therefore reversed the court of appeals judgment and remanded the case.

DISCOVERY SANCTIONS

***Am. Flood Res., Inc. v. Jones*, No. 05-0271, 2006 WL 1195394, 2006 Tex. LEXIS 436, 49 Tex. Sup. Ct. J. 606 (May 5, 2006) (per curiam).**

In this appeal of a discovery sanction, the Supreme Court upheld the trial court’s determination that discovery sanctions were warranted and remanded the case to the court of appeals to consider the amount of the sanctions award.

The discovery dispute centered on the depositions of attorney Harry Jones’s clients. The trial court granted a motion to compel the depositions and ordered them to begin on January 6, 2003. Jones then moved for reconsideration and moved to recuse the trial judge. He informed opposing counsel that his clients would not attend appear for deposition until the two motions were disposed. They did not appear as ordered on January 6. After that date passed, they withdrew

the recusal motion and the motion for reconsideration and terminated Jones.

The opposing party moved for discovery sanctions against both Jones and his former clients. After a hearing, the trial court sanctioned only Jones and ordered him to pay \$15,000. Jones requested findings of fact and conclusions of law. In those findings, the trial court stated the clients did not abuse the discovery process, but that Jones's conduct was sanctionable under Texas Rule of Civil Procedure 215.3.

The court of appeals reversed because the trial court relied on Rule 215.3, but did not find that the clients conduct was sanctionable. Sanctions under Rule 215.3 are reserved for discovery abuse by a party.

The Supreme Court first held that the court of appeals erred in considering only the trial court's findings of fact and conclusions of law. The court of appeals should have considered the entire record to determine whether the trial court abused its discretion.

The sanctions order did not refer to a specific rule, and the sanctions motion cited Texas Rule of Civil Procedure 215.2 as an additional basis for sanctions. Rule 215.2 provides for sanctions against either a party or the attorney advising the party. The Supreme Court found that there was evidence to support a sanction under Rule 215.2. The Court also found that there was sufficient evidence to support the trial court's finding that the clients had not abused the discovery process.

Jones also complained that the \$15,000 sanction was excessive. Because of the court of appeals' disposition, it did not reach Jones's complaint about the amount of the sanction. Therefore, the Supreme Court reversed the court of appeals and remanded the case to the court of appeals for consideration of Jones's arguments that the sanction was excessive.

ELECTION LAW

***In re Barnett*, No. 06-0275, 2006 Tex. LEXIS 281, 2006 WL 1042838, 49 Tex. Sup. Ct. J. 54 (April 21, 2006) (orig. proceeding) (per curiam).**

In this mandamus proceeding, the Texas Supreme Court held that the Dallas Independent School District and the District's Secretary of the Board of Trustees (collectively "DISD") abused their discretion by rejecting the application of school board candidate Marion Barnett because he omitted his street address from his permanent residence address on his application and instead provided that information in the adjacent space reserved for a separate mailing address.

On the filing deadline, Barnett filed an application to be a candidate for the DISD Trustee of District Six. In the space for "permanent residence address" Barnett wrote only "Dallas, TX 75224." In the adjacent space for "mailing address," he wrote his full street address. Barnett properly completed the rest of the application by providing his full name, date of birth, office and home telephone numbers, and his voter registration number. He also stated under oath that he had continuously lived in District Six for 33 years. On the same day, DISD rejected the application because it did not indicate a permanent address. The next day, Barnett submitted a corrected application. Nevertheless, DISD refused to put Barnett on the ballot.

To be eligible for DISD trustee, a candidate must reside in the district he seeks to represent. In addition, the application must contain the address of his permanent residence. DISD argued that because Barnett wrote his residence address in the mailing address space, it was "impossible" for DISD to establish his residency. The Supreme Court disagreed, and followed the similar case of *In re Bell*, where the Court held that residency in the proper voting precinct can be verified by examining the voter registration records. Here, Barnett's application included his voter registration number, and those records confirmed

his residency in District Six. Barnett also signed a sworn statement confirming his residency in District Six. The application provided sufficient information to allow DISD to determine Barnett's residency. Therefore, DISD should certify Barnett as a candidate and place his name on the ballot.

FAMILY LAW

***In re Mays-Hooper*, 189 S.W.3d 777 (Tex. 2006) (per curiam).**

In this case addressing the rights of grandparents, the Texas Supreme Court followed U.S. Supreme Court precedent—*Troxel v. Granville*—and held that the trial court's order granting visitation was improper.

Karen Mays-Hooper and her husband Kelly Hooper had a son. The couple divorced in 2000, and Kelly died in 2003. After Kelly's death, conflicts arose between Karen and her mother-in-law, Linda Thornton. Linda filed suit for court-ordered access to her grandson under Texas Family Code §153.432. Rejecting Karen's claims that the statute was unconstitutional, the trial court awarded Linda "possession" of the child for one weekend a month, two weeks in the summer, four days during Christmas vacation, and alternating Thanksgiving weekends, as well as access through weekly telephone calls. A panel of the Fort Worth Court of Appeals voted 2-1 to deny relief to Karen, and court voted 4-3 to deny the Karen's motion for rehearing *en banc*.

Following *Troxel*, which the Court found similar in all relevant aspects, the Supreme Court reversed: "[B]ecause the facts here are virtually the same, the judgment must be the same too." In this case, as in *Troxel*, there was no evidence that the child's mother was unfit, no evidence that the boy's health or emotional well being would suffer if the court deferred to her decisions, and no evidence that she intended to exclude Linda's access completely. Thus, the trial court's order granting visitation was improper.

The Court also rejected Linda's attempts to distinguish *Troxel*. Linda first argued that the Texas statute allowing access to "grandparents" was not as broad as the statute in *Troxel* that allowed access to "any person." However, the statute in *Troxel* was unconstitutional *as applied* to the specific context of grandparents related to a deceased father, which is the situation here. Linda also argued that the trial court gave special weight to Karen's determinations for the raising of her child. The Court rejected this too, citing well-established precedent that the State will not inject itself into the family relationship so long as a parent adequately cares for his or her child.

***In the Interest of A.M. and B.M.*, No. 03-0509, 2006 WL 1195328, 2006 Tex. LEXIS 466, 49 Tex. Sup. Ct. J. 585 (May 5, 2006).**

In this child support appeal, the Supreme Court considered the scope of the affirmative defense in Texas Family Code §157.008 to a suit to collect child support. That section states that an obligor parent who by agreement has possessed a child for periods exceeding court-ordered possession, and who has provided actual support for the child during that period "may request reimbursement for that support as a counterclaim or offset against the claim of the obligee."

It was undisputed that the obligor parent had possessed the couple's two children for periods exceeding court-ordered possession. After both children had reached the age of majority, the attorney general brought suit against the obligor parent for deficiencies in support payments. The obligor parent invoked §157.008 as a defense and also filed a counterclaim for reimbursement against the obligee parent.

The trial court found that the obligor parent owed a total of \$79,625 in support and that he had paid \$44,175, leaving a balance of \$35,450. The trial court also found that the obligor parent was entitled to both an offset and reimbursement for the periods of excess possession. These amounts exceeded the amount of support he had not paid. But the trial court affirmed the judgment of the IV-D court that the obligor parent pay \$2,331

because it reflected the IV-D's exercise of discretion not to allow all offsets and credits and to assess no interest.

The attorney general and the obligor parent appealed and the obligee parent did not. The court of appeals reversed. It concluded that the attorney general did not have standing to defend the obligee parent against the obligor parent's affirmative claim for reimbursement. The court of appeals also held that the obligor parent was entitled to all offsets and credits and entered judgment against the obligee parent for approximately \$5,000. The attorney general and the obligee parent sought Supreme Court review.

In an opinion by Justice Medina, the Court first considered the nature of the defense created by §157.008. The court of appeals approach allowed the obligor parent to receive both an offset and a reimbursement for periods of excess possession. This approach essentially shifted the child support obligation to the obligee parent during periods of excess possession. The Supreme Court rejected this approach and held that §157.008 provides for *either* an offset *or* a reimbursement, but not both. For periods of excess possession, the obligor parent may seek reimbursement if support was paid and must seek an offset if support was not paid. The Court also held that §157.008 is purely defensive and does not provide an independent right to seek reimbursement.

In light of that holding, the Court concluded that the attorney general does have standing to defend against a claim under §157.008.

Finally, the Court considered the burden of proof on the obligor parent who invokes §157.008. The attorney general contended that the obligor parent must present at least a rough estimate of actual expenses during the period of excess possession. The Court noted that it was undisputed that the obligor parent provided sole support for the children during the periods of excess possession. Therefore, the court of appeals could reasonably presume that the obligor parent was entitled to equate his monthly support obligation to the

actual support he provided each child during the periods of excess possession.

Justice Johnson dissented from the final section of the Court's opinion. He concluded that the obligor parent "was statutorily obligated to prove the amount he provided [during the periods of excess possession] in order to receive an offset or reimbursement.

INSURANCE

***Minnesota Life Ins. Co. v. Vasquez*, No. 04-0477, 2006 Tex. LEXIS 257, 2006 WL 889724, 49 Tex. Sup. Ct. J. 498 (April 7, 2006).**

In this bad faith insurance case, a unanimous Texas Supreme Court reversed the insured's award of extra-contractual damages, holding that there was no evidence the carrier knew its actions were false, deceptive or unfair.

In 1998, Joe and Elia Vasquez bought a mortgage accidental death policy from Minnesota Life. The policy promised to pay their home mortgage if either died due to an accident. In June 2000, Joe was hospitalized, suffered a seizure, and lapsed into a coma. After emerging from the coma, Joe, alone in his hospital room, apparently fell, hit his head, and died. On October 6, 2000, Ms. Vasquez filed a claim with Minnesota Life requesting payment of her \$41,000 mortgage balance. She submitted copies of the death certificate and autopsy report. After reviewing the documents, Minnesota Life sought advice from a medical consultant as to whether Joe's death resulted from an accident "independently of all other causes," as required by the policy. The consultant advised that he needed to see the relevant medical records. To get the records, Minnesota Life hired PMSI, a vendor specializing in that line. PMSI requested the medical records several times without success. Minnesota Life kept Ms. Vasquez informed of these activities, though notices were occasionally sent to her old address.

On January 25, 2001, Ms. Vasquez's attorney sent Minnesota Life a \$110,000 demand letter for

violations of the Texas Insurance Code. Minnesota Life's efforts to get the medical records continued to flounder until it finally sent its own demand letter to the hospital. The records were at last produced on March 25, 2001. As it turned out, they disclosed no additional details about Joe's death. Deciding there was no other way to determine exactly what happened, Minnesota Life paid the balance on the Vasquez mortgage on March 28th. Two days later, Minnesota Life was served with Ms. Vasquez's lawsuit alleging violations of the Insurance Code. At trial, the jury awarded Ms. Vasquez nearly \$350,000 in mental anguish damages, extra-contractual damages and attorneys' fees. The Corpus Christi Court of Appeals affirmed.

The Supreme Court reversed, holding that there was no evidence Minnesota Life knowingly committed an unfair settlement practice, as required by the Insurance Code. The two unfair settlement practices submitted to the jury were (1) failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim with respect to which the insurer's liability has become reasonably clear; and, (2) failing within a reasonable time to affirm or deny coverage of a claim to a policyholder.

The Court first held that there was no evidence Minnesota Life failed to settle Ms. Vasquez's claim after coverage had become reasonably clear. The available documents suggested that both a seizure and an accident caused Joe's death. The documents stated only that the head injury "followed" the seizure disorder, and listed both as a single cause, which suggested that both played a role in the death. As these documents were all the insurer had, if coverage was not reasonably clear from them, it was not reasonably clear at all. Because the policy covered death from an accident "independently of all other causes," coverage was not reasonably clear.

The Court further held that there was no evidence that Minnesota Life knew it was handling the claim in a false, deceptive, or unfair way. The Insurance Code defines failing to affirm or deny coverage within a reasonable time as an "unfair

settlement practice"; if such conduct is committed knowingly, an insured may seek mental anguish and extra-contractual damages. Here, Minnesota Life admitted that it did not pay the claim within a reasonable time after Ms. Vasquez sent everything requested from her (i.e., the death certificate and autopsy report). However, Minnesota Life presented undisputed evidence that the hospital from which the records were requested was slow to return calls and unresponsive to repeated requests. Other evidence confirmed that, at the time in question, four-month delays were not infrequent. Although there was plenty of evidence of unaccountable delays, there was no evidence that Minnesota Life was aware that its protracted efforts to get the medical records were false, deceptive, or unfair to Ms. Vasquez, or that Minnesota Life ever misled Ms. Vasquez. There was nothing to suggest that Minnesota Life intentionally prolonged the investigation or that its efforts were a sham to avoid paying what it admitted was a relatively small claim. There was also no evidence that Minnesota Life knew Ms. Vasquez was suffering mental anguish in the interim. Even her own expert admitted that he would not have paid her claim based on the autopsy report and death certificate alone. As it turned out, the medical records added nothing new to those documents, but it is undisputed that no one knew that at the time. Because there was no evidence that Minnesota Life was actually aware that it was handling the claim in a way that was false, deceptive, or unfair, the award of extra-contractual damages was incorrect.

***Allstate Indem. Co. v. Forth*, No. 05-0057, 2006 Tex. LEXIS 279, 2006 WL 1043529, 49 Tex. Sup. Ct. J. 542 (April 21, 2006) (per curiam).**

Because there were no allegations of damages or injury, the Texas Supreme Court held that the insured did not have standing to sue her insurance company for settling her medical bills in what she considered to be an arbitrary and unreasonable manner.

Pat Forth's daughter required medical treatment from a car accident. The personal-injury-

protection (PIP) of Forth's Allstate auto insurance policy, covered "reasonable medical expenses incurred for necessary medical services." Allstate settled Forth's medical bills for less than the actual amount billed. Forth sued Allstate for injunctive and declaratory relief, alleging that it arbitrarily reduced her bills without using an independent and fair evaluation to determine what amount of her medical expenses were reasonable. According to Forth, Allstate routinely discounts medical expenses by comparing those expenses to a database of reasonable medical expenses (usually about 85% of the amount billed by the medical provider). Noticeably, Forth did not claim that Allstate's conduct had caused her any damage.

In the trial court, Allstate filed a motion to dismiss, arguing that Forth lacked standing because she had no claim for damages, and Allstate had not caused her any actual injury; the trial court granted the motion. The court of appeals affirmed in part and reversed in part, holding that Forth lacked standing to seek prospective relief because Allstate no longer insured her, but that she could seek retrospective relief for any injury suffered while she was a policy holder. The court concluded that if Allstate paid less than the full amount of the "reasonable expenses," then Forth could claim injury because the policy required that Allstate pay reasonable expenses.

The Supreme Court reversed and rendered judgment dismissing Forth's claims. To have standing under Texas law, a party must have suffered a threatened or actual injury. Here, Forth does not claim that she has any unreimbursed, out-of-pocket medical expenses. She does not claim that any medical provider withheld treatment as a result of Allstate reducing their bills, or threatened to sue her for any deficiency, or harassed her in any other manner. From all appearances, Forth's medical providers accepted the amount Allstate paid them without complaint, thereby satisfying Allstate's obligation under the policy. As such, Forth has no claim of injury.

Without an injury, Forth has no standing and her claims should have been dismissed.

***Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc.*, No. 03-0647, 2006 WL 1195330, 2006 Tex. LEXIS 439, 49 Tex. Sup. Ct. J. 589 (May 5, 2006).**

The Supreme Court was asked to determine the scope of coverage for a third-party under an excess insurance policy. In an opinion by Justice Green, the Court held that the excess policy did not cover the third-party's sole negligence.

ATOFINA hired Triple S Industrial Corporation to perform maintenance and construction work at ATOFINA's Port Arthur oil refinery. The contract between ATOFINA and Triple S required Triple S to indemnify ATOFINA against personal injuries and property damage sustained in the performance of the contract unless they were attributable to ATOFINA's sole negligence. Triple S was required to purchase at least \$500,000 in comprehensive general liability ("CGL") insurance and at least \$500,000 in excess insurance. Triple S also agreed to name ATOFINA as an additional insured on both policies.

The CGL policy named ATOFINA as an additional insured, but specifically excluded ATOFINA's sole negligence from coverage. The excess policy had two relevant definitions of insured. One included any entity insured under a policy of "underlying insurance," but the coverage would be no broader than the underlying insurance. The other definition included any entity for which Triple S had agreed to provide insurance afforded in the excess policy.

A Triple S employee was killed in a workplace accident and his survivors sued ATOFINA and Triple S. The CGL insurer quickly tendered its policy limits, and ATOFINA claimed coverage under the excess policy. The excess insurer denied coverage. ATOFINA eventually settled with the survivors for an amount in excess of the

primary policy limits. ATOFINA then sought to recover the remainder from the excess insurer. The trial court granted the excess insurer's summary-judgment motion. The court of appeals reversed and held that Triple S had agreed to provide insurance for ATOFINA to the same extent Triple S had coverage. This holding treated ATOFINA the same as if it had been a primary insured on the excess policy.

The Supreme Court first recognized that the relevant contractual inquiry is not the agreement between ATOFINA and Triple S, but the excess insurance policy. The Court held that the policy was expressly limited to the coverage provided by the primary policy. Because the primary policy excluded liability based on ATOFINA's sole negligence, the Supreme Court concluded that the excess policy was similarly limited.

The Court rejected ATOFINA's argument that the second definition of insured was not limited to the scope of the primary policy. The Court concluded that the two definitions had to be read together, and that ATOFINA's reading would ignore the restriction created by the first definition.

Therefore, the Supreme Court reversed the court of appeals and remanded to the trial court to determine whether the injury was caused by ATOFINA's sole negligence.

INVERSE CONDEMNATION

***State v. Delany*, No. 04-0628, 2006 WL 6115760, 2006 Tex. LEXIS 416, 49 Tex. Sup. Ct. J. 557 (April 28, 2006) (per curiam).**

In this case, the Supreme Court reaffirmed its holding in *County of Bexar v. Santikos* that "when a tract has 'no businesses, homes driveways, or other improvements of any kind,' an impairment claim cannot be sustained on the basis that 'someday a developer might want to build a driveway at the single most difficult and expensive location on the entire property.'"

The *Santikos* opinion was issued a few months after the court of appeals issued its opinion in this

case. The Supreme Court in a per curiam opinion reversed the court appeals based on the reasoning from *Santikos*.

Here, the state demolished a road that provided access for the Delany's property to other public roads. The property was separated from the nearest public road by an roadless parcel owned by the state. The Delany's sued for inverse condemnation, asserting that the removal of the road substantially and materially impaired access to their property. The state argued that the Delany's could request—and the state would have to grant—driveway access across the state-owned parcel.

The Delany's first argued that they had an appurtenant easement guaranteeing access to the demolished road. The Supreme Court concluded that easements of access do not guarantee access to any specific road absent a specific grant.

The Delany's next asserted that the petition for condemnation in which the state took the parcel that made the Delany's property landlocked constituted a specific grant of access to the now-demolished road. The Court found that the petition created only a general easement of access.

The Court held that the Delany's would be entitled to impairment damages if the removal of the road "substantially and materially impaired access to their property." The evidence presented a trial focused on two hypothetical driveways, one at either end of the Delany's property. The trial court found that these two driveways would leave the property with "an unsuitable means of access to serve its intended purpose or highest and best use."

The Court concluded that because the Delany's property was unimproved, the mere fact that hypothetical development plans may have to be modified was insufficient to show that access was substantially and materially impaired. The Court also noted that a driveway could be built exactly where the former road had been. Thus, getting to the property would be no more difficult than it was before the road was demolished. The Court

therefore reversed the portion of the trial court's judgment granted damages for impaired access and rendered a take-nothing judgment.

JUDICIAL DISQUALIFICATION

***Tesco Am., Inc. v. Strong Indus., Inc.*, No. 04-0269, 2006 Tex. LEXIS 208, 2006 WL 662740, 49 Tex. Sup. Ct. J. 448 (Mar. 17, 2006).**

In this 7-2 decision, the Texas Supreme Court held that an appellate judge is disqualified from a case if, unbeknownst to her, before she took the bench another attorney at her very large firm played a very small role in the early stages of the appeal of that case.

Strong sued Tesco and FS New Products ("FSNP") for fraud, breach of contract, and misappropriation of trade secrets. Based on favorable jury findings, the trial court entered judgment in Strong's favor for over \$2 million in fraud and exemplary damages against Tesco and over \$100,000 for breach of contract damages against FSNP. A unanimous panel of the First Court of Appeals, with Justice Laura Higley authoring the opinion, affirmed as to Tesco, but reversed and rendered a take-nothing judgment as to FSNP.

Tesco filed a motion for rehearing that included a motion to disqualify Justice Higley and reassign the case to a different panel. Tesco claimed that Justice Higley was an attorney at Baker Botts at the same time that another attorney at the firm briefly appeared as lead appellate counsel for Strong. No appellate brief mentioned the firm's very limited involvement in the appeal, and no evidence showed that Justice Higley knew about it. However, Tesco claimed that she was constitutionally disqualified, and that the appeal should be assigned to a new panel. The panel members disagreed, but referred Tesco's motions to the other court members. Sitting *en banc*, a majority denied both motions. The original panel then reissued a substantially similar opinion, again authored by Justice Higley. Tesco then

appealed the denial of its motions and the panel's judgment on the underlying merits.

The Supreme Court confronted two issues: (1) whether Justice Higley was constitutionally disqualified, and if she was, then (2) whether the Court should decide the underlying merits, or reverse and remand the case to the court of appeals. On the first issue, the Court held that Justice Higley was disqualified. The Court based this decision on the origins of "vicarious disqualification" and their reading of TRCP 18b(1), TRAP 16.1, the Texas Constitution, and their opinion in *In re O'Connor*. Rule 18b(1), which applies to trial judges, requires disqualification if "a lawyer with whom they previously practiced law served during such association as a lawyer concerning the matter." Appellate Rule 16.1, however, has no such language. Nevertheless, in the *O'Connor* decision, the Court held that Rule 18b(1) "recognizes that a judge is vicariously disqualified under the Constitution as having 'been counsel in the case' if a lawyer with whom the judge previously practiced law served as counsel to a party concerning the matter during their association."

Based on this language, the Court then decide whether the Constitution or just Rule 18b(1) required vicarious disqualification, ultimately holding that both did. Rule 18b(1) was not intended to expand disqualification further than constitutionally required. Both the rule and the Constitution specify the same three grounds for disqualification (interest, connection, and counsel) and no others. Thus, the Court's statement in *O'Connor* that Rule 18b(1)(a) "recognizes that a judge is vicariously disqualified *under the Constitution*" reflected its understanding that "the rule was intended to *expound* rather than *expand* the Constitution." In addition, Texas law imputes one attorney's knowledge to all attorneys in a firm, which is an irrebuttable presumption for attorney disqualification. The Court's decision here comports with this presumption and protects the integrity of the profession by applying this consideration to judicial disqualification. Finally, the Court's decision effectuates the purpose of the

state constitution to protect against counsel in a case becoming a judge in the case, “a guarantee that makes no distinction between trial and appellate judges.”

Having determined that Justice Higley was constitutionally disqualified, the Court then addressed the fate of the court of appeals’ opinion, an issue of first impression under these circumstances. The Court applied the analysis it used in *Mapco, Inc. v. Forrest* and held that the judgment must be reversed because the opinion on which it was based was authored by a justice who was constitutionally disqualified: “[I]t would be stretching the Constitution too far to simply assume she was not involved.” Thus, the two remaining justices may decide this case, but they must do so without the participation of a disqualified justice.

The Court also refused to consider the merits of the appeal while a defect in the court of appeals’ decision still existed. According to the majority, a constitutional disqualification involves more than appearances because the substantive right is to an appeal *decided by qualified judges alone*. “It is precisely because appellate court opinions are the product of more than one justice that, if one is disqualified, the process must be conducted again.” The Court also refused to hold that a different panel of the court of appeals should hear the remand because (1) the two other members of the original panels were not disqualified, and (2) a party does not have a right to have its appeal heard by any particular panel.

The two-member dissent disagreed with the majority’s refusal to address the merits of the appeal. The dissent argued that remanding the case to the court of appeals was for appearance only, and was a “futile exercise” that will “waste everyone’s time and resources.” The appellate court changed little of the original opinion after the disqualification issue was raised; therefore, the same or similar decision is practically guaranteed. Also, remanding the case sends the wrong message by suggesting that appellate justices do not endorse the opinions and judgments they join, but merely rubber-stamp the

author’s analysis and conclusions. Because the court of appeals’ opinion was joined by two other justices who were not disqualified, and because all of the substantive issues had been fully briefed, the Supreme Court should determine the merits.

JURY CHARGE

***Shupe v. Lingafelter*, No. 05-0083, 2006 WL 1195354, 2006 Tex. LEXIS 435, 49 Tex. Sup. Ct. J. 604 (May 5, 2006) (per curiam).**

In this case, the Supreme Court considered whether the refusal to submit a requested instruction constituted reversible error.

This case arose out of a multi-vehicle accident. The plaintiff settled with one of the defendant-drivers and proceeded to trial against the other defendant-driver and his employer. The plaintiff asserted a negligent entrustment claim against the employer.

The jury charge contained one liability question addressing the negligence of the defendants. At the charge conference, the plaintiff requested an instruction regarding negligent entrustment, and the trial court refused to give it. The jury found did not find that the negligence of the remaining defendant-driver or his employer caused the accident. They assigned 100% of the fault to the settling driver.

On appeal, the plaintiffs asserted that the refusal to give the requested negligent entrustment instruction was reversible error. The court of appeals agreed and reversed and remanded for a new trial.

The Supreme Court held that the failure to give the instruction was harmless error in light of the jury’s other answers. To recover on negligent entrustment, the plaintiffs would have to prove that the defendant-driver’s negligence was a proximate cause of the accident. The jury was properly instructed regarding the liability of the defendant-driver. The jury’s answer indicated either that the jury did not find he was negligent

or did not find that any negligence was a proximate cause of the accident. Because of these findings, any error in refusing to submit the negligent entrustment question was rendered harmless. The Court therefore reversed the court of appeals and reinstated the trial court's judgment.

JURY SELECTION

Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743 (Tex. 2006).

Justice Jane Bland (sitting by appointment) delivered the Court's opinion regarding a trial court's restriction on voir dire questioning. Justice Medina filed a dissenting opinion, which was joined by Justice Wainwright and Justice Johnson. Justice Wainwright also filed a dissenting opinion, which was joined by Justice Johnson.

This is a products liability suit against the manufacturer of a vehicle involved in an accident. A four-year-old girl seated in the front seat died from injuries she sustained when the airbag deployed. She was not wearing a seatbelt. The plaintiffs claimed that the airbag was defectively designed. Hyundai argued that she would not have been killed if she had been wearing a seatbelt or if she had been sitting in the backseat.

During voir dire, plaintiffs' counsel asked whether the fact that Amber was not wearing a seatbelt would determine their verdict. Because so many jurors answered that it would, the judge dismissed the jury panel. During voir dire with the second panel, the judge questioned the jurors along the same lines, and there were a significant number of affirmative responses. The judge dismissed the second jury panel.

Before the third voir dire began, the judge told counsel they would be restricted to asking general questions about the panel members' attitudes about seatbelt use and their own seatbelt habits. The court did not allow plaintiffs' counsel to ask whether the panel members could not be fair and

impartial if the child was not using a seatbelt, no matter what the other evidence was. The court of appeals held that the trial court abused its discretion in refusing to allow the question.

The Supreme Court disagreed. The Court first noted that the purpose of voir dire is to expose improper biases that form the basis for statutory disqualification and to permit counsel to make intelligent use of peremptory challenges. The Court also noted that it is improper to ask prospective jurors what their verdict would be if certain facts were proved. The Court concluded that "a trial court does not abuse its discretion in refusing to allow questions that seek to determine the weight to be given (or not to be given) a particular fact or set of relevant facts. The Court held that such questions do not reveal improper subject-matter bias.

The Court decided that the question that the trial court refused was an improper "commitment" question, and that the trial court did not abuse its discretion in refusing to allow it.

The Court also held that the plaintiffs had not preserved their complaint regarding other seatbelt questions they intended to ask the panel members. The Court held that properly preserving error requires a timely objection and a sufficiently detailed explanation of the proposed area of inquiry that the trial court will be able to determine whether it is proper. Because plaintiffs' counsel only identified one area of inquiry, the Court held that any error as to other questions related to seatbelt use was not preserved.

Justice Medina's dissent focused on the preservation of error. Justice Medina agreed that the question phrased by plaintiffs' counsel was an improper attempt to pretest the weight the prospective jurors would give the fact that the child was not wearing a seatbelt. But he found that there were other inquiries regarding seatbelt use that would have been proper. Justice Medina also found that the trial court was sufficiently apprised of the types of questions that plaintiffs'

counsel wanted to ask, and that error was therefore preserved. He also concluded that the error was harmful because “it is impossible to know here whether the verdict would have been different had the jury been seated properly.” He also noted that, in accordance with *Cortez v. HCCI-San Antonio, Inc.*, the trial court should have determined whether the prospective jurors that indicated that the fact that the child was not wearing a seatbelt would be determinative were actually biased.

Justice Wainwright’s dissent also focused on error preservation. He noted that by the third voir dire, the trial court was “well aware plaintiffs’ counsel sought to ask questions concerning juror attitudes for seat belt usage of others, particularly of minors. He noted that in addition to the question identified by the majority, plaintiffs’ counsel indicated that he wanted to ask the same questions he had asked at the first voir dire, describing them as questions about belting and seat belting habits.

LABOR & EMPLOYMENT

Matagorda County Hosp. Dist. v. Burwell, 189 S.W.3d 738 (Tex. 2006) (per curiam).

In this per curiam decision, the Texas Supreme Court held that a statement in a personnel policy manual that “employees may be dismissed for cause” did not constitute an agreement that dismissal may be *only* for cause, and thus did not modify the at-will employment relationship.

Christine Burwell had been an employee of the District for nearly ten years when she was placed on probation and later terminated for her poor attitude, breaches of patient confidentiality, and unprofessional conduct. Disputing these reasons, Burwell, then 52, sued for age discrimination and breach of employment contract. After the District’s summary judgment was reversed on appeal, the case was tried before a jury, who found for Burwell on her contract claim but against her on the discrimination claim. A divided court of appeals affirmed.

Reversing the judgment for Burwell, the Supreme Court held that the District’s personnel policy manual did not modify the at-will employment relationship. Regarding dismissal, the manual stated that “[e]mployees may be dismissed for cause such as insubordination, serious misconduct, or for inability to perform the duties of their job satisfactorily....” According to the Supreme Court, this language plainly provided that dismissal may be for cause, but did not suggest that dismissal may be *only* for cause, “and that limitation cannot simply be inferred.”

In addition, the Court held that neither Burwell’s nor her supervisors’ subjective understanding of this provision could vary the plain terms of the manual. Burwell argued that two District managers involved in her firing testified that they could terminate an employee only for cause. The Court held that such evidence was insufficient: “neither [manager] could vary the plain terms of the manual by his subjective belief any more than Burwell could.”

Ed Rachal Foundation v. D’Unger, No. 03-1101, 2006 Tex. LEXIS 278, 2006 WL 1043081, 49 Tex. Sup. Ct. J. 537 (April 21, 2006) (per curiam).

In this whistleblower case, the Texas Supreme Court followed precedent and again declined to create a common-law cause of action for all whistleblowers.

Claude D’Unger was an officer and director of the Ed Rachal Foundation, a charitable organization located in Webb County on the Texas-Mexico border. Due to its location, Mexican migrants often cross the Foundation’s property. D’Unger became concerned that the ranch’s foreman, Ed DuBose, was harassing the migrants. He reported his concerns to the Foundation’s CEO, who told him “to drop it”; D’Unger took this as an instruction not to report DuBose to law enforcement. Later, DuBose caught three migrants and turned them over to Border Patrol agents. D’Unger then contacted the Border Patrol agents, who told him they had no knowledge or record of the incident. Concerned that a crime

may have been committed, D’Unger contacted a congressman, two sheriffs, the Texas Attorney General’s office, a senator, the IRS, a district judge, and the Mexican Consulate. When the Foundation’s CEO learned of D’Unger’s activities, he first suspended him, and then fired him when he refused to resign.

D’Unger sued the Foundation for breach of contract and wrongful termination, and the Foundation’s CEO for tortious interference. Despite conclusive evidence from the Border Patrol confirming that no crime had occurred—DuBose had safely delivered the migrants to the Border Patrol the same day he caught them—a Nueces County jury found for D’Unger on all his claims, and the trial court rendered judgment for \$364,194 in lost wages and \$193,001 in attorney’s fees. A unanimous Corpus Christi Court of Appeals reversed the breach of contract and tortious interference claims, but split on the wrongful termination claim, with the majority affirming the judgment.

The Supreme Court affirmed the appellate court’s holding on the breach of contract claim. The Court held that there was no evidence to support D’Unger’s breach of contract claim because he was an at-will employee and there was no unequivocal agreement binding the Foundation to employ him for any specific period of time. In addition, the Court reversed D’Unger’s wrongful termination claim. This claim was based on the whistleblower exception to at-will employment, which made it unlawful to terminate an employee if the sole reason was his refusal to perform an illegal act. But here, D’Unger was not asked to perform an illegal act. When he told the Foundation’s CEO about his concerns about DuBose, D’Unger was told “to drop it,” and his silence was not a criminal act. Nor was the evidence that D’Unger was asked to join a criminal conspiracy because he was not asked to participate in any impending criminal act, and there was no evidence that he ever intended to engage in a criminal act. The only possible crimes related to this instruction were those criminalizing harassment or conspiracies to

intimidate potential witnesses. However, there was no evidence that D’Unger was himself a witness or was asked to tamper with any witnesses.

***City of Houston v. Jackson*, No. 04-0465, 2006 Tex. LEXIS 258, 2006 WL 889697, 49 Tex. Sup. Ct. J. 492 (April 7, 2006).**

In this unanimous decision, the Texas Supreme Court held that §143.134(h), a penalty provision of the Local Government Code involving the intentional failure of a supervisor to implement a decision of a civil service commission, does not apply to a grievance examiner’s unappealed recommendation under §143.130 of the Code.

Robert Jackson, a Houston fireman, sought a voluntary transfer to Fire Station 70. When his request was denied, Jackson initiated a grievance pursuant to Subchapter G of Chapter 143 of the Local Government Code. That subchapter establishes a four-step process for resolving complaints of aggrieved fire fighters. Proceedings under that process increase in formality as the grievance advances from Step I to Step IV, when a final and binding decision is made by an independent hearing examiner or the Commission. When Jackson’s transfer was denied under the proposed solutions presented at Steps I and II of the grievance process, he elected to pursue his Step III appeal before a Commission-appointed grievance examiner instead of an independent third party hearing examiner.

After the informal hearing, the grievance examiner recommended Jackson receive a transfer to any station other than Station 70, that had an opening on November 21, 1996, the date of the recommendation. The grievance examiner also noted that Jackson was responsible for applying for his choice of transfer. Neither Jackson nor the Fire Chief appealed the grievance examiner’s recommendation to the Commission; consequently, the recommendation was deemed accepted.

Jackson never filed a proper transfer request. He was later transferred to another fire station. Unhappy, Jackson submitted and withdrew several transfer requests; those that were not withdrawn by Jackson were denied because they did not comply with the grievance examiner's recommendation. He then filed a second grievance, arguing that the original recommendation had never been implemented. This grievance was disposed of by telling Jackson that no ruling could be made on a grievance examiner's recommendation. He did not appeal this decision.

Two months later, Jackson sued the City of Houston and the Fire Chief of the Houston Fire Department, alleging the City's failure to implement the grievance examiner's recommendation violated §143.134 of the Local Government Code. He sought declaratory and mandamus relief, \$798,000 in statutory penalties and interest. After an appeal that addressed the City's plea to the jurisdiction and was eventually resolved against the City, the case went to trial. The jury found that the Fire Chief had intentionally failed to implement Jackson's transfer request, and awarded \$477,000 in statutory penalties, attorney's fees, post-judgment interest, and other expenses. Both the City and Jackson appealed, the City challenging the trial court's judgment on a number of grounds, including lack of jurisdiction, and Jackson contesting the period for which the trial court awarded the statutory penalty. The court of appeals affirmed.

The Supreme Court reversed, holding that the trial court lacked jurisdiction over Jackson's statutory penalty claim. Before resolving the penalty provision, the Court first determined that the law of the case doctrine did not prevent it from construing §143.134. The Court held that the doctrine does not bar reconsideration of the initial conclusion in a subsequent appeal, nor does it prevent the Court from considering an issue before it for the first time.

Chapter 143 of the Local Government Code provides the four-step process governing

Jackson's grievance. During his grievance process, Jackson was dissatisfied with the decisions through Step II. In appealing the Step II decision, Jackson had two Step III options. He could (1) "submit a written request stating the person's decision to appeal to an independent third party hearing examiner pursuant to the provisions of Section 143.057," or (2) "file a Step III grievance form with the director in accordance with Section 143.130," in which event the Commission appoints a grievance examiner to oversee the appeal. Jackson chose the former option, which effectively placed his grievance outside the influence of the Commission and its appointees.

According to the Court, Jackson's decision also removed the statutory penalty as an available remedy in any subsequent action. Section 143.134(h) states that the penalty applies only to final decisions made by "the commission under section 143.131" or "a hearing examiner under section 143.129." Therefore, by its plain terms, the penalty provision does not extend to a grievance examiner's recommendation under §143.130, the Step III option that Jackson chose. Chapter 143 contains substantive differences between grievance examiners and independent third party hearing examiners, and those differences necessarily informed the Court's construction of §143.134. The Legislature never intended to equate a "decision" of a "hearing examiner" (the language used in the penalty provision) with a "recommendation" of a grievance examiner.

LEGAL MALPRACTICE

***Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, No. 04-0681, 2006 Tex. LEXIS 440, 2006 WL 1195334, 40 Tex. Sup. Ct. J. 598 (May 5, 2006).**

In this legal malpractice case, the Supreme Court held that an estate's personal representative may maintain a legal malpractice claim on behalf of the estate against the decedent's estate planners. David Terk hired the law firm of Oppenheimer, Blend, Harrison, & Tate to prepare his will. After

his death, David's daughters, Kristin and Kimberly ("the Terks") became the joint, independent executors of their father's estate. As executors, the Terks sued several attorneys and the Oppenheimer firm (collectively, "the Attorneys") for legal malpractice, alleging that they were negligent in drafting their father's will and in advising him on asset management. They claim the estate incurred over \$1.5 million in tax liability that could have been avoided by competent estate planning. The trial court granted the Attorneys' summary judgment motion and the court of appeals affirmed, citing *Barcelo v. Elliott*, in which the Supreme Court held that beneficiaries could not maintain a malpractice action against a decedent's estate-planning lawyer because the lawyer lacked privity with the non-client beneficiaries and thus owed them no duty.

Here, the Supreme Court reversed and, drawing a distinction between the claims in *Barcelo* and the Terks' claims on behalf of the estate, held that personal representatives can bring legal malpractice claims on behalf of a decedent's estate. In *Barcelo*, the Court considered whether beneficiaries dissatisfied with the distribution of estate assets could sue an estate-planning attorney for legal malpractice after a client's death. The Court noted that suits brought by bickering beneficiaries would necessarily require extrinsic evidence to prove how a decedent intended to distribute the estate, creating a "host of difficulties." Ultimately, the Court held that the non-client beneficiaries could not maintain a suit against the decedent's estate planner because "the greater good is served by preserving a bright-line privity rule which denies a cause of action to all beneficiaries whom the attorney did not represent."

In contrast to the issue in *Barcelo*, the issue here was whether the same policy concerns applied to suits brought *on behalf of* the decedent client by his estate's personal representatives. The Court held that such concerns did not apply. Estate-planning malpractice claims seeking recovery for pure economic loss are limited to recovery for property damage. Such claims do not involve

beneficiaries bickering over the relative size of their bequest or omission from the estate plan. Therefore, an attorney's ability to represent a client zealously is not compromised. Additionally, in cases involving depletion of the decedent's estate due to negligent tax planning, the personal representative need not prove how the decedent intended to distribute the estate. Instead, the representative need only demonstrate that the decedent intended to minimize tax liability for the estate as a whole. Finally, while the interests of the decedent and a potential beneficiary may conflict, a decedent's interests should mirror those of his estate. Thus, the conflicts that concerned the Court in *Barcelo* were not present in this malpractice suit brought on behalf of the estate.

In so ruling, the Court disapproved of the holding in *Estate of Arlitt v. Paterson*, a San Antonio Court of Appeals' decision, that an estate-planning malpractice claim does not accrue during a decedent's lifetime—and therefore does not survive the decedent—because the estate's injuries do not arise until after death. Even though an estate may suffer significant damages after a client's death, this does not preclude survival of an estate-planning malpractice claim because the lawyer's alleged negligence occurred while the decedent was alive.

MALICIOUS PROSECUTION

***Kroger Texas, LP v. Suberu*, No. 03-0913, 2006 WL 1195331, 2006 Tex. LEXIS 441, 49 Tex. Sup. Ct. J. 592 (May 5, 2006).**

In this case, the Court considered the legal sufficiency of evidence of malice and lack of probable cause. In an opinion by Justice Jefferson, the Court concluded that there was legally insufficient evidence to support the jury's finding of lack of probable cause and of malice.

Theresa Suberu was stopped leaving a Kroger store and accused of shoplifting. She was arrested, but eventually acquitted of misdemeanor theft. She sued Kroger for malicious prosecution.

Three Kroger employees testified that they saw her leaving the store with a cart full of unsacked goods. Suberu testified that she was not pushing a cart when she left the store. The jury found for Suberu and the court of appeals affirmed.

Two of the elements of a claim for malicious prosecution are a lack of probable cause and malice on the part of the defendant toward the plaintiff. The Court noted that the purpose of these two elements is to “guard against a jury’s natural inclination to punish those who, through error but not malevolence, commence criminal proceedings against a person who is ultimately exonerated.” A malicious prosecution plaintiff must overcome a presumption that the defendant acted reasonably and had probable cause to initiate the criminal proceedings.

Suberu relied on her testimony that she was in the store for a few minutes to fill a prescription, that she left to get money from her car, and that she did not have a cart. The court of appeals reasoned that the jury must have concluded that the Kroger employees did not see Suberu leave the store with a cart full of unsacked goods.

The Supreme Court noted that the issue is not whether Suberu *actually* left the store with a cart of unsacked goods. Instead the issue is whether Kroger reasonably believed she did. The Court concluded that Suberu’s testimony alone was insufficient to prove the Kroger employee’s state of mind at the time she stopped Suberu and accused her of shoplifting. Even if the jury could reasonably conclude that Suberu did not steal groceries, there was no evidence from which the jury could conclude that Kroger did not reasonably believe she was stealing groceries.

The Court also concluded that there was insufficient evidence to support the jury’s verdict for Suberu on her claim of intentional infliction of emotion distress. The Court relied on its analysis of the elements of malicious prosecution to determine that there was no evidence that Kroger or its employees knowingly provided false information to police.

Justice Johnson (joined by Justice Medina, and in part by Justice Wainwright) concurred in part and dissented in part. Justice Johnson concluded that the jury’s verdict could have been based on a conclusion that Kroger’s honest belief that Suberu was leaving the store with a cart of unsacked goods was not reasonable. He therefore would have found that the evidence was sufficient as to Kroger.

He concurred with the Court’s opinion as to the individual Kroger employee, because he was not present when Suberu left the store and thus relied on the statements of other Kroger employees. Justice Johnson would have held that there was no evidence that the employee did not honestly and reasonably believe that Suberu was leaving the store with a cart. Finally, Justice Johnson suggested that the Court should reconsider its prior holdings that a lack of probable cause will support an inference of malice without further examination of the evidence. Justice Wainwright joined only that part of Justice Johnson’s opinion.

MEDICAL MALPRACTICE

***Olveda v. Sepulveda*, 189 S.W.3d 740 (Tex. 2006) (dissent from the Court’s denial of the plaintiffs’ petition for review; O’Neill, J., dissenting).**

In this medical malpractice case, the San Antonio Court of Appeals affirmed the trial court’s dismissal of Sepulveda’s claims because he failed to file a sufficient expert medical report. The Supreme Court denied Sepulveda’s petition for review. Justice O’Neill issued a dissenting opinion, asserting that the report was sufficient to support the plaintiff’s survivorship claim.

Dr. Sepulveda, a urologist, was one of a team of doctors who treated Frieda Hernandez, who was 7½-months pregnant and complaining of severe abdominal pain. Sepulveda assisted in the placement of a ureteral stent to relieve kidney obstruction; no fetal monitoring was performed. The baby died during the procedure; three days later, Hernandez was dead of cardiac arrest and

multiple organ failure caused by preeclampsia and HELLP syndrome.

Hernandez's relatives sued the health-care providers, including Sepulveda, for wrongful death and survivorship. They alleged that if the doctors had followed the proper standard of care, they would have saved the baby and Hernandez by timely discovering and treating her condition. To support their claim against Sepulveda, plaintiffs filed an expert report by Dr. Suresh, an obstetric anesthesiologist. Arguing that the report was insufficient under former Article 4590i, Sepulveda filed a motion to dismiss, which was granted by the trial court and affirmed by the court of appeals.

Contrary to the full Court's denial of review, Justice O'Neill asserts in her dissent that the report was sufficient as to the survivorship claim. An expert of a different specialty may testify so long as the subject of inquiry is common to and equally recognized and developed in both fields. Accordingly, the fact that Suresh was an obstetric anesthesiologist and Sepulveda was a urologist was not fatal because there are certain standards universally regarded as ordinary medical standards beneath which no common or community standards may fall and that apply across multiple schools of practice and to any physician. Suresh did not address the standard of care particularly applicable to Sepulveda's specialty, urology; instead, she addressed the general standard of care applicable to all physicians and surgeons performing a procedure on a patient in the third trimester of pregnancy. She was therefore properly qualified as an expert in this case.

As for Suresh's report, it did not establish a causal connection between Sepulveda's conduct and Hernandez's death from preeclampsia and HELLP Syndrome. However, the report specifically identified how Sepulveda's conduct failed to meet the applicable standard of care and purports to connect that conduct to the baby's death, asserting that Sepulveda's failure to monitor uterine contractions and the fetal heart

rate resulted in the baby's death. For this reason, Justice O'Neill concludes that the report was sufficient to support the survival action and would have granted the petition for review on this basis.

NEGLIGENCE—DUTY

***Kroger Co. v. Elwood*, No. 04-1133, 2006 Tex. LEXIS 467, 2006 WL 1302198, 49 Tex. Sup. Ct. J. 623 (May 12, 2006) (per curiam).**

In this personal injury case, the Supreme Court held that Kroger owed no duty to warn its employee, Billy Elwood, not to place his hand in a car doorjamb when loading groceries, and that Kroger did not need to supply additional equipment to Elwood for him to perform his job safely.

Elwood, a courtesy clerk at a Kroger grocery store, was injured when a customer shut her car door on his hand while he was loading her groceries into her vehicle. Elwood had placed one hand in the car's doorjamb, and one foot on the grocery cart to keep it from rolling down a slope in Kroger's parking lot. In the trial court, a jury found Kroger liable for Elwood's injuries, and the court of appeals affirmed.

The Supreme Court reversed and rendered that Elwood take nothing. Although an employer has a duty to use ordinary care in providing a safe workplace, the employer owes no duty to warn of hazards that are commonly known or already appreciated by the employee. Placing one's hand in a car doorjamb is a commonly known hazard, and one that Elwood testified he already knew. In addition, there was no evidence that loading groceries in a sloped parking lot was an unusually dangerous job, or that other courtesy clerks or even customers sustained similar injuries while loading groceries there.

NURSING HOME NEGLIGENCE

St. Luke's Episcopal Hospital v. Marks, No. 05-0693, 2006 WL 1195464, 2006 Tex. LEXIS 438, 49 Tex. Sup. Ct. J. 609 (May 5, 2006) (per curiam).

Without reference to the merits, the Supreme Court vacated the court of appeals judgment and remanded for further consideration in light of *Diversicare General Partner, Inc. v. Rubio*, 185 S.W.3d 842 (Tex. 2005).

PREMISES LIABILITY

Wal-Mart Stores, Inc. v. Spates, 186 S.W.3d 566 (Tex. 2006) (per curiam).

This case involves constructive notice of a hazardous condition in a retail store. The Supreme Court reaffirmed its holding in *Wal-Mart Stores, Inc. v. Reece*, 81 S.W.3d 812 (Tex. 2002).

In this case, the plaintiff alleged that an empty plastic six-pack ring caused her to fall and injure herself. She conceded there was no evidence that Wal-Mart created or knew about the hazard. Instead, she alleged constructive knowledge. She alleged that the ring was directly behind a Wal-Mart employee within 3-5 feet of the employee, and that there was no other person in aisle other than the employee for at least 30-45 seconds.

The trial court granted Wal-Mart's motion for summary judgment, but the court of appeals reversed.

The Supreme Court held that the evidence was insufficient to raise a fact issue on the combination of proximity, conspicuity, and longevity required by *Reece*. Because the summary judgment record contained no evidence that Wal-Mart should have discovered the ring, the Court reversed the court of appeals and rendered judgment for Wal-Mart.

PRODUCTS LIABILITY

General Motors Corp. v. Hudiburg Chevrolet, Inc., No. 03-0987, 2006 WL 741552, 2006 Tex. LEXIS 243, 49 Tex. Sup. Ct. J. 464 (March 24, 2006).

In this products liability appeal, the Supreme Court (in an opinion by Justice Hecht) addressed claims of indemnity against component parts manufacturers under both the common law and §82.002 of the Texas Civil Practice and Remedies Code. The suit arose from an accident involving a one-ton truck. In the accident, the truck's bed and chassis separated, pulling the dual fuel tanks' filler systems apart, and spilling fuel. The resulting fire injured one driver and killed the other. The plaintiffs sued Hudiburg Chevrolet (the seller) and GM (the manufacturer of the chassis).

The truck consisted of a drivable chassis manufactured by GM and an attached bed, manufactured by Koenig, Inc. Hudiburg hired B&M Truck Equipment to assemble the bed and attach it to the chassis.

The plaintiffs did not sue Koenig, but Hudiburg asserted cross-claims against Koenig for indemnity and contribution as a responsible third party. Hudiburg and GM settled with the plaintiffs, and Hudiburg brought suit against GM, Koenig, and B&M for indemnity under both common law and §82.002.

The trial court granted summary judgment for GM and Koenig on several grounds: (1) Hudiburg was not entitled to common-law indemnity because Hudiburg was independently liable for the plaintiffs' injuries; (2) the plaintiffs' pleadings did not allege that Koenig's bed was defective, so no statutory right to indemnity was triggered; (3) due process does not permit a manufacturer to be subject to indemnification without a determination that its product is defective; (4) a component-part manufacturer (GM) cannot, consistent with due process be liable for losses due to defects in a finished product that are unrelated to the component part; and (5) because

GM had settled with the plaintiffs, the losses for which Hudiburg sought indemnity were necessarily related only to Hudiburg's own conduct or Koenig's bed.

The court of appeals reversed and held: (1) the summary-judgment evidence did not establish that the chassis-body separation would not have occurred but for the faulty attachment of the body and chassis, which was a prerequisite to Hudiburg's independent liability on any theory; (2) the plaintiffs' pleadings could be reasonably construed to include a claim that Koenig's bed was defective; (3) Koenig's due process claim was premature, because it had not been held liable for indemnification; and (4) GM's due process claim failed absent proof that GM would be required to indemnify Hudiburg for losses not attributable to GM's chassis.

The Supreme Court first noted that statutory indemnity has potentially-offsetting indemnity obligations. The manufacturer of a component part claimed to be defective has a duty to indemnify and innocent seller/manufacturer of a finished produce which incorporates the component part. But the manufacturer of a defective finished product must indemnify the innocent seller/manufacturer of a component product. If neither the evidence shows that neither is innocent, both indemnity claims will fail. If the evidence shows that both are innocent, the indemnity claims will offset.

The Supreme Court then held that the plaintiffs' pleadings could not be construed to plead that Koenig's bed was defective. Merely pleading that the vehicle was defective could not be read to include an assertion that the vehicle's component parts were defective. Therefore, the court concluded that Hudiburg had not right of indemnity against Koenig under §82.002.

The Supreme Court affirmed the court of appeals' determination that the summary-judgment record did not conclusively establish the Hudiburg was independently liable for the loss. The evidence did not establish the injuries would have been

different if the fuel filler line had been connected differently and if the bed had been fastened to the chassis as securely as GM contends it should have been.

The Court also held that merely selling the defective truck was not independent liability, either under common law or the statute. But if B&M's faulty assembly caused the injuries, that fault would be attributable to Hudiburg, who hired B&M, and would preclude indemnity.

Because the summary-judgment evidence was insufficient, the Court held that GM and Koenig were not entitled to summary judgment on the ground that Hudiburg was independently liable. Because of the lack of evidence in the record, the Court refused to consider whether Hudiburg could be entitled to partial indemnity.

Finally, the Court reaffirmed its holding in *Bostrom Seating Inc. v. Crane Carrier Co.*, that a component part manufacturer has no statutory duty to indemnify for losses resulting from the fact that the product, as opposed to one of its components, was defective. The Court noted that the summary-judgment record was insufficient to make a determination regarding the extent to which Hudiburg defended and settled the plaintiffs' claims as they related to the chassis manufactured by GM.

The Court remanded the case to the trial court for further proceedings.

SUPERSEDEAS BONDS

***In re Smith*, No. 06-0107, 2006 WL 1195327, 2006 Tex. LEXIS 437, 49 Tex. Sup. Ct. J. 609 (May 5, 2006) (per curiam).**

In the case, the Supreme Court considered the new supersedeas bond requirements enacted in House Bill 4. Richard and Ginger Honaker obtained a judgment against Smith and Main Place (a company controlled by Smith) for over \$800,000 and commenced post-judgment discovery. Smith and Main Place filed notices of

appeal, but did not initially post a supersedeas bond. Two days before Smith was to be deposed, Smith and Main Place each deposited \$10.00 cash in lieu of bond and filed net worth affidavits. Smith averred that he had a negative net worth and that Main Place's net worth was \$0.

The Honakers filed a contest to the net worth affidavits and moved for sanctions and to compel discovery. They claimed: (1) that the affidavits were false; (2) that they needed additional discovery on Main Place's net worth; and (3) that Smith's closely held corporation, R.A. Smith & Company, Inc. was Smith's alter ego. R.A. Smith & Company was not named in the Honaker's suit.

The trial court held hearings on the contests and issued two orders. The first found that the affidavits were insufficient to establish either Smith's or Main Place's net worth. The order also found that R.A. Smith & Company was Smith's alter ego. Without stating a basis, the trial court made a finding as to Smith's net worth, but did not make a finding on Main Place's net worth. The second order granted the Honakers' motion to compel discovery and ordered sanctions against Smith.

After the court of appeals affirmed the rulings, Smith and Main Place filed motions in the Supreme Court under Texas Rule of Appellate Procedure 24.4 for review of the supersedeas award. The Court treated the motions as petitions for writ of mandamus.

The Court first found that the trial court erred in not stating with particularity its basis for determining Smith's net worth and in failing to make a finding on Main Place's net worth. But the Court rejected Smith's argument that the Honakers could not raise the alter ego theory post-judgment. The Court reasoned that if R.A. Smith & Company's is Smith's alter ego, then its net worth may be used to calculate Smith's net worth for supersedeas bond purposes. The Court noted, however, that R.A. Smith & Company cannot be liable for the judgment.

The Court also rejected Smith and Main Place's argument that the court erred in compelling post-judgment discovery. Smith and Main Place argued that the discovery was stayed by their supersedeas bonds. The Court noted that the post-judgment discovery was permissible under Texas Rule of Appellate Procedure 24.2(c)(2). The court declined to review the sanction award in the mandamus proceeding. The Court remanded the case for the entry of findings as to Smith's net worth and the alter ego finding and for a finding regarding Main Place's net worth.

ZONING

***City of White Settlement, Tex. v. Super Wash, Inc.*, No. 04-0340, 2006 Tex. LEXIS 194, 2006 WL 508628, 49 Tex. Sup. Ct. J. 404 (Mar. 3, 2006).**

A unanimous Supreme Court held that the City of White Settlement could not be estopped from enforcing a zoning ordinance, even though a City building official mistakenly approved Super Wash's building plan and issued a permit that violated the ordinance.

Super Wash's property was originally zoned for multi-family housing. In 1986, it was rezoned for commercial use. Before the rezoning and at the behest of area residents, the City imposed restrictions on the property's commercial use by passing an ordinance aimed at minimizing traffic in the neighborhood. The ordinance required the property to have a six-foot fence along Longfield Drive, which separated the commercial property from the residential neighborhood.

Unaware of the ordinance, Super Wash bought the property in 2000 to build a new car wash, and submitted its site plan to the City for approval. The plan called for an exit onto Longfield Drive, and did not include a fence along that street. Because the City's zoning map did not reference the fence requirement, a City building official mistakenly approved Super Wash's plan and issued a building permit. Days later, neighborhood residents brought the ordinance to the City's attention and insisted that Super Wash

comply with it. Four days after issuing the permit, the City told Super Wash that it had to build a fence along Longfield. But 16 days later and when construction was 45% complete, the City told Super Wash that the fence had to be continuous, so the planned exit onto Longfield had to be removed. Super Wash amended its plan and, under protest, completed construction in line with the City's order.

Super Wash sued the City on four theories involving the ordinance, including that the City should be estopped from enforcing it. Both parties moved for summary judgment. The trial court granted the City's motion and denied Super Wash's motion. Super Wash appealed. The Fort Worth Court of Appeals held, among other decisions, that material issues of fact precluded summary judgment on the estoppel claim, and remanded the case on that issue. The City then appealed to Supreme Court on the estoppel claim, the sole decision appealed by either party.

The Supreme Court held that the City could not be estopped from enforcing the ordinance, despite the mistakes made by the City building official. The Court began its analysis by noting the general rule that a city cannot be estopped from exercising its governmental functions. Barring estoppel helps preserve the separation of powers because legislative prerogative would be undermined if a government agent could, through a mistake, effectively repeal a statute.

The two exceptions to this rule do not apply in this case. The first exception is that justice requires the estoppel due to the City's fraud or other intentional act. The Court noted that Super Wash had been operating its business without the Longfield exit, so the exit was not necessary for its continued operation. The evidence also showed that the City notified Super Wash quickly upon learning of its error. In fact, there was no evidence that the City deliberately misled Super Wash, or that the City benefited from this mistake.

Regarding the second exception, that the estoppel does not interfere with a governmental function, the Court clarified the meaning of "interfere." The Court first noted that precluding a city from performing a specific governmental function in a single instance is not *per se* interference; otherwise, every attempt at estoppel would be considered interference. Instead, the relevant inquiry was whether estopping the city in a single instance would bar the future performance of that governmental function or impede the city's ability to perform its other governmental functions. Governmental functions include traffic control. As such, estopping the City would impede its attempt to answer the concerns of neighborhood residents about commercial traffic. Assuming that estopping the City here would allow it to enforce other zoning laws, the estoppel would still preclude the City from using its chosen method of regulating traffic along Longfield Drive and reduce its discretion in deciding how to best protect the public's safety, both of which are classic governmental functions.

***City of Dallas v. Vanesko*, 189 S.W.3d 769 (Tex. 2006).**

The Texas Supreme Court held that a city can enforce a zoning ordinance against a property owner whose substantially completed new home has been built in violation of the ordinance, even though the city had given preliminary approval to the owner's building plans.

Dallas residents Doug and Grace Vanesko were building a new home. As part of the project, the Vaneskos designed the home themselves and acted as their own general contractor. They submitted their building plans to the City of Dallas for a permit and paid an extra fee for the City to do a more extensive review to ensure that the plans complied with all codes and ordinances. The City approved the plans and issued a permit. During the next year as the new house was being built, City inspectors visited the site without complaint. But after the roof was framed in, an inspector told the Vaneskos that the structure was too high, and violated the zoning ordinance.

Rather than order the work to be stopped, the inspector recommended that the Vaneskos seek a height variance from the City Board of Adjustment (“the Board”). The City staff and 80% of the Vaneskos’ neighbors supported the request for a variance. The remaining 20% of the neighbors did not actively support the variance, but neither did they object to it. Nevertheless, the Board denied the Vaneskos’ variance request. They appealed the decision to a Dallas County district court that reversed the Board’s decision. A divided court of appeals affirmed.

The Supreme Court held that the Board did not abuse its discretion by denying the Vaneskos’ variance request. The Board’s standard of review was limited to specific criteria. The Court focused on the criterion that the ordinance forbids a variance that relieves only a self-created or personal hardship. The hardship encountered by the Vanesko was not related to the area, shape or slope of the parcel, but was instead their own creation: it arose from decisions they made in designing their home, as opposed to the nature and configuration of the lot. Moreover, the Vaneskos chose to design their house in a way that created the hardship; nothing about the lot required such a high roof, especially one that violated the zoning ordinance. Because the Vaneskos’ hardship was personal and self-created, the Board’s decision was justified.

The Vaneskos also argued that Board’s decision was improperly influenced by the city attorney’s instruction forbidding them from considering whether a permit had been issued in error, or whether the structure had already been built. However, the Court held that the attorney’s actions were irrelevant to its analysis: “[W]e can hardly say the Board abused its discretion by failing to consider a factor that it was not directed, by ordinance, to consider in the first place.”

In her dissent, Justice O’Neill was concerned that the Board misunderstood the level of discretion that the ordinance afforded. Specifically, the city attorney incorrectly admonished the Board to ignore evidence that (1) the city had erroneously issued the permit upon which the Vaneskos relied,

(2) the house had been substantially built in accordance with the plans the city had approved before the problem was discovered, (3) the cost to remedy the problem would be significant, and (4) there might be an adverse aesthetic effect on the neighborhood if the roof was torn off and re-pitched. If the board had taken this evidence into account and nevertheless denied the Vaneskos’ variance request, then the decision would have been within the Board’s considerable discretion. Because the record did not confirm whether the Board felt constrained by the admonishment, Justice O’Neill would remand the case to the Board for reconsideration of the Vaneskos’ variance request with the proper legal principles in mind.

**STATE BAR OF TEXAS
APPELLATE SECTION**

Annual Meeting

**Thursday, September 7
5:00 p.m.**

brief business meeting,
haiku contest winners announced,
cocktail reception,
cool appellate paraphernalia

immediately following the
Advanced Civil Appellate Practice Course

at the
**The Four Seasons Hotel
Austin, Texas**

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Texas Courts of Appeal Update—Substantive

Jerry D. Bullard, Adams, Lynch & Loftin, P.C., Bedford

David F. Johnson, Winstead Sechrest & Minick, P.C., Fort Worth

CONSTITUTIONAL LAW: ECCLESIASTICAL ABSTENTION DOCTRINE

***Patton v. Jones*, Cause No. 03-04-00389-CV, 2006 WL 1294803 (Tex. App.—Austin, May 11, 2006, n.p.h.).**

This controversy arises out of a claim of defamation against a minister. Patton was a director of youth ministries at Oak Hill United Methodist Church. Patton was terminated after several ministers discussed issues concerning Patton's dating habits, placing of arms around girls, and internet habits. Further, the chairwoman told several members of the congregation that what Patton did was "really bad" and that they had "to get him out before something happened at our church." Patton sued the church and individuals for tortious interference with his employment contract and defamation relating to the statements made in the decision making process and to the congregation members after the decision was made.

The defendants filed a motion to dismiss claiming that the trial court did not have jurisdiction over the dispute under the principles of the First Amendment of the United States Constitution. The trial court granted the motion, and Patton appealed.

The court of appeals described the First Amendment and stated that civil courts exercise no jurisdiction where a subject-matter of the dispute is strictly and purely ecclesiastical in its character. This principle is often referred to as the "ecclesiastical abstention doctrine," and as applied to employment decisions, a civil court does not have jurisdiction to decide controversies if the employment decision concerned a member of the clergy or an employee in a ministerial position. Courts should apply the doctrine not only to ministers but also to "all employees of a

religious institution, whether ordained or not, whose primary functions serve its spiritual and pastoral mission."

In this case, Patton was a director of youth ministries that included administrative duties such as coordinating the transportation, logistics, and travel arrangements for youth outings. He was responsible for organizing these trips, and made decisions regarding the activities. Further, he participated in the activities as a chaperone. The court stated: "Organizing and chaperoning these events for the youth ministry are activities that furthered the church's mission, which went beyond purely secular tasks . . ." The court concluded that as director, Patton functioned in a ministerial capacity.

The court of appeals affirmed the trial court's dismissal as to the tortious interference claim and as to the defamation claims that revolved around the decision to terminate Patton's employment. However, the court reversed the trial court as to the defamation claims involving statements to congregation members after the decision was made. The court stated: "because the statements contained in the chairwoman's letter and made in response to the congregation members' questions were outside the bounds of the Church's employment decision, they do not appear to be of an ecclesiastic nature, and therefore should not have been dismissed for lack of subject matter jurisdiction." The court then remanded the case for further proceedings on the remaining defamation claims.

INSURANCE/EXTRACTIONAL CLAIMS

***In re Lucinda J. Myers*, No. 07-06-0050-CV, 2006 WL 305033 (Tex. App.—Amarillo, February 9, 2006) (orig. proceeding).**

This original proceeding arises out of a suit in which Lucinda Myers (“Myers”) claimed that Mega Life and Health Insurance Company (“Mega”) refused to honor a life insurance policy covering her husband, who died of cancer shortly after the policy was issued. Mega asserted (via counterclaim and affirmative defense) that the policy was subject to rescission due to the pre-existing nature of the insured’s illness and his failure to disclose same when applying for the insurance. On the eve of trial, by letter ruling, the trial court ordered that Mega’s claim of rescission initially be tried to the jury. Meyers contended that the ruling realigned the parties and impermissibly shifted the burden of proof in the case.

The court of appeals noted that a trial court has great discretion over the conduct of a trial. It observed that disposing of the rescission counterclaim could dispense with the need to try Meyers’ claims. Arguably Myers’ success was dependent upon the existence of an enforceable insurance contract. Without such a contract, there could be neither a breach of contract nor an insurer/insured relationship giving rise to the duties Mega allegedly breached. Given this scenario and because the conservation of judicial resources and the efficient resolution of disputes are recognized policy goals, the court of appeals could not say that the trial court’s decision lacked reason.

The court of appeals also noted that, while the equitable relief of rescission can be asserted defensively, nothing prevented a party from asserting it affirmatively through an original petition. In that regard, the trial court had discretion to sever and try the rescission claim separately from those dependent upon the existence of a contract. Because the trial court had discretion to sever the claims, the court of appeals found nothing arbitrary or unreasonable in

the trial court following a procedure having a like effect.

LITIGATION: EXPERT TESTIMONY FOR LOSS OF BUSINESS INCOME

***Wyndham International, Inc. v. Ace American Insurance Co., et al.*, 186 S.W.3d 682 (Tex. App.—Dallas 2006, no pet.)**

Wyndham International, Inc. (“Wyndham”) appealed a judgment granting no-evidence motions for summary judgment in a coverage suit brought against ten insurance companies and Wyndham’s insurance broker, Marsh USA, Inc. (“Insurance Companies”). Wyndham sought over \$66 million for business income losses allegedly caused by the airline hijackings and terrorist attacks on September 11, 2001.

The United States government issued orders, in the face of the September 11 attacks, that halted all airline service, both commercial and private, for several days. Wyndham claimed these orders and the significantly increased travel security measures, along with the reaction of the world’s population, caused reservations to be cancelled and inhibited the public from using its 163 hotel and resort properties for at least the balance of September and October 2001.

Wyndham’s sole damages expert was David A. Borghesi, a C.P.A. and consultant. The Insurance Companies moved to exclude Borghesi on the basis that his opinions were unreliable and irrelevant. The trial court ordered the exclusion of Borghesi’s testimony.

Shortly after the order excluding Borghesi was signed, the trial court granted the Insurance Companies’ no-evidence motions for summary judgment, which were based on the grounds that there was no evidence to support Wyndham’s claim on the policies of insurance, nor was there any evidence of damages, in view of the exclusion of Wyndham’s sole damage expert.

On appeal, Wyndham challenged the exclusion of Borghesi, who based his entire opinion on monthly forecasts of room revenues prepared by Wyndham. To arrive at his conclusions, Borghesi compared the forecast data to the monthly, actual room revenues. The Insurance Companies claimed the forecasts were faulty and unreliable.

Wyndham claimed lost business income of over \$66 million for 163 of its properties; but, Borghesi's revenue forecasts were created in the course of Wyndham's business for only 101 of its properties. Borghesi testified he "extrapolated" the projections for sixty-two properties from the forecasts for the 101 properties by separating the sixty-two properties into categories by size and type of service, which Wyndham contends accounts for the differences between the different types of hotels in Wyndham's portfolio.

The Insurance Companies claimed that Borghesi's extrapolation was a subjective categorization that failed to address the "myriad factors" affecting the financial experience of each hotel, including geographic location, type, and seasonality. Further, the Insurance Companies claimed that extrapolations are only permissible if the expert based the analysis on a "scientifically valid mathematical formula."

The court of appeals concluded that Borghesi's opinion was not based upon a reliable foundation, and, accordingly, was irrelevant for several reasons. First, the Wyndham forecasts were not reliable. They were not prepared pursuant to any company-wide "hard and fast" rules and the business forecasts used by Borghesi as the basis for calculating lost income were significantly flawed. Second the extrapolations of revenue projections for sixty-two properties, which were drawn from the forecasts for the other 101 properties, were unreliable and flawed. Finally, Borghesi's failure to compensate for evidence of rebookings or for any other causes that could have affected Wyndham's profitability other than the events of September 11, 2001, rendered his opinion little more than speculation.

MEDICAL MALPRACTICE: SUFFICIENCY OF EXPERT REPORT

The University of Texas Southwestern Medical Center v. Summer and Layton Dale, Individually and as Next Friends of Macy Dale, a Minor, 188 S.W.3d 877 (Tex. App.—Dallas 2006, n.p.h.).

This is a case in which the University of Texas Southwestern Medical Center ("UT Southwestern") claimed that a lawsuit filed by Summer and Layton Dale ("Dale") should have been dismissed because Dale did not file an expert report in compliance with §74.351 of the Texas Civil Practice and Remedies Code.

In the original petition, Dale alleged that four UT Southwestern resident physicians negligently treated their daughter ("Macy") and that such negligence proximately caused Macy's injuries. Dale did not allege UT Southwestern was directly negligent, but alleged UT Southwestern was liable for the negligence of its residents.

Dale served UT Southwestern with a report by a medical expert specifically naming each resident and purporting to set forth how each resident breached the applicable standard of care. UT Southwestern never objected to the report, but filed a motion to dismiss the claims alleging that Dale did not file an expert report "as to UT Southwestern."

UT Southwestern did not dispute that Dale served UT Southwestern with a report within 120 days of filing suit. Nor did UT Southwestern dispute that the report (1) named the applicable residents, (2) stated the applicable standard of care, (3) stated how each resident breached the standard of care, and (4) stated how the breach proximately caused the injury. Instead, UT Southwestern claimed that Dale filed no expert report at all with respect to UT Southwestern because the report did not name "UT Southwestern."

Dale did not assert that UT Southwestern was itself negligent. Rather, Dale's claims against UT Southwestern were based entirely upon the actions of its resident physicians. Because Dale did not allege that UT Southwestern was directly negligent, the court of appeals held that an expert report was not required to mention UT Southwestern by name.

OIL AND GAS: DETERMINATION OF TITLE TO INTEREST OUTSIDE OF TEXAS

Trutec Oil and Gas, Inc. v. Western Atlas International, Inc., No. 00-16476-CV, 2006 WL 1071237 (Tex. App.—Houston [14th Dist.] April 25, 2006, n.p.h.).

This controversy involved whether a Texas court had jurisdiction to determine rights under an oil and gas license in another country. Trutec sued multiple parties for breach of contract and various tort claims arising from its interest in an oil and gas license in Nigeria. The trial court granted the defendants' motion to dismiss the case due to a lack of jurisdiction to resolve title disputes to property in foreign jurisdictions.

The court of appeals stated the general rules regarding the adjudication of interests in real property located outside of Texas:

Texas courts may not adjudicate title to realty in another state or country; they do not have subject matter jurisdiction over the property outside of Texas. Of significance here, interests in oil and gas rights such as working interests and royalty interests in oil and gas leases are considered interests in real property. As a result, the general prohibition against determining rights in real property located in other states or countries extends to rights in oil and gas leases in other states or countries.

Trutec alleged that these general rules did not apply because its claims only tangentially related to real property. Trutec also argued that the general rules did not apply because they related to

oil severed from realty that was really a personal property interest.

The court of appeals disagreed and held that all of Trutec's claims first required an adjudication of property interests outside of Texas. In other words, before the trial court could determine the merits of Trutec's breach of contract, breach of fiduciary duty, tortious interference, and other related claims, it would have had to decide whether Trutec did have an interest in the license.

Trutec's final argument was that its interests were in a license that was not a real property interest. The court disagreed stating "that license essentially was an oil and gas lease, allowing the producer to drill for oil and to obtain a mining lease if sufficient quantities of oil were discovered and successfully produced." The court of appeals affirmed the trial court's dismissal.

PERSONAL INJURY: VOIR DIRE

Brooks v. Armco, Inc., No. 06-04-00111-CV, 2006 WL 1329888 (Tex. App.—Texarkana May 17, 2006, n.p.h.).

This controversy involved an asbestos plaintiff's complaint about a trial court's decision to not strike jurors for cause, in improperly restricting a *Batson* challenge hearing, and in granting defense counsel an extra peremptory strike after sustaining one *Batson* objection. Brooks sued Armco due to the death of her husband from mesothelioma allegedly caused by asbestos that her husband was exposed to at work. During Brooks' voir dire questioning regarding the burden of proof, three panel members stated that they would use the criminal "beyond a reasonable doubt" standard in this tort case. Brooks moved to strike those members for cause. The trial court instructed the jury on the proper burden of proof, and upon further questioning, all members stated that they could follow the trial court's instructions. The trial court denied the strikes for cause. The court of appeals affirmed this decision stating:

For a bias to disqualify a juror, it must appear that the state of the mind of the juror leads to the natural inference that he will not or cannot act with impartiality. . . . [W]e find that [the panel members] were not biased as a matter of law, and the trial court did not abuse its discretion in refusing to strike them for cause. A reasonable construction of the record is that the prospective jurors in question simply stated what they thought the law ought to be on the burden of proof requirement, but when the trial court explained that it would instruct them as to the burden of proof required in this case, they indicated to counsel for both sides that they had no problem applying the burden of proof the court said they must use and that they would not try to apply any higher burden of proof. None indicated they could not or would not follow the law on the burden of proof as given to them by the trial court.

Brooks also complained about the trial court's conduct in limiting the Batson hearing. Specifically, Brooks complained that the trial court failed to give a reasonable opportunity to cross-examine defense counsel about his race-neutral reasons, and improperly failed to allow Brooks to examine defense counsel's voir dire notes. The court of appeals disagreed. It held that the trial court has discretion over the presentation of evidence and did not abuse its discretion where it allowed plaintiff's counsel to explore defense counsel's reasons for striking certain panel members and in not striking others. Moreover, the trial court offered to allow the examination to continue the next day, but plaintiff's counsel refused the offer. The court of appeals also held that the trial court did not abuse its discretion in not allowing access to defense counsel's voir dire notes because defense counsel only used the notes to "confirm the truth of his testimony, rather than using the notes to refresh his memory." Otherwise, the court held that any error was harmless because the trial court reviewed the notes in camera and verbally related their contents

to plaintiff's counsel, who used the comments in his cross-examination.

Finally, after the trial court sustained one of the plaintiff counsel's peremptory strikes and returned the challenged venire member to the panel, it allowed the defense counsel an extra peremptory strike. It replaced the one used to improperly strike the venire member. The plaintiff complained that the trial court erred in doing so and rewarded the defense counsel for his improper conduct. The court of appeals held that the trial court had discretion to allow another strike. The court stated that the trial court did not abuse its discretion because this was not an egregious case of discriminatory use of a challenge as the defense counsel allowed two African American members to remain on the panel without any challenge. Further, the court said that any error was harmless since the verdict was unanimous, and even if the juror who had been removed by the extra strike had been on jury and had voted for the plaintiff, there still would have been eleven votes for the defendant. The judgment for the defendant was affirmed.

PERSONAL PROPERTY: OWNERSHIP OF EVIDENCE PRODUCED IN DISCOVERY

Francis Sharp v. Windle Turley, No. 05-04-01521-CV, 2006 WL 727696 (Tex. App.—Dallas, March 23, 2006, n.p.h.)

This case involves a fact witness who claimed entitlement to evidence that he produced during the course of discovery. Specifically, Francis Sharp ("Sharp") claimed ownership of items, including financial information, that he removed from a trash dumpster maintained by the Roman Catholic Diocese ("Diocese"). Windle Turley ("Turley"), an attorney who represented several plaintiffs in a lawsuit against the Diocese, subpoenaed items from Sharp and took his deposition. In response to the subpoena, Sharp delivered items to Turley that he had removed from the Diocese's dumpster. Once the case concluded, Turley did not want to keep the items,

and both the Diocese and Sharp claimed that they were the rightful owners of the items.

Sharp filed a lawsuit claiming, among other things, that Turley obtained the items from him through fraud. Turley filed a motion for summary judgment claiming that Sharp's claim was barred as a matter of law on multiple grounds. The trial court granted Turley's motion for summary judgment.

The court of appeals affirmed the entry of summary judgment. Specifically, the court held that, under the unlawful acts rule, a plaintiff cannot recover for his claimed injury if, at the time of the injury, he was engaged in an illegal act. Texas courts have applied this rule, along with public policy principles, to prevent a plaintiff from recovering claimed damages that arise out of his or her own illegal conduct. Courts have interpreted this defense to mean that if the illegal act is inextricably intertwined with the claim and the alleged damages would not have occurred but for the illegal act, the plaintiff is not entitled to recovery as a matter of law.

Sharp argued that his claim was not barred by his unlawful acts and that he lawfully obtained the items because the Diocese abandoned them. However, the summary judgment evidence showed that the Diocese generated the waste; Diocese employees collected the waste and deposited it in a dumpster located on Diocese property; and the Diocese contracted with a private waste disposal company who emptied the dumpster into a truck and hauled the waste to a private landfill.

Sharp also claimed that the items were in a publicly accessible dumpster. However, the court held that items on private property are not "free for the taking" simply because they are publicly accessible. Additionally, the Diocese contracted with a private waste disposal company to remove the trash from the dumpster and dispose of it. There was no evidence that the Diocese intended to leave the items in the dumpster "free to be appropriated by any other person."

Because Sharp's conduct in removing the Diocese's items from Diocesan property without its permission was the foundation of Sharp's allegation that he had a superior right to the items and that alleged right was the basis of his fraud claim against Turley, the trial court property granted summary judgment in favor of Turley.

PRE-SUIT DISCOVERY: MEDICAL LIABILITY ACT DOES NOT PREVENT PRE-SUIT DEPOSITIONS UNDER RULE 202

***In re Allan*, No. 12-06-00040-CV, 2006 WL 1102700 (Tex. App.—Tyler, April 27, 2006) (orig. proceeding).**

This mandamus proceeding arose out of the trial court's denial of a request by Christopher Allan, M.D. ("Allan") to take pre-suit depositions in a potential medical malpractice case. The issue is whether the Texas Medical Liability Act ("TMLA") prohibits a Rule 202 pre-suit deposition.

Allan filed a petition to depose several healthcare providers to investigate a possible claim or suit arising out of the medical care provided to his mother.

The court of appeals described Allan's petition as a "potential" cause of action because he does not know the facts relating to his mother's care by the medical care providers identified in the petition. The court held that the definition of "health care liability claim" in the TMLA did not include a potential cause of action. Therefore, the trial court erroneously denied the petition.

Further, the court held that, because the order denying the petition is interlocutory and not a final, appealable order, Allan did not have an adequate remedy by appeal. Therefore, he was entitled to mandamus relief.

PROBATE LAW: ATTORNEY'S FEES FOR DEFENDING TORT CLAIMS

***In the Estate of Wilcox*, No. 09-05-523-CV, 2006 WL 1280619 (Tex. App.—Beaumont May 11, 2006, n.p.h.).**

This controversy involved a party's right to attorney's fees in a probate/tort case. Mary Lou Wilcox was a beneficiary under her mother's will. She filed various tort claims against her brother Peter Wilcox, who was named as an alternative co-executor under the will. The trial court awarded Peter a summary judgment and awarded him attorney's fees under Texas Probate Code §243. Mary Lou appealed the trial court's award of attorney's fees.

Peter contended that he was entitled to an award of attorney's fees because he "is a named beneficiary forced to defend the will in response to Mary Lou's allegations that he . . . breached duties owed under the will and interfered with her inheritance rights." He also alleged that he had "standing under the statute because Mary Lou specifically sued him as alternate independent co-executor of the estate accusing him of exercising the powers of a co-executor." Therefore, Peter alleged that the trial court's award was justified.

The court of appeals disagreed. The court noted that §243 provided that "When any person designated as a . . . beneficiary in a will . . . defends it or prosecutes any proceeding . . . for the purpose of having the will . . . admitted to probate . . . he may be allowed out of the estate ... reasonable attorney's fees." The court held that because there was no contest filed to the will and Mary Lou's claims were asserted against Peter as a tortfeasor, Peter defended the claims based upon his own alleged wrongdoing rather than in defending the will as a beneficiary or executor. Accordingly, the court reversed the trial court's award of attorney's fees and rendered that Peter take nothing on his claim for attorney's fees.

REAL ESTATE: RIGHT OF FIRST REFUSAL

***City of Brownsville, et al v. Golden Spread Electric Cooperative, Inc.*, Cause No. 05-05-01150-CV, 2006 WL 1331146 (Tex. App.—Dallas, May 17, 2006, n.p.h.).**

The case involved a dispute as to whether one of the co-owners of an electrical generating facility, Oklaunion Unit No. 1, effectively exercised its right of first refusal to purchase another co-owner's interest. The Oklaunion facility was co-owned by several entities including the City of Brownsville, the Oklahoma Municipal Power Authority ("OMPA"), and AEP Texas Central Company ("TCC"). The sale of any ownership interest in the Oklaunion facility was controlled by a participation agreement, which granted the co-owners a "right of first refusal." Under the terms of the agreement, a co-owner intending to sell its interest in the Oklaunion facility must serve on all other co-owners written notice of its intent to sell at least seven months before consummation of the intended transfer.

On January 30, 2004, TCC executed an agreement with Golden Spread Electrical Cooperative ("Golden Spread") for the sale of TCC's ownership interest in the Oklaunion facility. This agreement specifically stated that TCC's obligation to consummate the transaction was subject to the fulfillment of various conditions, including there being no effective exercise of the right of first refusal held by the facility's co-owners. Accordingly, if any one co-owner effectively exercised its right of first refusal, Golden Spread's contractual right to purchase TCC's interest would terminate. TCC sent the required notice of intention to transfer to the Oklaunion co-owners. Within the three-month exercise period, Brownsville sent notice to TCC and the other co-owners of its intent to exercise its option to purchase.

The City of Brownsville and the OMPA both contend they effectively exercised their respective rights to purchase the ownership interest of TCC. Golden Spread claimed that legal impediments existed to prevent either the City of Brownsville or the OMPA from purchasing TCC's interest on the terms necessary to exercise their rights of first refusal. Golden Spread claimed its contract to purchase the ownership interest from TCC was the only purchase agreement among the parties enforceable as a matter of law.

The court of appeals held that the right of first refusal or preemptive right to purchase requires the property owner to offer the property first to the holder of the right on the same terms and conditions offered by a third party. When the property owner gives notice of his intent to sell, the right of first refusal matures or "ripens" into an enforceable option.

A rightholder's exercise of the option to purchase must be positive, unconditional, and unequivocal. The rightholder must accept all the terms of the offer or the offer will be considered rejected. In the absence of an agreement otherwise, unequivocal acceptance of the terms of the offer is considered an exercise of the right to purchase.

The court of appeals held that Brownsville unequivocally accepted all the terms and conditions set forth in Golden Spread's offer to purchase TCC's interest in the Oklaunion facility. By doing so, Brownsville did everything in its power, and everything necessary, to effectively exercise its right of first refusal. Because one of the co-owners effectively exercised its right of first refusal, TCC's obligation to sell its ownership interest to Golden Spread terminated.

The fact that indemnity provisions in the Oklaunion purchase contract may not be enforceable was "clearly tangential" to the main purpose of the agreement, which was the transfer of the ownership interest, and did not effect the enforceability of the contract as a whole. Further, the inclusion of the severability provision in the agreement indicated that the parties were willing to sever out such tangential matters to preserve

the main agreement. Therefore, the possible invalidity of the indemnity provisions did not render void the entire agreement between TCC and Brownsville.

RESIDENTIAL CONSTRUCTION LIABILITY ACT: PREEMPTION OF COMMON LAW AND DTPA CLAIMS

Randy and Barbara Gentry v. Squires Construction, Inc. and Lewis Almon Squires, 188 S.W.3d 396 (Tex. App.—Dallas 2006, n.p.h.).

The Gentrys contacted Squires Construction about building a house. The Gentrys showed Squires Construction a photograph of what they wanted their new home to look like, but they did not have any blueprints. Squires Construction told the Gentrys it could build the home based on its own drawings because the Gentrys wanted to save money. Thereafter, the Gentrys entered into a written contract with Squires Construction.

When Squires Construction made its final draw request to the lender, the Gentrys refused the payment complaining of numerous construction defects.

Squires Construction sued the Gentrys for breach of contract and foreclosure of the lien, or in the alternative quantum meruit. The Gentrys filed counter-claims against Squires Construction and third-party claims against Squires (collectively "Squires") alleging breach of contract, breach of implied warranty, violations of the DTPA, and fraud, or, in the alternative, seeking rescission of the contract. Squires inspected the property and made a settlement offer, which was rejected.

After trial, the court rendered judgment in favor of Squires under the alternative theory of quantum meruit in the amount of \$16,134. All relief requested by the Gentrys was denied. The Gentrys appealed.

The court of appeals affirmed in part and reversed in part. The court recognized that, as a general rule, recovery under the theory of quantum meruit

is prohibited if an express contract covers the services or materials for which the claimant seeks recovery. However, there is an exception with respect to construction contracts. A contractor may recover the reasonable value of the services rendered and accepted or the materials supplied under the theory of quantum meruit if: (1) the services rendered and accepted are not covered by the contract; (2) the contractor partially performed under the terms of an express contract, but was prohibited from completing the contract because of the owner's breach; or (3) the contractor breached but the owner accepted and retained the benefits of the contractor's partial performance.

The trial court found that, although Squires failed to substantially comply with the contract, there was evidence that it partially performed under the contract and the Gentrys accepted and retained the benefits of Squires' partial performance. Accordingly, the court of appeals concluded the trial court correctly held that Squires was entitled to be paid its costs for labor and materials under the theory of quantum meruit.

The Gentrys also claimed the trial court erroneously concluded that all their claims were preempted by the Residential Construction Liability Act ("RCLA"). Squires responded that the trial court did not abuse its discretion because it found they complied with the "reasonable offer" provisions of the RCLA.

The court of appeals recognized that, where the RCLA modifies causes of action for damages resulting from construction defects in residences by limiting and controlling causes of action that otherwise exist, it does not preempt suits for breach of contract or breach of warranty after the presuit requirements have been completed. The RCLA also does not preempt a fraud claim. Therefore, the trial court erroneously held that the RCLA preempted all of the Gentrys' claims, including those to which the RCLA preemption provisions did not apply.

TOXIC TORTS: CONSTITUTIONALITY OF LIABILITY LIMITATIONS FOR ASBESTOS CLAIMS

***Robinson v. Crown Cork & Seal Company, Inc.*, No. 14-04-00658-CV, 2006 WL 1168782, (Tex. App.—Houston [14th Dist.], May 4, 2006, n.p.h.).**

This case involves a claim arising out of asbestos exposure. The Robinsons sued Crown Cork and others after discovering that Mr. Robinson had developed mesothelioma from years of working with products containing asbestos. In the trial court, Crown Cork admitted liability; however, before the trial court entered judgment, the Legislature enacted, and made immediately effective, a law that would preclude any recovery by the Robinsons from Crown Cork.

Prior to entry of judgment, Crown Cork moved for summary judgment on the basis that the legislation exempted it from paying any damages to the Robinsons because the damages it had already paid to other plaintiffs exceeded the monetary cap contained in the legislation. The trial court agreed and granted summary judgment in favor of Crown Cork.

On appeal, Ms. Robinson argued that the statute was unconstitutionally retroactive as it applied to her because it extinguished a vested right and that it was a special law designed specifically to aid Crown Cork. She also claimed that Crown Cork failed to establish each and every element of its affirmative defense.

In affirming the trial court's judgment, the court of appeals found that the statute was a valid exercise of the Legislature's "police power to balance competing individual and social interests and to enact legislation that reasonably responds to the issues and interests before it." Therefore, it could enact a statute that applies retroactively as a reasonable exercise of its police power.

Further, the court found that, while Crown Cork was certainly within the scope of the statute, it was not the only beneficiary of the statute. Instead, the court held that a reasonable basis for the statute exists based on the policy goals expressly enumerated in the statute's "Statement of Legislative Intent" as it relates to a desire to "ameliorate the effects of asbestos-related liabilities by limiting the amount of money innocent successor corporations are liable for in damages to the total gross asset value of the original corporation." Moreover, the court also held that "the Legislature sought to narrow the class to include only the most innocent of successor corporations, excluding those that continued in the asbestos business."

The court also found that Crown Cook conclusively established its entitlement to summary judgment based on the statutory limitation when Ms. Robinson failed to raise a fact question as to whether Crown Cork continued the "asbestos related business" of its predecessor.

TOXIC TORTS: EXPERT EVIDENCE NOT SUFFICIENT TO ESTABLISH CAUSATION

***Matt Dietz Co. v. Torres.*, No. 04-05-00552-CV, 2006 WL 1406586 (Tex. App.—San Antonio, May 24, 2006, n.p.h.).**

This controversy deals with the type of expert testimony that is necessary to establish causation in a toxic tort case. Torres worked for Dietz for eleven years as a foreman on a farming operation. In that position, Torres was exposed to pesticides by handling and mixing the products. In 1998, Torres was diagnosed with laryngeal cancer, and subsequently filed suit against Dietz for failing to provide protective equipment for the handling of the pesticides. After a \$6,000,000 verdict for Torres, Dietz appealed claiming that there was no evidence that the pesticides caused Torres' cancer.

The court of appeals started the analysis by determining whether Torres produced any general causation evidence that proved that the pesticides could cause laryngeal cancer. Citing the Texas Supreme Court's *Havner* opinion, the court concluded that if the plaintiff relied upon studies to prove general causation that the study had to indicate that the chemical will at least double the risk of cancer.

Torres' expert cited to one study that indicated a 1.5 increased risk of laryngeal cancer in farmers. The court of appeals concluded that the study did not support a finding that exposure to pesticides in general causes laryngeal cancer due to many reasons including that it did not have the required doubling of risks and did not associate the cancer with pesticide use.

The court of appeals also addressed specific causation. To establish specific causation through scientific studies, a plaintiff must introduce sufficient evidence that he is similar to those in the studies, which would include showing that (1) the injured person was exposed to the same substance, (2) that the exposure or dose levels were comparable to or greater than those in the studies, (3) that the exposure occurred before the onset of injury, and (4) that the timing of the onset of injury was consistent with that experienced by those in the study. Further, if other plausible causes of the injury exist, the plaintiff must exclude those other causes with reasonable certainty.

Regarding specific causation, Torres' expert could not identify a specific pesticide or substance that had a significant association with the cancer. There was no evidence that Torres' exposure was the same as or more than those in the study. Torres was exposed to the pesticides before the onset of cancer. Accordingly, the court of appeals found that Torres' expert's general and specific causation evidence amounted to no evidence. The court of appeals reversed and rendered for Dietz.

WORKERS' COMPENSATION: RECOVERY OF MEDICAL BILLS UNDER LETTER OF PROTECTION

Hays & Martin, L.L.P. v. Emmanuel E. Ubinas-Brache, M.D., Cause No. 05-05-00238-CV, 2006 WL 853173 (Tex. App.—Dallas, April 4, 2006, n.p.h.).

Israel Garcia (“Garcia”) was severely burned while removing glue from a floor at a Sears and Roebuck location. He was subsequently treated by Emmanuel Ubinas-Brache (“Brache”), a surgeon who specialized in plastic reconstructive surgery. Prior to the second surgery, Brache’s staff contacted Hays & Martin, L.L.P. (“Hays”), Garcia’s counsel, and requested a letter of protection for Garcia’s medical bills at the time of any settlement.

Texas Worker’s Compensation Insurance Fund (“TWCIF”), Garcia’s employer’s workers’ compensation carrier, preauthorized and paid for Garcia’s first surgery. Although TWCIF preauthorized the second surgery, TWCIF refused to pay Brache for the second surgery because Brache failed to submit an operative report with the claim. Garcia settled his lawsuit with Sears and received a \$1,150,000 settlement. As part of the settlement agreement, Garcia agreed to pay any remaining unpaid medical bills. When Brache resubmitted his claim for Garcia’s surgery, TWCIF refused payment because of the settlement agreement.

Brache filed suit against Hays claiming that Hays was obligated to pay Brache for Garcia’s expenses pursuant to the letter of protection. A jury agreed and awarded damages to Brache.

On appeal, Hays claimed that the trial court lacked jurisdiction over this suit because Brache failed to exhaust his administrative remedies before the Texas Worker’s Compensation Commission. The court of appeals disagreed because there was no dispute about TWCIF’s failure to pay for the second surgery. Rather, Brache sued Hays alleging it breached the contract to protect his medical bills in the event of a settlement. The Act does not provide for dispute resolution when, as here, payment is denied not on the basis of medical necessity or the reasonableness of the fee, but rather because the injured worker entered into a settlement agreement specifically providing he is responsible for any unpaid medical bills. Because the Act does not provide clear and express authority to resolve the dispute at issue in this case, Hays failed to show the trial court did not have subject matter jurisdiction over this case.

Hays also claimed the trial court lacked jurisdiction because §413.042 of the Act precludes a health care provider from pursuing a private claim against a workers’ compensation claimant except under certain circumstances not applicable in this case. However, Brache’s claim was for breach of contract pursuant to the letter of protection. Brache was not seeking to recover unpaid medical bills from Garcia. Brache’s claim was for damages from a third party not subject to monitoring under chapter 413 pursuant to a contract not governed by the Act. The court of appeals, therefore, concluded the dispute between Brache and Hays for payment pursuant to the letter of protection is not within the purview of the Act and is not precluded by §413.042.

Eric G. Walraven, Godwin Gruber, LLP, Dallas
Kendyl Hanks Darby, Haynes and Boone, LLP, Dallas

CLASS ACTIONS—WHEN DOES AN ACTION COMMENCE?

Braud v. Transport Service Co. of Illinois, 445 F.3d 801 (5th Cir. 2006).

This case presented the issue of what constitutes the “commencement” of a new suit as relates to the Class Action Fairness Act (CAFA).

On August 30, 2004, plaintiffs filed a class action petition in state court. On April 8, 2005, the plaintiffs amended their petition to name Ineos Americas, LLC (“Ineos”), as an additional defendant. Ineos was served with the original and supplemental class action petition on April 19, 2005. 445 F.3d 802.

Ineos removed the action to federal court, basing removal jurisdiction on CAFA. On June 17, 2005, the plaintiffs moved to remand to state court, and on July 12, 2005, they filed a purported unopposed motion to dismiss Ineos. The district court remanded the case, finding that CAFA did not apply because the plaintiffs had filed their initial complaint before CAFA’s effective date, although Ineos was not named as a defendant until after the effective date, February 18, 2005. *Id.* at 803.

Plaintiffs argued that the date the lawsuit was “commenced” is the date the complaint is filed with the court. However, “despite the logic” of this argument, the Fifth Circuit noted that the courts of appeals that have examined the issue have unanimously held that when a lawsuit is initially “commenced” for purposes of CAFA is determined by state law. The Fifth Circuit agreed. *Id.*

Relying on several decisions by sister circuit courts, the court held CAFA broadens diversity jurisdiction for certain qualifying class actions and authorizes their removal, and thus, “given its context, CAFA’s ‘commenced’ language surely

refers to when the action was originally commenced in state court.” *Bush*, 425 F.3d at 688. The court further held when an action is commenced in state court is determined based on the state’s own rules of procedure. *Id.*

The Fifth Circuit also addressed the issue of whether the addition of a new defendant “commences” a new suit. The court chose to follow the Seventh Circuit’s decision *Schillinger v. Union Pac. R.R.*, 425 F.3d 330 (7th Cir.2005), and held that “amendments that add a defendant ‘commence’ the civil action as to the added party.” This is based upon the straightforward reasoning that as to the added party, the action was commenced on whatever date they were added and if that date was after the effective date of CAFA, then that party has the option to remove the case to federal court pursuant to the provisions of CAFA. *Id.* at 804.

The Court also noted the district court retained jurisdiction over the matter even though the Plaintiffs dismissed their claims against Ineos. According to the Court, because the amended pleading satisfied CAFA’s jurisdictional provisions, at that point the federal court had jurisdiction under 28 U.S.C. §1332 because it is the “action” and not just the claims against a particular defendant that is removable. *Id.* at 807-808.

RES JUDICATA IN IMMIGRATION CLAIMS

Guevara v. Gonzales, F.3d 2006 WL 1362791 (5th Cir. May 19, 2006).

The sole issue presented in this case was whether a motion to reconsider a ruling by the Board of Immigration Appeals (BIA) filed by the Department of Homeland Security (DHS) constituted direct review or a collateral attack of the BIA decision. The Fifth Circuit concluded it was a collateral attack, and therefore barred by res judicata. *2.

Guevara petitioned for review of a BIA order. Subsequent to the BIA's initial decision affirming the immigration judge's ("IJ") order of removal, Guevara successfully moved to reopen, and the BIA terminated the removal proceedings. Approximately two and a half years later, the respondent, DHS, successfully moved the BIA to reconsider, arguing that the BIA did not have jurisdiction to grant Guevara's motion to reopen because he had been deported. *1.

In an issue of first impression, the Court decided to follow the Eighth Circuit, which had already decided that "[m]otions to reopen or reconsider in the immigration context are not appeals to the Board from its own order, but are more accurately described as collateral attacks on the Board's order." *White v. I.N.S.*, 6 F.3d 1312, 1315 (8th Cir.1993) (citing inter alia 8 C.F.R. §3.2). The Court also recognized that it had already determined "[t]he BIA's denial of an appeal and its denial of a motion to reconsider are two separate final orders, each of which require their own petitions for review." *Jaquez-Vega v. Gonzales*, 140 Fed.Appx. 547 (5th Cir. Aug.5, 2005) (unpublished) The Court opined that if a motion to reconsider is separate from and does not affect the finality of an appeal, it cannot be part of the direct review. Thus, it is a collateral attack and barred by res judicata. *2-3.

SECTION 1983 RETALIATION CLAIMS AGAINST PRISON OFFICIALS MUST ALLEGE MORE THAN DE MINIMIS ACT TO ESTABLISH CONSTITUTIONAL VIOLATION

***Morris v. Powell*, ___ F.3d ___, 2006 WL 1314329 (5th Cir. May 15, 2006).**

This case presented the Fifth Circuit with an issue of first impression, namely whether an inmate bringing a claim under 42 U.S.C. §1983 for alleged retaliation against him for exercising his First Amendment right to use the prison grievance system must allege more than a *de minimis* retaliatory act to establish a constitutional violation. The Court held that more than a *de minimis* retaliatory act must be alleged.

Morris submitted grievances to prison authorities concerning the way defendant Powell ran the Telford Unit's commissary, where Morris was assigned to work. Morris was later moved from the commissary to the kitchen. He worked in the kitchen's pot room and then was moved to the butcher shop. He was transferred from the Telford Unit to the Terrell Unit, where he presently resides.

Morris alleged that prison officials at the Telford Unit assigned him to a more taxing job in the kitchen in retaliation for the exercise of his constitutional right to file complaints against Powell. He also claimed that his transfer to the allegedly less desirable Terrell Unit was an act of retaliation.

The district court held, as a matter of first impression in this circuit, that an inmate must allege more than a *de minimis* retaliatory act in order to proceed with a claim for retaliation. The court further determined, without discussion, that the retaliation alleged by Morris was *de minimis*, so the court dismissed the claim. *1.

On appeal, the Fifth Circuit noted that a prison official may not retaliate against or harass an inmate for complaining through proper channels about a guard's misconduct, and then stated the four elements of the claim: (1) a specific constitutional right, (2) the defendant's intent to retaliate against the prisoner for his or her exercise of that right, (3) a retaliatory adverse act, and (4) causation. *Id.*

Whether an allegation of *de minimis* retaliatory acts can support a retaliation claim was an issue of first impression in the Fifth Circuit. The Court acknowledged that it had never upheld a retaliation claim that alleged only inconsequential, or *de minimis*, retaliatory acts by prison officials and engaged in a discussion of prior cases that discussed situations where the alleged retaliatory conduct did not rise to the level of a constitutional violation and those situations where it did. While the Court had not expressly adopted a *de minimis* standard like other circuits before this case, Fifth

Circuit precedent was consistent with the proposition that an inmate must allege more than *de minimis* retaliation to proceed with such a claim. *2.

According to the Court, the *de minimis* standard achieves the proper balance between the need to recognize valid retaliation claims and the danger of federal courts embroil[ing] themselves in every disciplinary act that occurs in state penal institutions. As stated by the Court, “the purpose of allowing inmate retaliation claims under § 1983 is to ensure that prisoners are not unduly discouraged from exercising constitutional rights. *See Crawford-El*, 523 U.S. at 588 n. 10, 118 S.Ct. 1584. Some acts, while motivated by retaliatory intent, are so *de minimis* that they would not deter the ordinary person from further exercise of his rights. Thus, such acts do not rise to the level of constitutional violations and cannot form the basis of a §1983 claim. *3.

Lastly, the Court pointed out that the *de minimis* standard is a threshold intended to “weed out” only inconsequential actions and is not a means to excuse more serious retaliatory acts by prison officials. Therefore, retaliation against a prisoner is actionable only if it is capable of deterring a person of ordinary firmness from further exercising his constitutional rights. *4.

FMLA—INVOLUNTARY LEAVE

***Willis v. Coca Cola Enterprises*, 445 F.3d 413 (5th Cir. March 31, 2006).**

In this labor and employment case, the Fifth Circuit addresses a question of first impression: What constitutes involuntary FMLA leave and what are the parties’ rights and obligations pursuant to this type of leave?

Coca Cola (“CCE”) employee Willis had been employed by CCE since 1994, and by 2003 she had risen to the level of Senior Account Manager. In 2003, Willis called her supervisor on a Monday to tell him that she was sick and would be unable to work that day. She also informed her supervisor that she was pregnant—but she did not

specifically tell him that she was sick *because* of the pregnancy. Willis called again the next morning (Tuesday) and inquired where she should report to work. Her supervisor told her she could not return to work until she had a medical release from a doctor. Willis informed her supervisor that she had an appointment on Wednesday. The supervisor understood that to mean the next day, but the appointment was actually the following week. Willis did not come into work or call for the next week.

On Thursday of the next week, the day after Willis’s doctor appointment, Willis returned to work. CCE fired her for violating the company’s “No Call/No Show” policy, whereby an employee who is absent from work for three consecutive days without notifying her supervisor is considered to have voluntarily resigned.

Willis filed suit under the Family and Medical Leave Act (“FMLA”), Title VII and various state statutes. The district court granted summary judgment in favor of CCE, holding that Willis had not offered any evidence that she was requesting medical leave pursuant to FMLA. The district court pointed to her expressed desire to return to work as evidence that she had not intended to invoke FMLA leave.

Willis argued on appeal to the Fifth Circuit that CCE had placed her on “involuntary” FMLA leave because her supervisor would not permit her to return to work without a medical release. Because she was fired during this involuntary leave, she claimed violations of FMLA. CCE responded that Willis had not specifically linked her illness to her pregnancy and had not provided adequate notice of her need to take leave as required by the FMLA.

The Fifth Circuit begins by noting that this is not a conventional FMLA case: Willis did not claim to have put her employer on notice of her need for FMLA leave; rather, she averred that CCE placed her on involuntary FMLA leave. The Court states that it is not contrary to FMLA for an employee to be placed on involuntary leave. However, citing to involuntary leave cases out of the Sixth and

Tenth Circuits, the Court holds that even in the case of involuntary leave the employee must provide sufficient notice to her employer of the need to take FMLA leave. Specifically, the employee must put the employer on notice of a “serious health condition.”

Applying this rule, the Court holds that although Willis’s employer put her on leave pending a medical release, indicating that CCE had awareness of her medical condition, Willis had not provided sufficient evidence that CCE placed her on leave because it was on notice that she had a *serious health condition*, such as sickness due to pregnancy. A mere complaint of sickness will not trigger FMLA: “We cannot assume that every time an employer chooses to place an individual on leave that the FMLA is triggered.” Based on this analysis, the Court holds that the district court did not abuse its discretion in granting CCE summary judgment. The Court also finds no evidence to support Willis’s Title VII claim.

PRODUCT LIABILITY—CERTIFIED QUESTION TO TEXAS SUPREME COURT

***Burden v. Johnson & Johnson Medical*, 447 F.3d 371 (5th Cir. April 19, 2006).**

In *Burden* a dental hygienist brought a state court product liability action against Johnson & Johnson (“J&J”) and other manufacturers and distributors of latex gloves, claiming that the gloves caused her to suffer allergic reaction. The case was removed to federal court due to diversity, and it subsequently settled.

Following settlement with the plaintiff, distributors filed a cross-claim for indemnity against the manufacturer defendants under TEXAS CIV. PRAC. & REM. CODE §82.002 (requiring a manufacturer to “indemnify and hold harmless a seller against loss out of a products liability action” except as caused by the seller). It was undisputed that the distributors sold products made by several manufacturers, but the distributors did not seek indemnification from all of the manufacturers. The district court entered

summary judgment for the manufacturers, holding that they had satisfied their obligation under §82.002 by offering a partial limited defense, which focused only on the products distributed by each manufacturer.

On appeal, the distributors argued that the district court erred in concluding that a limited defense was all that was required under §82.002, and that by defending themselves they had adequately defended the manufacturers.

The Court certifies the following question to the Texas Supreme Court: When a distributor sued in a products liability action seeks indemnification from less than all of the manufacturers implicated in the case, does a manufacturer fulfill its obligations under Texas Civil Practice and Remedies §82.002 by offering indemnification and defense for only the portion of the distributor’s defense concerning the sale or alleged sale of that specific manufacturer’s product, or must the manufacturer indemnify and defend the distributor against all claims and then seek contribution from the remaining manufacturers?

CONSTITUTIONAL LAW—DORMANT COMMERCE CLAUSE AND COMMERCIAL SPEECH

***Piazza’s Seafood World, LLC v. Odom*, ___ F.3d ___, No. 05-30098, 2006 WL 1174284 (5th Cir. May 4, 2006).**

In this case the Fifth Circuit considers the constitutionality of two Louisiana statutes, one that regulates the labeling of catfish and another that regulates the use of the word “Cajun” on food products.

In 2002, in response to a glut of Vietnamese “basa catfish,” Congress limited the class of fish sold in interstate commerce to which the term “catfish” could be applied. (“FMSRIA”). The law limited the label “catfish” to the species native to America.

Around the same time, Louisiana discovered that the American species of catfish was being farmed in China and sold in the U.S. as catfish. In response, Louisiana passed a state law further limiting the class of fish to which the label “catfish” could be applied (the “Louisiana Catfish law”).

Piazza’s Seafood has been selling seafood in Louisiana for over 50 years. Piazza’s imports and distributes products under the trade names “Cajun Boy” and “Cajun Delight,” trade names it has been using for over 30 years. Piazza’s imports included the Chinese-bred catfish. Odom instructed several of Piazza’s distributors to refrain from selling the Chinese catfish, and seized cases of Piazza’s product under the Louisiana law. All of Piazza’s Cajun products violated the Cajun law.

Piazza’s sued the Louisiana Department of Agriculture and Forestry to enjoin the Commissioner (“Odom”) from enforcing the Catfish and Cajun statutes against Piazza’s, asserting that (1) the Catfish statute is preempted by FMSRIA because it conflicted with the federal law, and (2) the Cajun statute, as applied, violates the First Amendment.

The district court granted summary judgment in Piazza’s favor on the basis that the Louisiana Catfish law was preempted by FMSRIA. The court alternatively held the Louisiana Catfish law unconstitutional under the dormant Foreign Commerce Clause because it was a protectionist measure that discriminated against foreign commerce (the Chinese catfish) in favor of local interests. As to the Cajun law, the district court held that the Cajun statute violated the First Amendment as applied to Piazza’s.

Affirming, the Fifth Circuit states the rule that the Foreign Commerce Clause (“Commerce with foreign Nations”) is violated if a state regulation (1) creates a substantial risk of conflicts with foreign governments, or (2) undermines the ability of the federal government to “speak with one voice” in regulating commercial affairs with foreign states. Here, the Louisiana Catfish law

discriminates against foreign commerce on its face: it treats domestic catfish differently from foreign catfish to the benefit of Louisiana and the detriment of the foreign state. The Court rejects Louisiana’s argument that the federal Catfish law condoned the Louisiana counterpart. Although Congress may permit a state to enact legislation that might otherwise violate the Commerce Clause, its intent to do so must be expressly stated. Mere consistency with federal law does not satisfy that requirement.

Having found that the Louisiana Catfish law discriminates on its face, the Court presumes unconstitutionality. Under the strict scrutiny standard, Louisiana was unable to overcome this presumption because it did not show that the Louisiana law served a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.

Turning to the Cajun statute, the Court considers Louisiana’s argument that the First Amendment was not violated because Piazza’s use of “Cajun” was misleading and deceptive. The Court recites the four-part test used in commercial speech cases: (1) whether the speech is protected by the First Amendment (for commercial speech, it must concern lawful activity and not be misleading), (2) whether the government interest is substantial. If the answer to both (1) and (2) is yes, then the Court must determine (3) whether the regulation directly advances the government interest advanced, and (4) whether it is not more extensive than is necessary to serve that interest.

The Fifth Circuit agrees with the district court and holds that the Louisiana Cajun law unconstitutional. The Court finds that the law is not inherently misleading, and that Louisiana’s law was more extensive than necessary because it made no exception for distributors like Piazza who noted the origin of their products. On this basis, the Court finds that the statute is unconstitutional as applied to Piazza’s.

Justice Higginbotham concurs in the opinion, but would focus the Court’s analysis on preemption given the fact that Congress had set forth a

detailed regulatory scheme pertaining to the labeling of catfish.

COSTS—PREVAILING PARTY

***Pachego v. Mineta*, ___ F.3d ___, No. 04-51160, 05-50129, 2006 WL 1195989 (5th Cir. May 5, 2006).**

In this employment discrimination case, the Fifth Circuit affirms the district court's dismissal of an employee's disparate impact claim. After affirming, the Court considers the employer's appeal of the district court's denial of court costs under FED. R. CIV. P. 54(d).

Rule 54(d) provides that "costs, other than attorneys' fees shall be allowed as of course to the prevailing party unless the district court otherwise directs." There is a strong presumption under Rule 54(d) that the prevailing party will be awarded costs. Although the district court dismissed the employee's claims, it did not award costs to the employer because the employer had brought the action "in good faith."

Deciding a question of first impression in the Fifth Circuit, the Court follows the lead of the other circuits to have considered the issue and holds that the losing party's good faith alone is insufficient to justify the denial of costs to the prevailing party.

REMOVAL UNDER THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

***Acosta v. Master Maintenance & Construction Inc.*, ___ F.3d ___, No. 05-30126, 2006 WL 1549959 (5th Cir. June 8, 2006).**

In *Acosta* the Court considers the question of whether the plaintiffs' action was related to an arbitration agreement falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"). The Convention includes jurisdictional grants giving federal district courts jurisdiction over cases

related to arbitration agreements falling under the Convention, which creates a basis for removal.

Plaintiffs sued Georgia Gulf Corporation and others ("GGC") in state court alleging injuries stemming from the release of mustard gas. Louisiana law allows a plaintiff to bring a direct action against a tortfeasor's insurers, so the plaintiffs joined two of GGC's foreign insurers, whose insurance policies included arbitration clauses governing disputes over coverage.

The insurers removed to federal court, invoking the Convention. Plaintiffs filed a motion to remand, which the district court denied. The insurers then filed a motion to enforce the arbitration clause against plaintiffs, and the plaintiffs challenged the district court's jurisdiction (which existed only to the extent the Convention applied).

Citing Congress's intent to encourage the recognition and enforcement of foreign arbitration awards. Uniformity is served by having Convention arbitration clauses in federal court. With these principles in mind, the Court considers the question of whether the subject matter of the underlying lawsuit "relates to" the arbitration agreement in the insurance policy between the alleged tortfeasor and the insurers.

The Court holds that the state tort lawsuits relate to the insurance policies: "Common sense dictates the conclusion that policy provisions relating to coverage of the insured's torts are, almost by definition, related to claims that are based on the disputed assertion of coverage of the insured's torts."

The Court also considers the question of whether the unanimity rule applicable to removals under §1441(a) also applies to removals under the Convention. But the Court declines to decide the issue in this case, holding that even if the unanimity requirement applies to Convention removals it is satisfied in this case.

Alan Curry, Harris County District Attorney's Office, Houston

PRESERVATION OF ERROR—ORAL MOTION FOR CONTINUANCE

***Williams v. State*, ___ S.W.3d ___, 2006 WL 1549762, No. 1-05-557-CR (Tex. App.—Houston [1st Dist.], June 8, 2006) (not yet reported).**

At trial, the defendant presented the testimony of three family members who provided the defendant with an alibi defense. Each relative testified that the defendant was with them at a family function during the time of the charged aggravated robbery. The defendant also wanted to present the alibi testimony of his girlfriend, but she was not present and could not be located. The defendant made an oral motion for continuance at that time, and the trial court denied that motion. On appeal, the defendant claimed that trial court erred by denying the defendant's oral motion for continuance in violation of his Fourteenth Amendment right to due process. The State responded that the defendant failed to preserve error because his motion for continuance was not in writing and was not sworn, as required by TEX. CODE CRIM. PROC. ANN. art. 29.03 (Vernon 1989) and *Dewberry v. State*, 4 S.W.3d 735, 755 (Tex. Crim. App. 1999). The defendant claimed that the court of appeals had an equitable power to review his motion for continuance, even though it was not in writing and had not been sworn. See *Darty v. State*, 149 S.W.2d 256, 257 (Tex. Crim. App. 1946); *Deaton v. State*, 948 S.W.2d 371, 374 (Tex. App.—Beaumont 1997, no pet.); *Petrick v. State*, 832 S.W.2d 767, 770 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd); *O'Rarden v. State*, 777 S.W.2d 455, 459 (Tex. App.—Dallas 1989, pet. ref'd); *Daigle v. State*, 658 S.W.2d 774, 775 (Tex. App.—Beaumont 1983, no pet.). The court of appeals held that, even that there was such an equitable power in Texas courts, the defendant had not established that his due process rights had been violated by the trial court's denial of his oral motion for continuance. "There is no reason to believe that the alibi testimony of a girlfriend, coming after the alibi testimony of three family

members, would have been so convincing to the jury that the preclusion of the girlfriend's testimony violated the defendant's constitutional rights."

PRESERVATION OF ERROR—CONSTITUTIONALITY OF STATUTE

***Burton v. State*, ___ S.W.3d ___, 2006 WL 1459558, No. 14-04-1072-CR (Tex. App.—Houston [14th Dist.], May 26, 2006) (not yet reported).**

An officer stopped the defendant in his vehicle after noticing that he was driving with a broken taillight. The defendant gave the officer permission to search his car, and the officer found a hand-rolled cigarette containing a usable amount of marijuana. The defendant admitted that the marijuana was his, explaining that he smoked marijuana for pleasure and that it helped him work better. The defendant was charged with possession of marijuana, and, at trial, the defendant represented himself and called two witnesses to read Biblical scriptures. The defendant claimed that these scriptures supported his religious beliefs that "the earth and nature created by God for use by man should not be inhibited by government" and "[b]ecause the marijuana plant was created by God, it was intended for use by man." Nevertheless, the jury convicted the defendant, and the defendant appealed. On appeal, the defendant claimed that the marijuana possession statute violated the First Amendment to the United States Constitution by interfering with the free exercise of his religious beliefs. This argument constituted an attack on the statute's constitutionality as applied to the defendant, not an attack on the statute's facial constitutionality. Although the defendant urged the jury to consider his religious beliefs in determining his guilt, he never argued to the court or requested a ruling that the statute was unconstitutional. By failing to request that the trial court find the statute unconstitutional as

applied to him, the defendant waived that argument on appeal.

PRESERVATION OF ERROR – STATE’S APPEAL

State v. Neesley, ___ S.W.3d ___, 2006 WL 1549772, No. 1-05-558-CR (Tex. App.—Houston [1st Dist.], June 8, 2006) (not yet reported).

The defendant was involved in a head-on collision with the driver of another vehicle, who ultimately died as a result of the collision. An investigating officer arrived at the scene of the collision and spoke with the defendant and determined that she had a moderate odor of alcohol on her breath. After learning that the defendant may have been driving recklessly, the officer decided that the defendant’s blood needed to be analyzed in order to determine whether the defendant was intoxicated. At the hospital, the defendant refused to give a breath or a blood sample, and an officer had a mandatory blood sample taken from the defendant. A registered nurse took blood samples from the defendant’s left arm for treatment purposes and for the officers. However, the first blood samples were contaminated or diluted with saline solution. Approximately 50 minutes later, the officer had a second blood sample taken from the defendant’s right arm, but he did not request the defendant’s permission to take the second sample, did not have consent, and did not have a warrant. The defendant claimed that the second blood sample should not have been taken, and the trial court granted the defendant’s motion to suppress because the controlling “implied consent” statute only permitted one blood specimen to be taken. The defendant filed a motion to suppress this second blood sample, and the trial court granted that motion. The State then brought a State’s appeal. In support of its appeal, the State claimed—in part—that (1) probable cause and exigent circumstances authorized the second drawing of the defendant’s blood without a warrant and without additional statutory compliance; and (2) the implied consent statute was not applicable because the defendant’s blood was drawn primarily for treatment purposes. The

court of appeals refused to address these claims by the State because they had not been raised at trial.

ESTOPPEL – THE *DEGARMO* DOCTRINE

Jarmon v. State, ___ S.W.3d ___, 2006 WL 1223863, No. 1-05-365-CR (Tex. App.—Houston [1st Dist.], May 4, 2006) (not yet reported).

Three friends were smoking cigarettes at an apartment complex when they were approached by two men, one of whom placed a gun to a victim’s head and demanded their money. After obtaining several items of the victims’ property, the two suspects ran away, and the victims called the police. Two of the victims were subsequently unable to identify the defendant in a photo lineup, but one of the victims was able to identify the defendant in court, as well as in that photo lineup. The State was subsequently permitted to present evidence of an extraneous offense in order to help prove the defendant’s identity as one of the perpetrators of the charged offenses. That extraneous offense constituted the aggravated robbery of another victim that occurred very close in time to the commission of the charged offenses. After the defendant was found guilty, he admitted his guilt at the punishment stage of trial. On appeal, the defendant claimed that the trial court erred in admitting the extraneous offense into evidence. The so-called “*DeGarmo* doctrine” held that a defendant who has been found guilty of a crime and who admits his guilt during the trial’s punishment phase is barred from contesting on appeal an error that occurred during the guilt-innocence phase of the trial. See *DeGarmo v. State*, 691 S.W.2d 657 (Tex. Crim. App. 1985). The Court of Criminal Appeals subsequently held that “*DeGarmo* doctrine” could not estop a criminal defendant from raising on appeal any matter that implicated a “value seen to be more important than the discovery of truth in a trial.” See *Leday v. State*, 983 S.W.2d 713, 725 (Tex. Crim. App. 1998). Therefore, when issues are raised on appeal by a defendant who has admitted his guilt during the punishment phase of his trial,

a reviewing court must “determine if the defendant asserts fundamental rights or guaranties [which he cannot be estopped from asserting], or whether the truth-finding function prevails to estop the defendant from raising them.” See *Gutierrez v. State*, 8 S.W.3d 739, 745 (Tex. App.—Austin 1999, no pet.); *Kelley v. State*, 22 S.W.3d 628, 631 (Tex. App.—Fort Worth 2000, pet. ref’d). The court of appeals held that not all appellate challenges to evidentiary rulings on the admissibility of evidence are immune from estoppel under the *DeGarmo* doctrine, but only those evidentiary rulings in which a fundamental right has been implicated. The court also held that the admission of legally obtained extraneous offense evidence did not implicate a fundamental right. Therefore, the *DeGarmo* doctrine prevented the defendant from raising his challenge to the admissibility of the extraneous offense.

NOTICE OF APPEAL – TIMELY FILING BY *PRO SE* INMATE

***Villarreal v. State*, ___ S.W.3d ___, 2006 WL 1152343, No. 4-06-22-CR (Tex. App.—San Antonio, May 3, 2006) (not yet reported).**

On November 28, 2005, the defendant was sentenced to 20 years in prison for committing the offenses of being a felon in possession of a firearm and aggravated robbery. The clerk’s records contained a *pro se* notices of appeal that were file-marked by the clerk on January 4, 2006. The record also contained a copy of the envelope in which the notices of appeal were mailed, and the envelope bore a postmark of January 3, 2006. The court of appeals ordered the defendant to show cause why his appeals should not be dismissed for want of jurisdiction. The defendant filed a response, claiming that he had prepared the notices of appeal while in administrative segregation in the Bexar County Adult Detention Center. Because he was in administrative segregation he did not have “normal privileges.” The defendant claimed that he gave the envelope containing the notices of appeal to jail authorities for mailing on December 26, 2005. The envelope was correctly addressed to the Bexar County

District Clerk’s office and properly stamped. The defendant further claimed that it was his practice when he sent mail from inside a jail or prison to write on the back of the envelope the date of mailing and the number of pages inside the envelope. The copies of the envelope in the clerk’s records indicated the number of pages inside and contained a partially obliterated handwritten date; the visible part was “26-05.” It appeared that the defendant’s envelope was not placed in the mail by jail authorities or postmarked until January 3, 2006, for reasons beyond the defendant’s control. In civil cases, “a pro se inmate’s claim under §14.004 of the Inmate Litigation Act is deemed filed at the time the prison authorities duly receive the document to be mailed.” A pro se litigant should not be “penalize[d] for failing to obtain a postmark or a file-stamp when the litigant has timely placed the document in the prison mail system, the only delivery system to which he or she has access.” See *Warner v. Glass*, 135 S.W.3d 681, 684 (Tex. 2004). “We know of no reason why an inmate attempting to exercise his right to appeal a criminal conviction should not be afforded the same consideration.” Therefore, the defendant timely filed his notices of appeal by delivering them in a properly addressed envelope to jail authorities on or before the filing deadline.

DEFERRED ADJUDICATION APPEALS

***Durgan v. State*, ___ S.W.3d ___, 2006 WL 1359620, No. 9-04-501-CR (Tex. App.—Beaumont, May 17, 2006) (not yet reported).**

Pursuant to a plea bargain agreement, the defendant entered a plea of guilty to the offense of delivery of cocaine, and the trial court placed the defendant on “deferred adjudication” probation. The State subsequently filed a motion to adjudicate the defendant’s guilt and to revoke her probation because she had violated several conditions of her probation. After finding that the defendant had violated the terms and conditions of her probation, the trial court revoked her probation and sentenced her to prison. The defendant filed a motion for new trial, in which she contended that newly discovered evidence

showed that she had mental and behavioral problems that created an issue of her competency at the adjudication hearing. After receiving testimony and evidence, the trial court denied the defendant's motion for new trial. On appeal, the defendant claimed that the trial court erred in not having her evaluated to determine if she was competent "to stand trial for a revocation hearing." However, an appeal that involves the defendant's competency at the adjudication hearing is an appeal that involves the trial court's determination of whether to proceed against the defendant with a "guilty" finding on the original charge. Such an appeal is not permitted under Article 42.12, Section 5(b) of the Code of Criminal Procedure. See *Bearden v. State*, 147 S.W.3d 661, 662 (Tex. App.—Amarillo 2004, no pet.); *Davis v. State*, 141 S.W.3d 694, 697-98 (Tex. App.—Texarkana 2004, pet. ref'd); *Nava v. State*, 110 S.W.3d 491, 493 (Tex. App.—Eastland 2003, no pet.); *Arista v. State*, 2 S.W.3d 444, 445-46 (Tex. App.—San Antonio 1999, no pet.). But see *Marbut v. State*, 76 S.W.3d 742, 746-47 (Tex. App.—Waco 2002, pet. ref'd).

HARM ANALYSIS—CONSTITUTIONAL HARM ANALYSIS

***Phillips v. State*, ___ S.W.3d ___, 2006 WL 1540780, No. PD-499-04 (Tex. Crim. App., June 7, 2006) (not yet reported).**

The defendants were charged with multiple counts of sexual assault, and the State introduced even more occurrences of each type of assault. The trial court refused to require the State to elect which occurrence was to provide a basis for each conviction. The Court of Criminal Appeals held that a trial court errs by failing to have the State elect at the close of its evidence when properly requested by the defense. Two of the reasons behind requiring the State to elect under such circumstances are to ensure unanimous verdicts, and to give the defendant notice of the particular offense that the State intends to rely upon for prosecution and afford the defendant an opportunity to defend. The Court of Criminal Appeals then held that consideration of separate

incidents without an election jeopardizes the defendant's right to a unanimous jury verdict as guaranteed by the Texas Constitution. In addition to protecting the unanimity of the jury verdict, an election is also required in order to provide the defendant with adequate notice and an opportunity to defend. The deprivation of notice also implicates fundamental constitutional principles—due process and due course of law. Therefore, any error on the part of the trial court in denying a defendant's proper request for an election should be subject to the constitutional-error harm analysis applicable to TEX. R. APP. P. 44.2(a).

HARM ANALYSIS—NON-CONSTITUTIONAL HARM ANALYSIS

***Dang v. State*, ___ S.W.3d ___, 2006 WL 1549116, No. 14-00-560-CR (Tex. App.—Houston [14th Dist.], June 8, 2006) (not yet reported).**

On appeal, the Court of Criminal Appeals held that the trial court erred in limiting defense counsel's closing argument to twenty minutes and by denying defense counsel's request for an additional three minutes, and the case was remanded to the court of appeals for a harm analysis. See *Dang v. State*, 154 S.W.3d 616 (Tex. Crim. App. 2005). The defendant claimed that the trial court's error was constitutional in nature and that the court of appeals, therefore, should apply the harm analysis applicable to TEX. R. APP. P. 44.2(a). The court of appeals noted that, on direct appeal, the defendant had not asserted that the trial court's restriction on the duration of closing argument violated his constitutional rights. The court of appeals further noted that the Court of Criminal Appeals had not determined that the trial court's improper limitation on the defendant's time for argument directly offended any part of either the United States Constitution or the Texas Constitution. "Although an appellate court may conclude that a trial court's unreasonable and arbitrary limitation on a defendant's closing argument violates the United States Constitution or the Texas Constitution, the Court of Criminal

Appeals did not do so in this case.” Therefore, because the Court of Criminal Appeals did not reverse based on a constitutional error, the court of appeals applied a non-constitutional harm analysis applicable to TEX. R. APP. P. 44.2(b).

UNASSIGNED ERROR – ADDITIONAL BRIEFING

***Pena v. State*, ___ S.W.3d ___, 2006 WL 1084004, No. PD-966-05 (Tex. Crim. App., Apr. 26, 2006) (not yet reported).**

The defendant was charged with possession of marijuana, and, before trial, he requested an independent analysis of the evidence. However, it was discovered that the alleged marijuana had been destroyed and, except for a lab report, all records documenting the testing of the evidence were lost. The defendant objected, contending that admission of the lab report after the physical evidence had been destroyed would violate his right to due process under the United States Constitution and due course of law under the Texas Constitution, but his objection was overruled. On appeal, the defendant contended that the trial court “erred in admitting testimony of test results concerning alleged marijuana when this material evidence and the original file concerning this evidence had been destroyed or lost prior to trial and without independent testing.” In support of his claim, the defendant relied upon federal caselaw addressing the due process implications of destroying potentially exculpatory evidence. The defendant did not claim that the Texas Constitution conferred broader protection than that articulated in the federal cases. On its own, the court of appeals decided to address whether the Texas Constitution’s Due Course of Law provision granted defendants greater protection than the United States Constitution. The court determined that the language of the Due Course of Law provision was different from and “arguably significantly broader than” the language found in the counterpart provision of the United States Constitution. The court also found that some other states had rejected the controlling federal caselaw in interpreting their own constitutions, that the required showing of “bad faith” was an

unworkable standard, that serious questions concerning the fundamental fairness of the trial can occur even in the absence of bad faith, and that recent findings of negligence in the handling of evidence in crime labs across the country—and in Texas—“demand that courts exercise caution when analyzing lost or destroyed evidence.” Therefore, the court of appeals held that the Texas Constitution required the State to preserve evidence that had apparent exculpatory value when comparable evidence was not reasonably available to the defendant. The court of appeals held that, when evidence that is potentially useful is lost or destroyed, a balancing test should govern whether the State’s case should be dismissed. The court would balance “the degree of negligence involved” against “the significance of the destroyed evidence considered in light of the probative value and reliability of secondary evidence that remains available,” and “the sufficiency of the other evidence used at trial to support the conviction.” After conducting this balancing test in the present case, the Court of Appeals concluded that the defendant had been denied due course of law under the Texas Constitution. The Court of Criminal Appeals reaffirmed that appellate courts are free to review “unassigned error”—a claim that was preserved in the trial below but was not raised on appeal. Many, if not most, of the types of error that would prompt *sua sponte* appellate attention need not be assigned for additional briefing by the parties because the error involved constitutes an obvious violation of established rules. However, novel constitutional issues are a different matter. When the issue is a novel one of constitutional dimension that threatens to overturn the acts of another branch or department of government, the court should exercise special care in deliberating on the matter. “We do not suggest that an appellate court must order briefing every time it decides to raise on its own a point of error not briefed by the parties.” Some rules—constitutional or otherwise—are already firmly established through prior litigation, having already passed through the fires of adversarial testing. But a novel rule that expands the reach of a constitutional provision can hamstring the Legislature, as well as frustrate trial courts and

prosecutors who relied upon the rule that was previously in effect. The court of appeals decided on its own to expand the reach of the Texas Constitution without first requesting briefing from the parties. The failure by the court of appeals to afford the parties an opportunity to brief the issue was error.

REVERSAL FOR NEW PUNISHMENT HEARING

***McNatt v. State*, 188 S.W.3d 198 (Tex. Crim. App. 2006).**

The defendant was indicted for the felony offense of driving while intoxicated (DWI) after having been previously convicted of DWI on two or more occasions. The indictment alleged that the primary DWI was committed on November 18, 2001, and the indictment alleged two prior convictions for the purpose of enhancement (occurring on January 19 and January 26, 1983). Because the second enhancement offense was not committed after conviction for the first had become final, the convictions counted as only one conviction for the purpose of determining the range of punishment under the enhancement statute—raising the punishment range from that of a third-degree felony (2 to 10 years of imprisonment) to that of a second-degree felony (2 to 20 years of imprisonment). The case was set for trial on March 17, 2003. On March 6, 2003, the State filed a letter conveying its notice of intent “to prosecute [the defendant] as a habitual offender.” The letter informed the defendant that he would be facing a punishment range of 25 years to life and that, in addition to the two enhancement convictions listed in the indictment, the State would rely upon a 1982 felony DWI conviction that was not listed in the indictment. On March 24, 2003, the day before sentencing, the trial court ruled that the State could not use for enhancement the 1982 felony DWI conviction pled in the March 6 notice because the notice was untimely. The next day, the State requested that the trial court reconsider its ruling and also requested permission to use a 1987 felony DWI conviction that was pled as one of the jurisdictional priors in the indictment. The trial

court permitted the State to use the 1987 felony DWI conviction to enhance the range of punishment to 25 to 99 years or life., and the defendant was sentenced to 99 years in prison. On appeal, the court of appeals held that the State failed to give sufficient notice of its intent to use the 1987 felony DWI conviction for enhancement. Therefore, the court reversed the assessment of punishment and remanded the case for a new punishment hearing. The court of appeals also held that the State would not be allowed to cure the notice problem on remand by giving notice before the new punishment hearing; rather, the State would be limited to using the prior (non-sequenced) convictions set out for enhancement purposes in the indictment. As a result, instead of seeking a sentence in the punishment range of 25 to 99 years or life, the State would be limited to seeking a sentence in the punishment range of 2 to 20 years. The Court of Criminal Appeals held that, under Article 44.29(b) of the Code of Criminal Procedure, a reversal of a defendant’s case for a new punishment hearing envisions the case being returned to a point at which the State could file new notice pleadings, including a notice of intent to use a prior conviction for enhancement purposes. Furthermore, “due process does not require that notice [of enhancement allegations] be given prior to the trial on the substantive offense.” *See Oyler v. Boles*, 368 U.S. 448, 82 S. Ct. 501, 503, 7 L. Ed. 2d 446 (1962); *Chandler v. Fretag*, 348 U.S. 3, 8, 75 S. Ct. 1, 99 L. Ed. 4 (1954). Therefore, after a defendant’s sentence is reversed on appeal because the State failed to give the defendant proper notice of its intent to use a prior conviction for enhancement purposes, the State is not prohibited on remand from giving the requisite notice and using the conviction for enhancement purposes at the new punishment hearing. The court of appeals erred in holding that the untimeliness of an enhancement allegation carries over to any retrial of the punishment proceedings. As long as the enhancement is not barred by other considerations (such as prosecutorial vindictiveness), the State is free to use a prior conviction for enhancement if proper notice of its

intent to do so is conveyed with respect to the new punishment hearing.

OUT-OF-TIME PETITION FOR DISCRETIONARY REVIEW

Ex parte Riley, ___ S.W.3d ___, 2006 WL 1540646, No. AP-75185 (Tex. Crim. App., June 7, 2006) (not yet reported).

The defendant was charged with possession of marijuana, and he filed a motion to suppress, claiming that there was no reasonable basis for an officer to stop him and that the evidence was found during an invalid warrantless search. The trial court denied the motion to suppress, and the defendant entered a plea of guilty to the offense. The defendant then appealed, and the court of appeals affirmed the defendant's conviction. The clerk of the court of appeals mailed a copy of the court's opinion to the defendant's attorney, but the attorney never received the copy. After learning about the opinion from the prosecutor, the defendant's attorney informed the defendant that his conviction had been affirmed by the court of appeals, he gave the defendant a copy of the opinion. The defendant expressed his desire to file a petition for discretionary review, but his attorney informed the defendant that the filing deadline had passed. The defendant subsequently filed an application for a post-conviction writ of habeas corpus, requesting leave to file an out-of-time petition for discretionary review. The Court of Criminal Appeals refused to find that the defendant's attorney had rendered ineffective assistance of counsel. Nevertheless, the court held that the defendant was entitled to an out-of-time petition for discretionary review. "In this case, there was a breakdown in the system, and due process requires that [the defendant] be permitted to exercise his statutory right to file a petition for discretionary review. However, this is not an opening for careless attorneys to disregard deadlines and blame it on the U.S. Postal Service. There are now procedures available to attorneys to reduce the chances that this type of breakdown will occur. CaseMail and opinion tracking are online tools offered by the courts to alert an attorney by electronic mail immediately when a case is handed down, alleviating the delay

resulting from regular mail. Thanks to technology, attorneys no longer have the excuse that they didn't know when their client's case was decided."

POST-CONVICTION WRIT OF HABEAS CORPUS—ILLEGAL SENTENCE

Ex parte Rich, ___ S.W.3d ___, 2006 WL 1540618, No. AP-75112 (Tex. Crim. App., June 7, 2006) (not yet reported).

The defendant was charged with felony driving while intoxicated. The indictment contained two enhancement paragraphs that alleged prior convictions for two felony offenses, delivery of a controlled substance and injury to an elderly person. The defendant entered a plea of guilty to the charged offense and pleas of true to the allegations in the two enhancement paragraphs. The defendant did not take a direct appeal. It was subsequently determined that the narcotics offense had been reduced to a misdemeanor, and the defendant filed an application for a post-conviction writ of habeas corpus, claiming that he received ineffective assistance of counsel because his attorney failed to investigate the prior conviction that was improperly used to enhance his punishment. The Court of Criminal Appeals held that a defendant should be allowed to raise a claim of an illegal sentence based on an improper enhancement for the first time on a writ of habeas corpus, even though the defendant failed to raise such a claim on direct appeal and even though the defendant had entered pleas of true to the enhancement paragraphs. The majority rejected the defendant's contention that his claim was actually one of actual innocence with regard to the improper enhancement paragraph.

NOTES

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