

ISSUE DRAFTING/ISSUE SPOTTING

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ISSUE DRAFTING/ISSUE SPOTTING

I. INTRODUCTION

"In law the right answer usually depends on putting the right question." *Estate of Rogers v. Comm'r*, 320 U.S. 410, 413 (1943) (Frankfurter, J.). This often-quoted phrase from Justice Frankfurter aptly captures the importance of issue spotting and issue drafting on appeal. Correctly framing the issue for appeal can be outcome determinative, and many leading appellate practitioners feel that if you let them frame the issue, they can win the appeal. One commentator on legal writing has stated: "There is no more important point in persuasive and analytical writings—and certainly no more commonly bungled—than framing the issue." BRYAN A. GARNER, *A DICTIONARY OF MODERN LEGAL USAGE* 471 (2d ed. 1995). The importance of carefully spotting and drafting the issues for appeal cannot be overstated.

Likewise, the importance of tailoring the issues to a particular court is paramount. The way an issue should be framed to capture the interest of the Texas Supreme Court is different from the way it should be framed to persuade a court of appeals. That is because the primary functions of the Texas Supreme Court and the courts of appeals are different, and practitioners should keep the differences in mind. This paper will first address drafting and spotting issues in general and then provide tips to be used for drafting issues in all appellate courts. The paper next focuses on drafting issues in the courts of appeals, with tips applicable to those courts. The paper then discusses drafting issues in the Texas Supreme Court, with tips specific to drafting issues in that Court. Finally, the paper provides tips for selecting the best issues to be raised on appeal.

II. DRAFTING ISSUES GENERALLY

The rules of appellate procedure provide that the statement of the issues in a brief must state concisely all issues presented for review and that "the statement of an issue or point will be treated as covering every subsidiary question that is fairly included." TEX. R. APP. P. 38.1(e), 53.2(f), 55.2(f). Because these rules allow practitioners leeway in drafting issues, one of the first considerations is what format to use for your case. There are also several tips that can guide the content that is placed in each statement of the issues.

A. The format of the issue

With the 1997 amendments to the Texas Rules of Appellate Procedure, practitioners gained greater freedom in the format they use for drafting issues. Under the prior point-of-error practice, most issues were stated in one sentence and began: "The trial court erred in. . . ." Under the current rules, however, the

appellant only has to "state concisely all issues or points presented for review." *See* TEX. R. APP. P. 38.1(e), 53.2(f), 55.2(f). This allows practitioners much greater freedom in choosing how to frame the issue for appeal.

One noted appellate lawyer has likened issue framing to picture framing: "A picture frame defines the object of interest by putting borders around it and focusing the viewer on what's important. Similarly, a skillfully-framed 'issue' in an appellate brief accomplishes a lot more than just preserving error. . . ." Mike A. Hatchell, *Prologue* to Bryan A. Garner, *Issue Framing: The Upshot of it All*, in STATE BAR OF TEXAS, 11TH ANNUAL ADVANCED CIVIL APPELLATE PRACTICE COURSE 1 (1997). Almost all writers on the subject agree that, whatever format is used, it should provide the reader enough detail to put the issue in context and to understand its importance to the case.

There are three formats most commonly seen in issue statements. These formats include: (1) the one-sentence issue; (2) the Bryan Garner "deep issue;" and (3) a hybrid of the two.

1. The one-sentence issue

The one-sentence issue is just what it sounds like. It frames the issue using only one sentence and typically begins with the words "whether" or "did." The length of the sentence varies from very short to very long. *See, e.g.*, Bryan A. Garner, *Issue Framing: The Upshot of it All*, in STATE BAR OF TEXAS, 11TH ANNUAL ADVANCED CIVIL APPELLATE PRACTICE COURSE 5 (1997). A typical example of the one-sentence issue is the following:

Whether the trial court abused its discretion in admitting the testimony of plaintiff's expert?

The one-sentence issue format is often more difficult to use effectively because it is hard to adequately *and* concisely state the issue in one sentence. If many facts are necessary to put the issue in context, a one-sentence issue can end up overly-long, convoluted, and difficult to read. *See id.*

2. The Bryan Garner "deep issue"

Bryan Garner advocates using a multi-sentence "deep issue" approach to issue framing. He describes his deep issue as follows: "A 'deep issue' is concrete: it sums up the case in a nutshell—and is therefore difficult to frame but easy to understand." BRYAN A. GARNER, *A DICTIONARY OF MODERN LEGAL USAGE* 471 (2d ed. 1995). According to Garner, the deep issue should:

- consist of separate sentences;
- contain no more than 75 words;

- incorporate enough detail to convey a sense of the story;
- end with a question mark;
- appear at the very beginning of a memo brief, or judicial opinion—not after a statement of facts; and
- be simple enough that a stranger, preferably even a nonlawyer, can read and understand it.

Bryan A. Garner, *The Deep Issue: A New Approach to Framing Legal Questions*, 5 SCRIBES J. LEGAL WRITING 1, 1 (1994/1995). The following is an example of a "deep issue" format:

To maintain a cause of action for fraud under California law, a plaintiff must show that the defendant made a false representation. In his deposition, Jones concedes that neither Continental nor its agents or employees made a false representation. Is Continental entitled to summary judgment on Jones's fraud claim? [49 words].

Id. at 4. This issue consists of multiple sentences and tells the reader sufficient background information to explain the context. The deep-issue approach follows a statement-statement-question, or premise-premise-conclusion, format. See Scott P. Stolley, *Asking the Right Question: Framing the Deep Issues*, 42 FOR THE DEFENSE 29, 30 (2000).

3. The hybrid issue

Many practitioners probably use a format that employs elements from both approaches. For example, they may frame an issue in one sentence, but also place sufficient facts in the sentence to give the reader the context of the issue.

In a straight-forward case in which only one or two facts is necessary to explain the context, such a format could work. Consider the following example:

Can a pleading defect be corrected by a "supplemental petition," or must the correction be designated an "amended petition" to be effective?

Sixth RMA Partners, L.P. v. Sibley, 45 Tex. Sup. Ct. J. 1275, 1280 (Sept. 14, 2002). The issue is stated in one sentence and it gives sufficient information to frame the issue in the proper context. The case involves a procedural question for which not many facts are relevant.

Another example of the hybrid format is where the writer sets up the context in an introductory question, followed by several short one-sentence questions. The following is such an example:

Should an order granting a new trial be subject to appellate review in Texas, as it is in the other 49 states, the District of Columbia, and the federal courts?

- Are a litigant's rights under the Texas and United States Constitutions violated by Texas' practice of immunizing new trial orders from review?
- Should a trial court be required to state its reasons for granting a new trial?

Volkswagen of Am., Inc. v. Ramirez, 46 Tex. Sup. Ct. J. 477, 490-91 (Mar. 6, 2003).

In this example, the writer was able to convey to the court in the introductory question the fact that Texas law on appellate review of new trial orders is out of step with every other state and the federal courts. The introductory question is then followed by a series of more specific questions.

Yet another example of a hybrid approach is the following:

Adverse Possession: The court of appeals held (without explanation) that there was a fact issue on "repudiation" of title that defeated Defendants' summary judgment on adverse possession. But, Mrs. Chapman claimed ouster in her pleadings and the 1883 Judgment plainly repudiates Mrs. Chapman's claim to the disputed property. In addition, that property has been visibly occupied for 118 years in repudiation of any Chapman interest.

- Did the court of appeals err in holding that Defendants' adverse possession claim was not established as a matter of law because "a fact issue exists as to whether there has been a repudiation of appellants' title"?
- Did Mrs. Chapman's judicial admission of ouster and the 1883 Judgment in Cause 1279 establish ouster as a matter of law?
- Did the court of appeals misapply the standard of review by failing to detail the evidence that raised fact issues on Defendants' adverse possession claim?

King Ranch, Inc. v. Chapman, 46 Tex. Sup. Ct. J. 393, 398 (Jan. 16, 2003). In this example, the writer used an introductory paragraph to set forth the factual context of the issues and then followed up with a series of specific questions.

Each of these examples illustrate the point that the format of the issue is, more often than not, case specific. What works in one case under one set of facts may not be effective in another case with a different set

of facts. The format used should be tailored to each individual case.

B. The argumentative vs. neutral debate

Another consideration in drafting the issue is whether it should be phrased in an argumentative manner or whether it should be neutral. An argumentative issue is one that suggests the answer, while a neutral issue simply asks the question. Commentators disagree on which way the issue should be framed. See Claudia Frost & Jacalyn Hollabaugh, *Practitioners Weigh in on Framing Issues and Points of Error*, 5 THE APPELLATE LAWYER 5, 7 (Houston Bar Ass'n App. Prac. Sec. Winter 1998-1999). The concern is that the statement of the issues is not part of the argument section of the brief and thus should not be too argumentative. There is nothing, however, in the Texas Rules of Appellate Procedure to prevent an advocate from using argument in the statement of the issues. See TEX. R. APP. P. 38.1(e), 53.2(f), 55.2(f).

Interestingly, a recent survey of Texas appellate justices showed that the majority of judges questioned—58 percent—preferred a positive statement of the issue that suggested the answer. Daryl L. Moore and Amy Hennessee, *Judicial Response to the Questionnaire*, in STATE BAR OF TEXAS 17TH ANNUAL ADVANCED CIVIL APPELLATE PRACTICE COURSE ch. 5 (2003). Only 15 percent preferred the issue stated in question form and only 15 percent preferred a neutral statement of the issue. *Id.* Based on these results, it seems that an approach that in some way suggests the answer should generally be favored.

C. General tips for drafting issues

There are several tips that apply to drafting issues regardless of the court in which the issues are presented. These tips help the writer frame issues in a way that is effective and persuasive.

1. Analyze, then write

Although it may seem obvious that the first step in the process should be to thoughtfully analyze the case, one of the most frequent mistakes writers make when it comes to drafting the issue is they begin writing portions of the brief without first developing a good working statement of the issues. See Bryan A. Garner, *Issue Framing: The Upshot of it All*, in STATE BAR OF TEXAS, 11TH ANNUAL ADVANCED CIVIL APPELLATE PRACTICE COURSE 3 (1997). The best way to draft an effective statement of the issues is to first spend a sufficient amount of time analyzing the applicable law and the facts of the case. The writer is then in the best position to determine what the whole case is really about and to spot the best issues to raise on appeal.

2. Try not to bury the nugget

Another mistake writers make in drafting an issue is burying the critical information under a slew of non-critical or irrelevant facts. A well-drafted issue will have the critical information up front so that the reader will be able to quickly understand what the case is about. The reader does not have to get through the entire brief before understanding the issues in the case. The rule itself requires that an issue be stated "concisely." TEX. R. APP. P. 38.1(c).

3. Be selective in choosing and arranging issues

Lawyers who do not regularly practice in the appellate courts are often shocked when advised to limit the number and type of issues to be raised on appeal. Deep down, trial lawyers resist the idea of having to give up on any issue. But it is universally recognized that weak arguments will dilute strong arguments, and there are few cases that involve more than two or three strong issues for appeal. One commentator has noted: "Too many headings signal to your panel that you do not know what issues are important enough to require serious consideration by the court of appeals." Michael E. Robinson, *Selection of Issues for Appeal: A View From the Justice Department*, in UNIV. OF TEX., 8TH ANNUAL CONF. ON STATE AND FEDERAL APPEALS 1 (1998).

One judge has even developed a litmus test that shows how the number of issues presented reflects upon the lawyer. Judge Ruggero Aldisert of the Third Circuit Court of Appeals created the following test with regard to the number of issues included in a brief:

<u>No. of Issues</u>	<u>Judge's Reaction</u>
3	Presumably arguable points. The lawyer is <i>primo</i> .
4	Probably arguable points. The lawyer is <i>primo</i> minus.
5	Perhaps arguable points. The lawyer is no longer <i>primo</i> . Probably no arguable points.
6	The lawyer has not made a favorable initial impression.
7	Presumptively, no arguable points. The lawyer is at an extreme disadvantage, with an uphill battle all the way.
8	Strong presumption that no point is worthwhile.

HON. RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT 131 (2d ed. 2003).

Though limiting issues is the general rule, there are of course exceptions to the rule. There may be situations where the party is required to raise issues

that are not as strong in order to preserve the winning point. As one commentator has explained:

For example, if the lower court has supported an adverse ruling on a number of alternative grounds, or one's adversary can be expected to do so, the appellant will have to refute each of them or lose his appeal if he does not. In that situation, for him to follow the principle that weak points should be avoided could be disastrous.

ROBERT L. STERN, *APPELLATE PRACTICE IN THE UNITED STATES* 287 (2d ed. 1989).

Unless there is a compelling reason not to do so, it is important to limit the number of issues to only those arguments that are strong. Including too many issues on appeal will lessen the credibility of the lawyer and the good issues.

Likewise, in a case involving multiple issues, put the strongest issues first. When the best issue in the case appears as issue number 12, the writer has significantly diminished the chances for obtaining a favorable ruling on appeal. Again, however, keep in mind that there may be situations where a party should not put the strongest argument first. For example, courts typically expect to see jurisdictional arguments raised at the beginning of the argument rather than at the end. ROBERT L. STERN, *APPELLATE PRACTICE IN THE UNITED STATES* 292 (2d ed. 1989).

4. Put the issues in context and make them understandable

Perhaps the most important thing to remember when drafting issues is to include enough facts to give sufficient context to the legal question, but not create confusion with unnecessary detail. Incorporating sufficient facts into the issues will give the court a needed frame of reference so that the justices have some sense of the questions at issue. One commentator described the task as making the issue understandable to the court without having to resort to anything other than the issue itself. Susan L. Bostic, *Sample Points of Error and Issues Presented in the Past Year: The Good, The Bad, and The Ugly*, in *STATE BAR OF TEXAS, PRACTICE BEFORE THE TEXAS SUPREME COURT* 4 (2003). This is a balancing act—the writer wants to provide context but does not want to provide so much information that the issue becomes confusing or difficult to read. Although there are different formats for getting across the context in the statement of the issue, *see supra* pp. 1-3, the importance of context is discussed in most articles and treatises on issue drafting.

In describing the context, use only the salient facts for the particular issue. Do not overburden the

reader with useless facts. Also, do not simply repeat the argument headings from the body of the brief. Those headings already appear in the brief and do not need to be repeated. *See* MICHAEL E. TIGAR & JANE B. TIGAR, *FEDERAL APPEALS JURISDICTION AND PRACTICE* § 9.10 (3d ed. 1999).

If there are too many facts that need to be included to provide the context of the issue, consider using a short introduction setting forth two or three sentences of facts followed by a series of one-sentence questions. Also, if there are several issues that are not directly related, try using subheadings to delineate the changes in topics. Many examples utilizing these approaches can be found in the attached appendices.

5. Know the audience

Another tip for drafting issues is to keep in mind the audience. As discussed in the next two sections, issues framed in a way to catch the Texas Supreme Court's attention may not be as effective in the courts of appeals. There are several differences between the courts that have an impact on how to frame the issues. *See* Pamela Stanton Baron, *Drafting Issues in the Texas Supreme Court*, in *STATE BAR OF TEXAS, 15TH ANNUAL ADVANCED CIVIL APPELLATE PRACTICE COURSE 2* (2001). Thus, make sure to know and write for the particular court in which the case is pending.

III. DRAFTING ISSUES IN THE COURTS OF APPEALS

In the court of appeals, the writer's goal is generally to convince the court that the trial court has committed some error that requires reversal. Thus, the way issues are framed in the court of appeals will often focus on the error-correcting function of the court. While the tips outlined above apply with equal force in the courts of appeals, there are some additional points to keep in mind when framing the issue in the court of appeals.

A. Court of appeals considerations

1. The rule

Rule 38.1(e) provides: "The brief must state concisely all issues or points presented for review. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included." TEX. R. APP. P. 38.1(e). Unlike the old point-of-error practice,¹ the practitioner in the court of

¹ The point-of-error practice under the prior version of the rules of appellate procedure was more technical than the issues presented practice under the current rules. Under the point-of-error practice, practitioners had to list the point of error, provide a parenthetical reference to the pages in the record where the matter complained of could be found, and then list the argument that was germane to the point of error. *See* Mike A. Hatchell, *The Effective*

appeals under the current rules has some leeway for creativity in framing the issues for review. The formats discussed in the previous section of this paper apply to framing issues in the courts of appeals.

2. The error correcting function of the courts

Perhaps the key point to keep in mind in drafting issues for the court of appeals is the error correction function of the courts of appeals. They must decide every case and every issue presented for review that is necessary to final disposition of the appeal. TEX. R. APP. P. 47.1. Thus, in selecting issues for an appeal to the court of appeals it is appropriate to focus on the error committed by the trial court.

Likewise, in most instances reversal in the court of appeals requires proof that the error caused the rendition of an improper judgment. See TEX. R. APP. P. 44.1(a)(1). When drafting issues in the court of appeals, the writer should also consider the effect the error had on the result below. The issue presented should also be such that the court of appeals wants to correct the error of the trial court.

B. Tips for drafting issues in the court of appeals

In addition to the tips outlined in the previous section, there are a few points to keep in mind that are specific to the court of appeals.

1. Provide a roadmap for the points raised

Although parties are no longer bound by a rigid point-of-error practice, some courts of appeals justices have lamented the loss of the structure provided by the old system. The prior practice provided an "architecture" for opinion writing and a checklist to ensure that each alleged error that was required to be addressed was in fact disposed of by the court. See Justice Adele Hedges, *A View From the Court of Appeals*, 5 THE APPELLATE LAWYER 1, 5 (Houston Bar Ass'n App. Prac. Sec. Winter 1998-1999). Thus, practitioners should be mindful of the court of appeals' responsibility and make clear each question that must be answered by the court in disposing of the appeal.

2. Narrow the issues

Often, the focus of the issues to be addressed by the court of appeals is narrower in scope than those addressed by the Texas Supreme Court. The court of appeals will not usually be addressing the effect of a particular ruling on the state's jurisprudence. As one justice put it: "It is us, the courts of appeals, who must 'fix' or affirm the trial court's rulings and judgment in

the practical context of real facts and real complaints." Justice Adele Hedges, *A View From the Court of Appeals*, 5 THE APPELLATE LAWYER 1, 5 (Houston Bar Ass'n App. Prac. Sec. Winter 1998-1999).

Courts of appeals are typically asked to apply settled law to the particular facts of each case brought before them. Courts of appeals thus generally concern themselves with the particular parties and facts of the case on review and it is helpful if the issues are tailored to those particular parties and facts. Of course, courts of appeals are still concerned with consistency in the law and the impact of their opinions on other areas of Texas law. But an advocate in the court of appeals should usually focus on framing the issues in a way that is specific to the particular case.

3. Limit the number of issues raised

It is worth repeating here that appellants should limit the number of issues raised on appeal. See *supra* p. 4. Although appellants will typically raise more issues in the courts of appeals than they would raise in the Texas Supreme Court, an appellant should still limit the number of issues raised to the strongest arguments. In most cases, there are no more than three, or at most four, strong issues that should be raised.

4. Keep a respectful tone

Because issues in the courts of appeals are so often focused on the alleged error committed by the trial court, it is easy to fall into the trap of maligning the trial court. Many justices have stated that an advocate will get nowhere by casting aspersions on a trial court in a manner that is unprofessional. The lawyer who does so will lose credibility with the court. Although an advocate need not be wholly deferential to the court below, the tone of the issues presented should always be professional.

IV. DRAFTING ISSUES IN THE TEXAS SUPREME COURT

Drafting issues in the Texas Supreme Court is almost always focused on convincing the Supreme Court that the issues are worthy of review. The discretionary jurisdiction of the Supreme Court means that it takes only the most grant-worthy cases. Historically, grant rates in the Supreme Court have hovered between 10 and 12 percent. Thus, when drafting issues for the Supreme Court, practitioners should focus on explaining why the issues raised by the case warrant review.

A. Supreme Court Considerations

1. The rules

There are two rules of appellate procedure applicable to drafting issues in the supreme court. Rule 53.2(f) applies to drafting the issues for petitions

Appellate Brief, in STATE BAR OF TEXAS, APPELLATE PRACTICE INSTITUTE 12-13 (1994). There lingered a fear among some practitioners that the point-of-error system was a procedural trap that could be avoided only by stating the same issue in every conceivable way. See *id.* at 12.

for review and rule 55.2(f) applies to drafting issues for briefs on the merits. Both rules provide that the party must "state concisely all issues or points presented for review. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included." TEX. R. APP. P. 53.2(f), 55.2(f). Rule 55, however, also provides that in the brief on the merits, "the phrasing of the issues or points need not be identical to the statement of issues or points in the petition for review, but the brief may not raise additional issues or points or change the substance of the issues or points presented in the petition." TEX. R. APP. P. 55.2(f).

2. Importance of the issues to the state's jurisprudence

A number of the justices on the Texas Supreme Court believe that the primary purpose of the supreme court is *not* error correction, but to focus on the state's jurisprudence. Thus, issues in the Supreme Court should encompass the particular problem in the case as well as the importance to the jurisprudence of the state. Justice Enoch recently stated as follows:

A justice reviewing a petition may be able to determine immediately, based on review only of the issue presented, that the case is not one warranting supreme court review. However, an issue presented can also attract judicial attention and encourage a justice to spend more time reviewing the case.

Justice Craig T. Enoch & Michael S. Truesdale, *Issues and Petitions: The Impact on Supreme Court Practice*, 31 ST. MARY'S L.J. 565, 595 (2000).

3. The changed procedural posture

Practitioners should also take into account the changed procedural posture of the case now that there is an opinion from the court of appeals. See Pamela Stanton Baron, *Drafting Issues in the Texas Supreme Court*, in STATE BAR OF TEXAS, 15TH ANNUAL ADVANCED CIVIL APPELLATE PRACTICE COURSE 2 (2001). In fact, some justices go directly to the court of appeals' opinion before reading the petition for review. *Id.* The court of appeals' opinion may state the issues in the case differently than the advocate sees the issues in the case. The court of appeals may also focus on issues that are different than those the advocate wants to present to the Supreme Court. Thus, the court of appeals' opinion and analysis will be a factor in drafting the issues for the Supreme Court.

4. Briefs on the merits

There are also differences in drafting an issue for a petition for review and drafting an issue for a brief on the merits. At the petition for review stage, the party is

mainly focused on capturing the Court's interest in the case and the answer at that point may not be as important as the actual question presented. See Pamela Stanton Baron, *Drafting Issues in the Texas Supreme Court*, in STATE BAR OF TEXAS, 15TH ANNUAL ADVANCED CIVIL APPELLATE PRACTICE COURSE 7 (2001). At the briefs on the merits stage, the party may want to focus more on persuading the Court how to answer the question presented. See David E. Keltner, *Drafting a Petitioner's Brief*, in STATE BAR OF TEXAS, PRACTICE BEFORE THE TEXAS SUPREME COURT 2-3 (2003). Be aware, however, that in most cases the Supreme Court calls for briefs on the merits before granting the petition for review. Thus, the party is still trying to get the case granted.

B. Tips for drafting issues in the Supreme Court

In addition to the tips noted in Section II above, there are additional tips to keep in mind when drafting issues for the Texas Supreme Court.

1. Focus on the importance of the issue to the state's jurisprudence.

Because the Texas Supreme Court is a court of discretionary review, whether an issue is important to the state's jurisprudence should be the focus of issue drafting in the Supreme Court. Unless the party is focused on obtaining error correction through a per curiam opinion, *see infra* pp. 7-8, the statement of the issues should explain why the case will impact the state's jurisprudence such that the Supreme Court should review the case.

When thinking about how to tailor the issues to emphasize their importance to the jurisprudence of the state, one good place to start is the list of considerations outlined in Texas Rule of Appellate Procedure 56.1. These include a concurrence or dissent at the court of appeals, a conflict among the courts of appeals, a statutory or constitutional issue, or an issue of first impression for the Supreme Court. Also consider whether the issue or problem affects many cases and litigants, is likely to recur, or if the court of appeals' resolution is out of step with national trends.

2. Tips for seeking error correction

There are slightly different considerations to keep in mind if the party is really trying to obtain correction of an error that is important to the parties, but probably not important to the jurisprudence of the state. In that situation, the party could focus more on the error committed by the courts below. The best method for seeking error correction is to limit both the issues and argument—preferably to one issue and only a few pages of argument. Pamela Stanton Baron, *Drafting Issues in the Texas Supreme Court*, in STATE BAR OF TEXAS, 15TH ANNUAL ADVANCED CIVIL APPELLATE

PRACTICE COURSE 8 (2001). Appendix B to this paper lists the issues presented in cases where the Supreme Court issued a per curiam opinion during the most recent term.

3. Keep in mind the I.O.P's and the Court's workload

In addition to the importance to the jurisprudence facet of issue drafting in the Texas Supreme Court, the Court's internal operating procedures and caseload can also effect the way in which issues are drafted. Because petitions are denied by default unless one of the justices acts to remove the petition from the "conveyor belt," the statement of the issues must be framed in a way that convinces at least one justice that further review is warranted.

Another consideration is the heavy workload of the justices. Under the petition for review system, each justice is required to read every petition for review that is filed. Rather than simply directing the court's attention to the matter complained of, issues in petitions for review at the Supreme Court must catch the justices' attention "in a way that convinces the justice to read further." Pamela Stanton Baron, *The New Petition for Review: Larger Issues, Smaller Brief*, in STATE BAR OF TEXAS, 10TH ANNUAL ADVANCED CIVIL APPELLATE PRACTICE COURSE 10 (1996).

While a good table of contents outlining the argument and the statement of the case give the justices some idea of what the case is about, some justices turn first to the issues presented to gauge the importance of the case and the likely level of the Court's interest. Drafting issues in a concise way that is easy to understand will go a long way to making the petition for review stand out from all the others the justices are reading.

4. Be very selective in choosing the issues

It bears repeating that in most cases counsel should limit the issues in a petition for review to only the strongest issues. Usually, only one or two issues can be briefed effectively in a petition, so the writer needs to focus even more carefully on choosing the strongest and most important issues. If more than one or two issues must be preserved, then list them as unbriefed issues in the petition. The additional issues can be fully briefed if the Court calls for briefs on the merits.

5. Consult other Supreme Court opinions and petitions on cases granted

Perhaps the best place to look for examples of issue statements is the Court's opinions. Both the introductory paragraph and the concluding paragraph should explain the question presented and the court's answer in either an issue statement or statement of the court's holding.

Petitioners can also look to the issue statements from granted petitions for review reprinted in the Texas Supreme Court Journal. Attached to this paper as Appendix A is a listing of all of the issues presented in petitions for review that were granted in the most recent term. Keep in mind, however, that not all granted petitions contain model statements of the issues.

Comparing the issue statements from the petitions with the Court's rephrasing of the issues in the resulting opinion may also prove enlightening. Writing the issues with an idea of what an opinion adopting the proffered view might look like may help the justices reach that view.

V. TIPS FOR ISSUE SPOTTING

A vital aspect of framing issues is the ability to spot the winning issues. Following many of the tips addressed above will help the writer to spot the best issues to raise on appeal. In addition, there are some specific considerations to keep in mind for spotting the winning issues.

A. Spotting issues generally

The talent for spotting winning issues on appeal generally comes from experience. A lawyer who has been in the court of appeals or the Supreme Court on many occasions will often know intuitively what issues should and should not be raised for review.

Even without such experience, however, there are ways to determine the best issues to be raised on appeal. The best place to start the analysis is to determine what points will gain the most relief possible. If the advocate is seeking a rendition of judgment in its favor, then a no evidence or matter of law challenge should be raised. If the advocate is seeking a new trial, then a factual sufficiency challenge should be raised.

Also consider the standard of review. The standard of review is often the deciding factor for determining what issues will succeed and those that will not. For example, very few challenges to a trial court's routine evidentiary rulings are sustained on appeal. This is because of the deferential abuse of discretion standard applied to such challenges and because the error must have resulted in the rendition of an improper judgment. Look for issues that will allow the most relief possible and that will be reviewed under a favorable standard of review.

Finally, research the types of rulings that are most often reversed on appeal. See, e.g., Lynne Liberato, Hon. Murry Cohen, and Kent Rutter, *Why Courts Reverse*, in STATE BAR OF TEXAS 17TH ANNUAL ADVANCED CIVIL APPELLATE PRACTICE COURSE ch. 17 (2003). Do courts often reverse for charge error? How often do courts reverse on legal insufficiency or factual insufficiency grounds? Is there a trend among courts to render judgment in favor of the defendant on

duty questions? This type of analysis can help guide the writer in spotting the issues with the best chance for success.

B. Spotting issues in the Supreme Court

For spotting issues in the Texas Supreme Court, also consult recent articles analyzing issues that seem to be of interest to the Court and cases that are currently pending before the Court. *See, e.g.*, Elizabeth V. "Ginger" Rodd, *What is Important to the State's Jurisprudence?*, in STATE BAR OF TEXAS, PRACTICE BEFORE THE TEXAS SUPREME COURT ch. 6 (2003). Having an idea of what issues the Court may be currently dealing with may lead the writer to an angle that would bring the case within the interest of the court.

Likewise, read the Texas Supreme Court Journal. Reading the opinions of the Supreme Court will provide the writer with an idea of the types of issues the Court is likely to reverse on and the types of issues the Court is likely to consider grant worthy.

VI. CONCLUSION

The importance of carefully selecting and framing the issues to be raised on appeal cannot be emphasized enough. Because the issues will be the lens through which the court will review the case, practitioners should thoroughly consider how to draft the statement of the issues. By putting the right question before the court, the party will go a long way towards winning its case on appeal.

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APPENDIX A:

Granted Petitions for Review September 1, 2002 – July 31, 2003

September 12, 2002

In the interest of A.V. and J.V., No. 01-0706. (Opinion of Court of Appeals, 57 S.W.3d 51)

Issues Presented

1. The Court of Appeals erred in addressing unpreserved alleged error as to the broad-form submission of the charge, since the trial court had jurisdiction and no express public interest was adversely affected. (*See* slip op. at 5-6, 8; *cf.* Puig's Br. at 31; Ct. R. vol. 8, at 80-84.)

2. The Court of Appeals erred in holding that the trial court's broad-form charge violated due process, since broad-form submission in termination suits does not violate due process. (*See* slip op. at 5-6, 8-9; *cf.* Cl. R. vol. II, at 226, 229.)

3. The Court of Appeals erred in holding that Section 161.001(1)(Q) of the Texas Family Code was unconstitutionally retroactive as applied to Puig, since that statute fell into at least two exceptions to the prohibition on retroactive statutes: (1) the statute is an exercise of the police power for the protection of the welfare of abused children; and (2) it was not reasonable for Puig to rely on prior law while he committed the felonies that resulted in his imprisonment. (*See* slip op. at 9-16.)

4. The Court of Appeals erred in holding that there was no evidence that the Department made reasonable efforts to return the children to Puig after he constructively abandoned them, since no efforts to place the children in prison with him would have been reasonable, where it was impossible to do so. (*See* slip op. at 14-16; *cf.* Puig's Br. at 21-22; Ct. R. vol. 7, at 90, 161.)

5. (not briefed): The Court of Appeals erred in holding that Puig preserved error as to his directed verdict complaint as to the retroactivity of the grounds of termination; since Puig failed to re-urge his motion for directed verdict after he put on his case. (*See* slip op. at 11; *cf.* Dep't's Br. at 11-14; Ct. R. vol. 7, at 234; *id.* vol. 8, at 8, 44, 78-79.)

6. (not briefed): The Court of Appeals erred in failing to consider the Department's argument that the court lacked jurisdiction over Puig's attempted appeal, where Puig failed to give notice of appeal of the judgment terminating his parental rights, or that Puig lacked standing to appeal the termination of the parental rights of the children's mother. (*Cf.* Dep't's Br. At 10; *compare* App. B with App. C.)

Sixth RMA Partners, L.P. v. Sibley, No. 02-0179. (Opinion of Court of Appeals, 105 S.W.3d 1.)

Issues Presented

1. Can a pleading defect be corrected by a "supplemental petition," or must the correction be designated an "amended petition" to be effective?

2. If a counter-plaintiff is incorrectly named in original pleadings, and the pleading defect is cured after the limitations period, is the suit barred by limitations?

a. Does Rule 28 prevent a claim by the partnership from being barred by limitations when the counterclaim was filed in the name of an entity under which a partnership was doing business?

b. Does the filing of suit against a correctly named defendant toll the statute of limitations when the only pending defect is in the name of the plaintiff?

c. When there is a defect in the name of a party, but the defendant has notice of the suit and is not misled or disadvantaged, is reversal and rendition warranted?

3. If there is a defect in the name of a party, but the opposing party never filed special exceptions or a verified denial alleging a pleading defect, is that defect waived, or can it be preserved in a motion for summary judgment heard on the day that the trial began?

September 26, 2002

J.M. Davidson, Inc. v. Webster, No. 01-0774. (Opinion of Court of Appeals, 49 S.W.3d 507.)

Issue Presented

Whether the Court of Appeals erred by holding that J.M. Davidson's arbitration provision was not enforceable because it lacked mutuality?

City of San Benito, et al. v. Rio Grande Valley Gas Co., et al., No. 02-0038. (Opinion of Court of Appeals, 63 S.W.3d 19.)

Issues Presented

1. Did the court of appeals err by affirming a class certification judgment and enter orders setting aside prior opt outs, thus disregarding the rights, decisions and ratifications of the unnamed municipal class members to opt out of a class, and forcing municipal unnamed class members to involuntarily remain as members of a class, rather than protecting the interests of the unnamed class members.

2. Did the court of appeals err by approving a class action and judgment without a "rigorous analysis" of the Rule 42 requirements approving a settlement which is unfair, inadequate and unreasonable to the class and which is actually a pass through of any

settlement funds, including funds used for attorneys' fees, in violation of this court's opinion in *General Motors Corp. v. Bloyed*, 916 S.W.2d 949 (Tex. 1996), and the underlying opinion of *Bloyed v. General Motors Corp.*, 881 S.W.2d 422 (Tex. App.—Texarkana 1994)?

3. Did the court of appeals err in setting aside the timely opt outs of unnamed class members and ignoring prior holdings that ratification of a "void" act at a subsequent municipal meeting is as potent as authority before the act?

4. Did the court of appeals err in holding that the opt out notices filed by attorneys hired on behalf of fifteen municipalities were invalid, where the attorney had been retained to represent each city's legal interests?

5. Did the court of appeals err in disregarding its prior holding and the law that a city government may not by omission be forced to become an involuntary member of a class action because delegation of the right to proceed in a class action and perform acts and duties necessary to the transaction of the city's business can be done only by resolution or ordinance?

6. Did the court of appeals err in disregarding the opt out notices of involuntary class members and failing to liberally allow the cities to opt out, as the rules regarding opting out are designed to protect the class members, not to penalize them?

Rescar, Inc. v. Ward, No. 02-0057. (Opinion of Court of Appeals, 60 S.W.3d 169.)

[Note: Two Petitions for Review]

Issues Presented by Rescar, Inc.

Rescar presents the following issues for review by this Court, or alternatively for remand to the First Court of Appeals, pursuant to Texas Rules of Appellate Procedure 53.2(f), 53.2(i), and 53.4.

1. Did the court of appeals err in affirming the jury's findings and the trial court's judgment in favor of Ward on his *Sabine Pilot* claim? *See* 60 S.W.3d at 175-78.

a. Did the court of appeals err by affirming Ward's recovery on his *Sabine Pilot* claim when there is no evidence of a request to commit a criminal act, thereby expanding common law liability and creating a new "private whistleblower" exception to employment at will?

b. Did the court of appeals err by rejecting Rescar's charge error complaints predicated on the erroneous formulation of Jury Question No. 2, which

- improperly combined a TCHRA statutory claim and a common law *Sabine Pilot* claim; and
- improperly combined two mutually exclusive causation standards, thereby creating a non-

sequitur by allowing the jury to that Ward was fired for a *sole* reason and *another* reason?

2. Did the court of appeals err in affirming the jury's findings and the trial court's judgment in favor of Ward? *See* 60 S.W.3d 173, 184.

3. Did the court of appeals err in avoiding resolution of the issues regarding the scope, effect, and submission of Ward's retaliatory discharge claim under the TCHRA? *See* 60 S.W.3d at 178.

a. Did the court of appeals err in holding that an election of remedies obviated the need to confront the TCHRA issues? *See id.*

b. Did the court of appeals err in holding that an election of remedies obviated the need to confront Rescar's contention that TCHRA excludes Ward's common law claims?

c. Did the court of appeals err in holding that election of remedies obviated the need to confront Rescar's contention that the TCHRA caps Ward's actual and exemplary damages at \$540,000?

d. Did the court of appeals err in holding that election of remedies obviated the need to confront Rescar's contention that Ward faced no potential individual liability and no potential criminal liability based on the claimed request to engage in discriminatory conduct, and that Question 2 erroneously defined "illegal act" with respect to the TCHRA?

e. Did the court of appeals err in holding that election of remedies obviated the need to confront Rescar's contention that the charge erroneously instructed the jury that Ward could not be fired if he engaged in any opposition to a discriminatory practice? 3 CR 596. (***Raised but not briefed***).

f. Did the court of appeals err in holding that election of remedies obviated the need to confront Rescar's contention that the TCHRA findings in Question 1 and Question 2 are not supported by legally or factually sufficient evidence, and are immaterial? (***Raised but not briefed***).

4. Did the court of appeals err in affirming the jury findings and judgment in favor of Ward in connection with his claim that Rescar acted with malice? *See* 60 S.W.3d at 181-83. (***Raised but not briefed***).

5. Did the court of appeals err in failing to address Rescar's contention that a hearsay "shop rumor" regarding discriminatory conduct was erroneously admitted into evidence At trial, while simultaneously and inappropriately relying upon that evidence in the opinion's factual discussion? *See* 60 S.W.3d at 174, 184. (***Raised but not briefed***).

Issues Presented by James Ward

1. Did the Court of Appeals erroneously substitute its own view of the facts for those of the jury

and the District Judge in evaluating Petition's intentional infliction of emotional distress claim in violation of the precedents of this Court and other Texas appellate courts including its own?

2. Did the Court of Appeals err by imposing a heightened standard of proof for demonstrating extreme and outrageous conduct?

3. Did the Court of Appeals err by imposing a heightened standard of proof for demonstrating severe emotional distress?

4. Did the Court of Appeals err by failing to find that Rescar did not properly preserve its "non evidence" assignment of error upon which the Court of appeals reversed the jury verdict in favor of Petitioner?

Forbes, Inc., et al. v. Granada Biosciences, Inc., et al., No. 01-0788. (Opinion of Court of Appeals, 49 S.W.3d 610.)

Statement of Issues Presented for Review

1. Did the Court of Appeals err in holding that the Respondents properly alleged a claim for business disparagement as to the *Forbes* article "as a whole under this Court's recent decision in *Turner v. KTRK Television, Inc.*, even though the Respondents never identified in the district court any particular provably false implication?

2. Did the Court of Appeals err in holding that the Petitioners' summary judgment motion failed to put at issue actual malice as to the article "as a whole" under *Turner v. KTRK Television, Inc.*, even though the motion was brought under rule 166a(i), identified actual malice as an essential element of the plaintiffs' claims, and stated that there was "no evidence" of actual malice?

3. Is there evidence that Petitioners published the *Forbes* article with actual malice?

a. Is a reporter's knowledge of an error that does not make any statement in the article "substantially false" proof of actual malice?

b. Is a reporter's knowledge of an error, first acquired after a nationally-distributed magazine was in print and put into distribution channels for delivery to readers, proof of actual malice at the time of publication?

c. Is a reporter's alleged intent to mislead the subject of an article about whether there was time to make changes before the article was published proof of knowing falsity?

4. When a company has in fact been sued for securities fraud by a man named Edward Bass, is a report of that lawsuit "substantially false" if it identifies the plaintiff as "Fort Worth near-billionaire Edward Bass," rather than the correct Edward Bass?

Issues Presented but not Addressed in Petition for Review per Texas Rule of Appellate Procedure 53.2(I)

5. Did the Court of Appeals err in reversing the District Court's holding that Respondents could not bring business disparagement claims based on statements that were not of and concerning themselves?

6. Did the Court of Appeals err in reversing the District Court's holding that Respondents could not bring business disparagement claims based on statements that did not defame the Respondents?

7. Did the Court of Appeals err in reversing the District Court's holding that the *Forbes* article in question was not substantially false as to any disparaging statements of and concerning the Respondents?

8. Did the Court of Appeals err in reversing the District Court's holding that the *Forbes* article in question contained privileged expressions of opinion and fair comment on a matter of public concern?

Holuec, et al. v. Brandenberger, et al., No. 01-1214. (Opinion of Court of Appeals, 58 S.W.3d 201.)

Issues Presented for Review

1. Did the District Court err by entering a permanent injunction that prohibits all agricultural activity on the entire 450-acre Holubec homeplace?

2. Did the Court of Appeals err under *State Dep't of Highways & Transp. v. Payne* in holding that the Holubecs' objection to Jury Question 8 was not preserved for review?

3. Did the District Court's refusal to submit Jury Question 8 with the date of July 30, 1997, as requested by the Holubecs, impermissibly deny the Holubecs the defense to which they are entitled under Ch. 251 of the Texas Agriculture Code?

October 10, 2002

Utica National Insurance Company of Texas v. American Indemnity Company, et al., No. 02-0090. (Opinion of Court of Appeals not yet published.)

Issues Presented

1. Does a liability insurer have a duty to defend its insured against a claim involving an injury allegedly resulting from multiple causes, when the injury would not have occurred—and thus the claim would not exist—"but for" conduct expressly excluded from coverage under the policy?

2. Did the court of appeals err by failing to address *Utica's* arguments why it had no duty to indemnify Mid-Cities Anesthesiology, when those arguments were expressly raised by *Utica* in both the trial court and court of appeals?

Delta Airlines, Inc. et al. v. Black, No. 02-0255. (Opinion of Court of Appeals not yet published.)

Issues Presented

1. Whether the court of appeals erred in reversing the trial court's summary judgment in favor of Delta and Perez, and against Black?

2. Whether the court of appeals erred in holding that Black's claim for damages for allegedly being denied boarding *were* not preempted by the Airline Deregulation Act of 1978?

City of Terrell Hills, et al. v. Champion Builders, et al., No. 02-0260. (Opinion of Court of Appeals, 70 S.W.3d 221.)

Issues Presented

1. Whether the Court of Appeals en banc *erred* in reversing the trial court's judgment notwithstanding the verdict (JNOV) based on official immunity where the Court of Appeals in defiance to the Supreme Court disregarded the applicable law of "A court must measure good faith in official immunity cases against a standard of objective legal reasonableness *without regard to the officer's subjective state of mind.*" *Wadewitz v. Montgomery*, 951 S.W.2d 464, 466 (Tex. 1997).

2. Whether the Court of Appeals en banc erred in holding individual public officials liable for negligence where no duty exists.

3. Whether the Court of Appeals en banc erred in holding individual public officials liable when the City of Terrell Hills was found not liable for Plaintiffs' taking claim which arose out of the same transaction and therefore, the petitioners are not liable under TEX. CIV. PRAC. & REM. CODE, *Chapter* 101, Section 101.106.

Garza, et al. v. Garcia, No. 02-0300. (Opinion of Court of Appeals, 70 S.W.3d 362.)

Issues Presented

1. Whether the Thirteenth Court of Appeals, in a break with established procedural rules in other trial contexts, erroneously concluded that the trial court made no convenience transfer pursuant to section 15.1002(b), even though Petitioners included such a request in their pleadings to transfer venue and the order granting a venue transfer was general in nature; and whether the Thirteenth Court erroneously faulted Petitioners for the general order and the absence of express findings of fact and conclusions of law and, in the process, erroneously circumvented the prohibition on appellate review of venue transfers for the convenience of the parties.

2. Whether the Thirteenth Court of Appeals erroneously concluded that Petitioner Garza "waived" the right to request a transfer of venue pursuant to section 15.002(a) of the Texas Civil Practice and

Remedies Code because he never specifically denied Respondent's alleged venue facts. Such a failure does not result in a "waiver," and, in any event, Respondent failed to plead venue facts to support venue in Starr county that would have required a specific denial on Petitioner Garza's behalf.

3. Whether the Thirteenth Court of Appeals erroneously reversed and remanded this case to the trial court in its entirety, where Respondent never made any allegation that Petitioner J & R waived its right to contest venue or had failed to specifically deny venue facts?

4. Petitioners introduced prima facie proof that Hidalgo County was a county of proper venue, and Respondent failed to introduce prima facie evidence that Starr County was a county of proper venue, and/or any prima facie evidence that she introduced was conclusively rebutted. Thus, this court should determine whether the Thirteenth Court of Appeals erroneously held that, even if a specific denial of venue facts had been made, the transfer from Starr County to Hidalgo County should be reversed, and whether, in so holding, that court also employed an improper standard and scope of appellate review.

5. Respondent Garcia challenged the jury's award of zero damages to physical impairment and disfigurement as being against the great weight and preponderance of the evidence, a point that the Thirteenth Court of Appeals did not address. Respondents request that this Court determine whether the jury's verdict should be affirmed as a matter of law.

October 24, 2002

Kerr-McGee Corp., et al. v. Helton, et al., No. 02-0356 (Opinion of Court of Appeals not yet published.)

Issues Presented:

1. Whether the opinion of Plaintiffs' expert on damages is unreliable, incompetent and inadmissible.

2. Whether there is any reliable, competent evidence to support an award of damages or to support the amount of damages awarded.

October 31, 2002

Hoffman-La Roche, Inc., et al. v. Zeltwanger, No. 02-0120. (Opinion of Court of Appeals, 69 S.W.3d 634.)

Issues Presented

1. This court has stated that intentional infliction of emotional distress is intended only to be a "gap-filler" tort. Other states with similar "gap-filling" views of intentional infliction do not allow the cause of action in situations where the plaintiff has another common law or statutory cause of action. Can a plaintiff in this state bring and recovery on a claim for

intentional infliction of emotional distress when the plaintiff also has (and brings) a claim for sexual harassment based on the same actions that form the basis of the intentional infliction of emotional distress claim? Further, can a plaintiff elude the strict caps that the Texas legislature and Congress have placed on punitive damages and non-economic damages by pursuing a sexual harassment complaint as a claim for intentional infliction of emotional distress?

2. This Court has held that employment matters such as terminating an employee, giving the employee poor evaluations, and even occasionally abusive behavior are insufficient to comprise an intentional infliction claim. The Court of Appeals held, in essence, that these types of acts were sufficient evidence of intentional outrageous conduct when they are combined with the alleged fact that the corporation "allowed" the development of a corporate culture that permits vulgar joke-telling. If this Court chooses to allow plaintiffs to bring intentional infliction claims when they have other statutory or tort remedies, do these acts constitute sufficient evidence of outrageous conduct of an intentional nature to allow the claim against Roche to be submitted to the jury? Also, is there legally sufficient evidence to support a jury finding against Roche based on this evidence?

3. Courts hold that conduct that forms the basis of a sexual harassment claim does not necessarily support a claim of intentional infliction of emotional distress. As a result, if this Court allows plaintiffs to bring intentional infliction claims when they have other statutory or tort remedies, courts must continue to attempt to draw distinctions between sexual harassment claims that involve "outrageous" conduct and sexual harassment claims that do not involve "outrageous" conduct. In that case—which primarily involved conversations describing sexual acts with and desires concerning individuals other than the plaintiff—constitute sufficient evidence of outrageous conduct to allow the intentional infliction claim to be submitted to the jury? Also, is there legally sufficient evidence to support a jury finding of intentional infliction of emotional distress based on this evidence?

The Cedars Treatment Center of DeSoto, Texas, Inc., et al. v. Mason, et al., No. 01-0926. (Opinion of Court of Appeals not yet published.)

[Note: Three Petitions for Review.]

Issues Presented by Minirth-Meier Clinic

1. The court of Appeals erred in reversing the trial court's grant of summary judgment on the issue of proximate cause as there was no foreseeability and no causation-in-fact.

2. The Court of Appeals erred in reversing the trial court's grant of summary judgment on the issue of

proximate cause because the expert testimony filed on behalf of Minirth-Meier Clinic, P.A. was appropriate summary judgment evidence.

3. The Court of Appeals erred in reversing the trial court's grant of summary judgment on the issue of proximate cause because the expert testimony of the Respondents was conclusory and, as such, was incompetent summary judgment evidence.

4. The Court of Appeals erred in reversing the trial court's grant of summary judgment because Minirth-Meier Clinic, P.A. owed no duty to Jodi Mason.

Issues Presented by IHS Cedars Treatment Center of DeSoto, Texas, et al.

1. Whether the parameters of causation, announced by the Court in *Doe v. Boys Clubs of Greater Dallas*, 907 S.W.2d 472 (Tex. 1995), *Union Pump Co. v. Allbritton*, 898 S.W.2d 773 (Tex. 1995), and their predecessors dictated a finding in this case that any connection between the purported negligence of Petitioners in discharging voluntarily admitted mental patients and the injuries suffered by Respondents in the auto accident was, as a matter of law and public policy, too remote to constitute cause-in-fact.

2. Likewise, under the same case authorities discussed in Issue No. 1, whether the injuries suffered by Respondents in the auto accident some 28 hours after their discharge were reasonably foreseeable by Petitioners.

3. Whether certain legal conclusions of Respondent's expert, which lacked factual support in the summary judgment evidence, were competent to raise a fact issue on proximate cause—as held by the Court of Appeals—or whether the unsubstantiated legal conclusions constituted no evidence.

Issues Presented by Teofilo Ramos

1. Psychiatrist Teofilo Ramos was treating Jodi Mason on a voluntary basis. He approved her request for release from the hospital, which coincided with the release of another psychiatric patient not under his care. Over 24 hours later, Mason was injured in a one-car accident while she was a passenger in a car driven by the other psychiatric patient. *Was Dr. Ramos' approval of Mason's release too remotely connected to the accident to be a legal case in fact of Mason's injuries?*

2. Under Mason's own theory of the case, the immediate cause of her injuries was the reckless driving of another psychiatric patient, Cynthia Thomas. The general rule, as prescribed in the Restatement (Second) of Torts, is that no person owes another a duty of protection from the conduct of third persons. *Did the court of appeals err by holding that Dr. Ramos*

owed mason a duty to protect her from the conduct of Thomas?

3. (not briefed): *Did mason adduce any probative evidence that Dr. Ramos should reasonably have foreseen that the accident or some similar event was the likely result of permitting Mason to leave Cedars Hospital?*

4. (not briefed): *Did the Court of Appeals err in considering the opinion of Mason's expert, Dr. Stephen Kramer, that Thomas suffered a "psychotic event" at the time of the accident, over Dr. Ramos' objection?*

November 21, 2002

In the interests of B.L.D. and B.R.D., Minor Children, No. 01-0882 (Opinion of Court of Appeals, 56 S.W.3d 203.)

Issues Presented

1. Does due process require that the Sixth Amendment right to effective assistance of counsel in criminal proceedings be extended to civil, termination-of-parental-rights proceedings? If so:

A. Can an alleged conflict of interest arising from the joint representation of the parents be waived? (not briefed)

B. Is a request for separate trials by jointly represented parents sufficient to preserve error when a request that separate counsel be appointed was not made? (not briefed)

C. Did the court of appeals err in considering a juror's affidavit regarding discussions occurring during jury deliberation to find that a conflict existed? (not briefed)

2. Did the court of appeals err in holding that the broad-form jury charge submitted by the trial court was fatally defective because it allowed the jury to find for termination without specifically requiring at least ten jurors to make a separate finding on either of the two statutory termination grounds presented in the jury charge?

A. If the jury charge was defective, did the Dosseys waive that error by not objecting to the charge? (not briefed)

Should these issues be resolved in the Department's favor, the Court should, pursuant to TEX. R. APP. P. 53.4, consider the following issues that were presented to the court of appeals but were not decided by that court:

3. Are specific questions regarding whether termination is in the best interest of the child required in the jury charge? (not briefed)

4. Are specific jury findings on the statutory grounds for termination required? (not briefed)

5. Was testimony regarding intentional nature of the scalding incident admissible? (not briefed)

6. Was evidence of Jimmy's alleged downloading of child pornography and other sexually related incidents admissible? (not briefed)

7. Is the evidence legally sufficient to support the jury's findings that statutory grounds for termination were met? (not briefed)

San Antonio State Hosp. v. Cowan, et al., No. 02-0348. (Opinion of Court of Appeals, 75 S.W.3d 19.)

Issue Presented

Section 101.021(2) of the Texas Tort Claims Act provides a limited waiver of sovereign immunity for a wrongful-death claim caused by a state employee's use of tangible personal property. The decedent, while he was in custody at San Antonio State Hospital, used his own personal property to commit suicide. Has the Hospital's sovereign immunity been waived, even though no state employee actually used the property to cause the decedent's death?

December 12, 2002

Union Pacific Resources Group, Inc., et al. v. Hankins, et al., No. 01-0836. (Opinion of Court of Appeals, 51 S.W.3d 741.)

Issues Presented

This oil and gas action involves 590 leases, 122 unique lease forms, and more than 50 different types of royalty clauses.

1. Should the class have been certified?

2. When a court decides whether a class should be certified, is it bound by a *per se* legal rule against considering "the merits"?

Hubenak v. San Jacinto Gas Transmission Co., No. 02-0213. (Consolidated Opinion of Court of Appeals, 65 S.W.3d 791.)

Consolidated for oral argument with

Hubenak, et al. v. San Jacinto Gas Transmission Co., No. 02-0214. (Consolidated Opinion of Court of Appeals, 65 S.W.3d 791.)

Consolidated for oral argument with

Wenzel, et al. v. San Jacinto Gas Transmission Co., No. 02-0215. (Consolidated opinion of Court of Appeals, 65 S.W.3d 791.)

Consolidated for oral argument with

Kutach Family Trust v. San Jacinto Gas Transmission Co., No. 02-0216. (Consolidated opinion of Court of appeals, 65 S.W. 3d 791.)

Issues Presented

1. The Texas Property Code requires, as a jurisdictional prerequisite, that a condemnor negotiate with a landowner in good faith, prior to filing a condemnation proceeding. San Jacinto admitted it demanded rights it could not condemn and that it would **NEVER** limit its precondemnation offer to only the rights it could legally condemn. Does the summary judgment record demonstrate, as a matter of law, that San Jacinto did not negotiate in good faith, as the Texarkana Court of Appeals would hold, or at least raise a genuine issue of material fact on the good faith negotiation issue, **as the Eastland Court of Appeals determined on identical facts?**

2. The Texas Penal Code has provisions that are designed to discourage people and entities from making false and deceptive statements with respect to property. San Jacinto has admitted it would **NEVER** have made an offer to the Landowner for only the rights it could legally condemn and threatened to condemn rights it could not legally condemn. Should Texas' courts declare behavior that the Texas Legislature has defined as criminal to be good faith in the context of a condemnation proceeding?

3. The case was before the First Court of Appeals on traditional **cross motions for partial summary judgment** on the jurisdictional issue of good faith negotiations. The First Court of Appeals held that the trial court's granting of San Jacinto's motion for partial summary judgment created an **implied fact finding** that San Jacinto negotiated in good faith and, based upon that erroneous conclusion of an implied fact finding, applied the no evidence standard of review to the implied fact finding. Have the standards for review of traditional summary judgment *motions* been changed in Texas?

Cusack Ranch Corp. v. Mid-Texas Pipeline Co., No. 02-0217 (Opinion of Court of Appeals, 71 S.W.3d 395.)

Issues Presented

1. The Texas Property Code requires, as a jurisdictional prerequisite, that a condemnor negotiate with a landowner in good faith, prior to filing a condemnation proceeding. MidTexas admitted it demanded rights it could not condemn and that it would **NEVER** limit its precondemnation offer to only the rights it could legally condemn. Does the summary judgment record demonstrate, as a matter of law, that MidTexas did not negotiate in good faith, as the Texarkana Court of appeals would hold, or at least raise a genuine issue of material fact on the good faith negotiation issue, **as the Eastland Court of Appeals determined on identical facts?**

2. The Texas Penal Code has provisions that are designed to discourage people and entities from making false and deceptive statements with respect to property. MidTexas has admitted it would **NEVER** have made an offer to the Landowner for only the rights it could legally condemn and threatened to condemn rights it could not legally condemn. Should Texas' courts declare behavior that the Texas Legislature has defined as criminal to be good faith in the context of a condemnation proceeding?

3. The case was before the Thirteenth Court of Appeals on traditional **cross motions for partial summary judgment** on the jurisdictional issue of good faith negotiations. The Thirteenth Court of Appeals held that the trial court's granting of MidTexas' motion for partial summary judgment created an **implied fact finding** that MidTexas negotiated in good faith and, based upon that erroneous conclusion of an implied fact finding, applied the no evidence standard of review to the implied fact finding. Have the standards for review of summary judgment *motions* been changed in Texas?

American Manufacturers Mutual Ins. Co., et al. v. Schaefer, et al., No. 02-0295. (Opinion of Court of Appeals, 65 S.W.3d 806.)

Issue Presented

In this case of first impression, Petitioners ask the Court to decide whether the collision coverage of the state-mandated Texas Personal Automobile Insurance Policy, issued by every automobile insurer in Texas, obligates the insurer to pay a first-party claim for inherent diminution in value of a vehicle when the vehicle has been fully and satisfactorily repaired to its pre-accident condition. In this case, the court of appeals held that the policy provides coverage for diminished value, directly conflicting with the holding of *Carlton v. Trinity Universal Ins. Co.*, 32 S.W.3d 454 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

MidTexas Pipeline Co. v. Dernehl, et al., No. 02-0320. (Opinion of Court of Appeals, 71 S.W.3d 852.)

Issue Presented

Does a condemning authority, as a matter of law, satisfy the statutory requirement for good faith negotiations prior to instituting a condemnation proceeding by relying on the expert opinion of an independent real estate appraiser and then making an offer to a landowner in excess of the property's value? *MidTexas Pipeline Co. v. Wright, et al.*, No. 02-0321. (Opinion of Court of Appeals not yet published.)

Issue Presented

Does a condemning authority, as a matter of law, satisfy the statutory requirement for good faith

negotiations prior to instituting a condemnation proceeding by relying on the expert opinion of an independent real estate appraiser and then making an offer to a landowner in excess of the property's value?

Cusack v. MidTexas Pipeline Co., No. 02-0359. (Opinion of Court of Appeals not yet published.)

Issues Presented

1. The Texas Property Code requires, as a jurisdictional prerequisite, that a condemnor negotiate with a landowner in good faith, prior to filing a condemnation proceeding. MidTexas admitted it demanded rights it could not condemn and that it would **NEVER** limit its precondemnation offer to only the rights it could legally condemn. Is there more than a scintilla of evidence to support the trial court's order of dismissal after an evidentiary hearing?

2. The Texas Penal Code has provisions that are designed to discourage people and entities from making false and deceptive statements with respect to property. MidTexas had admitted it would **NEVER** have made an offer to the landowner for only the rights it could legally condemn and threatened to condemn rights it could not legally condemn. Should Texas' courts declare behavior that the Texas Legislature has defined as criminal to be good faith in the context of a condemnation proceeding?

Town of Flower Mound, Texas v. Stafford Estates Limited Partnership, No. 02-0369. (Opinion of Court of Appeals, 71 S.W.3d 18.)

Issues Presented by Town of Flower Mound, Texas

1. Does the rough proportionality standard promulgated in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), apply to all development conditions, or only to conditions that require the dedication of property to public use?

2. Does *Dolan's* rough proportionality standard apply to all development determinations, or only to adjudicated decisions? (unbriefed issue)

3. Assuming that *Dolan's* rough proportionality standard is applicable in this case, did the Town's requirement, that Stafford (as a condition of residential subdivision plat approval) reconstruct and improve an abutting substandard street from which the subdivision development would take access, constitute a taking of property under *Dolan's* rough proportionality standard? (unbriefed issue)

4. Must a developer file suit to invalidate an alleged unlawful development condition before accepting the benefits of development approval?

5. Was Stafford barred from challenging the Town's street improvement requirement because Stafford did not bring suit to challenge the requirement

prior to requesting and obtaining final plat approval from the Town?

Issue Presented By Stafford Estates Limited Partnership

Stafford prevailed against the Town upon its claims and recovered a judgment for damages. The issue presented is whether the Court of appeals improperly reversed the trial court's award of attorney's fees and expert witness fees to Stafford by holding that Stafford was not a "prevailing party" for purposes of 42 U.S.C. §§ 1983 and 1988.

F.F.P. Operating Partners, L.P., et al. v. Dueñez, et al., No. 02-0381. (Opinion of Court of Appeals, 69 S.W.3d 800.)

Issues Presented

1. Does the proportionate responsibility statute apply in all dram shop cases, or just those in which the intoxicated patron is the plaintiff?

2. Is a dram shop defendant vicariously liable for the conduct of its intoxicated patron?

3. Is an intoxicated patron barred from being a responsible third party or a contribution defendant because the patron owes indemnity to the dram shop defendant?

4. Did the trial court err in severing the dram shop defendant's cross-action against the drunk driver?

5. Was an instruction on sole proximate cause required in the trial below?

Shell Oil Co. v. Khan, et al., No. 02-0401. (Opinion of Court of Appeals, 71 S.W.3d 890.)

Issue Presented

The trial court correctly granted Petitioner's Motion for Summary Judgment because the admissible evidence adduced in the summary judgment records established that Petitioners owed Respondent no legal duty to safeguard its tenant's employees from crime on the tenant's premises and the Court of Appeals' opinion to the contrary conflicts with *Smith v. Foodmaker, Inc.*, 928 S.W.2d 683 (Tex. App.—Fort Worth 1996, no writ).

January 16, 2003

King Ranch, Inc., et al. v. Chapman, et al., No. 01-0430. (Opinion of Court of Appeals, 41 S.W.3d 693.)

Issues Presented by King Ranch, Inc.

1. *Bill of Review.*

To sustain a bill of review in an attack upon a prior, final judgment, a plaintiff must establish that the judgment was obtained by extrinsic fraud of the

opposite party unmixed with negligence of the plaintiff.

a. Did the court of appeals err by holding that the Plaintiffs introduced some evidence of King's "extrinsic fraud" in obtaining the 1883 Judgment?

b. Do the seven "facts" the court of appeals cited as evidence of King's extrinsic fraud in obtaining the 1883 Judgment constitute a reasonable basis from which an inference of King's fraud could be made? Or, are those facts such meager circumstantial evidence that they cannot, as a matter of law, support any inference?

c. Did Plaintiffs have the burden of responding to a "no evidence" summary judgment to introduce some evidence that the 1883 Judgment was not due in part to their own negligence?

d. Should the "no evidence" summary judgment have been affirmed because Plaintiffs failed to prove that the 1883 Judgment was not due in part to their own negligence?

2. *Bar by Limitations:*

Bills of review are governed by the four-year statute of limitations. Plaintiffs tried to avoid limitations with claims of fraudulent concealment and the "discovery rule" but five generations of Chapman heirs have been aware of the 1883 Judgment and all that transpired in the underlying lawsuit.

a. Did the court of appeals misapply the standard for reviewing a "no evidence" summary judgment by holding that Defendants must conclusively negate the discovery rule?

b. Does the discovery rule or any deferred accrual apply to a bill of review?

c. Did the court of appeals err when it held, without analysis, that the same evidence supporting "extrinsic fraud" for the bill of review also "avoided the four-year statute of limitations for bills of review"?

d. Did Plaintiffs have the burden in responding to Defendants' "no evidence" summary judgment motions to prove that none of the original parties, and none of the succeeding generations of Chapman heirs, had actual or constructive knowledge of the elements of a bill of review?

e. Should the "no evidence" motions for summary judgment have been sustained when Plaintiffs failed to prove that the original parties to the 1883 Judgment and all succeeding generations were without actual or constructive knowledge of the elements of a bill of review?

f. Did the court of appeals err by failing to hold that there is no evidence that Plaintiffs did not, or could not in the exercise of reasonable diligence, have discovered their cause of action and that Plaintiffs' claim accrued, as a matter of law, more than four years before this suit was filed?

3. *Trespass to Try Title:*

To sustain their trespass to try title claim, Plaintiffs had to establish clear title in themselves. But the 1883 Judgment divested Plaintiffs' ancestors of all title to the disputed property.

a. Did the court of appeals err in holding, without analysis, that there were fact issues underlying the trespass to try title claim "[g]iven the evidence reviewed in our determination of the bill of review action? *Chapman*, 41 S.W.3d at 706.

b. Did the court of appeals err by failing to hold that the 1883 Judgment was valid, subsisting, and legally effective to deprive Plaintiffs of all right, title, or interest to the property in dispute?

c. Did the court of appeals materially misapply the standard of review by holding that the same evidence that raised a fact issue on the bill of review was sufficient to create fact issues for the trespass to try title action?

d. Is it conclusively established that the executor of the Chapman estate had the authority necessary to prosecute Cause 1279 to judgment without joinder of the heirs? If there was no such authority, was the 1883 Judgment void or merely voidable?

4. *Adverse Possession:*

The court of appeals held (without explanation) that there was a fact issue on "repudiation" of title that defeated Defendants' summary judgment on adverse possession. But, Mrs. Chapman claimed ouster in her pleadings and the 1883 Judgment plainly repudiates Mrs. Chapman's claim to the disputed property. In addition, that property has been visibly occupied for 118 years in repudiation of any Chapman interest.

a. Did the court of appeals err in holding that Defendants' adverse possession claim was not established as a matter of law because "a fact issue exists as to whether there has been a repudiation of appellants' title"?

b. Did Mrs. Chapman's judicial admission of ouster and the 1883 Judgment in Cause 1279 establish ouster as a matter of law?

c. Did the court of appeals misapply the standard of review by failing to detail the evidence that raised fact issues on Defendants' adverse possession claim?

Point Of Error

Did the court of appeals err in reversing the summary judgments in favor of defendants?

Issues Presented By Exxon

1. **Point of Error:** Did the court of appeals err in reversing the summary judgment in favor of Exxon and the other Defendants?

Bill of Review Issues

2. Elements of Proof

Did Plaintiffs raise an issue of material fact on each element of their bill of review?

(a) Did the court of appeals err in finding that Plaintiffs introduced some evidence of Richard King's extrinsic fraud?

(i) In that regard, does the circumstantial evidence cited by the court of appeals support the inference of extrinsic fraud by King, or is the evidence too weak to support the vital fact under the rules governing evidentiary inferences?

(b) Did the court of appeals err in finding that Plaintiffs introduced some evidence that the failure of their ancestors to present a meritorious defense in the original action was unmixed with the ancestors' own negligence?

(i) In that regard, does the circumstantial evidence cited by the court of appeals support the inference that the failure of their ancestors to present a meritorious defense in the original action was unmixed with the ancestors' own negligence, or is the evidence too weak to support the vital fact under the rules governing evidentiary inferences?

(c) Did Plaintiffs have the burden in responding to a "no evidence" summary judgment to introduce some evidence that the 1883 Judgment was due in part to their own negligence?

(d) Should the "no evidence" summary judgment have been affirmed because Plaintiffs failed to prove that the 1883 Judgment was not due in part to their own negligence?

3. Statute of Limitations

(a) Did Plaintiffs raise an issue of material fact on each element of fraudulent concealment?

(b) Does the discovery rule or any deferred accrual apply to a bill of review?

(c) Did Plaintiffs have the burden in responding to Defendants' "no evidence" summary judgment to prove that none of the original parties, and none of the succeeding generations of Chapman heirs, had actual or constructive knowledge of the elements of a bill of review?

(d) Should the "no evidence" motion for summary judgment have been sustained when Plaintiffs failed to prove that the original parties to the 1883 Judgment and all succeeding generations were without actual or constructive knowledge of the elements of a bill of review?

(e) Did the court of appeals properly apply the standard for reviewing a "no evidence" summary judgment by holding that Defendants must conclusively negate the discovery rule?

(f) Did the court of appeals err in holding, without analysis, that the same evidence supporting

"extrinsic fraud" for the bill of review also "avoided the four-year statute of limitations?"

(g) Did the court of appeals err by failing to hold that Plaintiffs' claim accrued as a matter of law more than four years before the bill of review was filed?

(i) In that regard, did the court of appeals err in failing to so hold, since there is no evidence that Plaintiffs did not, or could not in the exercise of reasonable diligence, have discovered their cause of action?

(h) Did the court of appeals err by not holding that Plaintiffs failed to raise a fact issue on fraudulent concealment, i.e., failed to offer some evidence that they did not, or could not in the exercise of reasonable diligence, have discovered their cause of action?

Trespass to Try Title and Adverse Possession Issues

4. Did the court of appeals err in holding, without analysis, that there were fact issues underlying the trespass to try title action "[g]iven the evidence reviewed in our determination of the billing o review action?"

5. Did the court of appeals materially misapply the standard of review by holding that the same evidence that raised a fact issue on the bill of review was sufficient to raise fact issues for the trespass to try title action?

6. Did the 1883 Judgment divest Plaintiffs' ancestors of title, or was it void as to some or all of Helen Chapman's heirs?

(a) If the 1883 Judgment is void as to Helen Chapman's heirs, has King Ranch accrued limitation title to adverse possession under TEX. CIV. PRAC. & REM. CODE §§ 16.024-16.028?

7. Did the court of appeals err in holding that King Ranch's and other Defendants' adverse possession defense was not established as a matter of law because a "fact issue exists as to whether there has been a repudiation of appellants' title in the Rincon?"

(a) If the 1883 Judgment is void as to Helen Chapman's heirs, was the cotenant relationship repudiated as a matter of law?

8. Did the court of appeals misapply the standard of review by failing to detail the evidence that raised fact issues on adverse possession?

9. Is it conclusively established that the executor had the authority necessary to prosecute the 1879 Action to judgment without joinder of the heirs?

In the Interest of L.M.I. and J.A.I., minor children, No. 02-0244. (Opinion of Court of Appeals not yet published.)

Issues Presented

1. Should the order terminating Ricardo's parental rights be set aside since Ricardo's signature on the affidavit of relinquishment of his parental rights

was procured in a manner that violated Ricardo's due process rights?

2. Should the order terminating Maria's parental rights be set aside since Maria's signature on the affidavit of relinquishment of her parental rights was procured in exchange for "small kindnesses" and unenforceable promises which constitute undue or overreaching as a matter of law?

Provident Life & Accident Ins. Co. v. Knott, No. 02-0458. (Opinion of Court of Appeals, 70 S.W.3d 924.)

Issues Presented by Provident Life Ins. Co.

A. Whether a court can rewrite a disability insurance policy's unambiguous definition of "total disability" and ignore its definitions of "partial disability" and "residual disability" in favor of a common-law definition of "total disability" that was adopted in readily distinguishable cases decided over 40 years ago.

B. Whether the Court of Appeals erred in finding a fact issue regarding whether Knott's disability commenced after his 65th birthday where he worked on a full-time basis in his predisability occupation for several years before and at least three months after turning 65.

C. Whether ERISA governs disability insurance policies covering the shareholders in a professional association where, at the time that some of the policies were issued, one of the shareholders was an employee without any ownership interest.

D. Whether disability insurance policies that are issued to a shareholder in a professional association can be part of an ERISA plan that provides various types of insurance coverage to the association's shareholders and employees.

Issues Presented by James Knott, M.D.

The summary judgment evidence presented in this case indicates that Provident never made an outright denial of Dr. Knott's claims for total disability benefits. Furthermore, it is undisputed that, from the time of his injury onward, Provident extended Dr. Knott the benefit of premium waivers intended for totally disabled policyholders. In light of Texas precedent holding that the accrual date of a cause of action where an outright denial is lacking is a question of fact. *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 828 (Tex. 1990), this Petition presents the following issue:

1. Did the court of appeals err in holding that the statutes of limitations barred Dr. Knott's claims for misrepresentations, breach of the duty of good faith and fair dealing, and violations of the Texas Insurance Code and Texas DTPA.

Ridge Oil Co., Inc. v. Guinn Investments, Inc., No. 02-0599. (Opinion of Court of Appeals, 73 S.W.3d 523.)

Issues Presented

1. An oil and gas lease creates a defeasible estate that automatically terminates when a condition—such as the continued production of oil or gas—is not fulfilled. The temporary cessation of production ("TCOP") doctrine was developed to continue the lease when production has temporarily ceased for reasons beyond the lessee's control. Did the court of appeals err in holding that the TCOP doctrine applies when Ridge Oil voluntarily ceased production?

2. The assignment of a portion of the acreage of an oil and gas lease creates a separate lease hold estate for each assignee. No court has ever before allowed the lessee of a separate tract, who owns no interest in the leasehold estate upon which production had ceased, to raise the TCOP doctrine so that lessee can continue to hold acreage without itself producing oil or gas. Did the court of appeals err in holding that Ridge Oil has a duty to continue production to sustain a leasehold estate owned by Guinn?

3. In its initial panel decision, the court of appeals, as a matter of law, rejected Guinn's alternative arguments that genuine issues of fact were raised as to whether operations continued or production ceased on the Ridge Oil Tract. By erroneously basing its subsequent en banc decision on the continued viability of Guinn's lease, the court of appeals did not rule on Guinn's alternative arguments. Did the court of appeals further err in not rejecting Guinn's alternative arguments that genuine issues of fact were raised as to whether operations continued or production ceased on the Ridge Oil Tract?

4. In its initial panel decision, the court of appeals affirmed the trial court's summary judgment against Guinn's alternative claims for fraud and tortious interference with contractual relationship. By erroneously basing its subsequent en banc decision on the continued viability of Guinn's lease, the court of appeals did not rule on the trial court's disposition of Guinn's alternative claims. Did the court of appeals further err in not sustaining the trial court's summary judgment against Guinn's claims for fraud and tortious interference with contractual relationship?

5. The trial court's final judgment awarded attorney's fees under the Uniform Declaratory Judgments Act to the party which prevailed on appeal. By erroneously basing its decision on the continued viability of Guinn's lease, the court of appeals held that Guinn, as the prevailing party, was entitled to attorney's fees and that Ridge Oil and Woodward were not entitled to attorney's fees. Did the court of appeals further err in holding that it was equitable and just to award attorney's fees to Guinn and in reversing the trial

court's award of attorney's fees to ridge Oil and Woodward?

6. The trial court's final judgment awarded to Ridge Oil and Woodward attorney's fees in amounts which were less than the jury found to be reasonable and necessary. By erroneously holding that Ridge Oil and Woodward were not entitled to attorney's fees, the court of appeals did not rule on the issues of whether the trial Court exceeded its authority and abused its discretion by reducing Ridge Oil's and Woodward's award of attorney's fees. Did the trial court exceed its authority and abuse its discretion by rendering judgment that Ridge Oil and Woodward recover attorney's fees in amounts less than the amounts found by the jury?

February 13, 2003

Joe, et al. v. Two Thirty Nine Joint Venture, No. 02-0218. (Opinion of Court of Appeals, 60 S.W.3d 896.)

Issues Presented by Harry J. Joe

1. This Court in *In re Perry*, 60 S.W.3d 857 (Tex. 2001) confirmed that immunity afforded to legislators extends beyond mere immunity from liability, and includes immunity from the burdens of defense, including discovery. The unanimous Court ruled that the district court abused its discretion when it *permitted* discovery from members of the Legislative Review Board and its staff. The Court of appeals in this case has held that the district judge abused her discretion when she *failed to permit* the deposition of Mr. Joe, a city councilman, pertaining to his "individual acts concerning the moratorium" adopted by the Irving City Council. *Is an elected member of a city council entitled to the same immunity from discovery as a member of the Legislative Review Board?*

2. Mr. Joe was a member of the Irving city Council, and an employee of Jenkins & Gilchrist. The Court of Appeals has held that Mr. Joe had a duty, before advocating or voting upon matter before the City Council, (1) to identify any clients of Jenkins & Gilchrist that may be "affected" by the matter (2) to disclose to any such client Mr. Joe's political position regarding the matter, and (3) to provide any such client private notice of when the matter would come before the city council in order to permit the client to "grandfather" its property from the effects of the legislation when passed. The Court of Appeals also held that Mr. Joe's "actual vote" as a council member "is evidence of the conflict with the client's interest." *Can the courts impose such duties upon members of the legislative branch of government, and is the imposition of such duties consistent with a republican form of government?*

3. The court of Appeals has held that a lawyer serving as a public official is free to act in a manner favorable to his law firm's private clients, but must obtain a firm client's "informed consent" before acting unfavorably to the client's interest. The Court of Appeals also held that a law firm has a duty to perform "conflicts checks for a partner who is a public official" regarding the lawyer-public official's political positions. Third, the Court of Appeals ruled that a lawyer serving as a public official has a duty to inform his law firm's clients of legislation before it is considered for approval by the legislative body, in time to permit those clients to avoid the effects of the legislation when it is enacted. *Can the Court of Appeals' holdings be reconciled with Texas Disciplinary Rule of Professional Conduct 1.10, which directs a lawyer serving as a public officer to refrain from representing a private client in connection with a matter in which the lawyer participates as a public officer, and which requires that such a lawyer not participate in, and be screened from, his law firm's representation of a client in any matter before the public body served by the lawyer?*

Issues Presented by Jenkins & Gilchrist

1. Texas Disciplinary Rule of Professional Conduct 1.10 "prevents a lawyer from exploiting public office for the advantage of a private client." Joe was an Irving City Councilman and partner in J&G. Did the Court of Appeals' decision violate Rule 1.10 by holding that Joe had a duty to inform his firm's client, 239 JV, that the Irving City Council would consider a housing moratorium that could affect 239 JV's interests even though the Council provided adequate public notice?

2. Section 171.004 of the Texas Local Government Code sets forth the exclusive conflict of interest rules governing municipal officials. Section 171.007 of the Local Government Code expressly preempts all common law conflict of interest rules. Did the Court of Appeals err in finding that common-law rules of conflict of interest based on the Restatement (Third) of the Law Governing Lawyers and Disciplinary Rule 1.06 apply to Joe's Council votes?

3. Did the Court of Appeals err in holding that Joe could be liable for breaching a duty to notify 239 JV of the impending moratorium vote even though neither he nor J&G ever represented 239 JV before the Irving City Council, never represented 239 JV in its opposition to the moratorium, the Irving City Council had given adequate public notice and 239 JV never claimed that it lacked notice of the Special Meeting?

4. 239 JV only alleged that Joe is liable to it for actions he took as part of his position as an Irving City Councilman. 239 JV also only alleged that J&G has derivative liability under *respondeat superior*. Texas

law holds that an employer can only be liable for acts of an employee in the scope of the employment. Can J&G be liable for Joe's actions undertaken as a public official?

5. Joe has official immunity for all actions taken as an Irving City Council member. 239 JV only alleged that Joe is liable to it for actions he took as part of his position as an Irving City Councilman. All of 239 JV's claims against J&G are based on derivative liability for Joe's actions. Does *respondeat superior* impute Joe's immunity to J&G?

Issues Not Briefed but Subject to Review

1. Whether Respondent's damages were reasonably foreseeable.

2. Whether the Court of Appeals erroneously reversed the trial court's denial of Respondent's Motion to Continue Joe's Motion for Summary Judgment despite the absence of any discoverable matter relevant to such Motion.

3. Whether the Court of Appeals erred in holding that Joe failed to preserve his absolute immunity claims.

GreenPoint Credit Corp. v. Perez, No. 02-0312. (Opinion of Court of Appeals, 75 S.W.3d 40.)

Issues Presented by GreenPoint Corp.

1. Was GreenPoint denied a fair trial because a juror failed to disclose during *voir dire* that she too had a dispute with GreenPoint over a mobile home that, if revealed, would have conclusively demonstrated a disqualifying bias?

2. Did the court of appeals apply the wrong standard in reviewing GreenPoint's challenge to the excessiveness of actual damages by failing to consider all the evidence relating to Perez' damage claims?

3. Is there legally sufficient evidence to support the jury's award of future damages?

Issues Presented by Ninfa Perez

1. The court of appeals reversed the \$10,000,000 judgment for DTPA additional damages in favor of Ninfa Perez based on an argument GreenPoint Credit Corporation indisputably never made. Was this reversal erroneous because it conflicts with this Court's decisions prohibiting a court of appeals from reversing on grounds raised *sua sponte* as well as violating fundamental principles of preservation of error and appellate review?

2. The court of appeals held that neither the evidence presented at trial nor the jury charge indicated that Ninfa Perez sought recovery under the DTPA. Yet, Ninfa Perez pled for DTPA additional (treble) damages; proved that GreenPoint knowingly violated the statute; obtained a finding, based on the DTPA definition of knowingly, that GreenPoint had

knowingly violated the statute; obtained a finding, based on the DTPA definition of knowingly, that GreenPoint had knowingly violated the statute; obtained a jury award of damages based on legal standards governing the assessment of DTPA additional damages; and obtained a judgment, based on the verdict, expressly awarding her additional damages under the DTPA. Did the court of appeals misconstrue the charge, verdict and judgment and misapply the law on the findings needed to recover DTPA additional damages?

3. Did the court of appeals commit reversible error by reversing the trial court's judgment in Ninfa Perez' favor for \$10,000,000 in DTPA additional damages and rendering a take-nothing judgment on that claim? Should this Court reverse the court of appeals in part and render judgment reinstating the \$10,000,000 recovery by Ninfa Perez?

West Orange-Cove Consolidated, et al. v. Alanis, et al., No. 02-0427. (Opinion of Court of Appeals, 78 S.W.3d 529.)

Issues Presented

Briefed Issues

1. In a case involving important and unsettled questions of constitutional law concerning the public school finance system in the State of Texas, did the court of appeals err in affirming the dismissal of Petitioners' claims at the pleading stage?

a. Should Petitioners have been given an opportunity to amend their pleadings, conduct discovery and/or present evidence?

b. Were Petitioners required to plead that they were "forced to tax at the highest allowable rate to provide the bare, accredited education" when that standard is not contained in the Texas Constitution?

c. Should there be a linkage between the constitutional "general diffusion of knowledge" standard and legislative accreditation standard, and if so, should it be subject to judicial oversight and/or evidentiary review based upon changed circumstances?

Unbriefed Issues

2. Was dismissal proper on the ripeness grounds that underlie the trial court's opinion?

a. Have Petitioners stated an actual injury? *Under the court of appeals holding, a single district that meets the pleading threshold can state a cognizable claim. Thus, the court of appeals rejected the trial court's conclusion that at least half the districts have to be taxing at the \$1.50 cap in order for Petitioners to state a claim and did not reach the issues of whether the trial court should have included in its calculation (1) the districts taxing near the cap (which would now bring the percentage of injured districts to 30%), and (2) districts that had granted constitutionally-authorized optional home-stead*

exemptions (which would now bring the percentage of injured districts to 41%). The following issues are presented in the event that the Court finds that the court of appeals' opinion is not dispositive:

i. must a certain percentage of school districts in the State be taxing at or near the \$1.50 "maintenance and operations" cap (the "\$1.50 cap") before Petitioners can proceed with their claim that the \$1.50 cap results in an unconstitutional state ad valorem tax?

ii. How much taxing discretion must a district have in order to have "meaningful discretion" within the meaning of *Edgewood III* and *Edgewood IV*? For example, does a district have to be taxing exactly at the \$1.50 cap without providing an optional homestead exemption before it lacks "meaningful discretion" within the meaning of *Edgewood III* and *Edgewood IV*?

b. Have Petitioners stated an injury that is sufficiently likely to occur?

Brooks, et al. v. Northglen Ass'n, No. 02-0492. (Opinion of Court of Appeals, 76 S.W.3d 162.)

Issues Presented by Geneva Brooks, et al.

1. As Northglen deed restrictions for sections 4 to 6 specifically limit increases in annual assessments when there is no homeowner vote, it was error to construe Chapter 204—enacted after the restrictions were adopted—to allow directors to increase the assessments above the limit, with no homeowner vote.

2. As Northglen deed restrictions for all sections provide that the penalty for late payment is interest, and nowhere provide for an additional late fee, it was error to construe Chapter 204—enacted after the restrictions were adopted—to authorize the Northglen directors (with no homeowner vote) to impose a late fee in addition to the interest charges authorized by the deed restrictions.

3. Petitioners are entitled to consideration of their claim for attorney fees.

Issues Presented by Northglen Association

1. Is there jurisdiction over this civil action or did the Court of Appeals err by rendering an advisory opinion?

2. Did the Sixth Court of Appeals err in its disagreement with the First Court of Appeals?

3. Did the Court of Appeals err in its analysis of Chapter 204?

March 6, 2003

Universal Health Services, Inc., et al. v. Renaissance Women's Group, P.A., No. 02-0193. (Opinion of Court of Appeals, 63 S.W.2d 537.)

Issue Presented

Absent an unambiguous, express promise to bargain away its right to make decisions regarding its property, can a lessor be required to operate a business in one part of its facility for the benefit of one who leases space in a different part of the facility?

Binur v. Jacobo, No. 02-0405. (Opinion of Court of Appeals, 70 S.W.3d 330.)

Issues Presented

Briefed and Partially Brief Issues

This case presents this Court with first impression issues of statutory construction and interpretation of substantive law regarding Article 45901 and of construction of the rules of procedure relative to summary judgment practice and procedure which impact courts and practitioners in virtually every civil proceeding filed across the state. These include:

1. Whether "dual motions" combining within the same document a "traditional" motion for summary judgment under rule 166a(c) that is supported with evidence, and a "no-evidence" motion for summary judgment under rule 166a(i), on the same or different grounds, limit the reviewing court to review only the traditional motion for summary judgment under the traditional summary judgment standard of review.

(a) Whether the Court of Appeals improperly reviewed Dr. Binur's Rule 166a(i) "no-evidence" motion for summary judgment under the "traditional" Rule 166a(c) summary judgment standard of review despite Dr. Binur having properly filed and presented a rule 166a(i) "no-evidence" motion for summary judgment.

(b) Whether Dr. Binur's motion for summary judgment properly presented a "no-evidence" motion under rule 166a(i).

(c) Whether the filing of a "no-evidence" motion prohibits all references to evidence which tends to show there is no evidence on the issue or challenged element raised within the no-evidence motion.

(d) Whether the filing of a combined "no-evidence" motion and a "traditional" motion in the same document precludes review by the appellate court simply because the movant has discussed and relied on evidence to support its traditional summary judgment grounds within that same document.

(e) Even if Dr. Binur's traditional motion did not conclusively establish entitlement to judgment as a matter of law, whether summary judgment was proper because Respondent failed to respond to the no-

evidence motion regarding the challenged element of proximate causation.

(f) Even if Dr. Binur's traditional motion for summary judgment did not conclusively establish entitlement to judgment as a matter of law, whether the court of appeals should have, nonetheless, conducted a review of Dr. Binur's no-evidence motion.

(g) Whether Respondent's response to Dr. Binur's motion for summary judgment pointed out evidence that raised a fact issue on the challenged element of proximate cause.

(h) Whether Respondent waived her right to complain of the trial court's grant of the "no-evidence" motion for summary judgment by failing to specially except to Dr. Binur's "no-evidence" motion for summary judgment and failed to brief those issues in the court of appeals.

2. Whether the court of appeals erroneously reversed Dr. Binur's summary judgment on the issues of lack of informed consent, where the court considered Respondent's informed consent theory under the standards applied to allegations of misdiagnosis, negligent representation, and negligent treatment—theories not asserted by Respondent.

(a) Whether section 6.02 of article 4590i provides a cause of action or theory of recovery when the allegations of misdiagnosis or unnecessary surgery are recast under the theory of informed consent.

(b) Whether, under section 6.02 of article 4590i, the informed consent theory of recovery includes the alleged failure to disclose the risk that the procedure might be unnecessary, and thus, whether the failure could have influenced a reasonable person in making a decision to give or withhold consent.

(c) Whether, when the procedure at issue is not included within List A or List B under article 4590i, a risk inherent in the procedure is whether the procedure is necessary.

3. Whether the court of appeals improperly imposed a duty under sections 6.02, 6.05, and 6.06 of Article 4590i on an assistant surgeon to obtain informed consent from a patient regarding the procedure to be performed by the lead surgeon or surgeon in charge.

Volkswagen of Am., Inc. v. Ramirez, et al., No. 02-0557. (Opinion of Court of Appeals, 79 S.W.3d 113.)

Issues Presented

1. Can a convicted first-degree murderer be cleansed of his constitutional ineligibility to serve on a Texas jury by the Texas probation statute, as the Corpus Christi Court of Appeals held in this case?

A. Does the probation statute impermissibly authorize Texas courts to confer "judicial pardons," as the Fort Worth Court of Appeals

held in *R.R.E. v. Glen*, 884 S.W.2d 189 (Tex. App.—Fort Worth 1994, writ denied)?

B. Is a juror who demonstrates a lack of "good moral character" qualified to serve under the Texas Constitution and statutes?

2. What constitutes an excited utterance under Texas Rule of Evidence 803(2)?

A. Is a TV news crew's videotaped interview with an unidentified witness admissible where the interview took place well after the accident, there was no showing of personal knowledge, the witness calmly insisted on anonymity, and he was not available for cross-examination.

B. Was the admission of the mystery witness's hearsay statement harmful when the statement was the only testimony supporting an expert's unreliable theory of causation, where plaintiffs' counsel represented to the court that the videotape was a "very important piece of evidence for the plaintiffs in this case," and where counsel opened and closed the plaintiffs' case with reference to the testimony?

3. Should an order granting a new trial be subject to appellate review in Texas, as it is in the other 49 states, the District of Columbia, and the federal courts?

A. Are a litigant's rights under the Texas and United States Constitutions violated by Texas' practice of immunizing new trial orders from review?

B. Should a trial court be required to state its reasons for granting a new trial?

Texas Farm Bureau Mut. Ins. Co. v. Sturrock, No. 02-0069. (Opinion of Court of Appeals, 65 S.W.3d 763.)

Issues Presented

Sturrock's insurance policy entitles him to personal-injury-protection coverage only or injuries resulting from a "motor vehicle accident." Sturrock hung his foot as he got out of his pickup. No other vehicle, person, or object was involved. Using the plain meaning of "motor vehicle accident" as recognized by case law from Texas and other jurisdictions—including this Court's opinion in *Farmers Texas County Mutual Insurance Co. v. Griffin*, 955 S.W.2d 8a (Tex. 1997)—Sturrock was not involved in a motor vehicle accident. Does *Mid-Century Insurance Co. of Texas v. Lindsey*, 997 S.W.2d 153 (Tex. 1999), change this meaning and compel a different result?

March 27, 2003

Ford Motor Co. v. Ridgway, et ux., No. 02-0552. (Opinion of Court of Appeals, 82 S.W.3d 26.)

Issues Presented

1. In a product-liability claim asserting a manufacturing defect, does Texas law require the plaintiff to identify, and to show with direct or circumstantial evidence, how the product varied from its intended design; or is identification and proof of a specific defect irrelevant in some cases because of the occurrence of the accident itself?

2. Can the plaintiff asserting a product liability claim for manufacturing defect sustain that claim on circumstantial evidence suggesting that a manufacturing defect was a possible cause of the accident, shifting to the defendant the burden of presenting evidence to show that the alleged defect was no more likely than other possible causes?

Texas Dep't of Protective & Regulatory Servs v. Mega Child Care, Inc., No. 02-0728. (Opinion of Court of Appeals, 81 S.W.3d 470.)

Issues Presented

1. The Administrative Procedure Act is procedural, in that it describes steps to be taken when another statute authorizes judicial review of a state agency order. Did the Court of Appeals err when it found that APA § 2001.171 authorizes judicial review of the Department's order?

2. Because no statute provides a right of judicial review, and because the Respondent did not assert a claim of an inherent right to judicial review in the trial court, the Supreme Court should reverse the judgment of the Houston Court of Appeals and render judgment affirming the judgment of the district court.

Diversicare General Partner, Inc., et al. v. Rubio, et al., No. 02-0849. (Opinion of Court of Appeals, 82 S.W.3d 778.)

Issues Presented

1. What is the scope of a health care liability claim, given that it is defined as "a cause of action against a health care provider for . . . a claimed departure from accepted standards of medical care or health care of safety . . ." TEX. REV. CIV. STAT. ANN. Art. 4590i § 1.03(a)(4) (Vernon supp. 2002)?

2. Is a claim that a nursing home resident was assaulted by another resident a health care liability claim, that is, a claimed departure from accepted standards of safety in the health care industry?

3. Is the alleged failure to provide a safe environment part and parcel to, and thus an inseparable

part of, the rendition of a nursing home health care provider's services to its residents?

4. Can admissions made in a plaintiff's pleadings and by plaintiff's counsel that the claim alleged focuses on the safety of the nursing home residents, and that it is a health care liability claim, be overcome by assertions that "portions of the underlying cause of action are not subject to" Article 4590i?

5. Will a plaintiff's stated intention to prove his/her claim with testimony from a health care expert trump an assertion that the claim does not involve an accepted standard of medical care or health care or safety under Article 4590i?

April 3, 2003

Excess Underwriters at Lloyd's, London, et al. v. Frank's Casing Crew & Rental Tools, Inc., No. 02-0730. (Opinion of Court of Appeals, 93 S.W.3d 178.)

Issues Presented

1. The trial court and Court of Appeals erred in applying the *Matagorda* case to reverse a judgment in favor of Excess Underwriters (granting them more than \$7 million) and grant Frank's Motion for Summary Judgment on Reimbursement.

a. Application of *Matagorda* to this case extends *Matagorda* beyond its facts and undermines its equitable principles without advancing public policy. The Supreme Court should grant review to further articulate the standards necessary to satisfy *Matagorda*'s consent requirement to guide Texas courts and potential litigants.

b. The *Matagorda* ruling was limited to its facts and cannot properly be extended beyond them. This Court held in the *Matagorda* case that a primary insurer on a Texas policy, that defends and settles a case, cannot be reimbursed for funds paid to settle noncovered claims without the insured's consent. The Excess Underwriters here had no authority to settle, no duty to defend, and did not control the defense or settlement, but settled at Frank's insistence. Frank's controlled the defense, solicited settlement, and acknowledged coverage issues reserved between Frank's and Excess Underwriters. Did the trial court err when it withdrew the judgment allowing reimbursement and applied the *Matagorda* case to an excess insurer on a Louisiana policy?

c. The *Matagorda* case reaffirmed the right to reimbursement under a quasi-contractual or other equitable theory. Excess Underwriters are entitled to reimbursement under the equitable doctrines of quantum meruit (because the settlement required Frank's written approval) and under assumpsit (because they paid the settlement upon Frank's demand). Did the trial court err when it applied *Matagorda* without

considering Excess Underwriters' rights to reimbursement under these equitable doctrines?

d. Texas law holds that insurance contracts are governed by the law of the state with the most significant relationship to the policy. Frank's policy was issued and delivered in Louisiana, under Louisiana law, to a Louisiana insured. Did the trial court err when it applied Texas law to interpret Excess Underwriters' right to reimbursement?

1) Under Texas choice of law rule, Louisiana law governs Excess Underwriters' right to reimbursement because Louisiana has the most significant contacts to the insurance policy.

2) Louisiana law holds that an insurer funding a settlement not covered by the policy may later seek reimbursement of those funds from its insured. Excess Underwriters funded a settlement of claims that were subsequently adjudicated as not covered under the umbrella policy. Under Louisiana law, are Excess Underwriters entitled to reimbursement of those settlement funds?

3) Louisiana law allows an action for unjust enrichment when one party pays a debt owed by another. The trial court correctly found that there was no coverage for the claims against Frank's. Excess Underwriters paid a claim that Frank's owed. Are Excess Underwriters entitled to reimbursement of funds paid to extinguish a debt that Frank's owed?

4) Even if Louisiana's law were undecided on the reimbursement issue, a Texas court may not properly presume Louisiana law to be the same as Texas law. Such a presumption may arise only when the foreign state's law is derived from common law. Louisiana's law is not. Did the Court of Appeals err in presuming Louisiana law to be the same as Texas law?

April 17, 2003

Texas Dep't of Criminal Justice v. Simons, No. 02-0479. (Opinion of Court of Appeals, 74 S.W.3d 138.)

Issue Presented

Whether the fact that a governmental entity performed some investigation of an incident is sufficient to satisfy the actual notice requirement of the Texas Tort Claims Act, even if the investigation reveals no facts that would alert the entity to its alleged fault and the claimant affirmatively tells the entity that he does not blame it for his injuries?

Diamond Shamrock Refining Co., L.P., et al. v. Hall, No. 02-0566. (Opinion of Court of Appeals, 82 S.W.3d 5.)

[Note: Two Petitions for Review.]

Issues Presented by Diamond Shamrock Refining, et al.

1. When the risk that causes a workplace death is unknown to the employer and has not been encountered before by the employer, is the evidence legally sufficient to support a finding of gross negligence?

2. How should the exemplary damages cap under Chapter 41 of the Civil Practices and Remedies Code be applied in the context of a gross negligence claim brought against an employer by a surviving spouse under Chapter 408 of the Labor Code?

a. After 1995 tort reform, is *Wright v. Gifford-Hill* still good law and is it still true that plaintiffs should not offer evidence of or obtain jury findings on actual damages, when actual damages are used to calculate the exemplary damage cap in Chapter 41 of the Texas Civil Practices and Remedies Code?

b. Should a surviving spouse seeking exemplary damages against an employer under the workers' compensation statute be allowed to make a mixed offer of "actual," "economic," "noneconomic," or "compensatory damages evidence that encompasses elements of damages attributable to persons other than the spouse herself, including the "damages" of the deceased employee who is statutorily barred from making any claim?

3. Did the trial court and the court of appeals err in allowing distinct entities to be treated as a single business enterprise?

4. Did the court of appeals err in reversing as to defendants who had a judgment in their favor, and as to whom the plaintiff did not appeal?

Response and Cross Points of Donna Hill

Response Point 1A. The law of exemplary damages does not, and should not, require proof that the defendant gained subject knowledge of the precise means and manner of death through a previously encountered chain of events.

Response Point 1B. There is legally sufficient evidence of gross negligence when a petrochemical refinery, knowing "with substantial certainty" that even a small amount of liquid allowed into a vapor compressor will cause an explosion, deliberately floods liquids into a vapor-only gas compression system designed by the employer to force liquids back into the discharge line of the compressor and protected solely by a check valve, which had been reported to be potentially faulty. The employer flooded this system in

spite of alarms and angry protests that such flooding "was going to blow up a compressor." Further, the employer did not provide the oncoming start-up crew in that unit with the knowledge and procedures to check for and drain liquids from the lowest point in the line, knowledge and procedures that had been in place in other units of the refinery.

Response Point 2. In this case, Chapter 41 of the Civil Practice and Remedies Code does not apply due to acts of the legislature. (This issue is addressed in Mrs. Hall's Cross Point 2.) Further, the cap of Section 41.008(b)(B)(2) was unconstitutional as applied by the trial court because it violates the Open Courts provision of the Texas Constitution. (This issue is addressed in Mrs. Hall's Cross Point 1B.)

Response Point 2A. Diamond Shamrock is estopped to raise its issue 2A because it deliberately invited the trial court into the very error upon which it now seeks to capitalize. If the cap is to apply, then Mrs. Hall must be allowed to put on evidence and obtain findings to allow its calculation, but Diamond Shamrock cannot benefit from inviting this error. (This issue is addressed in Mrs. Hall's Cross Point 1.)

Response Point 2B. Chapter 41 of the Civil Practice and Remedies Code expressly provides that Mrs. Hall, as a "claimant," may offer evidence and obtain findings on all her elements of actual damages, both direct and derivative. (This issue is addressed in Mrs. Hall's Cross Point 1A.)

Response Point 3. The courts below did not err in finding that the Diamond Shamrock entities were acting as a single business enterprise. Further, Diamond Shamrock waived complaining of error in this regard. (Mrs. Hall will reserve briefing this point unless and until requested to do by this Court.)

Response Point 4. The courts below did not err in reversing as to all the defendants who were found to have acted as a single business enterprise. (Mrs. Hall will reserve briefing this point unless and until requested to do so by this Court.)

Cross Point 1. A party waives complaining of error on appeal that it invited in the trial court.

A. If Chapter 41 of the Texas Civil Practice and Remedies Code applies to actions for exemplary damages for the death of an employee covered by workers' compensation, then a claimant must not be prevented from securing findings of economic and non-economic damages for the proper application of the exemplary damages cap.

B. The legislature did not intend to cap arbitrarily all jury awards of \$200,000.00 in actions for exemplary damages for the death of an employee covered by workers' compensation at \$200,000.00. Such an arbitrary application of Chapter 41 of the Texas Civil Practice and Remedies Code corrupts the rules of statutory construction and otherwise violates Article I, Section 13 of the Texas Constitution.

Cross Point 2 Due to acts of the legislature, Chapter 41 of the Texas Civil Practice and Remedies Code does not apply to this case.

Cire, et al. v. Cummings, No. 02-0670. (Opinion of Court of Appeals, 74 S.W.3d 920.)

[Note: Two Petitions for Review.]

Issues Presented by George Cire, Jr., et al.

1. When outcome determinative evidence is destroyed to avoid compliance with multiple discovery orders, must the trial court's sanctions order recite why every conceivable sanction would be ineffective in securing compliance and curing prejudice before striking pleadings even though:

- a. Compliance with discovery is impossible once the evidence is destroyed;
- b. The only sanction that is "just" is striking the pleadings that would be disproven by evidence that was destroyed to avoid production; and
- c. A presumption that claims lack merit is justified when evidence that would conclusively disprove them is destroyed in flagrant bad faith disregard for the discovery process and the court's orders.

2. Spoliation instructions are not sanctions a trial court's order must recite that it considered when confronting destruction of outcome determinative evidence.

- a. Spoliation instructions are not lesser discovery sanctions;
- b. Rather than cure prejudice, spoliation instructions would further prejudice the innocent party, and reward the offender; and
- c. Trial courts and the administration of justice should not bear the burden of imposing or reciting consideration of spoliation instructions as lesser discovery sanctions.

3. When there is a split among the courts of appeals concerning what lesser sanctions must be considered to avoid abuse of discretion, which precedent is controlling when a case tried in one appellate district is transferred to a conflicting district?

Issues Presented by Carla Roberson Cummings

1. Must a court hold an oral hearing before it imposes sanctions against an attorney representing a party? (*Trans-American Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991)).

2. May a court rule on objections to discovery and on alleged discovery abuses without notice and hearing? (Rule 215(1)(d), TEX. R. CIV. P. (repealed); Rule 215(2)(b), TEX. R. CIV. P. (repealed); Rule 215(3), TEX. R. CIV. P. (repealed); Rule 215.1(d), TEX. R. CIV. P.; Rule 215.2(b), TEX. R. CIV. P.; Rule 215.3, TEX. R. CIV. P.)

3. Is the legal sufficiency of an order compelling discovery to be tested in and of itself? (*Ex parte Slavin*, 412 S.W.2d 43 (Tex. 1967); *Ex parte Padron*, 565 S.W.2d 921 (Tex. 1978)).

4. Must a party file a response to a motion to compel discovery or may the party rely on the objections asserted in the responses to the discovery propounded?

5. Is moving for a rehearing on discovery orders sufficient to preserve the errors in those orders for appellate review?

May 1, 2003

Martin, et al. v. Amerman, et al., No. 02-0731. (Opinion of Court of Appeals, 83 S.W.3d 858.)

Issue Presented by Kirk E. Martin, et al.

The Court of Appeals incorrectly modified the Judgment of the Trial Court to delete the award of attorney's fees in favor of Petitioners.

Issues Presented by William M. Amerman, et al.

1. At trial, witnesses for both parties observed the deed descriptions of the Martins' land and the Amermans' land overlap by 30 feet. Both parties claimed ownership to this overlap. The boundary issue was secondary to title. Did the court of appeals erroneously overrule the Amermans' contentions that the trial court erred when it did not submit this case to the jury as a trespass to try title case?

2. Must a dispute over the title to land in Texas be submitted as a trespass to try title case, or may a boundary suit alone be permitted to resolve the title question?

3. This is a title case. The Martins failed to establish their title to the disputed 30 feet of property. The Martins maintain the burden of proof. The Amermans did not have to prove title. Did the court of appeals erroneously overrule the Amermans' issue that the trial court abused its discretion when it permitted a jury question to be submitted inquiring as to whether the Martins' survey was correct? The submission erroneously shifted the burden of proof and permitted consideration of an improper cause of action.

4. The Texarkana Court of Appeals did not give sufficient regard to the opinion in *Doria v. Suchowolski*, 531 S.W.2d 360 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.).

5. The Amermans never agreed to submit the lawsuit as a boundary dispute and never agreed to abandon their assertion this is a trespass to try title action despite the court of appeals' finding to the contrary. Likewise, the Amermans did raise a point of error on appeal concerning the trial court's failure to submit a jury question on trespass to try title and did not waive their complaint on this point.

6. (unbriefed issue) (Reserve Briefing for Brief on the Merits) The Amermans established as a matter of law that they owned the disputed 30 feet of land.

7. (unbriefed issue) (Reserve Briefing for Brief on the Merits) The survey prepared by Gilbert Johnston establishes the true and correct location of the boundary lines between the Martins' property and the Amermans' property, and it is superior in the priority of calls than the survey prepared by Whiteley.

8. (unbriefed issue) (Reserve Briefing for Brief on the Merits) The Martins failed to prove the Gilbert Johnston survey casts a cloud on title against the title to their property. There was no evidence that the Martins held title to the disputed property and that there was an adverse claim casting a cloud on the enjoyment of land. The Martins did not remove all doubt the Amermans held no right to the disputed property. Accordingly, there is no evidence to support the jury's findings in Jury Question No. 2.

The Texas Workers Compensation Comm'n v. Patient Advocates of Texas, et al., No. 02-0804. (Opinion of Court of Appeals not yet published.)

Issue Presented by Texas Workers Compensation Commission

Whether the Court of Appeals erred in holding that portions of the Commission's Dispute and Audit Rules, 28 Texas Administrative Code sections 133.301-133.305 constituted an improper delegation of power to a private entity under the *Boll Weevil* standards?

Issues Presented by Patient Advocates of Texas, et al.

1. Whether the *Medical Fee Guideline* (MFG) was promulgated in substantial compliance with APA rulemaking requirements.

2. Whether the TWCC exceeded its authority in promulgating the MFG, in particular with regard to the establishment of caps on fees known as a Maximum Allowable Reimbursement.

3. Whether the TWCC exceeded its authority in promulgating a statute of limitations on filing claims under the MFG.

May 8, 2003

State Farm Mut. Automobile Ins. Co., et al. v. Lopez, et al., No. 01-0540. (Opinion of Court of Appeals, 68 S.W.3d 701.)

Issues Presented

1. Did the court of appeals err by affirming a class certification order that contains no indication whatsoever how the class claims likely can and will be tried?

2. Did the court of appeals err by holding that State Farm waived the argument that *Bernal* requires a trial plan despite State Farm's argument that, under *Bernal*, "it is improper to certify a class without knowing how the claims can and will likely be tried?"

3. Is it error to certify a class whose putative members have irreconcilably conflicting economic interests, particularly where no subclasses exist and where the trial court's order gave no consideration how to try the conflicting interests?

4. Can a putative class action meet the typicality requirement when each class representative, by his or her unqualified fact testimony, has no viable cause of action against the defendants, particularly where the trial court's order gave no consideration to the claims, substantive law, or undisputed relevant facts?

5. Can and should a Texas court proceed with a Texas class action challenging the business judgment of the board of directors of a national mutual insurance company domiciled in Illinois, notwithstanding applicable Illinois law which prohibits such a proceeding?

May 22, 2003

Northern County Mutual Ins. Co. v. Davalos, No. 02-1007. (Opinion of Court of Appeals, 84 S.W.3d 314.)

Issues Presented

1. Whether an insurer tenders less than an unconditional defense by exercising its contractual right to control tactical decisions in litigation? Specifically, who is entitled to choose venue, the insured motorists or the insurer?

2. When venue is at issue, does an insurer who chooses to defend its insured motorist in Dallas County rather than Matagorda County breach its duty to the insured under the prompt payment of claims statute, codified at Article 21.55 of the Texas Insurance Code?

3. The express terms of Article 21.55 apply only to first party claims. Should Mr. Davalos have been allowed to recover under Article 21.55 for this third party claim?

Beals, et al. v. Reese, et al., No. 02-1061. (Opinion of Court of Appeals, 87 S.W.3d 203.)

Issues Presented by Roberta J. Beals, D.O.

Point of Error No. 1: Did the Court of Appeals err in reversing in part the summary judgment granted by the Trial Court as to Respondents' claims under the Texas Survival Statute and the Texas Wrongful Death Act, as contained in Chapter 71 of the Texas Civil Practice & Remedies Code; and in ignoring clear Texas Supreme Court precedent in doing so.

Point of Error No. 2: Did the Court of Appeals err in reversing the Trial Court's Summary Judgment with regard to Respondent Tara Reese's individual claims for personal injuries and damages?

Issues Presented by Fort Worth Osteopathic Hospital

1. Can the parents of a viable fetus, either individually or as legal representatives of the estate of the fetus, assert claims under the wrongful death and survival statutes when a health care provider negligently causes the fetus' death *in utero*?

2. Did Respondent Tara Reese produce more than a scintilla of evidence to support the elements of her claims for damages asserted in her individual capacity?

June 5, 2003

Compaq Computer Corp. v. LaPray, et al., No. 02-0705. (Opinion of Court of Appeals, 79 S.W.2d 779.)

Issues Presented and Briefed

1. May a court of appeals affirm the certification of a Rule 42(b)(4) class without analyzing the requirement of predominance and superiority, merely because it also is affirming the certification of a Rule 42(b)(2) class?

2. May a court of appeals affirm the certification of a mandatory class action for declaratory judgment where the relief sought would not resolve the dispute between the parties, would merely establish one or more factual elements of a pending class claim for damages, and would result in piecemeal litigation?

3. May a court of appeals affirm the certification of a nationwide class action for breach of warranty: (a) where significant individual issues predominate and the trial plan precludes the defendant from challenging them for each class member, and (b) without considering the interests of other states in having their laws applied?

4. May a court of appeals create a special rule of *res judicata* for class actions that allows class members to split causes of action for the same alleged injury?

5. Does certification of a non-opt-out class deny due process to absent class members—and fail to conform to Rule 42(b)(2)—when the issues to be adjudicated constitute principal elements of their pending claims for damages?

Issues Not Briefed

May a court, consistent with this Court's decision in *Intratex Gas Co. v. Beeson*, 22 S.W.3d 398 (Tex. 2000), base its decision to certify a class on its conclusion that the defendant's individual defenses will not survive summary judgment?

Does a trial plan that relegates Compaq's individual defenses to a secondary, non-jury "claims form" phase violate the right to trial by jury guaranteed by article V, §10 and Article I, § 15 of the Texas Constitution?

Whether the Trial Court, in conducting its *Bernal* inquiry into how the case would be tried, abused its discretion by admitting and relying upon the testimony of technical and economic experts that was unreliable pursuant to TEX. R. EVID. 702 and *E.I. duPont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995)?

Whether the Trial Court abused its discretion by admitting and relying upon testimony from law professors who sought to perform the Trial Court's function of applying the law to the facts?

June 12, 2003

Southwestern Bell Tel. Co. v. Garza, No. 01-1142. (Opinion of Court of Appeals, 58 S.W.3d 214.)

Issues Briefed in the Petition

Southwestern Bell will brief the following issues:

1. Retaliation—Defective Submission:

Garza's pleadings claimed Southwestern Bell made a "retaliatory discharge" in violation of the Labor Code, and he sought damages for "unlawful termination". But Question 1 disjunctively allowed the jury to find Southwestern Bell was liable if Garza was "disqualified or discharged . . . because he instituted or caused to be instituted a workers' compensation claim in good faith."

- *Was Question 1 defective because it departed from the pleadings and allowed the jury to determine liability on an evidentiary issue that did not match the damages awarded?*
- *Was the defect harmful?*
- *Did Southwestern Bell preserve the error in Question 1?*

2. Retaliation—Sufficiency of the Evidence:

The corporate decision to declare 12 jobs in Brownsville "surplus" was commenced five months before Garza's disqualification and was made by officials in another city with no demonstrated knowledge of Garza's October 1994 accident or his compensation claim. Garza's "disqualification" from a driving position was the same discipline that had been repeatedly suggested over seven years because of his safety record. The disqualification process was commenced before Garza filed his compensation claim.

Under the circumstances of this case, is there legally sufficient evidence that Southwestern Bell's decisions and actions involving Garza's employment were in violation of § 451.001 of the Labor Code and

taken solely in response to his filing a workers' compensation claim?

3. Punitive Damages:

Garza could recover punitive damages only by proving through clear and convincing evidence that Southwestern Bell acted with "actual malice". The requisite "intent" had to be that of a managerial agent of the corporation. There is no evidence that the officials who declared Garza's job "surplus" was managerial agents of the Company or had any knowledge of him or his work history. There is no evidence that Garza's supervisors were managerial agents of the Company or had personal animosity towards him. The Company, and Garza's supervisors, exercised positive efforts to get him qualified for a non-driving position.

Considering all the facts, is there clear and convincing evidence that Southwestern Bell acted with malice in the decisions it made and the actions it took regarding Mr. Garza's employment?

Did the court of appeals misapply the standard of review by failing to consider the entire record and by failing to cite undisputed facts that indicated there was no malice by Southwestern Bell?

An Issue Not Briefed

Proof of mental anguish must establish "severe" emotional distress that disrupts daily living. Proof of this element must show more than worry, anxiety, vexation, embarrassment, or anger. Here the proof of "mental anguish" consists of approximately 15 pages of the record and establishes only that David Garza felt bad about losing his job, was upset about his income loss, couldn't sleep, was depressed, and would get angry and upset three or four times a week.

Does the record satisfy the standards set by this court in Parkway Co. v. Woodruff, 901 S.W.2d 434 (Tex. 1995) for the recovery of mental anguish damages?

Is there legally sufficient evidence that David Garza sustained recoverable mental anguish as a result of Southwestern Bell's conduct in the past?

Is there legally sufficient evidence that David Garza sustained recoverable mental anguish as a result of southwestern Bell's conduct in the future?

Does the record support the entire sum of \$300,000 awarded for past mental anguish and \$300,000 for future mental anguish as found by the jury in Questions 2(e) and 2(f)?

Carl J. Battaglia, M.D., P.A., et al. v. Alexander, et al., No. 02-0701. (Opinion of Court of Appeals, 93 S.W.3d 132.)

Issues Presented

1. In a health care liability case, under art. 4590i § 16.02, are settlement credits to be deducted from past damages before prejudgment interest is calculated, or must a defendant pay prejudgment interest on amounts that are not awarded as damages?

2. If settlement credits are to be deducted before prejudgment interest is calculated, how are settlement credits to be allocated between past damages and future damages (upon which prejudgment interest is not recoverable)?

3. Did the courts below err in holding the Professional Associations liable for negligence?

4. May a physician's Professional Association be held directly liable for negligence when the physician himself, who is the only employee of the Professional Association, is held not negligent as a matter of law?

5. Were the Professional Associations' objections to the charge, and in their post-verdict motions, sufficient to preserve their complaints on appeal that the evidence was legally insufficient to justify submitting a negligence issue against them?

6. May a defendant be held jointly and severally liable in a health care liability case when it has not been found at least 51% responsible and the only joint venture alleged by the plaintiffs, of which that defendant is a member, has been held not negligent as a matter of law. (unbriefed)

7. May an appellate court *infer* a finding of liability against a joint venture in order to hold two members of the joint venture jointly and severally liable, when the only *pleaded* joint venture was held not liable as a matter of law. (unbriefed)

June 19, 2003

J. Hiram Moore, Ltd. v. Greer, No. 02-0455. (Opinion of Court of Appeals, 72 S.W.3d 436.)

Issues Presented

The *Holloway's line* of cases have long upheld and given effect to real property conveyances with specific descriptions followed by a general description of all lands owned by a grantor in a city, county, or

state (i.e., two grants). But the court of appeals, in a published opinion, refused to give effect to the language "In addition to the above described lands, it is the intent of this instrument to convey, and this conveyance does so include, all of grantors royalty and overriding royalty interest in all oil, gas and other minerals in the above named county or counties, whether actually or properly described herein or not, and all of said lands are covered and included herein as fully, in all respects, as if the same had been actually and properly described herein." Relying on *Jones v. Colle*, a "strip and gore" case, it held that this granting language conveyed nothing.

1. Are geographic grants, recognized and upheld in Texas for over 100 years, suddenly inadequate to effect a city-, county-, or state-wide conveyance.

2. Did this Court intend for *Jones v. Colle* to apply to geographic grants, overruling more than a century of Texas case law recognizing and upholding geographic grants?

Storage & Processors, Inc., et al. v. Reyes, No. 02-1008. (Opinion of Court of Appeals, 86 S.W.3d 344.)

Issue Presented

The court of appeals erred by improperly expanding the scope of the express negligence doctrine.

June 26, 2003

FFE Transportation Servs., Inc. v. Fulgham, et al., No. 02-1097. (Opinion of Court of Appeals not yet published.)

Statement of Issues

1. Can an entity that uses a product strictly for its own purposes, but that leases, or otherwise relinquishes possession of, the particular product to a third-party to further those purposes, be considered to have released that product into the stream of commerce such that it can be subject to strict tort liability?

2. In ordinary negligence cases, when and under what circumstances is expert testimony necessary to establish the applicable standard of care and breach of that standard of care?

3. What standard of review is to be applied on appeal to a determination regarding the necessity of expert testimony in ordinary negligence cases?

APPENDIX B:
Granted Petitions for Review by Per Curiam Opinions
September 1, 2002 – July 31, 2003

October 10, 2002

Williams v. Flores, No. 02-0035. (Opinion of Court of Appeals, 90 S.W.3d 724.)

Issue Presented

Did the Thirteenth Court of Appeals err in dismissing Appellant's appeal for want of jurisdiction?

December 5, 2002

The Office of the Attorney General of Texas vs. Lee, No. 01-0471. (Opinion of Court of Appeals, 47 S.W.3d 693.)

Issues Presented

1. For post-judgment interest to run, must the judgment contain an express post-judgment provision, or does interest run on all judgments by virtue of statute?
2.
 - a. Is the Office of the Attorney General, acting as the state's Title IV-D agency, required to pay fees or other costs in a Title IV-D appeal?
 - b. Under TEX. CIV. PRAC. & REM. ANN. § 6.001 (Vernon supp. 2001) [Apx. E], the Office of the Attorney General is exempt from paying a "bond for court costs" in an appeal. Does this statute exempt the Attorney General from paying appellate filing fees and other costs in advance of judgment?

In the Interest of L.S.R., No. 02-0039. (Opinion of Court of Appeals, 60 S.W.3d 376.)

Issue Presented

Can a court of appeals, in its opinion, fail to apply any standard of review and simply deny, without any citations to legal authority, the appellants' challenger to the factual sufficiency of the evidence?

December 12, 2002

Ray Ins. Agency, et al. v. Lois Jones, No. 02-0009. (Opinion of Court of Appeals, 59 S.W.3d 739.)

Issues Presented

1. Did the court properly interpret Article 21.49-2B when it held that an insurer may only cancel a personal automobile insurance policy for certain enumerated reasons within the first sixty days of the policy's effect, cannot cancel the policy for any

reason after the first sixty days, and must give more than ten days notice of cancellation?

2. Did the court of appeals properly suspend Rule 94, find trial by consent on the issue of estoppel when it was never pled, argued or mentioned, and then find estoppel as a matter of law for the nonmovant when the nonmovant failed to raise the issue in the trial court or produce any evidence to support the claim?
3. Did the court of appeals properly find that denial of receipt of notice raised a fact issue, when the contract provided that notice was effective upon mailing, that proof of mailing was sufficient, and independent proof of mailing was presented?
4. Did the court of appeals violate Petitioner's due process rights in finding several issues for the non-movant "as a matter of law," and in reversing the entire judgment, by addressing several issues that were never raised as error? (Not briefed).
5. Did the court properly determine Petitioner's no-evidence summary judgment points by allowing waiver of substantive objections and inferring fraudulent intent on insurers as a matter of course? (Not briefed).

Bennett v. Cochran, No. 02-0050. (Opinion of Court of Appeals, 92 S.W.3d 8.)

Issues Presented

1. Bennett requested a partial reporter's record but did not initially strictly comply with TEX. R. APP. P. 34.6(c)(1). Bennett subsequently complied with that Rule after the reporter's record was filed but 110 days before Respondent filed his brief.
 - If an appellant does not initially comply with TEX. R. APP. P. 34.6(c)(1) because he did not include a statement of points to be relief on appeal with his request for partial reporter's record, can he subsequently file the statement prior to Appellee's brief being filed and without prejudice to Appellee's right to designate additional portions of the record and be entitled to the presumption of TEX. R. APP. P. 34.6(c)(4)?
2. **Unbriefed Issues**
 - Is there more than a scintilla of evidence in the RECORD to support the jury's finding that Respondent failed to comply with the oral partnership agreement?

- Is there more than a scintilla of evidence in the record to support the jury's finding awarding Petitioner attorney's fees?
- Is there any legally sufficient evidence of negligent misrepresentation by Petitioner to support the jury's finding?

December 19, 2002

Callahan & Assocs. v. Orangefield Indep. Sch. Dist., No. 01-0993. (Opinion of Court of Appeals, 93 S.W.3d 124.)

Issues Presented

The trial court granted Callahan's motion for summary judgment on its application to affirm an arbitration Award, and denied OISD's motion for summary judgment on its application to vacate or modify. The Court of Appeals partially affirmed the Award, but also reversed and remanded in part, because it perceived a fact dispute as to whether the Arbitrator "made an evidence mistake" or "violated the common law" in stating that "there was no evidence with regard to the cost to replace the asphalt driveway."

Issues Briefed:

1. Can an arbitrator's award be modified if she "made an evident mistake" or "violated the common law" in stating her reasons for the award, and, if not, would issues of fact about such mistakes or violations prevent summary judgment?
2. Did the Court of Appeals violate statutory and common law authority by reviewing the evidence supporting the Arbitrator's statement?

Issues Not Briefed:

3. Did the Court of appeals reverse the summary judgment in favor of Callahan on grounds that OISD did not raise in the trial court?
4. Did the Court of Appeals modify the Award in the absence of statutory or common law grounds for doing so?
5. Can a trial court make or modify an award on an issue that the parties agreed to submit to arbitration?

February 27, 2003

Latch v. Gratty, Inc., No. 01-0773. (Opinion of Court of Appeals, 51 S.W.3d 756.)

Issues Presented

1. Whether the Court of Appeals erred in holding that Latch, an officer of Fun Motors, was liable for interfering with an agreement between Fun Motors and Gratty.

2. Whether the Court of Appeals erred in finding that there was legally and factually sufficient evidence to support the Trial Court's finding of proximate cause.
3. Whether the Court of appeals erred in finding that there was a valid and enforceable contract subject to interference.
4. Whether the Court of appeals erred in finding that the damages awarded by the Trial Court were supported by legally and factually sufficient evidence of lost profits and were not too uncertain or speculative to be awarded.

March 6, 2003

Austin State Hosp. v. Fiske, et al., No. 01-0395. (Opinion of Court of Appeals, 45 S.W.3d 707.)

Issue Presented

Whether Texas Health and Safety Code § 321.003 waives sovereign immunity with respect to alleged violations of the "patient's bill of rights." See TEX. HEALTH & SAFETY CODE §§ 321.002, .003.

Pinnacle Gas Treating, Inc. v. Read, et al., No. 02-0169. (Opinion of Court of Appeals, 69 S.W.3d 240.)

Issues Presented

Issue Number One

The Tenth Court of Appeals erred in finding that the second condemnation action, which was filed as a protective measure due to the trial court dismissing the first condemnation action, rendered the appeal of the first condemnation action moot.

Issue Number Two

The trial court committed reversible error when it dismissed Petitioner's first filed eminent domain action.

Issue Number Three

The trial court committed reversible error concerning the admission of evidence and testimony on lost profits from a non-existent business when it: (1) admitted improper testimony and evidence; (2) submitted an improper question in the charge to the jury; and (3) refused to submit jury charge questions and instructions requested by Petitioner.

[Note: Substituted for per curiam opinion delivered April 17, 2003.]

March 13, 2003

In the Matter of Z.L.B., No. 01-1209. (Opinion of Court of Appeals, 56 S.W.3d 818.)

Issues Presented

WHETHER THE STATE SHOULD BE ABLE TO CALL THE FIRST OUTCRY WITNESS WHO CAN

TESTIFY TO THE CHILD'S DESCRIPTION OF THE OFFENSE.

WHETHER THE COURT OF APPEALS ERRED WHEN IT HELD THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE STATE'S OUTCRY WITNESS TO TESTIFY.

March 27, 2003

Wal-Mart Stores, Inc. v. Miller, No. 01-1148. (Opinion of Court of Appeals, 54 S.W.3d 481.)

Issues Presented

1. Is an appellate court's decision to order initial en banc consideration after an appeal is argued and submitted to a three judge panel, but before the panel issues an opinion, one of absolute discretion, or does Texas Rule of Appellate Procedure 41.2(c) impose substantive limitations on a court's prerogative to consider a matter en banc? Additionally, was the Thirteenth Court of Appeals' decision to consider the instant matter en banc consistent with Rule 41.2(c)? The rule articulates express prerequisites to en banc review and the court of appeals violated the rule.
2. In performing a "no evidence" review, can the court of appeals draw inferences that are contrary to the uncontroverted evidence? It cannot. Yet, in analyzing Miller's "no evidence" issue, the Thirteenth Court of Appeals impermissibly drew inferences contrary to the undisputed evidence and Miller's direct testimony.

Wal-Mart also raises the following issue, which was raised as a cross-point in the court of appeals but not reached:

3. Whether legally sufficient evidence exists that Wal-Mart's conduct was the proximate cause of Miller's injuries. (Unbriefed issue).

April 17, 2003

Pinnacle Gas Treating, Inc. v. Read, et al., No. 02-0169. (Opinion of Court of Appeals, 69 S.W.3d 240.) Per Curiam Opinion delivered March 6, 2003, is withdrawn and the per curiam opinion delivered this date is substituted therefor.

[Note: Issues listed under March 6, 2003.]

April 24, 2003

Spohn Hospital, et al. v. Mayer, et al., No. 02-0443. (Opinion of Court of Appeals, 72 S.W.3d 52.)

Issues Presented

- Issue No. 1:** Was the trial court's discovery sanction just?

Issue No. 2: Did the Court of Appeals correctly apply the *TransAmerican National Gas v. Powell* test in holding that the trial court's discovery sanction was just?

Issue No. 3: TEX. R. CIV. PRO. 215.2(b)(3) permits a trial court—when just—to issue an order that "designated facts" be taken to be established. Was this an appropriate discovery sanction under the circumstances of this case?

Issue No. 4: In the context of discovery sanctions, under what circumstances may a trial court instruct a jury that certain facts are to be taken as "established"?

Issue No. 5: In *GTE Communications v. Tanner*, 856 S.W.2d 725, 729 (Tex. 1993), this Court stated that "[c]ase determinative sanctions may be imposed in the first instance only in exceptional cases when they are clearly justified and it is fully apparent that no lesser sanctions would promote compliance with the rules." Was the sanction in question "case determinative," and if so, was this an "exceptional case" in which such sanction was "clearly justified" and it was "fully apparent" that no lesser sanctions would have promoted compliance with the rules of Civil Procedure?

Issue No. 6: In the present case, there is no indication that the trial court considered the availability of lesser sanctions. The Court of Appeals' analysis concerning the availability and effectiveness of lesser sanctions was limited to the assertion that "[t]he trial court could, within its discretion, have determined that the defendant's conduct was so egregious that it could only be properly addressed with the sanctions imposed." Did this conclusion satisfy *TransAmerican's* requirement that "courts must consider the availability of less stringent sanctions and whether such lesser sanctions would fully promote compliance"?

Issue No. 7: *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991) states that "the sanction should be visited upon the offender," and that the trial court must at least attempt to determine whether the offensive conduct is attributable to counsel only, or to the party only, or to both." It also states that "a party should not be punished for counsel's conduct in which it is not implicated apart from having entrusted to counsel its legal representation." The

sanction in this case was based on the failure to promptly produce witness statements which Spohn's counsel took and which Spohn's counsel decided to withhold. There is no evidence the client (Spohn) even knew the statements were being withheld, much less played any role in the decision to withhold them. Nevertheless, the sanction was directed solely upon Spohn. The Court of Appeals failed to even mention this requirement, much less address it. Was that error?

Issue No. 8: Is *TransAmerican's* "visited upon the offender" requirement merely optional, so that appellate courts can choose to rely upon it when they want to reverse a discovery sanction, while simply ignoring it when it impedes affirmance of cases they wish to affirm? If so, is the "visited upon the offender" requirement similarly optional upon trial courts?

May 1, 2003

Hone, et al. v. Hanafin, No. 02-0548. (Opinion of Court of Appeals, 105 S.W.3d 15.)

Issues Presented

1. The Court of Appeals erred in determining Petitioners' appeal was untimely pursuant to TEX. R. APP. P. 26.1(a)(4) and 28.1.
2. The Court of Appeals erred in holding that Petitioners failed to provide a reasonable explanation for their failure to timely file their notice of appeal contrary to this Court's decision in *Garcia v. Kastner Farms, Inc.*.

May 8, 2003

Tiller v. McLure, No. 02-0136. (Opinion of Court of Appeals, 63 S.W.3d 72.)

Issues Presented

- A. May a corporate officer convert the corporation's contract claim into her own tort claim and thereby recover damages not available to the corporation?
- B. If so, does McLure's recovery in this case exceed the parameters of the tort of intentional infliction of emotional distress insofar as:
 1. Emotional distress was not the primary or intended consequence of Tiller's conduct.
 2. Insensitive or rude behavior does not constitute extreme and outrageous conduct.
 3. Although McLure was a grieving widow, she dealt with Tiller as a corporate officer charged with completing a \$400,000 commercial construction contract

4. In that context, emotional distress is inevitable, and a reasonable person undertaking such a contractual commitment could be expected to endure it.
5. The evidence was legally insufficient both to establish the existence of compensable mental anguish and to support the amount awarded.
6. The evidence was legally insufficient both to support a finding of malice and to sustain the award of punitive damages.

May 22, 2003

Marathon Corp. d/b/a Honda Suzuki North v. Pitzner, et al., No. 01-0870. (Opinion of Court of Appeals, 55 S.W.3d 114.)

Issues Presented

- Issue No. 1 - What Duty Did Marathon, The Building's Tenant, Owe To Pitzner, an Air Conditioning Contractor's Employee, Who Was Injured While Performing Air Conditioning Services?
- Issue No. 2 - Did Marathon, the Building's Tenant, Exercise Any Rights of Control Over Pitzner's Work by Locking its Store and Going Home at the Close Of Business? Pitzner Was Performing Air Conditioning Services on the Building's Roof, and Had Gained Access to the Roof with a Ladder He Brought to the Premises.
- Issue No. 3 - Is There Any Evidence to Show That Marathon: (1) Had Actual or Constructive Knowledge of a Dangerous Condition on the Premises, (2) That the Condition on the Premises Posed an Unreasonable Risk of Harm, and (3) That Marathon Did Not Exercise Reasonable Care to Reduce or Eliminate the Risk?
- Issue No. 4 - Did the Court of Appeals Err by Holding That Presumed Constructive Knowledge of Municipal Building Codes Constitutes Constructive Knowledge of "Dangerous Conditions," a Holding Which Is Contrary to *McDaniel v. Continental Apartments*, 887 S.W.2d 167 (Tex. App.—Dallas 1994, writ denied)?
- Issue No. 5 - Did the Court of Appeals Fail to Address Marathon's "No Evidence" Issues Regarding the Second and Third Elements: "Unreasonable Risk of Harm" and "Reduction and Elimination of Risk?" [Unbriefed Issue]
- Issue No. 6 - Is There Any Evidence to Show That Marathon Proximately Caused Pitzner's Injuries?

Issue No. 7 - Does a Defendant's Failure to Present Each Issue Included in its Motion to Transfer Venue Waive Those Issues Not Orally Presented during the Hearing Thereon?

Issue No. 8 - Does the Failure to Timely Pay a \$15 Motion for New Trial Filing Fee Allow an Appellate Court to Avoid Reviewing the Merits of Factual Sufficiency and Excessive Damages Issue?

June 5, 2003

Beaumont State Center v. Kozlowski, No. 02-0243. (Opinion of Court of Appeals, 70 S.W.3d 345.)

Issues Presented

1. Whether Texas Health and Safety Code § 321.003 is a clear and unambiguous waiver of sovereign immunity from suits alleging violations of the "patient's bill of rights." See Tex. Health & Safety Code §§ 321.002, .003.
2. Whether—if construed as a waiver of sovereign immunity—Health and Safety Code § 321.003 permits suits against mental retardation facilities like Beaumont State Center, as opposed to "mental health" facilities.

June 19, 2003

Horizon/CMS Healthcare Corp., Inc. v. Fischer, No. 02-0499. (Opinion of Court of Appeals, 106 S.W.3d 110.)

ISSUES PRESENTED BY HORIZON/CMS HEALTHCARE CORPORATION, INC. D/B/A DOCTORS HEALTHCARE CENTER

Issue 1: In this article 4590i case, Plaintiff tendered an expert report that was plainly insufficient under the statute. Plaintiff argued that the failure to provide an adequate expert report was due to "accident or mistake," based solely on her attorney's conclusory statements that she thought the report was sufficient. The trial court rejected the Plaintiff's argument. *Did the court of appeals misapply the abuse-of-discretion standard by holding that the trial court had no choice but to accept Plaintiff's conclusory evidence as true?*

Issue 2 (not briefed) Did the court of appeals err in holding that Plaintiff's expert, a registered nurse, was qualified to render a competent opinion regarding causation for purposes of an article 4590i expert report?

ISSUES PRESENTED BY TENET HOSPITALS LIMITED D/B/A DOCTORS HOSPITAL

ISSUE ONE: Whether statements of Mrs. Fisher's counsel that she thought that the

patently inadequate report counsel filed complied with the requirements of art. 4590i were legally insufficient to establish an accident or mistake in the absence of intentional non-compliance with, or conscious indifference to, those requirements.

ISSUE TWO: Whether the Court of appeals erred in concluding that Hogstel was a qualified expert under these circumstances.

July 3, 2003

In the Interest of K.N.R., No. 02-0442. (Opinion of Court of Appeals not yet published.)

Issue Presented

1. Did the court of appeals err in holding that broad-form jury charge submitted by the trial court was fatally defective because it allowed the jury to find for termination without specifically requiring at least ten jurors to make a separate finding on each of the statutory termination grounds presented in the jury charge?

A. If the jury charge was defective, did Respondent waive that error by not objecting to the charge? (not briefed)

Should these issues be resolved in the Department's favor, the Court should, pursuant to Texas Rule of Appellate Procedure 53.4, consider the following issue that was presented to the court of appeals but not decided by that court:

1. Is the evidence legally sufficient to support the jury's finding that statutory grounds for termination were met? (not briefed)

Floyd E. Jernigan, M.D. v. Langley, et al., No. 02-0575. (Opinion of Court of Appeals, 76 S.W.3d 752.)

Statement of Issues

1. As a matter of law, under a common law waiver theory can a defendant health care provider impliedly waive his right to a mandatory dismissal with prejudice under section 13.01, TEX. REV. CIV. STAT. ANN. Art. 4590i, when the statute, which does contain other time restrictions, provides no deadline within which to file a motion to dismiss or any due course of pleading requirement?
2. Did the court of appeals err in finding waiver by applying an implied deadline under section 13.01 which is contrary to the legislative intent of protecting defendant health care providers from frivolous lawsuits and which is contrary to existing Texas law expressly stating there is no such deadline in the statute?

3. In reversing the trial court's order granting the motion to dismiss, did the court of appeals err in finding an abuse of discretion by viewing the evidence in the light most favorable to *reversing* the trial court's judgment instead of in the light most favorable to *supporting* the trial court's judgment?

Baker, et al. v. Monsanto Co., No. 02-0603. (Opinion of Court of Appeals, 77 S.W.3d 477.)

Issues Presented

1. Did the lower courts err by failing to find that Monsanto Company was properly served under Rule 21a of the Texas Rules of Civil Procedure with Intervenors' *plea in intervention*?
2. Did the lower courts err by failing to hold that Monsanto Company made a general appearance when it filed its *original answer* on July 7, 1995, or when it filed its motion for summary judgment on June 5, 1997 on an affirmative defense that had not been properly pled under rule 94 of the Texas Rules of civil Procedure?
3. Did the lower courts err by failing to require Monsanto Company to show injury or harm before it was entitled to summary judgment in the case?

In the Interest of A.F., J.N.V., and J.V., minor children, No. 02-1167. (Opinion of Court of Appeals, 91 S.W.3d 410.)

Issues Presented

IN A CASE INVOLVING THE TERMINATION OF PARENTAL RIGHTS, SHOULD THE FUNDAMENTAL ERROR DOCTRINE TO A CHALLENGE TO THE CHARGE THAT WAS NOT PRESERVED AT THE TRIAL LEVEL?

HAS TEXAS DEPT. OF HUM. SERVS. V. E.B., WHICH APPROVED OF THE USE OF BROAD-FORM JURY CHARGES IN TERMINATION CASES, BEEN OVERRULED BY CROWN LIFE INS. CO. V. CASTEEL?