

**PETITION FOR REVIEW GRANT TRENDS  
2005**

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**19<sup>TH</sup> ANNUAL ADVANCED CIVIL APPELLATE PRACTICE  
COURSE**  
September 8 – 9, 2005  
Austin

**CHAPTER 9**



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Of counsel attorney specializing in civil appellate law and civil trial law.

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J.D., Texas Tech School of Law, 1977; Law Review, Associate Editor, 1976 – 1977;  
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B.A., Abilene Christian College, 1975; Debate Society; Campus Advance

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Of Counsel for the law firm Locke Liddell & Sapp LLP, June 2004 – present

Mullin, Hoard & Brown, Amarillo, Texas, 2000 – May 2004

Carr, Fouts, Hunt & Wolfe, Amarillo, Texas, 1996 – 2000

Hinkle, Cox, Eaton, Coffield & Hensley, Amarillo, Texas, 1994 – 1996

Culton, Morgan, Britain & White, Amarillo, Texas, 1981 – 1993

Templeton & Garner, Amarillo, Texas 1978 – 1981

Seventh Court of Appeals of Texas, Briefing Attorney 1977 – 1978

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Supreme Court of Texas Advisory Committee, 1999 – Present

Chair, Appellate Section, State Bar of Texas, 2002 – 2003

Chair, drafting committee of "Standards for Appellate Conduct" 1995 – 2002

Course Director, State Bar Advanced Civil Trial Course, 2004

Course Director, State Bar Advanced Appellate Practice Course, 1994

Pattern Jury Charge Committee, Business, Consumer, Employment Law, 1991 – 2001

Texas Center for Legal Ethics, Board of Trustees, 2002 – 2004; Advisory Council, 1998 – 2001

Grievance Committee, District 13, 1990 – 1994, Chair 1993 – 1994

U.S. District Court Advisory Group, Northern District of Texas, 1992 – 1997

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## **Petition for Review Grant Trends—2005**

By Charles “Skip” Watson

The Supreme Court of Texas is clearly not interested in correcting the perceived error presented by over 90% of the petitions it reviews. Justices report they routinely review roughly 28 petitions for review per week. On an average perhaps two of those 28 petitions will eventually be granted for review.

There are many ways to predict which petitions for review are granted by the Supreme Court. Trial lawyers tend to concentrate on theories ranging from conspiracy, to “anything except mine.”

This paper will focus on the three theories many appellate lawyers use to predict what will interest the court:

- Statistical analysis
- Subject matter analysis
- Areas of interest revealed in opinions

### **1. Playing the Odds.**

There is no need to reinvent the statistical wheel. Pam Baron has recently updated the pioneering statistical analysis she and Stacy Obenhaus first published in *The Texas Supreme Court by the Numbers*, University of Texas School of Law, 11<sup>th</sup> Annual Conference on State and Federal Appeals, (2001). This is an overview of their published work:

#### **Filings in 2000.**

Approximately 1,300 cases of all types were filed in the Supreme Court of Texas. Pam Baron and Stacy Obenhaus analyzed the first 300 filed in 2000. Of those, 218 or 73% were petitions for review.

Responses were voluntarily filed in 21% of the petitions for review. Responses were requested by the Court in additional 24%, resulting in responses in 45% of the cases.

Briefs on the merits were requested in 25% of the petitions for review.

Petitions for review were eventually granted in only 9% of the 218 cases reviewed. Of those 19 grants, one was a motion for rehearing, leaving the grant rate from the petitions for review alone at close to 8%. The odds of a grant were somewhere between 1 in 11 to 1 in 13.

The grant rate after a request for full briefing rose to 34.5%, or 1 in 3.

### **Filings in 2004.**

Four years later Pam Baron studied a smaller sample, the first 100 cases filed in 2004. Her findings were published in her column, *The Chair's Report*, in the State Bar of Texas Appellate Section newsletter, *The Appellate Advocate*, Vol. XVIII, No. 1, Summer 2005.

Of the first 100 filings in 2004, 71% were petitions for review. This study compared petitions for review and original proceedings after excluding six cases which did not proceed after an initial motion for extension of time and one disciplinary appeal.

Responses were voluntarily filed in 21.5% of the cases.

If I interpreted the statistics correctly, a response was waived in 44% of the cases. The Court requested responses in 33% of the voluntary waivers and in the 34.5% in which no response or waiver was initially filed. This resulted in responses being filed in 47% of the combined petitions for review and original proceedings.

Briefs on the merits were requested in 22.5% of the combined petitions for review and original proceedings. Interestingly full briefing was requested in 55% of the cases in which a response was voluntarily filed, 25% of the cases in which neither a response nor a waiver was voluntarily filed, and only 5% of the cases in which a response was voluntarily waived.

The overall grant rate was not determined for 2004. Pam Baron estimated it would be about 40% of the fully briefed cases which corresponds to about 9% of the combined petitions for review and original proceedings filings studied. Under discretionary review, as in life, the odds favor the house.

## **2. Isolating Subjects Granted for Review.**

Sensitivity to issues likely to attract the Court's attention distinguishes the handful of appellate practitioners whose grant rates exceed 10%. Any attempt to create subject categories is highly subjective. What matters is the knowledge gained by the effort.

### **Subjects Granted in 2000.**

The study of 218 cases filed in 2000 by Pam Baron and Stacy Obenhaus found that among granted petitions for review the following issues dominated:

- Procedure
- Statutory Construction
- Limitations
- Negligence
- Administrative Law

### **Subjects Granted in 2003.**

In December 2003, Mike Hatchell spoke at the Corpus Christi Bar Association's Appellate Seminar concerning practice before the Supreme Court. His spoken remarks were predicated on Molly Hatchell's compilation of petitions for review and mandamus granted by the Supreme Court found at [www.hatchellreport.com](http://www.hatchellreport.com).

The Hatchell's analysis of 2003 grants by subject were ranked as follows:

- Procedure (particularly involving expert witnesses)
- Statutory construction
- Contract construction (including insurance)

### **Subjects Granted or Pending in 2005.**

The following tables reflect petitions for review listed, granted, or pending in 2005 in the Hatchell Report. The subject categories used in the Hatchell Report are based on the Supreme Court staff's unofficial summaries of the issues briefed. The predominant issues are:

- Contract (including insurance)
- Procedure (including appellate, jury charge, jury argument, and summary judgment)
- Damages (including punitive)

Again, subject categories skew results. For example, there is no specific "statutory construction" section, and what is included in "procedure" is my compilation of several categories. The following tables will assist your analysis.

**2005 PETITION FOR REVIEW GRANTS  
BY SUBJECT\***

NUMBER OF CASES	SUBJECT
11	Insurance Law
7	Administrative Law
7	Contracts
7	Jurisdiction
6	Attorneys Fees
6	Constitutional Law
5	Class Actions
5	Procedure
4	Damages
4	Damages-Punitive
4	Employment Law
4	Immunity
4	Jury Charge
4	Negligence
4	Products Liability
3	Summary Judgment
3	Direct Appeal
3	Evidence
3	Prejudgment Interest
3	Premises Liability

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\* As classified by the Hatchell Report, [www.hatchellreport.com](http://www.hatchellreport.com) using unofficial Supreme Court staff case summaries.

<b>NUMBER OF CASES</b>	<b>SUBJECT</b>
3	Procedure—Appellate
3	Zoning & Planning
2	Attorneys
2	Colleges & Universities
2	Gross Negligence
2	Indemnity
2	Oil and Gas
2	Property
2	Taxes
2	Wills, Trusts & Estates
2	Wrongful Death Statute
1	Anti-trust
1	Arbitration
1	Condemnation
1	Contribution
1	Deceptive Trade Practices Act
1	Declaratory Judgment
1	Deeds
1	Dram Shop
1	Environmental
1	Expert Testimony
1	First Amendment
1	Fraud

<b>NUMBER OF CASES</b>	<b>SUBJECT</b>
1	Governmental Entities
1	Healthcare Liability
1	Judicial Disqualifications
1	Jury Argument
1	Limitations
1	Malicious Prosecution
1	Mental Anguish
1	Post-Judgment Interest
1	Proportionate Responsibility
1	Res Judicata
1	Sanctions
1	Supersedeas Bond
1	Telephone Consumer Protection Act
0	Assignment of Claims
0	Discovery
0	Exhumation
0	Venue

**PETITIONS FOR REVIEW**  
**PENDING IN SUPREME COURT IN 2005\*\***

CASE	SUBJECT	DATE GRANTED
<i>Alex Sheshunoff Management Services L.P. V. Kenneth Johnson, et al.</i> No. 03-1050	Contracts Employment Law Summary Judgment	09/10/04
<i>Alton J. Meyer and Meyer Acquisition Group, et al. v. WMCOI-GP LLC, et al.</i> No.04-0252	Arbitration	02/11/05
<i>Arturo Flores, et al. v. Millennium Interests Ltd., et al.</i> No. 04-1003	Contracts Damages Damages-Punitive Deeds Property	12/03/04
<i>AT&amp;T Communications of Texas, LP. V. Southwestern Bell Telephone Co., et al.</i> No. 03-0789	Administrative Law	05/28/04
<i>Baskin Family Camps Inc. v. James "Tex" Steeg,</i> No. 03-1107	Negligence	01/21/05
<i>Baylor University v. Betty A. Coley</i> No. 04-0916	Employment Law	06/10/05
<i>Bed, Bath &amp; Beyond, Inc. v. Urista</i> No. 04-0332	Jury Charge	05/27/05
<i>BMG Direct Marketing Inc. v. Patrick Peake, et al.</i> No. 03-0547	Class Actions	01/30/04
<i>Citizens Ins. Co. v. Daccach</i> No. 03-0505	Class Actions	09/03/04
<i>City of Dallas, et al. v. Doug Vanesco and Grace Vanesco,</i> No. 04-0263	Zoning & Planning	12/17/04
<i>City of Houston v. Donald Clark,</i> No. 04-930	Administrative Law	08/26/05
<i>City of Houston v. Robert Jackson,</i> No. 04-0465	Administrative Law	06/17/05
<i>City of Marshall v. City of Uncertain, et al</i> No. 03-1111	Administrative Law Environmental	07/02/04
<i>City of White Settlement v. Super Wash Inc.</i> No. 04-0340	Zoning & Planning	03/11/05

\*\* From the Hatchell Report,. [www.hatchellreport.com](http://www.hatchellreport.com) using unofficial Supreme Court staff case summaries.

CASE	SUBJECT	DATE GRANTED
<i>Columbia Medical Center of Las Colinas Inc. v. Athena Hogue, et al.</i> , No. 04-0575	Jury Charge Post-Judgment Interest Prejudgment Interest Wrongful Death Statute	02/11/05
<i>DaimlerChrysler Corp. v. Bill Inman, et al.</i> No. 03-1189	Class Action Contracts Jurisdiction	12/03/04
<i>Dallas County Community College District et al. v. William H. Bolton III, et al.</i> , No. 02-1110	Attorney Fees Class Actions Colleges & Universities Damages Immunity	10/17/03
<i>Dallas County v. Linda L. Wiland, et al.</i> No. 04-0247	Constitutional Law Damage Employment Law	02/11/05
<i>Diversicare General Partner Inc., et al. v. Maria Rubio, et al.</i> No. 02-0849	Healthcare Liability Negligence	03/27/03
<i>Edgewood ISD v. Neeley</i> No. 05-0148	Constitutional Law Direct Appeal Taxes	03/16/05
<i>Equistar Chemicals LP v. Dresser-Rand Co.</i> No. 04-0121	Contracts Damages Procedure Products Liability	02/11/05
<i>Evanston Insurance Co. v. ATOFINA Petrochemicals Inc.</i> No. 03-0647	Attorneys Fees Insurance Law	03/11/05
<i>F.F. P. Operating Partners L.P. v. Xavier DueZez and Irene DueZez, et al.</i> No. 02-0381	Contribution Dram Shop Jury Charge Proportionate-Responsibility	04/08/05
<i>Fairfield Ins. Co. v. Stephens Martin Paving, LP et al.</i> No. 04-0728	Damages-Punitive Gross Negligence Indemnity Insurance Law	08/27/04
<i>Fifth Club Inc. and David A. West v. Roberto Ramirez</i> No. 04-0550	Damages-Punitive Employment Gross Negligence	06/10/05

CASE	SUBJECT	DATE GRANTED
<i>GTE Mobilnet of Houston Inc. v. The Chair King, et al.</i> , No. 04-0570	Limitations Telephone Consumer Protection Act	03/11/05
<i>GuideOne Elite Insurance Co. v. Fielder Road Baptist Church</i> No. 04-0692	Evidence Insurance Law Procedure	06/17/05
<i>Hallco Texas Inc. v. McMullen County</i> No. 02-1176	Condemnation Constitutional Law Zoning & Planning	11/05/04
<i>HEB Ministries Inc., et al. v. Texas Higher Education Coordinating Board</i> No. 03-0995	Colleges & Universities First Amendment Summary Judgment	12/03/04
<i>Hicks v. Rice Food Market Inc.</i> No. 03-0848	Premises Liability	12/03/04
<i>Hyundai Motor Co. v. Victor Manual Vasquez, et al.</i> , No. 03-0914	Jury Argument Procedure Products Liability	10/15/04
<i>Judy Tooke and Everett Tooke v. City of Mexia</i> No. 03-0878	Contracts Governmental Entities Immunity	03/26/04
<i>Kathryn Aylor Bowden, et al. v. Phillips Petroleum Co., et al.</i> No. 03-0824	Class Actions Oil and Gas Res Judicata	09/10/04
<i>Kristen Terk Belt and Kimberly Terk Murphy, Joint Independent Executrixes</i> No. 04-0681	Attorneys Wills, Trusts & Estates	04/08/05
<i>Kroger Texas Limited Partnership and Robert Moody v. Theresa Suberu,</i> No. 03-0913	Malicious Prosecution Mental Anguish	09/10/04
<i>Lexington Ins. Co., et al. v. Strayhorn, Comptroller</i> No. 04-0429	Insurance Law	05/27/05
<i>Lilith Brainard et al. v. Trinity Universal Insurance Co.</i> No. 04-0537	Attorneys Fees Insurance Law Prejudgment Interest	03/11/05
<i>Mack Trucks Inc. v. Elizabeth Tamez, et al.</i> No. 03-0526	Evidence Expert Testimony Procedure Products Liability	07/02/04
<i>Maria Cristina Brittingham-Sada de Ayala v. Estate of Brittingham-McLean</i> No. 04-0160	Jurisdiction Wills, Trusts & Estates	02/11/05

CASE	SUBJECT	DATE GRANTED
<i>Mid-Continent Insurance Co. v. Liberty Mutual Insurance Co.</i> No. 05-0261	Insurance Law	05/13/05
<i>Minnesota Life Insurance Co. v. Elia L. Vasquez</i> No. 04-0477	Insurance Law Procedure	03/11/05
<i>Nick DiGiuseppe v. Roger Lawler</i> No. 04-0641	Contracts Procedure—Appellate	06/17/05
<i>Rawson-Koenig Inc. v. Hudiburg Chevrolet Inc., et al.</i> No. 03-0987	Indemnity Negligence Products Liability	06/11/04
<i>Reata Construction Corp. v. Dallas</i> No. 02-1031	Immunity	10/15/04
<i>Richard Fiess and Stephanie Fiess v. State Farm Lloyds</i> No. 04-1104	Insurance Law	01/21/05
<i>Robert Low, D.O., et al. Thomas J. Henry, et al.</i> No. 04-0452	Evidence Sanctions	12/17/04
<i>Sandy Dew, et al. v. Crown Derrick Erectors Inc.,</i> No. 03-1128	Jury Charge Negligence Premises Liability	11/05/04
<i>Seagull Energy E&amp;P Inc. v. Railroad Commission of Texas,</i> No. 03-0364	Oil and Gas	07/02/04
<i>Shirley Neeley v. West Orange-Cove Consolidated Independent School District et al.</i> No. 04-1144	Constitutional Law Direct Appeal	02/18/05
<i>State Farm Mutual Automobile Insurance Co. v. Jimmie R. Norris</i> No. 04-0514	Attorneys Fees Insurance Law Prejudgment Interest	03/11/05
<i>State Farm Mutual Automobile Insurance Co. v. Teresa Nickerson</i> No. 04-0427	Attorneys Fees Insurance Law	03/11/05
<i>State of Texas and Texas Parks and Wildlife Department v. Ricky and Sandra Shumake</i> No. 04-0460	Immunity Premises Liability Wrongful Death Statute	02/11/05
<i>Tesco American Inc. v. Strong Industries Inc. and Brooks Strong</i> No. 04-0269	Judicial Disqualification Procedure—Appellate	01/21/05
<i>Texas Municipal Power Agency et al. v. Public Utility Commission of Texas, et al.,</i> No. 04-0751	Administrative Law Jurisdiction	05/13/05

<b>CASE</b>	<b>SUBJECT</b>	<b>DATE GRANTED</b>
<i>Texas Municipal Power Agency et al. v. Public Utility Commission of Texas, et al.</i> No. 04-0752	Administrative Law Jurisdiction	05/13/05
<i>The Coca-Cola Co. et al. v. Harmar Bottling Co., et al.</i> No. 03-0737	Anti-Trust	09/03/04
<i>Theresa Marshall v. Housing Authority of San Antonio</i> No. 04-0147	Constitutional Law Jurisdiction Property Supersedeas Bond	03/11/05
<i>Tommy Thomas, Harris County Sheriff v. Jeanne Long</i> No. 03-0204	Administrative Declaratory Judgment Jurisdiction Summary Judgment	01/16/04
<i>Tony Gullo Motors I, L.P. and Brien Garza v. Nury Chapa</i> No. 04-0961	Attorneys Fees Contracts Damages-Punitive DTPA Fraud Procedure—Appellate	06/10/05
<i>Unauthorized Practice of Law Committee v. American Home Assurance Co. Inc., et al.</i> No. 04-0138	Attorneys Insurance Law	04/08/05
<i>West Orange Cove-Consolidated ISD v. Neeley</i> No. 05-0145	Constitutional Law Direct Appeal Taxes	03/16/05
<i>Yusurf Sultan v. Savio Matthew</i> No. 03-0831	Jurisdiction	04/09/04

### **3. Recognizing Future Subjects of Interest.**

The Court does not author the same opinion twice. As a result, statistics and categories ultimately give way to informed hunches used to frame issues that attract the Court's attention. This is where the 9% are conceived.

A few examples illustrate the progression of analysis.

#### **Logical Extensions of New Principles.**

The easiest issues involve simple recognition of how principles announced by the Court should be extended to new situations not necessarily covered by the initial pronouncement. There is an inherent tendency to resist change. Some lower court judges tend to limit new

principles to the facts of the cases decided by the Supreme Court, but the Supreme Court rarely announces principles for one case only. Successful Supreme Court practitioners invariably project new principles to new applications that logically flow from the initial opinion.

For example, *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000) applied the reversible error standard in TEX. R. APP. P. 44.1(a)(2) and 61.1(b) for preventing preservation of the appeal to broad form jury instructions containing invalid causes of action along with recognized causes of action. *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002) used the same standard to reverse inclusion of a damage element not supported by the evidence in an instruction with proven elements, even though the maximum actual error amounted to a few cents. *Romero v. KPH Consolidation, Inc.*, \_\_\_\_\_ S.W.3d \_\_\_\_, 2005 WL1252748 (Tex. 2005) extended this harmless error analysis to a proportionate liability question where one of the two underlying liability findings against one defendant was not supported by legally sufficient evidence. There can be no doubt that *Casteel* meant what it said.

### **Problems Created by Application of New Principles.**

The application of any new rule of law always creates unforeseen questions. Analysis must extend to “how is it going to work in practice?”

*Romero* offers the example of perfecting charge error that prevents presentation of the merits. At issue was whether the solution posed by *Casteel* and *Harris County*, of separately submitting the disputed issue, had to be preserved. In *Romero*, the savvy trial judge offered to submit an apportionment question isolating the liability grounds that were and were not suspect. The defendant refused the offer and relied on a “no evidence” objection to the unproven theory and to allowing it to taint the apportionment finding.

The Supreme Court held that error was preserved because the true error was the submission of the unproven theory in the first place.

### **Identify the Logical Outer Limits of a Principle.**

Most legal principles involve a balance of competing values. New principles are typically extended to new situations until their scope is sufficiently established. Then the Court draws the line that marks the limits of application.

An example is *Cire v. Cummings*, 134 S.W.3d 835 (Tex. 2004). For 12 years the Court had applied *Transamerican* and *Downey* to reverse initial discovery sanctions which prohibited or impeded presentation of the merits of the abuser’s case. In *Cire*, the Court found an example of abuse that justified the trial court’s assumption that the abuser’s case lacked merit. Sometimes defining the outer limits of a rule can be shown to be necessary to give it credibility.

### **Look for Future Trends in Dicta**

The Supreme Court sometimes signals where it wants to take the law with dicta that is cited as precedent when the issue is finally presented. Astute practitioners watch for citations containing only out-of-state or federal cases.

A notable example is *Hoffman-La Roche Inv. v. Zeltwanger*, 144 S.W.3d 438 (Tex. 2004). The opinion is based on a passing reference in *Standard Fruit and Vegetable Co. v. Johnson*, 985 S.W.2d 62, 68 (Tex. 1998) to the tort of intentional infliction of emotion distress as a “gap filler,” created to provide a remedy not otherwise afforded by statute. The reference was supported by two out-of-state citations.

*Romero* may also supply an example of future of reversible error analysis. The Court may have signaled the future outer limits of TEX. R. APP. P. 44.1(a)(2) and 61.1(b) reversal for “preventing presentation of the case” on appeal. When it added the single sentence: “But unless the appellate court is ‘reasonably certain that the jury was not significantly influenced by issues erroneously submitted to it’ the error is reversible.” Footnote 53 cites only to federal cases reciting the settled federal standard of review. The door is waiting to be opened to determine whether the courts will decide whether they are “reasonably certain” that *Casteel* error did not influence the jury.

### **Look for Future Trends in Concurring and Plurality Opinions.**

The turnover on the Court means that strongly held views by some justices may carry the day in a new conference.

*City of Keller v. Wilson*, \_\_\_\_ S.W.3d \_\_\_\_, 2005 WL 1366509 (Tex. 2005) should not have surprised anyone who read the plurality opinion statement that a jury may not “disregard undisputed evidence” in *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 519-520 (Tex. 2002). The new standard for reviewing legal sufficiency will dominate future filings. A review of opinions by remaining justices will provide areas of known interest.

### **Looks for Trends in Dissenting Opinions.**

Review of strongly held views likely to be reheard should extend to dissenting opinions as well. No one expects wholesale abandonment of precedent. At issue will be how fundamental perceived past error is. That may be revealed by deeply rooted views concerning the nature of the judicial process.

An example might be the roles of judges and juries reflected in the dissenting opinions in *H. E. Butt Grocery Co. v. Bilotto*, 985 S.W.2d 22 (Tex. 1998). The jury charge is the inevitable collision of those philosophies. The goal of preventing “jurors from outcome-oriented decision making” may be worth revisiting. *Id.* at 1223 (Hecht, J., dissenting).

### **Look Beneath the Conflicts for Reasons and Consequences.**

Conflict jurisdiction has been broadened, but that does not mean every apparent disagreement among courts of appeals will be addressed. Opinions that are clearly aberrations are rarely addressed. Conflicts that are skillfully disguised to reach a result are not likely to be addressed. Sketchy memorandum opinions will not likely be addressed.

The object is not to point to the conflict. It is to point out how the incorrect interpretation got it wrong, and the consequences of that reasoning being applied in the future. The key is to relate both the wrong-headed analysis and the adverse consequences to undermining principles announced by the Supreme Court and relied upon by the conflicted courts of appeals that got it right.

Sometimes the problem is in a rule announced by the Supreme Court which appeared clear until opposite results were reached in its application. The Supreme Court may become more interested in clarifying its own pronouncements.

In the near future, however, this Court may be absorbed in expanding and explaining its recent pronouncements.

### **Conclusion**

We are at the threshold of a new era in appellate advocacy. The advent of judicial determinations of whether jury determinations are reasonable will likely be interpreted by most as an opportunity for appellate jury arguments. It is not.

Instead it is an opportunity to explore with the Court how it will infuse something akin to the federal standards of legal sufficiency of the evidence and reversible error into appellate review. Success will depend on the ability to discern and argue subtle distinctions and effects. Guidance from those who have thought through where the Court is going will almost certainly be appreciated.

As in the past, those who believe appellate advocacy begins and ends with analysis will succeed.