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SECTION WEB SITE: www.tex-app.org

The Chair's Report

Robert M. (Randy) Roach, Jr., Cook & Roach, L.L.P., Houston

Dear fellow Section members and friends,

As the soon-to-be former Chair of the Appellate Section, I would like to end my year of service by warmly thanking the many Officers and Committee Co-Chairs who have all done an absolutely superb job of advancing the interests of the Section and its nearly 2,000 members. In this, my last Chair's Report, I am very pleased and honored to report how much the Section has accomplished under the leadership of the Council, the Committee Chairs, and the committee members who have actually done all the heavy lifting.

During this past year, we developed and implemented a number of new ideas in order to advance the interests and objectives of the Section. First, the Council fully supported the creation of several new committees to expand the Section's focus on CLE and Access to Justice, and to reach out to in-house counsel, academics, as well as the judiciary. As a result, the Section and its members can better communicate with and serve these core constituencies and consumers of appellate services.

Second, we appointed co-chairs to most committees, and we have significantly expanded the number of people in leadership positions. As a result we had both a first-year chair and an experienced second-year chair at the helm of most committees, and the work of the committees will be that much better for that continuity and experience at the helm.

Third, we regularly convened meetings of the Officers as an Executive Committee. This allowed us make more efficient use of the Council's time by permitting us to seriously craft new proposals before they are presented to the Council for discussion. As a result, the Council operated by consensus and unanimous votes this entire year.

Fourth, the work of standing committees such as the Website committee, Appellate Rules, Pro Bono, Section History, Annual Meeting, Advanced CLE course, *Appellate Advocate*, and Member Services, to name just a few, have all been outstanding. We all owe them a debt of gratitude and our thanks.

The work of this Section is important and time consuming, and so many members have contributed an enormous amount of time and effort to help accomplish the longstanding goals of the Section. I truly appreciate all the support and encouragement that I have received from the council and Section members over the last two years, and I look forward to the Appellate Section's traditions and goals being advanced by my good friend and colleague Doug Alexander when he becomes your Chair at our Annual Meeting. I hope to see as many of you as possible at the Annual Meeting on September 6th in Austin after the Thursday session of the Advanced CLE course.

Until then, all of you have my very best regards and thanks,

Robert M. (Randy) Roach, Jr.
Chair, Appellate Section
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APPELLATE SECTION
ANNUAL MEETING AND APPELLATE LYRIC CONTEST

The State Bar of Texas Appellate Section is holding its Annual Meeting on September 6, 2007. The meeting will take place at 5:00 p.m., immediately following the Advanced Civil Appellate Practice Course, at the Four Seasons Hotel in Austin, Texas.

The Annual Meeting will include a brief business meeting, a cocktail reception, and the performance of the winning entrees of the Appellate Lyric Contest.

CALLING ALL APPELLATE SONGWRITERS !

In connection with the Annual Meeting, the Appellate Section is pleased to announce its first Appellate Song Lyrics Contest. Contestants must change the lyrics of a well known song to give it an "appellate" touch. This is a partial example:

"Appellate Man"

(To the tune of Billy Joel's "Piano Man")

Its nine pm on a Sunday
I worked all weekend again
There's a pile of transcripts sitting next to me
Waiting for me to dive in

And they ask, sir, can you write a compelling brief?
Can you find the hidden issues?
Just give me a week and it will be complete
And then I'll give you the news.

Hey look at me I'm Appellate Man
I'm a lawyer who knows how to write
But when I've got a deadline
All I do is whine
That I will be drafting all night

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

APPELLATE SONG LYRICS CONTEST RULES

(1) All song lyrics must relate in some loose fashion to appellate law, appellate courts, or the appellate community. Lyrics may be for all or part of any well-known song.

(2) No more than one entry may be submitted per contestant.

(3) All entries must be received by 5:00 p.m. on Wednesday, August 29, 2007, by e-mail to ssanfelippo@rosewalker.com.

(4) By submitting an entry, contestants: (a) certify that the submitted work is original; and (b) grant a non-exclusive license to the Appellate Section to read, use, and publish entries in any form of oral, print, or electronic medium.

(5) Any entrant who is not a dues-paid member of the Appellate Section on September 3, 2007 is ineligible to win prizes. Any Appellate Section officer, member of the Annual Meeting Committee, or Appellate Song Lyrics Contest Judge is ineligible to win prizes. Persons who are ineligible to win prizes may still submit entries, which may be read at the awards ceremony and printed thereafter.

(6) Winners will be announced with much hoopla at the Appellate Section Annual Meeting on September 6, 2007 in Austin. The choice and number of prizes will be within the unfettered discretion of the judges. Decision of the judges is final and ironically unappealable. Need not be present to win. Offer void where prohibited by law.

An Interview With Chief Justice John G. Hill

Betty Marshall, Office of the State Prosecuting Attorney, Austin
Craig M. Price, Hammerle Finley, PLC, Denton

Questions by: **Betty Marshall (BM)**
Craig M. Price (CMP)

Answers by: **Chief Justice Hill (CJH)**

BM: I'm Betty Marshall. I'm an assistant state attorney right now for the office of the state prosecuting attorney. But in much younger days, I was a briefing attorney for Honorable John G. Hill, who at that time was a justice on the Second Court of Appeals, later Chief Justice. And this is part of an oral history project that the State Bar is doing where they talk to all the present and former Chief Justices.

It is my understanding that the questions are up to me and Judge Hill, so obviously I've made a number of suggestions when I wrote to you, Judge Hill. And I know I started out with family stuff, and I didn't know if you think that's important or if you want to talk about it. I know your father was a lawyer because I knew him. Did [your father] influence you to become a lawyer, or is there a family history of lawyering, judging?

CJH: Well, I've had some lawyers in my family. Actually, my father was the only practicing lawyer that I was aware of in my family at the time. And certainly, I'm sure that his being an attorney had some influence, although I did look at other professions.

One thing that made a difference was when I was in junior high school, there was a group of lawyers, which included friends of my father, who came and talked about lawyers and what they did. And in addition to that, I was influenced by the autobiography of Clash Derron. And I just felt like that it was something that I was supposed to do.

My father and mother both were great influences in my life. My father did insurance defense work and was in a small firm. One thing I noticed about him that I recall, though, is that he always had a high regard for those on the plaintiffs side of the docket, and judges also. He taught me his life's experience, what difference honesty, integrity, and dignity mattered, that those things mattered, fairness matters.

My mother prepared me in other ways. When I was a young man in elementary school and it was summer, I didn't have a lot of things to do. She sat me down with a typing instruction book and a typewriter and suggested I learn how to type. And, you know, I got to thinking about that years later about the fact that there was no earthly reason in the world to believe at that time that a young man would ever need to know how to type. But beginning in law school and then, of course, now, most of what I do is typing. And with voice recognition software, that may go by the wayside, too. But still, she pretty much prepared me for the legal profession in that way.

BM: Do you think she was thinking about that?

CJH: I don't know. I really think what she was thinking about is giving me something to do.

BM: Well, I know my daughter fought off becoming a lawyer because I am one. Sometimes it works the other way when you're a parent as a member of the profession. I think it's interesting what you're saying about how even though [your father] was on the defense side, he had a lot of respect for plaintiffs. Was that true of then compared to now? Was it because it was small numbers, small firms?

CJH: I really don't know the answer to that question. I think one thing about my father was that he liked all people. His father was a minister, Baptist minister. And really, that was the other thing is he just respected all people and believed they should be treated fairly. And, of course, when I was growing up, I grew up in the time of segregation and experienced the civil rights movement about the time I was in college. And that made a real difference in my life, the fact that my parents related to people, African-Americans, and other people, and had respect for them as people. And, of course, they took me to a church where we sang songs about that, about the equality of everyone.

BM: You talk about it was almost like recognizing a calling. Do you think the—I mean, Baptists brought your faith or this idea that, you know, the man's role is something that you got from your family?

CJH: There's no question that the church background that I came from teaches us that—I was taught that each of us is called to whatever it is we do. Of course, they put a lot of emphasis on calling to a religious profession; but at the same time, they—knowing that most of us were not going to be doing that—at the same time they made it clear that whatever we were doing, that we were called to do that.

And, in fact, it was interesting, when I left being Chief Justice, then I had to go through the deal of, well, obviously I'm not called to do that anymore. Is there something else I'm called to be doing? And I kind of spent a little time wondering about that, and I finally came to the feeling I guess last summer when I was on vacation that, well, what I'm doing now is what I'm called to do. I wasn't sure about it before then, but now I feel that's true.

BM: What exactly—will you say what it is exactly that you are doing now as opposed to?

CJH: Well, of course, I'm of counsel to a firm. But most of what I do is I am a senior justice, and I sit by assignment with the various courts of appeals; and I have had good fortune of sitting on quite a number of them during the last four or five years.

BM: Now, I get to read your opinions sometimes. So in a sense, then, it's still a continuation of what you did?

CJH: Yes.

BM: How did you decide to become a judge as opposed to most lawyers enjoy very much taking sides, let's say, doing trials, cultivating clients. But you very early on went into the judging business. Why?

CJH: Well, I really felt like that if I had a failing as an attorney, it was that I kept trying to look too much objectively at the situation to see what the correct result would be from justice or fairness, and I figured I could put that to best use as a judge.

BM: You're too fair. When you decided run for judge—you went to Baylor undergrad?

CJH: Yes, I did. And Roswell as well.

BM: In Roswell, right. And that's when you met Linda?

CJH: I met Linda in undergraduate school. She was in history class, and she liked to ask a lot of questions, and so it caused me to notice her.

BM: Notice her.

CJH: And she was dating someone in my—they didn't have fraternities at that time, but we did

have the equivalent—and she was dating someone in my organization. And I can remember during the political season, we had a little bit of discussion about the presidential election for that year.

BM: Which one?
CJH: The Lyndon Johnson and Barry Goldwater election.

BM: And were you on the same side?

CJH: Well, we weren't at that time, but later on by the time that we started dating we were.

BM: Just taking a wild guess, she was for LBJ?

CJH: No. I was for LBJ.

BM: Oh, you were? Oh, okay. And then she decided you were right?

CJH: Well, I think she likes to say that after further education, she became a Democrat.

BM: And then you got married when? After college?

CJH: We got married I think very shortly—just a few days after she graduated from college.

BM: Besides working on political campaigns even in college, can you think of anything else from college days or law school days that now you look back on it and say, gee, if I had only known, I should have or shouldn't have or ….

CJH: There's some interesting events that happened at that time. We studied First Amendment and cases about religious minorities, such as the Jehovah's Witnesses and their right to sell newspapers and things without government license.

And we had a young man who was with the White Muslim movement who came to the Baylor campus, which at that time was mostly an all-white campus, to sell his newspapers. And, of course, that attracted a lot of attention. But one day he was standing out in front of the law school and really talking to a bunch of law students, and no problem. The Waco Police Department apparently though felt that maybe this was a problem, and they had come and were going to arrest him. I questioned their right to do that and almost came very close to being arrested myself. The most conservative teachers at Baylor Law School though had come out before all this happened and were telling us to make sure his constitutional rights were guaranteed. I don't know if they were serious about it or not, but anyway, they did arrest him, but I think they just took him off of the campus and let him out.

BM: And that was during law school?

CJH: That was during law school. The group around this gentleman were all wearing suits because at that time, for practice court at Baylor, you were required to wear a suit to class. And most of us, that's what we were wearing, so it didn't look exactly like a riot was fixing to break out.

BM: Right. After Baylor, what did you do then?

CJH: Well, the—I was advised both by my practice court teacher, who was himself an appellate court judge, and my father both that I needed to start out in the District Attorney's Office. And so I came to work here in Tarrant County for Frank Trough, the district attorney. While I was waiting on that, I served as kind of a file clerk for the law library of Tarrant County.

I might add one thing about that job with the law library. I found out one day while working at the library—I had applied for a job at the District Attorney's Office, but I wasn't really sure when I was supposed to start. I had not been informed. I read in the newspaper one day while I was working in the law library that I had started that day at work at the District Attorney's Office, so ….

BM: They don't tell the important people.

CJH: Right. I told the law librarian, excuse me, I've really enjoyed working here, but I'm reading in the paper that I'm supposed to be across the street in the D.A.'s office.

BM: It's a good thing you were reading the paper.

CJH: I guess so.

BM: That is funny. Well, you're from Fort Worth, right? Were you born here?

CJH: Yes, yes, I was born here.

BM: Was your family from Fort Worth for any length of time?

CJH: Well, my father started practicing law here in 1929. His father, as I mentioned, was a minister and had served at different places within the state being a Baptist minister and lived in Waco for quite a while. And so my father graduated from Waco High School and then so after—he went to Baylor—and then after Baylor he came to Fort Worth and he began practicing here. So he practiced here for about 62 years, I guess, altogether.

BM: Wow. Yeah. And your mom's family also?

CJH: My mother was actually from Fort Worth herself. Her father was a business man here in Fort Worth.

BM: So your heritage goes back?

CJH: It goes back pretty far. I have a—I guess a great, great grandfather that's buried in the cemetery here in the county.

BM: Do you think that having a family and a wife rooted in one place and then serving the community yourself, do you think that's an advantage?

CJH: I think so, because I have a lot of emotional support from the community, not only from the church I grew up in, but from—you know, I see friends that I've known my whole life when I go to the grocery store.

BM: Right.

CJH: And my wife's not sure I know people outside my high school attendance district. I went to Paschal High School here. And I remind her, though, at the time I went, the attendance district was larger than it is now, so it does give us a little bit of leeway.

BM: Well, it's all good and fair. I mean, people can keep track you're a judge. But also, do you think it helps you, if there's ever a question of what is or what is not acceptable to a community, that kind of thing, because you have the long heritage, the long history here?

CJH: Yeah, I really don't know the answer to that. I always try to approach everything I did with the idea of what would someone, if—what would an educated person in the community who was familiar with the law and who was a fair-minded person, what would they think and conclude about this? And I'm sure that growing up here would give me perhaps a better idea; but then at the same point, fairness in dealing with people, I think that that would be something that would be important as well, although I realize maybe different places might have different ideas as to what is fair.

BM: Well, now, the question then would be, has Fort Worth changed? Is it more like a huge city like Dallas? It retains a lot of differences and, you know, probably so, do you think it's much more urban?

CJH: I think the people I know that are in the leadership of the community, the legal community and the general community, I think they pride themselves on trying to keep that small town friendliness and openness. It's very difficult to do when you get a much larger population, but I think the people over here try very hard to do that.

BM: Well, you've sat on several different courts of appeals?

CJH: Yes.

BM: So can you see the difference—and I wouldn't say Fort Worth attorneys are always collegial—but can you see a difference in other communities?

CJH: I really don't know from the standpoint of hearing oral arguments and everything, it's very difficult to get a sense of that. Sometimes people from other communities tell me this, that there's a difference. But not being in those communities, I'm really not in a position to say.

BM: You and your wife have both been very active in the Democratic party. You still consider yourselves Democrats?

CJH: I'm definitely a Democrat.

BM: And everybody else seems to be Republican now. They didn't all of a sudden, you know, become different people, just all Republican. What happened? I mean, I'm not trying to make this as a—what happened, for example, maybe even in Fort Worth? Most of the people I know didn't change their mind on any issues.

CJH: Well, there's a lot of different things, I think. One, I think the community changed quite a bit when Jim Wright left Congress. I think that made a major difference. But I really think even beyond that, a lot of the changes came in terms of the movement of people from other areas. Of course, you always have such a historical thing of the default political party, being the Democratic party. We have a lot of people who moved here from other parts of the country where the default political position was being a Republican, and so they brought that with them. And they were fair-minded people and a lot of them voted for me. But nevertheless, when you get into a situation where you're not with the majority default party, then obviously you don't stay in office in that situation.

BM: Well, did you ever consider switching in order to stay in office? Because that's what happened with a large number of office holders in Tarrant County; and a lot of people thought, you know, kind of as a bunch, they all switched.

CJH: Well, they did, and I respect their opinion. And I know it's something that they really anguished over and did what they felt was best. I really didn't feel like I could do that. I did worry about the people that had supported me as a Democrat and to have to go to them and say, well, you know, really now I'm a Republican. The other thing was I thought it would be good if both my family and myself would be able to vote for me for election, and that would have created a problem if I had changed it. I don't think any of us could have voted for me.

BM: Well, the price you paid, though, was not being elected again.

CJH: Yes, but that's all right. I would do the same again.

BM: Right. So when you were in the D.A.'s office, how long were you there?

CJH: I was originally in the District Attorney's Office about four years. And then I left and was in private practice briefly. And I sought appointment as judge of the Fort Worth municipal court initially.

BM: And how did you go about doing that?

CJH: Well, I just inquired. It was not a very popular position actually at the time. I had friends who were in the City Attorney's Office who were not interested at all. They had an opportunity to take those positions and were not interested in it, but I was interested in it.

BM: A municipal judge would handle?

CJH: Traffic tickets and municipal ordinance violations.

BM: Would this be search warrants?

CJH: Seems like we may have had some of those, yes.

BM: So being a D.A., that kind of helped some, I would think.

CJH: Yes. But usually, I think the search warrants usually they would take those to the justices of the peace. Now, we would have arraignments and warn them of their rights and that sort of thing.

BM: Did you see this as a stepping stone or you just thought, I'll see if I like being a judge?

CJH: It was just something I wanted to do at the time. It didn't pay a lot, but it paid more than I was making at the time I was practicing.

BM: Well, in the D.A.'s office, did you do trials?

CJH: I did just everything that you do in the D.A.'s Office at one time.

BM: How big was the office?

CJH: Well, I'd say maybe twenty-five or thirty attorneys. I could have that number wrong.

BM: All male?

CJH: Mostly. Mostly. Not all male. At least a portion of the time I was there I can remember women attorneys. The appellate section at that time consisted only of about one or two attorneys. I was a felony prosecutor, which at the time was the epitome of what everybody wanted to be in the District Attorney's Office. I wasn't particularly happy in that position, but I was going to stick it out until I heard the pastor search committee at my church. We went out and heard a minister talk about the fact that you need to assess not about what everybody else thinks is successful, but what is best for your situation. And I thought, well, you know, I'd really like to be in the appellate section, which was not a high prestige thing in the District Attorney's Office at the time I was there. I went to the D.A. and told him what I wanted to do. Fortunately, because of the fact that they had an ever increasing need and not a whole lot of people that really wanted to do that, I was able within a very short period of time of being the second person in the appellate section, and ultimately ended up being in charge of the appellate section.

BM: Then you went into private practice?

CJH: That's right. Mostly a little bit of mental health assignments, and I would consult with my father on things he was doing, although I was not a member of his firm by choice. I just thought we'd work easier together if I was not. We had a major kind of a civil rights sort of related kind of a case during that period. There was a group of men here who had announced a boycott for businesses of African-American men. And during part of that, there began a demonstration in Dallas against a radio station. I'm not going to say which one.

BM: Right.

CJH: A radio station, an African-American radio station but one that was not owned by African-Americans, I think. And one of the things they were doing was demonstrating against the advertisers of the station, and so that brought legal action over in Dallas. And I guess the local people in Fort Worth had given some indication of interest in participating in that, so they were joined in. And I got to go into district court in Dallas and defend them in an injunction suit to enjoin them from demonstrating against the advertisers of the station. There's some law in the Federal Regulatory deal against secondary ….

BM: Because the boycott ….

CJH: It was the secondary boycott aspects.

BM: Right.

CJH: And so basically I went over and wasn't successful in doing much, just kind of making the injunction more limited than what it was originally sought for. Interesting thing came out of that. Some time later after that hearing we had over there, we opened the paper one morning and saw that one of the clients had been accused of shooting an Arlington police officer in a—shooting at an Arlington police officer in a city

park in Arlington. And we—I didn't notice it, but my wife noticed the fact that the shooting was the same day as our court hearing in Dallas. And so I spent an interesting day. The client called me that morning saying, "What do I do now"? Because he was seeing what was in the paper. And I called the Sheriff and arranged to turn him over to the Sheriff. And this is not long after I had been in the District Attorney's Office, so I thought it would be a fairly simple matter to explain to them that this gentleman had been in court.

I guess ultimately I couldn't have represented him because I was a potential witness, but I was kind of caught up with this at the time, so I went to the District Attorney's Office just to try to tell them. We finally ended up—I did something that probably was not authorized. I talked him into taking a lie detector test. Our deal at the D.A.'s Office was that if he took this lie detector test and passed it, that they would not prosecute him. And he took it and passed it. And they didn't stop it, though. There was a reporter for the Star-Telegram who had been present at the court hearing, and they took him before the grand jury and got him to say that it was not possible for this fellow in Arlington to do this. It was an interesting—anyway, he was released on his own recognizance by the day's end that day.

BM: Got it. And how long were you municipal judge?

CJH: I was municipal judge for two years. And at that time it was required if you run for political office, that you leave employment with the city. And so I really wasn't thinking about running at that time for county court at law. I thought about it previously but hadn't done it. But I got a call one Friday seems like asking me if I didn't want to make that race. And I talked about it with my wife, and it's kind of like—well, this was in January, and it would mean that the election—I would not, at best, if I won the election, I wouldn't be able to take office for a year. And so I was going to quit my job and not knowing where any income was going to come in for a year. I talked it over with my wife, though, and she was very supportive.

BM: Did y'all have David then?

CJH: Let me think. Just barely. Just barely.

BM: So you had a baby, too?

CJH: Yeah, a small child. But Linda was very supportive, and I announced—in fact, I had to quit the following Tuesday. I went to the city council meeting and announced my intent to seek Tarrant County court at law. And I ended up with three opponents, including an attorney who is a good friend of mine today whose law partner was a county-wide elected official, but it came out okay.

BM: But back then basically everything was decided in the primary?

CJH: That's true, at that time.

BM: In the Democrat primary, which was probably May?

CJH: That's right. It was in May.

BM: Right. And then was this an open seat, and that's why there was so many people in it?

CJH: Yes, the judge had retired.

BM: Right. You didn't want to run against an incumbent?

CJH: That's true.

BM: And so a faction of the party asked you to run, or the party ….

CJH: I'm really not sure if the people that asked me were that much into parties. It was more of the lawyers in Fort Worth who were wanting me to run.

BM: And how did you campaign? You had been ….

CJH: As hard as I possibly could.

BM: I know you've been active in Young Lawyers, so basically you had the young lawyers with you.

CJH: I had a lot of lawyers' support. In fact, I've been most grateful through the years that the Bar Association has always supported me in whatever I've done. And I've always appreciated that and, really, if—without that support, I would have been maybe embarrassed to run.

BM: So you campaigned as hard as you can.

CJH: Well, I went to everything that I conceivably could.

BM: This is county wide?

CJH: Yes, it was, county wide. And I went to every possible event that I could think of to go and talk to everybody I could possibly think of to talk to and printed up every possible thing you could think to print up and ….

BM: What was your campaign platform?

CJH: That I had done a good job as a judge of the Fort Worth municipal court, and if I was elected to the county court at law, I'd do a good job there, too.

BM: Because you can't say what it is you do?

CJH: That's right.

BM: Did you tell the people what the court was?

CJH: Yes, I did. I'm sure I did.

BM: Because people don't know ….

CJH: They don't know today what the county court at law does.

BM: Right. So during that year how did you support yourself?

CJH: As best I recall, for the first part of the year until the primary was over, I had some retirement funds accumulated at the city, and we kind of lived on that. And then after that, the district attorney at that time, I believe it was Tim Curry, hired me for the period until the end of the year. The District Attorney's Office, because it's a civil court, really had very little business. So they felt comfortable in doing that. I worked in the appellate section during the time.

BM: So this was a civil court only?

CJH: That's right.

BM: Handling what?

CJH: A small—I think the limit at that time was $5,000 for lawsuits.

BM: Small claims?

CJH: And of course, it was actually the appeal from the justice of the peace court, the small claims.

BM: I remember small claims stories.

CJH: It was interesting as to how—you know, really, at that time $5,000 is a little different than it is today; and we had some pretty complex lawsuits, a lot of questions and special issues as I recall then.

BM: Were businesses suing businesses, people?

CJH: A lot of business-related kinds of things, a lot of collection, but also occasionally people suing businesses sometimes, and I imagine you had some inner business kinds of things, too. The reason people would pursue that in that court was because they could get to trial faster, they felt like they could.

BM: Right. Some would even go—they'd have to stick within that jurisdictional limit which may not be the more money, but you could get to them faster.

Craig was asking me—and I don't know if you want to actually answer these questions—but about the Bar itself, how it has changed.

CMP: Your Honor, I was wondering if you could describe the way the Bar—Tarrant County Bar Association—was when you got here and maybe describe how that has changed from your perspective over the years.

CJH: Well, I really haven't had the chance to see a lot of changes. The young lawyers, as best I could tell, and my memory is not too long ago, they seem to function about the same way as they did when I was there.

BM: It's very active.

CJH: One thing I do seem to remember that seems to be a little bit different is that I think that the Bar was more politically active in the earlier days as far as their influence with, say, the governing bodies, the commissioners court, and this type of thing. I think—I'm not sure what all the reasons are for it—but I think that there's been a shift in that. I think they're still very influential but not quite in the same way.

Otherwise, I haven't noticed just a lot of changes. I'm sure there have been, but I maybe haven't been paying attention to those as I should.

BM: How many people are lawyers here? Do you have any idea?

CJH: I have no idea now.

BM: Is it like 2,000 or 3,000, 2,500 to 3,000 now, or something like that?

CJH: That's probably one change we referred to before is the fact that the attorneys don't know each other as well as they used to.

BM: It used to be that most lawyers knew most lawyers? Most everybody had business at the courthouse?

CJH: Oh, yes. I think most lawyers used to know every other lawyer.

BM: Whereas now you might know whoever it is in whatever it is you do, but people do ….

CJH: That's right. Of course, the other major change which I think is very good and that is that, you know, when I first came here, there were very few women attorneys, very few African-American attorneys, and very few Hispanic attorneys, and certainly no Asian attorneys. And today we have any number of all of those. I think it broadens the participation of the community and the legal profession. I think that's very good.

BM: It is a big change. Was it mainly just white males back then?

CJH: Yes.

BM: From low class families or ….

CJH: Well, probably so, although we probably had some people maybe who had advanced through law school. But, no, it was mostly white males.

BM: We were talking before about your municipal judge, and then you decided to run for county court at law. You went to meetings around? Did you visit churches, go to political meetings, community groups, women's clubs?

CJH: Yes, all of them. All of them. I was really blessed. I had—my father and my wife both are very excellent political advisors. And so I was—not only did I have one wonderful political advisor in my family, I had two. And it really did make a difference, I think. But that election came out very well. I surprisingly won without a run-off.

BM: Yeah, that is good.

CJH: There had been a study before that that said that you could win an election if you had the support of the conservative and business community, or that if you didn't have that, you

needed the support of the liberal labor minority community, that maybe you could win an election in Tarrant County if you had that support.

It struck me that if—that was in terms of set up legislative elections. It seemed to me like that if it was based on fairness and this type of thing, that all of those groups, there wasn't any reason why they couldn't support the same person. And so I thought, well, if you had the support of both of those communities of interest, then you would certainly win an election. If you could win it with one, you'd certainly win it if you could have the two. And I think that's one of the reasons why the election was a success because I feel like I did have the support of both of those groups generally.

BM: Well, the Democratic party itself, of course, being basically the only party in town, had factions; and that would possibly be a way of describing some of the factions within the party ….

CJH: That's right.

BM: … that were actually further broken down. Did you deliberately try not to be involved in only one faction?

CJH: Well, I just tried to be myself and relate to all of the factions in terms of respect for all of them, and in terms of just myself and fact that I was going to do a good job if they elected me to do the job. And I had confidence that I would, and I hoped that I—I believe that I did.

BM: Well, certainly once you are on the bench, your decisions or opinions later on would be something people could use for the office. You can't run on a platform. You were at county court at law for?

CJH: I was county court at law judge for four years.

BM: And then?

CJH: And then instead of running for re-election, Justice Eva Barnes, who is certainly a pioneer, a long time attorney here in Fort Worth, announced that she was not seeking election to family court. And so on the day that her announcement was in the newspapers that she was not seeking office as judge of the family court, it also contained my announcement that I was running for it.

BM: How did you do that?

CJH: And I think it may have also contained the announcement of one of my opponents, my Democratic opponent for family court.

BM: Who was that?

CJH: Bill McClure, attorney in Fort Worth. Still is, I believe. And he sought that election. He was on the east side and president of the country club there, Woodhaven Country Club, I believe. And so he had been practicing law and he had some support.

BM: So the two of you ran in the primary?

CJH: Two of us in the primary, and I beat him in the primary, and then had a Republican opponent for that position as well.

BM: And that was in?

CJH: This was in 1978.

BM: And you did that for?

CJH: I did that for five years. I served four years in family court, was re-elected, had a Republican opponent again when I was re-elected in '82. Then I served a couple of years, and Mark White then appointed me to be a justice on the Court of Appeals.

BM: The Court of Appeals had been expanded in '81.

CJH: That's right. It expanded originally to six justices from three when they added the criminal jurisdiction. And then Justice Thimber, Chief

Justice Thimber prevailed on the legislature to add a seventh position, and I was the seventh position. It started when I was appointed.

BM: So when were you appointed to the Fort Worth Court of Appeals? In '83?
CJH: '83.

BM: Right.

CJH: And then for whatever reason, I didn't have an opponent in '84. Otherwise, my retirement from the Court of Appeals may have occurred sooner because that is a major election.

BM: Right. But still they were Republican in Tarrant County, but they were not winning at that point.

CJH: That's—I believe that's right. I believe that's right. Now, in '90, which would have been the next time I was up, I believe that was the year when the party switching occurred. I could be wrong about that, but I believe that's about when it was, just before that election. And I did have a Republican opponent in that election, but I was able to win that election.

BM: Now, at this point when you're running for election or re-election, you're talking about a 12-county area?

CJH: Now it's twelve counties. And I remember thinking that I always wondered how the people ran statewide. And I got to thinking one time as I was driving back from the twelve counties, that the only difference is the mode of transportation probably.

BM: So basically you attended everything you possibly could to try to get to meet everybody ….

CJH: Try to establish relationships with politically active people in these other counties.

BM: So you won re-election in '90. Was that a tougher race in terms of money, or the amount of work you had to do, or how close it was?

CJH: Well, I guess it's a little tough to discuss it with the twelve counties and the fact that there was growing Republican support. So we never did know exactly how the races were going to come out, but still enough people voting Democratic at that time. The race that year was close enough that the fact that—let's see. I believe that was the year that Ann Richards was elected governor too, so hence the court from the top of the ballot down, that helped.

BM: That helped. I believe it was when—was it Pete Geren who won a special election for Jim Wright?

CJH: Of course, Pete won the special election for Jim Wright's seat, but I really don't remember exactly when that was.

BM: Right, and it was very close. And I think that's when the other county officials realized that they were going to have to switch at some point because instead of winning convincingly, and he had widespread what seemed to be obvious support, he just barely made it. And I think then he was re-elected and he decided not to continue.

CJH: Right.

BM: But the inability or the weakening power of the Democratic party pulled people in for its announced person, but definitely I think some of the people noticed at that point. And I think that's what really made a lot of them switch. It was a year later, I think.

CJH: Well, the thing about it was that in Dallas there, also the fact that people had been losing elections in Dallas. It was the same over here, too. And in '93, Ann Richards appointed me to be Chief Justice of the appellate court.

BM: And then you ran for?

CJH: Then I ran for election for Chief Justice and ran into the, I guess, the Contract with America in '94.

BM: Right. You're certainly not the only one that's been affected that way, and I know we've already talked about how you now think of what you're doing as being part of your calling.

Do you think the switch in parties has hurt Texas? I don't mean that just the group that you identified with is no longer in power. But there are probably hundreds of people, you know, elected officials who didn't switch parties out of office or certainly dozens of people are very good. You're not the only one. Do you think this is bad for—to elect judges by party basically?

CJH: Well, I think that folks would be better served if the elections were not partisan, and I took this position before I was ….

BM: Would you still do it by election, though?

CJH: I think in Texas that you almost have to do it that way because I think most people want to do it that way. I don't get the impression that most want to elect judges on a partisan basis. I think it's the political leadership of one party or the other. I know one time when I sought the state Democratic nomination for a position on the Supreme Court, that my position in favor of nonpartisan election of judges was not a point taken in my favor at that time. But I felt—and I don't know what their position is today now that there are no Democratic elected judges at the statewide level. I don't know how they feel about that today, but I know at that time they very strongly felt for partisan elected judges. And I suspect if you took a poll of the Republican state executive committee, they would strongly favor partisan legislature.

BM: So do you think ….

CJH: I think the people—I think if you took a poll of the people in general, that they would favor nonpartisan election. And I think—at least it's always been my opinion that that would result in less judicial elections, which would mean less problems about fundraising. This year we've got a lot of injured Republican party elections and their judicial positions, so I really don't know if I'm correct about that. But I still think that and I believe that ultimately we would have less judicial elections than we do—you know, some of these—some of the counties at some point have said that they're going to go back the other way again because of demographics. Dallas County is an example.

BM: Because of the Hispanic voters, yeah.

CJH: Yeah. And then probably Fort Worth or Tarrant County some time after that. I don't know if that'll happen or not, but that will cause the same kind of upheaval all over again.

BM: Well, I know, for example—yeah, let's say, in the Valley where everybody's Hispanic and everybody's Democratic and that in the primary, there's no more political activity basically, that could also happen in the Republican counties and they could end up losing the vote in the general possibly. If the interest is gone out, it wouldn't be secure.

What about besides the partisan basis, the fundraising, the money, especially on the civil side, do you think it should be limited? Do you think everyone should just get a certain amount from some central fund? Do you think there should be committees that we have people that are qualified in terms of reforming the system? We may end up with a lot of people later on saying we shouldn't have.

CJH: Well, I think as long as you're doing an election, that it should be open to let people elect whom they want. I think that ….

BM: Even though it's Daniel Boone and Gene Kelly?

CJH: Well, I think that the public has a responsibility to pay attention to elections. And I don't know Mr. Kelly, and I don't know what kind of job he would have done had he been elected. But the—I think that the problem—it seems like they're trying to limit the process to make it difficult to participate in the process that we have. And because there's opposition to the process that we have as far as election is

concerned and people who want to employ that process and don't want a situation where there are campaign contributions. And so what they're doing since that change is not possible, they're just making it hard—to me, they're making it hard for people who are doing it to do it.
Now, I think there do have to be some limits. I don't think they need to get back in a situation we were in back when they did the big *60 Minutes* deal where people are making just very large contributions. I think that that's not necessary and certainly some of them now participate in some voluntary guidelines that we have. And you can still get contributions from people at least on a local level I think to do it, but it's—I've made a mistake I know as some others have, and I know that's a different deal perhaps.

BM: Besides politics we talked about a little bit, as an appellate judge in particular, can you think of particular cases or kinds of cases that either acquired your interest or you think you were able to make a mark in the field?

CJH: I think—I've been thinking about that, and I think that the cases that I felt like that were more important were those that involve the United States constitutional issues. I don't know why. I just always felt like—we had cases—I can remember the case involving *Casarez v. State*, I believe it was, involving whether or not prosecutors could challenge potential jurors on the basis of their religion. And I wrote a dissenting opinion for this court holding that they could not, and it got down to the Court of Criminal Appeals. They originally agreed with me and reversed on that question, but then some time later changed their mind and said that, yeah, well, I guess it's not prohibited by the constitution anyway is what they said. The Supreme Court of the United States has yet to rule on that. I don't know which way they'll go.

BM: That is interesting how far they'll let people go now because there's some—did you ultimately find yourself in a dissenting position? Would you say that you were off usually with the majority?

CJH: I was usually with the majority, but there were occasions when I did dissent. I tried not to dissent unless I really was very confident with my position.

BM: You were somewhat different having both—some background as a criminal lawyer in the D.A.'s Office and as a civil lawyer.

CJH: I had—this was probably one of the first courts I was really qualified for. I had some experience at that time both in the criminal side and civil side.

BM: Right. Because many times people are elected and are, I assume, astonished to find out that much of the case load in an appellate court involves more criminal than what they thought. Is that still true? Is it mainly criminal or family?

CJH: Of course, it's still—I'm sure it's still a majority of criminal in our appellate courts, I would think. I know when I left it was about fifty, sixty percent criminal.

BM: Well, certainly as a justice, you were particularly concerned with their rights and everything else. But as Chief Justice when you added the administrative duties, can you say what it was you felt was the hardest or biggest achievement or ….

CJH: I think the large part was finding time to do the paperwork that's involved with that position. I was so very fortunate that the people that I had to work with on the court, they were just such nice people and easy to work with. I never—with respect to the opinions, I never had the opinion that anybody was interested in results or that they had an agenda that they were trying to do. It was always what's the law with respect to this, if you ever had discussions about it; and everybody was really seeking that, I think.

We never had a situation—I know of no opinion that was written when I was there in which anyone had a negative thing to say about the people aligned on the other side that they were writing a dissent. It was always ….

BM: You had no nasty footnotes?

CJH: Nothing nasty at all.

BM: Well, when you were an appellate judge, what did you particularly like; oral argument, research, writing?

CJH: I think I liked the situation when you really feel like you're making a difference in the result, and the result is a fair result. And so you really feel like you're accomplishing a good thing and that it might not have happened that way if you hadn't been there, sometimes occasions like that. And those were the things I enjoyed the most, that and pretty good attorneys.

BM: I also wanted to ask you some pretty open-ended questions, you know, as well as asking you what—you know, I'm sure there's some stuff you've been thinking about before this interview in terms of what you want to say.

Craig, did you have any other questions?

CMP: A few questions. Judge Hill, I think you have a unique perspective from having grown up with a family that your father was a lawyer and he came to Fort Worth in 1929?

CJH: Yes.

CMP: From observing his practice and from your own practice, do you think that the practice of law has changed? The comment we hear now is that it's not as much fun as in the old days. And those of us who have only practiced in the last ten years or so want to know if that's true or not.

CJH: I think it must be true because I think there really is that feeling among lawyers that it's not as much fun now. And since I—as you may have noticed from our discussion, I really haven't done that much actual practice of the law. And so to me, it's still as much fun, but I'm not having to deal with the every day things of discovery and this type of thing. And again, I think it's because the community of lawyers has grown so greatly, I still see in the smaller communities the same kind of camaraderie as I think was here back early on, and it's still here to a certain extent. I think despite the increase, I think that lawyers in Tarrant County really do try and pride themselves on working with other folks to the extent that they can. And it gets a little bit more difficult, I would think, when the pool gets so much larger and you don't necessarily know who you're dealing with.

CMP: You started with the Court of Appeals here in Fort Worth and Tarrant County, the Second Court of Appeals in '83; is that correct?

CJH: That's right.

CMP: Has the process by which the court reaches its decision changed? You're still now very active. In that amount of time, has the process changed?

CJH: I don't see any change in the process, no. You have seven good folks over there now. And as best I can tell, mostly from the outside, I certainly haven't seen any difference on the times I've sat with them. And so, no, I don't think there's been any change in that.

CMP: Do you think the advent of computerized legal research, which now gives us access to all these other jurisdictions whereas twenty years ago we've only had access to, oh, cases, does that make for better opinions? Does it complicate things more?

CJH: You know, I still don't see a lot of citations with out-of-state authorities. It makes a lot of difference in my work. It makes what I do a lot easier to have that because I can just do a whole lot of research in just a very short time with that when before I'd be wandering around. Sometimes the indexes in some of the books are not what they could be or what you'd like them to be. And I used to fight that before computerized legal research, and now it's up to me as to what kind of index there is because I'm the one that has to decide, you know, how am I going to look this up. And so it really is an extra help to have that and really speeds up what I do.

CMP: You were an appellate specialist long before it became kind of in vogue. And now, of course, there are many firms and many lawyers who specialize in appellate law. Have you seen that attitude change over the years?

CJH: Well, there's just the change that you mentioned. In other words, of course, I'm not an appellate law specialist in the official sense of the word because, I guess, I came along before that was really something that was happening. But definitely there's been a growth of people who that's all they do. I guess before you had people that did everything, including appellate, but not really that many people who just did appellate work. So as far as specialization, there's obviously a difference in the law from the time I first started until now. And so we have now people not only in this area but other areas that are specializing in that. I think it's probably better for the public in the sense that they know what they're doing and hopefully boil some of the procedural problems that somebody who just kind of does it every now and then would run into.

CMP: What do lawyers in an appeal do that you'd like or what do they do that you don't like that doesn't help you as a justice on the Court of Appeals?

CJH: Well, it doesn't help me, or them, either one probably, to cite unpublished opinions. That's one thing. But as far as what I like about what they do, I like for them to, you know, express what the standard of review is and cite to the record. It's amazing, you know. You've got the rules that require citation to the record, and people do not. And then they'll cite legal conclusions without any kind of citation authority, either for that or really to—they don't make the logical step back from that authority. They just kind of say, this is authority. When they do that, then sometimes it makes me believe that maybe their position isn't the correct one. If it is, they should establish some authority for it.

CMP: What would you tell somebody who, one, goes to law school and asked your opinion, what would you tell somebody, a young lawyer who wanted to go into public service like you have?

CJH: Well, I would tell them it's very rewarding. If they're thinking about going to law school, I would certainly encourage them to do that. I think it's still a very worthy profession. People can do a lot of good for folks in the community.

With respect to procedurally, they've made it very difficult to do the judicial thing that I did because—we really don't have time to really go into it, but by moving the primary up to March and the filing deadline up to early January, and that combined with a legal requirement that a county court at law judge has to—is out of office if they announced for another office before the end of their last year of their term, that makes it very difficult for a county court at law person, without losing their job—and the fact that you have to have petitions to run with a number of signatures that have to be obtained almost like the first day of January, but yet you can't begin circulating them before the first day of January because you'll lose your office, it's an automatic vacancy. Under the Constitution of Texas it's an automatic vacancy of that office. So it's very difficult today for any party to make a transition from a county court at law judgeship to a district court judgeship by election. They just have to do it by appointment. So I guess it's still possible to do it. They just have to do it a different route.

But I would just tell people just to apply themselves and not—and be active in their community before they start running for office and not just start when they want without having prepared themselves for it for several years in advance.

CMP: It seems like during the last twenty-five, thirty years, the public perception of lawyers has changed, and not for the better. People do not regard lawyers as highly, I think, as they did before. Do you agree with that? And if so, how do you think we as lawyers can improve our image?

CJH: I think we can always work as hard as we can to improve our image. Unfortunately, it's the nature of the profession, I think, that there will always be people who have problems with the perception of the profession.

My father was on a public relations committee in the State Bar of Texas. I remember when I was a young man that he wrote General Mills because on the Lone Ranger, lawyers were frequently portrayed as the villain in the Lone Ranger. And I can remember his writing letters to General Mills about that. So it's—and that was a long time ago. And, of course, even people just always have had problems with the legal profession. It's the nature of it, just the fact that we represent people and somebody wins and somebody loses when we go to court.

BM: Okay. I had a couple of more thoughts. You mentioned out-of-state citations. Do you think there's a federalization of law more and more? Not necessarily states adopting federal law maybe. I mean, more of a—is getting blamed, or Texas is not all that different from New York?

CJH: Well, I think that probably varies from time to time. I think there is a tendency more toward having the states having a general body of law, you know. You've had all these model codes and things that have been adopted.

BM: Texas has the Rules of Evidence.

CJH: And the federal—patterned so much after federal rules. And I think that the Texas Supreme Court, you know, they still remain independent; but they'll look to other states also when they're discussing what they're doing.

BM: What I've seen is that maybe not directly, maybe in a vague way and it may be indirect, but judges are humans. They live in the community, and they do eventually reflect public opinion on issues. Do you think that you—do you agree with that? Do you think they should? Is it—we've got to live up to the law or, you know, what is the balance?

CJH: That's hard to gauge. I think that in terms of the values of the community, that it's inevitable that a judge is going to reflect the values of the community. I think in deciding the cases, that a judge with integrity is going to try the—he's going to try to reach the legal result. And, you know, you try to explain it perhaps in terms of the values of the community as to why you're reaching this result, although if that's the rule of law, I don't know that I always necessarily—I might have just been explaining it to myself. I don't know that I always explained it out in the opinion about why it's different for the values of the community. I just usually set forth what the law is. And so you can't just say, well, what do you think? The result ought to be this way. You really have to think about what would a principal member of the community who has integrity, education, and is familiar with the law and the values of the law, how would they do it? And, of course, I also try to decide, even beyond that, as an intermediate appellate court, my desire was always to decide it in such a way that the Supreme Court would agree with it if it's a civil case, the Court of Criminal Appeals if it's a criminal case.

BM: That's true, because you don't want to get reviewed or reversed or something.

CJH: That's right.

BM: I mean, that has to be at least in the back of your mind.

CJH: And I also want to think that attorneys who read it, whether they agree or not, will feel like it had been well brought out and was a good, well-written opinion.

BM: Because we see lots of opinions every week from courts of appeal one way or the other. It seems to be quite common. Do you think it's more common now or less common?

CJH: It's hard to say. I really don't know. Like I say, I really didn't get the opinion when I was working there.

BM: You were not seeing that.

CJH: But that anybody was particularly result-oriented.

BM: I will say that people preach public service, but they don't pay public service. Do you think that the disparity between the—I don't mean just incomes, but also influence from lawyers compared to people who now serve the public, there seems to be a great disparity. I wonder, do you think people will continue to go into public service for the right reasons?

CJH: Well, I would hope so. I mean, I know there's—like right now we've got a lot of people running for the Court of Appeals, and they're good people. And I haven't seen any deterrence of people wanting to be judges. They do have to take pay cuts, a lot of them do. And I think there's a limit, you know. I think because of that, it should be well-compensated, but on the same—at the same token, I think there's a limit because people just don't want to think of public officials being paid exorbitant, what they would consider exorbitant high salaries.

BM: I heard that—I believe it was the last legislative session, unhooking judges' salaries and retirement and legislator salaries and retirement didn't work. And I was never quite clear as to who was for or against this, but I know—and I don't know if the idea was to raise judges or raise legislators, but the headline, *Unhook the tube*, because of the problem with the judges' salaries.

CJH: Well, the way I understood the thing worked is that it would have unhooked judges' salaries from—I think what's hooked is the legislators' retirement pay as opposed to the judicial salaries.

BM: Right. And they didn't want to vote for their own retirement or something. They didn't want to ….

CJH: I think the idea was that they establish a separate commission that would do the salaries and still be hooked.

BM: In terms of retirement?

CJH: In terms of the legislative retirement.

BM: Okay. Then the commission could do it without the legislature having to do it?

CJH: Yeah, because if the legislature did nothing, the commissioners thing went into effect. And, of course, it was not supported at the polls.

BM: Right. I did leave some questions kind of for you, what events and people have influenced you the most, the challenges, and how you want to be remembered. And again, this is very premature in terms of your career. But, you know, the biggest changes, the biggest influences and you—the things you seek for the future, I mean, basically what you would like to say.

CJH: Okay. Well, of course, in thinking about this, my appreciation for the people of Tarrant County and not only the lawyers, but the general population of the county, as well as the other eleven counties in the Second Court of Appeals district for twenty years for giving me the opportunity to do this; and, of course, the people now who support me as far as doing what I'm doing now. And I appreciate that. It's such a great honor.

I thought about—you know, when you end up at this time and you start thinking about the possibilities of other careers because you know you've got a long time to go, and I gave it a lot of serious thought and I kept coming back thinking, what is it that I really enjoy doing and it's meaningful to me? And it's this.

And so I appreciate everybody's giving me the opportunity to do it in the past and continues to give me the opportunity to do it. Everybody's been very gracious and helpful and supportive over the years. I appreciate that.

BM: I remember once you were interviewed, and this is fifteen or more years ago now, and it was on a very serious question of some kind, and it was treated very seriously. And I think there was some question asked about how difficult your job was or it was a difficult decision you were facing.

And yet, your reaction, you somehow phrased it in such a way, because I remember you saying something along the lines you actually loved your job and that you didn't understand why other people didn't understand that, that you really enjoyed what you were doing. I can think of no better thing for a person to be able to say after twenty years that you enjoy what you're doing, not just that you were good at it or whatever, successful. Is that something that you think, because it combines the law and the public service?

CJH: I think so.

BM: The calling?

CJH: I think so. I think so. It's just always been an interesting challenge and something that I've enjoyed doing. I feel very fortunate because of that, because not everybody you know is in that situation.

BM: Any more questions? All right. We need to take a break anyway.

CJH: Okay.

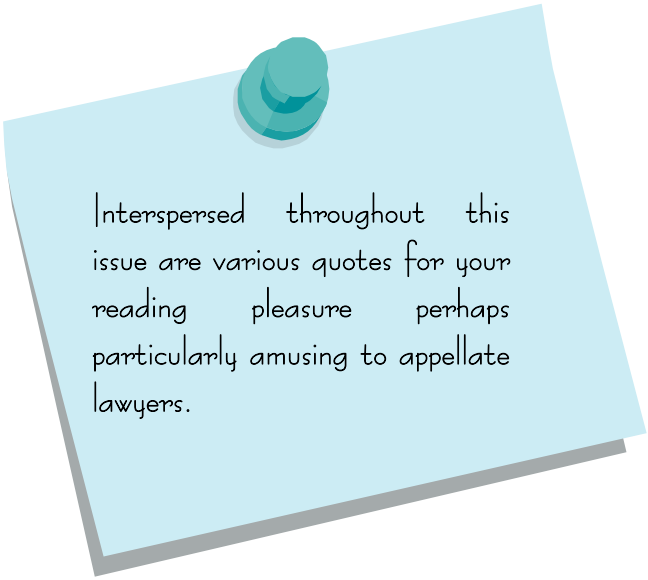
"The issues can be analyzed in pages less than fifty,

If plaintiffs could with thought and words endeavor to be thrifty."

Asher Rubin, California Deputy Attorney General

"The power of clear statement is the great power at the bar."

Daniel Webster



The Elusive Nuance in Philip Morris USA v. Williamson

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I. INTRODUCTION[1]

The U.S. Supreme Court's recent 5-4 decision in *Philip Morris USA v. Williamson*, 127 S. Ct. 1057 (2007), dealing with constitutional review of punitive damages awards, is widely viewed as a blockbuster opinion. The decision is also not without controversy, which is apparent just from the closely split vote and the alignment of the justices. In the end, it remains to be seen whether *Philip Morris* is really a blockbuster case or whether it will be relegated to relative insignificance in the pantheon of punitive-damages cases.

II. THE CASE AND ITS REASONING

It is hard to conceive of a more unsympathetic defendant or a more eccentric alignment of Justices in a Supreme Court decision than were present in *Philip Morris*. Two liberals, a moderate, and two conservatives (Justices Breyer, Souter, Kennedy, Alito, and Chief Justice Roberts, respectively) teamed up to vacate a $79.5 million punitive damages award against a tobacco company that a jury found had deceived a smoker into believing that cigarettes were safe. Arrayed against the majority was a splintered minority composed of two liberals and two conservatives (Justices Stevens, Ginsburg, Scalia, and Thomas, respectively).

The majority reversed on the most prosaic of grounds—the failure to give a jury instruction requested by Philip Morris. This failure, according to the majority, could have resulted in a taking of Philip Morris's property without due process. In short, the majority found a procedural due process violation.

The instruction that Philip Morris requested would have told the jurors that they could not award punitive damages to punish Philip Morris for injuries to nonparties—that is, to other current or former smokers who were strangers to the litigation. The plaintiff's lawyer, in fact, argued to the jury that Philip Morris, which has a one-third market share, is responsible for one-third of smoking deaths. Thus, Philip Morris argued there was a very real possibility that it was being punished for injuries to nonparties.

The majority apparently agreed, emphasizing that a defendant threatened with punishment has a due process right to present every available defense. It is, however, impossible to defend against charges of injuring nonparties when there are multiple unknowns, such as how many victims there are, how they were injured, and what injuries they suffered. For example, what if some portion of the unknown smokers were not deceived about the safety of smoking? Philip Morris would be hard-pressed to present evidence of this defense.

The majority determined, therefore, that due process requires proper jury instructions, so that the jurors will answer the right question. Without proper instructions, the jury can only speculate about injuries to nonparties, which the majority said would intensify the constitutional concerns raised by punitive damages awards. Curiously however, the majority left a colossal anomaly in its constitutional analysis.

Specifically, the majority held that juries may consider injuries to nonparties when determining whether the defendant's conduct was sufficiently reprehensible to warrant punitive damages. As Justice Stevens explained in his dissent, the majority distinguished "between taking third-party harm into account in order to assess the reprehensibility of the defendant's conduct—which is permitted—from doing so in order to punish the defendant 'directly'—which is forbidden." Justice Stevens complained that "[t]his nuance eludes me."

[1] This article originally appeared in *Mealey's Litigation Report: Tobacco*, a publication of LexisNexis.

Many could argue that this distinction will also elude lay jurors. The majority brushed off this concern, stating that "state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such [juror] confusion occurring." The majority offered no solutions, except to say that due process requires courts to provide some form of protection against the risk of confusion.

For now, then, we know that the jury can hear about harm to nonparties, but cannot punish for harm to nonparties. We know that while courts must protect against juror confusion, they have flexibility in determining what protections to implement. And while the majority did not expressly bless Philip Morris's requested instruction, prudent lawyers will likely assume that due process requires an instruction much like the one that Philip Morris proposed.

III. The Nuance Behind the *Philip Morris* Instruction

This, however, still leaves a huge question: How can a court determine whether the jury followed the instruction to consider injuries to nonparties only for reprehensibility purposes and not when determining the amount of punishment? The Philip Morris majority is smart enough to know that this question is usually unanswerable. So what is the majority really up to?

The best clue is the majority's repeated references to the requirement that the jury be properly instructed to answer the right question. As the majority explained, due process requires courts "to provide assurance that juries are not asking the wrong question, i.e., seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers."

The majority seems to be saying that the defendant must be given a chance for the jury to get it right. If a *Philip Morris*-type instruction is given, it is at least possible that the jury will understand the nuance, follow the instruction, and get it right. Maybe the court and the parties won't be able to tell if the jury followed the instruction, but at least the defendant will have been given a fighting chance. And in a rough sort of way, isn't that what procedural due process is about—that each party be given a fighting chance?

Without a *Philip Morris*-type instruction, there is little chance the jury will get it right. Without such an instruction, the jury would have to refrain from doing something that it wasn't told not to do—namely, not to punish for injuries to nonparties. A defendant like Philip Morris does not have a fighting chance that an uninstructed jury will refrain from punishing for harm to nonparties. But with the instruction, maybe the jury will perform the analysis correctly.

If a *Philip Morris*-type instruction is given and a big punitive-damages verdict still results, then it will be difficult for courts to determine whether the jury actually followed the instruction. In that event, courts can fall back on the *BMW of North America v. Gore*[2] / *State Farm Mutual Automobile Insurance Co. v. Campbell*[3] analysis to determine whether the award is constitutionally excessive. This would allow the court to reduce the award without resolving the perplexing question of whether the jury actually followed the *Philip Morris* instruction.

Also, if courts begin routinely giving a *Philip Morris*-type instruction, it might result in fewer big verdicts that require a constitutional-excessiveness review. If that result comes to pass, *Philip Morris* will be a significant decision, because there will be fewer cases in which courts must perform a convoluted constitutional balancing act.

If that result does not come to pass, then *Philip Morris* will likely become a relatively insignificant decision because smart plaintiffs' lawyers will always agree to a *Philip Morris*-type instruction. They will quickly adapt to *Philip Morris*, because they won't want to run the risk of a certain reversal on the very avoidable ground of charge error.

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[2] 517 U.S. 559 (1996).

[3] 538 U.S. 408 (2003).

If, despite a *Philip Morris*-type instruction, the jury still renders a large award of punitive damages, a smart plaintiff's lawyer would much rather take his or her chances with the *BMW v. Gor*e / *State Farm v. Campbell* balancing test. Courts have found ways to uphold large awards under that test, so a large award has a chance of surviving such review. But if the jury was not properly instructed, reversal for charge error will presumably be automatic.

IV. CONCLUSION

In the end, Philip Morris could ripen into a significant decision. But if plaintiffs' lawyers adapt to it quickly, and if jurors continue to award large punitive damages verdicts because the "nuance" eludes them, Philip Morris will likely atrophy into a footnote in the history of constitutional review of punitive damages awards.

"It cannot be helped, it is as it should be, that the law is behind the times."

Justice Oliver Wendell Holmes, Jr.

"We're doing this whole thing backward. Attorneys should wear numbers on their backs, and box scores should have entries for writs, dispositions, and appeals."

Bill Veeck, Owner, Chicago White Sox

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I. INTRODUCTION[1]

The Texas Rules of Appellate Procedure require the facts in a petition for writ of mandamus to be verified by affidavit.[2] Courts have consistently held that "[t]he affidavit must constitute such a positive statement of knowledge of the facts in the petition as would constitute a basis for a charge of perjury if such facts were found to be untrue."[3] The Rules contain this requirement because appellate courts are not equipped to find facts.[4] The failure to properly verify a petition for writ of mandamus generally results in denial of the petition.[5]

The affidavit must be "made on personal knowledge by an affiant competent to testify to the matters stated."[6] In practice, the petition is usually verified by the relator's attorney. Sounds simple enough, right? Not necessarily. While the requirement itself is simple, the practical application of the rule can be complicated. Problems arise when appellate counsel are required to verify the petition but do not have the requisite personal knowledge to swear to the facts recited therein. When an appellate attorney swears to the facts based on personal knowledge, does that attorney become a fact witness subject to deposition or worse, disqualification?

This article discusses the current state of Rule 52.3, exposes the inequitable application of the rule, and addresses the many unanswered questions left in its wake. Although the Rules Advisory Committee (the "Committee") recently considered revising Rule 52.3 in response to a request by the Texas Supreme Court, the Committee voted not to recommend an amendment to the rule. The authors propose an amendment to Rule 52.3 that dispenses with the verification requirement except in specific, limited circumstances and suggest that the Texas Supreme Court consider revising the rule.

II. PROBLEMS WITH THE VERIFICATION REQUIREMENT

There are two main problems with the verification requirement in Texas. First, attorneys verifying a mandamus petition must be able to swear to the facts stated in the petition based on their own personal knowledge of those facts. An appellate attorney, however, may not have personal knowledge of all the facts stated in the petition. Second, by verifying the facts stated in the petition, the appellate attorney risks disqualification from representation by becoming a fact witness. Moreover, these issues arise both when an appellate attorney verifies procedural facts and evidentiary facts.

A. Verification of Procedural Facts

Trial attorneys routinely hire appellate counsel to handle mandamus petitions. If the appellate attorney verifies the petition, acting solely on the

[1] The authors would like to thank the Honorable Justice Gina M. Benavides, the Texas Supreme Court Rules Attorney Jody Hughes, and Robert B. Gilbreath for their assistance with this article.

[2] TEX. R. APP. P. 52.3.

[3] *Elliott v. Hamilton*, 512 S.W.2d 824, 825 (Tex. Civ. App.—Corpus Christi 1974, orig. proceeding).

[4] *Id*. The Texas Supreme Court is expressly forbidden from finding facts. See TEX. CONST. art. V, § 6.

[5] *See Elliott*, 512 S.W.2d at 825; *see also Chapa v. Whittle*, 536 S.W.3d 681, 683 (Tex. Civ. App.—Corpus Christi 1976, orig. proceeding); *Cantrell v. Carlson*, 313 S.W.2d 624, 626 (Tex. Civ. App.—Dallas 1958, orig. proceeding), *leave granted, mand. granted*, 158 Tex. 528, 314 S.W.2d 286 (1958) (orig. proceeding). *But see Rosedale Partners, Ltd. v. 131st Judicial Dist. Court, Bexar County*, 869 S.W.2d 643, 646 (Tex. App.—San Antonio 1994, orig. proceeding) (considering merits despite defective verification because relator could refile petition with sufficient verification).

[6] TEX. R. APP. P. 52.3.

assurances of trial counsel, there is a good chance the verification will be deemed insufficient based on a lack of personal knowledge. If that happens, the relator may or may not have a chance to refile the petition with a proper verification.[7] In some cases, however, the deficiency may not be correctable because no one has the requisite knowledge, and the client loses rights by no fault of its own.

To illustrate this point, we will take you through a hypothetical:

A statute provides for a mandatory transfer of venue if a motion is filed that meets the statute's requirements. The defendant files a motion to transfer venue that meets the statute's requirements. Nonetheless, after a hearing, the trial court refuses to transfer the case.[8] The defendant's attorney prepares a petition for writ of mandamus. The attorney includes the following statements in the petition's verified statement of facts:

- a motion to transfer venue based on a mandatory venue provision was filed on his client's behalf;
- the motion to transfer venue met the statute's requirements, as reflected in a true and correct copy of the motion contained in the appendix/record; and
- the trial court refused to transfer the case, as reflected in a true and correct copy of the trial court's order and an authenticated hearing transcript contained in the appendix/record.

The defendant's attorney has personal knowledge of these facts and can properly verify them. Easy enough.

Now add the following facts to the hypothetical: Before the defendant's attorney has a chance to sign the verification and file the petition, he dies. An associate in the attorney's firm helped prepare and file all of the pleadings in the case. The associate's name, however, does not appear on the pleadings, and the associate did not attend the venue hearing. As the only person at the firm with knowledge of the case, the associate assumes the role of lead counsel for the case.

The associate completes the petition for writ of mandamus, verifies that the statements in the factual portion of the petition are true and correct, and files the petition with the appropriate court of appeals. The associate includes an authenticated copy of the hearing transcript in the record. The real party in interest, however, objects that the associate does not have the requisite personal knowledge to verify the petition because her name did not appear on the venue motion's signature block and because she did not attend the venue hearing.

Although this may seem far-fetched, the above-scenario is based on a true story. And it is likely to happen again. According to the American Bar Association, in April 2000, nearly thirty-six percent of all Texas lawyers in private practice were solo practitioners.[9] What happens to a solo practitioner's clients if they need mandamus relief but the solo practitioner is no longer around to verify the facts in the petition? The answer is unclear.

B. Attorneys Verifying Evidentiary Facts

More often, questions arise as to what sort of verification is required when the mandamus petition seeks relief from an order that required the taking of evidence. When the evidence permits but one ruling, and the trial court rules to the contrary, the court of appeals will review the evidence to determine if the trial court abused its

[7] *See Rosedale Partners, Ltd.*, 869 S.W.2d at 646 (noting that relator could cure defects in verification by simply re-filing petition with sufficient verification).

[8] *See generally Sokolosky v. McFall*, 750 S.W.2d 35 (Tex. 1988) (orig. proceeding).

[9] *See* James E. Brill, *Dealing with the Death of a Solo Practitioner*, *in* State Bar of Texas Prof. Dev. Program, 24thth Annual Advanced Estate Planning and Probate Course, ch. 8, p. 1 (2000).

discretion.[10] However, as Justice Hecht correctly noted, appellate attorneys will not usually have personal knowledge of the facts they must verify under the current rule:

> In practice, an attorney will often lack the personal knowledge of the facts demanded by the verification requirement, unless the facts relevant to the mandamus concern events witnessed by the attorney at trial. Thus, to comply with the requirement, it may be necessary to obtain sworn statements from witnesses or others with personal knowledge of the facts. . . . Several other issues are raised when the facts pertinent to the mandamus are neither within the attorney's personal knowledge nor the personal knowledge of any single witness. Must the petition be verified by multiple affiants?[11]

Another interesting question raised by commentators is whether the opposing party can successfully move to disqualify the relator's attorney because the required verification necessarily converts the attorney into a fact witness.[12] When the trial court's ruling is based on the taking of evidence, and the appellate attorney has to rely on evidentiary facts to demonstrate the client's right to mandamus relief, does that attorney become subject to a deposition or a motion for disqualification by the opposing party?[13] Commentators have suggested that practitioners refrain from verifying facts on behalf of their clients for these very reasons: "[A]ttorneys are well advised to use caution in swearing to pleadings because (1) they usually lack the requisite first-hand knowledge about the matters to be verified and (2) they risk becoming fact witnesses and, thus, ethically disqualified to continue as trial attorneys in the case."[14]

III. RULE 52.3'S VERIFICATION REQUIREMENT IS UNNECESSARY, AND COURTS ARE CIRCUMVENTING THE RULE

Rule 52.3's trap for relators really serves no purpose unless the matters complained about do not appear of record. Currently, a relator must file a record to support the petition.[15] The mandamus record must contain a certified or sworn copy of every document that is material to the relator's claim for relief that was filed in the underlying proceeding.[16] When the trial court has held an evidentiary hearing, the relator has the burden of providing an authenticated hearing transcript and a verification of all the facts stated in the petition to demonstrate that all the facts stated in the petition are true and correct.[17]

If the matter does not appear in the record, a verification may be necessary to aid the court in its determination. For example, if the trial court has refused to enter an order that it is required by law to enter, the relator's attorney may need to swear that he requested the order and that it was refused.[18]

In most cases, however, the record obviates the need for any verification. For example, in concurrent appeals and mandamus proceedings from the denial of a motion to compel arbitration,

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[10] *See Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992) (orig. proceeding).

[11] Letter from Nathan L. Hecht, Senior Associate Justice, Texas Supreme Court, to Charles L. "Chip" Babcock, Chair, Texas Supreme Court Rules Advisory Committee, app. B., p. 19 (Sept. 22, 2006), *available at* http://www.supreme.courts.state.tx.us/rules/pdf/SCAC_Hecht_092206.pdf.

[12] *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 3.08, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A-1 (Vernon 2005) (TEX. STATE BAR R. art. X, § 9).

[13] *See, e.g., Gilbert McClure Enters. v. Burnett*, 735 S.W.2d 309, 311 (Tex. App.—Dallas 1987, orig. proceeding) (trial court disqualified attorney based on attorney's verification of amended pleading).

[14] *See, e.g.*, 2 ROY W. MCDONALD & ELAINE G. CARLSON, TEXAS CIVIL PRACTICE § 7.23 (cautioning lawyers verifying pleadings because they usually lack the requisite first-hand knowledge and may become fact witnesses subject to disqualification).

[15] TEX. R. APP. P. 52.7.

[16] *Id.* at 52.7(a)(1).

[17] *Id.* at 52.7(a)(2); 52.3.

[18] *Sokolosky v. McFall*, 750 S.W.2d 35 (Tex. 1988) (orig. proceeding).

attorneys frequently request that the court of appeals either suspend the rules and consider the appellate record as the mandamus record or request that the court consolidate the proceedings to achieve the same result.[19] The matters complained about clearly appear in the clerk's record, which contains copies of the documents filed in the trial court, and in the reporter's record, which contains a transcript of any hearing as well.[20] If an appellate court can dispense with the verification requirement and decide a mandamus petition based on the appellate record, is the verification really necessary?

Moreover, courts are creating end-runs around the rule. A few courts have refused to dismiss mandamus petitions for a defective verification when the matters complained of appeared in the record.[21] In fact, a handful of cases have noted that the verification requirement has been relaxed where a full evidentiary hearing has been conducted below.[22] These cases provide little reassurance for a relator seeking relief from an order that will cause immediate irreparable harm. Indeed, the fact that courts are creating ways to circumvent the verification requirement highlights the need for a change in the rules.

IV. PROPOSED RULE CHANGE

The Supreme Court asked the Rules Advisory Committee to consider a change to Rule 52.3. In October 2006, the Committee considered and voted to adopt the following change:

> **52.3 Form and Contents of Petition.** All factual statements in the petition, not otherwise supported by sworn testimony, affidavit or other competent evidence, must be verified by an affidavit or affidavits made on personal knowledge by ~~an~~ affiants competent to testify to the matters stated. The petition must, under appropriate headings and in the order here indicated, contain the following ….[23]

However, at the end of the October meeting, several Committee members began discussing a different approach:

> **52.3 Form and Contents of Petition.** ~~All factual statements in the petition must be verified by affidavit made on personal knowledge by an affiant competent to testify to the matters stated.~~ The petition must, under appropriate headings and in the order here indicated, contain the following:
>
> . . .
>
> (g) *Statement of Facts*. The petition must state concisely and without argument the facts pertinent to the issues or points presented. Every statement of fact in the petition must be supported by citation to competent evidence included in ~~The statement must be supported by references to~~ the appendix or record.
>
> (j) *Verification*. The person filing the petition must verify that he or she has reviewed the petition and concluded that every factual statement in the petition is

[19] *In re Lerma*, 144 S.W.3d 21, 22 (Tex. App.—El Paso 2004, orig. proceeding) (considering record from two pending appeals in mandamus proceeding); *see also In re Reliastar Life Ins. Co*., No. 10-03-00185-CV, 2004 WL 1277860, at * 1 (Tex. App.—Waco June 9, 2004, orig. proceeding) (not designated for publication).

[20] *Compare* TEX. R. APP. P. 52.7(a), *with* TEX. R. APP. P. 34.5-34.6.

[21] *See Chamberlain v. Cherry*, 818 S.W.2d 201, 208 (Tex. App.—Amarillo 1991, orig. proceeding) (fact that relator's attorney did not attend hearing, rendering his affidavit verifying facts in petition defective, did not require dismissal of petition where hearing transcript in record); *In re Scally*, No. 01-99-00299-CV, 1999 WL 250790, at *1 (Tex. App.—Houston [1st Dist.] April 27, 1999, orig. proceeding) (not designated for publication) (court would not dismiss petition for failure to verify truth of facts stated in petition where record contained sworn or certified copies of documents filed in case).

[22] *See, e.g., Austin v. City of San Antonio*, 630 S.W.2d 391, 393 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.); *Pickard v. Castillo*, 550 S.W.2d 107, 112 (Tex. Civ. App.—Corpus Christi 1977, no writ).

[23] *See* Transcript of Texas Supreme Court Rules Advisory Committee Meeting (Oct. 21, 2006), *available at* http://www.supreme.courts.state.tx.us/rules/scac/2006/transcripts/102106transcript.pdf.

supported by competent evidence included in the appendix or record.

~~(j)~~(k) Appendix. [no change to rule text][24]

No new vote was taken at the October meeting after this second proposal.[25]

At the February 2007 meeting, the Committee revisited the issue.[26] The Committee voted on the two alternatives.[27] The majority voted for the latter version.[28] Curiously, an additional vote was taken later in the meeting to determine whether the rule should be amended at all.[29] The majority voted to keep the rule as is.[30]

V. CONCLUSION

As it stands now, the Committee will not recommend a change in Rule 52.3 to the Texas Supreme Court. Nevertheless, the Court should seriously consider a rule change because the current application of the rule is neither necessary nor effective. The record usually renders verification of the facts in the petition unnecessary, and courts are finding creative ways around the requirement to achieve a just result. A simple solution is for the Texas Supreme Court to dispense with the verification requirement in cases where the matters appear in the mandamus record.

Dispensing with the verification requirement in situations where the matters appear in the record is both efficient and effective. For example, Texas Rule of Civil Procedure 93 governs the verification of specific denials and provides that verification is required "unless the truth of such matters appear of record."[31] Language such as that used in Rule 93 can easily be incorporated into the rules of appellate procedure. Rule 52.3 can be amended to read: "All factual statements in the petition must be verified by affidavit made on personal knowledge by an affiant competent to testify to the matters stated, unless the truth of the matter appears in the mandamus record." An amendment similar to Texas Rule of Civil Procedure 93 would eliminate the problems with the current Rule 52.3 demonstrated above. Although the Rules Advisory Committee has not recommended a rule change, the Texas Supreme Court should nevertheless consider amending Rule 52.3.

[24] *Id.*

[25] *Id.*

[26] *See* Transcript of Texas Supreme Court Rules Advisory Committee Meeting Feb. 16, 2007, *available at* http://www.supreme.courts.state.tx.us/rules/scac/2007/021607trans.pdf.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] TEX. R. CIV. P. 93; *see also Cantu v. Holiday Inns, Inc.*, 910 S.W.2d 113, 116-17 (Tex. App.—Corpus Christi 1995, writ denied).

May It Please the Court?
A Memoir of My First Twenty Minutes

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First, let me give you a disclaimer. Obviously, as attorneys, we all work for our clients. In that regard, we strive to do the best job we can in order to achieve the most favorable outcome possible. This article, however, is not written from the client's perspective. Instead, it is a short memoir of my first appellate oral argument from a personal perspective. It is a retelling of an amazing experience in a young lawyer's life.

It seemed as if I had prepared for this day since my first year in law school. Back then, I had done very well in my law school's first year required moot court competition. As part of the curriculum, all Legal Research and Writing students were required to write an appellate brief, prepare a short oral argument on the same subject matter, and argue before "appellate judges"—also known as second- and third-year law students. If a team did well enough, the students would eventually have the opportunity to argue before local practitioners and eventually a panel of judges in the final round of the competition. My partner and I made it to the quarter-finals before being eliminated (by the team that eventually won). The appellate brief I authored received the best brief award for my section. The appellate bug bit me that year.

After that, I continued participating in appellate-related activities. My first-year moot court partner and I competed in an internal moot court competition during second year organized by the Board of Advocates. We received the best brief award and argued in the final round. The External Advocacy Program's moot court team invited me to become a member based upon my performance in the competition. For the two years that followed, I wrote appellate briefs for numerous regional and national moot court competitions as the team's primary brief writer. Good times. Of course, the most amazing experience of my law school career related to an amicus brief I authored to the United States Court of Appeals for the Armed Forces in an actual criminal case pending before the court. The court granted oral argument in the case and allowed the amicus to argue. It was a truly incredible ten minutes. But, I digress. Now, I readied myself for the first appellate oral argument as a private practitioner. I had sat through numerous arguments as a law clerk for two different appellate courts—but, this time I would be on the other side of the bench. This time it would be my voice echoing through the courtroom.

The case was familiar. I had worked on this case for over a year through the trial process. I had researched and written the bulk of the dispositive pleadings. I had sat through hearings and client meetings. I had endlessly reviewed the case file. I knew this case.

When our client decided to appeal, the case was officially turned over to me. I perfected the appeal, requested the appellate record, and waited. My thoughts constantly found themselves pondering the intricacies of the argument. There was no doubt that an uphill battle loomed on the horizon. Framing the key issue would be the secret to winning the first fight. I spent more hours than have ever been recorded preparing the brief. I always feel the proofreading and editing stages could go on forever. But, the due date does not wait. And so, I submitted Appellant's Brief to the intermediate appellate court. I was pleased with the outcome. Somehow I knew—this would be the case for which oral argument would be granted. Now, once again, I waited.

Although I always signed up for e-mail alerts with the courts of appeals, I still could not help checking the court's website daily. The court received my brief—good. Appellee's due date was set—good. Then, what's this? "Ready to set for oral argument." That was a notation I had not

seen before. Could it be? A telephone call to the court confirmed my suspicion, the court had granted oral argument. How could I possibly concentrate on anything else? At first, the prospect of oral argument consumed my thoughts. But, life goes on and other work called my name.

When the Appellees filed their brief, they agreed there was no Texas case on-point. This case was a perfect specimen for oral argument. I filed our reply brief. Appellees filed a sur-reply brief (I have only seen this in the most hotly debated cases). Given the contents of the sur-reply in relation to the overall arguments, I decided not to continue the briefing game—I would have the last word at oral argument.

As soon as I received official word of the date for oral argument, I began preparations. Methodically, I started to review the record, contemplate the issues, strategize, and organize the argument. As I worked on the case, I wanted everything to be perfect—facts, law, argument. I don't think these can all ever be perfect, but I tried to plan for as close to perfection as possible.

As we had done in law school, I planned a practice moot court round two weeks before the big day. I am not sure how common this is in the "real world," but it was a fantastic tool. My fellow attorneys, knowledgeable on the subject matter, asked pointed questions and endeavored to view my arguments though a most skeptical lens. I left the practice round much more confident than before. I left more confident in my arguments and in my ability to handle myself in the arena I would enter.

After that, solo preparations continued. The big day approached. Twenty minutes. I tried to get a no-interruption presentation down to the pre-defined time limits. All the while, I knew this argument would not escape questions. And, I was certain there would be many questions.

The day before argument arrived. My law firm partner (from whom I received the case) explained that he would be unable to attend because of his own hearing. Due to various scheduling conflicts, none of the lawyers in my firm would attend. But, my husband, would. He had attended my two law school oral arguments and he wanted to attend this one too. I am very fortunate to have someone so supportive that he actually enjoys sharing my passion for appellate law—even if he does not always understand the intricacies of the legal arguments (he is a computer guru, not an attorney).

My husband is so supportive that he stayed up late the night before helping me prepare. Over and over I presented my argument. He is so supportive that he even tried (with success, I might add) to ask me questions to simulate the effect those questions would have on my presentation. He is so supportive that he eventually made me go to sleep.

Morning came quickly. The long drive to the court did too. We waited together in the foyer of the courtroom watching other attorneys from different cases (and their clients) arrive. Eventually, my client arrived too. The doors to the courtroom opened. In we all filed. More waiting.

I watched as the other attorneys, in court for different cases, chatted. They all seemed to know each other. I watched as they all displayed their confidence. Each attorney was sure of their case—even though, clearly, not all would prevail. I watched as they too looked around. Each attorney surely wondered, despite their airs, how they would do and how good the other side would be. Based upon my time as a law clerk, I am not sure you can truly win or lose a case based upon oral argument. But, on some level, I think practitioners believe it possible. Behind their smiles and gestures, each of these lawyers wondered how much they would help or hurt their case.

The court heard one case before mine. It was in that forty-five minutes that I experienced my first true bout of sustained nervousness. In that first case, the court only asked questions of the appellant. It made sense, I told myself. Could I effectively answer all the questions I would get?

For a moment, my hands shook nervously. The appellee in the first case finished his presentation. As the appellant began rebuttal, all of my nervousness melted away. Five more minutes to go. Even my excitement was pushed to the back-burner. Adrenaline kicked in. I was up.

"May It Please the Court ...."

Questions were asked and answered. My first twenty minutes came and went (in what seemed like, I might add, less than twenty minutes). The merits of the case and how it turns out are not the subject of this article. As for oral argument, I am left looking forward to and anxiously awaiting another.

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ABORTION

***Gonzales v. Carhart*; *Gonzales v. Planned Parenthood*, Nos. 05-380, 05-1382, 127 S. Ct. 1610 (Apr. 18, 2007)**

In companion cases, the Supreme Court upheld the federal Partial-Birth Abortion Ban Act of 2003 against facial constitutional challenges. In the Act, Congress sought to ban the second-trimester procedure known as intact D&E (dilation and evacuation), in which a doctor substantially dilates the cervix, inserts surgical instruments into the uterus, and maneuvers them to extract the fetus intact (or largely intact), usually piercing or crushing the skull in order to allow the head to pass through the cervix. (The procedure differs from the standard D&E in that the entire body is removed, whereas in the standard procedure the fetus is typically ripped apart as it is removed and the doctor takes 10 to 15 passes to remove all of the fetus.) The Act was passed after the Court's decision in *Stenberg v. Carhart*, which had invalidated a Nebraska law banning partial-birth abortion, and the Act's factual findings and text are responsive to that decision. In two separate actions, a group of doctors and several advocacy groups facially challenged the Act's constitutionality. The district court in each case found the Act unconstitutional and enjoined its enforcement, and the Eighth and Ninth Circuits affirmed.

By a 5-4 vote, the Supreme Court reversed. Justice Kennedy, writing for the Court, assumed that the standards from *Planned Parenthood v. Casey* apply here—including that "[r]egulations which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn are permitted" if they do not pose an undue burden, *i.e.*, "a substantial obstacle to the woman's exercise of the right to choose." First, the Court determined that the Act is not void for vagueness because it gives doctors of ordinary intelligence a reasonable chance to know what is prohibited—the "deliberat[e] and intentional" delivery of a "living" fetus to a specified anatomical landmark "for the purpose of performing," and with the actual performance of, "an overt act that the [doctor] knows will kill [it]"—and it does not promote arbitrary or discriminatory enforcement. Second, the Court found that the Act is not impermissibly broad because it is carefully tailored to reach only a doctor who intends from the outset to perform an *intact* D&E. Third, the Court held that the Act is not facially invalid for posing a substantial obstacle to previability abortions. In the Court's view, the ban furthers Congress's legitimate interests in expressing profound respect for human (including fetal) life, protecting the medical community's ethics and reputation, and ensuring that people are fully informed about late-term abortions—including women who may come to regret their decision if they learn, after the fact, the way in which the procedure was performed. The Court said that a government, if it has a "rational basis" to act and does not impose an undue burden, may use its power to bar certain procedures and substitute others. The Court found that the absence of a health exception in the Act did not undermine its facial validity. It took as an assumption that the Act would be unconstitutional if it subjected women to significant health risks but, because the medical evidence before Congress on that issue was inconclusive, it held that the Act must be sustained against a facial attack. According to the Court, *Stenberg* must be read to leave room for legislative action in the face of medical disagreement. Finally, the Court stated that the proper means for pursuing these claims are not facial attacks, but as-applied challenges. The Court thus left open the possibility of a future challenge to the Act if it can be shown in concrete

circumstances that a woman's health requires an intact D&E.

Justice Thomas (joined by Justice Scalia) wrote a separate concurrence, agreeing that the Court properly applied current abortion jurisprudence, but stating that that jurisprudence is unfounded. Justice Ginsburg filed a dissent, joined by Justices Stevens, Souter, and Breyer, arguing that the Court failed to take *Casey* and *Stenberg* seriously. In her view, the right to reproductive choice is based not on privacy, but a woman's right to equal citizenship. As a result, the Court has always required laws regulating abortion to have a health exception for the mother, including (in *Stenberg*) for the very procedure at issue here. Justice Ginsburg argued that significant medical evidence supported the district courts' findings that banning intact D&E could endanger women's health—which was found to be sufficient in *Stenberg*. She also faulted the Court for not explaining why the Act prohibits intact D&E but not other procedures that are similarly troubling under the Court's reasoning and its "moral concerns"—such as standard D&E or, for that matter, any abortion. She especially criticized the Court for relying on the theory that women who have abortions may come to regret their decision, and for suggesting that the solution is to take away the woman's right to make the choice. Justice Ginsburg also argued that the Court failed to draw the line at viability, contrary to *Roe v. Wade* and *Casey*, and that facial attacks have always been permissible in the area of abortion—such as in *Stenberg*. Finally, Justice Ginsburg lamented that the Court—differently composed than the last time it had an abortion case—was not faithful to *Roe*, *Casey*, and *Stenberg*, and concluded that the Act is plainly unconstitutional under those precedents.

ANTITRUST

***Bell Atl. Corp. v. Twombly*, No. 05-1126, 127 S. Ct. 1955 (May 21, 2007)**

In this antitrust class action, the Court held that an antitrust complaint must allege something more than mere parallel conduct among industry competitors to state a claim for unlawful "contract, combination . . . , or conspiracy," under Section 1 of the Sherman Act.

The plaintiffs, representing a class of local subscribers of telecommunication services, filed a class action alleging that the defendants (major telecommunications companies) had conspired to exclude competitors and not to compete against one another in their respective geographic markets. The plaintiffs claimed that the defendants had ample opportunities to compete against one another, and identified a statement from one competitor that appeared to recognize a benefit to the industry if they refrained from competing. The Second Circuit held that these allegations adequately pled a conspiracy under § 1 because the plaintiffs were required only to allege facts that included a conspiracy among "plausible" possibilities.

In an opinion (7-2) by Justice Souter, the Court reversed and held that the complaint lacked any specifics in accusing the companies of conspiring not to compete in each other's territories for local telephone and internet service. The Court concluded that the mere fact that the parallel conduct was unfavorable to competition was insufficient to state a claim for antitrust *conspiracy*. Plaintiffs must provide enough facts to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement.

Importantly, the Court's holding may not be limited to the antitrust context. FED. R. CIV. P. 8 requires "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Rejecting the argument that Rule 8's notice pleadings standard does not require the pleading of facts, the Court concluded that a complaint must plead "enough facts to state a claim to relief that is plausible on its face." In this case, allegations of parallel conduct without the allegation of facts showing a meeting of the minds on conspiracy were insufficient because Rule 8

"requires a 'showing,' rather than a blanket assertion, of entitlement to relief."

Dissenting, Justice Stevens (joined by Justice Ginsburg) complained that the Court's holding moved away from the more simple notice pleadings standards developed in federal courts. He argued that dismissing the case "without even looking at any of that evidence marks a fundamental—and unjustified—change in the character of pretrial practice."

BANKRUPTCY

***Travelers Cas. & Surety Co. v. Pac. Gas & Elec.*, No. 05-1429, 127 S. Ct. 1199 (Mar. 20, 2007)**

The Supreme Court held that the Bankruptcy Code does not prevent creditors from obtaining attorneys' fees, authorized by contract, merely because they were incurred litigating bankruptcy issues. Pacific Gas & Electric (PG&E) filed for Chapter 11 bankruptcy. Travelers, which had issued bonds to guarantee PG&E's workers' compensation benefits, asserted a claim to protect its rights in case PG&E defaulted. Litigation ensued, with the parties reaching an agreement and stipulating, as relevant, that Travelers could assert a general unsecured claim for attorneys' fees (as was authorized in the parties' contracts). Travelers later filed a claim for attorneys' fees, but PG&E objected. Based on Ninth Circuit law that such fees may not be awarded where the litigated issues were peculiar to bankruptcy law, rather than to contract law, the bankruptcy court, district court, and Ninth Circuit rejected Travelers' attorneys' fees claim.

In an opinion by Justice Alito, the Supreme Court unanimously reversed and held that contract-based claims for attorneys' fees are not barred solely because they arose from litigating issues of bankruptcy law. The Court noted that a contract authorizing fees, if it is enforceable under substantive, non-bankruptcy law, is allowed in bankruptcy except where the Bankruptcy Code provides otherwise. Here, the Court found, none of the Code's relevant provisions rendered Travelers' fees claim unenforceable. It rejected the Ninth Circuit's contrary rule as unsupported in federal bankruptcy law.

COMMERCE CLAUSE

***U. Haulers Ass'n, v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, No. 05-1345, 127 S. Ct. 1786 (Apr. 30, 2007)**

The Court ruled here that local laws favoring state entities in areas of traditional government activity, and treating in-state and out-of-state private companies the same, do not discriminate against interstate commerce under the "dormant" Commerce Clause. Due to problems caused by the unregulated waste-disposal regimes in Oneida and Herkimer counties in New York, the state created a public entity—the Oneida-Herkimer Solid Waste Management Authority—to accept waste from private haulers in the counties (for a "tipping fee") and to process and dispose of it. The counties then enacted "flow control ordinances" requiring that all waste in the counties be delivered to the Authority's sites. A group of haulers and a trade association filed suit, claiming they could haul waste to out-of-state facilities for less and thus that the ordinances discriminate against interstate commerce. The district court found for the plaintiffs, relying on the Supreme Court's invalidation of a flow control ordinance in *C & A Carbone, Inc. v. Clarkstown*. The Second Circuit reversed.

The Court affirmed, with six Justices voting to sustain the flow control ordinances. In an opinion by Chief Justice Roberts joined in relevant part by Justices Scalia, Souter, Ginsburg, and Breyer, the Court found that the laws do not discriminate against interstate commerce for purposes of the dormant Commerce Clause. It distinguished *Carbone* because the flow control ordinance there required waste to be hauled to a *private* contractor, thus benefiting one private company over others, whereas the laws here benefit a *public* entity. According to the Court, treating a public entity differently than private ones is not discriminatory because they are not similarly situated, and such laws can be motivated by legitimate goals rather than in-state economic

protectionism. A contrary ruling, the Court said, would improperly inject courts into local policymaking and disrupt traditional government functions.

In a portion of Chief Justice Roberts' opinion joined by only three Justices, he wrote that the laws still must be analyzed under *Pike v. Bruce Church, Inc.* to determine if the burden on commerce is excessive compared to the local benefits. He found that the ordinances pass this test and voted to sustain them. Justice Scalia wrote separately, refusing to subject the laws to the *Pike* test and voting to uphold them because they are not facially discriminatory and are distinguishable from the type of laws previously held invalid by the Court. Justice Thomas concurred only in the judgment sustaining the laws because, in his view, the dormant Commerce Clause doctrine is unfounded, unworkable, and should be discarded. Justice Alito wrote a dissent, joined by Justices Stevens and Kennedy, arguing that the ordinances are indistinguishable from the one invalidated in *Carbone*, and that the public-private distinction is factually unfounded, legally unsupported, and unpersuasive.

CRIMINAL LAW

***James v. United States*, No. 05-9264, 127 S. Ct. 1586 (Apr. 18, 2007)**

The Supreme Court held that attempted burglary under Florida law qualifies as a "violent felony" under the federal Armed Career Criminal Act (ACCA). James pled guilty to possessing a firearm after a felony and admitted to three prior felonies, including one for attempted burglary in Florida. The district court applied the 15-year mandatory minimum sentence under the ACCA for having three prior "violent felony" convictions, 18 U.S.C. § 924(e), over James' objection that the attempted burglary conviction was not a "violent felony" under § 924(2)(B). The Eleventh Circuit affirmed.

The Supreme Court affirmed by a 5-4 vote. In an opinion by Justice Alito, it held that attempted burglary (as defined by Florida law) falls into the ACCA's residual definition of "violent felony," in § 924(2)(B)(ii), as a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another." Under Florida law, as construed by the Florida Supreme Court, a person is guilty of attempted burglary if he takes an overt act directed toward unlawfully entering or remaining in a structure with intent to commit a felony, but fails in perpetrating the offense. According to the Court, such conduct qualifies as a violent felony because the "potential risk of physical injury" to others that it presents is "comparable" to that posed by its "closest analog" among the offenses specifically enumerated in § 924(2)(B)(ii)—completed burglary.

Justice Scalia dissented, joined by Justices Stevens and Ginsburg, faulting the Court for providing insufficient guidance for lower courts in applying the ACCA's residual provision in the future. In his view, attempted burglary is not a violent felony because it does not present as much risk as that posed by the least risky of the enumerated crimes, which to him is burglary. Justice Thomas dissented, arguing that *Apprendi v. New Jersey* bars judicial determination of whether a prior conviction is a "violent felony."

DEATH PENALTY & HABEAS CORPUS

***Abdul-Kabir v. Quarterman*, No. 05-11284, 127 S. Ct. 1654 (Apr. 25, 2007)**

The Court ruled that, because there was a reasonable chance that Abdul-Kabir's sentencing jury felt foreclosed from giving mitigating effect to constitutionally relevant evidence, the Texas decision denying relief was contrary to and an unreasonable application of clearly established law under 28 U.S.C. § 2254(d)(1). Abdul-Kabir was sentenced to death in Texas. He had introduced two categories of mitigating evidence at sentencing: testimony from his mother and aunt regarding his troubled childhood, and expert testimony about impulse-control problems resulting from damage to his central nervous system. On state postconviction review, Abdul-

Kabir asserted a claim under *Penry v. Lynaugh* (1989) (*Penry I*), that the Texas special issues submitted to the sentencing jury failed to allow it to give mitigating effect to certain evidence. The Texas Court of Criminal Appeals (TCCA) denied relief in 1999. The district court denied relief and the Fifth Circuit affirmed. Consolidating the case with *Brewer v. Quarterman* (below), the Supreme Court granted certiorari.

Justice Stevens wrote the opinion for a 5-4 majority, reversing the Fifth Circuit and holding that clearly established federal law requires that juries be allowed to give meaningful consideration and effect to all mitigating evidence that might serve as a basis for punishment less than death. The Court parsed Supreme Court cases dating back to 1976, distinguishing precedent inconsistent with what it identified as clearly established law. The Court held that Texas's special issues, which asked only whether Abdul-Kabir's crime was deliberate and whether he poses a future danger, did not allow the jury to give mitigating effect to the two forms of evidence he introduced at sentencing. Requiring that juries be capable of giving evidence its full mitigating effect is the only way, the Court reasoned, to allow juries to give a "reasoned moral response" to mitigating evidence.

Chief Justice Roberts dissented, joined by Justices Scalia, Thomas, and Alito. He argued that the rule the Court identified was not clearly established, calling the Court's *Penry* jurisprudence a "dog's breakfast of divided, conflicting, and ever-changing analyses" and analyzing in detail the same cases as the did the majority. He also stated that the Court improperly considered several Supreme Court cases decided after 1999, the operative date for the "clearly established law" determination under § 2254(d)(1). Consolidating his opinion with *Brewer*, Justice Scalia also dissented, and was joined in full by Justice Thomas and in part by Justice Alito. In the portion of the opinion that Justice Alito joined, Justice Scalia echoed the Chief Justice's argument that the Court's *Penry* jurisprudence did not, in 1999, clearly establish that a jury must be capable of giving full effect to mitigating evidence. In the other part of Justice Scalia's dissent, he argued that the Eighth Amendment does not constrain the ability of states to cabin the discretion of capital sentencing juries.

***Brewer v. Quarterman*, No. 05-11287, 127 S. Ct. 1706 (Apr. 25, 2007)**

In this companion case to *Abdul-Kabir v. Quarterman* (above), the Court reaffirmed that juries must be able to give full effect to mitigating evidence. Brewer was sentenced to death in Texas. He had introduced a variety of mitigating evidence, including that he had been hospitalized for depression just before the murder, that he had witnessed his father abuse his mother, that he had used drugs, and that he was "dominated" by his girlfriend. In closing arguments, the prosecutor emphasized that the jury could answer only the special issues, and that it could not express a generalized response to doubts about Brewer's capital culpability. His sentence was affirmed by the TCCA on direct appeal in 1994 and postconviction relief was ultimately denied in 2001. The federal district court granted *Penry* habeas relief, but was overturned by the Fifth Circuit.

Justice Stevens wrote for the Court in reversing the Fifth Circuit, finding that the jury was not permitted to give full effect to Brewer's mitigating evidence insofar as it diminished his moral culpability. The Court rejected the Fifth Circuit's attempt to equate giving mitigating evidence "full effect" with giving it "sufficient effect," stating that such a proposition had "no foundations in the decisions of [the] Court."

Chief Justice Roberts dissented, and was joined by Justices Scalia, Thomas, and Alito. He criticized the Court for describing the difference between Penry's and Brewer's evidence as one merely of degree, because Penry's condition was a permanent mental disorder and Brewer's was episodic. For episodic conditions, the Chief Justice argued, the Court's *Penry* jurisprudence did not clearly establish whether the future dangerousness prong could give that evidence enough mitigating effect. Justice Scalia dissented

on the same grounds as in *Abdul-Kabir*, joined by Justices Thomas and Alito in the same parts as in that case.

***Schriro v. Landrigan*, No. 05-1575, 127 S. Ct. 1933 (May 14, 2007)**

In this case, the Supreme Court held that a federal district court has discretion to deny an evidentiary hearing on an ineffective assistance of counsel claim when the petitioner cannot make out a colorable claim for relief under AEDPA. During the sentencing hearing, Landrigan refused to allow his ex-wife and mother to present mitigating evidence on his behalf, and told the judge to "bring [the death penalty] on." He was sentenced to death and the Arizona Supreme Court affirmed on direct appeal. The Arizona courts denied his ineffective assistance claim for state postconviction relief. The federal district court denied Landrigan an evidentiary hearing on the ground that he could not prove prejudice on his ineffective assistance claim, but the Ninth Circuit reversed.

The Court reversed the Ninth Circuit, in an opinion by Justice Thomas. It held that Landrigan would be entitled to relief under AEDPA only if the state decision was unreasonable, and as a result, that Landrigan would be entitled to a hearing only if the material introduced at the hearing would show, by clear and convincing evidence, that the state fact-finding was unreasonable. The Court found that he could not meet his burden. First, it rejected the Ninth Circuit's claim that Landrigan instructed his counsel to ignore only certain mitigating evidence. Second, it distinguished precedent requiring counsel's adequate investigation of mitigating evidence on the grounds that, in those cases, the attorney had not been instructed to forego a line of defense. Third, the Court refused to apply an "informed and knowing" requirement to a defendant's decision not to introduce certain evidence. Finally, it determined that the poor quality of the mitigating evidence itself prevented Landrigan from making out a colorable claim for relief.

Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented. He first observed that the attorney's investigation of mitigating evidence was constitutionally insufficient. He then chided the Court for refusing to apply the "informed and knowing" waiver requirement to fundamental trial rights. He accused the Court of a cramped reading of the record, contending that a careful reading of the transcript demonstrated that Landrigan clearly had not intended to waive the right to introduce all mitigating evidence his attorney might have uncovered. Finally, Justice Stevens stressed what he believed to be the Court's failure to take into account the most powerful mitigating evidence, Landrigan's organic brain disorder.

***Smith v. Texas*, No. 05-11304, 127 S. Ct. 1686 (Apr. 25, 2007)**

The Supreme Court held here that objections citing *Penry I* are sufficient to preserve a claim under *Penry v. Johnson* (2001) (*Penry II*), which held that a "nullification instruction" given as an attempt to remedy the faults in the Texas special issues found in *Penry I* did not save the constitutionality of the special issues. Smith was sentenced between *Penry I* and *Penry II*. For the brief period between when the Court decided *Penry I* and when the Texas legislature revised the special issues in response to that decision, Texas courts (including Smith's trial court) tried to cure *Penry I* through a nullification instruction directing juries to answer "no" to one of the special issues if it believed that the offender did not deserve to be executed for any reason. On the first round of state collateral review in this case, the TCCA determined there was no *Penry* error and the nullification instruction was materially distinguishable from that in *Penry II*. In *Smith v. Texas* (2004) (per curiam) (*Smith I*), the Supreme Court overturned the TCCA, finding that there was *Penry* error and that the nullification instruction was inadequate under *Penry II*. On remand, the TCCA held that Smith's *Penry I* objection was insufficient to preserve his nullification claim, and thus that he had to show

egregious harm. The Court again granted certiorari.

Justice Kennedy wrote for the Court in reversing, holding that the TCCA wrongly distinguished between *Penry I* and *Penry II* error, and that Smith's instructional objection to the special issues was adequate to preserve the issue of whether the nullification instruction cured the infirmity identified in *Penry I*. The Court then analyzed the claim under state law applicable to claims of instructional error that are properly preserved, and found that its decision in *Smith I* meant that, by definition, Smith satisfied that standard. Justice Souter concurred, noting that the Court may eventually have to take up the question of whether *Penry* errors could ever be harmless.
Justice Alito, joined by Chief Justice Roberts and Justices Scalia and Thomas, dissented. He argued that Smith actively declined to object to the nullification instruction separately, and that his objections to the special issues generally were insufficient to preserve a *Penry II* claim. He would have upheld the TCCA's application of its "egregious harm" standard as an adequate and independent ground for decision, and would have dismissed for want of jurisdiction.

EDUCATION

***Winkelman v. Parma City Sch. Dist.*, No. 05-983, 127 S. Ct. 1994 (May 21, 2007)**

The Supreme Court ruled that the Individuals with Disabilities Education Act (IDEA) grants parents independent rights, allowing them to bring IDEA claims *pro se* on their own behalf. IDEA requires school districts like Parma City's to provide children with a "free appropriate public education" based on an individualized education program (IEP) developed jointly by the parents, school officials, and others. The Winkelmans were dissatisfied with their autistic son's IEP and filed an administrative claim. The claim was denied, and the Winkelmans filed a *pro se* federal complaint on behalf of their son and themselves. The district court granted judgment to the school district. The Sixth Circuit entered an order dismissing the Winkelmans' appeal unless they hired an attorney for their son, holding that IDEA gives only children (not parents) the right to a "free appropriate public education," and that it does not abrogate the common-law rule prohibiting non-lawyer parents from bringing suit *pro se* on behalf of their child.

In an opinion by Justice Kennedy, the Court reversed. It held that IDEA makes parents like the Winkelmans real parties in interest with rights that are independent those of the child. In the Court's view, moreover, parents' independent rights extend to the *substantive* formulation of the IEP—the right to a free appropriate public education for their child—not just procedural or cost issues, given the statute's provision for parents to participate closely in developing an IEP. It said that the opposite conclusion would lead to a confusing and onerous legal regime out of step with the statute's design, and, by leaving some parents without a remedy, would be unjust. Accordingly, the Court ruled that the Winkelmans could pursue their claims on their own behalf, regardless whether they were entitled to litigate *pro se* on their child's behalf.

Justice Scalia, joined by Justice Thomas, concurred in the judgment in part and dissented in part. After analyzing IDEA and the general *pro se* provisions in federal law, Justice Scalia concluded that IDEA grants parents the right to proceed *pro se* only when seeking expense reimbursement or redressing violations of their procedural rights—not when challenging the substantive adequacy of an IEP. He faulted the Court for going further, contending that IDEA clearly makes the substantive right to a free appropriate public education the child's, and that Congress had good reasons for that limitation.

***Zuni Pub. Sch. Dist. v. Dep't of Educ.*, No. 05-1508, 127 S.Ct. 1534 (Apr. 17, 2007)**

This case involves application of the federal Impact Aid Act. The Act provides funding for public education for local school districts that need help because of a federal presence in the district, and it bars states from offsetting that funding by reducing their own aid to the district.

However, it has an exception allowing a state to reduce its funding, due to federal impact aid, if the Secretary of Education finds that the state program merely "equalizes expenditures" among districts. The Act sets out a formula for the Secretary to use, under which a state offset is allowed if the district with the greatest per-pupil expenditures does not exceed, by more than 25%, the district with the lowest per-pupil expenditures. In making this determination, the Secretary must "disregard [districts] with per-pupil expenditures . . . above the 95th percentile or below the 5th percentile of such expenditures." Pursuant to implementing regulations, the Secretary applies these provisions by ranking districts in order of per-pupil expenditures; identifying the 95th and 5th percentile cutoffs based on *student population*; disregarding those districts falling outside the cutoffs; and comparing the highest and lowest of the remaining districts to see if they have a disparity less than 25%. Applying that formula here, the Secretary found that New Mexico was allowed to offset federal impact aid. Two districts sought review, saying the regulations were inconsistent with the Act because the Secretary was required to determine the cutoff points based on the *number of school districts*, without considering the number of students in each district. That claim was rejected by an administrative law judge, the Secretary, and ultimately the Tenth Circuit.

By a 5-4 vote, the Supreme Court affirmed and held that the Act permits the Secretary to identify which districts should be "disregard[ed]" by considering the number of each district's pupils, as well as the size of the district's expenditures per pupil. In an opinion by Justice Breyer, the Court found that the Secretary's method is reasonable and consistent with Congress's intent because it accorded with both the history and purpose of the "disregard" provision. The Court emphasized that this calculation method has existed for 30 years, and that the Act's current language was drafted in 1994 by the then-Secretary without suggestion that it required change in calculation method. Moreover, the Court held that the Act's plain language does not clearly indicate Congress's intent to foreclose the Secretary's interpretation, thus permitting (under *Chevron*) consideration of legislative history and the reasonableness of the Secretary's approach.

Justice Stevens wrote a concurrence arguing that, even if the Act's text was unclear, consideration of legislative history is proper under *Chevron*. Justice Kennedy concurred, with Justice Alito, saying he would prefer that the Court not invert the order of *Chevron* analysis. Justice Scalia dissented, joined by Chief Justice Roberts and Justice Thomas in full, and Justice Souter in part. He chastised the Court for misapplying *Chevron* by failing to start with analysis of statutory text, which in his view unambiguously forecloses the Secretary from using the method based on student population. He also chided the Court's reliance on, and analysis of, legislative history and purpose. Justice Souter agreed with Justice Scalia that the text is clear, though he acknowledged Congress's intent that the Secretary follow this method.

EMPLOYMENT DISCRIMINATION

***Ledbetter v. Goodyear Tire & Rubber Co.*, No. 05-1074, 127 S. Ct. 2162 (May 29, 2007)**

In this significant employment discrimination case, the Court held that later effects of past discrimination do not restart the limitations period for filing an EEOC claim.

Title VII of the 1964 Civil Rights Act requires plaintiffs to bring discrimination claims no more than 180 days after "the alleged unlawful employment practice occurred." For two decades Plaintiff Ledbetter worked for Goodyear Tire & Rubber's Alabama plant. By the end of her career, her salary was approximately 40-50% lower than her male counterparts. Ledbetter filed an EEOC action alleging discrimination on the basis of her sex with regard to pay. She then sued in federal district court, where a jury awarded her more than $3 million in back pay and compensatory and punitive damages, which the trial judge reduced to $360,000.

Reversing, the Eleventh Circuit held that Ledbetter's low pay at the end of her career did not justify reaching back to challenge pay decisions that occurred years before. Rather, Ledbetter was required to challenge pay decisions themselves within the 180-day limitations period set forth in Title VII. Affirming the Eleventh Circuit's holding, the Supreme Court stressed that discriminatory intent is the central element of any discrimination claim, and concluded that current effects (such as smaller paychecks) "cannot breathe life into prior, uncharged discrimination." Because Ledbetter did not challenged the discriminatory pay decision within 180 days of the discriminatory pay decision itself, her claims were barred.

ENVIRONMENTAL LAW

***Envt'l Def. v. Duke Energy Corp.*, No. 05-848, 127 S. Ct. 1423 (Apr. 2, 2007)**

In this unanimous opinion, the Court concluded that changes in power plants that may contribute to air pollution must be done only with a permit, and must be calculated on an annual basis rather than on the hourly basis, as argued by Duke Energy.

The Clean Air Act's "new source review" ("NSR") program dictates that if a company makes a physical or operational "modification" to an existing pollution source that increases the source's emissions, the company must obtain a permit may be required to control the emissions with new technology.

Duke Energy replaced or redesigned some of its coal-fired electric generating units. As a result, the EPA filed this enforcement action, claiming that Duke violated the Clean Air Act by doing the work without permits. Duke responded that none of its projects was a "major modification" requiring a PSD permit because none increased *hourly* emissions rates. The district court agreed, and the Fourth Circuit affirmed.

Granting certiorari, the Court addressed the narrow question of whether the EPA's regulations must be interpreted as requiring an increase in maximum *hourly* emissions, rather than maximum *annual* emissions, for a modification to occur. The EPA had interpreted the term "modification" differently in different EPA regulations. Vacating the Fourth Circuit's opinion, the Court held that the EPA is not required to interpret the term consistently between the its different sets of regulations. The Court notes that any particular term in one statute may take on distinct characters from association with different statutory objects calling for different ways of implementation. As a result, the Court deferred to the EPA's interpretation that "modification" meant in increase in annual emissions, not just hourly emissions.

***Massachusetts v. Envt'l Prot. Agency*, No. 05-1120, 127 S. Ct. 1438 (Apr. 2, 2007)**

In this important environmental case, the Court held that the federal Environmental Protection Agency ("EPA") is required to regulate greenhouse gasses as pollutants under the Clean Air Act.

Unsatisfied with the federal government's response to global warming, environmental groups filed a petition with the EPA, asking the agency to regulate carbon dioxide and other "greenhouse" gases from new motor vehicles. The groups argued that greenhouse gases are air pollutants and thus should be regulated under the Clean Air Act. The EPA denied the petition, finding that the Clean Air Act does not authorize the EPA to regulate greenhouse gas emissions and, even if it did, the EPA would choose not to exercise such authority.

A divided panel of the D.C. Circuit Court of Appeals upheld the EPA's decision, but issued three starkly different opinions. One judge wrote that the EPA's decision was justified, in part, by its citation to scientific uncertainties and policy considerations that warranted moderation in interpreting statutory provisions at this time. The second opinion, which formed a majority, held that the EPA prevailed because the petitioners failed to establish standing through a

demonstration of "particularized" injury from climate changes. The dissenting opinion sided with the petitioners, and would have held that the broad language of the Clean Air Act "plainly authorizes" the EPA to regulate greenhouse gas emissions from motor vehicles.

With Justice Stevens writing for the 5-to-4 majority, the Court first held that the environmental groups had standing to challenge the EPA's denial of their rulemaking authority. The Court then held that the EPA had neglected the Clean Air Act's "clear statutory command," and that the only way the EPA could "avoid taking further action" to reduce greenhouse gas emissions was "if it determined that greenhouse gases do not contribute to climate change" or otherwise explained why it could not—or would not—determine whether greenhouse gasses contribute to global warming. In the face of the EPA's failure to provide any scientific or "reasoned explanation" for refusing to regulate greenhouse gases, the Court held the agency was clearly required to do so.

Chief Justice Roberts, joined by Justices Alito, Scalia and Thomas, dissented, arguing that the petitioners lacked standing. In a separate dissent, Justice Scalia, joined by Chief Justice Roberts, and Justices Thomas and Alito, argued that it was the responsibility of Congress and the President, not the courts, to address the issue of global warming.

FALSE CLAIMS ACT

***Rockwell Int'l Corp. v. United States*, No. 05-1272, 127 S. Ct. 1397 (Mar. 27, 2007)**

This case involves application of the "original source" requirement of the False Claims Act. The Act prohibits making fraudulent payment claims to the government, and permits either the Attorney General or private individuals acting in the government's name (*qui tam*) to bring suit. However, it removes jurisdiction over *qui tam* actions predicated on publicly disclosed allegations unless the person bringing suit is the "original source of the information." An original source is one who "has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action . . . based on the information." In this case, Stone was an engineer at a nuclear weapons plant, operated by Rockwell under a government contract, who predicted that Rockwell's plan for creating solid "pondcrete" blocks would fail due to piping problems. He was wrong—Rockwell made solid blocks—but, after he was laid off, Rockwell found insolid blocks caused by other factors. The government and the media learned of them, in part because of Stone's disclosure of some facts to the government. Stone later filed a *qui tam* suit against Rockwell under the Act, and the government intervened years later. In the joint amended complaint filed by Stone and the government, as well as in a final pretrial order, the insolid blocks were alleged to have been caused by the other factors, not Stone's predicted piping problem. A jury found for Stone and the government on the pondcrete allegations. The Tenth Circuit held that Stone was an "original source" and sustained the verdict in his favor.

The Supreme Court reversed, with Justice Scalia writing for the Court. It held that Stone was not an original source because he did not have "direct and independent knowledge of the information on which the allegations are based." According to the Court, the relevant "information" is that supporting the relator's allegations, not the information on which the publicly disclosed allegations were based. And here, the relevant allegations were those in the amended complaint and final pretrial order. Under these standards, Stone was not an original source and could not bring suit: the false claims found by the jury were discovered after Stone left Rockwell, and were based on information about which Stone had no knowledge.

Justice Breyer took no part in the case. Justice Stevens dissented, joined by Justice Ginsburg. In his view, the "information" of which the relator must be the original source is the information

underlying the *publicly disclosed* allegations, and Stone might be able to prove he was the original source for the information underlying some allegations.

FOURTH AMENDMENT

***Scott v. Harris,* No. 05-1631, 127 S. Ct. 1769 (Apr. 30, 2007)**

Here, the Court held that an officer does not violate the Fourth Amendment by ending a high-speed, public-endangering car chase by forcing a fleeing motorist's car off the road, even if it risks serious injury or death to the motorist. Officer Scott was engaged in high-speed pursuit of Harris and, to end the chase, he applied his bumper to the back of Harris's car. The bump caused Harris's car to go off the road and crash, and Harris was rendered quadriplegic. Harris filed suit, alleging that Scott used excessive force resulting in an unreasonable seizure under the Fourth Amendment. The district court and Eleventh Circuit denied Scott qualified immunity.

In an opinion by Justice Scalia joined by seven other Justices, the Supreme Court reversed and held that Scott is entitled to summary judgment because he did not violate the Fourth Amendment. The Court first found that a video of the chase in the record blatantly contradicts Harris's version of events, such that no reasonable jury could believe his version. In such a case, there is no "genuine" dispute as to the facts, and courts should not adopt the plaintiff's version at summary judgment. Viewing the facts in the light shown in the video, the Court held that Scott did not violate the Fourth Amendment. It rejected the notion that *Garner v. Tennessee* sets forth a special test for cases involving the use of "deadly force," stating that the test for "excessive force" seizure cases is always one of reasonableness. Here, Scott's actions were reasonable in light of the fact that Harris intentionally placed himself, the officers, and numerous innocent bystanders in substantial and immediate risk of serious physical injury when he unlawfully engaged in reckless, high-speed flight. The Court ruled that an officer's attempt to end such a chase that threatens the lives of others does not violate the Fourth Amendment, even if it places the fleeing motorist at risk of injury or death.

Justice Ginsburg concurred, stating her understanding that the Court is not creating a *per se* rule because the inquiry is situation-specific. Justice Breyer echoed that point in his own concurrence, stated that watching the video made a difference to him, and argued that the Court should reconsider its framework for analyzing qualified-immunity claims. Justice Stevens dissented, criticizing the Court for departing from precedent by conducting a *de novo* review of the facts based on a video, and contesting the Court's view that the video rebuts Scott's version of the facts. In his view, the officers had no basis under *Garner* to use deadly force to stop Harris, and they could have prevented any risk to others by stopping the chase.

PATENT LAW

***Microsoft Corp. v. AT&T Corp.,* No. 05-1056, 127 S. Ct. 1746 (Apr. 30, 2007)**

The Court ruled here that the sale and supply of a master version of software (whether by disk or encrypted electronic transmission) to a foreign manufacturer does not qualify as patent infringement under §271(f) of the Patent Act. §271(f) of the Patent Act provides that infringement occurs when a person or entity "supp[lies] . . . from the United States," for "combination" abroad, a patented invention's "components."

AT&T owned the patent to certain speech-coding software that became part of Microsoft's Windows operating system. AT&T filed an infringement suit against Microsoft under §271(f) based on Microsoft's sale of a master version of Windows to a foreign manufacturer, who in turn generated copies of Windows, used those copies to install Windows on computers, and sold those computers to foreign users abroad. Microsoft responded that (1) the software in question was intangible information, not a "component" as envisioned by the Patent Act; and (2) whether or

not it qualified as a "component," the software had not been "supplied" from the United States because the copies were actually made abroad. The district court held Microsoft liable under §271(f), and the Federal Circuit affirmed.

Reversing (7–1) in an opinion by Justice Ginsburg, the Court held that the disk copies of Windows—not the Windows software code in the abstract—was the relevant component under § 271(f). Microsoft's foreign manufacturers did not use the master disk to install Windows on the individual foreign computers (the act that made AT&T's patented material usable). They first made copies from the master disks, and then the copies were installed in the foreign computers. Because Microsoft did not export the copies that were actually installed on the foreign computers, the Court held that it did not "suppl[y] . . . from the United States" "components" of the relevant computers, and thus it was not liable for infringement under § 271(f).

The Court's opinion concludes that foreign law alone governs the manufacture and sale of components of patented inventions in foreign countries. Therefore, AT&T's remedy for any infringing act occurring abroad does not lie within U.S. law but rather in obtaining and enforcing a foreign patent.

Justice Alito, joined by Justices Breyer and Thomas, concurred. While they agreed with the Court's ultimate conclusion, they took issue with the Court's choice not to address the issue of whether "a disk shipped from the United States, and used to install Windows directly on a foreign computer, would . . . give rise to liability under § 271(f) if the disk were removed after installation." Justice Stevens dissented, arguing that the Windows software, not individual copies of Windows, was the relevant "component." Chief Justice Roberts recused himself.

***KSR Int'l Co. v. Teleflex, Inc.*, No. 04-1350, 127 S. Ct. 1727 (Apr. 30, 2007)**

In this case, the Court refined the standard for determining how prior-art can be combined and when a 'combination patent' will be seen as obvious. The Patent Act, § 103, forbids the issuance of a patent when "the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art." Teleflex sued KSR for infringement of Teleflex's patent on its electronic adjustable floor pedals, which combined the pedal assembly with an electronic sensor.

Relying on *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1 (1966), the district court granted KSR's motion for summary judgment, holding that joining adjustable pedals with electronic devices was "inevitable," because a person trained in the industry would have found it obvious to combine the pedal assembly and the sensor because every element of the invention existed in prior patents. On appeal, the Federal Circuit reversed and remanded, relying on its "teaching-motivation-suggestion" test, under which a patent claim is obvious only if the prior art, the problem's nature, or the knowledge of a person having ordinary skill in the art reveals some motivation or suggestion to combine the prior art teachings.

Reversing in a unanimous opinion by Justice Kennedy, the Court held that the Federal Circuit's obviousness analysis under the "teaching-motivation-suggestion" test was too rigid and narrow to serve the purposes of patent law. While it provided helpful insight, it cannot be applied rigidly to restrict district courts from considering other factors that may impact the obviousness analysis. Although the Court did not replace the "teaching-motivation-suggestion" test with a clear standard for determining obviousness, the opinion clarified that "common sense" cannot be ignored in deciding the obviousness issue.

PREEMPTION

***Watters v. Wachovia Bank, N.A.*, No. 05-1342, 127 S. Ct. 1559 (Apr. 17, 2007)**

In a 5-3 opinion, the Court ruled that States are preempted from applying state banking regulations to a national bank's operating subsidiary, by virtue of the National Bank Act ("NBA") and the supervision of the Office of the Comptroller of the Currency ("OCC").

The OCC administers the NBA, which authorizes national banks to exercise "all such incidental powers as shall be necessary to carry on the business of banking." Wachovia Mortgage Corp., a state-chartered entity engaged in real estate lending, operated in Michigan, was acquired in 2003 by Wachovia Bank, a national banking association. Upon its acquisition, Wachovia Mortgage notified Michigan's Office of Financial and Insurance Services (OFIS) that it would no longer register with the OFIS, a required by Michigan law. As a result, OIFS advised Wachovia Mortgage that it was no longer authorized to operate in Michigan. Wachovia Bank sued and requested a declaration that as an operating subsidiary of a national bank, Wachovia Mortgage was not required to comply with state banking regulations because it was regulated by the OCC. Watters, the OIFS Commissioner, responded that Wachovia Mortgage was not itself a national bank, and thus Michigan's regulation was not preempted.

In an opinion by Justice Ginsburg, the Court determined that a wholly-owned operating subsidiary of an OCC-chartered national bank is subject to supervision by OCC, and *not* to State licensing, reporting, and visitorial laws. The Court concluded that a national bank's "incidental powers" include the power to conduct business through an operating subsidiary. Because Wachovia Mortgage was licensed as an operating subsidiary of Wachovia Bank, it was subject to OCC supervision. While the Court acknowledged that national banks and their subsidiaries are subject to state laws as a *general* application in daily activities, when there is significant impairment of the NBA's authority the state's regulations must give way. The Court further noted that where real estate lending is concerned, the NBA has vested exclusive authority in OCC.

The Court rejected a focus on corporate structure, emphasizing that it has never held that the preemptive reach of the NBA is limited to the national bank itself, and that the focus should be on the ability of national banks to exercise their powers with-out undue interference from state regulators. Rather, "we have focused on the exercise of a national bank's *powers*, not on its corporate structure."

Justice Stevens, joined by Chief Justice Roberts and Justice Scalia, dissented and argued that Congress did not give the OCC the authority to preempt state law. Justice Thomas recused himself from the case.

STATUTORY INTERPRETATION

***Limtiaco v. Camacho*, No. 06-116, 127 S. Ct. 1413 (Mar. 27, 2007)**

The Supreme Court determined that it had jurisdiction over this appeal from a judgment of the Guam Supreme Court, and held that the debt limitation provision of Guam's Organic Act required that Guam's outstanding debt be calculated by reference to the assessed, rather than appraised, value of property in the territory. Guam's Attorney General would not sign off on a bond initiative because he believed it violated the statutory debt ceiling, measuring that ceiling by reference to the assessed value of property. Guam's Governor sued for a declaration from the Guam Supreme Court that the issuance would not violate the statute because the value of property in the territory was appropriately measured by appraised value. The Guam Supreme Court agreed and issued the relief requested. The Ninth Circuit granted the attorney general's writ of certiorari, but Congress then divested that court of jurisdiction over appeals from Guam. The Ninth Circuit subsequently dismissed the appeal. The attorney general petitioned for certiorari in the Supreme Court over 90 days after the Guam

Supreme Court's judgment, but less than 90 days after the Ninth Circuit dismissed the then-pending appeal.

Justice Thomas wrote for the Court, which held that it had jurisdiction over the appeal and that the appropriate denominator for calculating the debt limitation was the assessed valuation of the territorial property. With respect to the jurisdictional issue, only a "genuinely final judgment" will trigger the 90-day certiorari period under the relevant statute and, according to the Court, the contested judgment of the Guam Supreme Court was not "genuinely final" until the Ninth Circuit dismissed the appeal. On the merits, the Court reasoned that one would not normally refer to appraised value as a "tax valuation," and that "tax valuation" most naturally means the assessed value to which the tax rate is applied. The Court rejected the Governor's argument that it owed deference to the Guam Supreme Court's interpretation, noting that the debt limitation provision appears in a federal statute.

Justice Souter, joined by Justices Stevens, Ginsburg, and Alito, dissented on the merits. Justice Souter reasoned that the term "tax valuation" could mean *any* objective valuation of the property used for tax purposes, and he invoked the statute's purpose—the "practical guarantee against crushing debt on future generations"—as evidence that the term referred to appraised value. If the term referred to assessed value of the property, Souter argued, Guam could increase the debt burden on future generations simply by tinkering with the assessment rate.

TAX

***EC Term of Years Trust v. United States*, No. 05-1541, 127 S. Ct. 1763 (Apr. 30, 2007)**

The Supreme Court held that the Internal Revenue Code (IRC) provides only nine months for parties to bring wrongful-levy claims against the United States. The IRS is authorized to levy upon the property of an individual who fails to pay taxes. To guard against the wrongful levying upon property not owned by the individual, 26 U.S.C. § 7426(a)(1) allows third parties whose property has been affected to bring a wrongful-levy suit against the United States—if they do so within nine months of the levy. For general tax-refund actions, by contrast, the IRC provides a longer limitations period: two years in which to file an administrative claim, and another two years in which to file suit after an administrative denial. 28 U.S.C. § 1346(a)(1). Here, the IRS assessed tax liabilities against the creators of the EC Term of Years Trust, and levied upon a bank account in which the Trust deposited funds. (The bank paid the Treasury.) The Trust filed a § 7426(a)(1) wrongful-levy claim almost a year later, but it was dismissed as untimely. The Trust then pursued an administrative tax-refund claim, and later filed a § 1346(a)(1) refund suit. The district court and Fifth Circuit held that a wrongful-levy claim under § 7426(a)(1) was the sole remedy possible and dismissed the case.

The Court affirmed, in a unanimous opinion by Justice Souter, invoking the rule that a "precisely drawn, detailed statute preempts more general remedies"—especially where resort to the general remedy would lead to an extended limitations period. Here, Congress specifically tailored § 7426(a)(1) (with its shorter limitations period) for third-party claims of wrongful levy, and third parties would "effortlessly evade" this scheme if permitted simply to fashion their claims as refund suits. The Court thus held that § 7426(a)(1) was the Trust's sole remedy.

***Hinck v. United States*, No. 06-376, 127 S. Ct. 2011 (May 21, 2007)**

Here, the Court ruled that the IRC makes the Tax Court the exclusive forum in which to challenge a decision by the Secretary of the Treasury not to abate interest on unpaid federal income taxes. The IRC provides for the accrual of interest on unpaid federal income taxes, but it allows the Secretary to abate any interest owing to the IRS's error or delay. Prior to 1996, courts held that the Secretary's abatement decisions were judicially unreviewable. In 1996, Congress enacted 26

U.S.C. § 6404(h) to give the Tax Court "jurisdiction over any action brought [by some taxpayers within 180 days of the decision] to determine whether the Secretary's failure to abate . . . was an abuse of discretion, and may order an abatement . . . ." In this case, the IRS denied the Hincks' abatement claim, and they sought review in the Court of Federal Claims. It dismissed the case, and the Federal Circuit affirmed, holding that § 6404(h) vests exclusive jurisdiction in the Tax Court to review abatement refusals.

The Court unanimously affirmed, in an opinion by the Chief Justice. The Court again relied on the rule that a "precisely drawn, detailed statute preempts more general remedies," as well as the principle that remedies provided by Congress are to be regarded as exclusive where no remedy was previously recognized. Here, § 6404(h) is detailed, specific, and comprehensive—providing a forum for adjudication, a limitations period, a standard of review, a limited class of possible plaintiffs, and authorization for judicial relief—and it was enacted against the backdrop of court decisions uniformly rejecting the possibility of any review of the Secretary's abatement refusals. Thus the Court concluded that § 6404(h), and its designated review forum, control all requests for review of the Secretary's refusal to abate. Otherwise, taxpayers could "effortlessly evade" the limitations Congress provided in § 6404(h) by fashioning their claims as general tax-refund challenges.

TELECOMMUNICATIONS

***Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, No. 05-705, 127 S. Ct. 1513 (Apr. 17, 2007)**

In this case the Court held that payphone service providers ("PSPs") have a private right of action under the Communications Act of 1934 against long distance carriers that fail to pay the PSPs for coinless payphone calls as required by FCC regulations.

The FCC is required to promulgate regulations that provide compensation to PSPs when consumers use payphones to access their own long distance provider's toll-free numbers to call long distance. In 2003, the FCC declared that a carrier's failure to pay dial-around compensation is an "unjust and unreasonable practice" within the meaning of § 201(b) of the Communications Act.

Relying on this FCC regulation, Metrophones, a PSP, sued Global Crossing under § 201(b), alleging it had failed to pay the full amount it owed for calls placed from Metrophones's payphones. The district court agreed, and held in Metrophones's favor. The Ninth Circuit affirmed, employing *Chevron* deference to allow a private right of action to PSPs, consistent with the FCC's interpretation if the 1996 Telecom Act.

In an opinion by Justice Breyer, the Court (7-2) affirmed the Ninth Circuit and held that Metrophones could sue Global Crossing in federal district court. It also held that the FCC's determination of what constitutes an "unreasonable practice" is reasonable, and thus lawful, applying *Chevron* deference.

Justice Scalia dissented, arguing that the majority's holding "conflicts with the Communications Act's carefully delineated remedial scheme." Justice Thomas, in his own dissent, raised the textual argument that the FCC had interpreted the Communications Act in a manner that was inconsistent with the unambiguous text.

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ADMINISTRATIVE LAW

***State v. Fidelity & Deposit Co. of Md.*, 223 S.W.3d 309 (Tex. 2007) (per curiam)**

In this case involving a counterclaim in a suit by the Texas Department of Transportation ("TxDOT") to enforce a performance bond for construction of a building, the Texas Supreme Court addressed (1) whether the agency waived its immunity from suit, and (2) whether the surety company was required to exhaust its administrative remedies before filing suit. The Court held that TxDOT waived, in part, its immunity, and that the surety was not required to exhaust its administrative remedies.

TxDOT contracted with a construction company to build a research and technology center for the agency. The construction company purchased a performance bond with Fidelity. When the company defaulted, TxDOT demanded Fidelity perform under the bond. Fidelity then secured another construction company, which finished the project, but not before disputes arose between Fidelity and TxDOT over cost overruns. Before Fidelity could seek compensation through the agency's dispute resolution system, TxDOT sued Fidelity, asserting breach of contract, and Fidelity counterclaimed that TxDOT defaulted on the original contract. TxDOT then filed a plea to the jurisdiction, arguing sovereign immunity and Fidelity's failure to exhaust administrative remedies. The trial court denied TxDOT's plea to the jurisdiction and granted Fidelity summary judgment on its motion that TxDOT had waived immunity. The court of appeals affirmed, holding that (1) TxDOT waived immunity against Fidelity's counterclaims by filing suit, and that (2) the dispute-resolution process in Texas Transportation Code Section 201.112 applied only to contracts for construction of bridges and roads, not buildings.

The supreme court reversed and remanded. First, the court held that because TxDOT initiated the litigation by suing for damages on the performance bond, it had no immunity against counterclaims sufficiently related to TxDOT's bond-enforcement claim. But that was the only extent of its waiver of immunity—TxDOT retained immunity from suit to the extent that Fidelity's damages exceed amounts offsetting TxDOT's monetary recovery. In addition, the Court held that the canon of *ejusdem generis*, when applied to the language of Texas Transportation Code Section 221.001, would not necessarily include a building (the subject of the parties' contract). Thus, the code did not require Fidelity to exhaust its administrative remedies.

APPELLATE PROCEDURE

***Hood v. Wal-Mart Stores, Inc.*, 216 S.W.3d 829 (Tex. 2007) (per curiam)**

Hood brought a *pro se* action against Wal-Mart for assault and battery. After the trial court granted summary judgment to Wal-Mart, Hood filed a notice of appeal but did not pay the filing fee or file an affidavit of indigence. When Hood filed his brief, the court of appeals notified him that his filing fee was past due and gave him 10 days to pay it. Instead, Hood filed an affidavit of indigence within the 10-day period. The court of appeals determined that the affidavit was untimely under Texas Rule of Appellate Procedure 20.1(c)(1) and dismissed the appeal.

The Texas Supreme Court, citing *Higgins v. Randall County Sheriff's Office*, 193 S.W.3d 898, 899 (Tex. 2006), held that "a court of appeals may not dismiss an action due to a formal defect or irregularity without first allowing the petitioner reasonable time to cure the error." Because the affidavit fulfilled the filing-fee requirement, the

supreme court reversed the dismissal and remanded the case for further proceedings.

***Doe v. Pilgrim Rest Baptist Church*, 218 S.W.3d 81 (Tex. 2007) (per curiam)**

Plaintiff sued Pilgrim Rest Baptist Church and two other defendants. The trial court granted summary judgment in favor of the church and the plaintiff timely moved for new trial. To make the summary-judgment order appealable, the trial court severed the claims against the church. The severance order had a hand-written addition that stated that the case would be severed "upon compliance with the District Clerk's procedure." Part of the district clerk's procedure was paying a filing fee.

The filing fee was paid, but not until 123 days after the severance order was signed. The plaintiff then filed a notice of appeal. The court of appeals dismissed the appeal because the notice had not been filed within 90 days after the severance order was signed.

The supreme court cautioned against conditioning the effectiveness of a severance upon a future condition because of the potential for confusion. The court concluded that the condition of compliance with the district clerk's procedure applied to the severance itself, not just the renumbering and restyling of the case. As a result, the severance was not effective until the filing fee was paid and the notice of appeal was timely filed.

ARBITRATION

***In re Bank One, N.A.*, 216 S.W.3d 825 (Tex. 2007) (per curiam)**

J&S Air, a Bank One customer, sued Bank One because Bank One honored checks that allegedly were forged by J&S Air's employees. After J&S Air obtained a no-answer default judgment, Bank One filed a motion to set aside the default judgment and motion for new trial. The trial court granted the motion and Bank One filed an answer. There had been no activity in the case for eight months when Bank One filed a motion to compel arbitration. The trial court denied the motion and the court of appeals denied mandamus relief.

The signature card signed by J&S Air incorporated a contract that contained an arbitration clause. The arbitration clause covered all disputes "arising from or relating in any way to this Agreement or [the Customer's] Account." The supreme court held the dispute about the forged checks fell within the scope of the arbitration agreement. J&S Air argued that Bank One waived its right to arbitration. But the supreme court held Bank One's motion to set aside the default judgment and motion for new trial did not "substantially invoke the judicial process." As such, the court conditionally granted the petition for writ of mandamus to compel arbitration.

ATTORNEY DISQUALIFICATION

***In re Basco*, 221 S.W.3d 637 (Tex. 2007) (orig. proceeding) (per curiam)**

In this employment dispute involving the disqualification of an attorney, the Texas Supreme Court held that Disciplinary Rule of Professional Conduct 1.09 expressly bars a former attorney from taking on a case against his former firm's client. Dr. Michael Basco ("Basco") sued Baylor Medical Center ("Baylor") in Grapevine after it terminated his hospital privileges. He alleged that the termination happened a few days after he reported negligence by the hospital's nurses in delivery of a child, and that Baylor sought to discredit him in the malpractice case that soon followed against both. Baylor gave two reasons for terminating Basco's privileges: (1) he improperly administered a drug to induce labor (although Baylor admitted there was no evidence of this), and (2) he failed to disclose a prior malpractice claim against him. As for the latter reason, Basco claimed that he hid the claim on advice of his counsel, Winston Borum ("Borum"). During the four years that the undisclosed malpractice suit was pending against Basco, Borum's law partner was James Stewart ("Stewart"). Stewart left Borum's firm a few

months after the case against Basco settled. After the case settled, Borum sent a letter to Baylor disclosing the case and asserting it lacked merit and had settled for nuisance value.

Now, Stewart was Baylor's counsel who was defending the hospital against Basco's claims of wrongful termination of privileges. After the trial court denied Basco's motion to disqualify and the court of appeals affirmed that ruling, the supreme court granted mandamus relief. The court held that even though Stewart never worked on Basco's malpractice case, Stewart would nevertheless be required to review his former law partner's work on Basco's case. Rule 1.09 expressly prohibits an attorney from representing a current client against a former client if the matter questions the validity of the earlier representation. Because Stewart would have to evaluate the advice Basco claimed to have received from Borum—whether he actually received it or not—Stewart's representation of Baylor would violate Rule 1.09.

ATTORNEYS' FEES

***Varner v. Cardenas*, 218 S.W.3d 68 (Tex. 2007) (per curiam)**

In this real estate dispute, the sellers sued the buyers for failing to make payments on a promissory note. In response, the buyers counterclaimed that the land was 180 acres less than represented. Both parties also made claims against the title insurer, but those claims were severed out.

After a bench trial, the trial court granted judgment to the sellers but reduced their award because of the acreage difference. The court of appeals reversed in part and granted the sellers the full amount of their damages because the buyers never pleaded mistake or sought to reform the deed. Neither party appealed that ruling.

The trial court also awarded the sellers attorneys' fees. Applying *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313 (Tex. 2006), the court of appeals reversed an award of attorneys' fees and remanded the case for segregation of recoverable fees from unrecoverable fees. The court of appeals held that the fees incurred in suing the title insurer and the fees incurred in defending against the buyers' counterclaim were not recoverable.

The Texas Supreme Court affirmed the court of appeals' holding that the fees incurred in the claims against the title insurer were not recoverable. But the court held that the counterclaim was asserted to reduce the amount of the sellers' recovery. Because their attorney's efforts to defend against the counterclaim were necessary to recover on the contract, the court reversed that portion of the court of appeals' opinion.

***Young v. Qualls*, 223 S.W.3d 312 (Tex. 2007) (per curiam)**

In this case involving the breach of a partnership agreement, the Texas Supreme Court addressed the issue of attorney's fees that should be awarded when a litigant's damages are reduced by remittitur. The court ultimately remanded the case for a new trial on the attorney's fees.

Lewis Qualls ("Qualls") sued Vernon Young ("Young") for breach of their partnership agreement after Young instructed Qualls to vacate the property they were developing together. The jury found that Young breached the partnership agreement and awarded Qualls $142,550 in damages. The parties agreed to submit the question of attorney's fees to the court, which awarded Qualls $46,331.86 in fees. The court of appeals affirmed the liability finding but determined that the evidence supporting the damage award was factually insufficient and reduced the damage award to $54,751.50, to which Qualls agreed.

The supreme court reversed because it could not determine whether the erroneous damage award affected the trial court's determination of attorney's fees. The court remanded the case for a

new trial on attorney's fees in accordance with its decision in *Barker v. Eckman*, 213 S.W.3d 306 (Tex. 2006). In *Barker*, the court held that that unless an appellate court is "reasonably certain that the jury was not significantly influenced by the erroneous amount of damages it considered," the issue of attorney's fees should be retried if the damages awarded are reduced on appeal. Although attorney's fees in this case were awarded by the trial court rather than the jury, the court held that the factors governing their assessment were the same and included consideration of the "results obtained."

ATTORNEY SANCTIONS

***Low v. Henry*, 221 S.W.3d 609 (Tex. 2007)**

Attorney Thomas J. Henry ("Henry") represented Joyce White ("White") in a medical malpractice case filed against Dr. Robert Low ("Low") and others. The case was based on the death of White's husband ("the decedent") after treatment for a stroke. Most of the claims involved the use of the drug Propulsid, although some alleged negligence by the doctors and hospital staff. Henry received copies of the decedent's medical records months before filing suit.

Two of the doctors filed motions for sanctions against Henry and White on the ground that the "none of the medical records from the hospital at which the physicians treated [the decedent] contained any reference to either doctor having prescribed or provided Propulsid to [the decedent]." Shortly after the motions were filed, White nonsuited her case. Although the doctors agreed not to seek sanctions from White, the motions for sanctions remained pending.

The trial court awarded $50,000 in sanctions against Henry. The court of appeals reversed and held that sanctions under Chapter 10 of the Civil Practice and Remedies Code were not proper because the allegations against the doctors had been stated in the alternative. The court also found that the sanctions motions "did not support sanctions under Chapter 10 for unrelated prior litigation" and that the trial court's sanction order lacked sufficient specificity.

Writing for a unanimous court, Justice Wainwright concluded that alternative pleading rules do not "permit alleging a claim with no reasonable basis in fact or law 'in the alternative' of a claim that does have support." Justice Wainwright noted that the plaintiff's petition alleged in several places that the doctors prescribed Propulsid even though the medical records clearly indicated that they had not. The court therefore concluded that the trial court did not abuse its discretion in awarding sanctions.

The court also held that Henry waived his arguments about lack of notice and the consideration of his conduct in other cases because he did not timely object.

The court further held that the trial court did not give a sufficient basis for its award of $50,000. The record did not specify how the trial court arrived at this number. Therefore, the court remanded the case to the trial court for reconsideration of the amount of the sanction.

ATTORNEY WORK-PRODUCT PROTECTION

***In re Bexar County Criminal District Attorney's Office*, 224 S.W.3d 182 (Tex. 2007) (orig. proceeding)**

In this case of first impression, the Texas Supreme Court held that the work-product privilege protects prosecutors from testifying in a malicious prosecution suit when they have already released the prosecution file. In this case, David Crudup ("Crudup") and his wife were feuding neighbors of Cynthia Blank ("Blank") and her teenage son, Travis. After several minor incidents that were reported to the Bexar County Sheriff's Office, Blank's son accused Crudup of threatening to kill him. The Bexar County Criminal District Attorney's Office ("the DA's Office") investigated the incident, interviewed witnesses and prepared reports. But because Blank refused to let her son testify at trial, the DA's Office was forced to drop the charges against Crudup.

Crudup then sued Blank and her son for malicious prosecution. He requested and received the DA's Office file on its case against him. Crudup then subpoenaed two district attorneys and an investigator related to the case. The DA's Office sought an order quashing the subpoenas and protecting its employees from testifying. The trial court granted the DA's Office's motion to quash. The court of appeals reversed and granted Crudup's petition for mandamus relief, reasoning that to succeed on his claim, Crudup must prove that the false information provided by Blank's son was the determining factor in the DA's decision to prosecute. Under these circumstances, the work-product privilege was not a blanket privilege covering all decisions made by the DA's Office.

The Texas Supreme Court reversed, holding that the work-product privilege bars compelled testimony by prosecutors. The privilege covers more than just documents; it covers an attorney's mental impressions, opinions, conclusions, and legal theories, the court held. Moreover, the privilege continues indefinitely beyond the litigation for which the materials were prepared, and is broader than the attorney-client privilege because it encompasses all communications made in preparation for trial, including an attorney's interviews with parties and non-party witnesses. Thus, all decisions made by the DA's Office on Crudup's criminal prosecution would be work product, and protected as such. Finally, the court held, while producing the prosecution file unquestionably waived protection of the documents themselves, that selective disclosure did not oblige the targeted deponents from the DA's Office to provide testimony interpreting, explaining or otherwise elaborating on matters contained in the file. Based on Crudup's intent to interrogate the district attorneys about case-specific details, the testimonial work-product privilege protected them from such disclosure.

In his concurring opinion, Justice Willett expressed his concern that mandating testimony from the DA's Office personnel on these facts would impose an unwarranted burden on the state's limited prosecutorial resources and impede the vigorous deployment of such resources.

In their dissenting opinion, Justice Johnson, Chief Justice Jefferson and Justice Medina argued that to the extent that the DA Office's work product was disclosed by documents, notes, trial preparatory memoranda, organization of the case file or in any other way by the file, the work-product privilege was waived long before the DA's Office filed its motion to quash the subpoenas. In addition, the dissent argued that the work-product privilege precludes testimony or discovery as to types of information but does not make persons privileged from testifying because witnesses are not the same as documents.

CLASS ACTIONS

***Farmers Group, Inc. v. Lubin*, 222 S.W.3d 417 (Tex. 2007)**

This case marks the first time in which the Texas Attorney General ("AG") has tried to bring a class action on behalf of insurance buyers. Although the trial court certified a class, the court of appeals reversed, holding that the AG did not comply with two certification requirements. The supreme court reversed the court of appeals' ruling and remanded to that court for further consideration of issues it did not reach.

After a lengthy investigation by the Texas Department of Insurance, the AG sued various Farmers Insurance ("Farmers") entities alleging inadequate disclosure and discrimination in its homeowners rating practices. Farmers then announced its withdrawal from the Texas homeowners' insurance market. The parties then decided to negotiate instead of litigate. Ultimately, they agreed to a settlement of $117 million and applied to the trial court for class certification and settlement approval.

Five policyholders intervened and objected to the certification and settlement. Denying the intervenors' relief, the trial court certified a class and approved the settlement. The court of appeals

reversed, holding the AG could not bring a class action under the Insurance Code without naming individual class members as representatives.

The supreme court disagreed, holding that an insurance class action prosecuted by the AG, by its nature, is different than a typical Rule 23 class action and therefore need not comply with every requirement under the Insurance Code or Rule 23. In so doing, the court considered three primary arguments by the AG. First, the AG argued that the doctrine of *parens patriae*—literally "parent of the country"—allows it to represent a class rather than have class representatives whose claims are typical and who will adequately represent the class. The court rejected this argument, holding that the doctrine had no place in the insurance code class action, that it was actually an alternative to a class actions, and that it is a vague concept that obscures rather than clarifies the court's analysis.

Second, the court addressed the language of the Insurance Code to determine if the class action requirements could be construed in such a way as to not render AG class actions impossible. The court noted that nothing in the code limited an AG's role to only class counsel; rather, the code authorized suits like this one upon request of the Insurance Department, not individual consumers. Moreover, requiring an AG to recruit individual representatives would be impractical. Though the court disagreed with the State's argument that an AG need not meet the general class action requirements at all, the court held that the typicality, adequacy and other prerequisites for all class actions must be applied to the damage claims asserted by the AG, rather than to that official personally.

In his dissent, Justice Hecht argued that when the AG sues at the behest of the Department of Insurance, the AG does so not as a class member or representative party but as a state officer. According to Hecht, the four prerequisites do not apply to a class action brought by the AG under the statute's plain language. Hecht otherwise agreed that the case should be remanded to the court of appeals to consider the issues it did not reach.

***Citizens Ins. Co. v. Daccach*, 217 S.W.3d 430 (Tex. 2007)**

Citizens Insurance Company of America ("CICA") sells life insurance policies exclusively to customers outside the United States. The company's principal place of business is Austin, Texas. Policyholders are permitted to assign dividends and other benefits to offshore trusts, which use the funds to buy the common stock of Citizens, Inc.

Various policy holders brought a class action in Texas against CICA under various theories. Fernando H. Daccach ("Daccach") moved to be appointed class representative and moved for class certification on one claim: that CICA sold or offered securities in the form of insurance policies without registering with the Texas Securities Board.

The trial court certified a class consisting of all people worldwide who "(1) purchased a CICA Policy and executed an assignment to a trust for the purchase of Citizens, Inc. stock, or (2) paid any money that, pursuant to a CICA Policy and assignment to a trust, was for the purchase of Citizens, Inc. stock, or (3) were entitled to any cash benefits from a CICA Policy that, pursuant to a CICA Policy and assignment to a trust, were for the purchase of Citizens, Inc. stock" from August 6, 1999 through the date of class certification. The court of appeals made one change to the class definition and affirmed the class-certification order.

The supreme court's analysis focused on whether the trial court conducted a proper choice-of-law analysis in concluding that Texas law would govern all of the class members' claims. The majority first concluded that Section 12 of the Texas Securities Act governs the choice-of-law analysis because the sole claim on which class certification was granted was the failure to register with the Texas Securities Board under Section 12. The majority noted that the fact that

the securities laws of different jurisdiction may apply does not create a conflict-of-laws problem. It simply means that the plaintiffs' claims could give rise to statutory violations in different jurisdictions. The majority therefore concluded that the trial court properly held that Texas law applied to the suit.

The court then examined the defendants' contacts in Texas to determine whether the application of Texas law satisfied due process requirements. The court stated that "[b]ecause Texas has a significant aggregation of contacts to the business activities alleged to have occurred within the state, we conclude that the application of Section 12 to this lawsuit falls comfortably within the constitutional constraints on the extraterritorial application of Texas laws."

The majority then held that because other jurisdictions' laws were implicated by the petition, the adequacy of the lead plaintiff's representations was an important issue. The court noted that the class action in Texas could impact the absent class members' ability to seek redress under the laws of their jurisdictions. Because Daccach abandoned all of the class claims other than the Texas Securities Act claim, the court held that the trial court erred "in certifying the class without considering the adequacy of the class representative in light of the *res judicata* effect of the class representative's decision to abandon claims."

The majority noted that *res judicata* bars litigation of claims that arise from the same subject matter as a prior suit and of any subject matter that could have been litigated in the prior suit. The majority also noted that the United States Supreme Court has held that, if the class has an adequate representative, the judgment in a class action may bind absent class members. The Texas Supreme Court rejected Daccach's argument that *res judicata* would not apply to those claims that are procedurally barred from class treatment.

The court also noted that, although a court cannot predetermine the *res judicata* effect of a class action, it must ensure that the class representative adequately represents the interests of the class to protect the due process rights of the absent class members: "We hold, therefore, that Texas Rule of Civil Procedure 42 requires the trial court, as part of its rigorous analysis, to consider the risk that a judgment in the class action may preclude subsequent litigation of claims not alleged, abandoned, or split from the class action. The trial court abuses its discretion if it fails to consider the preclusive effect of a judgment on abandoned claims, as res judicata could undermine the adequacy of representation requirement."

Additionally, the court held that "to certify a class in which the representatives have abandoned claims in favor of pursuing certain class claims, raising a risk of preclusion for absent class members, effective notice must be given to these absent members of an identified class regarding the preclusive effect that may attach to their individual claims. The unnamed members may then exercise independent judgment and chose to remain in the class or opt out."

Because the trial court failed to rigorously analyze the requirements of Rule 42 in light of Daccach's abandonment of potential class claims, the court reversed the class-certification order and remanded for further consideration.

One portion of the lead opinion did not garner sufficient votes to be the opinion of the court. In that section, Justice Wainwright concluded alternatively that the choice-of-law analysis turned on a statutory directive in the Texas Securities Act requiring the application of Texas law. Section 6(1) of the Restatement (Second) of the Conflict of Laws requires a court to follow "statutory directives of its own state on choice of law." This portion of the opinion concludes that "Based on the language, purpose, subject matter, and history of the Texas Blue Sky laws and the Uniform Securities Act, and the registration requirements in particular, we conclude the Texas Legislature intended Section 12 of the Texas Securities Act to prohibit the unregistered sale of securities from Texas, even when the purchasers

are nonresidents. This approach does not mean that the Texas Securities Act directs the application of the Texas Blue Sky laws in every securities case involving facts touching Texas or its residents. The question is one of legislative intent as to the particular provision at issue, subject to constitutional limitations."

Chief Justice Jefferson issued a concurring opinion joined by Justices Brister and Medina. The concurrence addresses the majority's choice-of-law analysis. The chief justice argued that the majority had not applied the seven factors set out in Section 6(2) of the Restatement (Second) of the Conflict of Laws; instead, the majority simply concluded that Section 12 of the Texas Securities Act governed the choice-of-law analysis.

The concurrence noted that a full consideration of the Section 6(2) factors is especially important in cases "which will adjudicate the rights of thousands of people in dozens of countries." The chief justice said he would have examined the substance of other nations' laws as well as the Texas Securities Act. Therefore, he would have directed the trial court to conduct a thorough choice-of-law analysis.

The chief justice also rejected the section of the main opinion regarding the application of Section 6(1). He noted that some statutes expressly direct the application of Texas law. He would, therefore, restrict the application of Section 6(1) to situations in which there is a clear statutory mandate.

CONSTITUTIONAL LAW—JUDICIAL RESTRAINT

***VanDevender v. Woods*, 222 S.W.3d 430 (Tex. 2007)**

This case illustrates the court's determination of judicial restraint. Deputy Sheriff James VanDevender ("VanDevender") sought a declaratory judgment that Jefferson County and its sheriff violated the Texas Constitution by failing to pay VanDevender's full salary during his second term as a deputy sheriff after he became disabled. The Texas Constitution grants county law officers their maximum salary while they are hospitalized or incapacitated until their term of office expires.

Judicial restraint cautions that when a case may be decided on a non-constitutional ground, a court "should rest its decision on that ground and not wade into ancillary constitutional questions." Here, the trial court and court of appeals held that the constitution did not entitle VanDevender to salary continuation benefits. The critical issue before both of these courts was whether VanDevender's disability in 2001 during his second term as deputy resulted from his on-the-job injury in 2000 during his first term as deputy. By failing to determine this issue, both courts reached the ultimate constitutional question—whether the constitution's full-pay entitlement extends into an officer's subsequent term of office—without first reviewing whether VanDevender's incapacity resulted from a job-related injury, a precondition to receiving continued salary. Because this threshold issue should have been addressed first, the supreme court vacated the court of appeals' judgment and remanded to that court to consider VanDevender's factual sufficiency argument.

CONTRACTS—IMPLIED WARRANTY OF SUITABILITY

***Gym-N-I Playgrounds, Inc. v. Snider*, 220 S.W.3d 905 (Tex. 2007)**

Ron Snider ("Snider") founded Gym-N-I Playgrounds, Inc. ("Gym-N-I"), and after a successful run of almost ten years, sold the business to two of his employees: bookkeeper Bonnie Caddell ("Caddell") and human resources manager Patrick Finn ("Finn"). The business was located in a 20,000-square-foot facility owned by Snider; the building did not have a sprinkler system. As part of the sale of Gym-N-I, Snider leased the facility to Caddell and Finn. The lease contained a disclaimer stating that Caddell and Finn accepted the building "as is" and express waived all warranties. Caddell and Finn signed the lease on behalf of Gym-N-I in 1993. The lease

expired in 1996, but Gym-N-I continued to occupy the building and pay rent until a fire swept through the facility in 2000, destroying everything.

Gym-N-I sued Snider for breach of the implied warranty of suitability, negligence per se, gross negligence and fraud. It argued that (1) the "as is" clause lapsed when the original lease term expired; (2) the clause did not waive claims for breach of the implied warranty of suitability, negligence per se, gross negligence and fraud; (3) the absence of a sprinkler system constituted a latent premises defect; and (4) the waiver of subrogation clause was not valid.

The court rejected Gym-N-I's first point, holding that the "as is" clause applied to Gym-N-I's lease of the building even though the lease had lapsed. Under the terms of the lease, Gym-N-I was a "holdover tenant" because it had never vacated the premises after 1996 when the original lease expired; thus, it could not be considered a new tenant against which the original terms of the lease did not apply. Second, the court held, based on its previous decision of *Prudential Insurance v. Jefferson Associates* and Texas public policy favoring parties' freedom of contract, that the "as is" clause nullified the implied warranty of suitability. Finally, the court held that the enforceability of the "as is" clause negated the causation element of Gym-N-I's claims; Agreeing to an "as is" clause effectively precluded Gym-N-I from proving that Snider's conduct caused any harm. Such agreement also contractually disavowed any reliance by Gym-N-I on any statements made by Snider. The court did not reach Gym-N-I's other issues.

DEBTOR / CREDITOR LAW

***First Commerce Bank v. Palmer*, No. 05-0686, 2007 WL 1576023 (Tex. June 1, 2007)**

In this case involving lender liability and usury claims, the Texas Supreme Court addressed whether two guaranty agreements were unenforceable based on the lack or failure of consideration. The court, finding no lack or failure of consideration, remanded the case to the trial court for further proceedings.

In this case, First Commerce Bank ("Bank") accelerated a 1983 note to a partnership that had been backed in part by stock owned by the late husband of Christine Palmer ("Palmer") and in part by life insurance on her. Both Palmer and her son, Frederick Palmer III ("the Palmers"), guaranteed the loan: Palmer guaranteed the loan in her individual capacity, and she and her son as independent co-executors of her late husband's estate. When Bank called the loan, the partnership president agreed to a new loan backed by real and personal property; the new loan was signed by the Palmers on March 30, 1988; they later signed the guarantees on August 9, 1988 that covered any indebtedness the partnership owed or "may hereafter be executed or incurred."

One day later, all parties signed a document modification, renewal, and extension of real estate note and lien, reciting the terms of their March 30, 1988 agreement with Bank. About four years later, the partnership defaulted on the loan and Bank sought payment from the guarantors, including the Palmers. Bank then filed suit and settled with every defendant except the Palmers. At a bench trial, Bank presented its case through the testimony of its president. Bank then rested and the Palmers moved for directed verdict, arguing that their 1988 guaranties could not be enforced because there was either a lack or failure of consideration. The trial court apparently agreed because it granted the Palmers' motion and rendered judgment that Bank take nothing. Bank appealed, and the court of appeals affirmed.

The supreme court reversed, holding that the guaranties were supported by consideration. The court stated that determining whether a guaranty agreement is independent of the debt it guarantees is not simply a question of the order in which the documents are signed: If the guarantor's promise is given as part of the transaction that creates the guaranteed debt, then the consideration for the debt likewise supports the guaranty. Even when

the guaranty is signed after the principal obligation, the guaranty promise is founded upon consideration if the promise was given as the result of previous arrangement, the principal obligation having been induced by or created on the faith of the guaranty. These guaranties without dispute were signed in connection with the renewal of the 1983 note.

DEFAULT JUDGMENT

***In re Discount Rental, Inc.*, 216 S.W.3d 831 (Tex. 2007) (per curiam)**

The real parties in interest obtained a default judgment against Discount Rental, which filed a restricted appeal without superseding the judgment. While the appeal was pending, the real parties obtained a writ of execution and the constable seized Discount Rental's property. At a hearing on the motion to sell the property, the parties reached an agreement about how the property would be sold. But before the property was sold, the court of appeals reversed the default judgment. Discount Rental then moved for return of its property under Section 34.021 of the Texas Civil Practice and Remedies Code. The trial court denied the motion.

The real parties in interest argued that Discount Rental, by agreeing to the terms of the sale, waived its rights to recover the property. The supreme court held that the agreement was based on the trial court's authority to force a sale. Because the default judgment was reversed, the trial court lacked that authority. Therefore, the Texas Supreme Court conditionally granted the petition for writ of mandamus and ordered the property returned.

DISCOVERY—WORK PRODUCT PRIVILEGE

***In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d 434 (Tex. 2007) (orig. proceeding)**

In this case of first impression involving an underlying medical malpractice claim, the supreme court addressed whether Texas Rule of Civil Procedure 193.3(d), known as the "snap-back" provision, preserves the privilege over Rule 192.3(e)(6)'s mandate that all documents provided to a testifying expert are discoverable. The court held that the inadvertent nature of the hospital's production in this case preserved the privilege under Rule 193.3(d) and entitled it to recover the documents, provided its designated expert did not testify at trial. However, because the hospital had not withdrawn the designation of the expert at issue, Rule 192's plain language, purpose and policy considerations compelled the conclusion that the privileged documents could not be snapped back.

Mona Palmer ("Palmer") sued Christus Spohn Hospital ("Hospital") for medical malpractice. Before filing suit, she notified Hospital of her claim. In response, Hospital hired an internal investigator, Sandra Northcutt ("Northcutt"), to conduct an investigation of the claim. Northcutt issued a written report that was considered work product in anticipation of litigation.

After Palmer filed suit, discovery proceeded normally. Hospital hired its only expert witness on standard-of-care issues, Nurse Kendra Menzies ("Menzies"). Menzies inadvertently received Northcutt's privileged report.

At Menzies' deposition, she was asked to produce all of the documents provided to her. Only then did Hospital's counsel learn Menzies had been given Northcutt's privileged report. Pursuant to the "snap-back" provision of Rule 193.3(d), Hospital timely sought return of the report. At the hearing on its motion to recover the document, Hospital produced an affidavit from Menzies indicating that she had not read the report but had merely glanced at it so as to determine that she did not need it; she did she rely on it for her opinions. The trial court denied Hospital's claim of privilege, stating that Menzies' review of the report was "unclear." The court of appeals denied Hospital's request for mandamus relief.

The supreme court also denied Hospital mandamus relief, essentially ruling that Hospital could not both preserve its privilege *and* keep its expert. The court noted that the parties agreed the

report was privileged and the hospital had timely filed its snap-back motion. The parties, however, disagreed on the impact of Rule 192.3(e)(6)'s mandate that all documents furnished to an expert are discoverable.

First, the court held that the express language of Rule 192.3 required production of the Northcutt report: "... all documents … that have been provided to … the expert" are discoverable. The court also observed that the policy underlying Rule 192.3 was to provide a hard-and-fast rule to eliminate discovery disputes. Moreover, the court said, Rule 192.5(c)(1) expressly states that work product loses its protected status when it is provided to a testifying expert.

Considering the foregoing, the court held that Rules 192.3(e)(6) and 192.5(c)(1) prevail over the snap-back provision if the expert intends to testify at trial in spite of the inadvertent document production. In other words, once privileged documents are disclosed to a testifying expert, and if the party who designated the expert continues to rely upon that designation for trial, the documents may not be retrieved even if they were inadvertently produced. If the party withdraws such an expert, then there would be nothing to prevent the snap-back rule's application, although a party seeking snap-back under such circumstances would bear a heavy burden in light of Rule 192.3's underlying purpose. The court further observed that this holding comports with both the decisions of federal courts and other states' courts.

DRAM SHOP LIABILITY

***F.F.P. Operating P's, L.P. v. Duenez*, No. 02-0381, 2007 WL 1376357 (Tex. May 11, 2007)**

This opinion is the third issued by the Texas Supreme Court in this case. Essentially, the court made the same holding—that dram shops are responsible for the proportion of damages they cause or contribute to cause, as set forth in the proportionate responsibility scheme—as in the previous opinions but refined its language slightly.

While working outdoors, Roberto Ruiz ("Ruiz") drank one and one-half cases of beer, bought another 12-pack at a store owned by F.F.P. Operating Partners ("FFP"), and then drove his truck head-on into the Duenez vehicle. The Duenez family ("Plaintiffs") sued FFP, Ruiz and others, but eventually nonsuited all defendants but FFP. FFP also filed a cross- action against Ruiz. The trial court granted the plaintiffs' motion for partial summary judgment, holding the proportionate responsibility scheme did not apply to their dram shop claims, and severed FFP's cross-action. At trial, the court refused to submit questions for the determination of Ruiz's negligence and for determining the proportionate responsibility of FFP and Ruiz. The jury returned a $35 million verdict against FFP, on which the trial court rendered judgment. The court of appeals affirmed.

The Texas Supreme Court reversed, holding that the proportionate responsibility scheme was applicable to the plaintiffs' dram shop claims. The 1995 version of Texas' proportionate responsibility scheme applied to this case, and the language in Chapter 33 of the Texas Civil Practice and Remedies Code—specifically, former Sections 33.002, 33.003, and 33.013—did not exclude its applicability to dram shop claims, but required the trier of fact to compare a defendant's responsibility with that of the plaintiff, other defendants and any responsible third party joined in the case. In so holding, the court relied on its 1993 decision in *Smith v. Sewell*, in which it held that the comparative scheme applied to a dram shop claim against an alcohol provider.

In addition, the court held that the trial court abused its discretion in severing FFP's cross-action against Ruiz. Texas Rule of Civil Procedure 41 prohibits severance if the claim "is not so interwoven with the remaining action that they involve the same facts and issues." Because FFP's cross- action against Ruiz was plainly interwoven with the plaintiffs' claims against

FFP, the trial court erred in severing the cross-action.

Chief Justice Jefferson and Justice O'Neill filed separate dissenting opinions, asserting they would have affirmed the court of appeals' decision. Chief Justice Jefferson said the court should reverse *Sewell* because the proportionate responsibility scheme does not apply to a dram shop claim: The Dram Shop Act provides for a form of vicarious liability and therefore, Section 33.003 does not allow the jury to apportion responsibility between the intoxicated patron and the provider in an action brought by an injured third party.

Justice O'Neill's dissent asserted, *inter alia*, that the majority's opinion effectively dilutes the deterrents that the Dram Shop Act was created to provide by permitting alcohol providers to reduce their liability through proportionate responsibility.

DUE PROCESS—NOTICE OF SUIT

***Hubicki v. Festina*, No. 05-0357, 2007 WL 1576044 (Tex. June 1, 2007) (per curiam)**

In this case involving claims of breach of contract and fraud, the Texas Supreme Court considered whether a party's due process rights were violated in the context of the substituted service exercised. The court determined that under these circumstances, as a matter of law, the plaintiff ("Festina") failed to establish that alternative service was reasonably calculated to provide the defendant ("Hubicki") with notice of the proceedings in time to answer and defend.

After Festina sued Hubicki, the trial court authorized substituted service by first-class mail and by certified mail, return receipt requested, on Hubicki at a post office box associated with a house he owned in Mexico. After Hubicki failed to answer the suit, the trial court rendered a default judgment against him for actual and punitive damages. The court of appeals affirmed. However, the Texas Supreme Court held that Festina failed to demonstrate that the method of service the trial court authorized was reasonably effective to give Hubicki notice of the suit. Festina made only one attempt to serve Hubicki under Rule of Civil Procedure 106(a) before moving for alternative service under Rule 106(b). Festina provided no evidence that Hubicki was actually receiving mail at the address Festina provided. Moreover, Festina did not attempt to serve Hubicki until almost a month after the process server swore that Hubicki was in Mexico, though Festina's petition alleged that Hubicki had a residence in Dallas. In sum, no evidence showed that Hubicki was in Mexico at the time Festina attempted service there.

EMPLOYMENT LAW

***County of Dallas v. Wiland*, 216 S.W.3d 344 (Tex. 2007)**

Three former deputy constables sued under the Civil Rights Act, 42 U.S.C. § 1983 after a newly elected constable decided not to continue their employment. They alleged they were improperly dismissed without cause and thereby denied substantive and procedural due process. They had complained to the Dallas County Civil Service Commission, which rejected their grievances, finding they had not been terminated.

The trial court granted partial summary judgment, finding that the terminations were made without cause as a matter of law. After a jury trial on damages, the court entered judgment on the verdict. The court of appeals affirmed the judgment.

The supreme court reversed and remanded. The court first concluded that the deputies could only be terminated for cause. The court found that the Dallas County Civil Service Commission's manual, taken as a whole, indicated that "covered employees are not to be discharged without being given a reason they can contest."

The court also concluded that the deputies were, in fact, terminated. The county argued that the deputy constables' employment terminated automatically when the new constable took office

because the constable should not be required to "retain a deputy in whom he does not have confidence." The court rejected this argument because the deputies were covered by Dallas County's civil service protection system. Because they were not given a hearing regarding their termination, the court concluded that the deputies had been denied procedural due process.

But the court also held that the trial court erred in finding that the terminations were made without cause as a matter of law. Because the county had consistently taken the position that there had been no termination, the county had not made any admissions regarding the grounds for the terminations and the civil service commission never inquired of the new constable as to any grounds for the terminations. The court noted that if just cause existed for the terminations, then the denial of procedural due process would not have caused any damages. The court therefore reversed the partial summary judgment and remanded the case for further proceedings.

The court also rejected the deputies' claims for denial of substantive due process. The court concluded that "[t]he County was in error about the legal effect of the expiration of a constable's term of office, but its decisions were nevertheless reasoned and reasonable. They were certainly not arbitrary, nor did they remotely approach the conscience-shocking required for a substantive due process violation."

Justice Brister, joined by Chief Justice Jefferson and Justices O'Neill and Medina, concurred in part and dissented in part. Justice Brister recounted Dallas County's efforts to secure civil service protections for deputy constables. He agreed with the majority's determination that the deputies had a property interest in their employment.

He disagreed with the majority's conclusions regarding substantive due process because, he said, the county did not preserve its argument. The county did not assert that the deputies lacked substantive due process rights until its second supplemental motion for new trial. Therefore, Justice Brister wrote, he would have held that the argument was waived.

Justice Brister also disagreed with the majority's decision to reverse the partial summary judgment regarding cause. He noted that, in response to a request for admissions, the county stated "Defendant admits that the decision not to swear in Plaintiffs was not based on 'just cause.' "

Finally, Justice Brister agreed that the lost wages from off-duty jobs and mental anguish damages were improperly awarded. He said he would have remanded the case only for consideration of the proper amount of damages.

***County of Dallas v. Walton*, 216 S.W.3d 367 (Tex. 2007)**

This case presents facts similar to those in *County of Dallas v. Wiland.* But the deputy in this case, Larry Walton ("Walton"), was required to sign the following statement before he was sworn in:

"I acknowledge, by accepting appointment as a Deputy Constable under Constable Burl Jernigan, that my appointment is at the will and pleasure of the Constable, and may be rescinded at any time. I further acknowledge that the term of my appointment is concurrent with that of the Constable, and if not rescinded will expire automatically at the expiration of the Constable's term of office."

The majority concluded that the statement was of no effect because nothing in the civil service statute contemplated that "individual constables can unilaterally remove otherwise covered deputies from the civil service system." Therefore, the case was remanded for further consideration in light of the *Wiland* opinion.

Justice Brister, again joined by Chief Justice Jefferson and Justices O'Neill and Medina concurred in part and dissented in part. He agreed that the statement signed by Walton had no impact on his procedural due process rights. He

also would not have rendered judgment on the substantive due process claim. He otherwise joined in the majority's judgment.

***In re RLS Legal Solutions, LLC*, 221 S.W.3d 629 (Tex. 2007) (orig. proceeding) (per curiam)**

In this employment dispute involving an arbitration clause, the supreme court held that the employee's claim of duress did not overcome the enforceability of the arbitration clause. Amy Maida ("Maida") was a sales representative with RLS Legal Solutions ("RLS"). During her employment with RLS, Maida signed several employment contracts. But she balked on signing a new contract in late 2001. The eight-page, single-spaced agreement contained numerous provisions related to term, compensation, non-competition, arbitration and other subjects. Maida testified that RLS told her she would not be paid if she did not sign the agreement. She eventually signed it but told RLS that she signed under duress. After her employment ended, Maida sued RLS, which sought to enforce the arbitration clause.

The Texas Supreme Court held that the clause was enforceable. Maida provided no evidence that the arbitration provision was the only provision to which she objected, or that it was the only provision she signed under duress. In fact, she testified that she was also dissatisfied with the compensation, commission and non-compete provisions of the new agreement. The court held that Maida's alleged duress did not preclude enforcement of the agreement's arbitration provision in absence of evidence that the duress was related exclusively to the arbitration provision. Unless the arbitration provision was singled out from the other provisions, the court said, the claim of duress went to the agreement generally and had to be decided in arbitration.

***Baylor University v. Coley*, 221 S.W.3d 599 (Tex. 2007)**

Betty Coley ("Coley") was a librarian who held a tenured position on the faculty of Baylor University ("Baylor"). When the director of the library where she worked left in 1985, Coley took on some of the director's responsibilities. In 1987, Baylor hired a new library director, Dr. Roger Brooks ("Brooks"). Brooks and Coley did not get along. Brooks changed Coley's responsibilities in the library. In 1993, he wrote to the university librarian regarding Coley's performance. The university librarian then contacted Coley about Brooks' complaints. She was told that she would be given an opportunity to improve. She was informed that she would have no supervisory, public service, or budgetary responsibilities. The supreme court noted that it was not clear whether these were part of her duties when she was hired or if she took them on while there was no director of the library. Coley complained to the university president, who told her she could pursue a hearing with the grievance committee, but she never did. She also complained in a letter to the university librarian, but said she did not want copy Brooks on the letter because things had been much better lately and she did not want to cause further confrontation.

In May 1995, Coley indicated to Brooks that she might need to take a disability leave. Brooks communicated the request to the university librarian, who told her she would need a statement from her doctor. In July she announced she would be retiring from the university. After leaving, she sued Baylor, Brooks and the university librarian, alleging they "circumvented her rights and privileges as a tenured faculty member and forced her to take early retirement by redefining her responsibilities."

Coley requested a jury question on breach of her tenure contract and asked that the jury be instructed that they could find constructive discharge if they found that she was required to take a subordinate position or one substantially different in its work and duties from the one for which she was tenured. The trial court refused to submit a question on breach of contract and instead asked the jury whether she had been constructively discharged. The trial court instructed the jury that they could find constructive discharge if "an employer makes conditions so intolerable that a reasonable person

in the employee's position would have felt compelled to resign." The jury found for Baylor on the question of constructive discharge.

The court of appeals affirmed the trial court's refusal to submit a question on breach of contract. But the court concluded that the trial court should have given the instruction requested by Coley.

The supreme court reversed and rendered judgment that Coley take nothing. Writing for the majority, Justice Hecht noted that the court of appeals' decision was based on a 1906 opinion by the Texas Supreme Court in *Kramer v. Wolf Cigar Stores, Inc.* In that case, the plaintiff alleged that his employment contract had been breached because he had been effectively demoted by being assigned to a smaller store. The majority distinguished *Kramer* on several grounds. First, the court noted that although there was evidence that Coley's responsibilities were altered, there was no evidence that she had been required to perform any job other than assistant professor. Coley did not introduce any contract with Baylor that specified her job functions. In addition, unlike in *Kramer*, Coley asserted constructive discharge in addition to breach of contract.

The majority found that instruction given by the trial court was taken verbatim from the Pattern Jury Charges and correctly stated the law. The court held that the instruction requested by Coley "confused two different breaches of an employment contract." Moreover, "[i]n essence, the instruction would have told the jury that a material change in work assignments forces resignation." And Coley had not cited any authority for that position, the court noted. Thus the court reversed the court of appeals' judgment and rendered judgment for the defendants.

In a concurring opinion, Justice Johnson (joined by Justice Wainwright) noted that Coley's proposed instruction improperly assumed a disputed fact. Coley's proposed instruction stated that Coley had a "tenured position." The defendants argued that the change in her duties was not a breach of her tenure because she had not been tenured in a specific position, but in a general field. The concurring justices would, therefore, have found that the requested instruction was defective because it assumed a material disputed fact.

EXPUNGEMENT

***State v. Beam*, No. 06-0974, 2007 WL 1576017 (Tex. June 1, 2007)**

In this expungement case, the Texas Supreme Court followed the language of Code of Criminal Procedure article 55.01, holding that the statute of limitations must expire before expunction can be granted. On June 20, 2005, Judy Beam ("Beam") was arrested and charged with a misdemeanor offense. Pursuant to a plea agreement, the charge was dismissed and Beam was granted deferred adjudication on the lesser charge of disorderly conduct. On February 16, 2006, less than two years later, Beam filed a petition for expunction pursuant to article 55.01 of the Code of Criminal Procedure. The trial court granted Beam's petition for expunction and the court of appeals affirmed.

The Texas Supreme Court reversed, holding that the express language of article 55.01 that requires expiration of the statute of limitations before an expunction may be granted, applies to both felonies *and misdemeanors*. Thus, Beam had to wait for the statute of limitations to expire on her misdemeanor before her expunction could be granted.

FAMILY LAW—GRANDPARENT VISITATION

***In re Derzapf*, 219 S.W.3d 327 (Tex. 2007) (per curiam)**

In this mandamus proceeding, the Texas Supreme Court addressed a 2005 amendment to the grandparent access statute. The amendment permits court-ordered access only if the biological or adoptive grandparent shows that denial of

access will "significantly impair the child's physical health or emotional well-being."

Ricky Derzapf ("Derzapf") is the father of three children. His wife, Jennifer, died of leukemia in June 2001. For the first few months after her death, Jennifer's mother and stepfather ("the Johnsons") assisted Derzapf in caring for the children, including having the children sleep at their home because of Derzapf's work schedule. The Johnsons were the children's primary caregivers. After a few months, however, Derzapf began to reassert himself as the primary caregiver. This resulted in tension between him and the Johnsons. The Johnsons filed suit to gain sole custody of the children, but the court dismissed the case.

After the case was dismissed, Derzapf disallowed the Johnsons' access to the children. The Johnsons filed a petition for grandparent access. After reviewing a court-appointed psychologist's report, the court issued temporary orders granting access.

The supreme court first observed that Jennifer Derzapf's stepfather was neither a biological nor an adoptive grandparent. As a result, he did not have standing to seek grandparent access. As to Jennifer's mother, the psychologist had concluded that the children would benefit from access to her, but did not conclude that lack of access to her would significantly impair the children's physical health or emotional well-being.

The court also concluded that Derzapf lacked an adequate remedy by appeal because the trial court's temporary orders "divest a fit parent of possession of his children . . . without overcoming the statutory presumption that the father is acting in his children's best interest. Such a divestiture is irremediable, and mandamus relief is therefore appropriate."

FAMILY LAW—SPOUSAL SUPPORT

***In re Green*, 221 S.W.3d 645 (Tex. 2007) (orig. proceeding) (per curiam)**

In this habeas corpus proceeding involving spousal support payments, the Texas Supreme Court held that a former husband could not be incarcerated under the Family Code for failure to pay spousal support payments based on a contractual obligation.

When Alvin Green ("Green") divorced his wife Brenda, the divorce decree stated that he "had agreed contractually" to pay her certain amounts of monthly spousal support for the next 12 years. Less than two years after the divorce, Green defaulted on the support. He also failed to maintain health insurance for the couple's children, another obligation under the decree. Brenda then filed a motion to enforce the decree and motion to "revoke suspension of incarceration," arguing that Green had failed to make spousal support payments and to maintain their children's health insurance, and requesting that he be held in contempt and incarcerated.

The trial court granted the motion and put Green in jail for 180 days. The court's order based the incarceration on his failure to pay the support, not on the failure to maintain insurance, although a later portion of the order cited both failures as grounds for incarceration. The court of appeals denied his habeas corpus petition.

The supreme court released Green pending his appeal and ultimately held that he could not be incarcerated for failing to make the contractual spousal payments in the decree because the failure to pay a private alimony debt, even one referenced in a court order, is not contempt punishable by imprisonment. Article I, Section 18 of the Texas Constitution prohibits imprisonment for a debt. Although Chapter 8 of the Family Code permits punishment by contempt of a spouse's failure to make spousal maintenance payments, the court held that Chapter 8 did not apply for several reasons.

First, Green's payments were not spousal maintenance payments under Chapter 8; rather, they were a contractual obligation, as expressly stated in the decree. Second, the support did not satisfy the requirements of Sections 8.051, 80.054, or 8.056—that the support not exceed three years; that Brenda was disabled, caring for a disabled child, or not able to support herself; and that the decree expressly state that the support expires upon Brenda's remarriage. The court further stated that Section 8.059(a) was to be construed in line with the constitutional bar against imprisonment for debts.

Finally, the court held that the trial court's contempt order lacked specific language making findings regarding Green's failure to pay for health insurance coverage. Thus, the order was ambiguous as to whether the court intended confinement on that ground.

FRAUD—DAMAGES

***Baylor Univ. v. Sonnichsen*, 221 S.W.2d 632 (Tex. 2007) (per curiam)**

Tom Sonnichsen ("Sonnichsen") was the head women's volleyball coach at Baylor University ("Baylor"). In 1995, Baylor administrators announced that for the first time the school would enter into written employment agreements with its coaches. Sonnichsen alleged that Baylor's general counsel announced that head coaches would be given two-year contracts and assistants would be given one-year contracts. Although the university prepared a one-year contract for Sonnichsen for the 1995-1996 school year, it was never delivered to him. Then in December 1995, Sonnichsen was informed that he would not be offered a contract from the 1996-1997 school year.

Sonnichsen sued, alleging breach of an oral promise to enter into a two-year employment contract and fraud. Baylor asserted that the statute of limitations barred the breach of contract claim, and Sonnichsen asserted promissory estoppel as a counter-defense.

The trial court granted summary judgment for Baylor on all claims. The court of appeals affirmed the summary judgment on the contract claim based on the statute of frauds. The court rejected Sonnichsen's counter-defense, holding that it was only applicable "if the two-year written contract was actually in existence at the time of the oral promise." The court of appeals also affirmed the summary judgment on the fraud claim to the extent Sonnichsen sought benefit-of-the-bargain damages. But the court held that Baylor had not proven that all of Sonnichsen's fraud damages were benefit-of-the-bargain damages and remanded the case for consideration of Sonnichsen's out-of-pocket damages.

After the remand, Baylor again moved for summary judgment on the fraud claim. Sonnichsen responded to the motion and filed a second amended petition that asserted a claim for breach of the 1995-96 contract that Baylor had prepared and executed but never delivered to him. Baylor filed a special exception to the new breach-of-contract claim. The trial court granted the special exception and the motion for summary judgment. The court of appeals reversed both rulings.

The Texas Supreme Court first concluded that the trial court did not abuse its discretion by granting the special exception without giving Sonnichsen the right to amend. The Court concluded that because the 1995-1996 contract was never delivered to Sonnichsen, he would not be able to establish mutual consent. The court also noted that Sonnichsen's new breach of contract claim did not assert any new oral promises. Because these failings would not be correctable with an amended pleading, the trial court did not abuse its discretion.

The court then noted that "[i]n *Haase v. Glazner*, we held that the statute of frauds bars a fraud claim for benefit-of-the-bargain damages when the claim arises from a contract that has been held to be unenforceable." But the statute of frauds does not bar the recovery of out-of-pocket damages.

Sonnichsen asserted four types of damages: (1) inability to obtain employment in 1996-1997; (2) lost opportunities of career advancement and increased earning capacity; (3) lost revenues from a summer volleyball camp; and (4) loss of tuition benefits through which he would have completed a master's degree. The court held that his so-called damages did not represent anything he parted with but were instead benefits he would have received if his employment had continued. Therefore, the Court reversed the court of appeals and rendered judgment for Baylor.

JURISDICTION—MOOTNESS

***Zipp v. Wuemling*, 218 S.W.3d 71 (Tex. 2007) (per curiam)**

Cynthia Zipp ("Zipp") was the guardian of the person and estate of Jewel Keller ("Keller"). After a dispute arose between Zipp and Keller's family, the district court removed Zipp for cause and appointed Alisa Wuemling ("Wuemling"). Zipp appealed the removal. While the appeal was pending, Keller died. The court of appeals dismissed the appeal, finding it became moot as of Keller's death.

The Texas Supreme Court reversed for two primary reasons. First, the court found that the affairs of Keller's estate still needed to wound up and that Zipp, Wuemling and the estate all had an interest in the proper appointment of a guardian. Second, the court held that Zipp had a cognizable interest in guardian fees, attorney's fees and costs. The court noted that Zipp's entitlement to these fees depended on the trial court's determination that there was just cause for her removal. Therefore, the court held the case was not moot as a result of Keller's death and reversed the court of appeals' dismissal.

JURISDICTION—PRIMARY JURISDICTION

***In re S.W. Bell Tel. Co., L.P.*, No. 05-0511, 2007 WL 1576025 (Tex. June 1, 2007) (orig. proceeding)**

In this case involving a dispute between utilities, the Texas Supreme Court addressed whether the trial court abused its discretion by refusing to abate the underlying suit to allow the Public Utilities Commission ("PUC") to resolve preliminary issues regarding agreements within its jurisdiction.

The case involved smaller telephone companies ("competitive local exchange carriers" that buy local telephone services from Southwestern Bell ("SWB") and compete with it for customers) that sued SWB for negligent misrepresentation, deceptive trade practices and antitrust. The smaller companies alleged that SWB charged higher rates for manually processing orders than those filed electronically. In response, SWB filed a summary judgment motion based on rulings by the PUC in what it claimed were identical cases. Alternatively, SWB sought referral to the utility commission, arguing that the commission had primary jurisdiction to decide threshold issues regarding SWB's contracts with the smaller companies. The trial court denied SWB's summary judgment and abatement motions. The court of appeals denied SWB's petition for mandamus relief.

The supreme court, however, held that the PUC has primary jurisdiction, despite its lack of power to adjudicate the claims. Although the PUC could not grant all the relief that the smaller companies requested, it was authorized to make initial determinations regarding the validity of the agreements and their interpretation. Basically, primary jurisdiction requires a trial court to defer to an agency to make an initial determination; the trial court must abate the lawsuit and suspend finally adjudicating the claim until the agency has had an opportunity to act on the matter.

MEDICAL MALPRACTICE

***Jackson v. Axelrad*, 221 S.W.3d 650 (Tex. 2007)**

Dr. David Axelrad ("Axelrad"), a psychiatrist, was treated for abdominal pain by Dr. Richard Jackson ("Jackson"), an internist, who prescribed a laxative and an enema for fecal impaction. But Axelrad was suffering from diverticulitis, for which an enema is contraindicated. The enema caused a perforated colon and Axelrad underwent two surgeries to treat the condition.

The jury found that both Axelrad and Jackson were negligent and assigned 51 percent of the responsibility to Axelrad and 49 percent to Jackson. Consequently, the trial court entered a take-nothing judgment in favor of Jackson. The court of appeals reversed on the ground that laymen generally have no duty to volunteer information during medical treatment.

Writing for a unanimous court, Justice Brister noted that the dispute turned on whether Axelrad neglected to tell Jackson where his pain began. Evidence in the record established the diverticulitis is generally associated with pain in the lower left quadrant of the abdomen. Jackson testified that Axelrad told him that he had pain "throughout his abdomen." Axelrad testified that he told Jackson the pain started the lower left quadrant. Justice Brister noted that "[i]n none of the histories taken by medical personnel during his treatment did Axelrad ever report that his pain began in the left lower quadrant, nor did he say so at his pretrial deposition."

Because the issues were submitted in broad form, the court had to rely on the presumption that the jury resolved the conflicts in the evidence in favor of the verdict. Justice Brister first noted that evidence may support one part of a verdict but not another. Jackson's version of events would support the negligence finding against Axelrad and Axelrad's version of events would support the negligence finding against Jackson.

To resolve the issue in such a "split verdict" situation, Justice Brister examined the purpose of the presumption. He concluded that the presumption exists to "protect jury verdicts from second-guessing on appeal." The only jury finding that was set aside by the court of appeals was the finding that Axelrad was negligent. Therefore, Justice Brister concluded that the court was required to presume that the jury resolved the conflict in favor of their finding that Axelrad was negligent.

Justice Brister then concluded, relying on *Elboar v. Smith*, 845 S.W.2d 240 (Tex. 1992), that patients have a duty to cooperate in their diagnosis. The court agreed with the court of appeals that in most cases, a patient's "failure to report the origin of pain will be no evidence of negligence." But the court noted that Axelrad was not an ordinary patient. Axelrad offered evidence of his own medical training. The court noted that he claimed experience with abdominal complaints. But Axelrad argued that his training could not be considered in evaluating the sufficiency of the evidence.

The court disagreed and held that "that ordinary prudence under the same or similar circumstances includes a party's expertise." The court therefore concluded that the jury was entitled to consider Axelrad's medical training in evaluating his conduct. The court reversed the court of appeals' judgment and remanded the case to that court for a factual sufficiency review.

OIL & GAS

***Seagull Energy E & P, Inc. v. Railroad Comm'n of Tex.*, No. 03-0364, 2007 WL 1299163 (Tex. May 4, 2007)**

In this oil and gas dispute involving the density and spacing for drilling a gas well, the Texas Supreme Court addressed two issues: (1) whether the Texas Railroad Commission ("the Commission") had statutory authority to regulate drilling and production in commingled mineral deposits, and if so, whether the commingled

deposits could be considered one reservoir for regulating drilling and production in the field; and (2) whether the Commission's order preventing production from a lease's only completed well in a particular reservoir constitutes an unconstitutional deprivation of vested property rights. The court held the Commission could consider commingled oil and gas deposits as though they were one reservoir when regulating drilling and production in the commingled field; and that the leaseholder failed to prove a taking.

Seagull Energy ("Seagull") sued the Commission after it denied Seagull's request for an exception permit to reopen a well. Seagull had shut its Davis Well No. 1, which produced only from one accumulation, to drill a second well, Davis Well No. 4, in an attempt to produce from three gas accumulations in the Cotton Valley gas field. When Davis Well No. 4 failed to produce from all three accumulations, Seagull asked the Commission for an exception that would allow it to produce from the Davis Well No. 1, which would tap into the accumulation missed by Davis Well No. 4. The Commission denied Seagull's request, a decision affirmed by both the trial court and court of appeals.

The Texas Supreme Court also affirmed, holding that the Commission had the authority to regulate production in a commingled field, and as such, could consider commingled oil and gas deposits as though they were one reservoir. The Commission's authority is based on Section 86.081(b) of the Texas Natural Resources Code, which was clarified by the Texas Legislature in 2005 in response to this very litigation. Thus, the Commission did not act arbitrarily in denying Seagull's request for an exception permit. Finally, the court held that Seagull failed to show that concurrent production from both wells was needed to prevent drainage as to the common reservoir, thus, there was no taking.

PERSONAL JURISDICTION

***Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569 (Tex. 2007)**

This wrongful death case arose from the death of Texas resident Andy Drugg ("Drugg") on a river rafting trip in Arizona. Drugg died after falling while attempting to get around a boulder on a narrow hiking trial. His parents sued Moki Mac River Expeditions ("Moki Mac") in Texas and Moki Mac filed a special appearance. The trial court denied the special appearance and the court of appeals affirmed.

In a majority opinion written by Justice O'Neill and joined by Chief Justice Jefferson and Justices Hecht, Wainright, Brister, Green, and Willett, the court concluded that Moki Mac is not subject to specific jurisdiction in Texas. The court reversed and remanded the case for consideration of whether Moki Mac is subject to general jurisdiction in Texas.

The majority first found that Moki Mac's activities in Texas were sufficient to satisfy the purposeful availment prong of the jurisdictional analysis. Moki Mac had regularly advertised in Texas, targeted Texas residents through mass and targeted email campaigns and maintained regular communications channels with customers in Texas. The court also found that Moki Mac benefited from its contacts with Texas.

The majority concluded that Texas courts should apply a "substantial connection" test to determine whether the cause of action is related to the defendant's contacts with Texas. In so doing, the court rejected the broad "but-for" test, the strict proximate cause test, and the "sliding scale" test. The substantial connection test requires that "for a nonresident defendant's forum contacts to support an exercise of specific jurisdiction, there must be a substantial connection between those contacts and the operative facts of the litigation."

Applying this test, the court concluded that the suit was not sufficiently related to Moki Mac's contacts with Texas. The decedent's parents

testified that they relied on Moki Mac's assurances of safety in its advertisements. But the court concluded that the parents' claims principally involved whether the guides exercised reasonable care in supervising the participants during the hike. The court concluded that "[w]hatever connection there may be between Moki Mac's promotional materials sent to Texas and the operative facts that led to Andy's death, we do not believe it is sufficiently direct to meet due-process concerns."

Justice Johnson dissented and was joined by Justice Medina. Justice Johnson would have adopted the proximate cause test for relatedness. But in his view, this test would have permitted the exercise of personal jurisdiction over Moki Mac. He concluded that "Moki Mac's conduct was particularly designed to and did increase the likelihood that Texas residents would respond favorably. Andy Drugg's death occurred while he was engaged in activities integral to the relationship Moki Mac induced by its efforts specifically directed toward Texas residents. Moki Mac should have reasonably foreseen that an injury to a client such as Andy while the client participated in activities integral to the relationship directly produced through Moki Mac's activities directed toward Texas residents would subject Moki Mac to being sued over the injury in Texas. There was a meaningful link between Moki Mac's actions directed toward Texas residents and the Druggs' suit." Therefore, Justices Johnson and Medina would have found that Moki Mac is subject to specific jurisdiction.

PRESERVATION OF ERROR—JURY CHARGE

***Equistar Chemicals, L.P. v. Dresser-Rand Co.*, No. 04-0121, 2007 WL 1299161 (Tex. May 4, 2007)**

In this negligence and breach of warranty case, the Texas Supreme Court held that a no-evidence objection asserted in post-trial motions did not preserve error so as to raise the economic-loss rule. Equistar Chemicals, L.P. ("Equistar") sued Dresser-Rand Co. ("DR") after a rotor blade that Equistar bought from DR failed, causing major damage to the rotor, the compressor and turbine to which the rotor was attached, and to adjacent parts of Equistar's petrochemical plant. The replacement rotor bought from and installed by DR failed about one month later, causing further damage. Equistar sued for strict liability, negligence, and breach of warranty based on both incidents.

The trial court denied DR's motions for summary judgment and judgment notwithstanding the verdict based on the statute of limitations under contract law. In a single damages question, the jury awarded Equistar more than $3.6 million to restore its plant to the condition it was in immediately before the two incidents. This damages question was not conditioned on any other question, and DR did not object to the question or instruction except as to the legal and factual sufficiency of the evidence.

The court of appeals held DR's no-evidence points in its directed verdict and post-trial motions "necessarily encompassed" the economic loss rule because if no tort claims could be asserted, then Equistar's cause of action accrued at the time of sale and its suit was untimely. (The economic loss rule applies when losses from an occurrence arise from failure of a product and the damage or loss is limited to the product itself. The rule does not preclude tort recovery if a defective product causes physical harm to the ultimate user or consumer or other property of the user or consumer in addition to causing damage to the product itself.) The court of appeals reversed and rendered a take-nothing judgment on damage claims for the compressor, reasoning that those were contract claims barred by limitations.

The supreme court reversed the court of appeals, holding that DR failed to preserve error on the economic loss rule. Although the court agreed with DR that it was not required to plead the economic loss rule as an affirmative defense, it disagreed that DR preserved error as to the rule by asserting no-evidence points in its post-trial motions. Here, the jury was asked to find only

one damage amount and was not instructed to distinguish damages resulting from its findings that DR committed torts from its finding that DR breached an implied warranty. By failing to object to the charge, DR failed to preserve error on the improper measure of damages that allowed the jury to find both tort and contract damages in a single answer.

PROBATE

***In re Est. of Nash*, 220 S.W.3d 914 (Tex. 2007) (orig. proceeding)**

In this case involving a pre-divorce will, the Texas Supreme Court interpreted the express terms of the will in determining that the ex-husband decedent's heirs, and not his stepdaughter, take under the will, irrespective of Probate Code Section 69.

Marvin and Vicki Nash were married at the time he executed his will in 1994. Marvin had a stepdaughter, Shelley, who was Vicki's daughter. In the will, Marvin named Vicki the primary beneficiary and Shelley as the contingent beneficiary. Marvin and Vicki divorced in 2002; Marvin died in 2004, making no new will. After Marvin died, his heirs—Marvin's mother, nephew and brother—filed an application for independent administration stating that Marvin died intestate.

After the trial court granted the administration, Shelley sought to probate Marvin's pre-divorce will. Ultimately, the trial court admitted Marvin's will to probate, issued letters testamentary to Shelley and declared that Shelley was entitled to the entire estate. The court of appeals reversed in part, holding that Marvin's estate descends to his heirs at law because the requisite condition precedent for Shelley to inherit under Nash's will never occurred. The Texas Supreme Court agreed and sided with the heirs.

Marvin's will left his entire estate to Vicki, provided that she survive him for 30 days. If Vicki and Marvin died at the same time, or if she predeceased him or did not survive him by 30 days, then Marvin's will gave his entire estate to Shelly. Shelly argued that Probate Code Section 69 gave her the entire estate. Section 69 renders null and void all provisions in favor of the divorced spouse taking under a will. Applying Section 69 to Marvin's will, Shelley argued that all provisions awarding Vicki the estate should be ignored, which would award Shelley Marvin's entire estate.

The supreme court disagreed. Marvin's will set forth conditions precedent to Shelley's award—that Marvin and Vicki died at the same time, that Vicki predecease Marvin, or that she not survive him for 30 days. Because Section 69 affects only those provisions in a will that favored the divorced spouse, the other provisions remained undisturbed. Thus, Shelley could not take under the will because none of these conditions precedent was met.

PROCEDURAL DUE PROCESS

***U.S. v. Boateng*, No. 05-0752, 2007 WL 1160435 (Tex. April 20, 2007) (per curiam)**

Afuah Boateng ("Boateng") obtained a default garnishment judgment against the government's Medicare intermediary, Trailblazer Health Enterprises, L.L.C. (Trailblazer"). Trailblazer filed a bill of review seeking to set aside the judgment based on sovereign immunity grounds. The trial court granted the bill of review, set aside the default judgment and dismissed the garnishment action, concluding that because TrailBlazer was entitled to sovereign immunity, the garnishment court lacked subject-matter jurisdiction.

The court of appeals reversed, concluding that procedural due process required the trial court to set the matter for trial and provide the garnishor an opportunity to be heard on the merits of the bill of review. Because fact issues remained regarding the extent of the United States' and TrailBlazer's sovereign immunity claims, the supreme court denied the parties' petitions for review.

PROCEDURE—SPECIAL APPEARANCE

***IRA Res., Inc. v. Griego*, 221 S.W.3d 592 (Tex. 2007) (per curiam)**

Enrique and Sonya Griego ("the Griegos") sought to invest in customer-owned, coin-operated telephones. The telephones would be owned by the Griegos but maintained by Alpha Telecom, the parent company of American Telecommunications Company ("ATC"). The investment was designed to give the Griegos a guaranteed percentage of revenues, which would be disbursed by ATC. The investment was brokered through SPA Marketing and its marketing agent, Abraham Martinez ("Martinez"). To fund the investment, the Griegos rolled over an individual retirement account ("IRA") worth $25,500 into a self-directed IRA administrated by a California-based company, IRA Resources, which in turn gave all but $500 to Alpha Telecom to purchase the telephones. Only three months into the deal, ATC stopped making disbursements to the Griegos.

The Griegos sued all of the companies and specifically alleged that IRA Resources aided and abetted the fraudulent investment by providing the mechanism for the transaction. IRA Resources filed a special appearance, which was denied by the trial court. The court of appeals affirmed in part, and reversed and rendered in part.

The Texas Supreme Court determined that the trial court did not have specific jurisdiction. The court based this decision on the absence of purposeful availment, the first requirement for minimum contacts. First, there was no evidence that IRA Resources had any contacts with the Griegos. All of their contacts were with Martinez, who claimed to represent IRA Resources. But the court of appeals held that Martinez was neither an agent nor an apparent agent of IRA Resources, as there was no evidence of either.

In addition, the Court found that IRA Resources' contacts with Texas were random and attenuated. IRA Resources neither marketed nor solicited in Texas and did not send the forms in this case to Texas. Although it received a financial benefit from the transaction with the Griegos, IRA Resources committed no act that indicated purposeful availment. In fact, its contract with the Griegos stated that California law would apply to any dispute between them. Though the IRA Resources agreement here does not require that disputes be litigated in California, this choice-of-law provision—coupled with the fact that Griego initiated contact with IRA Resources, which rendered all of its services within California—demonstrated that IRA Resources never anticipated Texas jurisdiction. Having found no specific jurisdiction, the court remanded the case to the court of appeals to determine general jurisdiction.

SOVEREIGN IMMUNITY

***State v. Holland*, 221 S.W.3d 639 (Tex. 2007)**

In this case involving the State's alleged misappropriation of a patent, the Texas Supreme Court held that the State did not have the requisite intent to support a takings claim because it acted under color of contract with the patent holder's companies.

Herbert Holland ("Holland") developed a cost-effective process to clean oil-contaminated bilge water. He was the president of Spill Removal Products, Inc. ("SRP"), and was the "managing member" of another company, Pollution Prevention Products ("PPP"). Through these companies, Holland contracted with the State's General Land Office ("GLO") to outfit three bilge water processing facilities with his filtration system.

While the construction of these facilities was underway, Holland applied for and received a patent on his filtration system, parts of which were being installed at the facilities pursuant to the parties' contacts. After getting his patent, Holland contacted the GLO and demanded additional payment of patent royalties. When the

GLO refused to pay, he sued. The trial court denied the State's plea to the jurisdiction.

After determining that it had jurisdiction because the underlying court of appeals' decision conflicted with the high court's decision in *General Services Commission v. Little-Tex Insulations*, the supreme court rejected Holland's takings claim. Holland argued that he had no contract with the State and therefore the State's use of his patent was unauthorized. However, the court observed that the absence of an express contract between Holland and the State, or uncertainty about the existence of an implied contract between them, was immaterial to deciding the capacity in which the State was acting.

The uncontroverted evidence showed that Holland, through SRP and PPP, voluntarily contracted with the State to provide his filtration process. Whether there was an implied contract between the State and Holland individually, the State used Holland's process under color of its contracts with SRP and PPP, not under its powers of eminent domain. If Holland had a valid patent infringement claim, it would be against SRP and PPP, not the State. Thus, the trial court erred in denying the State's plea to the jurisdiction.

***City of Dallas v. Saucedo-Falls*, 218 S.W.3d 79 (Tex. 2007) (per curiam)**

The plaintiffs in this case were Dallas firefighters and police officers who asserted they were entitled to a pay raise. The City of Dallas counterclaimed for declaratory judgment regarding the effect of a city resolution and for attorneys' fees and costs. The city then filed a plea to the jurisdiction asserting that the plaintiffs had not demonstrated waiver of the city's immunity from suit. The district court denied the plea to the jurisdiction and the court of appeals affirmed. The court of appeals relied on the Texas Supreme Court's first opinion in *Reata Construction Corp. v. City of Dallas*, which has since been withdrawn and replaced.

The supreme court reversed the court of appeals' judgment and remanded the case for further consideration in light of the its recent decisions regarding municipal sovereign immunity.

***City of Houston v. Williams*, 216 S.W.3d 827 (Tex. 2007) (per curiam)**

State law requires that when a Houston firefighter's employment is terminated, the firefighter is entitled to a lump sum payment for accumulated vacation and sick leave. A group of former firefighters sued the city seeking a declaratory judgment that these payments had been improperly calculated. The city filed a plea to the jurisdiction, which was denied by the trial court.

The court of appeals affirmed the trial court's decision on two grounds. First, the court held that the city's immunity was waived by the "plead and be impleaded" language in Section 51.075 of the Local Government Code. (The court of appeals' opinion preceded the Texas Supreme Court's decision in *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006). Because of the conflict between the court of appeals' decision and *Tooke*, the supreme court had jurisdiction in the case.)

The court of appeals' second ground for affirming the trial court's decision was that the firefighters sought declaratory relief. The supreme court rejected this argument because the only possible remedy for the firefighters would be money damages. The court held that "governmental immunity does not spring into existence when a damages award is finally made; it shields governments from the costs of any litigation leading up to that goal." The court therefore reversed the court of appeals decision and remanded the case for consideration of whether newly enacted Sections 271.151-.160 of the Local Government Code waived the city's immunity.

***City of Sweetwater v. Waddell*, 218 S.W.3d 80 (Tex. 2007) (per curiam)**

Several firefighters and the Sweetwater Professional Firefighters Association sued the

City of Sweetwater for failing to promote Allan Waddell ("Waddell") to the position of fire marshal and for failing to pay each firefighter the same base salary as required by statute. The city filed a plea to the jurisdiction, which the trial court granted without stating a reason. The court of appeals reversed, holding that the city's immunity was waived by the "sue and be sued" clause in the city's charter.

The supreme court held that the court of appeals' decision was inconsistent with the supreme court's opinion in *Tooke*. The court therefore reversed the court of appeals' judgment and remanded the case for further proceedings.

***Dallas Fire Fighters Ass'n v. City of Dallas*, No. 04-0821, 2007 WL 1576321 (Tex. June 1, 2007) (per curiam)**

The Dallas Fire Fighters Association and thirty-five individual firefighters, on behalf of themselves and a class of others similarly situated, sued the City of Dallas for breach of contract and for violation of the city's charter and civil service board rules in the city's use of an "oral assessment test" performed by an outside contractor in making promotion decisions. On the city's plea to jurisdiction, based in part on governmental immunity, the trial court dismissed the action, and the court of appeals affirmed.

Plaintiffs contended in part that immunity was waived by language in the City's charter, providing that the City may "sue and be sued [and] implead and be impleaded in all courts." The Texas Supreme Court disagreed, holding that under *Tooke*, this language by itself is not a clear and unambiguous waiver of immunity. However, because the Legislature enacted Sections 271.151-.160 of the Texas Local Government Code, which apply retroactively and waive immunity from suit for certain claims against local governmental entities, including municipalities, the court remanded the case for consideration of the new statutes.

***Abilene Hous. Auth. v. Gene Duke Builders, Inc.*, No. 05-0631, 2007 WL 1576324 (Tex. June 1, 2007) (per curiam)**

The Abilene Housing Authority ("AHA") contracted with Gene Duke Builders, Inc. ("Duke") for repair of housing units. After a dispute arose concerning completion and payment, Duke sued the AHA to compel arbitration. The trial court ordered arbitration, but the AHA then filed a plea to the jurisdiction, asserting that the procedures for resolving claims against the state in chapter 2260 of the Texas Government Code provided the exclusive forum for Duke's claim. In response, Duke argued, among other things, that the AHA was not a "unit of state government" to which chapter 2260 applied. Ultimately, the trial court agreed with the AHA, vacated the order compelling arbitration, and dismissed the case for want of jurisdiction.

The court of appeals reversed and made two holdings: (1) a municipal housing authority is not a "unit of state government" to which chapter 2260 applies; and (2) the AHA's immunity from suit was waived by Section 392.065 of the Texas Local Government Code.

Although the Texas Supreme Court agreed with the court of appeals' first holding, it disagreed with the second holding and reversed on that basis. The supreme court held that the text of Section 392.065 no more reflects an intent to waive immunity than the text of Section 51.075, which was addressed in *Tooke*. Because the court of appeals' opinion conflicted with *Tooke*, the court disapproved it. In addition, the court remanded the case so that the parties could address the newly enacted Sections 271.151-.160 of the Texas Local Government Code.

***City of Elsa v. M.A.L.*, No. 06-0516, 2007 WL 1576016 (Tex. June 1, 2007) (per curiam)**

Three City of Elsa police officers who resigned after testing positive for a controlled substance sued the city for disclosing confidential and

private medical information to the news media. The former officers sought money damages and equitable and injunctive relief for the alleged constitutional violations. The city filed a plea to the jurisdiction, which the trial court denied.

The court of appeals affirmed the trial court's denial of the plea as to the statutory claims, holding that a "sue and be sued" provision in the city's charter waived the city's immunity from suit. The court of appeals also reversed and remanded the trial court's denial of the plea as to the constitutional claims, holding that to the extent the plaintiffs' pleadings sought monetary damages, such claims were invalid but that equitable relief could be sought.

The Texas Supreme Court reversed, holding that *Tooke* contradicted the court of appeals' holding on the "sue and be sued" provision in the city's charter. Thus, the court reversed the part of the court of appeals' judgment that affirmed denial of the city's plea to the jurisdiction as to the claims for monetary relief. The court also held that the court of appeals did not err by refusing to dismiss the plaintiffs' claims for injunctive relief based on alleged constitutional violations.

***City of Pasadena v. Kinsel Indus., Inc.*, No. 06-0353, 2007 WL 1576327 (Tex. June 1, 2007) (per curiam)**

Kinsel Industries, Inc. ("Kinsel") contracted with the City of Pasadena to build a wastewater treatment plant. Kinsel's subcontractor, Environmental Infrastructure Group, L.P., sued Kinsel and others over disputes relating to the project, and Kinsel asserted third-party claims against the city. The trial court denied the city's plea to jurisdiction, and the court of appeals affirmed, holding that the city's immunity from suit was waived by Section 51.075 of Texas' Local Government Code and by a charter provision empowering the city to "sue and be sued." However, the Texas Supreme Court reversed based on its holding in *Tooke* and remanded to the case to the trial court so that the parties could address Sections 271.151-.160 of the Local Government Code.

***City of Arlington v. Matthews*, No. 06-251, 2007 WL 1576326 (Tex. June 1, 2007) (per curiam)**

Charles Matthews ("Matthews") sued the City of Arlington for breach of an employment separation agreement and intentional torts. The trial court denied the city's plea to the jurisdiction, which asserted governmental immunity. The court of appeals reversed as to Matthews' tort claims but affirmed as to Matthews' contract claims, holding that Section 51.075 of the Local Government Code waived the city's immunity from suit for those claims. The Texas Supreme Court reversed, holding that the court of appeals' decision conflicted with *Tooke*, and remanded the case to the trial court so that the parties could address Sections 271.151-.160 of Texas' Local Government Code.

***City of Texarkana v. Cities of New Boston, Hooks, DeKalb, Wake Village, Maud, Avery, & Annona*, No. 04-0797, 2007 WL 2067754 (Tex. June 1, 2007) (per curiam)**

The City of New Boston ("New Boston") and six other cities sued the City of Texarkana ("Texarkana"), asserting tort and contract claims based on water-supply agreements. The trial court denied Texarkana's motion to dismiss based on governmental immunity, but the court of appeals reversed as to the tort claims and affirmed as to the contract claims. Because the court of appeals' decision conflicted with the supreme court's decision in *Tooke*, the court disapproved that part of the holding. The court also denied Texarkana's petition for review as to Sections 271.151-.160 of the Local Government Code, thus allowing New Boston and the six other plaintiff cities to proceed on their contract claims.

***City of Galveston v. State*, 217 S.W.3d 466 (Tex. 2007)**

The State of Texas ("the state") attempted to sue the City of Galveston ("the city") to recover the costs of repairing damage to State Highway 275 caused by a ruptured city water line. After the state repaired the damage, the attorney general sued the city for negligent installation,

maintenance and upkeep of the water line. The city filed a plea to the jurisdiction, which the trial court granted. The court of appeals reversed and held that cities are not immune from suit by the state.

The supreme court reversed on a 5-4 vote. Justice Brister wrote the majority opinion, joined by Justices O'Neill, Green, Medina, and Johnson. The dissent was written by Justice Willett, joined by Chief Justice Jefferson and Justices Hecht and Wainwright.

Justice Brister's opinion first discusses the strong presumption in favor of immunity and the court's reluctance to find a waiver of immunity without clear legislative direction. The court noted that there was no legislative waiver of the city's immunity. Nor did the attorney general or the Department of Transportation seek legislative permission to sue.

The court then noted that although it had occasionally held that immunity does not exist, it would not do so here. The court noted that unlike in *Reata*, the policy concerns related to sovereign immunity apply here. First, if the state can sue a city, then "a substantial part of the public will no longer be shielded 'from the costs and consequences of improvident actions of their governments.' " Second, it is not clear how a court would enforce a judgment against a city. And third, although fundamental fairness required a finding of no immunity in *Reata*, it did not require such a finding here. In fact, the court reasoned, it would be fundamentally unfair to allow the state to sue cities but not allow cities to sue the state.

The majority also rejected the state's argument that logic required that the state be permitted to sue cities. First, the court noted that legislation rather than logic governs immunity. Second, the court rejected the idea that the city could not claim immunity against the state because its immunity derived from the state. The court noted that the state derives its authority from the people but regularly asserts immunity against suits by the people. Finally, the court noted that the major flaw in the state's reasoning was the idea that the state "gave" immunity to the city. Instead, immunity is derived from the Texas Constitution itself.

The court held that the question of the state's power to sue cities is better decided by the legislature than the courts. Therefore, the supreme court reversed the court of appeals' judgment and rendered judgment dismissing the case for lack of jurisdiction.

The dissent argued that legislative waiver is unnecessary because there is nothing to waive. In the dissenters' view, governmental immunity was created by the court and the court therefore has the power to decide when it exists. The dissent then noted that the state possesses inherent sovereignty and inherent immunity, but that cities do not. Additionally, the dissent noted that the court has repeatedly held that a city has no immunity of its own but is protected by the state's immunity when acting as the state's agent. Based on this derivative-immunity view, the dissent concluded that a city cannot wield borrowed immunity against the state.

The dissent also concluded that the concerns expressed by the majority would be controlled by "constitutional, budgetary, and pragmatic" controls.

SOVEREIGN IMMUNITY—POLICE

***City of San Antonio v. Ytuarte*, No. 05-0991, 2007 WL 1299145 (Tex. May 4, 2007) (per curiam)**

In this personal injury case, the supreme court addressed whether the court of appeals sufficiently analyzed the good faith element of immunity in a police pursuit case. In Texas, police officers are entitled to immunity for performing discretionary duties within the scope of their authority provided they act in good faith. Because (1) the court of appeals failed to analyze or apply the good faith standard, and (2) the city's

summary judgment evidence proved that the officers met the good faith standard, the supreme court reversed and rendered judgment for the city.

This case involved a high-speed chase by the San Antonio Police Department. Near the end of the nearly 20-minute chase, the police backed off the pursuit to make the fleeing suspect believe that he had evaded them. Shortly thereafter, the suspect lost control of his stolen vehicle, crashed into a parked car and injured a bystander, Dolores Ytuarte ("Ytuarte"). Ytuarte sued the city, which responded by asserting immunity and moving for summary judgment. The city's summary judgment motion was based on the good faith standard. The trial court denied the city's motion and the court of appeals affirmed, concluding that the city had not established the officers' good faith as a matter of law.

The Texas Supreme Court reversed and rendered judgment for the city. In so doing, the court held that the court of appeals' determination—that there was a material dispute concerning whether any police officer remained in hot pursuit of the suspect when the accident occurred—was irrelevant to the good faith standard. Good faith depends on how a reasonably prudent officer could have assessed both the *need* to which an officer responds and the *risks* of the officer's course of action based on the officer's perception of the facts at the time of the event. In support of its summary judgment motion, the city had provided expert testimony that addressed the need and risk factors and concluded that the officers in the pursuit acted in good faith. Ytuarte's summary judgment evidence, however, addressed only the risk factor. Thus, the supreme court held, her summary judgment evidence was insufficient to controvert the city's proof on good faith.

STANDING

***South Texas Water Authority v. Lomas*, 223 S.W.3d 304 (Tex. 2007) (per curiam)**

In this action for declaratory judgment and damages, the Texas Supreme Court held that residents and their private non-profit association lacked standing to bring their claims against the South Texas Water Authority ("STWA"), a conservation and reclamation district created by the legislature. Romeo Lomas ("Lomas"), other citizens of the City of Kingsville ("the city") and their private non-profit association ("WATER"), brought this action against the STWA challenging the operating expenses charged under a water-supply contract with the city. Lomas and WATER alleged that the contract's rates were excessive and discriminatory, causing the city's ratepayers to bear a disproportionate percentage of the operating costs compared to users in other municipal districts serviced by STWA. Lomas and WATER asserted standing as third-party beneficiaries of the water-supply contract, claiming the contract was intended to provide a direct benefit to the city's residents. WATER additionally asserted associational standing, and both Lomas and WATER alleged they had standing to bring suit as consumers and taxpayers.

The trial court determined that both plaintiffs lacked standing. The court of appeals reversed in part, holding that Lomas had individual standing to pursue monetary and declaratory relief, WATER had associational standing to pursue declaratory relief, and both parties had standing as third-party beneficiaries of the water-supply contract.

The supreme court disagreed, holding that both plaintiffs lacked standing: Lomas and WATER had no third-party beneficiary standing because (1) the water-supply contract between STWA and the city conferred no benefit to the plaintiffs such benefit could not be implied, and (2) the presumption against conferring third-party-beneficiary status on non-contracting parties was not overcome by any evidence or arguments offered by the plaintiffs. The court further held that Lomas and WATER lacked general standing because neither could show a particularized interest that was different from the public at large. That is, Lomas and WATER could not show that they were subjected to disproportionate or discriminatory treatment, because they were not treated any differently than any other citizen of Kingsville. Finally, the court held that WATER

did not have standing as an association because it could not show that its members had standing to sue in their own right. (Because Lomas had already failed to show this, WATER too lacked associational standing.)

SUBJECT-MATTER JURISDICTION

***Tellez v. City of Socorro*, No. 05-0629, 2007 WL 1576322 (Tex. June 1, 2007) (per curiam)**

In this case involving a dispute between a landowner and the City of Socorro's zoning board, the Texas Supreme Court held that the trial court had the power to hear the appeal of a zoning board's decision. Consequently, the supreme court held that the El Paso Court of Appeals erred in dismissing the matter it for lack of subject-matter jurisdiction.

Juan Tellez ("Tellez") operated an auto salvage yard in the City of Socorro. Six months after he bought an adjacent lot for the same use, the city enacted its first zoning laws and designated the lot as residential. After the city's zoning board denied his application for a non-conforming use permit, Tellez sued. The trial court affirmed the board's denial. The court of appeals, rather than reaching the merits, dismissed the suit *sua sponte* for lack of subject-matter jurisdiction.

The supreme court reversed, holding that the court of appeals had subject matter jurisdiction. Texas' Local Government Code set out specific criteria for challenging a zoning board's decision: The challenge must be made by a petition stating that the decision of the board of adjustment was illegal and must specify the grounds of the illegality. Here, the court of appeals dismissed Tellez's suit because he sued the City of Socorro rather than its zoning board, and because his petition did not specify how the board's decision was illegal. The supreme court held that the city's failure to object to either defect waived the procedural defects. More important, the supreme court held that these procedural defects—because they could be waived—did not confer subject-matter jurisdiction, which cannot be waived. Therefore, the court of appeals erred in dismissing the appeal for lack of subject-matter jurisdiction.

SUMMARY JUDGMENT PROCEDURE

***Ontiveros v. Flores*, 218 S.W.3d 70 (Tex. 2007) (per curiam)**

Juan Flores ("Flores") sued for fraudulent transfer, breach of fiduciary duty, tortious interference with contract, conspiracy, conversion and fraud. The trial court granted summary judgment to the defendants on all claims. The court of appeals reversed summary judgment on all claims and remanded all claims for further proceedings.

In the Texas Supreme Court, the defendants asserted that the court of appeals reversed summary judgment on claims for which the plaintiff had not preserved error. Both parties agreed that in the court of appeals Flores had only complained about the summary judgment on his claims for fraudulent transfer and breach of fiduciary duty. The supreme court therefore reversed the court of appeals judgment as to the claims for which the plaintiff waived error.

TEACHER RETIREMENT SYSTEM

***Holmes v. Kent*, 221 S.W.3d 622 (Tex. 2007) (per curiam)**

In this case, the Texas Supreme Court addressed designation of beneficiaries of the Teacher Retirement Systems ("TRS") of Texas' optional annuity. The standard retirement annuity provides payments only during the life of the retiree. But a teacher may elect an option annuity that provides reduced payments during the retiree's lifetime, but makes continuing payments to a designated beneficiary for the lifetime of the beneficiary. The court noted that "[o]nly one beneficiary can be designated, and changing the designation is restricted, since the value of the optional annuity, and hence the cost to TRS, depend on the beneficiary's longevity." Under the statute, a retiree who designates a spouse can change or

revoke the designation only with either (1) a notarized consent from the spouse or (2) a court order approving or ordering the change or revocation.

Linda Ann McWhorter ("McWhorter") elected the optional annuity when she retired and designated her husband as the beneficiary. While she and her husband were going through divorce proceedings, McWhorter signed a TRS form designating her son and daughter-in-law as the beneficiaries of "any payments which may be due under the Teacher Retirement System Law of the State of Texas following my death." The TRS advised McWhorter that the form she signed was not sufficient to change the beneficiary of the optional annuity and explained what needed to be done.

When the divorce became final, the decree awarded McWhorter "[a]ny and all sums, whether matured or unmatured, accrued or unaccrued, vested or otherwise, together with all increases thereof, the proceeds therefrom, and any other rights related to [McWhorter's] retirement benefits through the Teacher Retirement System, and any other profit-sharing plan, retirement plan, pension plan, employee stock option plan, employee savings plan, accrued unpaid bonuses, or other benefit program existing by reason of [McWhorter's] past or present employment."

McWhorter's attorney submitted a copy of the decree to the TRS and asked for information regarding the status of McWhorter's benefits. The TRS responded in writing that the decree was insufficient to change the beneficiary of the optional annuity and again explained what needed to be done. The court noted that "McWhorter never complied with TRS's instructions" before she died. Her will left everything to her son.

Because McWhorter never complied with the statutory requirements to change the beneficiary, the court concluded that her ex-husband was entitled to receive the annuity payments. The court rejected the son's argument that the estate had a constructive trust on the annuity funds because a constructive trust would frustrate the purposes of the statute. The court also found that since McWhorter never complied with TRS's instructions, it was not clear what her intentions were regarding the optional annuity payments. The supreme court rendered judgment for the ex-husband.

VENUE

***In re Texas Dep't of Transp.*, 218 S.W.3d 74 (Tex. 2007) (per curiam)**

In this consolidated proceeding, the Texas Department of Transportation ("TxDOT") and Gillespie County sought a writ of mandamus compelling the probate court of Travis County to transfer venue of a personal injury suit to Gillespie County.

The plaintiffs' daughter was a passenger in a car approaching the bridge over the Pedernales River in Gillespie County. The car slid off the road, through a gap between the guardrail and an embankment, and into the river. The daughter drowned.

The plaintiffs sued under the Texas Tort Claims Act and asserted that venue was proper in Travis County as to TxDOT because TxDOT and its bridge division maintained offices in Travis County and the negligent performance of their duties in Travis County caused the accident. They asserted that venue was proper as to Gillespie County under Section 15.005 of the Civil Practice and Remedies Code because it was proper as to TxDOT.

TxDOT argued that the only claims for which it could be sued under the Tort Claims Act were premises defect and special defect claims and that these claims did not arise in Travis County. The plaintiffs asserted that under *Wilson v. Texas Parks & Wildlife Dep't*, 886 S.W.2d 259 (Tex. 1994), the actions of TxDOT officials in Travis County contributed to the defects and therefore, the cause of action arose, at least in part, in Travis County.

The supreme court distinguished *Wilson* on the difference between premises-liability claims and contemporaneous-activity negligence claims. In *Wilson*, the claims were submitted as negligence claims rather than premises-liability claims and because of the procedural posture of the case, the court did not have to address whether the claims were properly presented.

The court then concluded that the plaintiffs' claims in this case were premises-liability claims, not contemporaneous-activity negligence claims. As a result, the cause of action did not arise in Travis County, and the court conditionally granted the petition for writ of mandamus.

WORKERS' COMPENSATION

***Daughters of Charity Health Servs. of Waco v. Linnstaedter*, No. 05-0108, 2007 WL 1576045 (Tex. June 1, 2007)**

In this workers' compensation claim, the Texas Supreme Court addressed whether a hospital can file a lien to recoup full treatment costs from workers' compensation claimants' recovery from a tortfeasor. The court held that a hospital that treated workers' compensation patients was bound by the Texas Labor Code's provision capping reimbursement, which prevented the hospital from seeking more from those patients or their insurance carriers.

Donald Linnstaedter ("Linnstaedter") and Kenneth Bolen ("Bolen") were injured in a car wreck that happened in the course of their employment. Both were treated at a Daughters of Charity Health Services hospital. Their hospital charges totaled $22,704.25; their workers' compensation carrier paid only $9,737.54. The hospital did not dispute that the latter amount was all that was due from the carrier under reimbursement guidelines mandated by the Texas Labor Code. But less than a week after the wreck, the hospital filed a lien for its charges with the county clerk pursuant to the Texas Property Code. The lien attached to Linnstaedter and Bolen's causes of action, which they filed almost two years later against the other driver in the wreck. Eventually, those claims were settled for $175,000, but the other driver's insurer paid $12,966.71 of that amount to the hospital to discharge its lien. Linnstaedter and Bolen then filed suit to recover the amount the other driver's insurer paid to the hospital. The trial court entered judgment for Linnstaedter and Jones and a divided court of appeals affirmed.

The Texas Supreme Court held that the statutory caps on reimbursement bind a hospital that treats workers' compensation patients. Although the Texas Property Code grants hospitals a lien to secure their fees, the Texas Labor Code prohibits liens against workers' compensation patients, and the Labor Code provisions take precedent in cases involving workers' compensation claimants like Linnstaedter and Bolen.

Jerry D. Bullard, Adams, Lynch & Loftin, P.C., Fort Worth
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ARBITRATION

***Diamond Offshore v. Donnie Hall*, No. 02-06-00272-CV, 2007 Tex. App. LEXIS 3825 (Tex. App.—Fort Worth May 17, 2007, no pet.) (mem. op.)**

This case involves a challenge to an arbitration award by multiple Diamond Offshore entities (collectively referred to as "Diamond Offshore"). Diamond Offshore and Donnie Hall ("Hall") agreed to arbitrate Hall's Jones Act claim for personal injuries instead of going to trial. The letter memorializing the arbitration agreement stipulated that maritime law would apply, that Hall was a "Jones Act Seaman," and that there would be no appeal of the award. The arbitrator awarded Hall over $2 million in damages, allocating a substantial portion of that amount to future in-home attendant care and mobility assistance. The arbitrator made specific findings in the award with regard to liability, damages, and past and future expenses. Diamond Offshore paid the award, obtained a release from Hall, and Hall dismissed his suit with prejudice. The trial court entered an "Agreed Take Nothing Final Judgment" on April 8, 2004.

On February 1, 2005, Diamond Offshore filed an original petition in Harris County, where the original lawsuit and arbitration occurred, to vacate and recover the arbitrator's award, alleging that it had discovered fraud in November 2004. Venue was transferred to Tarrant County on Hall's motion. Hall then moved to dismiss based on lack of subject matter jurisdiction. The trial court granted Hall's motion.

The court of appeals affirmed the trial court's dismissal for lack of jurisdiction. The court held that, even though Hall never filed a motion to confirm the underlying arbitration award, the April 8, 2004 "Agreed Take Nothing Judgment" constituted a confirmation of the arbitration award as well as a final judgment. Because Diamond Offshore filed its petition to vacate the arbitration award after the award had been confirmed by the trial court's final judgment, Diamond Offshore's challenge was too late. Therefore, with no other statutory, common law, or public policy grounds to vacate the award before it, the trial court lacked jurisdiction to review Diamond Offshore's complaint.

***TMI, Inc. v. Brooks*, No. 14-05-00604-CV, 2007 Tex. App. LEXIS 3539 (Tex. App.— Houston [14th Dist.] May 10, 2007, no pet.)**

The plaintiffs were nineteen homeowners who discovered their homesites had been environmentally contaminated. The homeowners sued the builder and other entities for failing to disclose the former presence of an oil and gas operation on the property. The homebuilder moved to compel arbitration pursuant to an arbitration provision in the purchase agreement signed by the homeowners. The trial court found that the arbitration was procedurally and substantively unconscionable and denied the builder's motion. The builder appealed, and the court of appeals reversed the trial court.

The arbitration provision stated that "all claims, disputes and other matters in question between seller and purchaser arising out of or relating to this agreement or to any alleged defects relating to the property . . . shall be decided by arbitration . . ." The court of appeals found that the Texas Arbitration Act applied because the parties' agreements specified that Texas state arbitration law would control the agreement. Under the Texas Arbitration Act, the court found that a party seeking to compel arbitration must establish the existence of a valid, enforceable arbitration agreement and that the claims asserted must fall within the scope of the agreement. The arbitration provision did not define the word property or defects, and the agreement stated that the purchaser was buying "the following parcel of

land, including all improvements as provided herein." The court of appeals therefore found that because the dispute involved contamination to the land, it fell within the scope of the arbitration provision.

The court of appeals then reviewed the homeowners' unconscionability defense. The court stated that the test for unconscionability was whether the clause involved was so one-sided that it was unconscionable under the circumstances existing when the parties made the contract. Unconscionability included both procedural unconscionability, which refers to the circumstances surrounding the adoption of the arbitration provision, and substantive unconscionability, which refers to the fairness of the arbitration provision itself.

Under the homeowners' procedural unconscionability argument, they argued that they signed the arbitration agreement due to the fraudulent inducement of the homebuilder. The court of appeals noted that a claim of fraudulent inducement that attacks the entire agreement is an issue that goes to the arbitrator. Whereas, an argument that a particular arbitration provision was entered into due to fraudulent representations is directed to the court. The court of appeals found that the homeowners were challenging the arbitration provision itself, and therefore it had jurisdiction to determine the procedural unconscionability claim.

To support the homeowners' fraud claim, they attached affidavits that stated that their understanding of the arbitration provision was that it applied only to construction defects, and the affidavits had a similar statement regarding their beliefs. Furthermore, they stated it was their belief from reading the arbitration provision and other undisclosed materials that the arbitration provision was limited to construction defects.

The court of appeals found that the evidentiary standards for motions to compel arbitration were the same as the standards for motions for summary judgment. The court held that the affidavits of interested witnesses submitted in opposition to a motion to compel arbitration must be clear, positive, direct, otherwise credible, free from contradictions and inconsistencies, and readily controvertible. The court found that the homeowners' statements were self-serving, were not readily controvertible, and constituted no evidence to support a finding of fraud.

Moreover, the court of appeals found that the homeowners had no evidence of justifiable reliance regarding the arbitration provision because the alleged misrepresentations would contradict the express, broad language of the arbitration provision, a merger clause that expressly stated that no statements or promises not specifically set forth in the agreement were relied upon, and an additional provision in the agreement that provided that the written agreement was the entire agreement between the parties.

The court of appeals then moved on to the homeowners' substantive unconscionability argument. The homeowners argued that the arbitration provision was substantively unconscionable because they would be forced to incur excessive costs in arbitrating their claims, resulting in undue financial hardship. The court noted that under certain circumstances, arbitration can be so cost prohibitive that it effectively precludes a litigant from exercising his or her statutory right to seek redress. In such a case the arbitration provision may be invalidated. In support of the homeowners' claims, they provided affidavit evidence by an expert stating that, under the American Arbitration Association ("AAA"), an arbitration could cost anywhere from $45,000 to $120,000. Furthermore, the homeowners had affidavit evidence that the amount of money would be economically unfeasible for them and create an undue hardship.

The court of appeals noted that all the homeowners' evidence regarding the arbitration costs rested upon the arbitration being conducted under the AAA. However, the arbitration agreement itself did not limit the arbitration to the AAA. It simply stated that the arbitration would be

conducted pursuant to AAA procedures. Accordingly, the court of appeals found that the parties could find an alternative, less-expensive method of arbitration. Additionally, the court of appeals found that the homeowners identified no evidence that a non-AAA arbitration would be a financial hardship to them. Accordingly, the court of appeals remanded the case to the trial court to enter an order granting the builder's motion to compel arbitration.

COMMERCIAL LITIGATION

***Cappuccitti vs. Gulf Indus. Prods. Inc.*, 222 S.W.3d 468 (Tex. App.—Houston [1st Dist.] 2007, no pet.)**

This is an interlocutory appeal challenging the denial of special appearance motions. Gulf Industrial Products, Inc. ("GIP") is a Texas corporation with its primary manufacturing facility in Baytown, Texas. GIP was founded by its president, Robert Kerley ("Kerley"), and manufactures and sells chemicals for use in mining under the trade name "Minerec."

In early 2002, Frank Cappuccitti ("Cappuccitti"), a New Jersey resident, telephoned Kerley at the Baytown plant. Cappuccitti explained that he was the general manager of the mining chemicals division of Cytec Industries ("Cytec") and wanted to meet with Kerley. Kerley agreed to a meeting, and Cappuccitti traveled to Texas and met with Kerley at GIP's Baytown plant. During the meeting, Cappuccitti explained that he was unhappy with his current job at Cytec because he was not getting along with the new CEO. Given his experience with Cytec, Cappuccitti told Kerley that he was thinking about quitting his job at Cytec to form a new company and would like GIP to sell products to him.

Kerley decided to use one of Cappuccitti's proposed corporations, also to be named "Minerec" (and incorporated in the Bahamas), as GIP's sole distributor outside the United States. Cappuccitti also formed CCC Holdings, Inc. ("CCC"), Minerec's parent company, in the Bahamas. CCC later changed its name to Flottec, Inc. ("Flottec"), which owned 90% of Minerec. Cappuccitti is Flottec's president, sole shareholder, and employee—he operates both corporations from his home in New Jersey.

The business relationship between GIP and Minerec continued until September 24, 2004, when GIP notified Cappuccitti that it was terminating the Agreement "for cause, specifically non-performance." Pursuant to the Agreement, following termination, GIP retained the "Minerec" tradename and Minerec was required to change its name.

After GIP terminated its agreement with Minerec, Cappuccitti paid all of Minerec's obligations, excluding the amount of $393,342 due GIP under GIP's line of credit and the $82,777 that Minerec owed GIP for products sold to Minerec. Litigation soon followed in which GIP asserted that Cappuccitti and Flottec were liable for the debt of Minerec under the alter ego and trust fund doctrines and for fraudulent conveyance. Cappuccitti and Flottec challenged the trial court's jurisdiction over them. The trial court denied their special appearance.

The court of appeals affirmed the denial of the special appearance because GIP met its burden of proving a relationship among Cappuccitti, Minerec, and Flottec such that piercing the corporate veil and bringing Cappuccitti and Flottec within the personal jurisdiction is justified. The court of appeals rejected Cappuccitti's argument that the fiduciary shield doctrine should apply to a promoter based on his fiduciary duty to the future corporation for which he acts. A promoter cannot act as an agent of a corporation that does not exist.

CONSTITUTION; CIVIL RIGHTS

***Poteet v. Sullivan*, 218 S.W.3d 780 (Tex. App.—Fort Worth 2007, pet. filed)**

Phillip Poteet ("Poteet") sued the City of Flower Mound ("City") and individual police officers, including Colin Sullivan and Henry Lucio ("Officers") for alleged constitutional violations, claiming that the Officers physically restrained

Poteet while his ex-girlfriend, Tanya Chin ("Chin"), removed Poteet's personal belongings from his home. Poteet asserted a Section 1983 claim against all defendants alleging that their actions deprived him of his Fourth and Fifth Amendment rights to be free from unreasonable searches and seizures and from being deprived of his property without due process of the law. The City and the Officers all filed summary judgment motions, which the trial court granted.

On appeal, the court affirmed the trial court's entry of summary judgment in favor of the City and the Officers' captain but reversed and remanded the claims against the Officers. The court acknowledged that the City had an unwritten policy to perform "civil standbys" solely to keep the peace without participating in any unconstitutional searches or seizures and without getting involved in issues of property ownership, especially when requested to do so by a victim of family violence. However, nothing in the "civil standby" policy gave the police carte blanche to violate the Fourth Amendment's prohibition against unreasonable searches and seizures, and nothing in this policy authorized the police to give any unlawful assistance or aid to one party over another.

In the case at bar, Poteet produced evidence raising a fact issue regarding whether the Officers did more in this civil standby than merely accompany Chin to keep the peace while she removed her property. Therefore, the trial court erred in granting summary judgment in favor of the Officers.

CONSTRUCTION LAW

***Cabo Constr. Inc. v. R F Clark Constr. Inc.*, No. 01-05-00487-CV, 2007 Tex. App. LEXIS 2880 (Tex. App.—Houston [1st Dist] April 12, 2007, no pet.)**

A customer sustained an injury after slipping and falling in a grocery store that had been undergoing remodeling. The customer sued the store and the general contractor for the remodeling job. Previously, the store, the general contractor, and a subcontractor entered into an agreement that contained an indemnification provision:

> To fullest extent permitted by law, the subcontractor shall indemnify and hold harmless the owner, the contractor, and the agents and employees of those parties from and against claims, damages, losses, and expenses arising out of or resulting from the performance of the subcontractor's work under the subcontractor but only to the extent caused by the negligent acts or omissions of the subcontractor, contractors, subcontractors or anyone directly or indirectly employed by them or anyone for whose acts they may be liable regardless of whether or not such claim, damage, loss, or expense is caused in party by a party indemnified hereunder.

The owner and general contractor sued the subcontractor under the indemnification provision and filed a motion for summary judgment to enforce it. The subcontractor responded that the indemnity provision was unenforceable because it did not pass the express negligence test. After the trial court granted the summary judgment, the subcontractor appealed.

The court of appeals noted that because indemnity provisions seek to shift the risk of one party's future negligence to another party, Texas imposes a fair notice requirement before enforcing such agreements. The fair notice requirements are the express negligence doctrine and the conspicuousness requirement.

Under the express negligence doctrine, an intent to indemnify one of the parties from the consequences of its own negligence "must be specifically stated in the four corners of the document." The court of appeals noted that in this case the indemnity provision expressly stated that the subcontractor will indemnify the store and general contractor for claims arising from the subcontractor's negligence, but it did not

expressly state that the subcontractor will indemnify those parties for claims arising from their negligence.

The store and the general contractor attempted to rely on the language toward the end of the indemnity provision to show that the subcontractor must indemnify them for their negligence. Specifically, they relied on the statement that the subcontractor would indemnify them for the subcontractor's negligence "or anyone directly or indirectly employed by them or anyone for whose acts they may be liable. . ." However, the court of appeals found that this language was unclear as to who was indemnified and for what, and that it was ambiguous. The court found that ambiguous indemnity provisions are unenforceable. The court thus reversed the summary judgment.

DISCIPLINARY PROCEEDINGS INVOLVING ATTORNEY'S FEES

***Cluck v. Comm'n for Law. Discipline*, 214 S.W.3d 736 (Tex. App.—Austin 2007, no pet.)**

The Commission for Lawyer Discipline ("Commission") brought a disciplinary action against Tracy Cluck ("Cluck") alleging that he committed professional misconduct by violating multiple provisions of the Disciplinary Rules of Professional Conduct in connection with his representation of a client. In June 2001, Patricia Smith ("Smith") approached Cluck to represent her in a divorce case. Cluck agreed to represent Smith and had her sign a contract for legal services, which stated, "In consideration of the legal services rendered on my behalf in the above matter I agree to pay TRACY D. CLUCK a non-refundable retainer in the amount of $15,000 . . . ." Following that sentence, a handwritten provision explained, "Lawyer fees are to be billed at $150 per hour, first against non-refundable fee and then monthly thereafter. Additional non-refundable retainers as requested." The contract stated that "no part of the legal fee is to be refunded . . . should the case be discontinued, or settled in any other matter."

Smith subsequently asked Cluck to stop the proceedings because Smith wished to reconcile with her husband. When Smith asked for a refund, Cluck refused to give her one based on the terms of the fee agreement. Smith subsequently filed a complaint with the State Bar of Texas based, in part, on the allegation that Cluck's fee was unconscionable and not representative of the work actually performed.

The trial court granted summary judgment imposing a 24-month probated suspension, plus court costs and restitution to the client in the amount of $15,000. On appeal, the court affirmed the entry of summary judgment and held that Cluck failed to hold the $20,000 advance fee paid by the client in a trust account. Despite contractual language to the contrary, the fee was neither nonrefundable nor a retainer but was an advance fee that should have been held in a trust account. If a fee is not paid to secure the lawyer's availability and to compensate him for lost opportunities, then it is a prepayment for services and not a true retainer. Therefore, Cluck violated Rule 1.14(a) because he deposited an advance payment fee, which belonged in part to the client, directly into his operating account.

INSURANCE / DECLARATORY JUDGMENT

***Richardson v. S. Farm Lloyds Ins.*, No. 02-04-072-CV, 2007 Tex. App. LEXIS 2631 (Tex. App.—Fort Worth April 5, 2007, pet. filed) (mem. op.)**

Eunice Richardson and Bobby Richardson ("Richardson") filed suit against Robert F. Kays ("Kays") and his insurer, State Farm Lloyd's Insurance ("State Farm") under Kays' condominium insurance policy as a result of an automobile accident that killed the Richardsons' son. State Farm had denied coverage for the accident. The Richardsons sought a declaratory judgment that State Farm had a duty to defend or indemnify Kays against the Richardsons' claims.

State Farm filed a plea to the jurisdiction and, in the alternative, a traditional summary judgment motion alleging that the trial court did not have subject matter jurisdiction over the claim because the Richardsons had no standing to litigate

whether State Farm had a duty to defend or indemnify its insured. In the alternative, State Farm moved for summary judgment on that basis that, even if fact questions existed as to whether State Farm had a duty to defend or indemnify Kays, summary judgment was appropriate because the Richardsons' pleadings demonstrated that no coverage existed under the policy because: 1) the use of a motor vehicle is expressly excluded from the definition of "occurrence" under the policy; and, 2) the negligent acts of Kays alleged by the Richardsons did not constitute an "accident" resulting in bodily injury within the meaning of the policy. The trial court granted State Farm's plea to the jurisdiction.

The court of appeals, which affirmed the trial court's order, held that a third party was entitled to bring a declaratory judgment in order to determine whether an insurance carrier has a duty to defend or indemnify for the conduct of its insured. However, in this case, the Richardsons' pleadings affirmatively negated the existence of coverage and established that State Farm would never have a duty to defend or indemnify Kays for the injuries resulting from his use of a motor vehicle. Therefore, the trial court correctly granted State Farm's plea to the jurisdiction and dismissed the Richardsons' lawsuit.

LEGAL MALPRACTICE

***Cap. City Church of Christ v. Novak*, No. 03-04-0075-CV, 2007 Tex. App. LEXIS 4148 (Tex. App.—Austin May 23, 2007, no pet.) (mem. op.)**

Capital City Church of Christ ("Church") appealed the entry of a summary judgment as to claims asserted by the Church against a law firm and two of its partners ("Firm"). The Church and Sam Chen, Inc. ("Chen") had been co-owners of a six-story building at 804 Congress Avenue in Austin (the "building") since October 1996. Their relationship was governed by a Co-Ownership Agreement, which contemplated that the Church and Chen would rent office space in the building to third parties, made the Church responsible for the building's physical facilities, and made Chen responsible for finances and accounting.

Over time, the relationship between the Church and Chen deteriorated, with Chen ultimately being accused of self-dealing or other malfeasance and with Chen accusing the Church of mismanaging the building. In late 2002, the Church and Chen agreed to work toward implementing a condominium regime under which each would own separate floors of the building. Originally, the law firm of Armbrust & Brown represented the co-owners jointly, but as negotiations deteriorated and conflicts arose, Chen hired the Firm as its separate counsel. Upon learning of the Firm's representation of Chen, the Church raised concerns that the Firm had a conflict of interest based on its prior representation of the Church.

Between 1996 and 1998, the Firm had provided legal work for the Church, principally involving disputes with tenants in the building. The Church was represented by other counsel when executing the 1996 Co-Ownership Agreement with Chen, as well as a subsequent 2002 amendment. In 2003, the Firm began providing legal services to Chen. Billing records show that one of the Firm's attorneys wrote a letter for Chen in June 2003 that responded to personal attacks made against Chen by Jim Colley, a minister of the Church. The Firm subsequently researched general partnership laws and other issues for Chen in June 2003.

The Church ultimately sued the Firm in October 2003. The Firm withdrew from representing Chen after suit was filed. Chen, represented by different counsel, and the Church subsequently resolved their dispute in 2004. The Firm moved for summary judgment on the basis that, as a matter of law, there was no "substantial relationship" between the Firm's prior and subsequent representations. The trial court granted the Firm's motion.

The court of appeals affirmed the trial court's summary judgment. Specifically, the court held that the Firm's representation of the Church in

matters related to the building in downtown Austin and the Firm's subsequent representation of Church adversaries in a dispute over the same building did not breach the Firm's fiduciary duty to the Church. The court noted that the Firm provided undisputed evidence that it did not divulge the Church's confidential information. The standard for disqualification required a client to show by a preponderance of the facts that a substantial relationship between an attorney's prior representation of the client and the attorney's subsequent representation of that client's adversary possesses a genuine threat that the attorney will divulge the former client's confidences. If the former client meets that burden, the presumption is that the former client revealed secrets that the attorney might reveal to the adversary. The court noted that the Church "points to no specific close relationship between the particular facts, issues, or legal theories involved in defendants' prior and subsequent representations as to 'create a genuine threat that confidences revealed to [its] former counsel will be divulged to [its] present adversary.'"

MEDICAL MALPRACTICE

***Daughtery v. Schiessler*, No. 11-06-00005-CV, 2007 Tex. App. LEXIS 3910 (Tex. App. — Eastland May 17, 2007, no pet.)**

The plaintiffs filed a medical malpractice lawsuit against a physician and a clinic, and 122 days later the plaintiffs filed a nonsuit. At the time of the nonsuit, the plaintiffs had not provided an expert report, and the defendants had not filed a motion to dismiss. Two days later, the plaintiffs filed a second original petition containing the same allegations as the first suit. The defendants then filed a motion to dismiss based on the plaintiffs' failure to comply with the expert requirement within 120 days of the filing of the first petition. The plaintiffs forwarded an expert report to the Defendants within 120 days of filing their second petition. The trial court granted the defendants' motion to dismiss, and the plaintiffs appealed.

The court of appeals held that the 120-day period to file an expert report does not recommence upon the refiling of a previously nonsuited claim. The court held that the 120-day period begins when the claim is first filed. The court concluded "to interpret section 74.351 otherwise would thwart the legislature's intent in adopting that section. If we were to hold, as the Plaintiffs suggest, medical malpractice claimants would be able to file a petition, take a nonsuit anytime prior to the healthcare providers filing a motion to dismiss, file another petition, take another nonsuit, etc. until the running of limitations. We do not believe the legislature intended such a result."

***Smith v. Fin. Ins. Co. of Am.*, No. 11-06-00271-CV, 2007 Tex. App. LEXIS 3483 (Tex. App.— Eastland May 3, 2007, no pet.)**

After filing a medical malpractice suit against a doctor, the plaintiff filed an expert report pursuant to Texas Civil Practice & Remedies Code Section 74.351. Later the plaintiff's workers compensation carriers intervened and asserted that they had a subrogation claim for benefits they paid to the plaintiff. However, the workers compensation carriers did not file an expert report. The trial court denied the defendant's motion to dismiss the workers compensation carriers' claims, and the defendant appealed.

The court of appeals noted that Section 74.351 requires a "claimant" to file an expert report not later than the 120th day after the date it filed the original petition. The court then noted the definition of "claimant" as follows:

> "Claimant" means a person, including a decedent's estate, seeking or who has sought recovery of damages in a health care liability claim. All persons claiming to have sustained damages as the result of the bodily injury or death of a single person are considered a single claimant.

TEX. CIV. PRAC. & REM. CODE § 74.001(a)(2) (Vernon 2005). The court of appeals held that "appellees and plaintiffs are considered to be a single claimant under the statute because

appellees' subrogation claim arises from the bodily injury sustained by Mr. Flores. Given their collective status as a single claimant, we conclude that appellees may rely upon plaintiffs' timely filing of an expert report to satisfy the requirements of Section 74.351."

PERSONAL INJURY

***Aguirre v. Vasquez*, No. 14-06-00325-CV, 2007 Tex. App. LEXIS 3345 (Tex. App.—Houston [14th Dist.] May 1, 2007, no pet.)**

Four employees of a company and a non-employee passenger were driving back to Texas from a worksite when they encountered a blinding dust storm. Aguirre drove the vehicle and attempted to pull over and stop to wait out the dust storm. However, he stopped the vehicle in a lane of traffic, and a second vehicle approaching in the same lane hit Aguirre's vehicle from the rear. Aguirre and two other employees were killed, and the non-employee and the other remaining employee suffered serious injuries.

After the injured employee and the families of the deceased employees received workers' compensation benefits, they sued Aguirre's estate. Aguirre's estate filed a motion for summary judgment alleging that the exclusive remedy provision in the Workers' Compensation Act barred the co-employees' claims.

Generally, workers' compensation benefits are the exclusive remedy of an injured employee against the employer or its agent or employee. To recover under the Workers' Compensation Act, an employee must have been injured in the course and scope of employment.

The plaintiffs alleged that Aguirre's estate failed to establish that he was acting in the course and scope of his employment as a matter of law and, therefore, the exclusive remedy provision did not apply. The court of appeals noted that "course and scope of employment" means an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer, and that is performed by an employee while engaged in the furtherance of the affairs or business of the employer. The court of appeals also noted that transportation to and from the place of employment is specifically excluded unless (i) the transportation is furnished as part of the contract of employment or is paid for by the employer; (ii) the means of the transportation are under the control of the employer; or (iii) the employee is directed in the employee's employment to proceed from one place to another place.

The court of appeals found that it was undisputed that the employees went out of state at the direction of their employer, and they were returning home similarly at the direction of the employer. Further, Aguirre was doing so at the direction of his foreman, who was too tired to drive and who specifically instructed Aguirre to drive the company truck. Workers were expected to use company vehicles supplied for the purpose of traveling to and from a jobsite. All the employees involved in this matter were on the clock while traveling. The court of appeals concluded that the employees were engaged in the course and scope of their employment at the time of the accident as a matter of law. Because none of the employees waived coverage under the Texas Workers' Compensation Act, the court found that all the employees and/or their respective estates or family members were barred from filing claims against Aguirre based on negligence.

However, the Workers' Compensation Act does not prohibit recovery of exemplary damages by the surviving spouse or heirs of a deceased employee whose death was caused by an intentional act or omission of the employer or by the employer's gross negligence. The plaintiffs' evidence of gross negligence was their expert who opined that the decision to voluntarily stop in a lane of interstate highway was grossly negligent. The court of appeals found that this statement was conclusory, and it found that the summary judgment proof was sufficient only to raise a fact question regarding simple negligence, not gross

negligence. Accordingly, the court affirmed the summary judgment finding that the co-employee plaintiffs' and their estates' claims against the driver of the first vehicle were meritless.

The trial court had also granted summary judgment against the non-employee passenger in the first vehicle against Aguirre's estate. The non-employee was Aguirre's father. In the non-employee's deposition, he stated that he did not think that Aguirre had done anything to cause the accident and that he did not blame Aguirre for the accident. The trial court granted summary judgment based upon the statements being judicial admissions that barred the non-employee's claim.

The court of appeals found that the non-employee's testimony did not meet the requirements for a judicial admission. He testified as to his personal opinion of his son's driving on the day of the storm and did not testify as to what an ordinarily prudent person would have done in the exercise of ordinary care, nor did he purport to be qualified to do so. The court stated that "there is no showing that Daniel understood the duty owed by Ernesto or that he intended to swear himself out of court by stating his son did nothing wrong by failing to blame his son for the accident." Accordingly, the court reversed the summary judgment against the non-employee passenger.

***Bosler v. Riddle*, No. 07-05-0283-CV, 2007 Tex. App. LEXIS 1744 (Tex. App.—Amarillo March 7, 2007, no pet.) (mem. op.)**

On December 7, 2002, a police cruiser driven by Officer Travis Riddle ("Riddle") collided with a motor vehicle driven by Theresa Cameron ("Cameron") as she attempted to make a left-hand turn in front of Riddle. Cameron's children, Courtney and Colton, were in the vehicle and sustained injuries; Courtney did not survive.

Four (4) days later, a personal injury lawyer sent a letter to the City of Lubbock Police Department indicating that he had been retained to represent Cameron and her minor children. Cameron never filed suit, but the children's father, Charles Bosler ("Bosler") brought suit on July 2, 2003, seeking damages for the wrongful death and survival claims of Courtney and personal injury claims of Colton. The defendants, the City and Riddle, obtained summary judgment on the basis that Bosler did not give notice of his claims within six (6) months as required by Section 101.101(a) of the Texas Tort Claims Act.

The court of appeals reversed as to the City on the basis that it received formal written notice (via the attorney's letter) of the claim and actual notice was imputed to the City. However, judgment was affirmed as to Riddle. The court held that the notice requirements of the Tort Claims Act applied only to governmental units and do not apply to claims against an employee based on individual liability. Although the trial court erred in determining that claims against Riddle were barred by Bosler's failure to provide him notice, Bosler did not challenge the granting of summary judgment on this basis and, therefore, waived error.

***Mills v. Fletcher*, No. 04-06-00345-CV, 2007 Tex. App. LEXIS 3723 (Tex. App.—San Antonio May 16, 2007, no pet.)**

This case involved the application of Section 41.0105 of the Texas Civil Practice and Remedies Code to an award of past medical expenses for a medical care provider who had written off the balance due. Section 41.0105 provides the following: "In addition to any other limitation under law, recovery of medical or healthcare expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant." TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105 (Vernon Supp. 2006).

The defendant argued that the amounts written off were neither actually paid nor actually incurred by or on behalf of the plaintiff. As such, the defendant argued that pursuant to Section 41.0105, the plaintiff was not entitled to recover the written-off amounts. In response, the plaintiff argued that he incurred the medical charges at the time of his doctor's visit and that any amounts

later written off should not affect the charges that he incurred.

The court of appeals cited to common definitions for the word "incur," one of which was "to become liable or subject to, to bring down upon oneself." The defendant argued that the word "incur" means simply to become liable to pay, and because the amounts were written off or adjusted by the medical provider, the plaintiff will never have to pay those amounts. Additionally, the defendant emphasized that pursuant to the rules of grammar the word "actually" in the statute modifies both paid and incurred, and as such "actually incurred" must necessarily be a limitation on expenses incurred. The court stated:

> that is, if "incurred" is a big circle, "actually incurred" must necessarily refer to a smaller circle within that big circle. In contrast, [plaintiff] argues in his brief that "actually incurred" refers to other expenses that have been charged and not paid.

The court of appeals agreed with the defendant's interpretation. The court held that the plain meaning of Section 41.0105 indicated that amounts written off by medical providers will not be actually incurred by the plaintiff, and therefore the plaintiff was not entitled to recover those amounts. The court held that, because the statute was unambiguous, it did not need to refer to legislative history. The court furthermore denied the plaintiff's due process, open courts, and vagueness arguments.

One justice dissented from the opinion stating that the statute as interpreted by the majority violated the collateral source rule. The dissenting justice would have found that the amounts written off by a healthcare provider would not count against the plaintiff's recovery. The dissenter concluded by stating "because I believe the majority decision erroneously allows [the defendant] to reap the benefits of [the plaintiff's] decision to purchase health insurance, I respectfully dissent."

PROBATE

***Ajudani v. Walker*, No. 01-06-00089-CV, 2007 Tex. App. LEXIS 4049 (Tex. App.—Houston [1st Dist.] May 24, 2007, no pet.)**

The applicants offered for probate seven hand-written pages as a purported holographic will by a doctor. The probate court appointed an attorney ad litem for the doctor's minor daughter. The ad litem filed numerous applications for payment of his expenses and fees, which the court granted.

The ad litem then filed a motion for summary judgment arguing that the holographic document was not a will because the doctor lacked the necessary testamentary intent. The probate court granted that motion and also included language that assessed all costs associated with the defense of the case to be taxed against the applicants. The applicants appealed that motion for summary judgment, and the court of appeals affirmed.

After the case was remanded back to probate court, the ad litem filed numerous other applications for fees and expenses that were all granted by the probate court. Finally, the ad litem filed a motion to assess costs and requested that the cost of the proceeding, around $27,600.00, be assessed jointly and severally against the applicants. However, the total amount of the fees supported by the ad litem's previous applications were a little over $25,000.00. The trial court granted the ad litem's motion, and the applicants appealed.

The court of appeals discussed briefly the probate court's plenary jurisdiction to enter the order assessing costs against the applicants. The court found that the probate court had the jurisdiction to clarify its previous summary judgment order awarding costs.

The court then turned to the issue of whether the probate court had the authority to assess the ad litem attorney's fees against the applicants. The Texas Probate Court provides that each attorney ad litem is entitled to reasonable compensation for services in the amount set by the court , which are

taxed as costs in the proceeding. The court then cited the legislative history that indicated that such costs would be charged against the estate.

The court found that the probate court did not have authority to award costs for the attorney ad litem against the applicants even though they were the losing parties. Rather, the trial court only had authority to award those costs out of the doctor's estate. After finding that because only $25,000.00 in fees were supported by the evidence, the court of appeals modified the probate court's order to award $25,000.00 in attorney ad litem fees from the doctor's estate.

***Jones v. Krown,* 218 S.W.3d 746 (Tex. App.—Fort Worth 2007, pet. filed)**

This is an appeal from a declaratory judgment voiding a will's bequests and devises to Tilde Jones ("Jones"). An attorney prepared a will for Michele Zorn ("Zorn"), who named Jones as executrix and as a beneficiary of the estate. Jones worked in the attorney's office as an independent contractor for several years, including the time during which Zorn's will was drafted and executed.

After Zorn passed away, Jones filed an application to admit Zorn's will to probate. Krown, Zorn's sister and heir at law, filed a motion for declaratory judgment, arguing that all devises and bequests to Jones are void under Section 58b of the Texas Probate Code, which provided that "a devise or bequest of property in a will to an heir or employee of the attorney who prepares or supervises the preparation of the will is void." The trial court subsequently entered judgment in favor of Krown, including an award of attorney's fees.

The primary issue on appeal is whether a paralegal employed as an in-office independent contractor is an employee for purposes of Section 58b of the Probate Code. The court of appeals held that Jones was an "employee" under the Probate Code and, therefore, affirmed the judgment.

REAL ESTATE

***Chicago Title Ins. Co. v. Home Loan Corp.*, No. 14-04-01059-CV, 2007 Tex. App. LEXIS 3095 (Tex. App.—Houston [14th Dist.] April 24, 2007, no pet.)**

The plaintiff was a mortgage lender who suffered a loss after it foreclosed on the underlying property. The plaintiff then sued the title company who acted as a closing agent for the real estate transaction. The plaintiff alleged fraud and breach of fiduciary duty based upon the title company's failure to disclose on the HUD-1 closing statement that half of the seller's proceeds would be paid, at the seller's request, to a third party. The jury found for the plaintiff on both the fraud and breach of fiduciary duty claims and awarded an amount of exemplary damages, and the title company appealed.

Regarding the fraud claim, the title company alleged that there was no evidence that it had any intent to induce the plaintiff. The plaintiff argued that the following evidence showed the title company's intent: (i) the title company understood that the plaintiff required that the completed HUD-1 be faxed to it as a condition of funding the underlying loan and knew that the plaintiff would rely on the HUD-1 being accurate; (ii) the plaintiff testified that its normal course was to rely on title companies as settlement agents to disburse funds; and (iii) the title company's expert testified that the HUD-1 is a standard closing document used in hundreds of transactions upon which lenders rely in funding loans.

However, the HUD-1 did not purport to reflect the disposition of the funds. Accordingly, the court of appeals found that there was no evidence that the title company knew or suspected that the disbursement to the third party was out of the ordinary or considered that the disclosure of such a disbursement on the HUD-1 was an option, let alone an obligation. Furthermore, the court of appeals found that because the exemplary damages award was solely conditioned upon the fraud finding, both damage awards would be reversed.

However, the court of appeals affirmed the jury's finding that the title company breached a fiduciary duty. The court of appeals reviewed the evidence against the actual charge questions provided to the jury. The first charge question asked if the title company owed a fiduciary duty to the lender. It instructed that a fiduciary relationship existed between the lender and the title company if the jury found that the lender was a party to the escrow transaction. However, the charge question did not define the term "party." The court of appeals found that there was evidence that the plaintiff was a "party" to the transaction notwithstanding the fact that a different lender was ostensibly reflected in the closing documents as the lender.

The court of appeals also reviewed the evidence against the second question that asked if the title company failed to comply with its fiduciary duty to the lender. On appeal the title company argued that its duties were limited in the context of a real estate closing. The court of appeals, however, did not limit the fiduciary duties because the charge question did not do so and because there was no objection or request for any further instructions. Accordingly, the court of appeals affirmed the breach of fiduciary duty finding and affirmed the actual damages awarded under that theory.

SOVEREIGN IMMUNITY

***Muenster Hosp. Dist. v. Carter*, 216 S.W.3d 500 (Tex. App.—Fort Worth 2007, no pet.)**

In 2003, Bonnie Carter, M.D. and Karla Davidson-Cox, M.D. ("Physicians") entered into employment agreements with the Muenster Hospital District ("District") in which they were guaranteed an annual income of $120,000.00. The Physicians subsequently reported to the District's board that they suspected patient neglect and Medicare fraud by a particular physician employed by the District. After providing their complaints to the hospital administrator, the Physicians received written notification from the administrator that they were the subject of investigations for disruptive behavior. The Physicians also asserted that, three (3) months later, the District's CFO filed a groundless report of suicidal behavior by one of the Physicians with the Texas Medical Association.

The Physicians subsequently tendered letters of resignation, and the District sent demand letters seeking reimbursement under their employment agreements: $40,500.19 from one physician and $196,464.69 from the other. Neither Physician responded; instead, they filed suit against the District alleging retaliatory discharge and breach of contract.

The District filed a plea to the jurisdiction with respect to the Physicians' retaliatory discharge claim and a counterclaim for breach of contract. The District argued that it did not waive sovereign immunity for the Physicians' retaliatory discharge claims. The court denied the plea to the jurisdiction.

On appeal, the court of appeals affirmed the denial of the plea to the jurisdiction because the doctors' retaliatory discharge claims were germane to, connected with, and properly defensive to the District's breach of contract counterclaim. Therefore, the District waived its immunity from suit for the retaliatory discharge claims. The waiver, however, extended only so far as the doctors' retaliatory discharge claims act as offsets to the District's breach of contract counterclaim against the Physicians.

***Sanders v. City of Grapevine*, 218 S.W.3d 772 (Tex. App.—Fort Worth 2007, pet. denied)**

Don and Susan Sanders ("Sanders") purchased a home constructed by Weekley Homes, L.P. ("Weekley") in the Silverlake Estates Subdivision of Grapevine, Texas ("City"). One of the reasons Sanders bought the house was because of its "wooded" and "country" atmosphere. Sanders subsequently sued Weekley and the City because of the destruction of numerous trees within the subdivision, which Sanders claimed violated a City ordinance. Sanders also alleged that, after attempting to resolve the problem by

correspondence and attendance at City council meetings, Weekley's employees and the City began a systematic plan of harassing them.

Sanders filed suit against Weekley asserting claims for breach of contract, DTPA violations, fraud, negligence, and negligent representation based, in part, on Weekley's failure to comply with the City's tree ordinance. Sanders asserted fraud, negligence, and negligent misrepresentation claims against the City because of its failure to enforce the tree ordinance. Sanders also sought declaratory judgment to determine their rights under the sales contract and the City's tree preservation ordinance.

The trial court granted Weekley's motion to compel arbitration and the City's plea to the jurisdiction, dismissing all claims against the City. Sanders appealed the trial court's order granting the City's plea to the jurisdiction.

The court of appeals affirmed the grant of the City's plea to the jurisdiction with respect to the fraud and negligence claims, but it reversed and remanded Sanders' declaratory judgment action against the City. The court held that Sanders did not need legislative permission to sue the City in order to determine its rights under a statute or ordinance because "[c]onstruing the petition liberally in [Sanders'] favor, we hold that their claim for declaratory relief, on its face, does not seek to impose damages or other liability on the City; therefore, on the pleadings before us and the trial court, the City does not have immunity from appellants' cause of action under the Declaratory Judgment Act, and the trial court erred by granting the City's plea to the jurisdiction as to that claim."

Thomas F. Allen, Jr., Carrington, Coleman, Sloman & Blumenthal, L.L.P., Dallas

ARBITRATION

***Diamond Offshore Co. v. Donnie Hall*, No. 02-06-00272-CV, 2007 Tex. App. LEXIS 3825 (Tex. App.—Fort Worth May 17, 2007, no pet.) (mem. op.)**

Donnie Hall ("Hall") filed a personal injury action against various Diamond Offshore entities (collectively, "Diamond") under the Jones Act. After a mistrial, the parties agreed to arbitration. The arbitrator awarded Hall more than $2 million in damages, which Diamond paid. Hall dismissed his suit with prejudice and the trial court entered final judgment on April 8, 2004.

On February 1, 2005, Diamond filed a new lawsuit seeking to vacate and recover the arbitration award on the ground it had discovered fraud on Hall's part in November 2004. After venue was transferred to Tarrant County, Hall moved to dismiss Diamond's action for lack of jurisdiction. The trial court granted this motion and Diamond appealed.

The court of appeals affirmed on the ground that it lacked jurisdiction to hear Diamond's appeal because Diamond's attempt to vacate the award was untimely. Under the Texas Arbitration Act, a party seeking to vacate an arbitration award on grounds such as fraud must make its application to do so within 90 days after the date the grounds were known or should have been known. TEX. CIV. PRAC. & REM. CODE § 171.088(a)(1), (b).

The court of appeals first considered whether the trial court's final order "confirmed" the award, even though the court did not issue a formal confirmation. Diamond argued that the final order was simply an agreed final take-nothing judgment and that appellant had failed to file an application to confirm the award. The court of appeals held that Diamond, by paying the award, had waived its right to require Hall to file a confirmation application. And while the order did not explicitly state the conditions of the award, its language and effect—affirming the arbitration award, approving the agreement between the parties, and dismissal of Hall's underlying suit with prejudice—was the functional equivalent of a confirmation.

Because the trial court's order acted as both a confirmation and a final judgment, Diamond was required to seek to vacate the award at or before the date of final judgment, and no later than the ninetieth day after it received its copy of the award. The court of appeals observed that Diamond did not comply with this timeline and its attempts to vacate the award were thus too late.

The court rejected Diamond's argument that Section 171.088(b) created a type of discovery rule for bringing a motion to vacate, in which a party could challenge an arbitration award within 90 days of becoming aware of the grounds for vacatur. The court stated that it could not vacate an arbitration award "for a mere mistake of fact." 2007 Tex. App. LEXIS 3825 at *13. The court also noted that the trial court had specifically found that Diamond had not met its burden to prove that Hall had been "malingering" with regard to his injuries. *Id.* at *14. As a policy matter, the court expressed the belief that Diamond's discovery rule would "allow a losing party to vacate an arbitration award ninety days after alleged fraud *at any time* after the award was rendered, even after it had been confirmed," and would thus "eliminate finality of all arbitration awards and eradicate the benefits of arbitration." *Id.* at *12, n.6.

JURISDICTION

***Young v. Villegas*, No. 14-06-00072-CV, 2007 WL 967108 (Tex. App.—Houston [14th Dist.] Apr. 3, 2007, no pet.)**

Silvia and Armando Villegas ("the Villegases") sued Dr. Amy Young ("Young") and Baylor

College of Medicine based on alleged negligence in the delivery of the Villegases' twin sons. Young and Baylor filed joint traditional summary judgment motions asserting immunity under TEX. HEALTH & SAFETY CODE § 312.006 and a joint motion to dismiss for lack of subject matter jurisdiction (which the court of appeals treated as a plea to the jurisdiction), again based on claims of immunity. Baylor did not assert any counterclaims, cross-claims, or other claim for affirmative relief. Before the trial court ruled on the motions for summary judgment and pleas to the jurisdiction, the Villegases nonsuited Baylor. Months later, the trial court denied the motion and plea as to Young. Both Baylor and Young filed interlocutory appeals.

The court of appeals dismissed Baylor's appeal for lack of appellate jurisdiction. The court held that it did not have jurisdiction to hear Baylor's appeal because Baylor was no longer a party to the case: The Villegases had nonsuited all claims against Baylor before the trial court ruled, and Baylor had not asserted any counterclaims or cross-claims to otherwise remain in the lawsuit.

Baylor argued that it could appeal the ruling based on TEX. CIV. PRAC. & REM. CODE § 51.014(a)(5) and (8), which provide, respectively, for interlocutory appeals from denials of summary judgment motions based on assertions of immunity by "officers or employees" of the state or a political subdivision, or from the grant or denial of a plea to the jurisdiction by a governmental unit. The court of appeals noted that while Section 51.014(a) did not expressly state that the motion or plea that was denied must have been asserted by the person taking the interlocutory appeal, "principles of standing generally require this to be so." 2007 WL 96108 at *3.

The court further reasoned that Baylor could not base its appeal on Section 51.014(a)(5) because it was not an "individual officer or employee," or on Section 51.014(a)(8) because the trial court never denied its (as opposed to Young's) plea to the jurisdiction. The court of appeals rejected Baylor's claim that the trial court's "refusal to rule" was equivalent to a denial of its motions. *Id.* at *3-*4. On the contrary, the court stated, "The trial court had good reason for not ruling . . . Baylor was no longer a party to the case." The court also rejected Baylor's claim that a plaintiff may not nonsuit a defendant after that defendant has asserted an immunity defense.

The court of appeals further held Young could not appeal her plea to the jurisdiction under Section 51.014(a)(8) because she was not a "governmental unit." Young could, however, appeal the denial of her summary judgment motion because she was an "officer or employee" of Baylor, a state-supported medical school. The court of appeals held that the trial court did not err in denying Young's motion because the statute granting immunity from suit, TEX. CIV. PRAC. & REM. CODE § 312.006, applies only to entities such as medical schools, not individuals. The court therefore dismissed Baylor's appeal entirely and Young's appeal of the denial of her plea to the jurisdiction, and affirmed the trial court's order denying Young's summary judgment motion.

JURISDICTION—PERSONAL JURISDICTION

***Farwah v. Prosperous Maritime Corp.*, 220 S.W.3d 585 (Tex. App.—Beaumont 2007, no pet.)**

Ravinderpal Farwah ("Farwah") was an Indian national and a crew member aboard the *Seatransport*, a ship docked at Smith's Bluff, Texas. He died in a car accident while returning from a trip to Port Arthur, Texas, in a private car that he hired with another crew member. Asserting failure to provide a safe workplace and safe transportation, Farwah's widow, individually and on behalf of Farwah's estate and their children (collectively, "the Farwahs") sued four corporations connected to her husband's former employer. The defendants were all non-resident corporations with principal places of business outside the United States. The defendants filed special appearances, which the trial court granted, and the Farwahs brought an interlocutory appeal.

The court of appeals affirmed, holding first that the defendants' Texas contacts, as contained in the special appearance evidence, did not establish general jurisdiction. The court said the fact that the *Seatransport* and another ship managed by Valles Steamship Canada, Ltd. ("Valles") and another defendant and manned by a third defendant made various port calls in Texas was insufficient to establish general jurisdiction over any of the defendants. The court noted that the separate entity that chartered the ships directed the itineraries, and none of the defendants controlled or had the right to control the ships' ports of call.

The court also held the purchase of supplies and use of services by Valles in Texas did not support general jurisdiction over any of the defendants. With regard to Valles, the court said that "[d]espite their frequency, mere purchases, or their equivalent, are insufficient" to establish general jurisdiction. 220 S.W.3d at 593. Moreover, the court said, the quality of the contacts was insufficient because Valles only purchased supplies and services in Texas, as opposed to elsewhere, was the charterer's choice of Texas ports of call. *Id.* at 594. As such, Valles "did not purposefully direct its business activity to Texas." *Id.*

The court rejected the Farwahs' attempt to impute Valles' Texas contacts to the other defendants based on an alter ego theory. The court noted the defendants were not related as parent-subsidiary corporations and there was no evidence that any one controlled another's operations, or that corporate formalities were disregarded. In any event, because Valles' Texas contacts were insufficient for general jurisdiction, the other defendants' contacts were also insufficient, as they had even less business activity in Texas than Valles.

Next, the court of appeals held there were insufficient contacts to support specific jurisdiction. Again, the only defendant with any substantial direct contacts with Texas was Valles. The court held that Valles' purchase of supplies and use of services in Texas were substantial enough to demonstrate that Valles "purposefully availed itself" of doing business in Texas. *Id.* at 597. These contacts did not exhibit a "substantial connection" to the operative facts of the litigation, however. Specifically, the special appearance evidence did not show that Valles owned the premises where the collision occurred, exercised any control over the driver, or that it employed an incompetent driver.

Finally, the court held that the special appearance evidence "fail[ed] to show that any of [the other defendants] purposefully availed themselves individually" of doing business in Texas or (again) that any of them was an alter ego for Valles. Accordingly, specific jurisdiction could not be established over those defendants, either.

JURISDICTION—PLENARY POWER

***Newsom v. Ballinger Independent School District*, 213 S.W.3d 375 (Tex. App.—Austin 2007, no pet.)**

Cecyle Newsom was employed by Ballinger Independent School District ("BISD") as the eighth-grade girls' basketball coach. While driving to the school complex to conduct a team practice, she was fatally injured in a car accident. Her husband, Kevin Newsom ("Newsom"), filed a claim for worker's compensation benefits on his behalf and on behalf of his children with his late wife. BISD denied this claim on the ground that the coach's death did not occur in the course and scope of her employment. At the subsequent hearing before the Texas Department of Insurance, Division of Worker's Compensation (the "Division"), the hearing officer concluded the coach had been acting in the course and scope of her employment and that her family was entitled to benefits. BISD appealed the decision to the Division's appeals panel, which affirmed.

In September 2004, the BISD sought judicial review in district court. BISD moved for summary judgment on the ground that, under Section 401.011(12)(A) of the Texas Labor Code,

the course and scope of an employee's employment does not include travel to and from a person's place of work. On April 5, 2005, the district court granted BISD's motion and rendered summary judgment in BISD's favor. Newsom filed a motion for new trial, which was overruled by operation of law on June 20, 2005. On July 18, 2005, Newsom filed his notice of appeal.[1]

On July 13, 2005, BISD discovered that it had failed to comply with a provision of the labor code requiring a party seeking judicial review of an appeals panel decision about death benefits to file with the Division any proposed judgment 30 days before the reviewing court renders judgment. A judgment entered without compliance with this requirement is void. TEX. LAB. CODE ANN. § 410.258(f). On July 18, 2005, in an attempt to comply with this rule after the fact, BISD submitted to the trial court a proposed second summary judgment, identical to the first summary judgment, to be entered at least 30 days later. BISD did not, however, request that the first summary judgment be vacated.

On August 9, 2005, the Division conditionally intervened to challenge the district court's jurisdiction over the case. The Division contended that the April 5 summary judgment was final and that the court lacked jurisdiction to enter the second judgment because its plenary power had expired. Newsom and BISD both argued that the district court retained plenary power over the dispute because the original judgment was void and thus not final. Following a hearing, the district court signed the second summary judgment on August 31, 2005.

The court of appeals held that the trial court's plenary power had expired on July 19, 2005, 105 days after it signed the April 5 summary judgment. Pursuant to TEX. R. CIV. P. 329b(c), Newsom's motion for new trial was overruled by operation of law 75 days after the April 5 summary judgment was signed. Under Rule 329b(e), the trial court retained plenary power for an additional 30 days, until July 19, 2005

The court rejected BISD's claim that the trial court's plenary power was contingent on the validity of the April 5 summary judgment, stating that "[a] judgment can become final even if it is void." 213 S.W.3d at 379. The court said BISD's argument would undermine "the very purpose of limiting a trial court's plenary power," which is "to foreclose the possibility of a suit continuing indefinitely even though a final judgment has been obtained." *Id.* The court set aside the August 31 summary judgment and dismissed the parties' appeal from that judgment.

The court held that it had jurisdiction to hear Newsom's appeal from the April 5 summary judgment. The court held that because Newsom properly perfected his appeal, and because the district court lost its plenary power, the court of appeals had exclusive jurisdiction over the appeal. The court then held that because BISD failed to comply with Section 410.258(f) of the Labor Code, the April 5 summary judgment was void. The court dismissed Newsom's appeal and held the underlying dispute remained pending in the district court. *Id.*

JURISDICTION—RIPENESS

***City of Austin v. Whittington*, No. 03-05-00232-CV, 2007 Tex. App. LEXIS 3315 (Tex. App.—Austin Apr. 26, 2007, no pet.).**

The City of Austin ("the City") filed a condemnation action in county court against Harry Whittington and other individuals and entities (collectively, "the Whittingtons") that owned a block of property in Austin. The county court entered summary judgment in favor of the City regarding the propriety of the condemnation itself. The question of compensation to the Whittingtons was tried to a jury, which awarded the Whittingtons $7,750,000. The final judgment

[1] The court of appeals observed that while Newsom's notice of appeal was technically untimely (it was filed thirteen days late), the court would treat the explanation at oral argument by Newsom's counsel for the delay as an "implied" motion for extension. Because this explanation plausibly demonstrated that the delay was not deliberate or intentional, the court granted the extension, rendering the notice of appeal timely.

specified that the City obtained title to the property, but exempted from the determination the ownership of a 20-foot strip of land separating the two halves of the property. The Whittingtons appealed, asserting the condemnation was improper. The court of appeals reversed and remanded the case to county court.

Shortly before appealing the county court judgment, the Whittingtons filed a declaratory judgment action in district court based on the county court's judgment, seeking a declaration regarding the ownership of the 20-foot strip. The district court entered final judgment, declaring, among other things, that the Whittingtons, and not the City, owned the 20-foot strip. The City appealed that judgment.

The court of appeals held that the county court's judgment was never final because of the Whittingtons' appeal. As such, the appellate court held, the district court lacked jurisdiction to interpret the county court's judgment and should have dismissed the entire action. After reviewing the standard for ripeness, the court of appeals concluded that "the validity of the district court's declarations was necessarily contingent on the [county court] judgment's being affirmed on appeal in all respects." 2007 Tex. App. LEXIS 3315 at *13. Accordingly, the Whittington's declaratory judgment action had not been ripe when it was filed. *Id.* The court vacated the declaratory judgment.

Based on the reversal of the county court's judgment and the vacatur of the declaratory judgment, the court concluded the Whittingtons possessed title to the property. The court declined the parties' request to opine further about the ownership of the land, noting that doing so "would amount to an inadmissible advisory opinion." *Id.* at *14.

JURY SELECTION

***Smith v. Dean*, No. 2-06-042-CV, 2007 Tex. App. LEXIS 3617 (Tex. App.—Fort Worth May 10, 2007, no pet.)**

Appellants David and Cathy Smith (collectively, "the Smiths") brought a medical malpractice suit against Dr. William Dean and the Cardiovascular and Thoracic Surgical Group of Wichita Falls (collectively, "Dean") for problems that arose during an aortic valve replacement. During voir dire, the Smiths' counsel asked the jury panel several convoluted questions regarding whether they would follow court instructions when applying evidentiary standards. A couple of panel members responded vocally, but more than 30 indicated their agreement by raising their hands. Dean's counsel attempted to rehabilitate the venire members by clarifying the Smiths' questions. He asked the venire members on a row-by-row basis to raise their hands if they would not be willing to abide by the court's instructions regardless of their personal beliefs. Only seven venire members raised their hands.

The trial court granted challenges for cause to remove all seven venire members who had indicated that they would not abide by the trial court's instructions. The trial court also granted the Smiths' challenge for cause to remove the two vocal venire members. However, the trial court denied the Smiths' challenge for cause to remove the remaining panel members who merely raised their hands in agreement, In so doing, the court said that the questions had been confusing and inaccurately framed, that the jurors had succumbed to a "me too" attitude in raising their hands, and they had been properly rehabilitated. The Smiths complained their remaining six peremptory challenges were insufficient to strike the 12 venire members who had survived their challenges for cause, and requested five additional peremptory challenges. The trial court refused this request. The Smiths exercised two of their peremptory challenges against this group but did not use their remaining four challenges. Ultimately, eight members of the group of 33

served on the jury. The jury returned a verdict for Dean and the Smiths appealed.

The court of appeals affirmed. The court first held that the Smiths had not properly preserved their challenge to the selection of all eight jurors. Though the Smiths had six peremptory challenges, they only used two on the group. Thus, they waived their objections to the first four jurors.

The court held the Smiths did preserve error with regard to the remaining four jurors because, even if they had used all of their peremptory strikes against the complained-of jurors, four of those jurors would have remained in the panel. Nevertheless, the court of appeals held that the trial court did not abuse its discretion in overruling the Smiths' challenges for cause against these jurors.

Citing *Cortez v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87 (Tex. 2005), the court noted that the questions by the Smiths' counsel were confusing and that confusion cannot render a potential juror disqualified. The court also noted that the venire members did not express "unequivocal bias by merely raising their hands." 2007 Tex. App. LEXIS 3617 at *22-23. Finally, the court held, while the jurors expressed "some bias," they were rehabilitated by Dean's counsel and the trial court's explanations of the proper burden of proof. *Id.* at *23. Upon questioning by Dean's counsel, none of the jurors in question raised their hands or otherwise stated that they could not follow the court's instructions or the law. Based on these facts, and deferring to the trial court's superior position to judge the venire members' sincerity and capacity, the court of appeals affirmed, holding the trial court did not abuse its discretion in denying the Smiths' challenges for cause.

MANDAMUS

***In re Reagan*, No. 09-07-113-CV, 2007 Tex. App. LEXIS 2783 (Tex. App.—Beaumont Apr. 12, 2007, orig. proceeding)**

In a lawsuit between James P. Reagan ("Reagan") and Concord Capital Group, LLC ("Concord"), Concord served Reagan with 50 requests for admissions. Reagan did not respond to the requests. A year later, Concord filed a motion in limine that referred to the now-deemed admissions. At this point, Reagan responded to the requests, admitting five and moving to strike the remaining deemed admissions. As part of this motion, he included an affidavit from his counsel explaining her failure to notice the requests, which had apparently been included with the petition. The trial court denied the motion and Reagan sought mandamus relief.

The court of appeals conditionally granted Reagan's mandamus petition. The court noted that under TEX. R. CIV. P. 198.3, "the guiding rule and principal" for withdrawing deemed admissions is a showing of good faith and no undue prejudice. 2007 Tex. App. LEXIS 2783 at *2. Following the Texas Supreme Court's opinion in *Wheeler v. Green*, 157 S.W.3d 439 (Tex. 2005), the court also observed that, "absent flagrant bad faith or callous disregard for the rules, due process prohibits sanctions that preclude the disposition of a claim on its merits. 2007 Tex. App. LEXIS 2783 at *2.

The court held that the trial court abused its discretion in denying Reagan's motion to strike the deemed admissions. The court stated that, while the trial court could have concluded that Reagan was aware of the requests when he was served with them, the trial court made no finding that either Reagan or his counsel consciously failed to respond. Significantly, the court noted, the deemed admissions "effectively determined the entire controversy." *Id*. at *3-*4. The court also noted that the year-long delay between Reagan's receipt of the requests and his answers was marked by court-ordered mediation; that the case had not yet gone to trial; and that, in light of

testimony during an earlier hearing, Concord could not have reasonably believed that Reagan had no defenses. The court held any prejudice to Concord that resulted from Reagan's delay in responding to the request for admissions could have been remedied through intermediate sanctions. In sum, the court stated that lesser sanctions may have been appropriate, but the trial court "need not foreclose a trial on the merits because a party did not comply with discovery requests." *Id.* at *4.

The court also held that mandamus was appropriate because Reagan lacked an adequate remedy by appeal. When a discovery ruling "has the effect of precluding a decision on the merits of a party's claim or defense," remedy by conventional appeal is inadequate, unless the sanctions are imposed simultaneously with a final, appealable judgment. *Id.* Accordingly, the court granted Reagan's request for mandamus relief.

***In re City of Coppell*, 219 S.W.3d 552 (Tex. App.—Dallas 2007, orig. proceeding)**

In 2004, CB Parkway Business Venter VI, Ltd. and Trammell Crow Company No. 43, Ltd. (collectively, "CB") purchased approximately 350 acres of land that was located within the City of Dallas, but surrounded by the City of Coppell ("Coppell") and the City of Irving. The majority of the property was within the Coppell Independent School District ("CISD"). CB applied to the City of Dallas to change the zoning for the property to allow for mixed-use development.

A number of lawsuits, including the three at issue here, sprang from CB's attempt to change the property's zoning restrictions. First, Coppell and CISD filed a condemnation action in Dallas County Court at Law No. 3 (the "Condemnation Suit"), seeking to condemn a portion of the property for uses such as park space and affordable housing. The City of Dallas approved CB's zoning application on January 25, 2006.

Second, on March 21, 2006, CB filed suit against Coppell, its mayor, and members of its city council in the same county court (the "Abuse of Process Suit"). CB alleged that the condemnation proceedings were an illegal attempt to condemn land in the City of Dallas without that city's permission and an abuse of process. The defendants filed a plea to the jurisdiction, contending the trial court lacked subject-matter jurisdiction over CB's claims because the defendants were immune and the case, therefore, was not ripe. The trial court continued the hearing on this motion to permit discovery.

Third, Coppell and CISD sued CB and the City of Dallas in district court, seeking a declaratory judgment that the City of Dallas' rezoning was unlawful (the "Rezoning Suit"). In its Abuse of Process Suit, CB moved to transfer the Rezoning Suit to the county court pursuant to the Dallas County Local Rules. The trial court conducted a hearing on this motion; though no evidence was introduced, the court granted the motion and transferred the Rezoning Case.

The court of appeals held that the trial court abused its discretion in ordering the transfer. The appellate court held the trial court should not have granted the motion to transfer without first ruling on Coppell's pending plea to the jurisdiction. Under Dallas County Local Rule 106, the trial court must have jurisdiction over both cases—the first case before it and the second case being transferred to it—for a transfer to be proper. The appellate court said the trial court abused its discretion by granting the transfer motion without first confirming that it had jurisdiction over the case pending before it (the Abuse of Process Suit).

The appellate court further held the trial court also abused its discretion because the Rezoning Suit was not sufficiently related to the Abuse of Process Suit to justify the transfer. Under Dallas County Local Rule 107, a transfer is mandatory if the two cases arise out of "the same transaction or occurrence." The cases here did not meet that standard, the court found. While the Abuse of Process Suit and the Condemnation Suit were

premised on the attempts by Coppell and others to condemn a portion of the property, the Rezoning Suit involved the City of Dallas' action in granting CB's zoning application. The appellate court concluded the only common element was the fact that the same property was the basis for all three cases, which was insufficient to render the lawsuits "significantly and logically related." 219 S.W.3d at 559.

The lesser standard for discretionary transfer was not met, either. Under Rule 106, transfer is appropriate if the two cases are "so related" that transfer "would facilitate orderly and efficient disposition of the litigation." *Id.* Given the lack of evidence at the hearing and the distinct factual basis for the Rezoning Suit, the court of appeals concluded, the trial court had insufficient information to justify the transfer.[2]

Despite the fact that the trial court abused its discretion in ordering the transfer, mandamus relief was unavailable because the appellate court found Coppell and CISD had an adequate remedy by appeal. That is, because the trial court's transfer was an "incidental ruling" that could be corrected on appeal, the court denied mandamus relief.

[2] The court rejected CB's other attempts to create a nexus between the Rezoning Suit and other two suits. These arguments included CB's claim that all the pending litigation was part of a larger "litigation scheme," the fact that Coppell had sought injunctive relief in both the Condemnation Suit and the Rezoning Suit, and CB's belief that Coppell would argue later that the Rezoning Case had to be resolved before damages could be awarded elsewhere.

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AMERICANS WITH DISABILITIES ACT AND EMPLOYMENT RETIREMENT INCOME SECURITY ACT

***Jenkins v. Cleco Power LLC*, No. 05-30744 2007 WL 1454363 (5th Cir. May 18, 2007)**

Daniel Jenkins ("Jenkins") filed a lawsuit against Cleco Power LLC ("Cleco") and Liberty Life Assurance Co. ("Liberty"), asserting a claim of disability discrimination under the Americans with Disabilities Act (ADA) and the Employment Retirement Income Security Act (ERISA). *Id.* at *1. The district court granted summary judgment for Liberty regarding Jenkins' ERISA claim on the basis that he did not qualify for disability benefits. *Id.* at *3. Subsequently, the district court granted a motion for involuntary dismissal under Federal Rule of Civil Procedure 41(b), concluding Jenkins failed to establish that: (1) he was disabled under the ADA; (2) the company failed to reasonably accommodate him; and (3) the company retaliated against him for requesting a reasonable accommodation. *Id.*

On appeal, the panel upheld the district court's summary judgment in favor of Liberty on the ERISA claim. *Id.* at *4. The panel noted that, under ERISA, a plan administrator has the discretion to construe the plan documents and determine plan eligibility. *Id.* at *3. Courts may only overturn an administrator's decision if it was arbitrary and capricious—or in other words—made without a rational connection between the known facts and the ultimate decision. *Id.* Under the plan at issue in this case, employees were not entitled to receive disability benefits if they could work in other occupations consistent with their experience and education. *Id*. at *4. Based on a report showing Jenkins was employable in certain jobs within his area, the panel concluded Liberty did not abuse its discretion when it terminated Jenkins' disability benefits. *Id.*

With respect to the ADA claim, the panel disagreed with the district court that Jenkins was not disabled. *Id.* at *5. The ADA defines disability as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." *Id.* at *4 (quoting 42 U.S.C. § 12102(2)(A) (2007)). The panel concluded that "sitting" was a major life activity, and the evidence showed Jenkins was substantially limited in his ability to sit. *Id.* at *5. However Jenkins failed to establish Cleco did not reasonably accommodate him. *Id.* The panel pointed to the fact that Cleco attempted to place Jenkins in several different positions, ultimately offering him a position with reduced physical activity that was acceptable to his doctor. *Id*. at *6.

Finally, regarding Jenkins' retaliatory discharge claim, the panel applied the three-step burden-shifting framework adopted by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). *Id.* at *6. The panel concluded that, although Jenkins could establish a prima facie case for his retaliation claim, Cleco established a legitimate non-discriminatory reason for the termination; namely that Jenkins refused the reasonable accommodation Cleco offered him. *Id.* Moreover, there was no evidence the proffered reason for the termination was a pretext. *Id.*

CLASS ACTIONS—CERTIFICATION

***Cole v. Gen. Motors Corp.*, 484 F.3d 717 (5th Cir. 2007)**

General Motors Corp. (GM) brought an appeal of the district court's order certifying a nationwide class of car owners that asserted breach of warranty claims relative to allegedly defective airbag sensors in certain Cadillac DeVille models.

The panel rejected GM's argument the class members had not suffered any injury. GM essentially asserted the class action was a "no-injury products liability" suit. *Id.* at 722-23. The panel noted, *inter alia*, that "[p]laintiffs allege that each plaintiff suffered economic injury at the moment she purchased a DeVille because each DeVille was defective" and that "[p]laintiffs seek recovery for their actual economic harm (*e.g.* overpayment, loss in value, or loss of usefulness) emanating from the loss of their benefit of the bargain." *Id.* at 723. The panel further noted that "plaintiffs may bring claims under a contract theory based on the express and implied warranties they allege." *Id.* The panel concluded " that plaintiffs have established a concrete injury in fact and have standing to pursue their class action." *Id.*

However, the panel agreed with GM that the district court had abused its discretion in certifying the class because the predominance requirement for Federal Rule of Civil Procedure 23(b)(3) certification did not exist. Noting that under applicable Louisiana choice of law rules individual class members' claims would be governed by the substantive law of fifty-one jurisdictions, the panel held "plaintiffs did not sufficiently demonstrate the predominance requirement because they failed both to undertake the required 'extensive analysis' of variations in state law concerning their claims and to consider how those variations impact predominance." *Id.* at 725 (citations omitted). In particular, the panel observed that applicable laws varied as to the necessity of proving reliance, notice of breach, privity, and manifestation of vehicle defects. *Id.* at 726. The panel wrote that plaintiffs failed to articulate adequately how these "variations in state law" would not preclude predominance in this case." *Id.* at 725.

Holding that the plaintiffs had failed to carry their burden to establish predominance, the panel reversed the order granting class certification and remanded for entry of an order denying class certification. *Id.* at 730.

CLASS ACTION—SECURITIES LITIGATION

***Oscar Private Equity Inv. v. Allegiance Telecom, Inc.*, 487 F.3d 261, (5th Cir. 2007)**

In this securities class action, Oscar Private Equity Investments ("Oscar") alleged Allegiance Telecom, Inc. ("Allegiance") fraudulently misrepresented certain line-installation counts in its first three quarterly financial announcements, and that Allegiance's stock dropped after it ultimately restated the count in the fourth quarter. The district court, relying on the fraud-on-the-market theory for classwide reliance, certified the securities-fraud class action for alleged violations of sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities Exchange Commission.. On interlocutory appeal, Allegiance argued the district court should have considered all evidence, both for and against loss causation, at the class-certification stage. Moreover, Allegiance argued the district court abused its discretion when it found Oscar had made an adequate showing with respect to loss causation.

A majority of the panel, in an opinion by Judge Higginbotham over a dissent by Judge Dennis, vacated the certification order because Oscar was held to have failed to have made a sufficient showing that the market reacted to the corrective disclosure, and thus, the fraud-on-the-market theory was not available. Thus, the majority held, because the plaintiffs could not establish common questions of law and fact predominated over individual questions of reliance, certification of the class was improper.

The majority held that a class certification based on the fraud-on-the-market theory must be supported by a showing that the plaintiffs' losses were caused by the alleged misrepresentations followed by the corrective disclosures, stating "[w]e now require more than proof of a material misstatement; we require proof that the misstatement *actually moved* the market . . . [e]ssentially we require plaintiffs to establish loss causation in order to trigger the fraud-on-the-market presumption." The majority reviewed

Oscar's expert's event study, which provided that Allegiance's stock reacted to the entire bundle of negative information contained in the fourth quarter announcement, and concluded "[w]hen multiple negative items are announced contemporaneously, mere proximity between the announcement and the stock loss is insufficient to establish loss causation."

The majority also held loss causation must be established at the class-certification stage by a preponderance of all admissible evidence. Judge Higginbotham wrote that the majority "cannot ignore the *in terrorem* power of certification, continuing to abide the practice of withholding until 'trial' a merit inquiry central to the certification decision, and failing to insist upon a greater show of loss causation to sustain certification, at least in the instance of simultaneous disclosure of multiple pieces of negative news." In determining whether loss causation and reliance should be addressed at the class-certification stage, the majority stated its view that the Supreme Court's decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) has been misinterpreted by other courts and does not preclude courts from giving full and independent weight to each Federal Rule of Civil Procedure 23 requirement pertaining to class certification, regardless of whether the requirement overlaps with the merits of the case.

Dissenting, Judge Dennis wrote that none of the majority's cited decisions "nor any other decision of this court holds that proof of loss causation is part of the fraud-on-the market presumption." Judge Dennis wrote that the majority's central authority, *Greenberg v. Crossroads Sys., Inc.*, 364 F.3d 657 (5th Cir. 2004), improperly requires the plaintiff to prove—as a condition for using the fraud-on-the-market presumption—that a misrepresentation or corrective disclosure moved the price of the company's stock. This improperly shifts the burden of proof from the defendant—who must rebut the fraud-on-the-market presumption of reliance, to the plaintiff—who is now required to establish proof beyond the existence of an efficient market. Judge Dennis also stated that, to the extent that *Greenberg* was correctly decided, proof of reliance, as distinguished from proof of loss causation, only required a showing of an increase in the stock price on the heels of a misrepresentation. Finally, Judge Dennis disagreed with the majority's analysis of the trial court's role at the class certification stage and stated that class certification hearings should not be mini-trials on the merits of the class or individual claims. *Id.* at *15.

***Regents of the Univ. of Cal. v. Credit Suisse First Boston LLC*, 482 F.3d 372 (5th Cir. 2007), *petition for cert. filed*, 75 USLW 3557 (U.S. Apr. 05, 2007) (No. 06-1341)**

The plaintiffs alleged that certain banks entered into partnerships and transactions that allowed Enron Corp. ("Enron") to misstate its financial condition by taking liabilities off its books and booking revenue from transactions when Enron was actually incurring debt. *Id.* at 377. There were no allegations that the banks were fiduciaries of the plaintiffs, that they improperly filed reports on Enron's behalf, or that they engaged in any manipulative activities in the market for Enron's securities. *Id.*

The district court granted class certification after allowing the plaintiffs to take advantage of the presumption of reliance and the fraud-on-the-market theory to establish reliance on a class-wide (as opposed to an individual) basis. *Id.* at 378. The district court held it could certify a class of plaintiffs whose losses were caused by a common scheme, even though the defendants in this case were secondary actors. *Id.* The district court reasoned that a defendant who knowingly engages in an act in furtherance of the larger scheme could be jointly and severally liable for the loss caused by the entire overarching scheme, including conduct of other participants not known to the defendant. *Id.* The district court also held a preliminary finding of market efficiency was not needed when a plaintiff pleads under Rule 10b-5(a) (forbidding deceptive devices, schemes, and artifices) and 10b-5(b) (prohibiting deceptive acts,

practices, and courses of business) of the Securities Exchange Commission. *Id*. at 378.

On interlocutory appeal of the class certification order, the panel initially noted it had the power under Federal Rule of Civil Procedure 23(f) to address arguments that implicate the merits of the plaintiffs' causes of action to the extent that those issues also implicate the class certification decision. *Id.* at 380. Thus, the panel could review the factual and legal analysis of the lower court, including the merits of the district court's theory of liability, when relevant to class certification. *Id*. at 381. The panel applied a de novo standard of review in determining whether the district court applied the correct legal standard in reaching its decision to certify a class. *Id*. at 380.

Using this scope and standard of review, the panel reversed the class-certification order of the district court, holding there was no sustainable theory for class-wide reliance because: (1) the banks did not owe any duties to the shareholders; at most, their actions constituted aiding and abetting liability that did not give rise to primary liability under section 10(b) of the Securities Exchange Act of 1934; and (2) the bank's conduct was not conduct on which an efficient market could be presumed to rely, because the banks did not act directly in the market. *Id*. at 390-92. Therefore, plaintiff-investors could not take advantage of the fraud-on-the-market presumption of reliance needed for class certification. *Id.* at 393.

Judge Dennis concurred in the judgment, but on different grounds. Judge Dennis initially noted that the majority considered issues beyond the scope of the court's limited, interlocutory review under Rule 23(f). *Id*. at 397-98. In his view, the majority's reasoning dealt with whether section 10(b) extended to acts by secondary actors who did not, in the majority's view, make direct misrepresentations to the market. *Id.* at 397. Judge Dennis considered this to be an issue regarding the substantive merits of the plaintiffs' claims and not an issue regarding whether individual issues of reliance predominate over common issues. *Id.* at 397-98. Judge Dennis concluded that the district court should have determined whether the banks engaged in conduct under the securities laws that would result in primary liability to the plaintiffs. *Id*. at 407.

CLASS ACTION REMOVAL—CLASS ACTION FAIRNESS ACT

***Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc.*, 485 F.3d 793, (5th Cir. 2007)**

In this class action removed from Louisiana state court under the Class Action Fairness Act of 2005 (CAFA), one of the defendants brought a permissive appeal of the district court's remand order issued under the "local controversy" exception of CAFA. The putative class was composed of patients and relatives of deceased patients alleging injuries and wrongful death as a result of medical care provided immediately after Hurricane Katrina in facilities impacted by the hurricane.

On appeal, the panel held the parties seeking to remand the class action had to prove by a preponderance of the evidence the statutory citizenship requirements for remand had been met. *Id.* at 797. Under CAFA's local controversy exception, a plaintiff has to show that: (1) more than two-thirds of the members of all proposed plaintiff classes in the aggregate were citizens of the state where (and when) the action was filed; (2) at least one defendant is a citizen of the state and engaged in conduct that formed a significant basis of the class claims; and (3) the injuries resulting from the conduct of any defendant occurred in the state where the action was first filed. *See id.* To show citizenship, a plaintiff must establish that he or she is domiciled in the state, which requires proof of residence and an intention to remain in the state. *Id.* at 797-98.

Applying these legal standards, the panel concluded the remand-seeking parties failed to meet their burden to show at least two-thirds of the members of all proposed plaintiff classes in the aggregate were citizens of Louisiana. *Id*. at 804. The panel discounted medical records submitted by plaintiffs that showed primary billing addresses in Louisiana, because proof of

residence alone was not enough without a showing that the patients, many of whom (at the time of suit) were relocated outside of Louisiana, intended to return to Louisiana. *Id.* at 798-802. The court also discounted census data showing that Katrina victims intended to return to Louisiana because this data was not specific enough to the proposed plaintiff class. *Id*. at 802. Thus, the plaintiffs failed to meet the requirements for remand under the "local controversy" exception. *Id.* at 803.

***Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc.*, 485 F.3d 804, (5th Cir. 2007)**

In this appeal, like the one above, a plaintiff filed a lawsuit on behalf of a putative class of patients and relatives of deceased or injured patients against hospitals, owners and operators in Louisiana state court alleging claims for, among other things, negligence and intentional misconduct in the aftermath of Hurricane Katrina *Id.* at 808. Defendants LifeCare Management Services, L.L.C., and LifeCare Hospitals of New Orleans, L.L.C. (collectively "LifeCare") filed a timely notice of removal without co-defendant Tenet Health Systems Memorial Medical Center d/b/a Memorial Medical Center's ("Memorial") consent. *Id.* at 808. The plaintiff initially moved to remand the case based on the "local controversy" exception to CAFA. *Id.* After the plaintiff withdrew its motion, Memorial filed a memorandum supporting remand and adopting the plaintiff's position. *Id.* The district court remanded the case to state court based on all three exceptions to removability under CAFA, and LifeCare brought a permissive appeal. *Id.* at 809.

Under CAFA, the party seeking removal has only to prove minimal diversity and an aggregated amount in controversy of at least $5 million. *Id*. at 810. CAFA eliminated the requirement of unanimous consent among all defendants and the one-year removal deadline. *Id.* After a case has been removed, CAFA provides three exceptions to the exercise of federal jurisdiction that would justify remand: (1) the home state exception; (2) the local controversy exception; and (3) discretionary jurisdiction. *Id.* (citations omitted). In this case, the panel focused specifically on the "discretionary jurisdiction" prong, under which a plaintiff must only show that more than one-third but less than two-thirds of all proposed classes were citizens of the state in which the action was originally filed. *Id.* at 812. The district court may then weigh other factors to determine whether to remand. *Id.*

Under the "discretionary jurisdiction" provision, the party seeking remand bears the burden of proof to establish the domicile of at least one-third of the class members at the time of the filing of the lawsuit. *Id.* The panel noted the moving party's decision to abandon the remand motion had no impact on the analysis because the district court is empowered to determine its own subject-matter jurisdiction. *Id.* at 812-13. Moreover, under CAFA, non-consenting defendants could move to remand the case, but such defendants had to prove by a preponderance of the evidence that the citizenship requirements of CAFA are met. *Id.* at 813.

The panel concluded that Memorial had made a credible showing with respect to the citizenship in Louisiana of at least one-third of class members in the aggregate. *Id.* at 818. The panel pointed to the following: (1) medical records establishing residency in Louisiana of over 97% of the patients; (2) affidavits by prospective class members displaced as a result of Hurricane Katrina stating that they intended to return to Louisiana; (3) proof of emergency contact numbers in Louisiana for the deceased patients; and (4) the presumption of "continuing domicile" for those class members forced to relocate after the hurricane. *Id.* at 814-18.

Although only eight affidavits were offered in which the affiants expressed an intention to return to Louisiana, the panel concluded the district court could reasonably determine from these affidavits, in combination with the other evidence, that at least one-third of the proposed class members were Louisiana citizens at the time of the filing of the lawsuit, less than two months

after Hurricane Katrina. *Id.* at 818. The panel also found that, despite the fact that the size of the potential class could not be precisely measured, the class was narrowly defined to include a finite group of persons who were hospital patients at the time the hurricane struck. *Id.* at 820-22.

Having concluded Memorial met its burden of proof regarding citizenship, the panel then turned to the factors to be weighed under the "discretionary jurisdiction" provision. The panel concluded that: (1) the claims involved local interests, particularly because the claims related to the operations of two Louisiana businesses during a local disaster; (2) the majority of the claims asserted by plaintiff involved negligence issues governed by Louisiana law; (3) a distinct nexus existed between Louisiana as the forum and the class members, alleged harm, and the defendants; (4) the number of citizens of Louisiana was substantially larger in the aggregate than the number of citizens in other states; and (5) there was no evidence of any other class action being filed in the preceding three-year period involving the same or similar claims on behalf of the same or other persons. *Id*. at 822-23. Accordingly, the panel affirmed the district court's remand order.

EMPLOYMENT DISCRIMINATION

***Bourdais v. City of New Orleans*, 485 F.3d 294 (5th Cir. 2007)**

In this appeal from a bench trial, non-minority recruits of the City of New Orleans' (the "City") fire department sued on allegations of reverse discrimination arising out of alleged hiring delays resulting from the City's policy of using race as a factor in its fire recruit hiring policy. *Id.* at 297. In prior, separate litigation brought by other plaintiffs (non-minority recruits the City had not hired), the hiring policy was declared violative of the Fourteenth Amendment's guarantee of the right to equal protection. *Id.*

On appeal from the judgment for the plaintiffs, the City challenged the trial court's finding that, despite the recruits' apparent awareness of the predecessor non-hiree litigation (brought years earlier), the applicable one-year limitations period did not bar the claims. The district court found after the bench trial "that the plaintiffs neither knew nor should have known of their causes of action" before the potential for discriminatory delays in their hiring was revealed in a deposition of the City superintendent in 1998—thereby placing the plaintiffs' suit within the limitations period. *Id.* at 298.

The panel observed, "[t]his Court reviews such determinations, when made after trial and not upon summary judgment, for clear error." *Id.* (citations omitted). The panel stated that "[w]hether the extremely limited knowledge certain plaintiffs had of the [prior suits by non-hirees]—and the [other plaintiffs] should have had—triggered the statute of limitations is a fairly close question." *Id.* at 299. Ultimately, the panel held the trial court had not committed clear error because "[o]ne reasonable conclusion the [plaintiffs] could draw is, because [the plaintiffs were in fact hired], they were not subject to the same discrimination the [predecessor, non-hired] plaintiffs complained of." *Id*.

The panel further held that, in denying any damages to several of the plaintiffs, "[t]he district court did not err in placing the burden of showing an adverse employment action took place on each plaintiff." *Id.* at 300. The panel observed that, even assuming the applicability of burden shifting of the type in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), "the burden only shifts to the defendant after a plaintiff proves that[:] (1) there was an adverse employment action, and (2) race played a 'substantial or motivating factor' in it." *Id*. (citation omitted). The panel held the affected plaintiffs "failed to show they were eligible for hire in any class earlier than the ones they were hired into[;] … [i]n other words, they failed to show that they suffered an adverse employment action whatsoever." *Id.*

As for the prevailing plaintiffs' requests for lost pension benefits, the panel noted the district court treated the claim as one for front pay and that this classification was not challenged on appeal. *Id.* at

300-01. The panel was careful to note that "[w]hether a plaintiff's delayed accumulation of pension benefits should be considered back pay or front pay appears to be an unresolved issue in this Circuit" and, holding the issue was waived because neither party had briefed it, the panel declined to "disrupt the district court's classification of this award as front pay [with the] note that the issue remains undecided." *Id.* 301 at n.9.

Applying the governing abuse of discretion standard for front pay awards, the panel held the district court had not abused its discretion in refusing such an award, explaining "[t]he dollar amount of damages attributable to the delayed pension benefits is extremely speculative, and given the uncertainty of whether the pensions will ever vest, the district court was within its discretion to find that awarding such damages would go beyond making the plaintiffs whole." *Id.* at 301. Accordingly, the panel affirmed the district court's judgment and award *in toto*.

EMPLOYMENT RETIREMENT INCOME SECURITY ACT—FAILURE TO STATE A CLAIM

***Ferrer v. Chevron Corp.*, 484 F.3d 776 (5th Cir. 2007)**

The plaintiffs in these consolidated cases sued their former employer, Chevron Corp. ("Chevron"), for breach of fiduciary obligations under ERISA arising out of alleged misrepresentations relative to eligibility requirements for obtaining enhanced benefits under Chevron's retirement plan. *Id.* at 778. The district court granted Chevron's 12(b)(6) motion and the plaintiffs appealed.

The panel affirmed, holding the plaintiffs had failed to allege a causal connection between Chevron's alleged misrepresentations and the plaintiffs' claimed entitlement to receive additional retirement benefits. *Id.*

In conjunction with a planned workforce reduction, Chevron amended the pertinent retirement plan in 1999 to include a "Special Involuntary Termination Enhancement" (SITE) plan for qualifying employees notified during a specified period that their employment would be involuntarily terminated without cause. *Id.* at 779. Plaintiffs alleged Chevron misrepresented the requirements for SITE benefits in several oral and written communications and that, as a consequence, the plaintiffs retired voluntarily and therefore lost the opportunity to obtain potential SITE benefits. *Id.* at 780.

On appeal, the panel noted that plaintiffs' "Amended Complaints and the briefing on appeal studiously avoid alleging that had the plaintiffs decided not to retire voluntarily, Chevron would have involuntarily terminated their employment, and they would have been eligible for SITE plan benefits." *Id.* at 781. Against this backdrop, the panel held "[t]he plaintiffs' alleged loss of benefits did not 'result[] from' any of the misrepresentations that the plaintiffs contend Chevron made." *Id.* (citations omitted).

The panel observed that "[n]o plaintiff has alleged that any employee in his or her group was eligible to receive or actually received SITE benefits." *Id*. The panel further noted that "[w]hat the plaintiffs have avoided alleging and what they do not contend in this court is that if Chevron had not made the misrepresentations and plaintiffs had not retired, Chevron would have involuntarily terminated their employment [and made them eligible for SITE benefits]." *Id.* at 782.

On the basis that "the allegations in the plaintiffs' complaints are missing the necessary causal link between the misrepresentations and the plaintiffs' eligibility for SITE plan benefits," the panel distinguished *Mathews v. Chevron*, 362 F.3d 1172 (9th Cir. 2004). In *Mathews*, the Ninth Circuit held Chevron breached a fiduciary duty to a group of similarly situated employees—however, there Chevron had stipulated that everyone in the plaintiffs' work group would have received SITE benefits if they had not retired. *Ferrer*, 484 F.3d at 782 (citing *Mathews*, 362 F.3d at 1177, 1186).

The panel concluded that "[e]ven if 'lost chance of involuntary termination' is actionable under ERISA," the plaintiffs' failure to allege any legally-cognizable causal nexus between the alleged misrepresentations and their eligibility for SITE plan benefits meant that they had failed to state a claim for relief under ERISA. *Id.* at 782. Accordingly, the panel affirmed the 12(b)(6) dismissal. *Id.* at 783.

EXPERT EVIDENCE

***Knight v. Kirby Inland Marine, Inc.*, 482 F.3d 347 (5th Cir. 2007)**

Two former employees brought a toxic tort suit for chemical exposures they suffered while employed by Kirby Inland Marine, Inc. ("Kirby"). *Id.* at 350. Specifically, the former employees claimed they were exposed to benzene while working as tankermen for Kirby, and that they later developed cancers as a consequence. *Id.* To prove causation, the former employees hired a highly-qualified epidemiologist and physician to testify as an expert on causation. *Id.*

After a *Daubert* hearing, the district court determined the expert testimony was inadmissible. *Id.* In reaching its decision, the district court excluded all of the more than fifty studies that the expert's testimony was based on. *Id.*

On appeal, the panel affirmed the district court's decision to exclude the expert's testimony. *Id*. Writing for the panel, Justice Stewart noted that a district court's determination on admissibility of expert evidence under *Daubert* is reviewed only for abuse of discretion. *Id.* at 351. An abuse of discretion may be found only when the district court's ruling is based on an erroneous view of the law or a clearly erroneous assessment of the evidence. *Id.*

On appeal, the former employees contended the district court abused its discretion in its determination that the proffered evidence was unreliable. *Id.* at 352. The panel disagreed and held that, even though there was some basis for the conclusions proffered by the expert's evidence, it could not conclude the district court's evaluation of the evidence was clearly erroneous. *Id.* at 355. Further, the panel determined the district court did not abuse its discretion in determining the various studies were unreliable. *Id*.

FAMILY MEDICAL LEAVE ACT

***Greenwell v. State Farm Mut. Auto. Ins. Co.*, 486 F.3d 840 (5th Cir. 2007)**

Sandra Greenwell ("Greenwell") filed a lawsuit against State Farm Mutual Automobile Insurance Co. ("State Farm") claiming violations of the Family Medical Leave Act (FMLA) and Title VII after her employment with the company was terminated. *Id.* at 841. The district court dismissed the Title VII claim with prejudice, but it also found a factual dispute existed with respect to whether Greenwell's son suffered a serious medical condition resulting in her absence from her work under the FMLA. *Id.* The district court concluded, however, that Greenwell failed to provide sufficient notice under the FMLA regarding her absence and granted summary judgment to State Farm. *Id.*

On appeal, the panel considered the narrow issue of whether Greenwell provided sufficient notice under the FMLA to preclude her termination due to excessive absences. *Id.* The FMLA requires employees to provide an employer with at least thirty days notice in the case of foreseeable absences. *Id*. at 842. For unforeseeable absences, an employee must give an employer notice as soon as practicable under the circumstances. *Id.* The employee must give enough information to the employer to demonstrate that the leave is a result of a condition that would qualify under FMLA. *Id.*

The panel concluded Greenwell's notice that she was going to be absent due to her son's asthma did not provide enough information to notify her employer that the absence was due to a serious condition that would be protected under the FMLA. *Id.* at 843. The panel noted Greenwell

chose not to follow the company's established FMLA procedures and obtain supporting medical documentation, which the record showed she had previously done regarding another matter. *Id.* at 843-44. As postured, State Farm lacked enough information to be able to determine whether Greenwell's absence qualified for FMLA protection, and the panel affirmed the summary judgment accordingly. *Id*. at 844.

FIRST AMENDMENT

***Houston Chron. Publ'g Co. v. City of League City*, No. 05-41689, 2007 WL 1544645 (5th Cir. May 30, 2007)**

The plaintiffs, two newspapers, brought a Section 1983 action against the City of League City, Texas (the "City"), challenging an ordinance regulating street vendors and door-to-door solicitors. *Id.* at *1. The ordinance required solicitors to register with the City, submit to a criminal background check, pay a fee, and post a bond. *Id.* Subsequently, the City amended the ordinance to prohibit solicitation by any person within a public roadway while cars are stopped at a traffic signal. *Id.* at *1-2. However, the amendment did not preclude a solicitor who remained on surrounding sidewalks or unpaved shoulders, but who was not in the roadway, including on medians or islands. *Id.* at *2.

The district court permanently enjoined enforcement of the ordinance, holding that it was unconstitutional both facially and as applied. *Id.* The district court also held the amendment was *de facto* discriminatory because the City enforced it based on the content of the message being conveyed. *Id.* Thus, the amendment to the ordinance could not be justified as a valid restriction on time, place and manner speech limitations. *Id.* The City appealed the injunction but subsequently repealed the portion of the ordinance relating to registration, bond, and fee requirements. *Id.*

The panel first considered whether the newspapers had standing, and whether the appeal was partially mooted by the fact that part of the ordinance was repealed after the City filed its notice of appeal. *Id.* at *3. To show standing, the newspapers had to show that: (1) they had suffered or will imminently suffer a particularized and concrete injury-in-fact; (2) the injury was fairly traceable to the defendant's conduct; and (3) a favorable judgment would be likely to redress the injury. *Id.* Here, the newspapers established they engaged in sales that would be or were subject to the ordinance. *Id.* This was sufficient to show that the newspapers' First Amendment exercise was chilled by the ordinance. *Id*. Regarding whether the repeal of the ordinance would moot the appeal and require a vacatur of the injunction, the panel concluded that a vacatur was not appropriate where the mootness resulted from voluntary action by the moving party rather than events unrelated to the judgment. *Id.* at *5-*6.

The City also argued the portion of the ordinance that was not repealed was a constitutionally permissible, content-neutral time, place and manner restriction. *Id*. at *7. The panel agreed with the district court that, because streets are traditional public forums and the sale of newspapers was a protected First-Amendment activity, a content-based regulation like the one at issue had to be narrowly tailored to achieve a compelling government interest. *Id.* at *8. The panel concluded the ordinance was not facially unconstitutional because it served a compelling interest of public safety. *Id.* Moreover, the ordinance was appropriately narrowly tailored to apply only to street solicitations at intersections with traffic signals. *Id.* Finally, the ordinance was not unconstitutional as applied because the evidence showed that the City had not enforced the ordinance against the defendant newspapers. *Id.* at *9.

***Illusions-Dallas Private Club, Inc. v. Steen*, 482 F.3d 299 (5th Cir. 2007)**

In this case, the panel reversed a summary judgment for the State of Texas regarding the plaintiffs' First Amendment claims. *Id.* at 315.

The panel determined that a recently-enacted Texas statute sufficiently implicated the First Amendment to warrant further analysis under the relevant First Amendment jurisprudence. *Id.* at 305.

The plaintiffs are various sexually oriented businesses ("SOBs") that feature sexually oriented dancing, otherwise known as adult cabarets. *Id.* at 303. In 2003, the Texas legislature enacted section 32.03(k) of the Texas Alcoholic Beverage Code. *Id.* This statute generally prohibits the issuance of club permits (permits that allow the owner to serve alcohol) to SOBs that operate in dry political subdivisions. *Id.* The effect of this statute is that it denies the SOBs operating in dry political subdivisions the ability to serve alcohol. *Id.*

On appeal, the plaintiffs contended section 32.03(k) violated their First Amendment rights. *Id*. at 303. However, the State of Texas argued section 32.03(k) does not implicate the First Amendment at all. *Id.* at 305. The State contended section 32.03(k) only regulates the SOBs' ability to legally serve alcoholic beverages. *Id.* The State further argued section 32.03(k) merely affects the rights of observers of erotic dancers to consume alcoholic beverages and does not affect the rights of the dancers to engage in such expression or the rights of the clubs to offer it. *Id.* The panel rejected the State's arguments, ruling that alcohol regulations of SOBs can implicate the First Amendment. *Id.*

In reaching its decision, the panel rejected the plaintiffs' contention that section 32.03(k) should be subject to strict scrutiny, ruling that the appropriate level of review was instead only intermediate scrutiny. *Id.* at 307-308. The panel noted the primary purpose of section 32.03(k) was to regulate the service of alcohol, and not to regulate the content of speech. *Id*. at 308.

The panel also noted that section 32.03(k) should be analyzed under a four-part test. Under this test, section 32.03(k) is constitutional only if: 1) the State regulated pursuant to a legitimate governmental power; 2) the regulation does not completely prohibit adult entertainment; 3) the regulation is aimed not at the suppression of expression, but rather at combating negative secondary effects; and 4) the regulation is designed to serve a substantial governmental interest and is narrowly tailored. *Id.*

On appeal, the plaintiffs argued the State did not show that section32.03(k) is designed to serve a substantial governmental interest. *Id.* The panel agreed with this argument, ruling the State did not produce evidence that section 32.03(k) was designed to serve a substantial governmental interest. *Id.* at 313. In reaching its decision, the panel commented that the only actual evidence the State proffered in support of its argument was in the form of land-use studies by other cities on the negative secondary effects caused by SOBs. *Id.* However, these studies were later excluded from the summary judgment record on the grounds that they were hearsay. *Id.* Therefore, the panel determined there was no evidence to show that section 32.03(k) furthers a substantial governmental interest. *Id*. at 313. Accordingly, the panel reversed the district court's summary judgment for the State of Texas on the plaintiffs' First Amendment claims. *Id.* at 315.

Finally, the panel emphasized that its holding was a narrow one and that the State's evidentiary burden was very slight. *Id.* The panel stated the outcome in this case could have been different if the State's land-use studies had not been excluded in the district court and the State had not challenged the exclusion on appeal. *Id.*

INTERLOCUTORY APPEAL—QUALIFIED IMMUNITY

***Connelly v. Tex. Dept. of Crim. Just.*, 484 F.3d 343 (5th Cir. 2007)**

In this retaliatory termination and employment discrimination case, one of the defendants appealed the district court's order denying his qualified immunity summary judgment motion. *Id.* at 345.

The panel observed that, "[a]lthough the appellate courts ordinarily do not have jurisdiction to review a denial of a motion for summary judgment, a district court's order denying qualified immunity is immediately appealable to the extent it turns on an issue of law." *Id.* (citation omitted). Continuing, the panel noted that "[i]f the defendant only argues that, contrary to the district court's determination, there is insufficient evidence in the record to support the plaintiff's version of the facts, we must dismiss the appeal for lack of jurisdiction." *Id.* at 345-46 (citation omitted).

The qualified immunity inquiry asks: "(1) whether the plaintiff has alleged a violation of a constitutional right[;] and (2) whether the defendant's conduct was objectively reasonable in light of the clearly established law at the time of the incident." *Id.* at 346 (citation omitted). "Any arguments not addressed to these questions may not be considered on interlocutory appeal, and an appeal relying on these improperly raised arguments should be dismissed." *Id.*

On appeal, the defendant contended that the plaintiff had produced insufficient evidence to show the decision to terminate her was motivated by her speech because the plaintiff had officially reported defendant's unauthorized practice of law. *Id*. at 346. The panel disregarded this point, noting the argument had never been raised below and, in any case, an attack on the evidence supporting the plaintiff's underlying claim could not be considered for the purpose of an interlocutory appeal. *Id.*

As for the objective reasonableness prong, the panel commented that the defendant had fundamentally misunderstood the nature of the objective reasonableness inquiry. On appeal, the defendant argued he satisfied the objective reasonableness requirement because he terminated the plaintiff based on her employment-related misconduct, not her speech. *Id.* However, "[o]bjective reasonableness in the qualified immunity context refers to whether [the defendant's] alleged behavior was reasonable even if it was unlawful, because clearly established law did not render it a constitutional violation at the time." *Id.* (citation omitted). The panel found the appellant-defendant had wholly failed to address this standard, while ; the plaintiff-appellee had pointed to law and facts tending to establish unreasonableness, thus carrying her burden. *Id*. at 347.

In dismissing the appeal, the panel concluded, "[b]ecause [the defendant's] arguments may not be asserted on interlocutory appeal of a denial of qualified immunity, the court lacks jurisdiction over the appeal." *Id.* at 347.

PERSONAL JURISDICTION

Moncrief Oil Int'l, Inc. v. OAO Gazprom, 481 F.3d 309 (5th Cir. 2007)

In this case, the panel affirmed the district court's dismissal for want of personal jurisdiction on the ground that the defendants did not have sufficient minimum contacts with Texas. *Id.* at 314.

In 1998, Moncrief Oil International Inc. ("Moncrief") entered into various agreements with OAO Gazprom ("Gazprom"), OAO Zapsibgazprom ("Zapsib"), and OAO Severneftegazprom ("Severn") (collectively "the defendants") to develop Russian oil fields. *Id.* at 311. Moncrief is a Texas corporation that develops foreign oil and gas fields around the world. *Id.* at 310. The defendants are all organized under the laws of the Russian federation and their principal place of business is in Moscow, Russia. *Id.* Moncrief asserted specific personal jurisdiction existed over the defendants, but the district court ruled the defendants did not have sufficient minimum contacts, and ultimately dismissed the case for lack of personal jurisdiction. *Id.* at 310.

On appeal, Moncrief argued that Zapsib established minimum contacts by: 1) entering into contracts with Moncrief; 2) knowing from the outset of the transaction that Moncrief is a Texas

resident; 3) acknowledging and approving of Moncrief's substantial performance in Texas; and 4) sending an executive to visit Moncrief in Texas in furtherance of the performance of the contract. *Id*. at 312.

The panel disagreed with Moncrief, ruling that these factors did not establish the required minimum contacts. *Id.* at 314. The panel concluded that merely contracting with a resident of Texas is not enough to establish personal jurisdiction. *Id.* at 312. In addition, the panel wrote, "a plaintiff's unilateral activities in Texas do not constitute minimum contacts where the defendant did not perform any of its obligations in Texas, the contract did not require performance in Texas, and the contract centered outside of Texas." *Id.* In reaching its decision, the panel noted that the agreements were negotiated and prepared in Russia, not Texas. *Id.* The panel further found the executive's visit did not create personal jurisdiction, relying on the fact that no agreement was established during the visit and most of the negotiations occurred outside of Texas. *Id.* at 313. Accordingly, the panel concluded Zapsib did not have sufficient minimum contacts to warrant personal jurisdiction in Texas. *Id*. at 313.

Moncrief also argued that Gazprom established minimum contacts by sending an executive to Texas to speak at a US and Russia Energy Summit. *Id.* at 314. While in Texas, Gazprom's executive met with Moncrief to discuss the future performance of the already existing agreements between the two companies. *Id.* The panel concluded that the executive's visit did not establish minimum contacts, finding that the visit was for the purpose of the summit, and his meeting with Moncrief was purely incidental to that. *Id.* Because Moncrief sought to attribute Gazprom's contacts to Severn and offered no independent basis for personal jurisdiction as to Severn, the no-jurisdiction determination relative to Gazprom applied to preclude the exercise of jurisdiction as to Severn as well. *Id.* Accordingly, the panel affirmed the district court's dismissal, ruling that there were insufficient contacts to support the exercise of personal jurisdiction. *Id.*

PRODUCT LIABILITY—EXPRESS WARRANTY

***Evans v. Ford Motor Co.*, 484 F.3d 329 (5th Cir. 2007)**

Mark Evans worked as a used car manager and asserted he had been injured when the 1999 Ford Explorer he had parked (on the lot where he worked) shifted into gear and backed over his leg. The case against Ford Motor Co. ("Ford") went to trial on Evans' theory of express warranty under the Louisiana Product Liability Act. *Id.* at 332-33. Evans asserted, *inter alia*, that "the Explorer has a 'perceived park' defect—arising from a 3/16ths-inch insert plate in the steering column between the park and reverse gears—that deceived him into believing the Explorer was in 'Park,' when it in fact was not." *Id.* at 333.

In support of his express warranty claims, Evans argued on appeal that: "(1) the Explorer failed to conform to statements in the owner's manual[;] (2) the shift indicator was an affirmative representation the Explorer was in 'Park' when it was not[;] (3) the Explorer did not conform to the 'green light' warranty that was given at the auction [where the vehicle had been purchased by the used car dealership][;] and (4) the Explorer failed to conform to the manufacturer's 36-month/36,000 mile warranty." *Id.* at 335.

Relative to the owner's manual claim, the plaintiff asserted these statements from the manual to support the jury verdict in his favor: "Make sure the gearshift is securely latched in P (Park). This position locks the transmission and prevents the rear wheels from turning." *Id.* Holding that "[t]here was no warranty that the rear wheels would be prevented from turning if the shift mechanism was not securely latched," the panel held Evans could not recover because the evidence was undisputed that Evans did not make sure the gearshift was securely latched in park, and the evidence was undisputed that the gearshift was not in fact securely latched in park. *Id.* at 336. The panel also observed that "there was no

evidence that Evans had seen or relied on the owner's manual before he was injured." *Id.*

Relative to the shift-indicator and "[auction house] green light warranty" theories, the panel held that they failed as a matter of law because, "even assuming either the shift indicator or the 'green light' constituted or contained an express warranty, a question we do not decide, there is no evidence that Ford … made any representation or warranty." *Id.* at 335. "[T]here is no evidence that Ford Motor Company had any role in the auction or in tagging the Explorer as a 'green light' vehicle. Similarly, there is no evidence that any defect in or damage to the shift indicator was caused by Ford." *Id.*

Similarly, the panel concluded there was no evidence the manufacturer's 36-month/36,000-mile warranty was breached. The panel wrote: "[Evans] merely recites that the warranty remained in effect at the time of his injury. He points to no provision in the warranty he contends supports the jury's finding." *Id.* at 336.

In light of the foregoing, the panel held that, as a matter of law, there was no failure to conform to an express warranty and reversed and rendered judgment for Ford. *Id.* at 332, 336.

RETROACTIVITY—ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT

***Garrido-Morato v. Gonzales*, 485 F.3d 319 (5th Cir. 2007)**

In this case of first impression in the Fifth Circuit, the panel was called upon to decide whether the Illegal Immigration Reform and Immigrant Responsibility Act's (IIRIRA) definition of an aggravated felony could be retroactively applied to recharacterize a prior conviction for harboring illegal aliens.

The panel noted that determining whether a statute like the IIRIRA is impermissibly retroactive requires analysis of: (1) whether Congress clearly communicated its intent that the law be applied retroactively; and (2) where such a clear statement is lacking, "there is an impermissible retroactive effect where the application of the statute 'attaches new legal consequences to events completed before the statute's enactment.'" *Id.* at 322 (citations omitted).

The definitional portion of the IIRIRA, found in section 321(b), provides the new definition of aggravated felony applies "regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph[,]" and, section 321(c), provides the amendments "shall apply to actions taken on or after the date of the enactment of this Act." *See id.* at 323 .

The panel observed "[t]he meaning of the phrase 'actions taken' is a question of first impression in this circuit." *Id.* at 324. Agreeing with five of the six other circuit courts' decisions on the issue, the panel concluded that "actions taken" are "decisions of the Attorney General's representatives with regard to a particular alien" and not the date of the offense or conviction. *Id.*

Because the immigration judge in the underlying proceedings conducted deportation hearings after the September 30, 1996, effective date of the IIRIRA, that "action taken" compelled the immigration judge to utilize the retroactive definition of aggravated felony. The panel held "[i]n sum, there is no ambiguity in [section] 321(c) that would cast doubt on Congress's intent that the definition of aggravated felony is to be applied retroactively with respect to any action taken that implicates [section] 321." *Id.* at 324.

Joel Androphy, Berg & Androphy, Houston
Rachel Grier, Berg & Androphy, Houston

SEARCH AND SEIZURE

***United States v. Ziegler*, 474 F.3d 1184 (9th Cir. 2007)**

In *Ziegler*, the Ninth Circuit held that a defendant had a reasonable expectation of privacy in his workplace computer, but the defendant's employer could validly consent to a search of the computer. The defendant's employer reported to the FBI that the defendant had accessed child-pornographic websites from a workplace computer. The FBI allegedly requested the employer to make a copy of the defendant employee's hard drive. The court concluded that the defendant had a reasonable expectation of privacy in his office and workplace computer because his office was not shared by co-workers and was kept locked. The court, however, determined that the defendant's employer could consent to a search of the defendant's computer because it is the type of workplace property that remains within the control of the employer even where the employee places personal items in it. The court further relied on the company's complete administrative access to any employee's machine and the company-installed firewall, which monitored employees' internet traffic.

***United States v. Andrus*, 483 F.3d 711 (10th Cir. 2007)**

In *Andrus*, the Tenth Circuit held that a defendant's father could consent to a search of the defendant's computer. The defendant was convicted of possession of child pornography after agents of the Bureau of Immigration and Customs Enforcement found the images on his personal computer following a search of the home he shared with his father. The defendant argued on appeal that his father did not have apparent authority to consent to a search of his personal computer. The court analogized a computer to suitcases, footlockers or other similar personal items. The court noted that when addressing a third party's apparent authority to consent to a search, the court may examine whether a computer is locked, or password protected, whether the law enforcement agents know or should reasonably know that the computer is password protected, and the location of the computer within the house. The court held that the law enforcement officers could reasonably believe that the defendant's father had apparent authority even though the computer was password protected and located in the defendant's room, because the father had unlimited access to the son's room and the computer was available for use to other members of the household.

SENTENCING

***United States v. Mercado*, 474 F.3d 654 (9th Cir. 2007)**

Joining the majority of circuits, the Ninth Circuit in *Mercado* held that a sentencing court could consider conduct underlying acquitted criminal charges. The defendants were convicted of RICO conspiracy violations and conspiracy to distribute narcotics stemming from their alleged activities as members of the Mexican Mafia. They were acquitted of other charges, including conspiracy to murder. The trial court considered the criminal conduct charged in the acquitted counts to enhance the defendants' sentences. The defendants appealed and argued that their constitutional right to a jury trial was violated, particularly in light of *Booker*. The Ninth Circuit disagreed stating that *United States v. Booker*, 543 U.S. 220 (2005) did not undermine *United States v. Watts*, 519 U.S. 148 (1997), which held that a sentencing court could consider conduct underlying charges of which a defendant is acquitted. Even though a jury may have found the government failed to prove a crime beyond a reasonable doubt, a sentencing court could still find that the conduct was proven by preponderance of the evidence during sentencing.

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

ABATEMENT OF APPEAL—IN CAMERA HEARING

***LaPointe v. State,* No. 225 S.W.3d 513 (Tex. Crim. App. 2007)**

At trial, defense counsel sought to cross-examine the sexual assault victim regarding her prior sexual history for the purpose of "exploring a bias or motive for testifying." Defense counsel told the trial judge that he believed that the victim had "engaged in sex with multiple partners at various times." The State objected on the basis of TEX. R. EVID. 412.

The trial judge decided to address the admissibility issue in an *in camera* hearing where only the judge and the victim were present. The judge specifically declined to allow defense counsel to question the victim for the purpose of making a bill of exception, but the trial judge did offer to ask the victim any questions the defense wished to submit.

After the prosecution's direct examination of a nurse, the defense sought to cross-examine her on the victim's prior sexual history. Again, the trial judge refused to permit defense questioning of the witness for the purpose of creating a bill of exception. Instead, the trial judge adhered to the same procedure used with the victim: defense counsel submitted questions and the hearing was held with only the trial judge and the witness being present.

On appeal, the court of appeals held that the trial court erred in excluding the parties from the *in camera* hearing. However, instead of reversing the defendant's conviction, the court of appeals abated the appeal and remanded the case for a retrospective *in camera* hearing that permitted the presence of the parties and the questioning of the witnesses by the parties' attorneys.

After that hearing was held in the trial court, the Court of Criminal Appeals held that the *in camera* proceeding contemplated by Rule 412 is an adversarial hearing at which the parties are present and the attorneys are permitted to question witnesses. The court also held that, under TEX. R. APP. P. 44.4, it was proper to abate the appeal and remand the case to the trial court, so that it could hold the proper retrospective hearing under Rule 412.

When a trial court has erroneously withheld information necessary to evaluate a defendant's claim on appeal (e.g. failure to file required findings of fact) or has prevented the defendant from submitting information necessary to evaluate his claim (e.g. refusing to permit an offer of proof), the appellate court is directed to step in and order the trial court to correct the situation. The key to Rule 44.4 is that there must be an error that the appellate court can correct.

ABATEMENT OF APPEAL—OUT-OF-TIME MOTION FOR NEW TRIAL

***Benson v. State,* 224 S.W.3d 485 (Tex. App.—Houston [1st Dist.] 2007, no pet.)**

After the defendant was convicted of the offense of aggravated assault and was sentenced, his trial counsel did not file a motion to withdraw from the case. Nine days after sentencing, the defendant filed a *pro se* notice of appeal, which stated, "The defendant, an indigent, prays for the setting of APPEAL BOND, and NOT BEING REPRESENTED BY COUNSEL SINCE SENTENCING also prays for the APPOINTMENT OF APPELLATE COUNSEL."

After the defendant was finally appointed an attorney on appeal, the defendant's appellate counsel filed an appellate brief that requested an abatement of the case pursuant to *Jack v. State,* 42 S.W.3d 291 (Tex. App.—Houston [1st Dist.]

2001) (order abating appeal), and *Jack v. State*, 64 S.W.3d 694, 696-97 (Tex. App.—Houston [1st Dist.] 2002), *pet. dism'd*, 149 S.W.3d 119 (Tex. Crim. App. 2004). The defendant claimed that the trial court erred by failing to appoint appellate counsel in time for him to file a motion for new trial, and he requested the court of appeals to abate the present appeal and remand the cause to the trial court for an evidentiary hearing to determine whether he received effective assistance of counsel during the period for filing a motion for new trial.

The court of appeals noted that, in *dicta* in its opinion in *Jack v. State*, the Court of Criminal Appeals had criticized the abatement procedure previously employed by the court of appeals in *Jack v. State*. Therefore, in view of this disapproval, the court of appeals held that the precedential value of the court's previous opinions in *Jack v. State*, had been abrogated. The court of appeals abandoned the abatement procedure used in *Jack v. State.* After refusing to abate the appeal, the court additionally held that the defendant had failed to rebut the presumption that he was represented by trial counsel during the period of time for the filing of a motion for new trial. *See Oldham v. State*, 977 S.W.2d 354, 363 (Tex. Crim. App. 1998).

ANDERS BRIEFS

***In re L.E.H, Jr.*, No. 4-06-787-CV, 2007 WL 1063051 (Tex. App.—San Antonio Apr. 11, 2007, no pet.)**

The defendant appealed from a trial court's judgment involuntarily committing him for temporary mental health services. The defendant's court-appointed attorney filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967).

The court of appeals held that the *Anders* procedure is appropriate when court-appointed counsel concludes that an appeal of an involuntary commitment order is frivolous. *Cf. In re D.A.S.*, 973 S.W.2d 296, 299 (Tex. 1998) (reaching same holding with regard to appeals from civil juvenile delinquency adjudications). A person facing involuntary commitment faces a potential loss of liberty. And, in these proceedings, the State has a duty to ensure that the defendant is afforded the opportunity of legal counsel. The Legislature has also mandated the appointment of an attorney to represent a proposed patient in an involuntary commitment proceeding. An attorney appointed to represent a person who is appealing an involuntary commitment order is also ethically bound not to file a frivolous pleading. All of these factors support the conclusion that the *Anders* procedure should be applied to appeals involuntary commitment proceedings.

APPELLATE RECORD—EXHIBITS NOT MADE A PART OF THE RECORD

***Amador v. State*, 221 S.W.3d 666 (Tex. Crim. App. 2007).**

After the defendant was charged with committing the offense of driving while intoxicated, he filed a motion to suppress in which he claimed that he was seized without reasonable suspicion and that evidence obtained against him was obtained without probable cause. At a hearing on the motion to suppress, the defendant called the arresting officer and played portions of her patrol-car videotape to challenge the "prolonged" detention. The defendant did not have the videotape marked, and he told the trial judge that it was not necessary to have a reporter's record of the words spoken on the videotape because "[t]he tape will suffice itself, Your Honor." Although portions of the tape were played, the videotape was never formally offered into evidence.

The officer testified that she saw the defendant speeding on a freeway, and that she followed him to the next exit, where he pulled over in a parking lot. After noting the defendant's slow responses, the officer wrote up a warning ticket for speeding and was ready to deliver it to the defendant when she smelled alcohol on his breath. The officer arrested the defendant for committing the offense of driving while intoxicated after she had him perform some field sobriety tests, but she never actually testified how the defendant performed on

those field sobriety tests. The focus of the trial attorneys' questioning was instead on the officer's continued detention of the defendant after she had written a warning ticket for speeding.

In his argument to the trial court, defense counsel stated that the videotape showed that "there is no mumbled speech on the tape. There is no slow reaction. So no matter what the officer said she observed or heard, [reasonable suspicion] just wasn't there."

On appeal after the defendant's conviction, the defendant did not designate the videotape to be included in the appellate record. The State, therefore, requested that it be permitted to supplement the appellate record with a copy of the officer's scene videotape, which showed the defendant performing the field sobriety tests. The defendant objected, arguing that the videotape had never been marked as an exhibit or formally introduced into evidence in the trial court.

The court of appeals denied the State's request because the defendant had objected and because the court could not determine whether the entire videotape was shown at trial. However, the court of appeals held that, because the defendant had "introduced the videotape, suffered the adverse ruling on his motion to suppress, and presented an incomplete record on appeal," he had failed to ensure that "'the record on appeal [was] sufficient to resolve the issue he present[ed].'" Therefore, the court of appeals assumed that the videotape supported the trial court's implicit finding that the officer had probable cause to arrest the defendant for DWI.

The Court of Criminal Appeals held that reviewing courts can assess only the evidence that is actually in the appellate record. If the appellate record is incomplete or anything relevant is omitted from it, any party may "direct the official court reporter to prepare, certify, and file in the appellate court a supplemental reporter's record containing the omitted items." The court also noted that, sometimes the parties may treat an exhibit, document, or other material as if those items had been admitted into evidence, even though they were never formally offered or admitted in the trial court. Under such circumstances, that evidence can properly be included in the appellate record and considered by the appellate court. But, if the court reporter's record is unclear and the parties cannot agree as to whether and to what extent they, the trial court, or the jury saw or used an item that was not formally introduced into evidence, "the trial court must—after notice and a hearing—settle the dispute."

In this case, the court of appeals erred by "assuming" that (1) the officer's videotape recorded the defendant's performance of the field sobriety tests, (2) the trial judge viewed all of that portion of the videotape, and (3) the video depiction of those tests supported the officer's opinion that the defendant was intoxicated at the time she arrested him. Reviewing courts cannot "assume" or speculate about the contents of exhibits or other materials that are not contained in the appellate record.

The court of appeals properly denied the State's written request for supplementation because the defendant objected to its inclusion and because the parties could not agree on how much of the videotape was actually viewed and used in the trial court. But the court of appeals was mistaken to leave this disagreement unresolved. The court should have remanded the case to the trial judge, so that it could settle the dispute as to what portions of the videotape had been admitted into evidence. The case was remanded to the court of appeals, presumably that such a hearing in the trial court could be ordered.

FACTUAL SUFFICIENCY REVIEW

***Roberts v. State,* 221 S.W.3d 659 (Tex. Crim. App. 2007).**

The evidence showed that the robbery victim, who had known the defendant for more than 40 years, gave the defendant a ride in his car to an apartment complex. As the defendant and the victim sat in the car in the parking lot of the

complex, the victim became suspicious that he was about to be robbed by other men in the parking lot.

The victim told the defendant to get out of the car, but the defendant delayed. The defendant eventually got out of the car, leaving the front passenger door open, and the defendant got in the back seat of the car and began "bouncing up and down."

The victim saw the defendant waving in the back seat just before several men with guns surrounded the car. One of these men got into the front passenger seat through the front passenger door that the defendant had left open. The men robbed the victim of some of his property, including his car, but no one robbed the defendant.

The defendant did not testify at trial, but the trial court admitted his grand-jury testimony, in which the defendant claimed that he was not involved in the robbery and that he even tried to prevent it by telling the robbers to leave the victim alone. In his initial statement to the police, the victim had made no claim that the defendant set him up for the robbery or that the defendant was waving from the back seat just before the robbers approached the victim's car. Two of the robbers testified that the defendant was not involved in the robbery.

The defendant claimed on appeal that the evidence was factually insufficient to support his conviction, and the court of appeals rejected the defendant's claim with the following language:

> Rodrigo Barnes, a childhood friend of Andrew Roberts, Jr., was carjacked at gunpoint by a neighborhood gang. Roberts knew the gang members and was in the back seat of Barnes's parked Mercedes Benz when the carjacking occurred. Barnes had been trying to get Roberts out of the vehicle before the robbery, but Roberts was detaining him. Barnes believed Roberts was setting him up for the robbery by signaling the gang while sitting in the back seat. Roberts and two of the gang members who pled guilty to aggravated robbery said he did not assist in the robbery. Roberts was convicted of aggravated robbery. He was sentenced to 35 years in prison. We affirm.
>
> Roberts first contends that the evidence is factually insufficient to support his conviction as a party to the aggravated robbery. Viewing the evidence under the appropriate standard of review, we find the evidence factually sufficient to support the conviction. Issue one is overruled.

The factual-conclusivity clause in Article V, Section 6 of the Texas Constitution makes the factual-sufficiency decision by a court of appeals final and conclusive upon the Court of Criminal Appeals. A review by the Court of Criminal Appeals of a direct-appeal court's factual-sufficiency decision is limited by the factual-conclusivity clause to determining only whether the direct-appeal court properly applied "rules of law."

In this case, the factual-sufficiency decision by the court of appeals did not improperly apply any "rules of law." The court of appeals' opinion set out the "most important and relevant" evidence, including evidence contrary to the jury's verdict that three witnesses (the defendant, Williams and Betacourt) testified that the defendant was not involved in the robbery. *Cf. Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000) ("When *reversing* on insufficiency grounds, the appellate court should *detail* the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient.") (emphasis added).

HARM ANALYSIS—PREVENTING A QUESTION DURING VOIR DIRE

***Jones v. State*, No. 223 S.W.3d 379 (Tex. Crim. App. 2007)**

Through a question directed at the entire venire, the defendant sought to inquire whether prospective jurors could give effect to the law that prohibits them from considering, for punishment

purposes, whether a defendant will ever be paroled. The State objected that the question was "improper voir dire," and the trial court sustained this objection. On appeal, the court of appeals held that the trial court's error was not constitutional in nature and that the trial court's error was harmless under TEX. R. APP. P. 44.2(b).

The Court of Criminal Appeals noted that the "right to counsel" under the Texas Constitution has included the right to pose proper questions during voir dire examination. Furthermore, previous case law has not drawn a connection between the Texas constitutional right to be heard by asking questions at voir dire and a generalized notion of effective assistance of counsel. Rather, the cases have more specifically focused on whether counsel had the opportunity to intelligently exercise challenges for cause and peremptory challenges.

Analyzing the constitutional right in question as one of counsel's general effectiveness at trial is inconsistent with past cases conferring upon counsel the constitutional right to make his own individualized assessment of each prospective juror. The constitutional right to be heard at voir dire is a right to *participate* in the proceedings in a certain way. The denial of that participation is the constitutional violation, even if it is later determined that the defense was not compromised by that denial. Such a later determination would be relevant to a harm analysis conducted under TEX. R. APP. P. 44.2(a), but it is not appropriate for determining whether this type of constitutional violation occurred.

Although the dissenting opinion suggested that the cases recognizing a state constitutional right to ask proper questions were wrongly decided, the majority did not find it prudent to address that question in this case. "The state constitutional right in question has been recognized for over ninety years. If the State wishes this Court to re-examine whether the Texas Constitution confers the right to ask proper questions in voir dire, it should raise this issue and afford this Court the benefit of an analysis of the issue and allow any party the opportunity to respond."

MOTION FOR NEW TRIAL—SHOWING OF HARM FROM JUROR MISCONDUCT

***White v. State,* No. 225 S.W.3d 571 (Tex. Crim. App. 2007)**

The defendant entered a plea of guilty to the charge of intoxication manslaughter, and she was sentenced to nine years in prison. At a hearing on the defendant's motion for new trial, the defendant and the State stipulated that there were pending theft charges against two of the jurors in the case. Both jurors testified that, at the time of their jury service, they were unaware of any pending theft-by-check charges against them.

In response to the State's objection based upon TEX. R. EVID. 606(b), the trial court allowed the defendant's trial attorney to make a bill of exception based on the questions that he wished to ask the challenged jurors, but it did not permit counsel to record the jurors' answers to those questions. The defendant asserted that the trial court violated her right to due process of law when it denied her requests to present testimony and to make a bill of exception regarding the harm that she suffered from the seating of the two "absolutely disqualified" jurors.

She claimed that the service of a disqualified juror introduces into a jury's deliberation "outside influence," for the purposes of Rule 606(b)—that is, the influence of a person who is absolutely excluded by law from the jury room. And, noting that Article 44.46 of the Code of Criminal Procedure requires a defendant to show "significant harm" because of the service of a disqualified juror, the defendant claimed that "significant harm" was shown by the mere presence of the two absolutely disqualified jurors participating in jury deliberations and decision-making.

However, the Court of Criminal Appeals held that the plain language of Rule 606(b) indicates that an

"outside influence" is something outside of both the jury room and the juror. Furthermore, the challenged jurors' mere presence was not "significant harm," for the purposes of article 44.46. Rule 606(b) also does not prevent a defendant from discovering whether the challenged jurors caused "substantial harm." Non-juror evidence can still be used to impeach a jury's verdict in that manner.

MOTION FOR NEW TRIAL—UNTIMELY AMENDMENT

***Moore v. State,* 225 S.W.3d 556 (Tex. Crim. App. 2007)**

After the defendant was convicted of the offense of driving while intoxicated, the defendant's trial attorney timely filed a motion for new trial and a motion to withdraw as counsel. The motion to withdraw was granted. Almost two months after the sentence had been imposed, the defendant's appellate attorney filed an amended motion for new trial and a motion for leave to file the amended motion for new trial.

The amended motion raised two grounds that had not appeared in the initial motion for new trial, including a *Brady* claim. No affidavits or other supporting documentation were included with this amended motion. One week later, the defendant filed a second amended motion for new trial, alleging the same grounds but including affidavits and documentary support, along with another motion for leave to file.

The trial court granted the motion for leave to file the second amended motion for new trial on the same day that it was filed. A hearing was held on the second amended motion for new trial on the 73rd day after the date that the sentence was imposed. The trial court granted the defendant's second motion for new trial on the *Brady* ground alone.

Over a week later, the State filed a motion requesting the trial court to reconsider its order granting the defendant's second amended motion for new trial, asserting for the first time that the trial court lacked authority to grant such a motion because it had not been timely filed in accordance with TEX. R. APP. P. 21.4. The trial court denied the State's motion for reconsideration, believing that it lacked the authority to act on the State's motion because it was filed beyond the 75-day period for ruling on a motion for new trial.

The Court of Criminal Appeals held that the filing of an amended motion for new trial beyond the 30-day period set forth in Rule 21.4 does not deprive the trial court of jurisdiction. And the rule also does not deprive the trial court of the authority to rule on an untimely amendment to a timely motion for new trial, at least absent an objection from the State—as long as the ruling is within the 75 days for ruling on a motion for new trial.

The court's holding was consistent with the history behind Rule 21.4 and its predecessors. *See Dugard v. State*, 688 S.W.2d 524 (Tex. Crim. App. 1985). Because a trial court retains the authority to rule on a timely filed motion for new trial within the 75-day period, it also retains the authority to allow an amendment to that original motion within that same period, and to rule on that amendment, so long as the State does not object. The State, as opponent of a tardy amendment to a motion for new trial, can forfeit its right to complain about the tardy amendment by inaction.

Rule 21.4(b) *does* permit the State to insist within the 75-day time period that the trial court rule only upon the timely motion for new trial as originally filed or timely amended, but not as untimely amended. Should the trial court refuse to limit its ruling to the original motion and grant relief on the basis of the amendment over the State's objection, the appellate court should consider only the validity of the original and any timely amended motion for new trial, and should reverse any ruling granting a new trial based upon matters raised for the first time in an untimely amendment.

Moreover, the record should be sufficient to demonstrate that the State was afforded a

meaningful opportunity to object to the untimely amendment, or to any order purporting to grant it, within the 75-day period. However, absent such an objection (and assuming an opportunity to object), ordinary principles of procedural default will apply, and the State will not be heard to complain for the first time outside of the 75-day period of the untimely amendment.

POST-CONVICTION WRIT OF HABEAS CORPUS—NON-CONSTITUTIONAL CLAIMS

***Ex parte Douthit,* No. AP-75267, 2007 WL 1490469 (Tex. Crim. App. May 23, 2007)**

The defendant was charged with committing the offense of capital murder; he entered a plea of guilty to the charged offense and was sentenced to life in prison. Almost eighteen years after he had entered his guilty plea and was sentenced, the defendant filed an application for a writ of habeas corpus alleging that, when he pled guilty, the applicable law "did not allow a defendant to waive the right to a jury trial in a capital case."

However, the violations of the previous versions of Articles 1.13 and 1.14 of the Code of Criminal Procedure were not jurisdictional defects or constitutional or fundamental errors. The defendant neither alleged nor presented any evidence that he desired to exercise his constitutional right to a trial by jury or that such right was violated by the trial judge's acceptance of his waiver. Rather, the record demonstrated that the defendant voluntarily waived his right to a jury trial in two separate documents.

The Court of Criminal Appeals will not grant habeas corpus relief where there is no federal constitutional right, the defendant waived a right in a manner that was merely inconsistent with the procedures outlined by a statute, and the record reflects that the defendant did so knowingly and voluntarily. Therefore, the defendant's claim is not cognizable on a post-conviction writ of habeas corpus. *Ex parte Dowden,* 580 S.W.2d 364 (Tex. Crim. App. 1979); *Ex parte Jackson,* 606 S.W.2d 934 (Tex. Crim. App. 1980); and *Ex parte Bailey,* 626 S.W.2d 741 (Tex. Crim. App. 1981), are overruled.

POST-CONVICTION WRIT OF HABEAS CORPUS—SUBSEQUENT WRITS

***Ex parte Brooks,* 219 S.W.3d 396 (Tex. Crim. App. 2007).**

Evidence at trial showed that a confidential informant told police that the defendant's brother was selling cocaine out of his hotel room. The defendant was found in that hotel room, and there was a plastic bag containing a white powder on a table just inside the room. Other narcotics and narcotics paraphernalia were found in the room after a search warrant was executed. The plastic bag that was visible when the defendant opened the door was later determined to contain 19 grams of cocaine.

The defendant was charged with, and convicted of, possessing cocaine weighing more than four grams and less than 200 grams. The defendant later filed a "subsequent" application for a post-conviction writ of habeas corpus pursuant to Article 11.07, section 3 of the Code of Criminal Procedure. The defendant claimed that he was entitled to a new trial based on his claim of actual innocence because he was denied his constitutional right to confront the State's confidential informant, and because newly discovered evidence that was previously unavailable to him demonstrated that there was never a confidential informant against him. The defendant claimed that he was an innocent bystander and was merely present in his brother's residence where cocaine and a firearm were concealed without his knowledge. An affidavit from the defendant's brother stated that he was the sole resident of the apartment and that he was the sole owner of the handgun and of the cocaine that the police found when they searched his apartment.

Pursuant to Article 11.07, Section 4(a)(2), for a "subsequent" application for a writ of habeas corpus, the defendant was required to establish by

a preponderance of the evidence that, but for a violation of the United States Constitution, no rational juror could have found the defendant guilty beyond a reasonable doubt.

The Court of Criminal Appeals held that, while the text of Article 11.07, Section 4(a)(2) does not specifically state that the defendant must make a prima facie claim of actual innocence, it is inherent in the subsequent-writ provisions that the defendant meet that threshold requirement before the merits of his claim will be considered. In reaching this holding, the court drew an analogy to the decision of the United States Supreme Court in *Schlup v. Delo,* 513 U.S. 298 (1995), and to the similar language in Article 11.071, Section 5 of the Code of Criminal Procedure.

It is not necessary for a defendant to prove his innocence; rather, all that is necessary is a prima facie showing of actual innocence. Therefore, the Court of Criminal Appeals may not consider the merits of a "subsequent" application for a post-conviction writ of habeas corpus unless it includes a prima facie showing of actual innocence in order for the defendant to demonstrate that the constitutional violation at his trial resulted in a miscarriage of justice.

In this case, the defendant did not meet the threshold requirement of showing that a constitutional violation led to a miscarriage of justice due to the incarceration of someone who is actually innocent. Because the defendant did not include a prima facie claim of actual innocence in addition to his constitutional claims, the application was dismissed under article 11.07, section 4.

STANDARD OF REVIEW—CHARGE ON LESSER-INCLUDED OFFENSE

***Hall v. State,* 225 S.W.3d 524 (Tex. Crim. App. May 9, 2007)**

The Court of Criminal Appeals noted that there have been four general approaches taken in the United States in order to determine whether a party is entitled to a charge on a lesser-included offense: (1) "strict-statutory;" (2) "cognate-pleadings;" (3) "cognate-evidence;" and (4) "inherently related."

The first approach would permit a lesser included-offense instruction only when all of the statutory elements of the lesser offense are contained within the statutory elements of the greater offense. Under a general cognate approach, which is followed by a majority of state courts, a jury instruction on a lesser offense could be permitted even when the lesser offense is not composed of a subset of the statutory elements of the greater crime. Under the "cognate-pleadings" approach, the court would look to the facts and elements as alleged in the charging instrument, and not just to the statutory elements of the offense, to determine whether there exists a lesser-included offense of the greater charged offense. Under the "cognate-evidence" approach, the court would include the facts adduced at trial in its lesser-included offense analysis. The fourth approach would permit a jury instruction on a lesser-included offense if the offense was "inherently related" to the greater offense.

After reviewing how courts had treated the issue in Texas in the past, the Court of Criminal Appeals held that the "cognate-pleadings" approach would be the sole test for determining whether a party may be entitled to a lesser-included-offense instruction. Therefore, the determination of whether the allegation of a greater offense includes a lesser offense should be made by comparing the elements of the greater offense, as the State pled it in the indictment, with the elements in the statute that defines the lesser offense.

The "cognate pleading" approach is necessarily a pure question of law. It does not depend on the evidence to be produced at the trial. It may be—and to provide notice to the defendant—must be, capable of being performed before trial by comparing the elements of the offense as they are alleged in the indictment or information with the elements of the potential lesser-included offense.

SUPPLEMENTAL ISSUE FOR REVIEW

***Garrett v. State,* 220 S.W.3d 926 (Tex. Crim. App. 2007)**

While traveling on a rain-slicked road during early morning hours, the defendant came upon an accident scene, where police and firefighters were placing flares and cones on the road. The defendant was not traveling over the speed limit, but he was traveling much faster than other drivers. The defendant's car slammed into the cones and hit a firefighter, who was wearing a reflective vest that revealed that he was a firefighter.

The defendant was eventually convicted of aggravated assault of a public servant. On direct appeal, the defendant complained of the trial court's charge to the jury. The court of appeals requested supplemental briefing regarding the sufficiency of the evidence to convict—particularly whether the evidence was sufficient to show that the defendant was aware that the victim was a public servant at the time that he recklessly assaulted the victim. The parties submitted supplemental briefs on that issue, but the court of appeals ended up not addressing the sufficiency of the evidence.

The Court of Criminal Appeals held that the court of appeals' orders requesting briefing on the sufficiency of the evidence did not grant or even impliedly grant a supplemental issue for review. Had the defendant raised the sufficiency of the evidence in his original brief, or had the court of appeals explicitly granted the supplemental issue for review when it requested supplemental briefing, the court of appeals, pursuant to TEX. R. APP. P. 47.1, would have been required to address the issue concerning the sufficiency of the evidence in its written opinion. Since that was not the case, the court of appeals was not required to address the sufficiency of the evidence.

TIMELINESS OF NOTICE OF APPEAL

***State v. Jones,* 220 S.W.3d 604 (Tex. App.—Texarkana 2007, no pet.)**

The Texas Department of Public Safety (DPS), upon receiving notice that the defendant had been charged with driving while intoxicated (DWI), suspended the defendant's concealed handgun license. A justice of the peace court ruled in favor of the DPS, sustaining the suspension. Thirty-one days after entry of the order by the justice court, the defendant appealed to the county court at law.

The DPS filed with the county court at law a plea to the jurisdiction, citing Section 411.180(e) of the Government Code, alleging that the justice court determination had become final after 30 days. The county court at law denied the DPS's plea to the jurisdiction, holding that, because this was an appeal from a justice court, the Rules of Appellate Procedure applied. The county court judge then applied Rules 10.5 and 26.3 to permit a late filing of the appeal. The county court at law then entered an order that purported to reverse the suspension ordered by the justice court and denied the suspension of the concealed handgun license.

The court of appeals held that section 411.180(e)'s 30-day requirement is jurisdictional in nature. *See Sullivan v. Tex. Dep't of Pub. Safety,* 93 S.W.3d 149, 153 (Tex. App.—Beaumont 2002, no pet.); *Tex. Dep't of Pub. Safety v. Kreipe,* 29 S.W.3d 334, 336 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). Furthermore, when an appeal is taken from a justice court to a county court at law, the county court hears the matters *de novo.* The Rules of Appellate Procedure are not applicable to the appeal of a matter from a justice court to a county court. Accordingly, the Rules of Appellate Procedure do not vest the judge of the county court at law with the authority to extend the time for the filing of an appeal past the 30 days set out in Section 411.180(e).

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