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SECTION WEB SITE: www.tex-app.org

Pamela Stanton Baron, Attorney at Law, Austin

Appellate types are a constant disappointment to their friends and families. The things we are trained to do are of no use to them whatsoever. We won't draft wills or contracts, or make threatening calls to the many and varied third parties who have wronged them immeasurably. We can't steer them toward the next great investment or give them tax advice. We don't file lawsuits. We spend very little time in court; and, when we deign to make a rare public appearance, it is in twenty-minute blocks of time. In those infrequent litigious moments, we are not engaged in a Perry-Mason style cross-examination yielding a crying confession to some heinous crime. More likely, we are the ones being riddled with tough questions and hoping that we don't yield under the pressure by conceding some vital point.

So what can we do, if anything? We can write. But what good is that to our nearest and dearest? And, if we are such skilled wordsmiths, where are the string of best sellers and all the accompanying accoutrements of wealth? John Grisham hasn't done us poor misunderstood appellate specialists any favors.

Abandoned by our inner circle of kith and kin, we are a solitary folk. Even when we band together for protection in big firms or appellate boutiques, we cannot overcome the loneliness of the much-maligned writer. Despite the modern emphasis on group projects and cooperative thinking, collective writing is an idea whose time will never come. If you haven't noticed, even large literary movements are comprised of books written by individual authors. Emerson and Thoreau may have skipped the odd rock together on Walden Pond, and Emerson may have hobnobbed with the Alcotts and so forth, but the Transcendentalists produced not a single joint essay, opus, piece, pamphlet, or poem. Were writing a team project, William Wordsworth would never have "wandered lonely as a cloud."

The eremitic life of the appellate specialist is ill suited to the social, gregarious, attention-seeking, or convivial personality. Those who aspire to life-of-the-party status need not apply. Adoring crowds will not gather round to hear your much-rehearsed anecdote about that terrifying moment when you almost used "which" instead of "that." Even your co-workers, in those rare moments when you emerge bleary-eyed from your office, are apt to treat you more as a dusty curiosity than a desirable companion. The queue of volunteers to review your latest draft will be short and limited to those who are led to expect substantial cash remuneration in return. Even those who love you most will be noticeably absent without leave when a mock argument panel is being assembled. In short, appellate law is an occupation best left to those without great social aspirations.

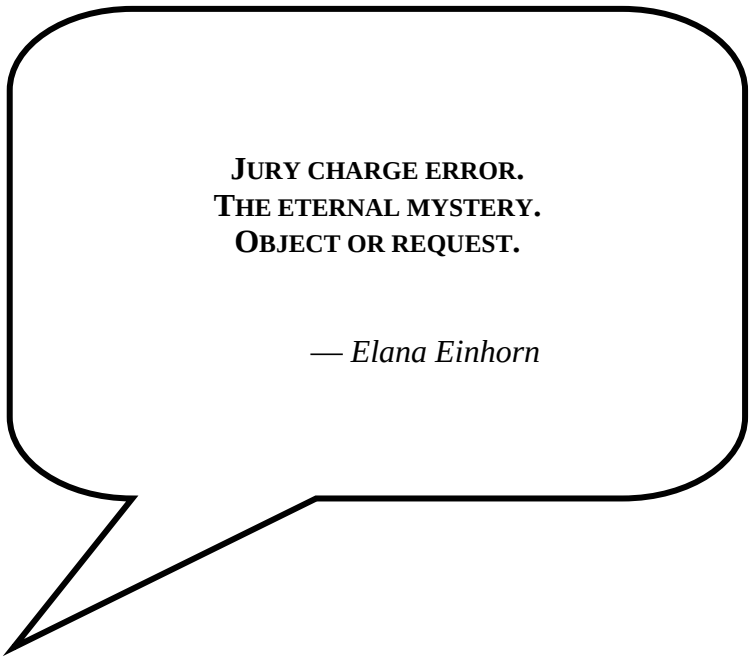
What surprises many is how few tools are actually needed to accomplish the lorn and desolate tasks of the appellate briefwriter. A computer with a confusing, annoying, and footnote-altering word processing program is a must. So, too, is an internet connection, preferably high speed to mock the speed at which the work is actually performed, as well as an overpriced subscription to an online legal research database. Pens and pencils are optional, although a variety of neon-colored highlighters is mandatory. A shrine to the proper muse must be constructed on a nearby surface and piled high with traditional sacrifices: oversized paper clips, small plastic figurines, abandoned cell phones, miscellaneous logo pens, and spare change. Add six toner cartridges, a ream of copy paper, and a large trash receptacle, and you have almost all the essential apparatus required to nail up an appellate shingle. All that is missing is a favorite reference book, several oil tankers of coffee, and a large bag of candy lingering from the most recent holiday. Voilà, it is time to write.

To succeed, an appellate specialist must read not just profusely, but indiscriminately. Certainly, an occasional opinion or two from a Texas appellate court is advisable. Beyond that, anything legible

is fair game, from Chekhov to cereal boxes to Chinese take-out menus, from The Prince to Prince Valiant to The Princess Diaries, from Wodehouse to The Maine Woods to How I Play Golf by Tiger Woods. The most unlikely of sources may produce a turn of phrase, an engaging cadence, or an alluring alliteration that can be adapted (i.e., purloined) to enliven an otherwise unremarkable hodge-podge of legal mumblings.

Which leads me to a final caution, followed by a confession. We appellate types are easily influenced. Unbeknownst to us, we may find our writing style subtly altered in response to whatever we last read. Much as consuming a jalapeño pizza within two hours of bedtime may produce vivid dreams or even nightmares, so too perusing a highly-stylized piece of prose before composing a brief may have serious and unintended consequences. A brief written close on the heels of prolonged exposure to Hemingway will no doubt fall far short of the page limits and sound with a short staccato beat. Immersion in the works of Dickens, in contrast, will yield long sentences, words to fill ten fifty-page briefs, and a fact statement that no one can read without crying into a monogrammed handkerchief. In the interest of producing a concise and comprehensible court submission, Proust and Joyce are not ideal preliminary reading. Flaubert should be avoided at all costs; even the most generous court will not grant a ten-year extension of time to file your brief.

And now for the confession. To the chagrin of my family, I am constantly dragging home second-hand books including, most recently, A Treasury of American Humor. Currently, I find myself under the Svengaliesque spell of a triumvirate of aloof, sophisticated, satirical essayists popular in the first half of the twentieth century — Robert Benchley, Irvin S. Cobb, and Will Cuppy. Were they to hear of their unmistakable influence over this column, doubtlessly they would replace that perpetual scowl common to all American humorists with an out-an-out wry frown.



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ATTENTION

RECENT ANNOUNCEMENTS FROM THE SUPREME COURT OF TEXAS

In two advisories, the Supreme Court of Texas announced that recordings of oral arguments will be posted on the Court's website and that it has expanded Electronic Briefing requirements.

* *

Friday, December 3, 2004

COURT BEGINS POSTING RECORDED ORAL ARGUMENTS

The Texas Supreme Court began Friday posting links to audio recording of oral arguments, starting with causes submitted this week. Previously recorded arguments will be added in stages.

Future arguments should be accessible by the end of the day of argument.

"The Court has implemented this service as an interim step toward broadcasting all arguments on the internet through streaming audio and video software, assuming the Legislature provides funds for this project," Chief Justice Wallace B. Jefferson said. "The obvious benefit is that the general public, legal community, media and students will have the ability to observe the legal process via the internet without the inconvenience and cost of traveling to Austin."

Online users will be able to click from a link to choose from posted recordings listed by the first two digits of the cause number (those digits reflect the year a case was filed with the Court) or by argument date.

December 17, 2004

COURT TO REQUEST EXPANDED ELECTRONIC BRIEFING FOR POSTING AND INTERNET ACCESS

To enhance remote access to Texas Supreme Court filings, the Court began today asking for briefing from all parties and interested parties in electronic formats in cases for which full briefing's requested.

The request will be only for briefs requested today and in the future.

Until now the Court requested briefing on the merits in such formats only for those cases granted review and set for argument.

With letters requesting full briefing, attorneys will be asked to submit, on computer disk or by email attachment, briefs they will file on the merits as well as previously filed petitions for review, responses or replies (as applicable). This request will include all responsive briefs as well as briefs by amici curiae ("friend-of-the-court" briefs).

Briefing eventually will be available from case information files at the Court's website.

The Court prefers briefs sent in Adobe's searchable PDF format. In the alternative, attorneys and parties should submit briefs in updated WordPerfect or Word formats. Click here to see the Court's information sheet and related forms that will be sent with requests for full briefing on petitions.

Certified Questions To and From The Texas Supreme Court

Pamela Stanton Baron, Attorney at Law, Austin

When a court must interpret the law of another jurisdiction in deciding a case, as a general rule the court may determine that law from existing cases or may make a reasonable Erie guess as to how the issue would be decided. When the court is unable or unwilling to determine foreign law, in a few situations, statutes permit the court to certify the question to the foreign jurisdiction for an answer.

There are, however, obstacles to the certification of a legal question to a court: as a matter of constitutional law, a court does not have the power to act other than in a case or controversy pending before it. Consequently, answering a certified question is considered to be rendering an advisory opinion, an act beyond the jurisdiction of the Texas courts. To answer certified questions, a court must therefore expressly be given that power by the Constitution.

Texas permits two types of certification: (1) from a federal appellate court to the Texas Supreme Court; and (2) from the Texas Supreme Court to the highest court of another state, to the extent such courts are themselves constitutionally authorized to accept such questions.

I. Texas Supreme Court jurisdiction to answer questions of state law certified from federal appellate courts

The Texas Supreme Court's authority to hear certified questions from federal appellate courts is relatively new, existing only since 1986.

A. A brief history

In 1985, Texas voters amended the state constitution to empower the Texas Supreme Court to accept questions certified from federal circuit courts:

(a) The supreme court and the court of criminal appeals have jurisdiction to answer questions of state law certified from a federal appellate court. (b) The supreme court and the court of criminal appeals shall promulgate rules of procedure relating to the review of those questions.

Tex. Const. art. V § 3-c. The necessity for the amendment was explained: "The Texas Supreme Court has determined that under the Texas Constitution judicial power does not embrace giving advisory opinions." Senate Judiciary Committee, Bill Analysis, S.J.R. 10, § 1 R.S. (1985). The amendment was effective January 1, 1986. The court adopted a rule providing for a procedure for certified questions. Former Tex. R. App. P. 114, now Tex. R. App. P. 58.

The Texas Supreme Court answered its first certified question in 1988 in *Lucas v. U.S.*, 757 S.W.2d 687 (Tex. 1988). Since then, it has answered a total of seventeen certified questions, accepted another two which are currently pending, and declined to address three (a full listing of these cases appears in the appendix to this article). All but two have been certified from the United States Court of Appeals for the Fifth Circuit; the court has answered one question each from the Second and Fourth Circuit Courts. This averages to about one certified question per year since the Court was constitutionally empowered to accept certified questions.

The certification process had a bit of a rough start. After the Texas Supreme Court declined three certified questions from the Fifth Circuit in a three-year period, one taking eleven months to decline, a few comments from the federal justices expressed displeasure with the handling of certified questions by the Texas court. *See Amberboy v. Societe de Banque Privee*, 831 S.W.2d 793, 799-800 (Tex. 1992) (Doggett, J., dissenting and concurring). Adding fuel to the fire was an opinion purportedly issued by the federal court criticizing the certification process in Texas, which the alleged author later denied ever

existed, and another published opinion of the federal court referencing the Texas Supreme Court's "Delphic refusal" to accept a certified question. *See id*.

This early breach was eventually healed, possibly by the fact that the Texas Supreme Court accepted all subsequently certified questions from the Fifth Circuit as well as by language in later opinions indicating a more cooperative attitude. *See, e.g., Sonnier v. Chisholm-Ryder Co.*, 909 S.W.2d 475, 477 (Tex. 1995) ("We welcome the opportunity to respond to certified questions from the federal courts and give deference to the requests brought us."); *Amberboy v. Societe de Banque Privee*, 831 S.W.2d 793 (Tex. 1992) ("We acknowledge the Fifth Circuit's experience in this area and welcome constructive suggestions on how the interjurisdictional certification process can be improved.").

B. Limitations on certification jurisdiction

Under the constitution, the Texas Supreme Court may only answer "questions of state law." Further, by rule, the court has restricted its jurisdiction as follows:

The Supreme Court of Texas may answer questions of law certified to it by any federal appellate court if the certifying court is presented with a determinative question of Texas law having no controlling Supreme Court precedent. The Supreme Court may decline to answer the questions certified to it.

Tex. R. App. P. 58.1 Thus by constitution and by rule, the court's jurisdiction on certified question is limited to: (1) determinative (2) questions of state law (3) for which there is no controlling Texas Supreme Court precedent and (4) which is certified from a federal appellate court.

The court will limit its consideration to the questions certified "and nothing more." *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 349 (Tex. 1990). Any response other than what is necessary to answer the question is dicta. *Rose v. Doctors Hosp.*, 801 S.W.2d 841, 844 (Tex. 1990). The court will decline to answer further questions submitted by the parties that were not certified by the federal court. *Doody v. Ameriquest Mortgage Co.*, 49 S.W.3d 342, 346 (Tex. 2001).

The question certified must be one for which there is no controlling Supreme Court precedent. The court equivocated somewhat on this requirement in *Sonnier v. Chisholm-Ryder Co.*, 909 S.W.2d 475 (Tex. 1995). There, the question had been previously decided by the Texas Supreme Court in a per curiam opinion. Nonetheless, the court accepted the question because (1) only the intermediate appellate courts had considered the question with the benefit of full briefing and oral argument; (2) the per curiam decision was decided without argument and contained no analysis; (3) the per curiam opinion had been criticized by courts and commentators. 909 S.W.2d at 478.

Because the court cannot determine issues of fact and does not have jurisdiction over the whole case but only the questions certified, it will only answer the legal questions presented to it and will not attempt to apply those answers to the facts of the case. *Amberboy v. Societe de Banque Privee*, 831 S.W.2d 793 (Tex. 1992) ("It would exceed this court's constitutional and rule-based authority to apply our answer to the factual record before the Fifth Circuit."). The court will decline to answer questions "dependent upon issues of fact." *Exxon Co., U.S.A. v. Banque de Paris et des Pay-Bas*, 32 Tex. Sup. Ct. J. 623 (Sept. 20, 1989) (declining question).

One separate opinion provides additional insight into reasons the court may decline to accept a certified question. These include when the factual record is not adequately developed, when the federal court has already properly resolved the legal issue, and when the court determines the matter involved is not important to the jurisprudence of the state. *Amberboy v. Societe de Banque Privee*, 831 S.W.2d 793, 800 (Tex. 1992) (Doggett, J., dissenting and concurring).

The court may accept only questions certified by a federal appellate court. It may not accept questions certified from state appellate courts, including state supreme courts.

C. Procedure for certified questions

Rule 58, the rule governing certified questions, is a bit sketchy. Possibly for that reason, when the court accepted its first certified question in 1988, it explained in some detail its procedures once the question was received:

Upon receipt of the certified questions from the Fifth Circuit, the case was docketed and assigned a number in normal sequential order. Notice of the docketing was furnished the Attorney General, as required by Tex. R. App. P. 114(f) (the Attorney General did not intervene). Thereafter, the court, by majority vote, determined that it would accept the question and render an answer. At that time, the case was set for oral argument and the court determined to allow Lucas, who was urging the unconstitutionality of the statute, the role of petitioner even though the United States of America was the appealing party in the Fifth Circuit. Argument in the case was allowed as in any other cause before the court.

***Lucas v. U.S.*, 757 S.W.2d 687, 687-88 (Tex. 1988).**

1. *Certification request*

The certifying court must issue an order setting out the questions to be answered and a stipulation of all relevant facts, "showing fully the nature of the controversy in which the question arose." Tex. R. App. P. 58.2. A certified copy of the order must be sent to the Texas Supreme Court by the federal appellate clerk, together with a list of all parties and counsel. Tex. R. App. P. 58.3. The clerk should not forward the record unless requested by the Supreme Court. Tex. R. App. P. 58.4.

2. *Fees and costs*

The fee of $125 is shared equally by the parties unless the certifying court orders otherwise. Tex. R. App. P. 58.5; Tex. Gov't Code § 51.005(b).

3. *Notice by clerk; intervention by state*

The Supreme Court will then determine whether to accept the question. The excerpt from the Lucas case above suggests that it takes a majority vote, or five justices, to accept a certified question. The clerk will notify the parties and the certifying court of the acceptance. Tex. R. App. P. 58.6.

The clerk will also notify the Attorney General of Texas if the constitutionality of a Texas statute is at issue and the State or any of its agencies or employees is not already a party. *Id.* The State may then intervene at any reasonable time for briefing and argument, if argument is permitted. Tex. R. App. P. 58.8. The intervention is limited to the constitutional question. *Id.*

4. *Briefing and argument*

Once the question is accepted, the court may re-designate the parties to reflect their positions on the certified question. *Lucas*, 757 S.W.2d at 688. The petitioner must file a brief within thirty days of the notice that the question is accepted; the respondent must file an answering brief within twenty days after receiving the opening brief. Tex. R. App. P. 58.7(a). The court will entertain extension requests. *Id.*

The brief must comply with the rule governing briefs on the merits, Tex. R. App. P. 55, "to the extent its provisions apply." Tex. R. App. P. 58.7(a).

Oral argument may be granted on a party's request or on the court's own motion. Tex. R. App. P. 58.7(b). The court may decide the case without argument. Tex. R. App. P. 59.2.

5. *Opinion and answer*

The answer to the questions certified must be contained in a written opinion. Tex. R. App. P. 58.9. Recently, opinions in answer to certified questions have issued within a year or less of oral argument.

6. *Rehearing and certification of answer*

The rule contemplates the filing of motions for rehearing. Tex. R. App. P. 58.10. Motions for rehearing are due within fifteen days of the issuance of the opinion; the court will entertain motions for extension. *See* Tex. R. App. P. 64. Once all motions for rehearing have been overruled, the clerk will send to the certifying court a copy of the opinion under the Supreme Court's seal. Tex. R. App. P. 58.10.

II. Texas Supreme Court jurisdiction to certify questions to the highest court of another state

There is no express authority for the Texas Supreme Court to certify a question out to other jurisdictions. However, the court, "on its own motion," has done just that. In *Minnesota Mining & Mfg. Co. v. Nishika Ltd.*, 955 S.W.2d 853, 853 (Tex. 1996), the Texas Supreme Court had before it issues of Minnesota law for which there was no controlling Minnesota precedent. It certified the issues to the Minnesota Supreme Court.

The court apparently viewed the jurisdictional issue as limited to the question of whether the receiving court had authority to answer certified questions. Unlike Texas, the Minnesota Supreme Court is not limited to answering questions from federal appellate courts. By statute, the Minnesota court may answer "questions of law certified to it by the . . . highest appellate court or the intermediate appellate court of any other state" under conditions similar to those governing federal certified questions in Texas. *Id.* at 853 n.1.

Minnesota accepted and answered the two questions certified, and the Texas Supreme Court issued an opinion applying those answers to the facts of the case. *Minnesota Mining & Mfg. Co. v. Nishika Ltd.*, 953 S.W.2d 733 (Tex. 1997).

Texas cannot accept questions certified by courts of other states because the constitutional grant is limited to questions certified by federal appellate courts. As the Minnesota case illustrates, some other states do permit their highest courts to accept certified questions from other state courts. *See* Justice Nathan Hecht and Chris Griesel, Straight to the Top: Direct Proceedings to the Supreme Court at 7 & n.39, State Bar of Texas, Practice Before the Texas Supreme Court (April 2003) (citing Delaware and Oregon provisions permitting highest courts of those states to accept certified questions from sister state courts).

Appendix: Listing of cases certifying questions to the Texas Supreme Court

A. <u>Certified questions accepted and answered</u>

All questions were certified by the Fifth Circuit unless otherwise indicated: *Interstate Contracting Corp. v. City of Dallas*, 135 S.W.3d 605 (Tex. 2004); *Doody v. Ameriquest Mortgage Co.*, 49 S.W.3d 342 (Tex. 2001); *Grapevine Excavation, Inc. v. Maryland Lloyds*, 35 S.W.3d 1 (Tex. 2000); *Stringer v. Cendant Mortgage Corp.*, 23 S.W.3d 353 (Tex. 2000); *Hernandez v. Tokai Corp.*, 2 S.W.3d 251 (Tex. 1999); *Fitzgerald v. Advanced Sine Fixation Sys.*, 996 S.W.2d 864 (Tex. 1999); *American Home Assurance Co. v. Stephens*, 982 S.W.2d 370 (Tex. 1998); *Balandran v. Safeco Inc. Co.*, 972 S.W.2d 738 (Tex. 1998); *Computer Assoc. Int'l v. Altai, Inc.*, 918 S.W.2d 453 (Tex. 1996) (Second Circuit); *Sonnier v. Chisholm-Ryder Co.*, 909 S.W.2d 475 (Tex. 1995); *Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex. 1994); *Canavati De Checa v. Diagnostic Ctr. Hosp., Inc.*, 852 S.W.2d 935 (Tex. 1993); *Boyert v. Tauber*, 834 S.W.2d 60 (Tex. 1992) (Fourth Circuit); *Amberboy v. Societe de Banque Privee*, 831 S.W.2d 793 (Tex. 1992); *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348 (Tex. 1990); *Humana Hosp. Corp. v. American*

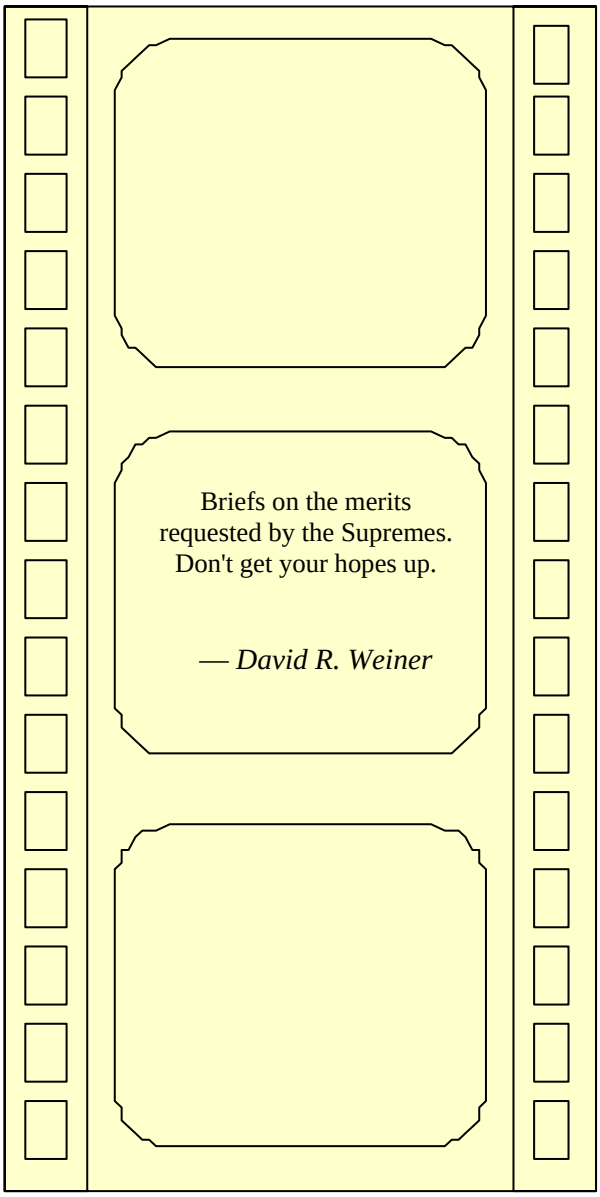
Med. Sys., Inc., 785 S.W.2d 144 (Tex. 1990); *Lucas v. U.S.*, 757 S.W.2d 687 (Tex. 1988).

B. Certified questions accepted and pending

Both pending cases are certified from the Fifth Circuit: *Fairfield Ins. Co. v. Stephen Martin Paving LP*, No. 04-0728 (argued Nov. 9, 2004); *Flores v. Millennium Interests, Ltd.*, No. 04-1003 (to be argued Feb. 15, 2005).

C. Certified questions declined

All certified questions that the court has declined are from the Fifth Circuit: *Hotvedt v. Schlumberger Ltd.*, No. D-0802, 34 Tex. Sup. Ct. J. 610 (June 5, 1991); *Reliance Ins. Co. v. Capital Bancshares, Inc.*, No. C-8962, 33 Tex. Sup. Ct. J. 615 (June 27, 1990); *Exxon Co., U.S.A. v. Banque de Paris et des Pay-Bas*, No. C-8684, 32 Tex. Sup. Ct. J. 623 (Sept. 20, 1989).



J. Brett Busby, Mayer, Brown, Rowe & Maw L.L.P., Houston

FIRST AMENDMENT

***City of San Diego v. Roe*, No. 03-1669 (Dec. 6, 2004) (*per curiam*).**

In this case, the Supreme Court held that a police officer's internet sales of police uniforms and of sexually explicit videotapes depicting police characters did not constitute protected speech on a matter of public concern. The San Diego Police Department fired Officer Roe, asserting that the sales violated specific Department policies and that Roe did not stop distributing information about the videos after being ordered to do so. Roe then sued the City of San Diego, alleging that his firing violated his right to free speech. The district court granted summary judgment to the City, holding that the sales were not expression relating to a matter of public concern, but the Ninth Circuit reversed.

The Supreme Court summarily reversed the Ninth Circuit in a per curiam opinion. It held that Roe's speech did not qualify for heightened protection under *United States v. Treasury Employees*, 513 U.S. 454 (1995), which applies only to speech unrelated to employment that has no effect on the mission and purpose of the employer. Here, Roe linked his videos to his police work in a way injurious to his employer. In addition, the Court concluded that balancing the interests of Roe and his employer was not appropriate because Roe's speech did not touch on a matter of public concern. The speech did not address a subject of legitimate news interest and did nothing to inform the public about any aspect of the Department's functioning or operation.

Ibico machine
Punch punch punch and spiral bind
Another brief done

— Robert Fugate

DEATH PENALTY

***Smith v. Texas*, 125 S.Ct. 400 (2004) (*per curiam*).**

In *Tennard v. Dretke*, 124 S.Ct. 2562 (2004), the Supreme Court pointedly rejected the Fifth Circuit's test for deciding whether Texas' jury instructions permitted a capital sentencing jury to give effect to the defendant's mitigating evidence in reaching its verdict. In this case, the Court delivered the same message to the Texas Court of Criminal Appeals.

Smith offered a variety of mitigating evidence at the sentencing phase, including learning disabilities and participation in special education classes, a speech handicap, a 78 IQ, and a troubled childhood. In deciding his sentence, the jury was asked to consider (1) whether Smith committed the crime deliberately and (2) whether he posed a risk of future dangerousness. The jury was also given the nullification instruction held constitutionally inadequate in *Penry v. Johnson*, 532 U.S. 782 (2001). The jury answered both special issues "yes," and Smith was sentenced to death. In his state habeas petition, Smith argued that the sentence violated the Eighth Amendment because the special issues did not allow the jury to give effect to his mitigating evidence. The Court of Criminal Appeals rejected this claim.

In a per curiam opinion, the Supreme Court summarily reversed. It held that the Court of Criminal Appeals had applied the same screening test for mitigating evidence that *Tennard* rejected. Mitigating evidence does not need to rise to the level of a "uniquely severe permanent handicap" or have a "nexus" to the crime in order to be relevant. The Court then examined Smith's evidence of low IQ, troubled childhood, and history of special education classes and concluded that the jury might well have considered this evidence as a reason to impose a sentence less than death. Because the nullification instruction did not allow the jury to give effect to that

evidence, the instructions were constitutionally inadequate. Justice Scalia, joined by Justice Thomas, filed a dissenting statement.

IMMIGRATION

***Leocal v. Ashcroft*, 125 S.Ct. 377 (2004).**

In this case, the Court held that criminal offenses that either lack a mens rea component or require only a showing of negligent operation of a vehicle are not crimes of violence for which deportation is authorized. Leocal, a lawful permanent resident, pleaded guilty under Florida law to driving under the influence of alcohol (DUI) and causing serious bodily injury in an accident. The INS initiated removal proceedings against him, contending that he had been convicted of a crime of violence. An administrative judge authorized his deportation and the Eleventh Circuit dismissed his petition for review.

In a unanimous opinion by Chief Justice Rehnquist, the Supreme Court reversed and remanded. The statutory definition of "crime of violence" encompasses 18 U.S.C. § 16(a), which includes offenses involving the use of physical force, and section 16(b), which includes offenses involving a substantial risk that physical force may be used. The Court held that because these statutes focus on the active employment of physical force or the risk thereof, they suggest a higher degree of intent than negligent or merely accidental conduct. Given that Florida's DUI statute requires no proof of a mental state, it does not fall within either section. In addition, the Court concluded that the phrase "crime of violence" suggested a category of actively violent crimes that cannot be read naturally to include DUI offenses.

LIMITATION OF LIABILITY

***Norfolk So. Ry. Co. v. James N. Kirby, Pty Ltd.*, 125 S.Ct. 385 (2004).**

This case concerns the scope of liability limitations in maritime bills of lading. Kirby contracted with ICC to arrange delivery of machinery from Australia to Huntsville, Alabama. The contract limited ICC's liability and contained a "Himalaya clause" extending the limits to downstream parties including agents and independent contractors. ICC then contracted with Hamburg to transport the containers by sea to Savannah, Georgia. This second contract also contained liability limitations and a Himalaya clause specifically covering inland carriers. Finally, Hamburg hired Norfolk to transport the machinery by train from Savannah to Huntsville. When the train derailed, Kirby sued Norfolk for damage to the machinery.

The district court granted partial summary judgment to Norfolk, ruling that the liability limits in the two contracts applied. The Eleventh Circuit reversed, holding that the Kirby-ICC contract's liability limits did not apply to Norfolk because (1) it was not in privity with ICC when the contract was formed and (2) the Himalaya clause did not specifically extend to inland carriers. In addition, it held that Kirby was not bound by ICC-Hamburg contract's limits because ICC was not acting as Kirby's agent when it entered into the contract.

The Supreme Court reversed and remanded in a unanimous opinion by Justice O'Connor. The Court applied federal law, concluding that the contracts' primary objective was to transport goods by sea and that the final land leg did not alter their essentially maritime nature. The Court then held that the liability limits in both contracts applied to Norfolk. As to the Kirby-ICC contract, the Himalaya clause indicated an intent to extend the liability limitation broadly, and neither privity nor specificity was required. Because the parties must have anticipated using a land carrier's services in order for the machinery to reach Huntsville, Norfolk was an intended beneficiary of the clause. Regarding the ICC-Hamburg contract, the Court held that when an intermediary contracts with a carrier to transport goods, the cargo owner's recovery against the carrier can be restricted by liability limitations to which the intermediary and carrier agree. Thus, ICC was Kirby's agent for the single purpose of contracting for subsequent liability limitations,

but Kirby retained the right to sue ICC for losses exceeding the limits to which it agreed.

STATUTORY INTERPRETATION

***Koons Buick Pontiac GMC, Inc. v. Nigh*, 125 S.Ct. 460 (2004).**

In this case, the Court held that statutory damages are capped at $1,000 for violations of the Truth in Lending Act ("TILA") involving consumer loans secured by personal property. Nigh bought a truck on credit from a dealership, which overcharged him and improperly restructured the financing twice. He sued under TILA and a jury awarded him twice the amount of the finance charges – about $24,000. The Fourth Circuit upheld the award, rejecting the dealership's argument that a $1,000 cap applied.

The Supreme Court reversed and remanded in an opinion by Justice Ginsburg. The predecessor of the statute at issue, 15 U.S.C. § 1640(a)(2)(A), originally authorized damages of twice the finance charge up to a maximum of $1,000. Following several amendments, (A) now provides for: (i) damages of twice the finance charge for consumer loans; (ii) a different measure of damages for consumer leases, "except that liability under this subparagraph shall not be less than $100 or greater than $1,000"; or (iii) damages of not less than $200 or greater than $2,000 for consumer loans secured by realty. The Court held that the statutory language was ambiguous, but that the conventional meaning of "subparagraph" suggested that Congress intended the $1,000 cap to apply to all of subparagraph (A) – including loans such as Nigh's that fall under clause (i). Looking to the history of amendments to the statute, the Court concluded that Congress did not intend to alter the meaning of clause (i) when it added clause (iii) to authorize an increased recovery for certain loans.

Justice Stevens concurred, joined by Justice Breyer. He argued that the text unambiguously provided a $1,000 cap for clause (ii) alone, which is not an absurd result, but that resort to legislative history is always proper. In his view, the history supported the Court's holding. Justice Kennedy (joined by Chief Justice Rehnquist) also concurred, observing that while there is a respectable argument that "subparagraph" unambiguously includes clause (i), the text is not altogether clear and thus examination of other interpretive resources was proper. Justice Thomas concurred in the judgment, agreeing that the text was ambiguous but concluding that the statutory amendment history, together with consistent lower court holdings that the cap applied to clause (i) before the addition of clause (iii), resolved the ambiguity. He argued that it was unnecessary to consider the anomalous results of alternative interpretations.

Justice Scalia dissented, stating that the question was not the meaning of "subparagraph" but rather when liability under the subparagraph is limited to $1,000. He argued that dispositive weight should be given to the statutory structure, which shows that liability under subparagraph (A) is capped at $1,000 only in consumer-lease cases covered by clause (ii). He criticized the Court's broad interpretation of the cap for creating a conflict with the higher cap in clause (iii). He also argued that the lack of legislative history indicating that Congress meant to alter the interpretation of the $1,000 cap when it added clause (iii) was irrelevant to the meaning of the current statute.

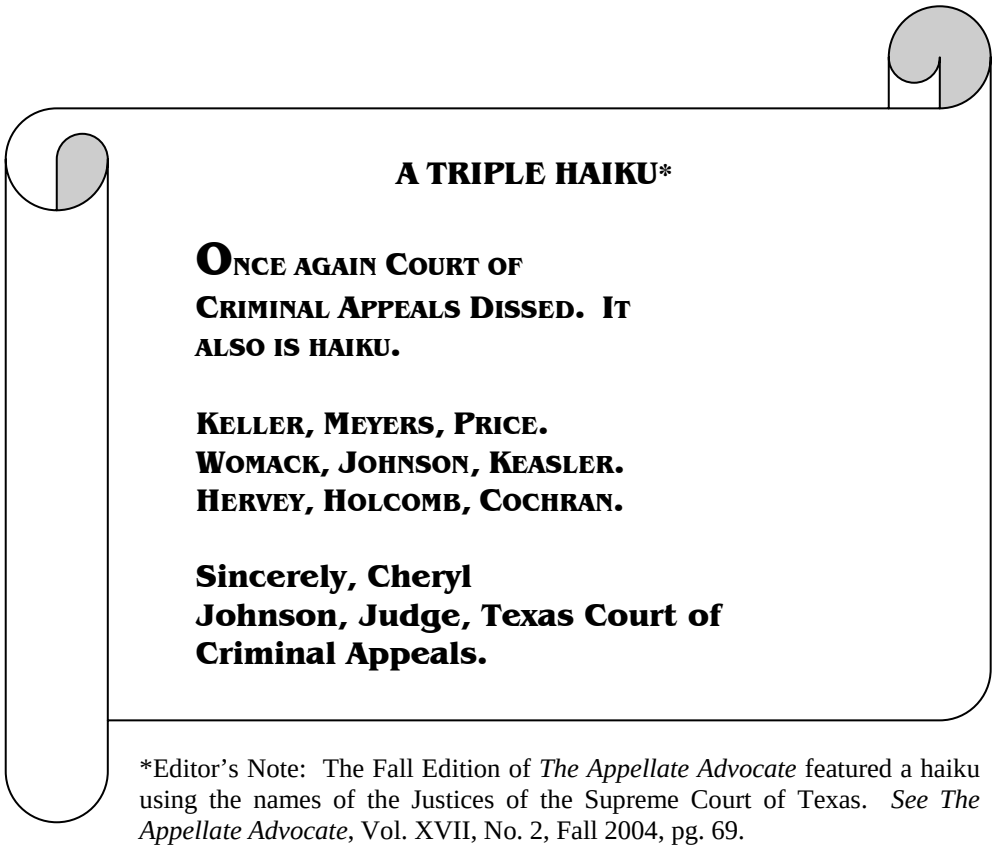
TRADEMARK

***KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, No. 03-409 (Dec. 8, 2004).**

This case considers whether consumer confusion is relevant in evaluating a fair-use defense to trademark infringement. KP began using the term "microcolor" to market permanent cosmetic makeup in 1990 or 1991; Lasting Impression registered "Micro Colors" as a trademark for the same purpose in 1992. After its mark became incontestable, Lasting Impression sued KP for infringement and KP asserted a defense of fair use. The district court entered summary judgment for KP on the defense, finding that KP used the term not as a mark but fairly and in good faith only to describe its goods. The Ninth Circuit

reversed, holding that the district court should also have considered possible consumer confusion about the origin of KP's goods.

In a unanimous opinion by Justice Souter, the Supreme Court vacated and remanded. It held that a party raising a fair-use defense has no burden to negate any likelihood that its use of the mark will confuse consumers about the origin of the goods or services. Rather, a plaintiff claiming infringement of an incontestable registered mark must show likelihood of confusion as part of its prima facie case. While a defendant may offer evidence to rebut this element, it may also choose to assert a fair-use defense to bar relief even if the prima facie case is sound. The Court declined to say, however, that the degree of confusion is irrelevant to any part of the fair-use defense (such as the question whether a defendant's use is objectively fair).



*Editor's Note: The Fall Edition of *The Appellate Advocate* featured a haiku using the names of the Justices of the Supreme Court of Texas. *See The Appellate Advocate*, Vol. XVII, No. 2, Fall 2004, pg. 69.

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BILL OF REVIEW

***Gold v. Gold*, 145 S.W.3d 212 (Tex. 2004) (per curiam).**

The issue in this case is whether a restricted appeal is a prerequisite to filing a bill of review. The Court held that it was not and reversed the court of appeals' judgment and remanded the case to the trial court.

In February 2000, a wife filed a Petition for Enforcement against her ex-husband alleging that he had fraudulently transferred community property to his father in violation of settlement agreement reached during the divorce. The case was dismissed for want of prosecution in August of 2000. The file indicates that the ex-husband's defense attorney was sent a post card regarding the dismissal, but the wife was not. It was undisputed that the wife's attorney did not learn of the dismissal until months later in January of 2001.

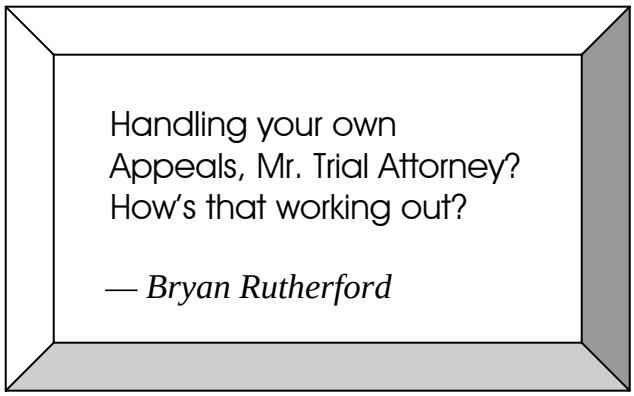
The wife filed a bill of review on February 8, 2001. The trial court dismissed it. The court concluded that before filing the bill of review, she was required to pursue a restricted appeal. The court of appeals affirmed.

The Supreme Court disagreed for several reasons. First, the Court specifically noted that a restricted appeal was only available to the wife if (1) she filed within 6 months of the judgment, (2) she was a party to the underlying suit, (3) she did not participate in the dismissal hearing, and (4) there was error apparent on the face of the record. While, the wife could meet the first three requirements she could not meet the fourth. As the Court had recently held, the absence in the record of any proof that notice of intent to dismiss was sent to a party is not error apparent on the face of the record.

Second, more generally, the Court has never held that failing to file a restricted appeal bars a bill of review. Rather, there are only three prerequisites to filing a bill of review: "(1) a meritorious defense, (2) that was not made due to fraud, accident, or wrongful act by an opponent or official mistake by a clerk, and (3) unmixed with any fault or negligence of the party filing the bill."

While the ex-husband argued that failing the file a restricted appeal constituted negligence or fault, the Court rejected this claim. Rather, the Court recognized that there were many reasons a party may choose file a bill of review instead of a restricted appeal. First, a bill of review allows a trial court to correct its own errors, eliminating the need for appellate review. Second, in a bill of review, all facts can be considered, not just those appearing on the face of the record. Third, discovery is available during a bill of review. And fourth, it avoids having to "follow both avenues of appeal seriatim."

Finally, the Court further noted that even though relief by way of bill of review is typically only available if a party uses due diligence in pursuing all legal remedies and does not ignore any, a party does not "ignore" a remedy by choosing one form of review over another. Thus, the filing of a restricted appeal is not a prerequisite to filing a bill of review.



CHAPTER 33

CONVERSION—TEXAS BUSINESS AND COMMERCE CODE

***Southwest Bank v. Information Support Concepts, Inc.*, 48 Tex. Sup. Ct. J. 80, 2004 WL 2366171 (Oct. 22, 2004).**

The issue in this case is whether Chapter 33 of the Texas Civil Practice and Remedies Code applies to a conversion action brought under Texas Business and Commerce Code § 3.420. The Supreme Court held that it does not.

An employee stole multiple checks from the plaintiff. The employee deposited them in her personal bank. The plaintiff sued the bank under Texas Business and Commerce Code § 3.420 (the "UCC") for conversion. The bank attempted to join the employee as a responsible third party under Texas Civil Practice and Remedies Code Chapter 33. The trial court denied the request stating that the bank was not entitled to apportion responsibility. The plaintiff moved for summary judgment and the trial court granted it entering a judgment against the bank. The bank appealed complaining about the trial court's refusal to join the employee as a responsible third party. The court of appeals affirmed the trial court's decision noting that under the UCC depository banks have an obligation to verify an endorsement. This specific statute controlled over the more general provisions set out in Chapter 33. The bank then filed a petition for review, which was granted.

The Court began its analysis by looking at the UCC. It recognized that it contained a comprehensive allocation of responsibility among parties to banking relationships. For example, there are provisions that permit banks to sue thieves who present stolen checks. In addition the UCC contains its own comparative negligence provisions that apply to some, but not all, conversion claims. These provisions allow banks to seek to hold both negligent payors and payees responsible. The provisions show that the UCC has moved away from strict liability for banks that convert checks.

Next, the Court looked at the effect Chapter 33 would have on the comparative responsibility scheme already established in the UCC. As stated above, there are certain conversion actions within the UCC where no comparative scheme exists. At least one Amici advocated that Chapter 33 applies to these type claims. The Court noted, however, that this would cause inconsistent results within the UCC. For example, there is a comparative scheme in place for forged checks, but not for checks missing endorsements. Under the Amici's construction of Chapter 33, a thief's liability would be submitted in missing endorsement cases, but not forged cases. Yet, as the Court reasoned, the bank should bear more culpability in missing endorsement cases than forged cases. Under the Amici's position the opposite would be true.

Ultimately, the Court concluded that because the UCC is more specific and because applying Chapter 33 to the UCC would adversely affect the comparative scheme already set out in the UCC, that Chapter 33 did not apply to the UCC conversion claim.

DRAM SHOP ACT

***F.F.P. Operating Partners, L.P. v. Dueñez*, 47 Tex. Sup. Ct. J. 1068, 2004 WL 1966008 (Sept. 3, 2004).**

The principle issue in this case is whether the proportionate responsibility statute applies to Dram Shop Act claims brought by innocent third parties. The Supreme Court held that it does.

The plaintiffs were severely injured in car accident. The driver who caused the accident was intoxicated. Among others, the plaintiffs sued the defendant store who sold the driver alcohol. The defendant store filed a cross action against the driver. The trial court, however, severed that claim out, leaving the defendant store as the only defendant in the case. The defendant store objected at trial claiming that the jury charge omitted: (1) any question submitting the driver's negligence as a responsible third party, and

(2) any comparative responsibility question asking the jury to determine what percentage of negligence causing the accident was attributable to the driver and what percentage was attributable to the store. The jury found against the defendant store and awarded $35 million to the plaintiffs.

On appeal, the court of appeals affirmed the trial court and held that the comparative responsibility statute did not apply to dram shop claims involving innocent third parties (i.e., claims by persons who were not served the offending alcohol but were injured by another person who was).

The Dram Shop Act essentially imposes liability on servers of alcohol if it shown that the recipient was "obviously intoxicated to the extent that he presented a clear danger to himself and others." If this is shown the provider is liable for the actions of its customer.

Chapter 33 of the Texas Civil Practice and Remedies Code, which governs the apportionment of responsibility, applies to "any cause of action based on tort in which the defendant, settling person, or responsible third party is found responsible for a percentage of the harm for which relief is sought." It specifically allows the trier of fact to apportion responsibility with respect to each person causing or contributing in any way the harm. Chapter 33 excludes certain types of cases, but does not exclude claims under the Dram Shop Act.

The Supreme Court began its analysis with the plain language of Chapter 33. It noted that Chapter 33 was intended to apply to all causes of action based on tort unless they were excluded. The Court discussed its decision in *Smith v. Sewell* in which the Court concluded that in first-party claims (*i.e.*, claims where the intoxicated person is suing for injuries they themselves incurred) Chapter 33 applied. While the court of appeals believed that *Sewell* did not apply in this case because the injured parties were innocent third parties (not the person actually served the alcohol), the Supreme Court noted that *Sewell* did not create any such exception for third party claims.

Next, the Court looked at the Dram Shop Act. The court of appeals concluded that the Act imposed vicarious liability on providers and thus there was nothing to apportion between the driver and the provider. The Supreme Court, however, determined that the Act has a direct liability component as well. Under the Act the provider's liability stems from its own wrongful conduct—making alcohol available to an obviously intoxicated person. Thus, there may be a need to apportion liability between the provider and the driver.

Chapter 33 states that the trier of fact is to apportion responsibility to each person who "cause[d] or contribute[d] to cause in any way" the harm. The Court recognized though that while the Dram Shop Act's causal connection specifically focuses on the harm caused by the intoxicated person, the Act also made providers liable because it was deemed that they "'contributed [in some] way}' to harm that intoxication causes."

The plaintiffs argued that the provider should not be able to shift responsibility to the intoxicated driver because it would undermine the purpose of the Dram Shop Act. In particular the plaintiffs feared that the innocent third party would be harmed if the driver were insolvent. The Court countered that just because the provider has some direct liability under the statute does not mean that the provider is not also liable for the actions of the intoxicated driver. Thus, the percentage of fault attributable to the driver can be imputed to the provider and will simply added to that of the provider. By doing so, the innocent third party will not assume any risk that an intoxicated driver may be insolvent. Thus, the purposes of the Dram Shop Act can still be met by applying Chapter 33 to such claims.

In addition to discussing the applicability of Chapter 33 to the Dram Shop Act, the Court also reviewed whether the trial court properly severed

the provider's cross claim against the intoxicated driver. The court of appeals found that the severance was proper since the provider's liability was vicarious and as such its right to recover from the driver did not become actionable until an adverse judgment was taken. In addition, because the provider's liability was vicarious in nature, the driver did not meet Chapter 33's definition of a responsible party. However, as explained above, the provider's liability was not purely vicarious. Therefore, the trial court should have submitted the driver for apportionment of liability.

Justice Owen, joined by Justices Hecht, Wainwright and Brister dissented. Essentially, the dissent agreed that Chapter 33 applies to the Dram Shop Act. The disagreement, however, is with how it applied. The dissent asserts that the driver's percentage should not be imputed to the provider. The dissent disagrees with the majority's premise that the Dram Shop Act creates a type of vicarious liability on the part of the provider. Rather, the dissent claims that prior case law shows that the Dram Shop Act only creates direct liability on the part of the provider. Moreover, the dissent claims that the majority's construction of Chapter 33 does more than make the provider responsible for its percentage of responsibility found by the trier of fact. Under the majority's construction, the provider is responsible for 100 percent of the damages and the sole function of Chapter 33 for Dram Shop claims is to provide a method to determine the amount for which the provider may seek indemnity from the intoxicated driver.

CONSOLIDATION

***In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203 (Tex. 2004) (per curiam).**

The issue in this mandamus proceeding is whether the trial court improperly consolidated for trial the workplace toxic tort claims of twenty plaintiffs against nine defendants. The Supreme Court held that the trial court abused its discretion in doing so and that there was no adequate remedy by appeal.

The underlying litigation was filed in 1994 by 454 plaintiffs against approximately 55 defendants. The plaintiffs are former employees of a company and worked at the company's manufacturing plant. The plaintiffs have alleged injuries caused by workplace exposure to a combination of chemicals and products that they refer to as "toxic soup." The plaintiffs claim that the chemicals were made or supplied to the plant by the defendants.

This case has been the subject of three different mandamus proceedings. While the defendants originally sought mandamus relief on discovery issues and the trial court's first order to consolidate, the Court only reviewed the trial court's orders limiting or abating discovery. The Court did not reach the issue of consolidation, but cautioned the trial court to consider the factors set out in *In re Ethyl Corp.* and *In re Bristol-Myers Squibb* in determining whether it was appropriate. In this proceeding, the consolidation issue is back before the Court.

In this proceeding, the Court in this proceeding reviewed whether the consolidation was proper using the factors set out in *Ethyl*:

(1) Common Work Site

The plaintiffs argued that each of the plaintiffs worked at the same facility and therefore shared a common work site. The defendants countered that the plant was large and had several work areas, some in separate buildings. The Court refused to treat the entire plant as a common work site. It noted that common work sites did not turn only on location but also on the similarity of exposure that occurred at a particular location. Treating the entire plant as a common work site would complicate product identification in the case because different mixtures were used in different areas of the plant. Moreover, there were multiple air conditioning and ventilation systems in use that changed the exposure to chemicals in different locations. The twenty plaintiffs that were consolidated worked in different areas and did not provide any evidence that they were exposed to the same injury producing chemicals.

Thus they worked at multiple work sites and this factor weighed against consolidation.

(2) Similar Occupations

There is no dispute that the twenty plaintiffs had dissimilar occupations. This creates an issue about different levels of exposure for each plaintiff. The Court noted that this is further complicated by the fact that the plaintiffs are not claiming exposure to a single toxin that caused the harm, but rather exposure to multiple chemicals that were mixed together to create a toxic soup. Thus, jurors would not only have to keep track of the different exposure levels, but also the many different combination of chemicals used at different work sites. Accordingly, the Court determined this factor weighed against consolidation as well.

(3) Time of Exposure

The time of exposure has two aspects: the date and the length of exposure.

(a) Date of Exposure

The Court found that the twenty plaintiffs worked at the plant during a range of thirteen years. The evidence showed that during this time period different chemicals were used at the plant and were periodically changed. Because of this and the different dates that the plaintiffs worked at the plant, this factor weighed against consolidation.

(b) Length of Exposure

The Court held that this factor likewise weighed against consolidation. In particular, the length of exposure for many of the twenty plaintiffs differed significantly.

(4) Similar Injury

Once again, the injuries suffered by the plaintiffs varied significantly. The twenty plaintiffs alleged more than 55 ailments and no two plaintiffs had identical symptoms. The Court recognized that the fact that there were numerous different injuries alone does not justify mandamus relief. However, the fact that the injuries are caused by multiple chemicals and combinations thereof creates a different situation. In other cases where the injuries were different, the alleged cause was the same. Once again, the Court found that the exposure to various chemicals in different work sites combined with differing injuries created too much confusion. Thus, this factor weighed against consolidation.

(5) Living or Deceased

Each of the twenty plaintiffs is living. Thus, the Court concluded this factor favored consolidation.

(6) Remaining Factors

The Court noted that the remaining factors of status of discovery and whether the plaintiffs were represented by the same counsel favored consolidation. However, the Court also noted that these factors were less important than the others.
Ultimately, the Court concluded that the most critical factors weighed against consolidation. Based on all of the differences in work site, exposures, and injuries, finding liability on one defendant would not aid in finding liability on another defendant against a different plaintiff. Rather, the Court surmised that it would confuse and prejudice the jury. Accordingly, the Court held that the trial court abused its discretion in consolidating the twenty plaintiffs for trial.

For mandamus relief to lie, the Court also had to evaluate whether the defendants lacked an adequate remedy on appeal. While the Court recognized that most consolidation orders do not threaten a defendant's substantial rights (thus precluding mandamus relief), the Court also recognized that in extraordinary circumstances, an ordinary appeal is inadequate. The Court then found that such extraordinary circumstances were present in this case. The Court reasoned that an appellate court could never remedy the likely juror confusion that would be created.

Thus, the Court conditionally granted the writ of mandamus and ordered the trial court to vacate its consolidation order.

DEFAULT JUDGMENTS

***Campus Investments, Inc. v. Cullever*, 144 S.W.3d 464 (Tex. 2004) (per curiam).**

The issue in this case is whether a certificate of service from the Secretary of State conclusively establishes that process has been served on a corporation such that default judgment can be granted ten days after the certificate is on file. The Supreme Court concluded that it does.

Plaintiffs sued the defendant corporation alleging they suffered injuries during a robbery. After several unsuccessful attempts to serve the defendant's registered agent, the plaintiffs requested service on the Secretary of State. The Secretary issued a certificate that he had received and forwarded a copy of the citation and petition by certified mail, which was returned marked "Attempted—Not Known." The plaintiffs then took a default judgment against the defendant.
Rule 107 prohibits a party from taking a default judgment until citation and proof of service have been on file for ten days. In *Capital Brick, Inc. v. Fleming Mfg. Co.*, the Supreme Court held that the Secretary of State's certificate is conclusive evidence that the Secretary of State, as agent of the defendant, received service of process and forwarded service as required by the statute. The First Court of Appeals in this case determined that the Court's holding in *Capital Brick* dispensed with the requirement that the default judgment record include the citation and return. However, the Sixth Court of Appeals reached a different conclusion noting that without the citation, it was impossible to tell whether the defendant was informed of the details necessary to respond. The Supreme Court agreed with the First Court of Appeals.

The Supreme Court reasoned that the Secretary of State in cases such as this is an agent, not for serving, but for receiving process on the defendant's behalf. As such, the certificate from the Secretary conclusively establishes that process was served and the purpose of Rule 107 is fulfilled.

The Court reasoned that in cases where a defective citation through substitute service misleads a defendant, the defendant may bring a bill of review and establish the necessary facts. In the case at hand though, the defendant was not misled. Rather, through the defendant's own negligence—failing to update its address with the Secretary of State—the defendant never received anything the Secretary sent.

DISABILITY DISCRIMINATION

***Little v. Texas Dept. of Criminal Justice*, 48 Tex. Sup. Ct. J. 56, 2004 WL 231899 (Oct. 15, 2004).**

The issue in this case is whether a person whose left leg is amputated and now uses a prosthesis suffers from a disability as defined by the Texas Labor Code. The Supreme Court held that the plaintiff was disabled.

Under section 21.051 of the Texas Labor Code, an employer commits an unlawful employment practice if, because of a disability, the employer refuses to hire an individual. The term "disability" means "physical impairment that substantially limits at least one major life activity." The plaintiff in this case has an amputated leg. She wears a prosthetic and walks with a noticeable limp. The plaintiff applied with the Texas Department of Criminal Justice to be a food services manager. She applied over 20 times between 1995 and 1999. Each time she was told she was qualified for the position but was denied employment. The plaintiff claims that the Department discriminated against her based on her disability.

The Department moved for summary judgment arguing that the plaintiff was not disabled as defined by the Texas Labor Code. Specifically, it argued that the plaintiff is not unable to perform a broad range of jobs, she needs no accommodation, she is not substantially limited in

any major activity, and her condition must be considered as corrected by the prosthesis.

The plaintiff countered that the United States Supreme Court has recognized that even though a person may have a prosthetic leg, they may still be disabled because of a substantial limitation on their ability to walk or run. In addition, the plaintiff claimed that she had a record of a disability and that she was entitled to prove that the Department's hiring personnel perceived her as disabled. The plaintiff concluded by stating that she had produced sufficient evidence to entitle her to have her case heard by a jury. In particular, the plaintiff attached the following evidence to her response: (1) an affidavit describing the difficulty she had walking; and (2) deposition testimony from individuals who had conducted the employment interviews and who had admitted noticing the plaintiff's limp.

The trial court granted the Department's motion for summary judgment without stating the specific grounds. The court of appeals affirmed because it found that the plaintiff was not disabled.

The Supreme Court began by noting that it was undisputed that the plaintiff had a "physical impairment" and that walking is a "major life activity." However, as the plaintiff stated, the issue is "whether the prosthesis has restored function so that the impairment is no longer a substantial limitation of the major life activity of walking."

In reviewing federal precedent, the Court recognized that in determining whether a person is disable, courts should consider measures that mitigate the impairment. Next, the Court discussed what constitutes a "substantial impairment." A person need not be totally unable to walk to be disabled. Rather, she only needs to be "significantly restricted as to the condition, manner, or duration of her walking as compared to that of an average person in the general population."

In this case, the Court found that the summary judgment evidence reflects that the plaintiff was significantly restricted as to the manner in which she could walk compared to average people. The Court cited several cases that reached similar conclusions. Accordingly, the court of appeals erred in affirming the trial court's grant of summary judgment on that ground.

At the trial court, the Department moved for summary judgment on two grounds. The first was the disability point. The second was that the plaintiff did not have any direct evidence of discriminatory intent and that she could not raise an inference of discriminatory intent by proving that the Department's reasons for not hiring her were pretextual. While the Supreme Court had the ability under Texas Rule of Civil Procedure 53.4 to consider the second point, the Court declined to do so without the benefit of the court of appeals review of the point. Thus, the Court remanded the case to the court of appeals for further consideration.

MALICIOUS PROSECUTION

***First Valley Bank of Los Fresnos v. Martin*, 144 S.W.3d 466 (Tex. 2004).**

The issue in this case is whether there was any evidence to support the plaintiff's malicious prosecution claim against the defendant. The Supreme Court held that there was no evidence of malicious prosecution.

The plaintiff took out a loan from the defendant bank. He pledged cattle as collateral for the loan. After several renegotiations and nonpayment of the loan, the bank accelerated the note. The plaintiff angered by several events refused to aid the bank in rounding up the cattle. The bank attempted to do so, but was only partially successful. Frustrated, the bank complained to the authorities. The local sheriff investigated and was likewise unable to locate the plaintiff's cattle. While the bank and the sheriff's report focused on the missing collateral, the plaintiff was eventually indicted for selling or disposing of secured

property in violation of a penal statute that restricted such activity. Eventually the charges were dropped. The plaintiff then filed suit against the bank claiming malicious prosecution. The jury awarded the plaintiff more than $18 million. The Supreme Court reversed the judgment.

The Court began by noting that the plaintiff admitted at trial that all of the objective elements of the crime were met. As such, the bank did not have a duty to inquire whether there was some explanation or alibi before filing charges. As a matter of law, the plaintiff could not establish a lack of probable cause, which he was required to do to prove his claim.

The court of appeals found to the contrary for three reasons. First, the court of appeals found that there was sufficient evidence of malicious prosecution because the Bank had improperly reported that it could not find any of the cattle, when in fact it had found and sold 20. The Supreme Court noted though that this statement was immaterial to the indictment. The indictment relied on cattle that the plaintiff had sold, not on cattle the bank found and sold. And, a person who provides false information to a law enforcement official cannot have caused the prosecution if the information provided was immaterial. In this case, there was no evidence the bank made any false statements about the plaintiff's sale of the cattle. Rather, the only false statements made by the bank regarded other cattle and were immaterial.

Second, the court of appeals found that the bank could be liable for failing to disclose material facts. However, as the Court has noted in past, once a citizen has probable cause to report a crime, there is no malicious prosecution, even if the subsequent report fails to fully disclose all relevant facts.

And third, the court of appeals held that the bank waived its lien on the cattle that the plaintiff sold because a director at the bank helped move them for sale. The court of appeals determined that the director had apparent authority. The Supreme Court, however, disagreed and found that the director did not have any type of authority to waive the banks lien. The Court found that (1) there was no evidence of an act by the bank that clothed the director with apparent authority to act on his own towards outsiders, (2) the scope of any apparent authority that might have existed did not extend to the authority to forgive a debt, and (3) there was no evidence the director expressly waived any of the bank's rights.

Justice Wainwright concurred and wrote separately to address an issue regarding jury charge waiver not reached by the Court. The bank objected to a definition that was submitted to the jury asserting that the judge had improperly modified the definition it provided. On appeal, the plaintiff claimed that the bank waived any error by failing to follow Rule 276, which required the bank to procure from the judge an order stating that the submitted charge was "modified as follows:[state what the judge modified] and given, and exception allowed." Justice Wainwright disagreed with the plaintiff and argued that Rule 276 did not control, but rather Rule 274 did. In particular Justice Wainwright asserted that because the bank did not rely on the definition being given and because the definition was not wholly omitted, all the bank was required to do was object. And, the bank did precisely that.

***Dillard Dept. Stores, Inc. v. Silva*, ___ S.W.3d ___, 2004 WL 2313818 (Tex. Oct. 15, 2004).**

In this per curiam opinion, the Court affirmed an award of actual damages for false imprisonment but reversed a punitive damage award on the same claim. Dillard invoked the shopkeepers privilege to justify its detention of Silva on suspected theft. However, the Court noted, that privilege only protects Dillard from liability to the extent it is reasonable in the manner it detained Silva. In this case, there was evidence from which the jury could have concluded that Dillard was not reasonable in the manner it detained Silva. Specifically, there was testimony that Silva was thrown to the ground and handcuffed in a physically threatening manner, that Silva was denied a glass of water to take needed medicine,

and that Silva was taunted by Dillard employees. This evidence was sufficient to support the jury's finding of liability for false imprisonment, the shopkeepers privilege notwithstanding. However, the Court concluded that the award of punitive damages was not justified on this evidence. The Court held that the circumstances of Silva's detention did not reflect "clear and convincing evidence" of an "extreme risk of substantial harm."

MEDICAL MALPRACTICE

***Garland Community Hosp. v. Rose*, 48 Tex. Sup. Ct. J. 111, 2004 WL 2480381 (Nov. 5, 2004).**

The issue in this case is whether negligent credentialing is a health care liability claim as defined by the Medical Liability and Insurance Improvement Act (4590i). The Supreme Court held that it is.

The plaintiff alleged that she suffered injuries due to a doctor's negligence in performing surgery. The plaintiff sued both the doctor and the hospital. She asserted both vicarious and direct liability theories against the hospital. In particular, the plaintiff asserted that the hospital was negligent in credentialing the doctor and permitting him to perform surgeries. In support of her claims, the plaintiff filed an expert report pursuant to the requirements of 4590i.

The hospital moved to dismiss the negligent credentialing claim on the basis that the plaintiff's expert report was insufficient under the requirements of 4590i. The trial court granted the motion. However, on appeal, the court of appeals held that because negligent credentialing was not a health care liability claim as defined by 4590i, it did not apply and an expert report was not required. The hospital filed a petition for review. A "health care liability claim" is defined as:

> A cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care or health care or safety which proximately results in injury to or death of the patient, whether the patient's claim or cause of action sounds in tort or contract.

The court of appeals held that a claim for negligent credentialing did not fall under this definition because the hospital's act of credentialing occurred before the plaintiff was a patient—not "*during* the patient's medical care, treatment, or confinement." The Supreme Court disagreed with this rationale.

The Supreme Court stated that the court of appeals "strict temporal distinction does not comport with the realities of the credentialing process." The Court then noted that the credentialing process is ongoing and continuous. It includes not only the initial decision to grant privileges, but also continuing reevaluation and monitoring. Moreover, a party's complaint about credentialing is not directed solely to the initial decision, but also to the hospital maintaining those privileges while the party was a patient. Thus, the credentialing occurs both before and during the treatment of a patient. The Court continued by warning that the court of appeals' holding would have broader ramifications because many of a hospital's functions are performed before a particular patient arrives. Thus, applying a strict temporal distinction would create a large loophole to 4590i, and would undermine its purpose.

The Court also reasoned that a hospital's credentialing activities are an inseparable part of the medical services a patient receives. A primary purpose of a hospital is to provide a place where doctors dispense medical treatment. The credentialing of the doctors to provide this service is necessary to the hospital's core function and therefore is an inseparable part of the health care rendered to patients.

Finally, as with other health care liability claims, a negligent credentialing claim involves a

specialized standard of care. As such, expert testimony is required to establish liability. Clearly, negligent credentialing claims involved "accepted standards of . . . health care." Thus, the Court concluded that negligent credentialing claims are health care liability under 4590i and an expert report is required.

NUISANCE

***Schneider National Carriers, Inc. v. Bates*, 48 Tex. Sup. Ct. J. 6, 2004 WL 2192576 (Oct. 1, 2004).**

The issue in this case is whether the nuisance complained of is permanent or temporary. The Court found that it was permanent. Because of this limitations began to run when the injury first occurred and the plaintiffs' claims are barred.
Seventy-nine home owners and renters who live near the Houston Ship Channel sued several defendants asserting, among other things, a claim of nuisance. The defendants operate a trucking firm, a painting and sandblasting firm, and firms that manufacture bleach, wood preservatives, polyesters, and other chemical products. The plaintiffs filed affidavits that asserted that the air pollution and nuisance was ongoing and continuous, constant, and always present. The only symptoms the plaintiffs complained of were typical to discomfort not disease. Thus, they sought nuisance damages not personal injury damages.

The defendants moved for summary judgment based on limitations. They claimed that the plaintiffs' affidavits established as a matter of law that their claims alleged permanent nuisances. The trial court granted the motion. The court of appeals, however, reversed, claiming that there was a fact issue about whether the nuisance was temporary or permanent. The Supreme Court granted the petition for review.

The limitations period for a private nuisance is two years. The law clearly states that accrual of a nuisance claim depends on whether the nuisance is permanent or temporary. A permanent nuisance claim accrues when the injury first occurs or is discovered. A temporary nuisance claim accrues anew upon each injury. In this case, the issue is whether the conditions complained about by the plaintiffs is permanent or temporary.

The Court specifically granted the petition in this case to try to clarify the standards for what constitutes a temporary versus a permanent nuisance. A permanent nuisance is one that involves "an activity of such a character and existing under such circumstances that it will be presumed to continue indefinitely." A nuisance is temporary "if it is uncertain if any future injury will occur, or if future injury 'is liable to occur only at long intervals." The Court noted though that there is not a base line standard used in applying these definitions and as a result many courts of appeals have reached irreconcilably different conclusions in applying them.

The Court began its analysis by acknowledging that there are three things effected by finding that a nuisance is permanent versus temporary: (1) the type of damages that can be recovered (future damages are only available for a permanent nuisance); (2) the number of suits that will be filed; (3) and when the claim accrues. The Court then determined that the distinction between permanent and temporary should correspond to the consequences. Accordingly, the Court examined each in turn to clarify how the standards apply.

In Texas, if a nuisance is temporary a landowner may recover only the lost use and enjoyment that has already occurred. However, for permanent nuisances, a party may recover lost market value. The Court then reasoned that when a nuisance is such that it has a long term impact on market value, regardless of how often the nuisance occurs, it is more likely that the nuisance is permanent.

Next, the Court evaluated how a party would seek redress for its injury. If the future harm is reasonably predictable, then the harm is permanent and one suit can be brought. If though the harm is "anyone's guess" then the nuisance is

temporary and a claimant must bring a series of suits as each injury occurs. Thus, the Court concluded that if future damages are reasonably ascertainable and the nuisance occurs often enough before trial to allow jurors to evaluate it fully in one case, the nuisance is more than likely permanent.

Ultimately the Court held that a nuisance is permanent if it is sufficiently constant or regular that future impact can be reasonably evaluated. If the nuisance is so irregular or intermittent that future injury cannot be estimated with reasonable certainty, then it is temporary.

The parties disagreed on whether the frequency and constancy should focus on the defendant's operations or the plaintiffs' injuries. Texas law up until now has been inconsistent on this point as well. The Court then held that a nuisance can be permanent when either the defendant's operations or the plaintiffs' injuries make it so. It makes no difference whether the source causing the nuisance is permanent or the damages are permanent—both can cause a permanent nuisance.

Many other jurisdictions also look at whether a nuisance can be abated to determine whether it is permanent or temporary. For several reasons, however, the Court disagreed and held that the characterization of a nuisance should not depend on whether it can be abated. The court realized that while it may be true that if the effects of a nuisance are abated it is no longer permanent, the converse is not true—just because a nuisance is not abated does not mean it must be permanent. Moreover, with respect to limitations, the date that a claimant's claim accrues is not dependent on whether the injury can eventually be abated. Rather, the cause of action accrues when facts occur that authorize a party to seek justice—regardless of the form justice eventually takes. And finally, virtually any nuisance can be said to be abatable. Thus, this cannot be a reliable test for distinguishing between permanent and temporary nuisances.

Finally, in applying the standards set forth in the opinion, the Court concluded that the nuisances in the present case were permanent. The Court noted that the plaintiffs' allegations show that the conditions complained of occur at least several times in most weeks or months. And, a nuisance need not occur daily to be deemed permanent. The Court then found that the conditions occurring as often as alleged could be assessed by jurors in determining the total future impact on the neighborhood. The jury would not have to guess at their impact. Accordingly, there is no fact issue about whether the nuisances were permanent.

The plaintiffs complained that because the nuisances cannot be connected to a particular source that they cannot be deemed permanent as a matter of law. The Court noted though that it was the plaintiffs who lumped all of the defendants together. Moreover, as stated above, either a plaintiff's injury or the defendant's operations can make a nuisance permanent—in this case the plaintiffs' injuries do so.

The plaintiffs also claimed that they should have been given more time to conduct discovery to determine if operations could be improved or see if any violations or accidents had occurred at defendants' plants. Again, as stated above, whether the condition could be abated does not affect the character of the nuisance. And, while the Court recognized that an industrial accident could create a nuisance that was so different in character so as to be temporary, the plaintiffs' affidavits do not allege any sudden or recent changes in the nature of their discomfort. Because further discovery could not make the nuisance temporary, the Court held that the trial court did not abuse its discretion.

OIL AND GAS

***Ridge Oil Co. Inc. v. Guinn Investments, Inc.*, 47 Tex. Sup. Ct. J. 1080, 2004 WL 1966096 (Sept. 3, 2004).**

The primary issue in this case is whether a 1937 lease was terminated. The Court held that it was.
Guinn and Ridge were both lessees under a 1937 oil and gas lease. The lease covered two adjoining tracts of land. The lease stated that it would remain in effect "as long thereafter as oil or gas, or either of them is produced from said land." The possibility of reverter of the mineral interests in each tract are separate as well—the successors to the lessors of the Guinn tract have no interest in the Ridge tract and the successors to the lessors of the Ridge tract have no interest in the Guinn tract. None of the lessors (except Ridge, who obtained a percentage of the possibility of reverter of the mineral estate of the Ridge tract) are parties to the suit.
At one time there was a producing well on the Guinn tract, but it was plugged and abandoned in 1950. There has been production on the Ridge well since 1937 and there were two producing wells at the time of the dispute. Until December 1, 1997 these wells sustained the 1937 lease as to both the Ridge and Guinn tracts.

Guinn acquired its interest in the summer of 1997. Thereafter, Ridge offered to purchase this interest. Guinn declined. Ridge then decided that it would attempt to terminate the lease. Ridge told its pumper to cut off the electricity to the wells on the Ridge tract and to perform no other activities on the premises. The wells ceased production on December 1, 1997.

Ridge then sent a letter to the interest holders on the Ridge tract explaining that it was terminating the lease and obtaining new leases on both the Guinn and Ridge tract. With the letter he sent new leases and offered to pay $500 bonus to each interest owner upon execution. Ridge also agreed to pay $50 a month (the average monthly royalty payment for the last six months of production) to each owner for the loss of royalty proceeds while the wells were shut in. All of the mineral owners accepted the offer and executed new leases effective March 3, 1998. The wells resumed production on this date.

On February 27, 1998, 79 days after Ridge shut the wells in, Guinn obtained a drilling permit to drill a well on the Guinn tract. Guinn also attempted to pay surface damages to gain entry to drill and drove a wooden stake into the ground marking the spot of the proposed well.

Guinn filed suit against Ridge on March 8, 1998. Within a month after suit was filed, Ridge obtained leases from some of the mineral interest owners of the Guinn tract. In Guinn's suit it contended that the 1937 lease had not terminated as to its tract, either because the cessation of production was temporary or because Guinn had begun operations on the Guinn tract before the lease expired and was prevented from continuing those operations by Ridge. In the alternative, Guinn alleged that if the lease had terminated, Ridge had tortiously interfered with Guinn's contract rights and committed fraud.

The trial court granted Ridge summary judgment and ordered that Guinn take nothing, that the 1937 lease had terminated, and that Ridge recover attorneys' fees. Guinn appealed. The court of appeals, en banc, reversed and rendered the trial court's judgment after concluding that the temporary cessation of production doctrine applied, the cessation was temporary, and Ridge's surrender of its lease and the taking of new leases did not terminate the 1937 lease at to Guinn.

The Court began by making it clear that the determinations in this case do not purport to adjudicate the rights of the absent mineral interest owners. The only issue is whether the 1937 lease remains in effect as to the Guinn tract. The Court then looked to the language of the 1937 lease. Based on it, the Court found that production on any part of the land covered by the lease, continues the lease in effect as to all land covered by the lease. This true even when the lessee assign interests in parts of the leased premises to different operators and only one operator continues production.

Ridge claims, however, that because of the cessation of production on the Ridge tract, the 1937 lease was immediately terminated in its entirety. Alternatively, Ridge asserts that the lease terminated when it executed new lease with the owners of the possibility of reverter of the mineral interest on the Ridge tract. Guinn countered that the cessation was only temporary and therefore under the temporary cessation of production doctrine, the 1937 lease did not terminate.

The temporary cessation of production doctrine provides that temporary cessation of production in paying quantities does not terminate a lease that states that it will remain in effect as long as oil or gas is produced. Only the permanent cessation of production will terminate the estate. The Court then stated that absent language to the contrary in the lease, this doctrine applies even when a lease covering more than one tract or interest is held by production from a well operated by a partial assignee of the lessee's rights. Thus, the central issue in the case is whether there was a temporary cessation.

Ridge began by contending that its cessation on December 1, 1997 terminated the lease. However, it also argued that the execution of new leases on March 3, 1998 alternatively terminated the lease. The Court did not decide whether the cessation on December 1, 1997 terminated the lease, but rather evaluated the execution of new leases on March 3, 1998. The Court noted that it is well known that parties to an oil and gas lease can surrender or terminate all or part of the lease. This can be done by including a provision in the original lease or by signing a new lease. Accordingly, when the owners of the possibility of reverter of the mineral interests of the Ridge tract executed new leases with Ridge, they terminated the 1937 lease as to that tract. Thus, the production by Ridge from the Ridge tract was performed under the new lease, not the 1937 lease. The cessation of the production under the 1937 lease then became permanent.

Ridge, however could not affect Guinn and its lessors' interest under the 1937 lease and termination of the Ridge lease, in and of itself, could not terminate the 1937 lease as to the Guinn tract. The Guinn tract remained effective as long as oil or gas was produced by "a lessee." The question then becomes was there production "by a lessee" on March 3, 1998. The Court determined that the answer to the question was no. Ridge was no longer a lessee under the 1937 lease and there was no production on the Guinn tract by the remaining lessee, Guinn.

Guinn countered though that Ridge should not be permitted "washout" its interest under the 1937 lease in this manner. Specifically, Guinn contends that the Court should prohibit a lessee from surrendering or terminating a lease to destroy the rights of another partial assignee of the lessee's interest. The Court declined to adopt such a rule. It noted that while an argument could be made that such a rule should exist to keep a lessee from destroying an overriding royalty owner's interest, there is a distinction between a royalty owner and a lessee. A royalty owner is a non-participant in the lease and has no right or ability to go onto the property and drill or take other action to perpetuate the lease. Whereas a lessee could continue the lease by drilling a well and obtaining production. The Court then stated Ridge had no duty to Guinn or the owners of the possibility of reverter of the mineral interest. It was free to mutually agree with the owners of the possibility of reverter of mineral interest in the Ridge tract to terminate the 1937 lease as to their respective interests. It is immaterial that a collateral effect of the agreement caused the 1937 lease to terminate by it own terms.

Guinn next argued that the 1937 lease was maintained by operations. The Court once again disagreed. Guinn alleged that it had obtained a permit to drill, that sometime prior to March 4, 1998 it had attempted to pay surface damages in the course of gaining entry to drill, and that a stake had been driven into the ground to mark the well site. Guinn also alleged that it was excused

from pursuing anything further operations because of Ridge's conduct.

Texas law states that when a lessor wrongfully repudiates a lease, the lessee is relieved from any obligation to conduct any operations pending a judicial determination of the controversy. However, the Court acknowledged that Ridge was not Guinn's lessor. No action taken by Ridge had any impact on Guinn's ability to commence or maintain operations.

Ridge did finally claim in an interest in the Guinn tract on March 25, 1998. Consequently, the Court considered what operations were conducted between March 3, 1998 , the date production permanently ceased under the 1937 lease and March 25, 1998, the date Guinn's interest in the 1937 lease was first repudiated and Ridge made an adverse claim in the Guinn tract. The Court discussed several cases in which other courts reviewed what constituted continuing or maintaining operations. Ultimately the Court determined that there was no evidence that Guinn had conducted any activity whatsoever. Thus, as a matter of law, this did not satisfy the "as long as operations are being carried on" provision.

The Court likewise denied Guinn's claims for a constructive trust and for tortious interference and fraud. The Court concluded that there is no confidential relationship between partial assignees of leasehold interests (such as Guinn and Ridge) under a base lease. Moreover, Ridge did not owe a duty to Guinn to perpetuate the 1937 lease or to procure its renewal or extension. In fact, Ridge and the lessors of the Ridge tract had the right to terminate the 1937 lease as to their interests. Accordingly, there is no basis for a constructive trust, a tortious interference claim, or a fraud claim.

Ridge filed a cross appeal complaining about the trial court's reduction of attorneys' fees awarded under the Declaratory Judgment Act. In particular, Ridge argued that the trial court had only two choices: award all the attorneys' fees found by the jury or award none of them. The Court held that this was incorrect. Rather, the trial court had the discretion to reduce the fees to what it finds is equitable and just. And, this finding is reviewed on appeal for abuse of discretion.

PROPERTY OWNERS' ASSOCIATIONS

***Simpson v. Afton Oaks Civic Club,* 145 S.W.3d 169 (Tex. 2004) (per curiam).**

The issue in this case is whether by failing to object at trial about the missing property owners, a property owners' association waives it right to challenge a trial court lack of jurisdiction. The Supreme Court concluded that the complaint was waived.

Simpson, a property owner, brought suit against the property owners' association seeking a declaratory judgment voiding the creation of the association. The trial court granted the association's summary judgment. On appeal, however, the court of appeals dismissed the case for lack of jurisdiction because the other property owners were necessary to the action and had not been joined. The Supreme Court, however, reversed.

The Supreme Court noted that its previous decision in *Brooks v. Northglen Association*, was controlling in this case. In *Brooks* the Court held that a property owners' association cannot assert this jurisdictional argument for the first time on appeal. Rather, the association must bring the error to the trial court's attention either by requesting that the court abate the case and join the other property owners or by filing special exceptions. In this case, the association did not assert its jurisdictional challenge at the trial court level. As such, it waived its challenge. Thus, the Supreme Court reversed the court of appeals' judgment and remanded the case to the court of appeals for a determination on the merits.

INSURANCE

***Enterprise Leasing Co. of Texas v. Barrios*, ___ S.W.3d ___, 2004 WL 2565905 (Tex. Nov. 12, 2004) (per curiam).**

In this per curiam opinion, the Court held that a provision in a rental car agreement required the renter to reimburse the rental car agency for the cost of the vehicle after the car was stolen. The provision at issue stated that "Renter is responsible for and agrees to pay to Owner the retail value of replacing and/or repairing all losses and damages to the rented car including 'loss of use' during the period it is unavailable for rental use . . . regardless of fault or negligence of the Renter . . . ." The caption to this provision was "DAMAGE TO RENTED CAR." The court of appeals concluded that the provision was ambiguous as to whether the renter was required to pay for a *stolen* car, emphasizing the caption's use of the word "DAMAGE." The Texas Supreme Court disagreed, holding that the provision unambiguously requires a renter to pay for a stolen car regardless of the renter's fault. The Court noted that the contract clearly requires the renter to "replac[e] and/or repair[] all losses and damages to the rented car." This covers theft of the car, as "'all losses' means all losses."

***Old American County Mutual Fire Ins. Co. v. Sanchez*, ___ S.W.3d ___, 2004 WL 2366174 (Tex. Oct. 22, 2004).**

Chief Justice Jefferson held for a unanimous Court in this opinion that an insured spouse of a person listed as the "named insured" in declaration page of an auto policy may reject Uninsured Motorist (UM) and Personal Injury Protection (PIP) coverages. The parties stipulated that Mr. Sanchez was the only "named insured" listed in the declaration page, that Ms. Sanchez rejected UM and PIP coverage when she applied for the policy, and that premiums were never charged for UM or PIP coverage. The only issue was whether Ms. Sanchez had statutory authority to waive these coverages. The Court concluded that, under articles 5.06-1(1) and 5.06-3(a) of the Texas Insurance Code, the spouse of a named insured has statutory authority to waive UM and PIP coverages. These statutory provisions contain two key phrases: (1) "any insured named in the policy," and (2) "the named insured." The Court concluded that the Legislature intended these phrases to be equivalent. Since they are synonymous, the Court then had to determine the meaning of "named insured" as used in the statutes. The Court looked to the "Texas Family Automobile Policy" that was the standard policy when the statutes were written to answer this question. The TFAP defined "named insured" to include both the individual named on the declaration page and that individual's spouse, if a resident of the same household. From this, the Court concluded that the Legislature must have intended the phrase "named insured" to include the spouse of the named insured, if a resident of the same household. The Court noted that this construction was consistent with the scope of Ms. Sanchez's authority in the transaction, as she purchased the insurance for herself and her husband and she was covered under the policy to the same extent as Mr. Sanchez. For these reasons, the Court held that Old American was entitled to summary judgment that the policy did not provide UM and PIP coverage because those coverages were waived.

ELECTRIC UTILITIES

***Centerpoint Energy, Inc. v. Public Util. Comm'n of Texas*, 143 S.W.3d 81 (Tex. 2004).**

In a lengthy and jargon-laden opinion, the Court determined that a rule promulgated by the Public Utility Commission as part of deregulation violated the Public Utilities Regulation Act (PURA) and thus was invalid. The only issue before the Court was the date from which utilities should be allowed to recover so-called "carrying costs" associated with "stranded costs."

"Stranded costs" are essentially those costs associated with building and operating an electric power plant that would have been recoverable in the pre-deregulation regulated market but are

likely not recoverable in the competitive market. As part of its rulemaking authority, the PUC established a rule under which a utility could recover its "carrying costs" (basically, interest on the amount of money it costs utilities to carry its stranded costs) only after "true-up proceedings," which by statute were to commence two years after the deregulation date.

In a 5-4 opinion, Justice Owen held for the Court that this rule was invalid. The Court found that the rule was inconsistent with PURA, which allows utilities to recover their "net, verifiable, nonmitigatable stranded costs incurred in purchasing power and providing electric generation service" that "exist on the last day of the freeze period." 143 S.W.3d at 84 (quoting Tex. Util. Code §§ 39.252(a), 39.201(g)).

The main point of contention between the majority opinion and the dissent (authored by Justice Brister) centers around whether "stranded costs" exist at the point of deregulation or whether they "exist" as an accounting construct only and, therefore, come into existence only at the point that the accounting is done. The Court concluded that PURA "implicitly, if not explicitly," recognizes that stranded costs necessarily exist from the time of deregulation. Any rule, therefore, that does not allow utilities to recover carrying costs on those stranded costs from the time that the stranded costs come into existence, is contrary to PURA. Because the record is not sufficiently developed for the Court to determine whether utilities could potentially have a double recovery of at least some carrying costs following a "true-up" accounting proceeding, the Court remanded to the PUC for further proceedings.

The dissent would have affirmed the validity of the PUC rule at issue. What the Court calls "carrying costs," the dissent calls "interest," and notes that PURA does not mention recovery of interest on stranded costs. The dissent further states that the section of PURA on which the Court relies to hold the rule invalid is not about requiring that utilities can recover interest, but rather concerns making sure that consumers do not avoid stranded cost recovery by switching to new providers. The dissent also notes that the PUC's rule is reasonable for a number of reasons, including that the Legislature provided by statute for calculation of "stranded costs" during the "true-up" proceedings, when it is not known what the "stranded costs" ultimately will be. Because the Legislature set the true-up proceeding as the time for determination of the estimated stranded costs, the PUC's rule allowing utilities to recover "carrying costs" on the estimated stranded costs as of the time of the true-up proceedings is reasonable, according to the dissent.

MANDAMUS – ADEQUATE REMEDY BY APPEAL

***In re The Prudential Ins. Co. of Am.*, ___ S.W.3d ___, 2004 WL 1966015 (Tex. Sept. 3, 2004), and *In re AIU Ins. Co.*, ___ S.W.3d ___, 2004 WL 1966010 (Tex. Sept. 3, 2004).**

In these significant mandamus proceedings, the same five Justices held that mandamus relief is available when a trial court abuses its discretion in refusing to enforce a contractual jury trial waiver provision (*Prudential*) or in refusing to enforce a contractual forum-selection clause (*AIU*). The same four Justices dissented in both cases on the ground that the relator has an adequate remedy by appeal.

The Court held in both cases that the contractual clauses at issue are enforceable through mandamus because appellate relief is inadequate when weighing the "practical and prudential" considerations, such as the inevitability of reversal and the utter waste of judicial resources on a proceeding under such circumstances. These cases are important because of the detailed discussion of (and, suggests the dissent in both opinions, departure from) the "adequate remedy by appeal" prong as set forth in *Walker v. Packer*.

In re Prudential: In this significant case, Justice Hecht, writing for a majority comprising Justices Hecht, Owen, Smith, Wainwright, and Brister, held that the trial court clearly abused its discretion in refusing to enforce a contractual jury waiver provision, and that mandamus relief is available to correct this error. First, the Court

rather summarily disposed of the real party's argument that jury trial waivers are void as against public policy. The Court noted that a party can waive the right to trial by jury under Texas Rule of Civil Procedure 216, and that parties can agree to alter the method of dispute resolution in numerous ways, some even more fundamental than trial by jury as opposed to a bench trial.

Next, the Court discussed at length the considerations to be considered in determining whether an adequate remedy by appeal exists. The Court first noted that "'adequate' has no comprehensive definition; it is simply a proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts." 2004 WL 1966015 at *6. In a passage that is sure to generate interesting briefing in future mandamus proceedings, the Court stated:

> Mandamus review of incidental, interlocutory rulings by the trial courts unduly interferes with trial court proceedings, distracts appellate court attention to issues that are unimportant both to the ultimate disposition of the case at hand and to the uniform development of the law, and adds unproductively to the expense and delay of civil litigation. Mandamus review of significant rulings in exceptional cases may be essential to preserve important substantive and procedural rights from impairment or loss, allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments, and spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings. An appellate remedy is "adequate" when any benefits to mandamus review are outweighed by the detriments. When the benefits outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate.

Id. The Court explained that this determination is not abstract or formulaic but is practical and prudential, and resists categorization. *Id.* at *7. The Court reasoned that trial court rulings that are clearly wrong but that have a potentially significant impact on the legal system should, as a matter of prudence, be corrected by mandamus. The Court cautioned, though, that "the benefits of mandamus review are easily lost by overuse." *Id.* at *8.

In the case at issue, the Court concluded that mandamus relief is proper because the issue is clear but appellate review is neither meaningful nor likely, noting that "[e]ven if Prudential could somehow obtain reversal based on the denial of its contractual right, it would already have lost a part of it by having been subject to the procedure it agreed to waive." *Id.*

In a dissent joined by Justices O'Neill, Jefferson, and Schneider, Chief Justice Phillips declares that the Court "retreats" from the principles announced in *Walker v. Packer*. The dissent suggests that the Court incorrectly assumes that Prudential's contractual right will be lost forever if the Court does not intercede in a mandamus proceeding, noting that "[i]f Prudential has been . . . damaged [by a breach of contract], it should seek damages directly from the breaching party as in any other contract case." *Id.* at *1. The dissent also rejected the Court's analogy of the jury trial waiver provision to an arbitration provision (which is enforceable by mandamus), noting that unlike arbitration, there is no public policy reason to encourage parties to waive a jury trial. *Id.* at *2. The dissent also pointed out an anomaly in the Court's jurisprudence created by the Court's holding – namely, that a contractual waiver of the jury trial right is enforceable by mandamus, while the constitutional right to a jury

trial is not. *Id.* (citing *General Motors Corp. v. Gayle*, 951 S.W.2d 469, 477 (Tex. 1997)). Finally, the dissent notes that the Court fails to "apply its new ad hoc balancing test" to the adequate remedy prong, instead issuing mandamus in a situation that is far from "compelling." *Id.* at *3. In light of this conclusion, the dissent wonders aloud "[w]hether today's ruling has fundamentally altered [the] traditional rules [set forth in *Walker v. Packer*], or is merely an anomaly, remains to be seen."

In re AIU: In this case decided the same day as *Prudential*, the Court held that a contractual forum-selection clause is enforceable by mandamus. Justice Owen, writing for the same majority as in *Prudential*, first held that the trial court abused its discretion in refusing to enforce the forum-selection clause. The Court then held that mandamus relief was available to remedy the trial court's error. The Court analogized forum-selection clauses to arbitration provisions, for which mandamus relief has long been available, stating that the underlying considerations for enforcing such contractual terms by mandamus are the same – the trial in the improper forum would be a total waste of judicial resources, and there is "no meaningful distinction between this . . . forum-selection clause and arbitration clauses." 2004 WL 1966010 at *4. The Court further noted that it does not hesitate to issue mandamus when a relator is subjected to "clear harassment." *Id.* at *5. The Court concluded that a real party in interest that breaches a forum-selection clause amounts to such harassment: "Subjecting a party to trial in a forum other than that agreed upon and requiring an appeal to vindicate the rights granted in a forum-selection clause is clear harassment." *Id.*

Chief Justice Phillips, joined by the same dissenters as in *Prudential*, authored a dissent in which he concluded that mandamus should not issue because there is an adequate remedy by appeal. The dissent noted, in response to the Court's holding that the forum-selection clause at issue is enforceable, that there are significant differences between arbitration clauses (which have long been favored under Texas law) and forum-selection clauses (which until recently have been strongly disfavored). A forum-selection clause "ousts" a court of competent jurisdiction in favor of another court, and thus was long held to be void as against public policy. Whether enforceable or not, the dissent went on to state, mandamus relief should be denied because "[t]he law provides remedies other than mandamus to assure that contracting parties receive the benefit of their bargains." *Id.* at *10. The dissent, noting that mandamus proceedings mark an interruption to orderly trial court proceedings, also rejected the idea that granting mandamus relief to enforce forum-selection clauses "will save judicial resources over the long term." *Id.* at *11.

FIRST AMENDMENT

***New Times, Inc. v. Isaacks*, 146 S.W.3d 144 (Tex. 2004).**

In a comprehensive and scholarly opinion for a unanimous Court, Chief Justice Jefferson held that an article that appeared in a Dallas weekly newspaper was clearly satirical in nature and thus constituted protected free speech, that the article was not motivated by actual malice, and that therefore no action by the public officials who claimed to be harmed by the article would lie.

The article at issue appeared in the paper a week after a 13-year-old had been arrested and detained in a juvenile detention facility after writing a Halloween story for a school assignment in which he described shooting a teacher and two classmates. Denton County Juvenile Court Judge Darlene Whitten ordered the boy's detention, and District Attorney Bruce Isaacks, although ultimately declining to prosecute, commented that the school had reason to be concerned. The writers of the article believed that Whitten and Isaacks had overreacted, and set out to write a satiric article demonstrating this point.

They wrote an article that described the arrest and detention of "diminutive 6 year-old" Cindy Bradley for writing a book report about "cannibalism, fanaticism, and disorderly conduct" in the Maurice Sendak children's book, *Where the*

Wild Things Are. The article contained fictitious quotes attributed to Whitten and Isaacks. Offended, Whitten and Isaacks sued the newspaper, its parent company and publisher, and the authors of the article for libel.

The trial court denied a summary judgment motion filed by the media defendants, who sought interlocutory review. The court of appeals affirmed, holding that there were fact issues as to whether the article failed to provide any notice to a reasonable reader that that it was satire or parody and that a reasonable reader could conclude that it contained statements of fact. The court of appeals further held that there was evidence of "actual malice" because the paper and the article's authors knew or strongly suspected that when they published the article it contained false and defamatory statements.

The Supreme Court reversed on both elements and rendered judgment for the media defendants. First, the Court explained the long-standing significant role of satire and other forms of humor to political speech. The Court then noted that the issues presented in this case must be considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 146 S.W.3d at 154 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Reviewing case law from other courts on satire and parody, the Court concluded that satire is entitled to constitutional protection, and "the test is whether the publication could be reasonably understood as describing actual facts." *Id.* at 157.

Applying this test, the Court concluded that "[t]he court of appeals has underestimated the 'reasonable reader.'" *Id.* The Court noted that the article at issue has numerous obvious markers that make clear it is not intended as a factual account but as a satiric criticism of the previous actions of Whitten and Isaacks in their official capacity. Significantly, the Court stated that the test is not whether any readers were in fact misled; even reasonable readers might be. Rather, the test is whether, objectively, the hypothetical reasonable reader can reasonably understand the article as stating actual fact. Here, there were numerous "clues" to indicate that the article was fictitious satire:

- the unorthodox headline ("Stop the madness") and photo of a smiling child holding a stuffed animal, captioned "Do they make handcuffs this small? Be afraid of this little girl."

- the article's assertion that the six-year-old child was placed in ankle shackles due to her school disciplinary record, "which included reprimands for spraying a boy with pineapple juice and sitting on her feet."

- the fabricated quote attributed to then-Governor George W. Bush, stating that *Where the Wild Things Are* "clearly has deviant, violent, sexual overtones" and that "zero tolerance means just that. We won't tolerate anything."

- reference to Isaacks's "quote" that "[w]e've considered having her certified to stand trial as an adult, but even in Texas there are some limits."

- Judge Whitten's alleged statement that "[a]ny implication of violence in a school setting ... is reason enough for panic and overreaction."

- The article's reference to a freedom-opposing religious group that bears a ridiculous acronym: God Fearing Opponents of Freedom ("GOOF").

- Six-year-old Cindy Bradley's scoffing at the reaction to her book report and saying, "Like, I'm sure. It's bad nough people think like Salinger and Twain are dangerous, but Sendak? Give me a break, for Christ's sake. Excuse my French."

Id. at 158. The Court further rejected the idea that a reader who only read part of the article might conclude that it was factual, concluding that such a reader is not "objectively reasonable" for purposes of the test. Finally, the Court noted that, while a disclaimer unambiguously declaring that the article was satiric might have helped, the absence of such a disclaimer is not dispositive, particularly in light of the clear signals of the article's satiric nature.

The Court also rejected the court of appeals' holding on the malice prong. The Court noted that the traditional "knowledge of falsity" test makes no sense as applied to satire, precisely because the writer intends "calculated falsehood" to make a point. The Court instead articulated the standard as whether "the publisher either kn[e]w or ha[d] reckless disregard for whether the article could reasonably be interpreted as stating actual facts." *Id.* at 163. The Court rejected an "intent to ridicule" standard, noting that that is precisely the point of satire. Because the summary judgment evidence presented by the media defendants conclusively established that they had no knowledge or intent that the article be interpreted as stating actual fact (to the contrary, they intended the reader to "get" the joke), and because Whitten and Isaacks presented no contrary evidence raising any fact issue, summary judgment was appropriate on the actual malice ground.

LEGISLATIVE IMMUNITY

***Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150 (Tex. 2004).**

Two Thirty Nine Joint Venture (239 JV) retained a Dallas law firm (firm) to assist in corporate formation, and acquisition, development, and sale of 239 acres of land in Irving, Texas. In September 1994, 239 JV had a potential buyer under a contract to purchase the last eleven acres of the Irving property. While that contract was under review, a member of the firm voted with the unanimous Irving city council to place a moratorium on apartment construction in Irving. As a result, the potential buyer cancelled the contract with 239 JV.

239 JV then brought suit against the firm and its partner who served on the Irving City Council, alleging breaches of the duty ordinary care, fiduciary duty, the duty of loyalty, and a malpractice claim based on conflict of interest. The Supreme Court, reversed the Court of Appeals' judgment and upheld the trial court's grant of summary judgment for the firm. The Court held that legislative immunity shields lawyer-legislators from civil liability for activities within their legislative capacities, and, therefore, 239 JV could not recover against either the member of the firm who voted with the city council or the firm itself.

SOVEREIGN IMMUNITY

***Texas Dept. of Transp. v. City of Sunset Valley*, 146 S.W.3d 637 (Tex. 2004).**

The City of Sunset Valley (Sunset Valley) brought inverse condemnation and common-law nuisance claims against the Texas Department of Transportation (TxDOT) attempting to collect damages for the cost of reconstruction one of the city's main roads that TxDOT severed and destroyed when it expanded State Highway 290 through Sunset Valley. The mayor of Sunset Valley and a member of the city council also intervened individually, bringing equal protection and private nuisance claims based on TxDOT's alleged failure to install adequate signage, as it had done in all other similarly situated Texas Cities, and its installation of high-mast floodlights on Highway 290 that "spotlighted" and destroyed the rural character of neighboring property.

Sunset Valley argued that section 203.058(a) of the Texas Transportation Code waived TxDOT's sovereign immunity, allowing Sunset Valley to recover for the cost of reconstructing its road from TxDOT. Section 203.058(a) allows a state agency to recover adequate compensation for real property taken or destroyed by TxDOT. The Supreme Court held that the statute did not give Sunset Valley standing to bring suit against TxDOT because "state agencies," as defined in the statute, are limited to "agencies of the State,

which generally exercise statewide jurisdiction," as distinguished from "political subdivisions, like municipalities, which have limited geographic jurisdiction." Therefore, the Court held that Sunset Valley could not recover the costs of reconstructing its road. Furthermore, the Court also dismissed Sunset Valley's common law nuisance based on the high-mast flood lights because there was no other basis for waiver of sovereign immunity.

Sunset Valley brought a takings claim for the property value of the old road that TxDOT severed to construct the highway. The court held that Sunset Valley's takings claim failed as a matter of law because the City merely holds roads in trust for the benefit of the state, with legal title and a superior right of ownership belonging to the State.

The intervenors alleged that the fact that TxDOT had failed to install signage marking city exits and limits, as it had done for other similar municipalities, and TxDOT installed high-mast traffic lights, unlike those it had installed in other municipalities, violated their equal protection rights. The Court dismissed the intervenors' equal protection claim, holding that "State and federal equal-protection guarantees relate to 'equality between persons as such, rather than between areas, and territorial uniformity is not a constitutional prerequisite.'"

The mayor also asserted a private-nuisance claim based upon the high-mast floodlights that spotlighted his property. The Court found that TxDOT had sovereign immunity with respect to this claim and, therefore, the mayor had to prove that the nuisance rose to the level of an unconstitutional taking to recover. The Court held that the impacts from the alleged nuisance were common to the community and therefore did not give rise to private cause of action.

NO-EVIDENCE REVIEW – WAIVER

***City of Arlington v. State Farm Lloyd's*, 145 S.W.3d 464 (Tex. 2004).**

State Farm Lloyd's brought a subrogation action against the City of Arlington to recover compensation for a sewer backup that damage an insured's home. State Farm alleged that Arlington's operation of the sewer lines constituted a nuisance, not because Arlington operated the lines improperly, but because "'the City intentionally acted to maintain the system for the benefit [o]f its citizenry, knowing all the time that backups such as the one involved here are inherent' in the operation of sewer systems."

The jury found that the sewer system created a nuisance and that the second backup (of two) constituted a taking under Article 1, Section 17 of the Texas Constitution. Arlington appealed, arguing that it was immune from nuisance liability unless the nuisance amounted to a taking under the doctrine of Sovereign Immunity, and that State Farm presented no evidence to support the requisite intent for a takings claim, or that the property was taken for public use.

The court of appeals did not reach the merits of Arlington's claims, holding instead that Arlington waived its issues on appeal because it failed to include specific citations to the record in its briefing.

The Supreme Court reversed, holding that Arlington did not waive its issues by failing to cite to the factual record in the Argument Section of its brief because it had provided record references with page numbers in the brief's Statement of Facts. Furthermore, the Court held that Arlington's citations to the "entire record" to support its no-evidence points did not waive its no-evidence issues. The Court held that while arguments based on the strength of the evidence - *e.g.*, "the evidence is so weak as to create only a mere surmise or suspicion" - require citation to relevant parts of the record, an argument that there is complete absence of evidence in the

record requires the appellate court to review the entire record.

In determining the merits of State Farm's claim, the Supreme Court held that a heightened intent standard was required to support a takings claim against the City. Specifically, the Court held that the complaining party must demonstrate that the governmental entity knows a specific act is causing identifiable harm or knows that the specific property damage is substantially certain to result from an authorized government action. Ultimately, the Court concluded that State Farm had presented no such evidence of intent and rendered judgment for Arlington.

ELECTION LAW – POLITICAL CONTRIBUTIONS

***In re Newton*, 146 S.W.3d 648 (Tex. 2004).**

Bobby Glaze and David Leibowitz, Democratic Party candidates for election to the Texas House of Representatives, brought an action for an injunctive and declaratory relief against the Associated Republicans of Texas Political Action Committee, and its Treasurer, Norman Newton (collectively "ART PAC"). Glaze and Leibowitz alleged that ART PAC violated of several sections of the Texas Elections Code in connection with its fund raising activities. After receiving the pleadings and hearing unevidenced attorney argument, the 53rd District Court of Travis County found that ART PAC had violated the statutes and issued a temporary restraining order that prohibited ART PAC from soliciting, accepting, or spending corporate funds for fourteen days.

ART PAC petitioned for mandamus relief directly to the Texas Supreme Court. The Supreme Court held that a direct petition was appropriate because the issue, which affected all the political races to which ART PAC contributed, was of statewide importance.

The Court found that the district court erred when it granted the injunction based only on the parties' hastily prepared pleadings and unevidenced attorney argument that the status quo was in fact a violation of the law. The Court questioned why the plaintiffs waited until the first day of early voting to seek a TRO against ART PAC when they alleged that ART PAC had been engaged in the alleged violations over a period of years and were long aware of its publicly filed financial statements. The district court's error was compounded by the fact that the TRO would not be lifted, and the temporary injunction hearing would not be held, until the day after the November election, effectively preventing ART PAC from participating in the election. The Court concluded the TRO left ART PAC with no adequate remedy by appeal and ordered the district court to lift the injunction. Justice Wainwright concurred, adding that, absent mandamus relief, ART PAC's rights under the Texas and United States Constitutions to free speech would be permanently denied because they would not be permitted to participate in the election.

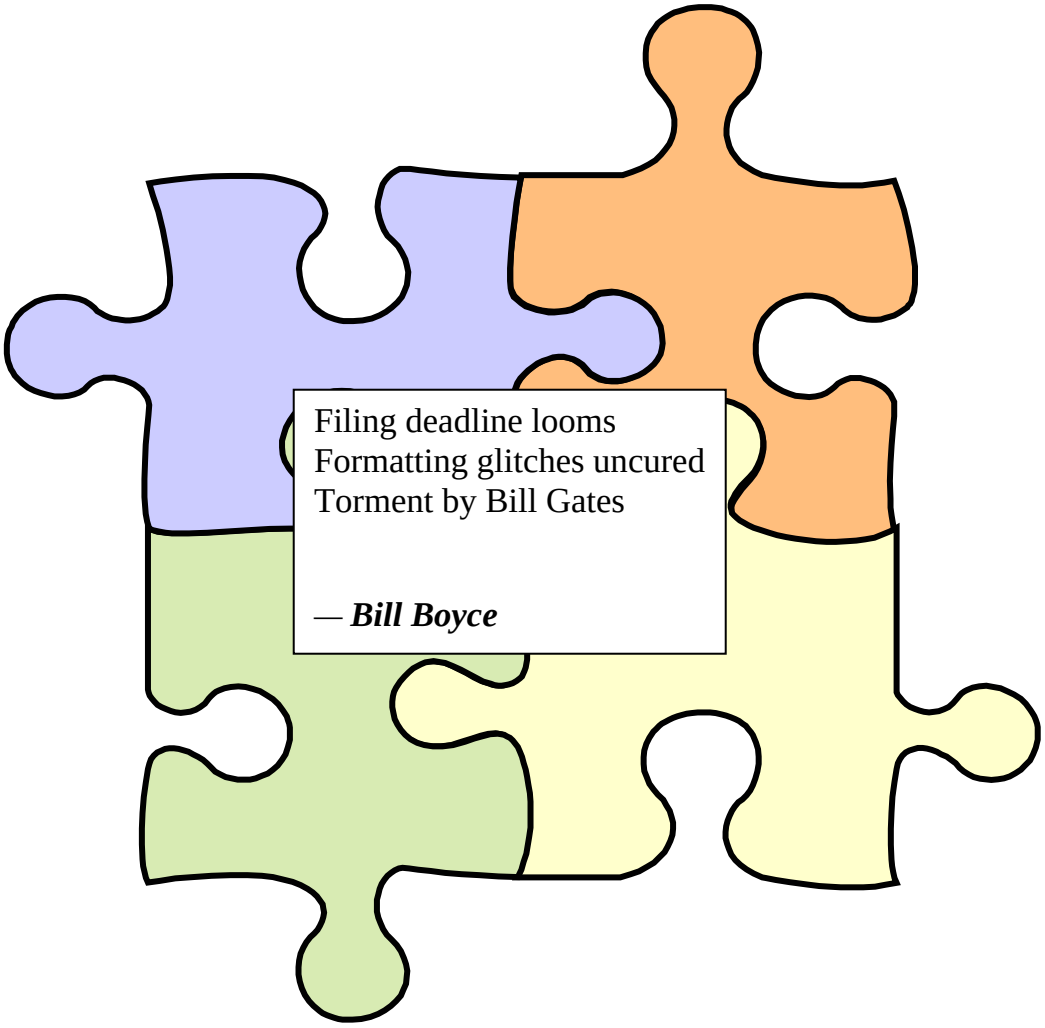
PRODUCT LIABILITY

***Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170 (Tex. 2004).**

Raymond Gomez, an former abrasive blasting worker, contracted silicosis from silica dust he inhaled during sand blasting operations. Gomez brought a products liability and negligence action against Humble Sand & Gravel, a supplier of silica flint to his employer. Justice Hecht, writing for the Court, concluded that silica suppliers like Humble had no duty to warn its customers that inhaling silica dust can be disabling and fatal and that workers must wear air-fed hoods, because that information had long been commonly known throughout the industry. The Court further declined to impose a duty on silica suppliers to warn their customers' employees regarding the dangers of silica inhalation absent evidence that the warning would have been effective. The Court stated that it could not determine from the record whether a warning from the suppliers would have effectively reached their customers' employees. The Court remanded for trial, stating that the silica supplier bears the burden of proving

that the warning would not have been effective to avoid the imposition of a duty to warn its customers' employees.

Justice O'Neill, joined by Justice Schneider, dissented. The dissent argued that the Court improperly applied the sophisticated-user doctrine in a dangerous manner that undermines a long-recognized duty to warn and compromises worker safety. Further, the dissent complained that requiring courts to determine when a warning would be so non-effective as to excuse a duty to give the warning created a confusing and impossible legal standard.



Chris Brisack, Norquest & Brisack, L.L.P., McAllen
Robert Fugate, Fanning, Harper & Martinson, P.C., Dallas

RULE 60(b) MOTION FOR RELIEF

***McCorvey v. Hill*, 385 F.3d 846 (5th Cir. 2004).**

McCorvey, formerly known as Jane Roe, filed a Rule 60(b) motion for relief from judgment in which she sought to have the district court revisit the Supreme Court's *Roe v. Wade*, 410 U.S. 113 (1973) decision. The Trial Court ruled McCorvey's motion was not filed within a reasonable time after final judgment was entered. McCorvey appealed, initially arguing that 28 U.S.C. § 2281 required a three judge district court to hear and decide cases involving injunctions against enforcement of state statutes based on allegations of unconstitutionality, so that the action of the single district court judge was without authority.

The Court disagreed, dismissing McCorvey's appeal, noting that § 2281 was repealed and that *U.S. v. Louisiana*, 9 F.3d 1159, 1171 (5th Cir. 1993), held that a single judge, acting alone, after said repeal could decide subsequent modified remedial orders. The Court also noted that, although McCorvey was complaining that the district court rejected her Rule 60(b) motion as untimely, an antecedent question was whether she had presented a justiciable case or controversy, and that indeed her claims were moot because the statute declared unconstitutional in *Roe* had been repealed. Finally, the majority, in a footnote, took issue with the district court's decision that a 30-year delay, regardless of the circumstances, is too long as a matter of law to bring a Rule 60(b) motion. "Rule 60(b)(5) and (b)(6) do not require the motion for relief from judgment be brought within a limited period of time. Instead, these provisions require only that the motion 'be made within a reasonable time'.... Therefore, 'what constitutes a reasonable time under Rule 60(b) depends on the particular facts of the case in question.'"

Also interesting is Judge Jones' concurring opinion. She agreed that McCorvey's case is now moot, but also elaborated at length about the changed conditions that might result in a different outcome if *Roe* is revisited.

ACCOUNTANT NEGLIGENCE / CERTIFIED QUESTIONS

***Compass Bank v. King, Griffin & Adamson, P.C.*, 388 F.3d 504 (5th Cir. 2004).**

The lender (Compass Bank) to a corporation that ultimately defaulted on a loan sued the public accounting firm (King, Griffin & Adamson, P.C.) that performed the corporation's audit, alleging that the Firm negligently misrepresented the corporation's finances. The Firm moved for summary judgment, which was granted, and the Bank appealed. The Bank moved the Fifth Circuit to certify to the Texas Supreme Court the question whether Texas uses an actual knowledge or a foreseeability test for negligent misrepresentation claims against accountants. After noting that certification is not a panacea for resolution of all difficult state law questions that have not been answered by the state's highest court, the Fifth Circuit majority affirmed the trial court judgment, voting not to certify, feeling that the question was sufficiently answered by other lower court and federal decisions, as well as Texas' adoption of the Restatement on negligent misrepresentation.

Judge DeMoss dissented, arguing that certain state and federal authorities suggest that a Court might go (and had indeed gone) the other way, that one of the state court decisions relied on by the majority was unpublished and a "very weak reed" to rely upon, and that certification was therefore preferable to "an *Erie* guess."

IMPROPER JOINDER

***Smallwood v. Illinois Cent. R.R.. Co.*, 385 F.3d 568 (5th Cir. 2004) (en banc).**

The driver of a vehicle, Smallwood, hit by a train brought a negligence claim against Illinois Central (ICRR) and the Mo. Dept. of Trans. (MDOT). The trial court denied a motion to remand, which was appealed.

In what the Court acknowledged was "the first time this Court *en banc* has addressed the issue of improper joinder," the Fifth Circuit held that, when a non-resident defendant's showing that there is no reasonable basis for predicting that state law would allow recovery against an in-state defendant equally disposes of all defendants, there is no improper joinder of the in-state defendant and the entire suit must be remanded to state court.

The majority began its opinion by noting the traditional two prong test for establishing improper joinder, which asks a) if there was actual fraud in the pleading of jurisdictional facts, and b) if the plaintiff is unable to establish a cause of action against the non-diverse party in state court. The majority further noted that usually a Rule 12(b)(6) type analysis, looking only at the pleading allegations, is sufficient, but noted that in some cases the plaintiff may have misstated a claim or omitted facts, in which case the Trial Court may "pierce the pleadings and conduct a summary inquiry." The plaintiff's motive or purpose is irrelevant to the summary inquiry, and considering same risks moving the court into resolution of the merits.

Applied to this case, ICRR was required to prove that Smallwood's claims against MDOT were preempted by federal law. However, preemption also barred Smallwood's claims against ICRR. In this situation, "there is no improper joinder; there is only a lawsuit lacking in merit. In such cases, it makes little sense to single out the in-state defendants as 'sham' defendants and call their joinder improper.... [T]he allegation of improper joinder is actually an attack on the merits of plaintiff's case...." The majority ordered the trial court to remand the case for want of jurisdiction to the state court.

The dissenting justices, including Justices Jolly, Jones, Smith, Barksdale, Garza, Clement and Prado, issued a variety of opinions, all concerned that the majority was not simply applying traditional improper joinder analysis. They opined that the current test is more objective, eschews personal motives, and is simpler because it does not require examining the case against the diverse defendant. The dissenters did applaud the majority's efforts to define more precisely (*vis a vis* the earlier panel opinion) the majority's "common defense theory," noting that the majority "had restricted the rule to apply only when the in-state defendant's defense is identical to the one asserted by the diverse defendant, which defense automatically and simultaneously disposes of the plaintiff's case against the diverse defendant as well."

AGENCY INTERPRETATION OF STATUTE / WAIVER OF ARGUMENT NOT PRESENTED TO AGENCY

***Louisiana Environmental Action Network v. U.S. EPA*, 382 F.3d 575 (5th Cir. 2004).**

An environmental organization challenged the EPA's approval of revisions to state implementation plans under the Clean Air Act for ozone in the Baton Rouge area. The Fifth Circuit noted that it reviews the agency's decisions under the standards set forth in *Chevron U.S.A., Inc. v. Natural Resource Defense Counsel, Inc.,* 467 U.S. 837 (1984). The first step of the *Chevron* inquiry is "to determine whether Congress has 'directly spoken to the precise question at issue.'" If Congress has directly spoken to the precise question, then the reviewing court must "give effect to [its] unambiguously expressed intent." Under this standard, "[r]eversal is warranted only where an agency interpretation is contrary to 'clear congressional intent.'"

Step two of the *Chevron* analysis "applies when the statute is either silent or ambiguous." When step two applies, "the court determines whether the agency interpretation is a 'permissible construction of the statute.'" Accordingly, "[d]eference is warranted where the agency's construction is permissible." Thus, the Fifth Circuit reverses only where the agency's construction is "arbitrary , capricious, an abuse of discretion, or otherwise not in accordance with law." (Citing the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A)). The Court noted that "under this deferential standard, a court reviewing an agency action may not substitute its own judgment for that of the agency." However, the Court will not defer to an agency decision that "is without substantial basis in fact." Accordingly, the Court limits the scope of its inquiry "to determining if the agency's judgment conforms to minimum standards of rationality" or, in other words, "whether the agency action bears a rational relationship to the statutory purposes" and whether there is "substantial evidence in the record to support it."

Applying these standards, the Court held EPA's approval of contingency measures prior to the failure of the State Implementation Plan was a reasonable interpretation of the Clean Air Act. However, the Court also found that the EPA had not "persuasively demonstrated" that pollution reductions at a trunkline facility more than twenty-four miles south of the non-attainment area had a rational connection to the properly applicable contingency measures. Therefore, the Court remanded to the EPA for additional investigation or explanation. (Citing *Fed. Power Comm'n v. Florida Power & Light Co.*, 404 U.S. 453, 744 (1972) (stating that if an agency decision cannot be affirmed on the basis of the administrative record, then the matter should be remanded to the agency for further consideration)).

The Court also held the appellant waived its argument that trunkline emissions could not be valid contingency measures because the reductions were required by state law. This contention was waived because the appellant "failed to raise the challenge before the EPA during the comment period on the final rule regarding the substitute contingency measure." The Court applied the rule that "[a]bsent exceptional circumstances, a party cannot judicially challenge agency action on grounds not presented to the agency at the appropriate time during the administrative proceeding." (Quoting *Public Citizen, Inc. v. EPA*, 343 F.3d 449, 461 (5th Cir. 2003)).

F.R.A.P. 38 SANCTIONS IN TAXPAYER CASE

***Trowbridge v. Comm'r of Internal Revenue,* 378 F.3d 432 (5th Cir. 2004).**

After the United States tax court found Taxpayer liable for tax deficiencies, it sanctioned Taxpayer for advancing frivolous positions and instituting and maintaining the proceeding primarily for delay. Taxpayer argued the Tax Court lacked jurisdiction, that he was not a "taxpayer" or "resident" of Texas subject to tax laws, that he forfeited all benefits from the United States, and so on. Taxpayer had also sought answers to 480 interrogatories and 545 requests for admission. The Fifth Circuit sanctioned Taxpayer for bringing a frivolous appeal, noting that "the Tax Court held that these very same arguments were frivolous and imposed sanctions of $25,000 against [Taxpayer], whose sanctions did not deter him from pressing the same frivolous arguments on appeal." The Fifth Circuit awarded a lump sum sanction of $6,000, pursuant to 26 U.S.C. § 7482(c)(4), 28 U.S.C. § 1912, and Federal Rule of Appellate Procedure 38. In awarding sanctions, the Fifth Circuit cited *Parker v. Commissioner*, 117 F.3d 785, 787 (5th Cir. 1997), which approved "the practice of imposing a lump sum sanction in lieu of costs because it 'saves the government the additional cost of calculating its expenses, and also saves the court the time and expense of reviewing the submission of costs.'"

ELEVENTH AMENDMENT IMMUNITY / INTERLOCUTORY APPEAL / ADA

***McCarthy ex rel. Travis v . Hawkins*, No. 03-50608, 2004 WL 2635695 (5th Cir. Nov. 19, 2004).**

The original decision in the case between these parties issued on Aug. 11, 2004 and is contained at 381 F.3d 407. A Petition for Rehearing En Banc subsequently was denied by the majority. However, Judges Smith, Jolly, Jones, Barksdale, Garza, Clement and Pickering joined in this pointed written dissent from the rehearing en banc.

This case originated from a claim by mentally disabled state residents against state officers alleging that the officers failed to provide adequate community-based living options to individuals with mental retardation and other disabilities, in violation of the Medicaid statute, the ADA, and the Rehabilitation Act. The panel opinion, written by Chief Judge King, held that, in a matter of first impression in the Fifth Circuit, state officers in their official capacities are proper defendants in an Ex parte Young suit to enforce the officers' alleged duties under Title II of the ADA, and that the Court of Appeals is not required to determine the constitutionality of the statutes sought to be enforced in the Ex parte Young suit on interlocutory appeal. Judge Smith wrote a dissent, picking up on language from Judge Garza's panel dissent, arguing that "a challenge to the constitutionality of a statute underlying an [*Ex parte Young* suit] is a proper subject of an Eleventh Amendment immunity analysis and that consideration of such a challenge is within the scope of an interlocutory appeal from the denial of a claim of Eleventh Amendment immunity."

The Court remained split when considering whether to accept en banc review. The dissenters argued primarily that the Eleventh Amendment grants immunity not just from ultimate liability, but also from suit, so that any "constitutional question must be addressed on interlocutory appeal if that immunity [from suit] is to be recognized." The dissenters argued against the majority's concern -- that the Court lacked not just discretion but jurisdiction to review the constitutional issue on interlocutory appeal --was even more reason to review the issues in this case now, the first available opportunity.

FEATHERWEIGHT STANDARD FOR FELA SUFFICIENCY ISSUES

***Rivera v. Union Pacific R.R. Co.*, 378 F.3d 502 (5th Cir. 2004).**

An injured welder brought a Federal Employer's Liability Act ("FELA") claim against his employer for negligently assigning him to a task beyond his physical capabilities. The jury found in favor of the worker. On appeal, the railroad argued the district court erred by denying its alternative motions for judgment as a matter of law or new trial on the ground that there was insufficient evidence to sustain the jury's finding of FELA liability under the "negligent-assignment" doctrine. The parties disputed the applicable standard of review. The Court held that, in the FELA context, it "must affirm the denial of the defendant's motion for judgment as a matter of law unless there is a complete absence of probative facts to support the conclusion reached by the jury." The Court referred to the standard as "FELA's featherweight standard of review." The Court rejected the railroad's argument that the Court should be guided by a reasonableness standard, noting that the featherweight standard "is highly favorable to the plaintiff, and recognizes that the FELA is protective of the plaintiff's right to a jury trial." The Court affirmed the judgment for the employee.

And how, asks the judge,
Do you overcome waiver?
Oralist swallows.

— Emilv Frost

REVERSE FOIA SUITS / MOOTNESS / OVERLY BROAD & VAGUE INJUNCTIONS

***Doe v. Veneman*, 380 F.3d 807 (5th Cir. 2004).**

In this reverse FOIA (Freedom of Information Act) case, farmers and ranchers sought to prevent the United States Department of Agriculture (USDA) from releasing data to the Animal Protection Institute (API). At issue was the release of names and locations of ranches and farms where "Livestock Protection Collars" (LPCs) were applied to sheep by the USDA. The LPCs have a bladder filled with restricted-use pesticide. If the sheep is attacked by a coyote or mountain lion, the attacking animal would presumably be killed. Under the agreements with the USDA, ranchers and farmers who participated in the program were called "Cooperators." Later, a second group, the Forest Guardians, sought additional information related to the LPCs. A Texas district court entered a permanent injunction which prohibited the government from disclosing any information that would allow the recipient to obtain or deduce the identity of Cooperators.

The appellants argued the district court exceeded its jurisdiction to the extent its injunction prohibited disclosure of information sought by the Forest Guardians, who had settled their FOIA claims brought in a New Mexico court. The Court reviewed Article III principles requiring a live case or controversy in order to sustain its jurisdiction. Because the Forest Guardians settled their claims, the issues related to their suit were moot. Moreover, the Forest Guardians settlement did not require the government to disclose the objected-to information. In this situation, a reverse-FOIA suit does not provide the remedy sought by the Cooperators. Rather, a party seeking to prevent the release of government information may seek judicial review under the Administrative Procedures Act. Accordingly, the district court's injunction prohibiting the release of Cooperator information sought in the Forest Guardian suit exceeded the district court's jurisdiction.

The Court also addressed whether the injunction was vague and overly broad. The broadness of an injunction refers to the range of proscribed activity, while vagueness refers to the particularity with which the proscribed activity is described. "Vagueness" is a question of notice, *i.e.*, procedural due process, and "broadness" is a matter of substantive law. The injunction was overly broad because (1) the information sought in the Forest Guardians suit was not properly before the court, (2) the Cooperators suit never challenged the release of locations where the LPCs were used, and (3) it improperly applied to all LPC records. In addition, the injunction was vague because its language was not specific since it encumbered the federal defendants with determining what combination of information might enable other parties to determine the identity of Cooperators.

TRADEMARK RIGHTS TO SURNAME / WAIVER OF ARGUMENTS / MODIFIERS

***Vais Arms, Inc. v. Vais*, 383 F.3d 287 (5th Cir. 2004).**

In this unfair competition claim under the Lanham Act and other theories, the Fifth Circuit affirmed the district court's grant of summary judgment and entry of a permanent injunction. The appellant, an individual named Vais, manufactured and sold firearm muzzle brakes through his unincorporated proprietorship, "Vais Arms." Mr. Vais sold his business to "Vais Arms, Inc." Then, Mr. Vais left the country, but later returned and began competing against Vais Arms, Inc. Mr. Vais resumed using the "Vais" mark. Vais Arms, Inc. brought suit. Mr. Vais argued, before the Fifth Circuit, that an individual cannot abandon his surname as a matter of law. The Fifth Circuit held that Mr. Vais waived this argument because he did not raise it in the district court. The Court further noted that, even if the argument had been preserved, it would rule against Mr. Vais because rights to use of a surname as a descriptive mark can be abandoned.

The Fifth Circuit also affirmed the district court's enforcement of the parties covenant not to compete for a geographic region including all of the United States. The geographical limitation at issue follows:

> This covenant shall apply to the geographical area that includes all U.S. states and countries which are included in the current customer bases.

Acting on Vais Arms, Inc.'s request, the district court reformed the clause to include only "U.S. states." At issue was whether "current customer bases" modified both "U.S. states" and "countries" or only "countries." The majority held that "a plain reading confirms beyond quibble" that the phrase "current customer bases" modifies only the foreign "countries" aspect of the geographic coverage–not the "U.S. states" portion. Judge Pickering dissented, in part, because he concluded the language was reasonably susceptible to more than one meaning and, therefore, ambiguous.

ERISA

***Ellis v. Liberty Life Assurance Co. of Boston*, No. 03-20623, 2004 WL 2635692 (5th Cir. Nov. 19, 2004).**

Plaintiff was a participant in an employee welfare benefits plan who claimed that her long-term disability (LTD) was wrongly terminated. She initially sued for breach of contract, breach of the duty of good faith and fair dealing, and violation of the state insurance statutes. The action was removed to federal court, where she amended her complaint to include an ERISA claim. The trial court dismissed the state law claims as preempted by ERISA, but granted summary judgment for Plaintiff on the ERISA claim.

The Court of Appeals reviewed the decision, affirming in part, reversing in part, and rendering in part. Justices Jolly and Wiener held that a) Plaintiff was entitled to amend her complaint to include the ERISA claim, b) the legally correct interpretation of the policy provision making a plan participant eligible for LTD benefits if she was "unable to perform all of the material and substantial duties" of her job due to injury or sickness meant that the participant was eligible only if she could not perform "each and every job duty," and c) the administrator, to support the termination of benefits after the administrator initially determined that the participant was eligible, was not required to prove a substantial change in the participant's medical condition.

Judge Pickering dissented, noting that the policy language was ambiguous and therefore should be construed against the insurer so that the phrase means "unable to perform *all* of the material and substantial duties" of the job, but for other reasons found this not dispositive. Instead, he took issue with allowing administrators to terminate benefits after previously finding eligibility, saying there should be required either a demonstration that the initial decision was erroneous or substantial evidence of a change in the claimant's medical condition.

The majority expressed concern that such a test would chill quick, initial determinations favoring the participant and that sometimes administrators just make an erroneous decision and should be able to reverse it. Judge Pickering noted that in this case, however, the administrator acknowledged the initial determination was still "appropriate."

ADA / MEANINGFUL ACCESS

***Melton v. Dallas Area Rapid Transit*, No. 04-10043, 2004 WL 2632857 (5th Cir. Nov. 19, 2004).**

Plaintiffs sued on behalf of their disabled adult son, Jason Melton, contending that Dallas Area Rapid Transit (DART) was required by the ADA to make "reasonable accommodations" to its paratransit services, including picking up Jason directly behind his house rather than a block away

from the house. The trial court granted DART summary judgment.

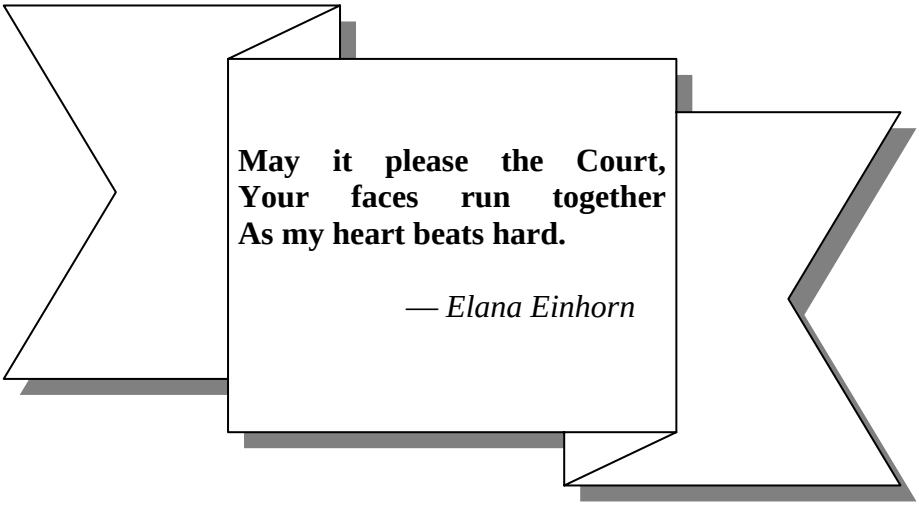
All parties agreed that Jason Melton met the first element of a prima facie case because he is a qualified individual within the meaning of the ADA. The second element was disputed. DART argued that Jason had not been excluded from participation in, or denied the benefits of, DART's paratransit service. Jason countered, arguing that he had been denied "meaningful access," and that Supreme Court precedent rendered this the equivalent of a full denial of access. The Court, Judge Jolly writing joined by Judges Garwood and Barksdale, did not directly address this argument, instead deciding the case on the third ground of an ADA prima facie case, *i.e*., whether there was discrimination on the basis of Jason's disability. More specifically, the Court phrased the question as: "whether a paratransit service that is consistent with an FTA-approved plan is sufficient for compliance with the ADA, or whether the ADA requires a public transportation system to make reasonable modifications to its paratransit service," noting that this was an issue of first impression for any federal circuit court.

In resolving this case, the Court first noted that the duty to provide reasonable modifications under the ADA does not apply to public transportation services, programs, and activities of public entities. The Court also noted that the law requires public entities to submit a plan that provides a level of paratransit service comparable to the services provided to individuals without disabilities. Once the plan is approved, this is all that is required. Indeed, providing paratransit services *not* in accord with the plan would be prohibited discrimination.

ADA / INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

***Brennan v. Mercedes Benz USA*, 388 F.3d 133 (5th Cir. 2004).**

Plaintiff was a student with dyslexia and attention deficit disorder who brought an ADA lawsuit against his automotive mechanic school based on the school's alleged interference with his "job training." Judge Jerry Smith, writing for a unanimous panel that also included Judges Jones and Stewart, in affirming the trial court judgment, held that a student does not have standing to bring an ADA claim against a school or manufacturer involved in the school program because the student was not in an employment relationship with either the school or the manufacturer. The Court also found that the defendants' conduct was not "anything near the sort of outrageous behavior needed to support a claim for intentional infliction of emotional distress."



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ARBITRATION

***Micwal, Inc., f/d/b/a Cross Timbers Care Center v. The State Of Texas*, 2004 WL 2569386 (Tex.App.--Fort Worth 2004, n.p.h.).**

This case presents the question of whether a party who elects to resolve a dispute by arbitration under Ch. 242 of the Texas Health & Safety Code may thereafter seek to vacate an arbitration award entered against it. The State of Texas sought civil penalties against Cross Timbers Care Center. Cross Timbers elected to resolve the State's claims through binding arbitration under Ch. 242 of the Texas Health & Safety Code which governs resolution of civil penalties sought by the State against convalescent and nursing homes. An arbitration award was entered and Cross Timbers moved in the district court to partially vacate the arbitration award. The Fort Worth Court of Appeals noted that no statutory provision exists permitting a party who elects binding arbitration under Ch. 242 to move to vacate, or appeal an arbitration award. In the instant case, because Cross Timbers was the party moving for arbitration, the trial court was not permitted to vacate the arbitration award under Ch. 242's statutory scheme. The court noted that Ch. 242 authorizes a trial court to vacate an arbitration award only upon an application made by a party not electing and moving for arbitration under the chapter. Thus, the court held that because Cross Timbers was the party electing and moving for arbitration that the trial court properly denied Cross Timbers' motion to vacate the arbitration award.

SOVEREIGN IMMUNITY

***Texas Dept. of Family & Protective Services v. Atwood*, 2004 WL 2823135 (Tex.App.--Houston [1st Dist.] 2004, n.p.h.).**

This case presents a question of first impression, namely, whether the Texas Tort Claims Act waives the Texas Department of Family & Protective Services' sovereign immunity to liability for claims arising from the death or injury of a child caused by the use of tangible property or by a premises defect in a licensed foster home.

The Texas Department of Family & Protective Services (DFPS) removed three children from their mother's care and placed them with licensed foster parents, Dolan and Linda Roe. Thereafter, a DFPS caseworker visited the Roe home to evaluate the children. The DFPS caseworker noticed an above-ground swimming pool accessed directly by a deck in the Roe's backyard. Concerned that the children might access the swimming pool while outside the supervision of the Roes, the caseworker urged Mrs. Roe to construct a locking gate to prevent the children from accessing the pool alone. The caseworker informed Mrs. Roe that it was the policy of Region 6 of DFPS to require a locked gate to block swimming pool access. Mrs. Roe agreed to install a gate and assured the caseworker that a permanent locking gate would be constructed that evening. Approximately ten days later, Mrs. Roe found one of the children lying at the bottom of the pool. The child died. Thereafter, the biological parents sued the Roes and the DFPS claiming: (1) the use and misuse of personal property, (2) premises defect, (3) negligent supervision, (4) joint enterprise, and (5) joint venture. The biological parents alleged that at the

time of the incident DFPS was a possessor of the property and that DFPS exercised control over the Roe's home. Additionally, the biological parents asserted that DFPS waived sovereign immunity from the underlying claims because those claims involved personal injury and death caused by a condition and/or use of personal property, as well as a condition and/or use of real property. The DFPS filed a plea to the jurisdiction, contending that the Plaintiff's claims were barred by sovereign immunity and governmental immunity. The Plaintiffs contended that the claims were not barred because they fell within the waiver of governmental immunity as set forth in the Texas Tort Claims Act.

The Texas Tort Claims Act expressly waives sovereign immunity in three general areas: (1) injury caused by an employee's use of a motor vehicle, (2) injury caused by a condition or use of tangible personal or real property, and (3) injury caused by premise defect. There was no question that DFPS is a "governmental unit" as defined under the Tort Claims Act. The court considered whether the biological parents' pleadings of jurisdictional evidence were sufficient to maintain either a premise defect claim or a claim for injury arising out of conditions or use of property within the Tort Claim Act's immunity waiver.

The Houston Court of Appeals made several holdings. First, the court concluded that the biological parents' claims of negligent supervision were not actionable because negligent supervision claims do not constitute a premise defect or the condition or use of property. Second, the Tort Claims Act waives immunity for a use of personal property only if the governmental unit is itself the user. The court noted that a governmental unit does not "use" personal property merely by allowing someone else to use it and nothing more. The DFPS was not itself the user of the personal property in question. Third, the Houston court noted that although DFPS regulated the Roe foster home and had the right to place or remove the children, DFPS did not have the legal right to control the Roes. Based on this, the Houston court concluded that the Roe's, as foster parents of a regulated, registered foster home licensed by the DFPS, were not employees as defined under the Tort Claims Act, and, therefore, were not acting within the scope of employment. Fourth, the biological parents alleged that the personal property in question lacked an integral safety component and that DFPS had a duty to provide all integral safety components. However, the court of appeals concluded that the biological parents did not allege, nor provide any evidence, that DFPS provided any of the personal property that allegedly lacked an integral safety component. As such, the court concluded that the biological parents' claim against DFPS for injury arising out of condition or use (or misuse) of defective or non-defective tangible property was insufficient to waive sovereign immunity under the Tort Claims Act.

With regard to the premises defect claim, the Houston court stated that a licensee asserting a premises defect claim must first show that the defendant possessed - that is, owned, occupied, or controlled - the premises where the injury occurred. The court noted that it was undisputed that DFPS neither owned or occupied the premises at issue. Thus, the question before the court was whether DFPS assumed sufficient control over that part of the Roe's property so that DFPS had the responsibility to remedy the danger to the foster child. The court concluded that DFPS did not assume control over that part of the Roe's property that presented the potential danger to the foster child such that DFPS can be liable for the Roe's failure to remedy it. As such, the court concluded that the biological parents did not plead or prove the first element of a premises liability claim, namely, that DFPS possessed the property. Finally, the court of appeals concluded that the foster care agreement between DFPS and a foster family did not constitute a joint enterprise because it was an enterprise which did not have a business or pecuniary interest, a necessary element to establish joint enterprise. Moreover, the foster care agreement between DFPS and the Roes did not constitute a joint venture because there was no evidence that the agreement included any sort of an agreement to share profits or losses, a required element to establish a joint venture.

PATERNITY

***In re Sharon Elizabeth Sullivan*, 2004 WL 2800943 (Tex.App.--Houston [14th Dist.] 2004, orig. proceeding).**

This original proceeding presents a question of first impression under the Texas Family Code: Does an unmarried man who donated sperm to an unmarried woman for the conception of a child have standing to maintain a proceeding to adjudicate parentage of the resulting child? Sharon Sullivan was an unmarried woman. Bryan Russell was an unmarried man. Neither had been married previously. Sullivan wanted to conceive a child. Russell agreed to provide his sperm so that Sullivan could be artificially inseminated. Russell and Sullivan signed a "co-parenting" agreement, which provided, among other things, that the decision to conceive and bear a child was a joint decision of the parties and based upon the commitment of each party to parent the child. The co-parenting agreement further stated that each party agreed that the child born as a result of the donor insemination procedure would be the child of Russell as if he and Sullivan were married at the time of conception, and that Russell would be named as the father on the birth certificate. Finally, the co-parenting agreement provided that Sullivan would provide primary residence for the child, but that Russell would have possession of the child at any and all times mutually agreed to in advance by the parties, and, failing mutual agreement, that Russell would have possession of the child under the standard possession schedule attached to the agreement.

Before the child was born, a disagreement arose between Russell and Sullivan. Russell filed to adjudicate parentage, and for breach of contract. Russell sought a decree establishing a parent-child relationship between the child and Russell Sullivan filed a plea to the jurisdiction claiming that under the Texas Family Code Russell lacked standing to bring a proceeding to adjudicate parentage because he is a sperm donor with no parental rights. The trial court ruled that Russell had standing and denied Sullivan's plea to the jurisdiction. Sullivan then filed a petition for writ of mandamus alleging that the trial judge abused her discretion by finding that Russell had standing to maintain a proceeding to adjudicate his parentage.

Texas Family Code § 160.602 provides that "[a] man whose paternity of the child is to be adjudicated may maintain a parentage proceeding." Sullivan contended that Russell is not "a man whose paternity of the child is to be adjudicated" because Russell is a donor who lacks parental rights and standing to maintain a parentage proceeding. Sullivan further contended that § 160.702 of the Texas Family Code deprives Russell of standing because, under that section, "a donor is not a parent of a child conceived by means of assisted reproduction."

The court of appeals noted that the term "a man whose paternity of the child is to be adjudicated" is a perplexing and ambiguous statutory phrase. The court ultimately concluded that the phrase "a man whose paternity of the child is to be adjudicated" is broad language, and that had the Texas Legislature intended to exclude donors from the class of those who have standing to maintain a parentage proceeding, that the legislature easily could have excluded donors from that group. Thus, for purposes of standing, the court concluded that § 160.602 confers standing on a man alleging himself to be the biological father of the child in question and seeking an adjudication that he is the father of that child. The court further concluded that under the statute, as drafted, the issue of a man's status as a donor under § 160.702 of the Texas Family Code is to be decided at the merit stage of the litigation rather than as part of the threshold issue of standing.

EXPERT DISQUALIFICATION

***Formosa Plastics Corp. v. Kajima International, Inc.*, 2004 WL 2534207 (Tex.App.--Corpus Christi 2004, n.p.h.).**

This case presents the question of what test should be applied when one seeks to disqualify an expert that switches sides in a lawsuit. In this case, Formosa - the defendant, hired a consulting expert in connection with a lawsuit which Kajima had filed against Formosa. Thereafter, Formosa changed lawyers, and Formosa's expert was told that his work for Formosa was "on hold." A few months later, Kajima's lead counsel contacted the expert. Ultimately, the expert was hired by Kajima and designated as a testifying expert for Kajima. Thereafter, Formosa filed a motion to strike the expert for "side-switching." The Corpus Christi court noted that disqualification of an expert that switches sides is an issue of first impression in Texas. However, the Corpus Christi Court of Appeals adopted the two-part test set forth in *Koch v. Bordeaux*, 85 F.3d 1178 (5th Cir. 1997) by the Fifth Circuit Court of Appeals. The two-part test is: (1) was it objectively reasonable for the first party who claims to have retained the expert to conclude that a confidential relationship existed between that party and the expert; and (2) did the first party disclose any confidential or privileged information to the expert? The court of appeals, in applying the two-part test, concluded that it was objectively reasonable for Formosa to conclude that a confidential relationship existed with the expert, and that Formosa disclosed confidential information to the expert. It should be noted that in a dissenting opinion, Justice Castillo concluded that the standard to apply to the conflict of interest challenge to Kajima's expert should be analogous to the standards associated with appellate review of a trial court's ruling on an attorney disqualification motion, and, therefore, the abuse of discretion standard of review should be applied.

INSURANCE

***Columbia Cas. Co. v. CP Nat'l, Inc.*, 2004 WL 2066247 (Tex.App.--Houston [1st Dist.] 2004, no pet.**

Plaintiff National Emergency Services, Inc. (NES) is a physician practice management company. CP National Inc. (CPN) is one of NES' affiliates that provides emergency room care physicians. The physicians in question worked at Sibley Memorial Hospital in Washington, D.C. Columbia Casualty Company provided NES, and its affiliates (including CPN and physicians under contract with NES) coverage under certain professional liability insurance policies against claims and suits arising out of alleged medical malpractice. The policy at issue was a "claims-made medical practitioner's policy" that insured NES and its affiliates and subsidiary companies as "named insured" against claims covered by the policy and reported to the carrier. In 1998, a medical malpractice lawsuit was filed against numerous defendants. Pursuant to the policy, Columbia defended NES, CPN, and Doctors Doyan and Pearce, employees of CPN. A dispute arose concerning the applicable limits of the Columbia policy. Columbia claimed that the policy expressly provided for a "per loss event" limit of liability of $1 million. NES and CPN argued that the policy afforded a separate $1 million limit each for claims against Dr. Doyan and Dr. Pearce, thus creating a policy limit of $2 million. NES and CPN filed a lawsuit against Columbia. The trial court granted NES' and CPN's motion for partial summary judgment as it related to the dispute over the monetary limits available.

The facts of the underlying lawsuit were generally as follows. Howard Flax sought treatment at Sibley Emergency, complaining of persistent fever and cough. Dr. Doyan examined Flax. Dr. Doyan ordered a chest x-ray. Dr. Doyan performed a preliminary reading of the x-ray and concluded it was negative for pneumonia but that there was possibly a large lymph node. The next day, Dr. Newman, a radiologist interpreted the chest x-ray as "probably normal" and suggested a

repeat x-ray in 30 to 60 days. He sent his report to the emergency room the next day, where Dr. Pearce was on duty. Dr. Pearce was responsible for reporting the x-ray interpretation from the radiologist to Mr. Flax and to Mr. Flax's private physician. Dr. Pearce allegedly failed to inform Flax's private physician about the x-ray and failed to communicate to Mr. Flax that, although the x-ray looked normal, there was a possible presence of an abnormality and that a follow-up x-ray was recommended in 30 to 60 days. Flax was later diagnosed with lymphoma and died. In the underlying lawsuit, the survivors alleged that the defendants misinterpreted, mishandled, and miscommunicated the results of Mr. Flax's chest x-rays taken at Sibley Hospital.

On appeal, Columbia's sole issue was whether the trial court erred in rendering summary judgment for CPN and NES declaring that the policy afforded a separate $1 million limit each for Dr. Doyan and Dr. Pearce. Columbia contended that the insurance policy at issue provided only a single limit of liability in the amount of $1 million for the claims arising out of the injury to Mr. Flax. The court of appeals looked to the "limits of liability" section of the policy (Section III), and Endorsement 12 which contained a "$1 million per loss event" endorsement. The court of appeals reversed and rendered, holding that Columbia's total liability under the policy is limited to $1 million. The court concluded that all the medical incidents involved the same patient, at the same facility, during the same period of time, with regard to the same x-ray. The court further noted that all of the acts of malpractice alleged against Doctors Doyan and Pearce allegedly lead to a single result that formed the basis of the Flax lawsuit - failure to apprise Flax of his lymphoma, leading to a delayed diagnosis, and thus Flax's early death from lymphoma. The court therefore concluded that the medical incidents that formed the basis of the Flax lawsuit are related medical incidents under the plain meaning of the policy language.

MEDICAL MALPRACTICE

***Gross v. Burt,* 2004 WL 1944382 (Tex.App.--Fort Worth 2004, pet. filed).**

Hunter and Tyler Burt were born prematurely at Harris Methodist Hospital. They both required ventilation and some oxygenation and remained in neonatal intensive care for approximately two months. One of the twins, Hunter, was potentially at risk for retinopathy of prematurity (ROP), which can result in retinal scarring, retinal detachment, vision loss, and even blindness. Babies at risk for ROP require serial screening. Dr. Kim Smith, a neonatologist, was the admitting and attending physician for the twins while they remained in neonatal intensive care. It is the attending neonatologist who determines whether a premature baby needs to be screened for ROP. Harris Hospital had an ROP screening protocol. When a premature infant meets the protocol criteria, the infant's name is placed on one of the consulting ophthalmologist's examining list. The actual screening is performed by a pediatric ophthalmologist. At the Harris Neonatal Intensive Care Unit, the pediatric ophthalmologist is a consulting physician requested or ordered by the attending physician, who reports back to the attending physician. Dr. Smith ordered a screening ROP examination for Hunter because he met the hospital protocol for ROP screening. On Dr. Smith's order, Dr. Gross performed a preliminary screening examination. Dr. Gross determined that Hunter had Stage 1 ROP in his right eye, and Dr. Gross reported his findings and recommendations to Dr. Smith and recommended that Hunter seek a follow-up visit within two weeks. The Harris Neonatal nurses helped the mother make eye appointments for both twins in approximately ten days. The mother did not take the twins to the scheduled appointment. The mother missed the rescheduled appointment. Hunter did not see a pediatric ophthalmologist until June of 1997 when, he, along with his brother, Tyler, were both diagnosed as being legally blind.

At trial, the jury determined Dr. Gross to be 15% at fault. Dr. Gross appealed. Dr. Gross argued, among other things, that any physician-patient relationship he had with the twins was terminated upon completion of his initial screening for ROP. Dr. Gross contended that he had no physician-patient relationship with Hunter, and that any relationship he had with Hunter ended when he completed the initial screening ROP exam in the neonatal intensive care and provided Hunter's attending neonatologist with his report and diagnosis. The parents contended that the physician-patient relationship continued and Dr. Gross consented to further examination and treatment, especially in light of a letter from Dr. Smith's office that was either taped to Hunter's crib in the neonatal intensive care or was included in Hunter's discharge papers from the hospital. The "Dear Parent" letter explained to the parents about ROP and that follow-up examinations are routine and necessary.

The court of appeals noted that the "Dear Parent" letter was a form letter written by Fort Worth Neonatal Associates, P.A., Dr. Smith's practice group, as opposed to Dr. Gross' group. The court concluded that this type of form letter alone would not impose a continuing physician-patient relationship with Dr. Gross. The court finally concluded that the mere act of agreeing to see a patient at a later time does not establish the physician-patient relationship. (The court noted this was especially so when there had been an intervening identification issue as in the instant case). The court concluded, "[i]f we were to expand the duty of continued care to all patients who are seen at hospitals by consulting physicians beyond the hospital setting based solely upon the fact that they were seen by the physician in the hospital, there would be no end to the physician-patient relationship." The court held that under the facts, the examination of a patient at a hospital by a consulting or referred specialist physician does not create a continuing duty upon that physician to insure follow-up is maintained once the physician has supplied the primary or referring physician with the results unless the patient and the consulting or referred specialist physician take some further affirmative action to continue the relationship.

Of particular note is the dissenting opinion from denial of motion for rehearing en banc by Justice Walker. Notably, Justice Walker stated that she believes the case presents an issue of extraordinary circumstances requiring an en banc review. Justice Walker noted that the issue appears to be a case of first impression involving an increasingly common issue of the extent of a physician-patient relationship arising out of consultation by a specialist in the hospital setting. Readers should keep an eye on this case.

LIMITATIONS

***Riston v. John Doe 1 a/k/a Thyssenkrupp Elevator Corp.*, 2004 WL 1661030 (Tex.App.--Houston [14th Dist.] 2004, pet. denied).**

This case presents an issue of first impression in Texas of whether a plaintiff can use a "John Doe" petition to toll the statute of limitations if not otherwise specifically authorized by statute. The plaintiff claimed she was injured when she was struck by an elevator door in Houston Intercontinental Airport. She originally sued the City of Houston only. However, the day before limitations ran, plaintiff filed a first amended petition adding defendants "John Doe #1 through John Doe #5" as defendants. She alleged that these "John Doe" Defendants designed, manufactured, sold, installed, built and/or maintained the elevator. Two days after limitations had run, the plaintiff filed a second amended petition identifying John Doe #1 as "a/k/a Thyssenkrupp Elevator Corp." Thyssenkrupp moved for summary judgment claiming that the plaintiff did not file suit against Thyssenkrupp within the two year statute of limitations. The trial court granted the motion for summary judgment and dismissed plaintiff's claims against Thyssenkrupp.

The Houston Fourteenth Court of Appeals noted that, "[t]his presents an issue of first impression in Texas. The parties do not cite, and we have not found, any Texas law addressing the use of a 'John Doe' petition to toll the statute of limitations, except where specifically authorized by statute." The Houston court noted that the misnomer doctrine was inapplicable, noting that "John Doe" is not a misnomer for any person or entity. The Houston court further noted that no Texas statute generally authorizes a "John Doe" petition to toll limitations as to an unknown defendant. The court noted that Texas legislature has authorized the use of a "John Doe" petition to toll limitations for unknown defendants in sexual assault cases. However, there is no similar provision in the two year statute of limitations for personal injury suits that are not based on sexual assault. The court noted that if the legislature had intended for the two year statute of limitations to be tolled as to unknown defendants by the filing of a "John Doe" petition, it could have included such a provision in the statute. The court also stated that although a "John Doe" petition involves an unknown defendant, for limitations purposes, it should be treated the same as a petition involving misidentification. The court explained that misidentification is distinct from misnomer. Misidentification arises when two separate legal entities actually exist and the plaintiff mistakenly sues the entity with a name similar to that of the correct entity. In such a case, the plaintiff has sued the wrong party and limitations is not tolled. Finally, the court noted that the statute of limitations would have little, if any, import if they could easily be circumvented by filing a "John Doe" petition.

When you file a brief,
do make it concise and sweet.
The court will be pleased.

— *Jill Stephens*
Staff Attorney

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RIGHT TO APPEAL AND TEX. R. APP. P. 25.2(a)(2)

***Estrada v. State*, No. 01-04-00086-CR, 2004 WL 2250890 (Tex. App.—Houston [1st Dist.] Oct. 7, 2004, no pet.) (per curiam).**

As part of a plea-bargain, Estrada pleaded guilty to aggravated assault and true to elements in an enhancement paragraph indicating he had a prior felony conviction. The trial court's certification of the appellant's right to appeal expressly stated that "the defendant has NO right of appeal . . . [and] the defendant has waived the right of appeal."

The court of appeals originally issued an order notifying the parties that the appeal would be dismissed unless Estrada could produce an amended certification indicating he had been granted the right of appeal by the trial court. He could not and the court of appeals issued an opinion dismissing the appeal.

Estrada subsequently filed a motion for rehearing arguing for clarification on several points, but most notably on whether the trial court's refusal to grant permission to appeal and certify appellant's right to appeal the adverse ruling on his motion for new trial was itself appealable.

The first district court dismissed the appeal for lack of jurisdiction, because Texas Rule of Appellate Procedure 25(a)(2) specifically limits appeals in plea-bargained cases to only: (1) matters raised by written motion filed and ruled on before the trial court, or (2) after receiving the trial court's permission to appeal. Neither of these exceptions applied to Estrada. Further, the court of appeals explained that, in delegating authority to the Court of Criminal Appeals to promulgate appellate rules in criminal cases, the legislature has provided that the rules could not abridge, enlarge, or modify the substantive rights of a litigant.

PLEA TO THE JURISDICTION

***Ray Ferguson Interests, Inc. v. Harris County Sports and Convention Corp.*, No. 01-04-00568-CV, 2004 WL (Tex. App.—Houston [1st Dist.] Oct. 7, 2004, no pet.).**

In 1999, the Harris County Sports and Convention Corp. ("HCSCC"), a local government corporation created under section 431.101(a) of the Transportation Code, awarded Ray Ferguson Interests, Inc. ("Ferguson") a contract to build parking lots and other facilities at Reliant Stadium. Problems subsequently arose, Ferguson sued HCSCC and HCSCC initially counterclaimed for damages and attorneys fees against Ferguson, but later filed a jurisdictional plea to each of Ferguson's claims. Soon thereafter, the trial court dismissed all of Ferguson's claims with prejudice.

The issue presented on appeal was whether, under the Texas Supreme Court's recent decision in *Reata Construction Corp. v. City of Dallas*, 47 Tex. Sup. Ct. J. 408, 2004 WL 726906 (Apr. 2, 2004), HCSCC waived its governmental immunity from suit by intervening in a lawsuit to assert claims for affirmative relief.

The court of appeals held that, while this case concerned a counterclaim for affirmative relief and *Reata* dealt with a governmental entity intervening to assert affirmative relief, the distinction did not warrant a different result. Accordingly, the court reversed and remanded, holding that even if the counterclaim was compulsory—as HCSCC alleged—the proper procedure for a governmental entity to follow under *Reata* is to first file a plea to the jurisdiction before filing any counterclaim.

FINALITY

***In re Nasir*, 142 S.W.3d 357 (Tex. App.—El Paso 2004, orig. proceeding).**

George and Rosa Colomo filed a medical malpractice lawsuit against Porfirio Miranda, R.N., David Raphael, M.D., and Daoud Nasir, M.D., on behalf of their deceased son. However, the Colomos never served Raphael and he never appeared before the trial court. Nasir and Miranda later moved for a no-evidence summary judgment, and the trial court granted their motion on December 13, 2002. The court then set that order aside on July 14, 2003 after the Colomo's filed a motion for reconsideration—albeit almost four months after the trial court's plenary power over the summary judgment expired on March 28, 2003. Nasir filed a petition for writ of mandamus.

The court of appeals considered whether the summary judgment granted on December 13, 2002 was final in light of the Texas Supreme Court's decision in *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). At issue was whether *Lehmann*—which held that a judgment is final for purposes of appeal only if it disposes of all pending parties and claims in the record—overruled the Supreme Court's decision in *Youngstown Sheet & Tube Co. v. Penn*, 363 S.W.2d 230 (Tex. 1962), where the Court held that a case in which a party was never served and did not answer should be viewed on appeal only as if a discontinuance regarding the unserved party had been granted, and the judgment should be regarded as final for the purposes of appeal.

After canvassing other jurisdictions' handling of this issue, the court of appeals held that there was no indication in *Lehman* that the Supreme Court intended to overrule *Youngstown*. Accordingly, the court of appeals conditionally granted the writ of mandamus.

***Fresh Coat, Inc. v. Life Forms, Inc.*, 125 S.W.3d 765 (Tex. App.—Houston [1st Dist.] 2003, no pet.).**

After both were made parties to a class-action lawsuit, Life Forms, Inc. ("Life Forms") sued Fresh Coat, Inc. ("Fresh Coat") for indemnity. Life Forms then filed a motion for summary judgment alleging that Fresh Coat was contractually obligated to indemnify Life Forms for the attorneys' fees, costs, and settlements incurred and paid by Life Forms as a result of the class-action suit. The trial court signed a "Final Judgment" granting Life Forms' motion for summary judgment, which contained the proviso that "[t]his is a final judgment disposing of all parties and all issues," and a "Mother Hubbard" clause stating that "[a]ll relief not expressly granted is denied."

Fresh Coat appealed the judgment, alleging that the language the trial court used was not an unequivocal statement of finality, because the trial court did not include the phrase " . . . and is appealable" after the "final judgment disposing of all parties and all issues" passage.

The court of appeals rejected this argument, holding that because the trial court could not have granted any more relief to Life Forms than it did (awarding to the penny, the amount of damages that Life Forms claimed it was entitled to recover from Fresh Coat), the judgment clearly, finally, and unambiguously disposed of all parties and all claims. The appellate court further explained that if Fresh Coat had any question as to the finality of the trial court's judgment, it could have either requested the trial court clarify its judgment while the court still retained plenary power, or perfected a timely appeal from the judgment.

ACCELERATED APPEALS AND TEX. R. APP. P. 28.3

***In re J.S.*, 136 S.W.3d 716 (Tex. App.—El Paso 2004, no pet.).**

After receiving a courtesy reminder from the clerk of the court of appeals regarding the past-due status of the appellant's brief, the appellant cited Texas Rule of Appellate Procedure 28.3 as allowing for the absence of briefing in accelerated appeals.

The appellate court expressly issued an opinion in this case to clarify the correct application of the rule. The court construed the clause from Rule 28.3 stating that the "appellate court may allow the case to be submitted without briefs" to give only the reviewing court, and not the appellant, the discretion to dispense with normal briefing requirements.

In a case where an appellant believes that briefing may be unnecessary, the court of appeals held that the appellant should file a proper motion, accompanied by the proper fee, and demonstrate why briefs should not be required.

Therefore, the appellate court ordered the appellant to file a motion for extension of time to file the brief.

RECORD INFORMALITIES AND TEX. R. APP. P. 10.5(a)

***Waite v. Waite*, No. 14-02-01211-CV, 2004 WL 2222836 (Tex. App.—Houston [14th Dist.] Oct. 5, 2004, no pet.).**

Margaret Waite sued her husband Daniel for divorce, and he appealed the unequal property division awarded him in the divorce judgment. Mrs. Waite filed a motion to dismiss her ex-husband's appeal under the theory that he accepted substantial benefits awarded him in the divorce decree.

Mr. Waite argued to the court of appeals that it could not consider Mrs. Waite's motion to dismiss because of Texas Rule of Appellate Procedure 10.5(a), which governs informalities in the record, alleging that the acceptance of benefits doctrine was really a record informality, and as such, Mrs. Waite's motion was not timely filed.

The court of appeals rejected Mr. Waite's argument, explaining that the acceptance of benefits doctrine is a substantive rule grounded in estoppel; and therefore has nothing to do with informalities in an appellate record, which involve procedural defects in the form of the record itself. Accordingly, the court found that any appellate deadlines contained in Rule 10.5(a) did not apply to Mrs. Waite's motion to dismiss.

NEW TRIAL

***Pessel v. Jenkins*, 125 S.W.3d 807 (Tex. App.—Texarkana 2004, no pet.).**

Edward and Linda Jenkins (the "Jenkins") purchased a home from Pete Pessel, but only two years later the Jenkins sued both Pete and his wife Donna (the "Pessels") for construction defects in their home. With the court's permission, the Pessels' attorney withdrew shortly before trial, and the court instructed all further correspondence be sent directly to the Pessels. They failed to appear at the trial, however, and the trial court rendered judgment against them, awarding attorneys fees and costs of the court as well. The Pessels filed a motion for new trial, alleging that they never received any notice of the trial setting, but the trial court denied the motion.

The Pessels appealed the trial court's denial, and the court of appeals reviewed the factors governing the grant of a motion for new trial outlined in *Craddock v. Sunshine Bus Lines, Inc.*, 134 Tex. 388, 133 S.W.2d 124 (1939). Although the Jenkins alleged that the Pessels could not satisfy any of the *Craddock* factors, the appellate court held that because the Pessels alleged that their failure to answer before judgment was not intentional or the result of conscious indifference, they satisfied the first *Craddock* factor, and

therefore did not need to meet any of the remaining *Craddock* requirements in order to be entitled to a new trial.

REPORTER'S RECORD AND TEX. R. APP. P. 34.6(d)

***Daniels v. University of Texas Health Science Center of Tyler*, No. 12-03-00399-CV, 2004 WL 1795348 (Tex. App.—Tyler Aug. 11, 2004, no pet.).**

Daniels sued the University of Texas Health Science Center of Tyler ("UTHC") for injuries she received from a UTHC employee's negligence. The jury awarded a monetary sum for her past medical expenses, but denied all other relief. Daniels timely filed her notice of appeal, but did not request the reporter's record, citing the large expense involved.

Texas Rule of Appellate Procedure 34.6 governs the procedures related to filing and supplementing the reporter's record. The court of appeals held, that because Daniels did not file any portion of the reporter's record, she was not entitled to file a supplemental reporter's record. While Rule 34.6(b)(3) prohibits an appellate court from refusing to file a reporter's record or supplemental record because of a failure to timely request it, the court of appeals explained that the question before it did not involve the effect of an appellant's failure to timely request a reporter's record, but a supplemental record *in lieu of* a reporter's record. Rule 34.6(d) governs the filing of a supplemental reporter's record, and it plainly states that a supplemental reporter's record may be filed when a reporter's record has been filed and is later discovered to be incomplete.

The appellate court found that Daniels had other avenues available to her if the financial hardship of filing the entire reporter's record was truly too burdensome, such as filing a partial reporter's record under Rule 34.6(c), or an agreed reporter's record as permitted by Rule 34.2.

NO EVIDENCE MOTIONS

***Cimarron Hydrocarbons Corp. v. Carpenter*, 143 S.W.3d 560 (Tex. App.—Dallas 2004, pet. filed).**

Cimarron Hyrdrocarbons Corp. ("Cimarron") contracted with one of Bob Carpenter's subsidiaries to select, furnish, and install casing in one of Cimarron's oil and gas wells. The casing failed, causing no oil or gas to ever be produced from the well, and Cimarron sued Carpenter for various DTPA violations. Carpenter filed both traditional and no-evidence motions for summary judgment, which the trial court granted after Cimarron failed to timely respond. Cimarron appealed and was granted relief at the trial court, but was overruled by the Texas Supreme Court, which reversed and remanded the case back to the trial court to consider the legal sufficiency of Carpenter's motion for no-evidence summary judgment.

The court of appeals recognized a split of opinion among the courts of appeal as to whether a nonmovant preserves error when no response is filed to a no-evidence summary judgment. The appellate court agreed with the interpretation given to the Texas Supreme Court's decision in *McConnell v. Southside Independent School District*, 858 S.W.2d 337 (Tex. 1993)—which dealt with traditional summary judgments—by other courts of appeal as not requiring a nonmovant to object to the legal sufficiency of a no-evidence motion for summary judgment at trial. Accordingly, the court of appeals held that Cimarron timely raised the legal sufficiency of Carpenter's no-evidence summary judgment in its original appellate brief.

RESTRICTED APPEALS AND TEX. R. CIV. P. 106 AND 107

***Armendariz v. Barragan*, 143 S.W.3d 853 (Tex. App.—El Paso 2004, no pet.).**

Rose Barragan sued Araceli and Jose Armendariz for injuries she sustained that were the result of a car accident caused by Araceli. After several attempts to serve the Armendarizes failed, service was finally accomplished by securing the forms to the front doors of both Aracelli and Jose's residences per Texas Rule of Civil Procedure 106. The Armendarizes failed to appear at trial and the court found against them. The Armendarizes subsequently filed a restricted appeal under Texas Rule of Appellate Procedure 30, alleging that the error apparent on the face of the record was Barragan's defective service of process due to a lack of a verified return of the service citation, as required by Texas Rule of Civil Procedure 107.

The court of appeals held that, under the Texas Supreme Court's decisions in *Primate Construction, Inc. v. Silver*, 884 S.W.2d 151 (Tex. 1994) and *Uvalde Country Club v. Martin Linen Supply Co.*, 690 S.W.2d 884 (Tex. 1985), a reviewing court cannot presume a valid return of citation if none was ever introduced into the record, and as such, the attempted service of process is rendered invalid. The appellate court explained that while the record reflected a valid exercise of service, nothing in the record showed that a verified return of citation was ever delivered. Accordingly, the court of appeals concluded that the service of process was invalid and of no effect, and vacated the judgment of the trial court.

PLENARY POWER

***Martin v. Texas Department of Family and Protective Services*, No. 01-03-01111-CV, 2004 WL 1945255 (Tex. App.—Houston [1st Dist.] Aug. 31, 2004, no pet.).**

The Texas Department of Family and Protective Services ("TDFPS") sued Connie Martin seeking, among other things, to terminate her parental rights. However on the same day that Martin moved for sanctions against the TDFPS for filing a frivolous lawsuit, the TDFPS nonsuited its claims against her. Well past the thirty-day period immediately following the trial court's signing of the nonsuit order, Martin appealed, alleging that her motion for sanctions was a claim for affirmative relief and that, as such, it extended the court's plenary power until its resolution.

The court of appeals reviewed existing case law, including its own, and held that a motion for sanctions does not present a claim for affirmative relief, and that a judgment need not resolve a pending sanctions motion to be final, citing *Lane Bank Equipment Co. v. Smith Southern Equipment, Inc.*, 10 S.W.3d 308 (Tex. 2000). Therefore, the appellate court held that the trial court's nonsuit order was a final judgment, and thus the trial court lost its plenary power, including its power to sanction TDFPS thirty-one days after the judgment issued.

HYBRID MOTIONS AND TEX. R. CIV. P. 166a

***Waite v. Woodard, Hall & Primm, P.C.*, 137 S.W.3d 277 (Tex. App.—Houston [1st Dist.] 2004, no pet.).**

Woodard, Hall & Primm ("the law firm") intervened in a divorce action involving Waite—a former client—in order to recover attorney's fees and expenses. The parties attempted to settle, but failed to mutually agree to all of the terms of the proposed agreement, and the law firm filed a no-evidence motion for summary judgment citing "TEX. R. CIV. PROC. 166(i)." On appeal, the law firm argued that its summary judgment motion was really a hybrid one that rested on both the no-evidence and traditional summary judgment rules of civil procedure.

The court of appeals concluded that while Rule 166a does not prohibit hybrid motions, the motion must give fair notice to the nonmovant of the basis on which type of summary judgment is sought. Here, the appellate court determined that the law firm's motion for summary judgment clearly and expressly rested on the tenets of Rule

166a(i), the rule governing motions of no-evidence summary judgment, and not on 166a(c), the rule governing traditional motions for summary judgment. Accordingly, the court of appeals reversed and remanded the cause.

STANDING

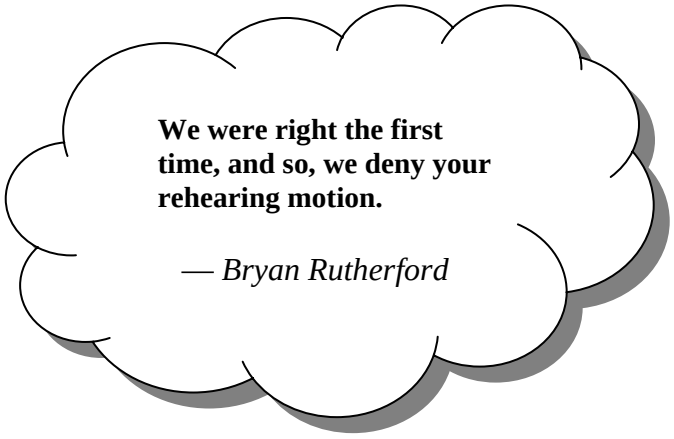
***BASF FINA Petrochemicals Limited Partnership v. H.B. Zachry Company*, No. 01-03-00723-CV, 2004 WL 2612835 (Tex. App.—Houston [1st Dist.] Nov. 18, 2004, no pet. h.).**

Appellants BASF FINA Petrochemicals, ATOFINA Petrochemicals, Inc., and BASF Corporation (collectively, "BFLP") were not parties to the underlying suit filed by appellees H.B. Zachry Company and Zachry Construction Corporation (collectively, "Zachry") against ABB Lummus Global, Inc. regarding the construction of an ethylene plant. In the course of the lawsuit, Zachry served two subpoenas on BFLP seeking the production of various categories of documents and other materials regarding the plant. In response, Zachry produced a large volume of documents, email messages, and other electronic data. BFLP also filed two motions requesting reimbursement for both its legal costs and fees incurred in gathering, reviewing, and producing the documents. The trial court granted the motion with regard to reimbursement for costs, but not for attorneys' fees. BFLP filed a motion for rehearing, which the trial court denied. BFLP filed a petition for writ of mandamus in the court of appeals, but prior to the court's consideration of this petition, the parties in the underlying suit settled and the trial court entered an order of dismissal. BFLP then brought this direct appeal from the denial of its request for attorneys' fees.

The court of appeals first addressed the question whether BFLP had standing to challenge, by direct appeal, the trial court's order denying the attorneys' fees request. The court held that, despite the general rule that an appeal can only be brought by a party named in the suit, BFLP had standing under the doctrine of "virtual representation" because its interests were directly represented by its own counsel in the trial court and BFLP was, in effect, "bound" by the trial court's final order of dismissal because BFLP could not independently seek recovery for its fees from Zachry in another lawsuit. The court of appeals noted that if the trial court had ordered Zachry to pay BFLP's fees, Zachry would have had the right to seek appellate review of that ruling upon entry of final judgment. To conclude that BFLP could not appeal the denial of its fee request would leave BFLP (and others similarly situated) without legal remedy.

The court of appeals noted that when the trial court entered its final order of dismissal, that court's plenary power expired. Accordingly, the court of appeals could not issue a writ of mandamus to the trial court, because such a writ would command the trial court to perform a void act.[1] The court concluded that, "under the circumstances presented in this case," BFLP had standing to challenge the trial court's denial of its motion by direct appeal.

On the merits of Appellants' appeal, the court of appeals affirmed the trial court's refusal to award attorneys' fees. The court of appeals held that, under Rules 205.3(f) and 176.7 of the Texas Rules of Civil Procedure, a non-party may not recover attorneys' fees as "costs of production."



[1] Accordingly, the court dismissed the petition for writ of mandamus "as moot." *In re BASF FINA Petrochemicals Ltd. P'ship*, 2004 WL 2618361 (Tex. App.—Houston [1st Dist.] Nov. 18, 2004, no pet. h.).

Joel M. Androphy, Berg & Androphy, Houston
Thomas Graham, Berg & Androphy, Houston

***U.S. v. Butler,* 2004 WL 2660599 (9th Cir. Nov 23, 2004).**

The Ninth Circuit held that a 2001 amendment to the United States Sentencing Guidelines ("USSG") requiring grouping of fraud and money laundering counts was a clarifying amendment that should be applied retroactively when sentencing a defendant under the 1995 edition of the USSG. Generally, courts must impose sentences in accordance with the version of the USSG in effect on the sentencing date. However, if the court determines that use of that edition of the USSG would violate the *ex post facto* clause of the United States Constitution, the court uses the Guidelines Manual in effect on the date of the offense. Since the grouping provision was introduced to resolve a circuit split, it is a "clarifying rather than substantive" change. The court held that a clarifying amendment to resolve a circuit split should be applied retroactively when sentencing.

***U.S. v. Scott,* 2004 WL 2375903 (5th Cir. October 19, 2004).**

The Fifth circuit found that the trial court did not err by instructing the jury that a scheme to defraud included "a scheme to deprive another of the intangible right to honest services" even though the indictment did not include such a definition of "scheme to defraud." The court found that the defendant was on notice via the charge for health care fraud that her offense was in connection with the "delivery of health care benefits, items and services" in violation 18 U.S.C. § 1347 establishing that a scheme to defraud included "a scheme to deprive another of the intangible right to honest services."

***U.S. v. Fernandez,* 2004 WL 2399856, (9th Cir. October 27, 2004).**

The Ninth Circuit held that the more lenient pleading requirements of Hobbs Act prosecutions should be applied to RICO cases. The court, relying on previous rulings, held that in the context of Hobbs Act prosecutions that an indictment does not need to allege facts on how interstate commerce was affected, nor state any theory of interstate impact. The court rationalized that since both the Hobbs Act and RICO prosecutions require a showing of only a *de minimis* effect on interstate commerce to meet the respective jurisdictional elements, that the pleading requirements of the Hobbs Act was equally applicable to the interstate nexus requirement in the RICO statute. In addition, it was found that the more lenient pleading requirements of the Hobbs Act and RICO statute do not apply to the Sherman Act, which requires a more significant showing of an effect on interstate commerce.

Like so many flags
blown about in the wind, your
objections held: waived.

— Bryan Rutherford

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

PRESERVATION OF ERROR – TIMELINESS OF CHALLENGE TO CHARGING INSTRUMENT

***Heidelberg v. State*, 144 S.W.3d 535 (Tex. Crim. App. 2004).**

In his trial for committing the offense of the sexual assault of his wife's eight-year-old granddaughter, the defendant testified in his own defense. The trial prosecutor cross-examined the defendant, and he questioned the defendant about his willingness to speak to an investigator and whether he knew that the investigator was trying to contact him about the allegations of sexual assault that had been made against him. The defendant's trial attorney made an objection based upon the Fifth Amendment to the United States Constitution, noting that the defendant did not have to talk with anyone. The same Fifth Amendment objection was made when the trial prosecutor called the investigator on rebuttal to testify about his inability to contact and speak with the defendant.

On appeal, the defendant claimed that the trial prosecutor's questioning commented upon his post-arrest silence in violation of Article I, Section 10 of the Texas Constitution. The Texas Court of Criminal Appeals noted that the Fifth Amendment protects post-arrest silence made only *after Miranda* warnings have been given, while Article I, Section 10 of the Texas Constitution protects a defendant's post-arrest silence even before such warnings have been administered. The court additionally noted that the trial prosecutor's questioning of the defendant were not time-specific—that is, one could not tell from the trial prosecutor's questions whether he was asking about pre-arrest silence, post-arrest pre-*Miranda* silence, or post-arrest post-*Miranda* silence. The court further noted that, in his objections, the defendant's trial attorney made no mention of the defendant being under arrest. Therefore, the Court of Criminal Appeals held that, due to: 1) the lack of time-specific questions by the prosecutor, 2) the failure of the defendant's trial attorney to cite to the Texas Constitution or even specify that he was objecting to post-arrest silence, 3) and the lack of commentary by the judge in making his rulings on the objections, the defendant did not preserve error on his claims under the Texas Constitution.

***Neal v. State*, ___ S.W.3d ___, No. PD-1559-03 (Tex. Crim. App., Nov. 17, 2004) (not yet reported).**

The defendant was in the county jail awaiting trial on charges of forgery and burglary when he was found with a homemade weapon—a toothbrush that had been sharpened into a stabbing instrument. The defendant subsequently entered pleas of guilty to the forgery and burglary charges in accordance with plea bargains with the State. Approximately two months later, he was charged with possession of a deadly weapon in a penal institution, based upon his possession of the homemade weapon. Almost two years later, the defendant filed a federal civil rights lawsuit, claiming that he had been mistreated in the county jail, and, prior to trial in the civil rights lawsuit, the attorneys defendant and the State negotiated a plea bargain for a two-year sentence on the deadly weapon charge. However, before the defendant could be brought to court to accept the plea bargain, it was discovered that he was HIV positive, and the State subsequently dismissed the deadly weapon charge. Several months later, after the federal civil rights lawsuit had been concluded, the deadly weapon charge was re-filed against the defendant. The federal district court made a ruling in the defendant's favor on the civil rights lawsuit, and the State declined to re-offer the original two-year plea bargain on the deadly weapon charge. The trial court found the defendant guilty of the deadly weapon charge in a bench trial.

At the punishment stage of the trial, the defendant requested that the trial court sentence him to two years in accordance with the original plea bargain, claiming that the re-indictment had been unfair and retaliatory, but the trial court assessed the defendant's punishment at confinement for six years. For the first time on appeal, the defendant claimed that his conviction should be reversed and the case dismissed because of prosecutorial vindictiveness, and the court of appeals agreed and reversed the defendant's conviction. However, the Texas Court of Criminal Appeals held that the defendant's claim of prosecutorial vindictiveness had not been preserved at trial, and raising the claim in mitigation of punishment was not sufficient to preserve that error. In order to preserve error for the purposes of appeal, the defendant should have filed a motion to quash or set aside the indictment based upon the specific ground of prosecutorial vindictiveness.

DEFENDANT'S RIGHT TO APPEAL

***Griffin v. State*, 145 S.W.3d 645 (Tex. Crim. App. 2004).**

The defendant entered a plea of guilty to the offense of burglary in accordance with a plea bargain with the State. The defendant filed no pre-trial motions, and he did not seek the trial court's permission to appeal. Nevertheless, the defendant filed a notice of appeal, and the court of appeals dismissed the defendant's appeal for want of jurisdiction because of the failure to comply with TEX. R. APP. P. 25.2.

On petition for discretionary review before the Texas Court of Criminal Appeals, the defendant claimed that the court of appeals erred in dismissing his appeal prior to briefs being filed on the merits because he was entitled to raise jurisdictional matters on direct appeal. However, the Court of Criminal Appeals noted that the 1977 amendment to Article 44.02 of the Texas Code of Criminal Procedure included nothing to indicate that the legislature intended to exempt jurisdictional issues from the general limitation on a defendant's right to appeal after the defendant had entered a plea of guilty or no contest in accordance with a plea bargain with the State. The court further held that the current TEX. R. APP. P. 25.2 is intended to carry out the purpose of the legislature's original rule—to eliminate meritless appeals after the trial court has accepted the terms of the plea agreement.

Therefore, jurisdictional issues can be raised on appeal in such cases only if the trial court has given the defendant permission to appeal or if the trial court has ruled on a written pre-trial motion that raises the jurisdictional issue. Otherwise, in such a case, the defendant must litigate the jurisdictional issue by way of a post-conviction writ of habeas corpus.

***Kelly v. State*, ___ S.W.3d ___, No. 10-04-283-CR (Tex. App.—Waco, Nov. 3, 2004) (not yet reported).**

Three years after the State had dismissed criminal charges against the defendant, the defendant filed a motion for the disclosure of grand jury proceedings. The trial court denied that motion, and the defendant attempted to appeal. The defendant claimed that her appeal of the trial court's denial of her motion was civil—as opposed to criminal—in nature. The defendant relied upon *In re Grand Jury Proceedings,* 129 S.W.3d 140 (Tex. App.—San Antonio 2003, pet. denied), in support of the assertion that she could bring such an appeal. However, the court of appeals held that the appeal of the trial court's denial of the defendant's motion was still a criminal matter, even though charges against the defendant had been dismissed, and no law or constitutional provision gave the court of appeals jurisdiction over such an appeal. Therefore, the defendant's appeal was dismissed.

***Ex parte McGregor*, 145 S.W.3d 824 (Tex. App.—Dallas 2004, no pet.).**

The defendant was convicted of committing the offense of sexual assault of a child, and he was required to register as a sex offender under Chapter 62 of the Texas Code of Criminal Procedure. The defendant petitioned the trial

court to exempt him from registering as a sex offender, as contemplated by TEX. CODE CRIM. PROC. ANN. art. 62.0105 (Vernon Supp.2004-05). The trial court held a hearing on the defendant's petition and denied it. The defendant then attempted to bring an appeal from the trial court's denial of his petition. The court of appeals noted that, while the legislature has granted the right to appeal from orders other than judgments of conviction in certain situations, the fact that the legislature did not include a similar right to appeal in the language of Article 62.0105 indicated that the legislature did not intend to permit an appeal from a ruling under that statute. Therefore, the court of appeals dismissed the defendant's appeal for want of jurisdiction.

***Hicks v. State*, ___ S.W.3d ___, No. 10-03-83-CR (Tex. App.—Waco, Oct. 27, 2004) (not yet reported).**

The defendant filed a motion for post-conviction DNA testing, and the trial court granted that motion. However, after the testing had been conducted, the trial court found that the DNA results were unfavorable to the defendant. The defendant brought an appeal from that finding. In that appeal, the defendant attempted to bring challenges to his previous conviction. However, appeals under Chapter 64 of the Texas Code of Criminal Procedure do not include collateral attacks upon the previous convictions. That portion of the defendant's appeal was dismissed.

DEFENDANT'S RIGHT OF APPEAL – PRE-TRIAL WRIT OF HABEAS CORPUS

***Ex parte Smith*, ___ S.W.3d ___, No. 5-04-842-CR (Tex. App.—Dallas, Nov. 19, 2004) (not yet reported).**

The defendant and several others required a fellow college student to drink large quantities of water, and the victim suffered convulsions and was hospitalized as a result of the large intake of water. The defendant was charged with committing the felony offense of aggravated assault by causing serious bodily injury, and he filed an application for a pre-trial writ of habeas corpus, claiming that—under the doctrine of *in pari materia*—he should have been charged with committing the less serious, but more specific, offense of hazing. Since the offense of hazing was only a misdemeanor, the defendant additionally claimed that the district court did not have jurisdiction. The trial court denied relief on the defendant's application for a pre-trial writ of habeas corpus, and the defendant brought an appeal.

The court of appeals held that the defendant's claim was not cognizable by way of a pre-trial writ of habeas corpus because a pre-trial writ of habeas corpus is not appropriate when resolution of the question in the defendant's favor would not result in the defendant's immediate release. Furthermore, when there is a valid statute or ordinance under which a prosecution may be brought, habeas corpus is not generally available before trial to test the sufficiency of the complaint, information, or indictment. The only exceptions to that rule have generally involved situations in which the proceedings would have been rendered void because of the defect in the charging instrument. However, a prosecution for aggravated assault can be properly brought in district court. The defendant's *in pari materia* claim also would not render the prosecution void, and it would not result in the defendant's immediate release. If the defendant is convicted of aggravated assault, he has an adequate remedy by way of a direct appeal from that conviction.

VICTIM'S RIGHT OF APPEAL

***In re Court of Inquiry*, ___ S.W.3d ___, No. 8-04-241-CR (Tex. App.—El Paso, Sept. 23, 2004) (not yet reported).**

A court of inquiry was convened to investigate several alleged crimes, including the alleged sexual assault of a victim by two El Paso police officers. The judge presiding over the court of inquiry eventually terminated the proceedings, finding that there was no probable cause to issue arrest warrants for any particular offenses. The

purported sexual assault victim then attempted to bring an appeal from the judge's ruling. However, the court of appeals noted that Chapter 52 of the Texas Code of Criminal Procedure does not provide for an appeal from a judge's determination in a court of inquiry, and the court noted that an alleged victim or potential complainant in a criminal case is guaranteed a right of appeal. Therefore, the appeal was dismissed for want of jurisdiction.

STANDARD OF REVIEW – UNCONTROVERTED AFFIDAVITS

***Charles v. State*, 146 S.W.3d 204 (Tex. Crim. App. 2004).**

The defendant entered pleas of guilty to the offenses of attempted burglary, aggravated kidnapping, and aggravated robbery. After being convicted, the defendant filed a motion for new trial, claiming that he was denied his right to the effective assistance of counsel because his trial attorney did not conduct an independent investigation into the voluntariness of a confession. The defendant claimed that, if there were a chance he could have suppressed his written statement, he would not have pleaded guilty. The defendant specifically requested that the hearing on the motion for new trial be conducted by affidavits, and a hearing on the defendant's motion for new trial was conducted by affidavits. The trial court then denied the defendant's motion for new trial.

On appeal, the defendant claimed that the affidavits presented in support of his motion for new trial should have been taken as true because the State did not offer contradicting affidavits, and the defendant noted that the trial court had made no findings in that regard because TEX. R. APP. P. 21.8(b) forbids a trial judge from summarizing or commenting on the evidence when he rules on a motion for new trial.

However, the Texas Court of Criminal Appeals noted that statements in affidavits of interested witnesses concerning their own state of mind are "uncontrovertible" because "the mental workings of an individual's mind are matters about which adversaries have no knowledge or ready means of confirming or controverting." (quoting *Lection v. Dyll*, 65 S.W.3d 696, 701 (Tex. App.—Dallas 2001, pet. ref'd)). The court held that a trial judge has discretion to discount factual assertions in an affidavit by an interested party that do not meet this test, and that an appellate court, in its review, must defer to the trial court's ruling to the extent that any reasonable view of the record evidence will support that ruling. Therefore, the Court of Criminal Appeals agreed with the court of appeals that, in the context of the denial of a motion for new trial, "[a] deferential rather than de novo standard applies to our review of a trial court's determination of historical facts when that determination is based, as here, solely upon affidavits" regardless of whether the affidavits are controverted.

Under that standard of review, the Court of Criminal Appeals rejected the defendant's assertion that the court of appeals could not hold that the trial court had impliedly disbelieved the defendant's affidavits because the trial court was prevented from making that express finding under TEX. R. APP. P. 21.8(b). Rather, the court held that the court of appeals could defer to any reasonable implied factual findings that the trial court might have made in denying the motion for new trial. The Court of Criminal Appeals stated in a footnote, "Because, under [TEX. R. APP. P. 21.8(b),] a trial court cannot make findings of fact in denying a motion for new trial, a defendant who wishes to have the trial court explicitly set out his findings concerning the historical facts pertinent to his ineffective assistance of counsel claim, should raise that claim in a habeas corpus proceeding."

POST-CONVICTION WRITS OF HABEAS CORPUS – FRIVOLOUS APPLICATIONS

***Ex parte Rieck*, 144 S.W.3d 510 (Tex. Crim. App. 2004).**

The defendant filed twenty-one applications for post-conviction writ of habeas corpus, and several of those were dismissed pursuant to Article 11.07, Section 4 of the Texas Code of Criminal Procedure, which bars consideration of subsequent applications unless certain requirements are met. In his most recent application for a post-conviction writ of habeas corpus, the defendant complained about the time credit consequences of his 1999 parole revocation, and those claims were identical to those raised in his sixteenth application. The Texas Court of Criminal Appeals asked the parties to brief the question of whether the defendant, by filing a meritless application for a post-conviction writ of habeas corpus, would forfeit certain good-conduct time. The question centered around Section 498.0045 of the Texas Code of Criminal Procedure which allowed for the forfeiture of good-conduct time if an inmate's "lawsuit" was dismissed "as frivolous or malicious."

The Court of Criminal Appeals reviewed a large number of differing authorities concerning whether an application for a post-conviction writ of habeas corpus constituted a "lawsuit" for the purposes of Section 498.0045. The court came to the conclusion that the meaning of the word "lawsuit" was ambiguous, and that, therefore, the court was required to consider the legislative history of the statute to determine if applications for post-conviction writs of habeas corpus were intended to be included within the scope of "frivolous or malicious lawsuits" under Section 498.0045. A review of that legislative history led the court to conclude that applications for post-conviction writs of habeas corpus were not intended to be included with the scope of "frivolous or malicious lawsuits."

However, parenthetically, the court did "observe that the evident purpose of the forfeiture statute—to reduce frivolous litigation—would be served by the statute's application to habeas proceedings. Every year, this Court is inundated with post-conviction habeas filings. In spite of the enactment of the abuse of the writ provisions of Article 11.07 § 4, application numbers have continued to climb. In fiscal year 1995, 3,996 applications were filed in this Court; in fiscal year 2003, that number increased to 6,660."

State's Appeals – Personal Authorization of Appeal by Prosecuting Attorney

***State v. Blankenship*, 146 S.W.3d 218 (Tex. Crim. App. 2004).**

The defendant was convicted of several violations of municipal ordinances in municipal court, but that conviction was reversed on appeal before the county court. The State then brought an appeal from the county court's judgment, with the city filing a notice of appeal and an amended notice of appeal, which stated that the "County Attorney has consented to the City Attorney prosecuting this appeal under Article 45.201 of the Code of Criminal Procedure." Both of these notices of appeal were signed by an assistant city attorney only. The defendant challenged the jurisdiction of the court of appeals on the basis that the county attorney had not made the appeal, as required by Article 44.01(d) of the Texas Code of Criminal Procedure and *State v. Muller*, 829 S.W.2d 805 (Tex. Crim. App. 1992). The city responded with several documents, including an affidavit signed by the county attorney all indicating that the county attorney had timely consented to and authorized the city's appeal. The Texas Court of Criminal Appeals held that the assertion in the city's amended notice of appeal that the "County Attorney has consented to the City Attorney prosecuting this appeal" constituted a written express personal authorization by the county attorney of the notice of appeal.

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