The Appellate Advocate

State Bar of Texas Appellate Section Report

Vol. 19, No. 1 Fall 2006

IN THIS ISSUE

ARTICLES

JUDICIAL SPOTLIGHT

REGULAR FEATURES

SECTION WEB SITE: www.tex-app.org

A Special "Thank You"

The Appellate Advocate and the Appellate Section of the State Bar of Texas would like to thank THOMSON/WEST for its continued support of *The Appellate Advocate*, for its excellence in providing electronic legal research tools, and for its partnership in the advance of professionalism in appellate advocacy. Thank you THOMSON/WEST.

Warren W. Harris, Bracewell & Giuliani LLP, Houston

As the outgoing Chair of the Appellate Section, I would like to thank the Council and our committee chairs and committee members for their great efforts. It has been a real pleasure and honor to work with so many talented people this past year.

One of the Section's flagship projects is the Appellate Boot Camp and the 20th Annual Advanced Civil Appellate Practice Course, which was held at the Four Seasons Hotel in Austin on September 6-8. As you would expect, Lynne Liberato did a superb job as course director. There could have been no one better to chair our 20th annual program. The speakers and topics got rave reviews. Additionally, the Section awarded court-attorney scholarships and need-based scholarships to members in its continuing effort to make CLE affordable for all. Save the date for next year's course: September 5-7, 2007 at the Four Seasons Hotel in Austin.

In conjunction with the Advanced Appellate course, the Section held its annual meeting and reception with the judiciary. Both events were well attended. At the annual meeting I recognized the committee chairs for their outstanding service. Kim Phillips was honored for her three years of service as Editor of *The Appellate Advocate*; Kim has done an absolutely wonderful job with our newsletter. Bill Boyce and the faculty of the Motions and Appellate Advocacy Committee were recognized for the terrific job they did in working with the Texas Access to Justice Commission to educate and train the state's legal aid lawyers on motions, briefs, and oral argument. Scott Rothenberg was thanked for his tireless efforts in keeping our members' records updated.

The Professionalism Committee, chaired by Justice Ann McClure, was recognized for providing speakers to the Texas law schools to speak on the Standards for Appellate Conduct. The Section History Committee, chair JoAnn Storey, and members Karen Precella and Hon. David Farris, was thanked for preserving and archiving the history of the Section and the appellate judiciary. The Website Committee, chair Brett Busby, and members Steve Hayes, Eric Walraven, and Justin Presnal, was also thanked for continuing to improve the Section website and recently adding the appellate library. The Pro Bono Committee, chairs Marcy Greer and Jeff Levinger, solicited volunteers for two new appellate pro bono projects.

Outgoing council members Hon. Bud Arnot, Mara Blatt, and Cindy Timms were also recognized at the annual meeting for their outstanding service to the Section. At the annual meeting, the Section elected the 2006-07 officers and council members and Randy Roach took office as the new Section chair. Photos from the meeting and the reception are available on the Section's website.

The Section again honored Helen Cassidy by presenting the second annual Cassidy Award for the highest rated CLE presentation at the prior year's Advanced Appellate course. This year's recipients were Phil Durst (Recent Texas Cases Involving Actual and Compensatory Damages) and Kurt Kuhn (Rehearing in the Texas Supreme Court).

The Section also gave special recognition to Andrew Weber for his service as Clerk of the Supreme Court of Texas. Andrew was thanked for making the Texas Supreme Court the most user-friendly court in the State.

The winners of the appellate haiku contest were announced and can be viewed on the Section's website. Many thanks to Annual Meeting Chairs Robert Dubose and Kevin Dubose for their efforts to make the contest, meeting, and reception with the judiciary such a success.

Warren Harris
Outgoing Chair, Appellate Section
warren.harris@bracewellgiuliani.com

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

As the incoming Chair of the Appellate Section, I would like to begin my year of service by thanking outgoing Chair Warren Harris. As I said at the Annual Meeting, Warren has done an absolutely superb job of advancing the interests of the section and its many members. He has worked tirelessly and passionately as your Chair, and we owe him a debt of gratitude for his outstanding work. One need only look at the Outgoing Chair's Report to see how much the Section has accomplished under the leadership of Warren, the Council, the committee Chairs, and the committee members who see to it that the important and wide-ranging work of the Section is accomplished.

During this coming year there are a number of new ideas I would like to pursue to advance the interests and objectives of the Section. First, I will ask the Council to support the creation of several new committees to expand the Section's focus on CLE and to reach out to in-house counsel, trial lawyers, academics, as well as the judiciary, so that the Section and its members can better communicate with and serve these core constituencies and consumers of appellate services. Second, I plan to appoint co-chairs to most committees so that we can both expand the number of people in leadership positions and so we can have both a first-year chair and an experienced second-year chair at the helm of most committees. Third, I plan to convene meetings of the officers as an Executive Committee. This will allow us to make more efficient use of the Council's time by permitting us to carefully craft new proposals before they are presented to the Council for discussion.

The work of this Section is important and time consuming, and so many members have contributed their valuable time and talents to help accomplish the longstanding goals of the Section. I greatly appreciate all the support and encouragement that I have received over the last several months, and I look forward to advancing the Appellate Section's traditions and goals as your Chair.

Robert M. (Randy) Roach, Jr.
Incoming Chair, Appellate Section
rroach@cookroach.com

An Interview with Chief Justice Adele Hedges

S. Shawn Stephens, Baker & Hostetler LLP, Houston

Questions by **S. Shawn Stephens**
Answers by **Chief Justice Adele Hedges**

Q: Justice Hedges, thank you for speaking with me today.

A: I'm happy to do it.

Q: Can you tell us how you first came to the Court of Appeals?

A: Yes. In November of 1992 I was elected to the First Court of Appeals. I was elected to subsequent terms on that court and served there until December of 2003, when I was appointed as Chief Justice on the Fourteenth Court of Appeals.

Q: What initially attracted you to the appellate bench?

A: I always enjoyed research and writing and, when a seat came open on the First Court, attorneys approached me and asked me to consider it. I agreed to consider it because the courts of appeals are great courts.

Q: Why?

A: First, because of accessibility. They consider every case that is appealed, without discretion. They are the people's court, the courts of last resort for the vast majority of litigants.

Second, because the courts of appeals are the very fabric of our rule of law, our social compact, an agreement about our core values and moral principles, a guide book for our social behavior. It is our opinions that most often give guidance, not just to individual litigants, but to all citizens, because they provide predictable standards of behavior and social stability.

Q: What is the most rewarding aspect of being a judge?

A: It affords me the great intellectual luxury of being able to think and write about the law. It also allows me to talk with my colleagues, my briefing attorneys and those who appear in my court about where a legal principle originated, how it should be applied and how it can be distinguished. I also get the chance to work with young lawyers, in our briefing attorneys program, which I really enjoy.

Q: You have a wide variety of interests—what are your interests outside the law?

A: I have an interest in music. I play the flute and play it at my church. I also have an interest in physical fitness and enjoy Pilates training. I call myself a "serial hobbyist" because I've had serious interests in photography, jewelry making and knitting, to name a few of my hobbies. I also have the best two Siberian Huskies in America. They would have starred in the movie "Eight Below," had they awakened in time for the audition.

Q: Not only do you have a variety of extra-legal interests, you have a variety of degrees: a B.A., an M.A., a Ph.D. and a J.D. Have you used any of those non-law degrees?

A: Yes. In addition to practicing law at Fulbright and Porter and Clements, serving as General Counsel for Champion Realty Corporation and Republic Bank Houston, I once was a professor of French at Rice University.

Q: Is there anything you'd like to say to the lawyers of the state who may practice in your court?

A: Yes. I want them to know that it is important for people to feel that they've had their day in court. I want them to know that I try to write my opinions so that people can understand the law and model their behavior accordingly. I also want them to know that I believe delay has serious consequences.

Q: You seem very excited about the new/old courthouse. Can you tell us about that?

A: Yes, I am very excited about it. Now that the civil district courts have moved to their new courthouse, the old Harris County Courthouse will be restored to house the 1st and 14th Courts of Appeals. The Texas Historical Commission gave Harris County a $500,000 grant, through the Texas Historic Courthouse Preservation Program, as seed money for this restoration. There are two distinct areas of restoration. The first is the public space and the second is the non-public space. As for the public space, the goal is to restore it as closely as possible to its 1910 state. This will include reopening the central rotunda to its 5 story height and reconstruction of the grand entry staircases that led from the exterior ground level to the main entrance that was located on the second floor. These features were lost in a 1953 remodeling of the courthouse. The restoration will also bring back original features such as maple courtroom floors and mosaic tile floors. It will result in two traditional large courtrooms with balconies and beautiful plaster work. We have the original plans for the courthouse, but only have 3 black and white photos from that era. We'd love to have more.

Q: What will the restoration of non-public space consist of?

A: The non-public space will evoke the spirit of the public space in a more contemporary design.

Q: Is it a challenge to plan for modern security needs in a 1910 design?

A: Yes, it is one of the biggest challenges. For example, the grandeur of the original entry does not easily lend itself to modern security apparatus.

Q: When do you anticipate moving to the new courthouse?

A: We expect it to be ready in summer of '09.

Q: Thank you for talking with *The Appellate Advocate*.

A: You are welcome.

Slaves, Reconstruction, and The Supreme Court of Texas

Robert B. Gilbreath, Jenkens & Gilchrist, P.C., Dallas

I. Introduction.

History, Oliver Wendell Holmes, Jr. once observed, is a part of the rational study of law.[1] A look at the history of the Supreme Court of Texas reveals a rich and fascinating past, and the articles reviewed here cover some of the most tumultuous times in that court's history. Read on to find out how the antebellum supreme court took pains to protect the civil rights of African Americans within the constraints imposed by the system of slavery and to learn about George Paschal, the court's iconoclastic, shotgun-toting official reporter.

II. A.E. Keir Nash, *The Texas Supreme Court and Trial Rights of Blacks 1845-1860*, 58 J. AM. HISTORY 622 (1971).

In the 1970's, political scientist A.E. Keir Nash published a number of articles examining southern judicial decisions in slave cases.[2] Nash introduced his laudatory 1971 article on the Texas Supreme Court's treatment of African Americans before the Civil War with this excerpt from *Calvin v. State*, 25 Tex. 789, 796 (1860): "The law of the case . . . is precisely the same as if the accused were a free white man, and we cannot strain the law even 'in the estimation of a hair,' because the defendant is a slave."[3]

I discovered Nash's article while writing a piece on the Texas Supreme Court's decision in the "Emancipation Cases," *Hall v. Keese* and *Dougherty v. Cartwright,* 31 Tex. 504 (Tex. 1868), which dealt with the question of exactly when slave contracts became unenforceable. Nash's theory—that the supreme court had "a remarkable antebellum tradition of fair treatment of blacks"[4]—came as a great surprise. There is a substantial body of supreme court case law on slaves, and though my Emancipation Cases article does not involve the antebellum slave cases, I read a handful of those decisions and found little to encourage the notion that the court was progressive in its views on slavery.

Nash's comprehensive look at the cases, however, led him to a different conclusion: "Before 1861, a pattern of Texas judicial behavior prevailed which . . . was active in expanding protection of the black under the rule of law. The judges of the antebellum Texas supreme court appear to have been anxious to secure as much justice for the black man as was possible within a caste society."[5] Nash too was surprised to find that the Texas Supreme Court "exhibit[ed] a strong strand of concern for the black man *qua* human."[6]

Professor Nash analyzed four types of cases: (i) criminal prosecutions by the state against whites who harmed African Americans, (ii) felony trials of African Americans, (iii) civil suits by slaves seeking their freedom, and (iv) "subversion" against the slave system—enticing slaves to abscond or petty infractions such as selling liquor to African Americans.[7] His review revealed three commendable attitudes of the five judges who sat

[1] Oliver Wendell Holmes, Jr., *The Path of the Law,* 10 HARV. L. REV. 457, 469 (1897).

[2] Others have written on this topic as well. *See, e.g.,* WILLIAM E. WIETHOFF, A PECULIAR HUMANISM: THE JUDICIAL ADVOCACY OF SLAVERY IN HIGH COURTS OF THE OLD SOUTH, 1820-1850 (Univ. of Georgia Press 1996).

[3] A.E. Keir Nash, *The Texas Supreme Court and Trial Rights of Blacks 1845-1860*, 58 J. AM. HISTORY 622, 622 (1971) [hereinafter "Nash"].

[4] *Id.*

[5] *Id.* at 624.

[6] *Id.*

[7] *Id.* at 624-25.

on the Texas Supreme Court from 1845 to 1860: "a measured insistence on the rule of law as against hysterical protection of the institution of slavery; a demand that the 'humanity' of blacks be recognized as a countervailing force to the exigencies of 'property'; and a sympathy with the individual black seeking liberty."[8]

One of the cases Nash discusses draws an intriguing link between the past and present. After I mentioned my Emancipation Cases article to Chief Justice Wallace Jefferson, he directed my attention to *Westbrook v. Mitchell*, 24 Tex. 560 (1859). There, the supreme court affirmed a judgment rendered by N.W. Battle, a Waco judge whose slaves included Chief Justice Jefferson's ancestor, Shedrick Willis.[9] Judge Battle ruled that former slave Lewis John Redrolls could not lawfully sell himself back into slavery before January 27, 1858, when the Texas Legislature enacted a law permitting such transactions. The supreme court agreed: "The recognition of such a right might lead to its exercise for bad purposes."[10] In Nash's view, the court's opinion in *Westbrook* "contained a substantial hint that the Texas judges were less than warmly sympathetic to the new law."[11]

Nash concludes with this plaudit for the supreme court's progressive views on the treatment of African Americans before Reconstruction:

> The "unfree" marketplace of the slave economy seemed to allow in the judicial marketplace of ideas greater freedom for the display of justice and humanity toward the black than did state courts after emancipation. Nowhere was this more true than on the Texas supreme court between 1845 and 1860. At the very least, it seems safe to assert that the judicial lot of the southern black in this century would have been measurably more secure had all twentieth-century southern judges been as insistent as [Justice James H.] Bell and his brethren that the law was to be applied precisely the same for a black claimant as for a white man, and that it could not, because of color, be strained "even in the estimation of a hair."[12]

III. James P. Hart, *George W. Paschal*, 28 TEX. L. REV. 23 (1949).

James P. Hart was an associate justice on the Supreme Court of Texas from 1947 to 1950. His 1949 biographical piece on George W. Paschal, whose many vocations included official reporter of the Texas Supreme Court, is absolutely riveting. Paschal was a fascinating character:

> George W. Paschal was one of the outstanding figures in the legal profession in Texas in the period from the annexation of Texas to the Union to the end of Reconstruction. He is remembered today chiefly because of his *Digest of the Laws of Texas* and his reports of the decisions of our Supreme Court, but he was also an outstanding legal practitioner, a judge of the Supreme Court of Arkansas, a lecturer in law in Georgetown University in Washington, D.C., and he even edited a newspaper in Austin, *The Southern Intelligencer*.[13]

---

[8] *Id.* at 625; *but see* Thomas D. Russell, *Articles Sell Best Singly: The Disruption of Slave Families at Court Sales*, 1996 UTAH L. REV. 1161, 1164-65 (1996) (arguing that "Nash's findings of solicitude and fairness must be confined to the narrow categories of cases that he examined: white assaults on and murders of slaves and free blacks and manumissions.").

[9] *See* Kevin Priestner, *Profile: Wallace Jefferson*, 66 TEX. B.J. 405 (2003); Anita Davis, *Wallace Jefferson Takes Oath of Office*, 64 TEX. B.J. 580 (2001).

[10] 24 Tex. at 562.

[11] Nash at 636.

[12] *Id.* at 642.

[13] James P. Hart, *George W. Paschal*, 28 TEX. L. REV. 23, 23 (1949) [hereinafter "Hart"].

Paschal's life, Justice Hart observed, was "full of paradoxes." He was a native Southerner and an anti-abolitionist, but he was vehemently opposed to secession and was placed under house arrest by Confederate authorities during the Civil War.[14] Yet when the war ended, Paschal disparaged "carpetbaggers" and urged clemency for imprisoned Southern leaders.[15] Federal military authorities appointed Paschal official reporter of the Texas Supreme Court during Reconstruction, but he was "bitterly critical" of the court he served even though its members were appointed by the same authorities.[16]

Justice Hart's article also came to my attention while doing research for my Emancipation Cases article because Paschal played a significant role in that litigation. Not only was he the supreme court's official reporter, but he also argued the cases, joined by Charles S. West. Only West and Paschal responded to the Court's call to the entire bar for lawyers willing to present arguments.[17] In his official report of the court's decision, Paschal baited his enemies with anti-secessionist vitriol, including this harangue against the former rebels:

> Those who had been loudest to proclaim their purpose to perish in the defense of slavery were the first to reach the provost marshal's and the loudest in their response to the manumission oath. Then they hurried back to contrive some plan to retain the services of those who they had owned. The negroes stood aghast, not knowing whether most to trust their old masters or their liberators.[18]

Justice Hart recounts intriguing details about Paschal's life, such as his marriage to the daughter of a Cherokee chief, his service as a justice on the Arkansas Supreme Court, his practice as a Texas attorney, and his tenure as editor and publisher of *The Southern Intelligencer*, a weekly newspaper published in Austin.[19] In one account, Justice Hart describes how the intense competition between *The Southern Intelligencer* and *The Texas State Gazette*, also published in Austin, led to a near gun battle on the streets of Austin:

> The culmination of this bad feeling was an incident in 1859 in which challenges for duels were exchanged, Paschal and his son and their antagonists appeared on Congress Avenue, armed with double-barreled shotguns (but at different times), and the parties were finally put under peace bonds by Judge Vontress at Georgetown and Judge Terrell at Austin.[20]

Paschal reported the cases decided by the Texas Supreme Court from 1866 to 1869, in volumes 28-31 of the Texas Reports.[21] In those days, Justice Hart explains, the reporter "was expected to make an independent study of the record and to make independent statements of the facts and the decision of the lower court, as well as to summarize the briefs and arguments of counsel."[22] Paschal's summaries contain valuable historical information and "lively personal reminiscences" about members of the supreme court and some of the more notable cases that came before the court.[23]

The court, however, was not amused by Paschal's creative reporting and ordered him to truncate his

---

[14] *Id.*; *see also* James W. Paulsen, *If At First You Don't Secede: Ten Reasons Why The "Republic of Texas" Movement is Wrong*, 38 S. TEX. L. REV. 801, 808 (1997).

[15] Hart at 13.

[16] *Id.*

[17] *Hall v. Keese,* 31 Tex. 504, 534-35 (1868) (Hamilton, J., dissenting).

[18] *Id.* at 511.

[19] Hart at 24-27.

[20] *Id.* at 27.

[21] *Id.* at 34.

[22] *Id.*

[23] *Id.* at 34-35.

reports.[24] Unbowed, Paschal rebuked the justices in his preface to volume 31 of the Texas Reports:

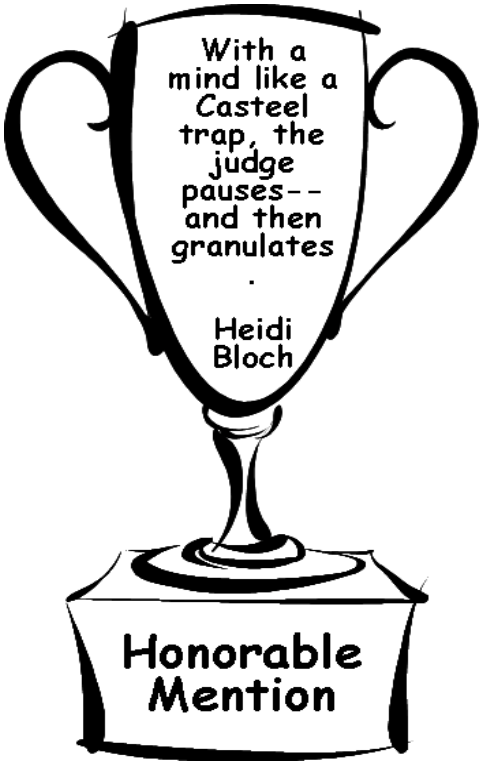
> I know of no legal authority for this interference. Every lawyer will well understand the little credit to be given to reports which should leave the whole history of the facts to the judge and suppress the beliefs of counsel! Had I desired to retaliate, I should have printed these gentlemen's opinions just as they wrote them, and have left them to take care of their own literary fame.[25]

Paschal's insubordination got him fired.[26] He later became a professor at the Law School of Georgetown University in Washington, D.C., which he was instrumental in founding.[27] He died in 1878 in Washington, where he is buried in the Rock Creek Cemetery.[28] Justice Hart concludes with this masterful synopsis of Paschal's legacy:

> The impression which we get from considering Paschal's life as a whole is that he was a man of very high ability, approaching genius, who never seemed to find himself, as we would say today, well adjusted to his environment. As a lawyer and legal author, he seems to have been universally respected. He was, however, almost continuously involved in violent controversy. His fate was to be in the minority in the South at a time when the South was in dire trouble and when his views were regarded by most of his neighbors as treasonable. We may conjecture that under different conditions he would have been a nationally famous advocate, jurist or author, or possibly all three. As it was, he led an exciting, fearless and industrious life, and we are indebted to him for enlightening many pages of Texas legal history which would otherwise be dull and obscure.[29]

IV. Conclusion.

It's anyone's guess what the contrarian George Paschal would say about Professor Nash's theory that the Texas Supreme Court was a champion of African American civil rights before the Civil War. Most likely, his response would have been something akin to Abba Eban's sardonic remark: "History teaches us that men and nations behave wisely once they have exhausted all other alternatives."[30]



[24] *Id.* at 35.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 41.

[28] *Id.*

[29] *Id.* at 41-42.

[30] JON WINOKUR, THE PORTABLE CURMUDGEON 135 (Dutton 1992).

Troy Hornsby, Miller, James, Miller & Hornsby, L.L.P., Texarkana

Under the "American Rule", each party to litigation is responsible for their own attorney's fees. *See Turner v. Turner*, 385 S.W.2d 230, 233 (Tex. 1964). However, in Texas, under some statutes and situations a party can recover their attorney's fees, *see Knebel v. Captial Nat'l Bank,* 518 S.W.2d 795, 804 (Tex. 1974), which may include appellate attorney's fees. *Mid City Rental v. Miner-Dederick*, 583 S.W.2d 428, 433 (Tex. Civ. App.—Beaumont 1979), *rev'd on other grounds*, 603 S.W.2d 193 (Tex. 1980).

In some jurisdictions, the decision of awarding such attorney's fees for trial rests with the trial court, and the decision of awarding appellate attorney's fees is made by the appellate court. *Int'l Sec. Life Ins. v. Spray,* 468 S.W.2d 347, 349 (Tex. 1971). However, a Texas appellate court may not initiate such an award, since this would be the exercise of original rather than appellate jurisdiction. *Id.* Rather, in Texas, the determination of appellate attorney's fees is made by the trial court prior to the appeal. *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998); *see also Spray,* 468 S.W.2d at 349. Such a decision necessarily involves two issues: whether to award the fees and the reasonableness (amount) of those fees.

THE TRIAL COURT'S DECISION TO AWARD APPELLATE ATTORNEY'S FEES

The decision of whether to award appellate attorney's fees authorized by statute is generally at the discretion of the trial court. *Trevino v. Am. Nat'l Ins. Co.*, 168 S.W.2d 656, 660 (Tex. 1943). Even when the trial court submits the question of the reasonableness (amount) of attorney's fees to a jury, the trial court retains the right to determine whether or not to award attorney's fees. *Hansen v. Academy Corp.*, 961 S.W.2d 329, 334-334 (Tex. App.—Houston [1st Dist.] 1997, pet. denied).

The determination of the reasonableness (amount) of reasonable attorney's fees is a question for the trier of fact. *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 12 (Tex. 1991). If the jury is the fact finder, there must be competent evidence in the record to support an award of appellate attorney's fees. *Great Am. Reserve Ins. Co. v. Britton*, 406 S.W.2d 901, 907 (Tex. 1966). Likewise, if the trial court is the fact finder, the general rule is that the record must contain competent evidence of appellate attorney's fees and a trial court does not have authority to adjudicate the reasonableness of attorney's fees on judicial knowledge without the benefit of evidence. *Id.* However, when the attorney's fee claim is pursuant to Texas Civil Practice and Remedies chapter 38, "the court may take judicial notice of the usual and customary attorney's fees in a proceeding before the court or in a jury case in which the amount of attorney's fees is submitted to the court by agreement." TEX. CIV. PRAC. & REM CODE § 38.004(1).

The fee should be only that which would be reasonable for a litigant himself to pay his own attorney. *Argonaut Ins. Co. v. ABC Steel Prods. Co.,* 582 S.W.2d 883, 889 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.). More specifically, the attorney's fee amount must be reasonable under the particular circumstances of the case and must bear some reasonable relationship to the amount in controversy. *Id.* However, it is permissible for the attorney's fee award to exceed the amount in controversy. *See, e.g.*, *Republic Bankers Life Ins. Co. v. Morrison*, 487 S.W.2d 373, 377 (Tex. Civ. App.—Texarkana 1979, no writ); *Union Nat'l Life Ins. Co. v. Reese*, 476 S.W.2d 928, 929 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.). In fact, a net recovery is not a prerequisite to an attorney's fee award. *See McKinley v. Drozd*, 685 S.W.2d 7, 10-11 (Tex. 1985); *see also Building Concepts, Inc. v. Duncan*, 667 S.W.2d 897, 905 (Tex. Civ. App.—Houston [14th Dist.]

1984, writ ref'd n.r.e.). Specific factors to be considered by the fact finder in determining the amount of reasonable attorney's fees include: (1) the time and labor required, novelty and difficulty of the question presented, and the skill required to properly perform the legal service; (2) the likelihood that the acceptance of employment precluded other employment by the lawyer; (3) the fee customarily charged in the locality for similar services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer performing the services; and (8) whether the fee is fixed or contingent. *Arthur Anderson & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997). While these factors may be considered, the court is not required to receive evidence on all of them. *Hagedorn v. Tisdale*, 73 S.W.3d 341, 353 (Tex. App.—Amarillo 2002, no pet.). The trial court is also free to look at the entire record, the evidence presented on reasonableness, the amount in controversy, the common knowledge of the participants as lawyers and judges, and the relative success of the parties. *Chilton Ins. Co. v. Pate & Pate Enters., Inc.*, 930 S.W.2d 877, 896 (Tex. App.—San Antonio 1996, writ denied); *Argonaut Ins. Co.*, 582 S.W.2d at 889.

EVIDENCE OF APPELLATE ATTORNEY'S FEES

Evidence of a contingency fee agreement alone is insufficient to support award of an attorney's fee. *Arthur Anderson & Co.*, 945 S.W.2d at 818. However, evidence by an expert witness that such a contingent fee arrangement was entered and was usual and customary for the type of litigation involved is sufficient to support a judgment. *Liberty Mut. Ins. Co. v. Allen*, 669 S.W.2d 750 (Tex. App.—Houston [1st Dist] 1983, writ ref'd n.r.e.); *see also, Texas Farmers Ins. Co. v. Hernandez*, 649 S.W.2d 121 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.).

Finally, if attorney's fees are authorized for some, but not all, of a party's claims, that party generally has the duty to segregate recoverable attorney's fees from unrecoverable attorney's fees. *Stewart Title Guar. Co.*, 822 S.W.2d at 11. If, however, no objection is made to the failure to segregate attorney's fees, either at the time evidence of attorney's fees is presented or at the time of the charge, the error is waived. *Hruska v. First State Bank of Deanville,* 747 S.W.2d 783, 785 (Tex. 1988).

Expert testimony is generally required to support an award of attorney's fees. *Gulf Paving Co. v. Lofstedt*, 144 Tex. 17, 188 S.W.2d 155, 161 (1945). However, the fact finder is not bound by expert testimony on attorney's fees and may award a lesser amount. *State Farm Fire & Cas. Co. v. Gandy*, 880 S.W.2d 129, 139 (Tex. App.—Texarkana 1994), *rev'd on other grounds*, 925 S.W.2d 696 (Tex. 1996). In fact, a court can disregard even uncontested expert testimony of attorney's fees if it is unreasonable, incredible, or its belief is questionable. *Ragsdale v. Progressive Voters League*, 801 S.W.2d 880, 882 (Tex. 1990).

An attorney testifying as to appellate attorney's fees should establish himself as an expert. *Lesikar v. Rappeport*, 33 S.W.3d 282, 307-08 (Tex. App.—Texarkana 2000, pet. denied). Then the attorney should address the *Arthur Anderson* factors in testifying as to the reasonableness of the attorney's fees involved. *See Arthur Anderson & Co.*, 945 S.W.2d at 818. Additionally, the attorney should segregate fees for each step of the appellate process such as appeal, petition for review to the Supreme Court, and briefing on merits before the Supreme Court. *See, e.g.*, *Chrys-Ply Cty. v. Guerrero*, 620 S.W.2d 700, 707 (Tex. Civ. App.—San Antonio 1981, no writ). Finally, the attorney should segregate recoverable attorney's fees from unrecoverable attorney's fees. *Stewart Title Guar. Co.*, 822 S.W.2d at 11.

In some situations, expert testimony at trial can be avoided. Expert testimony of attorney's fees may be by affidavit in a default judgment. *Westcliffe v. Bear Creek Constr.*, 105 S.W.3d 286, 294 (Tex. App.—Dallas 2003, no pet.) (citing *Texas Commerce v. New*, 3 S.W.3d 515, 517-18 (Tex.

1999). Additionally, affidavit testimony can support an award of attorney's fees in a summary judgment. *Texas Commerce v. New*, 3 S.W.3d 515, 517-18 (Tex. 1999). Finally, an award of attorney's fees as a sanction can be based upon an affidavit. *See, e.g., Smith v. Marshall B. Brown, P.C.*, 51 S.W.3d 376, 382 (Tex. App.—Houston [1st Dist.] 2001, pet. denied); *Mid-Continent Cas. v. Safe Tire Disposal Corp.,* 2 S.W.3d 393, 397 (Tex. App.—San Antonio 1999, no pet.).

Such an attorney's fee affidavit must set forth the expert's qualifications, his opinion regarding reasonable attorney's fees, the basis for his opinion, and not be controverted. *Basin Credit Consultants, Inc. v. Obregon*, 2 S.W.3d 372, 373 (Tex. App.—San Antonio 1999, pet. denied). When an attorney's affidavit contains this necessary information, it constitutes "expert opinion testimony" and can sufficiently establish reasonable attorney's fees when it meets the requirements of the summary judgment rule. *Enell Corp. v. Longoria*, 834 S.W.2d 132, 135 (Tex. App.—San Antonio 1992, no writ); *Owen Elec. Supply, Inc. v. Brite Day Constr., Inc.*, 821 S.W.2d 283, 288 (Tex. App.—Houston [1st Dist.] 1992, no writ). To create a fact issue, the non-movant's attorney must file an affidavit contesting the reasonableness of the movant's attorney's fee affidavit. *See Tesoro Petroleum Corp. v. Coastal Refining & Mktg., Inc.*, 754 S.W.2d 764, 767 (Tex. App.—Houston [1st Dist.] 1986, no writ).

The parties can bypass the need for fact finding as to the amount of attorney's fees by stipulating to the reasonableness of such attorney's fees. A stipulation serves as proof on an issue that otherwise would be tried. *Hansen v. Academy Corp.*, 961 S.W.2d 329, 335 (Tex. App.—Houston [1st Dist.] 1997, pet. denied). It is conclusive on the issue addressed, and the parties are estopped from claiming to the contrary. *Shepherd v. Ledford*, 962 S.W.2d 28, 33 (Tex. 1998). More specifically, parties can stipulate to the reasonableness of appellate attorney's fees. *See, e.g.*, *Adjusters & Loss Consultants Group v. Johnson Int'l*, No. 13-01-874-CV, 2004 WL 2535399, at *5 (Tex App.—Corpus Christi Nov. 10, 2004, no pet.) (mem.).

TRIAL COURT'S ORDER GRANTING APPELLATE ATTORNEY'S FEES

The trial court may not grant a party an unconditional award of appellate attorney's fees. *Texas Farmers Ins. Co. v. Cameron*, 24 S.W.3d 386, 400 (Tex. App.—Dallas 2000, pet. denied); *Humble Nat'l Bank v. DCV, Inc.*, 933 S.W.2d 224, 236 (Tex. App.—Houston [14th Dist.] 1996, writ denied). Doing so could penalize a party for pursuing a meritorious appeal. *Cameron*, 24 S.W.3d at 400; *Humble Nat'l Bank*, 933 S.W.2d at 236. A party may not be penalized for successfully appealing error occurring in a lower court's judgment. *King Optical v. Automatic Data Processing, Inc.*, 542 S.W.2d 213, 218 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.). However, some appellate courts have found it implicit in a trial court's judgment that the award of appellate attorney's fees is conditioned on a successful appeal. *Spiller v. Spiller*, 901 S.W.2d 553 (Tex. App.—San Antonio 1995, writ denied); *Robinwood Bldg & Dev. Co. v. Pettigrew*, 737 S.W.2d 110, 112 (Tex. App.—Tyler 1987, no writ). Additionally, several Texas courts have held that an unconditional award of appellate attorney's fees under Texas Family Code sections 11.18 and 14.082, regardless of whether an appeal is successful, is not error. *D.R. v. J.A.R.*, 894 S.W.2d 91, 96-97 (Tex. App.—Fort Worth 1995, writ denied); *Von Behren v. Von Behren*, 800 S.W.2d 919, 924 (Tex. App—San Antonio 1990, writ denied); *Abrams v. Abrams*, 713 S.W.2d 195, 197-98 (Tex. App.—Corpus Christi 1986, no writ).

Appellate attorney's fees can be conditioned in two ways. The judgment can award a certain amount of attorney's fees for the trial of the case and an additional certain amount of appellate attorney's fees in the event of an appeal to a court of appeals or the Supreme Court. *Seureau v. Mudd*, 515 S.W.2d 746, 749 (Tex. Civ. App.—

Houston [14 Dist.] 1974, writ ref'd n.r.e.).[1] Alternatively, the court can award a certain amount of attorney's fees for the trial and appeal of the case with remittitur provisions against the total attorney's fees in the event that the other party does not appeal. *See Spray,* 468 S.W.2d at 349-50. Suggested conditional language for the award of attorney's fees for a judgment using the first option is as follows:

> IT IS ORDERED, ADJUDGED, and DECREED that Plaintiffs recover from Defendant attorney fees in the sum of $30,000.00 for services rendered through the trial of this case. Additionally, if Defendant files an appeal (or cross-appeal) which is ultimately unsuccessful, Plaintiffs will be further entitled to $20,000.00 as a reasonable attorney fee. Additionally, if Defendant files a petition for review (or cross-petition) in the Supreme Court of Texas which is ultimately denied, Plaintiffs will be further entitled to $6,000.00 as a reasonable attorney fee. Additionally and finally, if such a petition for review (or cross-petition) is granted, but relief is not ultimately granted to Defendant, Plaintiffs will be entitled to an additional $20,000.00.

APPELLATE ATTORNEY'S FEES ON APPEAL

If an appeal is only partially successful, then the party is only entitled to that portion of the appellate attorney's fee award attributable to the portion of the appeal the party prevailed in. *Smith v. Smith*, 757 S.W.2d 422, 426 (Tex. App.—Dallas 1988, writ denied). In such a situation, the appellate court should reverse the award of all appellate attorney's fees and remand the issue to the trial court for a determination of the reasonable amount of appellate attorney's fees to be awarded to appellee in view of the fact that appellant was partially successful on the appeal. *Id.*; *see also Southwestern Bell Tel. v. Vollmer*, 805 S.W.2d 825, 834 (Tex. App.—Corpus Christi 1991, writ denied), *overruled on other grounds, Houston Lighting & Power Co. v. Auchan USA, Inc.,* 995 S.W.2d 668 (Tex. 1999).

A party must be careful not to waive a claim for appellate attorney's fees at trial. A prevailing party making a claim for attorney's fees must present evidence of appellate attorney's fees at trial and secure a finding thereon in order to be entitled to them; a failure to present such evidence will waive the claim. *Loomis Constr. Co. v. Matijevich*, 425 S.W.2d 39, 44 (Tex. Civ. App.—Houston [1st Dist.] 1968, no writ). However, a non-prevailing party does not waive a claim for attorney's fees by failing to present such evidence. *See e.g. State Farm Lloyds v. Borum*, 53 S.W.3d 877, 894-95 (Tex. App.—Dallas 2001, pet. denied); *Alden Prop. v. EMC Mortgage Corp.*, No. 05-03-01748-CV, 2005 WL 164581, at *3 (Tex. App.—Dallas Jan. 26, 2005, no pet.) (mem.); *Haugen v. Olson*, No. 05-03-00501-CV, 2003 WL 22939738, at *4 (Tex. App.—Dallas 2003, no pet.) (mem.); *State Farm Lloyds v. Borum*, 53 S.W.3d 877, 894-95 (Tex. App.—Dallas 2001, pet. denied). If the issue of appellate attorney's fees is properly preserved at trial, it can be addressed by the appellate court.

The court of appeals may not initiate an appellate attorney's fee award itself, since this would be the exercise of original rather than appellate jurisdiction. *Spray*, 468 S.W.2d at 349. Rather, the trial court's determination of whether attorney's fees are available under a particular statute is a question of law reviewed *de novo*. *Pacesetter Pools, Inc. v. Pierce Homes, Inc.*, 86 S.W.3d 827, 833 (Tex. App.—Austin 2002, no pet.) (citing *Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 94 (Tex. 1999)). The trial court's determination of whether or not to award attorney's fees is reviewed by the appellate court for abuse of discretion. *Bocquet*, 972 S.W.2d at 21; *Ragsdale v. Progressive Voters League*, 801

[1]This was the system specifically disapproved of by the Supreme Court in *Cooksey v. Jordan*, 143 S.W.141 (Tex. 1912). However, that case was specifically overruled by *Security Life Ins. Co. v. Spray*, 468 S.W.2d 347 (Tex. 1971).

S.W.2d 880, 881 (Tex. 1990) (per curiam). Additionally, the reasonableness of an attorney's fees award may be reviewed by the appellate court for excessiveness under a sufficiency of the evidence standard. *Stewart Title Guar. Co.*, 822 S.W.2d at 12.

When factually insufficient evidence supports the award, the appellate court may order a remittitur of excess fees as a condition of affirming the judgment of the trial court, but it may not increase the allowance of fees. *Reinstma v. Greater Austin Apt. Maint.*, 549 S.W.2d 434, 437 (Tex. Civ. App.—Austin 1977, writ dism'd). More specifically, a jury finding that reasonable attorney's fees was zero is often against the great weight and preponderance of the evidence where evidence was presented of attorney's fees. *See, e.g.*, *Elizabeth-Perkins, Inc. v. Morgan Exp., Inc.*, 554 S.W.2d 216, 219 (Tex. Civ. App—1977, no writ). An attorney's fee award can also be indirectly affected by an appellate court's actions though the attorney's fee award itself is not under review.

If the appellate court modifies an award of damages, it should remand the issue of attorney's fees to the trial court because the amount a party recovers is one factor for the trial court to consider in assessing reasonable attorney's fees. *Burns v. Miller, Hiersche, Martens & Hayward, P.C.,* 948 S.W.2d 317, 327 (Tex. App.—Dallas 1997, pet. denied); *see also Arthur Andersen & Co.,* 945 S.W.2d at 818. If an appellate court reverses the judgment of the trial court, it can restore a prior jury finding on appellate attorney's fees. *See Lee v. Universal Life Ins. Co.*, 420 S.W.2d 222, 226 (Tex. Civ. App.—Houston [14th Dist.] 1967, writ. ref., n.r.e.). Alternatively, upon reversal, the appellate court can sever the issue of attorney's fees and remand it alone to the trial court. *See Espinoza v. Victoria Bank & Trust*, 572 S.W.2d 816, 829 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.). Finally, upon modification when an appellant was awarded attorney's fees for trial, but not for appeal, the court of appeals should remand the issue of the amount of the appellate attorney's fees to the trial court. *Hennessey v. Skinner*, 698 S.W.2d 382, 386 (Tex. App.—Houston [14th Dist.] 1985, no writ).

J. Brett Busby, Mayer, Brown, Rowe & Maw LLP, Houston
Lee B. Kovarsky, Mayer, Brown, Rowe & Maw LLP, Houston[1]

BANKRUPTCY

***Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co*., 126 S. Ct. 2105 (2006).**

In this case, the Supreme Court decided that unpaid workers' compensation premiums are not entitled to priority status under the Bankruptcy Code. Howard Delivery Service contracted with Zurich American Insurance to provide workers' compensation coverage for Howard's employees in ten states. When Howard filed for Chapter 11 bankruptcy, Zurich filed an unsecured claim for unpaid premiums and sought priority status under 11 U.S.C. § 507(a)(5), which confers credit priority upon "contributions to an employee benefit plan . . . for services rendered." The bankruptcy court denied the claim and the district court affirmed, refusing to accord priority status to the unpaid premiums. The Fourth Circuit reversed in a *per curiam* opinion with no majority rationale.

In an opinion by Justice Ginsburg, the Supreme Court reversed the Fourth Circuit and remanded. It reasoned that Congress had added § 507(a)(5) in 1978 as a response to two prior Supreme Court cases refusing to extend priority status to certain types of fringe benefits under § 507(a)(4), a related wage and salary provision. Zurich urged that § 507(a)(5) should incorporate ERISA's more inclusive definition of "employee welfare benefit plan," but the Court rejected that position. Workers' compensation regimes usually displace common-law tort liability and thus inure largely to the benefit of employers, a condition the Court considered inconsistent with § 507(a)(5) priority status. The Court observed that States generally prescribe and regulate insurance coverage for on-the-job accidents, whereas they generally leave § 507(a)(5) benefits such as pensions and health insurance to private ordering. Citing the Bankruptcy Code's "equal distribution aim," the Court declined to construe ambiguities in § 507(a)(5) to include Zurich's claims.

Justice Kennedy (joined by Justices Souter and Alito) dissented, questioning the majority's apparent position that benefits must inure exclusively to employees in order to qualify employee plan premiums for priority under § 507(a)(5). He concluded that the workers' compensation arrangements qualified as "employee benefit plans" under § 507(a)(5) because, as a practical matter, they provide benefits to employees. He also accused the majority of misreading the bankruptcy principle of equal treatment for like claims to accord priority to as few creditors as possible.

CRIMINAL LAW

***Clark v. Arizona*, 126 S. Ct. 2709 (2006).**

In this case, the Court rejected a constitutional challenge to Arizona's insanity defense. Clark was charged with intentionally or knowingly killing a police officer. At his bench trial, he offered undisputed evidence of his paranoid schizophrenia, arguing that it both established an insanity defense and negated the requisite *mens rea*. The traditional English *M'Naghten* test provided two alternative ways of proving insanity: that a mental defect left the defendant unable to understand either (1) what he was doing or (2) that his action was wrong. An Arizona statute included only the latter definition, however. The trial court found that Clark had not proven insanity under that definition, and it followed an Arizona case holding that a defendant cannot rely on evidence of mental defect short of insanity to negate *mens rea*. It rejected Clark's due process

[1] The authors thank Erin Glen Busby and Edward C. Dawson for their contributions to this update.

challenges to the Arizona definition and the *mens rea* ruling, and the state court of appeals affirmed.

The Supreme Court affirmed in an opinion by Justice Souter. It held that dropping the first prong of the *M'Naghten* insanity test did not offend a fundamental principle of justice, as there were significant differences in both traditional and modern Anglo-American approaches to insanity. The abbreviated test was constitutionally adequate because it recognized the relevance of cognitive incapacity. Moreover, Clark's effort to prove that he did not understand what he was doing would (if successful) have established that he did not understand that the act was wrong.

The Court also found Arizona's rule that mental defect evidence could be considered only for its bearing on an insanity defense, not on the element of *mens rea*, consistent with due process. While a defendant has a due process right to present favorable evidence on an element of the crime, Arizona had good reasons for curtailing that right here. The Court noted that States have authority to presume that defendants are sane and place the burden of persuasion on the defendant to prove otherwise. This authority would be subverted if a defendant could simply address his capacity evidence to *mens rea* rather than insanity. In addition, given the disagreements within the psychiatric profession about the contours of many mental diseases and the difficulty in drawing reliable conclusions about criminal responsibility based on psychological concepts devised for thinking about treatment, Arizona's rule limiting the use of psychiatric evidence served to avoid confusion and misunderstanding by jurors. The Court concluded that Clark's counsel had not preserved an objection to the exclusion of factual "observation evidence" concerning his behavior around the time of the crime.

Justice Breyer dissented in part, arguing that the distinction among the types of evidence offered by Clark was unclear and that the Court should remand for consideration of whether the trial court erroneously barred Clark from offering observation evidence. Justice Kennedy (joined by Justices Stevens and Ginsburg) dissented, arguing that it violated due process for the court to prevent Clark from offering any evidence that he did not commit the crime because, as a factual matter, his mental illness made him unaware that he was shooting a police officer. Arizona's rule impermissibly excluded evidence regardless of how credible and material it was in disproving an element of the offense. Justice Kennedy concluded that the rule substantially burdened Clark's defense and that Arizona's purported justifications did not support categorical exclusion. He also argued that Clark's counsel properly preserved his objection to the exclusion.

***Dixon v. United States*, 126 S. Ct. 2437 (2006).**

In this case, a fractured majority held that federal law did not require the Government to disprove a "duress" defense beyond a reasonable doubt. Dixon was tried under a federal statute for receiving a firearm while under indictment and for making false statements in connection therewith. She admitted that she knew she was under indictment and that she knew receiving a firearm was a crime, but argued that she was subject to duress. The trial judge instructed the jury that Dixon had to prove duress by a preponderance of the evidence, but Dixon argued that the Government had to disprove duress beyond a reasonable doubt. The Fifth Circuit rejected Dixon's argument and the Court granted *certiorari*. No Justice believed that the *Constitution* required the Government to disprove duress beyond a reasonable doubt, but the case nonetheless produced four opinions, each containing a different approach to whether the *statute* imposed that requirement.

Justice Stevens, writing for the Court, rejected Dixon's two primary arguments. First, the instruction did not run afoul of the Due Process Clause because duress does not "disprove" the existence of a culpable mental state, an element that must be proven beyond a reasonable doubt. Noting that federal crimes are statutory creatures, the Court then considered whether the Safe Streets Act of 1968, which created Dixon's crime, required the Government to disprove duress beyond a reasonable doubt. The Court held that it

did not, reasoning that because the Act made no express reference to duress, duress must have retained its common law status as an affirmative defense subject to a preponderance of the evidence standard. The Court also held that the Act's language and structure reflected no intent to adopt the Model Penal Code's minority approach to duress, which would have required the Government to disprove duress beyond a reasonable doubt.

Justice Kennedy concurred, highlighting a point of interpretive disagreement with Justice Stevens' opinion. He argued that the absence of an express statutory provision relating to something like duress authorizes courts to consult more recent, post-Act material in order to identify the controlling rule of criminal law. He emphasized that the defendant should continue to bear the burden of proof on duress because the evidentiary burden should not vary across statutes that similarly omit discussion of it. Based on the traditional rule of placing the burden of proof for a particular issue on the party most capable of producing it, Justice Kennedy favored placing the burden on the defendant.

Justice Alito, joined by Justice Scalia, also concurred. Like Justice Kennedy, he emphasized that the burdens for proving duress should not vary across statutes that do not address the subject expressly. Unlike Justices Stevens and Kennedy, however, he would always assume that the default rule requires the defendant to prove duress by a preponderance of the evidence, without respect to the status of the defense at the time Congress enacted the operative statute.

Justice Breyer (joined by Justice Souter) dissented, arguing that Congress simply did not consider the duress issue. Conceding that the issue was close, he would have adopted a default rule that criminal evidentiary burdens are the same with respect to affirmative defenses as they are with respect to elements of the offense. Based on the principle that evidentiary burdens should uniformly reflect the development of criminal practice, he concluded that the prosecution should have to disprove duress beyond a reasonable doubt.

***Washington v. Recuenco*, 126 S. Ct. 2546 (2006).**

In this case, the Court held that a jury's failure to find a sentence enhancement beyond a reasonable doubt was subject to harmless error analysis. Washington law provides for a three-year sentence enhancement for assault with a firearm and a one-year enhancement for assault with a deadly weapon. Here, the jury found that Recuenco committed assault with a deadly weapon; no firearm question was submitted. Nevertheless, the state trial court applied the three-year enhancement. In the Washington Supreme Court, the State conceded error under *Blakely v. Washington*, 542 U.S. 296 (2004), but urged the court to find the error harmless. The court rejected the State's argument, holding that *Blakely* error is structural error that will always invalidate a conviction.

The U.S. Supreme Court reversed and remanded in an opinion by Justice Thomas. After concluding that the judgment below did not rest on adequate and independent state-law grounds, the Court held that failure to submit a sentencing factor to the jury is not structural error. The Court had previously held that failure to submit an element of an offense to the jury was subject to harmless-error analysis. Given *Blakely*'s recognition that elements and sentencing factors must be treated the same, it concluded that harmless-error analysis was likewise appropriate here.

Justice Stevens dissented, arguing that the Court should not have taken the case to prevent the Washington courts from granting their citizens greater protection than the minimum required by the Federal Constitution and that the Washington Supreme Court could reinstate its judgment on state law grounds. Justice Ginsburg (joined by Justice Stevens) also dissented, pointing out that assault with a deadly weapon and assault with a firearm are discrete charges requiring discrete jury instructions. Because the information charged

and the jury found Recuenco guilty of all elements of the deadly weapon offense, she argued that the harmless error rule did not allow the Court to displace the jury's verdict with a conviction on an uncharged greater offense.

CRIMINAL PROCEDURE

***Davis v. Washington*, 126 S. Ct. 2266 (2006).**

These related cases addressed whether the Confrontation Clause applies only to testimonial hearsay and, if so, whether statements made to law enforcement during a 911 call or at a crime scene qualify as testimonial. Davis attacked his girlfriend, who described the incident to a 911 operator. The victim did not appear in court, so the 911 call was the only trial evidence identifying the assailant. The trial court admitted the call as non-testimonial evidence and Davis was convicted of violating a domestic no-contact order. The Supreme Court of Washington affirmed. In a second case, Hammon's wife spoke to police and signed a battery affidavit after her husband assaulted her. The State charged Hammon with domestic battery and a probation violation. Hammon's wife did not appear at trial, and the trial court admitted both her statements to police and the battery affidavit. The court convicted Hammon of domestic battery and a probation violation. The Indiana Supreme Court affirmed, holding that Hammon's on-the-scene statements were non-testimonial and could be admitted as excited utterances. It held that the trial court erroneously admitted the affidavit, but that the error was harmless.

In an opinion by Justice Scalia, the Court concluded that the Confrontation Clause applied only to testimonial statements. It then held that the affidavits and statements to police in *Hammond* were testimonial but that 911 call in *Davis* was not. The Court reasoned that statements are non-testimonial when they are made in the course of police interrogation and under circumstances that objectively indicate that the interrogation's primary purpose is to address an ongoing emergency. Conversely, statements are testimonial when the circumstances objectively indicate that the primary purpose of the interrogation is to aid subsequent criminal prosecution. Under this test, the Court concluded that the 911 statements in *Davis* were made in order to assist police in confronting an ongoing emergency, while the statements to police and affidavit in *Hammon* could only serve the purpose of aiding subsequent criminal enforcement.

Justice Thomas wrote a partial dissent, deriding the majority's "primary purpose" test as neither predictable nor targeted towards the abuses that the Confrontation Clause contemplates. Reciting the history of the Clause, he described its primary target as *systematic* interrogation of witnesses. Thus, he would have admitted the contested material in both *Davis* and *Hammon*.

***Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006).**

Article 36 of the Vienna Convention on Consular Relations, which the United States has ratified, requires officials to inform a foreign detainee of his right to have his consulate notified of the detention. In these two cases, the Supreme Court addressed the effect of a failure to comply with the Convention. When Sanchez-Llamas was arrested in Oregon, officials did not inform him of this right, and he subsequently made incriminating statements. At trial, the judge denied Sanchez-Llamas' motion to suppress the statements based on the officials' failure to comply with Article 36. Sanchez-Llamas was convicted and the state appellate courts affirmed. Similarly, Virginia authorities did not inform Bustillo of his right when he was arrested, but he did not raise the Article 36 violation until he filed a state habeas petition. The Virginia courts dismissed the claim as procedurally barred.

The Supreme Court affirmed in an opinion by Chief Justice Roberts. Assuming without deciding that the Convention granted individuals judicially enforceable rights, the Court held that suppression was not an appropriate remedy for a violation. Because the Convention did not mandate a specific remedy, it was not for the federal courts to impose one on the States. The

Court observed that its exclusionary rule cases rested on its supervisory authority over federal courts, but it lacked such authority over state courts. In any event, Article 36 had nothing to do with searches or interrogations, the primary areas where the exclusionary rule had been used, and other constitutional and statutory rights effectively protected the interests Sanchez-Llamas claimed were served by Article 36.

As to Bustillo, a prior Supreme Court case had held that States could subject Article 36 claims to the same procedural default rules as other federal-law claims. The Court recognized that the International Court of Justice (ICJ) had recently interpreted the Convention to preclude the application of procedural default rules, and that the United States was formerly a signatory to an optional protocol giving the ICJ compulsory jurisdiction over disputes arising out of the Convention. Nevertheless, the Court held that because treaties are given effect as federal law, determining their meaning was its province. The Court gave respectful consideration to the ICJ's interpretation, but concluded it was contrary to the treaty's statement that Article 36 rights shall be exercised in conformity with the laws of the detaining state, which included procedural default.

Justice Breyer (joined by Justices Stevens and Souter and in part by Justice Ginsburg) dissented. He argued that the Convention does grant rights that an individual may invoke. As to procedural default, he noted that the treaty's clause about the laws of the detaining state also requires that those laws give full effect to the purposes of Article 36. Thus, he argued that procedural default rules should apply unless the default was caused by the State's failure to inform the defendant of his Convention right and state law provided no other avenue for raising the issue. He also contended that suppression could sometimes provide the only effective remedy for a violation of the Convention.

***United States v. Gonzalez-Lopez*, 126 S. Ct. 2557 (2006).**

Gonzalez-Lopez hired a lawyer to represent him on a drug charge, but the district court denied the lawyer's application for admission *pro hac vice*. On appeal, the Eighth Circuit held that the district court's reason for denying the application was erroneous, that Gonzalez-Lopez had been denied his Sixth Amendment right to paid counsel of his choosing, and that reversal of his conviction was required.

The Supreme Court affirmed and remanded in an opinion by Justice Scalia. The Government conceded that the trial court erred in denying the lawyer's application, and the Court held that the error violated the Sixth Amendment right of a defendant who does not require appointed counsel to choose who will represent him. The Court rejected the Government's argument that no violation occurred unless the defendant showed that substitute counsel was ineffective or not as good as the chosen counsel, creating a reasonable probability of a different result. It reasoned that the Sixth Amendment guarantees the right of the accused to be defended by the counsel he believes to be best, and that a denial of that right is complete without a showing of prejudice. The Court also concluded that the violation was a structural error not subject to harmless error analysis, reasoning that it was impossible to know what different choices chosen counsel would have made and to quantify their impact.

Justice Alito (joined by Chief Justice Roberts and Justices Kennedy and Thomas) dissented, arguing that a defendant should have to make at least some showing that a violation of his right to chosen counsel adversely affected the quality of assistance he received. He also contended that because the Constitution did not mandate any particular remedy for the violation, harmless error analysis was required by statute and rule.

DEATH PENALTY

***Kansas v. Marsh*, 126 S. Ct. 2516 (2006).**

Under a Kansas statute, a defendant must be sentenced to death if the jury finds beyond a reasonable doubt that aggravating circumstances are not outweighed by mitigating circumstances. The Kansas Supreme Court held that this statute established a presumption in favor of death in violation of the Eighth and Fourteenth Amendments because it required imposition of the death penalty when aggravating and mitigating circumstances were in equipoise. It therefore reversed Marsh's capital murder conviction and remanded for a new trial.

The U.S. Supreme Court reversed and remanded in an opinion by Justice Thomas. The Court first held that it had jurisdiction to review the Kansas judgment even though state-court proceedings were not complete because the federal claim had been finally decided. It also concluded that the Kansas Supreme Court had not based its decision on adequate and independent state-law grounds. Turning to the merits, the Court found the Kansas statute constitutional. Based on a prior case holding that a State may give a defendant the burden to prove that mitigators outweigh aggravators, the Court reasoned that a State must also be able to impose the death penalty when the prosecution has proved beyond a reasonable doubt that mitigators do not outweigh aggravators. The Court also observed that the Kansas statute permitted the jury to consider any relevant mitigating evidence. It did not create a general presumption in favor of the death penalty, but permissibly channeled the jury's discretion and clearly informed them that a determination that the evidence is in equipoise is a decision for death.

Justice Souter (joined by Justices Stevens, Ginsburg, and Breyer) dissented, arguing that breaking a tie among mitigators and aggravators in favor of death impermissibly places a thumb on death's side of the scale. The automatic statutory tie-breaker, he reasoned, did not turn on the relevant factors identified in the Court's prior cases: the details of the crime, the particular person who committed it, and whether the crime and criminal are among the worst of the worst. He also argued that recent exonerations of death row prisoners counseled against maximizing death sentences in doubtful cases, which prompted a lengthy rebuttal by Justice Scalia in a separate concurrence.

EDUCATION

***Arlington Cent. Sch. Dist. Bd. of Ed. v. Murphy*, 126 S. Ct. 2455 (2006).**

The Individuals with Disabilities Education Act (IDEA) provides that "a court may award reasonable attorneys' fees as part of the costs" to parents who prevail in an action brought under the IDEA. In an opinion by Justice Alito, the Court held that this provision does not authorize prevailing parents to recover fees for services rendered by experts. The Court noted that Congress enacted the IDEA pursuant to the Spending Clause, and that conditions to a State's acceptance of federal funds must be set out unambiguously. The IDEA does not explicitly allow the awarding of expert fees, and it uses the term of art "costs," which generally does not include expert fees. Thus, it fails to provide the necessary clear notice that States could be liable for expert fees. In addition, the IDEA includes detailed provisions designed to ensure that attorneys' fees awarded are reasonable, but no provisions concerning expert fees.

The Court also discussed a prior decision holding that the term "costs" in Federal Rule of Civil Procedure 54(d) includes only those costs listed in 28 U.S.C. §1920, and it concluded that the same reasoning applied in this case. In addition, the Court had interpreted almost identical language in 42 U.S.C. § 1988 as not permitting the award of expert fees.

Justice Ginsburg concurred in part and in the judgment, rejecting the Court's "clear notice" requirement but finding that the text of the IDEA did not support expert fee awards.

Justice Breyer (joined by Justices Stevens and Souter) dissented, arguing that Congress's intent to include expert fees among the "costs" permitted to be awarded under the IDEA was clear from a Conference Report stating that "the term 'attorneys' fees as part of the costs' include[s] reasonable expenses of expert witnesses."

Justice Souter also filed a brief dissent, contending that Justice Breyer's resort to the Conference Report was reasonable because another section of the Handicapped Children's Protection Act of 1986 (which added the cost-shifting provision) had mandated a GAO study of the costs and expenses of parents in IDEA actions.

ELECTIONS

***League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594 (2006).**

This case involved challenges to the U.S. congressional redistricting plan adopted by the Republican-controlled Texas Legislature in 2003. The challengers contended both that the redrawn districts constituted an impermissible partisan gerrymander and that certain new districts impermissibly diluted minority voting strength in violation of § 2 of the Voting Rights Act, 42 U.S.C. §1972(b). In a set of fractured opinions, the Supreme Court concluded that the redistricting plan was not an impermissible partisan gerrymander, that redrawn District 24 did not impermissibly dilute African-American voting strength, but that redrawn District 23 did impermissibly dilute Latino voting strength in violation of the Voting Rights Act.

Alleged partisan gerrymander: Justice Kennedy, writing for a five-justice Court, articulated the current state of the law on the justiciability of challenges to alleged impermissible partisan gerrymanders: such claims are justiciable but can succeed only if the challenger can articulate a workable standard for determining whether a redistricting plan is an impermissibly partisan gerrymander.

In a controlling portion of his opinion not expressly joined by any other Justices, Justice Kennedy concluded that the challengers had not articulated a workable standard under which the Court could conclude that the Texas redistricting plan was an impermissible partisan gerrymander, and so had failed to state a claim on which relief could be granted. Justice Kennedy's opinion further rejected the argument that the decision to redraw districts between decennial censuses rendered the redistricting plan inherently suspect, and Justices Souter and Ginsburg joined his opinion on that point.

Chief Justice Roberts and Justice Alito agreed with Justice Kennedy that the challengers had failed to articulate a workable standard for identifying impermissible partisan gerrymanders. They noted that the question of justiciability had not been presented in this case, however, so the Court had no occasion to revisit it. Justices Scalia and Thomas reiterated their view that partisan gerrymander claims are nonjusticiable.

Finally, Justice Stevens, joined by Justice Breyer, dissented, concluding that the whole plan was an impermissible partisan gerrymander.

Voting rights: Justice Kennedy, joined by Chief Justice Roberts and Justice Alito, concluded that District 24 (a Dallas district) did not impermissibly dilute African-American voting strength. African-Americans were less than a majority in the prior District 24, and the district court had committed no clear error in rejecting questionable evidence that African-Americans had the ability to elect their candidate of choice in favor of other evidence that an African-American candidate of choice would not prevail. Justices Scalia and Thomas concurred in this conclusion.

Justice Kennedy, writing for a five-Justice Court (including Justices Stevens, Souter, Ginsburg, and Breyer), concluded that District 23 (a West Texas district) did impermissibly dilute Latino voting strength. The Court held that the creation of the majority-Latino District 25 failed to remedy the removal of Latino residents from District 23 because District 25 had wide geographical

dispersion (stretching from Austin to the Rio Grande) and widely different political interests among its Latino voters due to disparities in their economic status.

Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito, dissented, concluding that the removal of Latino residents from District 23 did not constitute intentional vote dilution, and that the intentional creation of District 25 as a majority-minority district survived strict scrutiny because the parties conceded that the creation of that district was reasonably necessary to comply with §5 of the Voting Rights Act.

***Randall v. Sorrell*, 126 S. Ct. 2479 (2006).[2]**

In this case, the Court struck down provisions of the Vermont campaign finance statute as inconsistent with the First Amendment. The law imposed stringent limits on expenditures made during a two-year general election cycle (*e.g.*, $300,000 for the governor's race and $4,000 for a state senator's race, with incumbents limited to 85% of the maximum amounts). Contribution limits were similarly stringent (*e.g.*, $400 to a statewide candidate, $300 to a state senate candidate), and applied to individuals, organizations, and political parties. Unlike the expenditure limits, the contribution limits were not indexed for inflation.

Justice Breyer authored the plurality opinion, in which Chief Justice Roberts joined and Justice Alito joined in part. The plurality declined to overrule the Court's holding in *Buckley v. Valeo*, 424 U.S. 1 (1976), that expenditure limits are unconstitutional or to distinguish it on the ground that *Buckley* did not consider the government's interest in encouraging candidates to spend more time campaigning among ordinary voters and less time raising money.

In considering the contribution limits, the plurality looked to *Buckley*'s statement that such limits are permissible as long as they are "closely drawn" to match a "sufficiently important interest." While the plurality recognized that it would ordinarily defer to a legislature's particular expertise in matters related to the costs and nature of running for office, it stated that there must be some lower bound to permissible contribution limits. Contribution limits that are too low can actually harm the electoral process by preventing challengers from mounting effective campaigns against incumbents. The Court noted that, in real dollar terms, the Vermont limits were a fraction of the amounts considered permissible in *Buckley* and in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), and would only shrink in comparison as time passed because of the lack of indexing for inflation.

The plurality identified five factors that led it to conclude that the contribution limits were too restrictive. First, the record suggested that the contribution limits would significantly restrict the amount of funding available for challengers to run competitive campaigns. Second, applying the same contribution limits to political parties and other contributors threatened harm to the right to associate in a political party. In particular, the limits might discourage those who wish to contribute even small amounts of money to a party because the party would not be able to use the amassed sums. Third, the treatment of expenses associated with volunteer services as contributions aggravated the problems presented by the limits. Fourth, the limits are not adjusted for inflation and thus decline in real value each year. Fifth, the record did not show any special justification for so restrictive a limit.

Justice Alito concurred in part and concurred in the judgment, stating that the respondents had not argued that *Buckley* should be overturned despite *stare decisis*, and therefore he would not reach the question whether *Buckley* should be reexamined.

Justice Kennedy concurred in the judgment, stating that the plurality's result is correct "within the legal universe we have ratified and helped create," but that he was skeptical about the validity of that "system and its operation."

[2] The authors' firm filed an *amicus* brief in support of the Vermont officials.

Justice Thomas, joined by Justice Scalia, also concurred in the judgment, stating that *Buckley* should be overruled because it provides insufficient protection to political speech and has proved impossible to apply in a coherent and principled fashion. Instead, both contribution and expenditure limits should be subject to strict scrutiny—a test that the limits in this case would fail.

Justice Stevens dissented, stating that *Buckley*'s holding on expenditure limits is wrong and should be overruled because money is not equivalent to speech and there is no convincing evidence that the important interests favoring expenditure limits are fronts for incumbency protection.

Justice Souter (joined in part by Justices Ginsburg and Stevens) also dissented, arguing that *Buckley* did not categorically foreclose the possibility that some expenditure limit might comport with the First Amendment and that *Buckley* had not squarely considered the effect of fundraising on candidates' time. In addition, although the contribution limits in this case were low, they were not "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless."

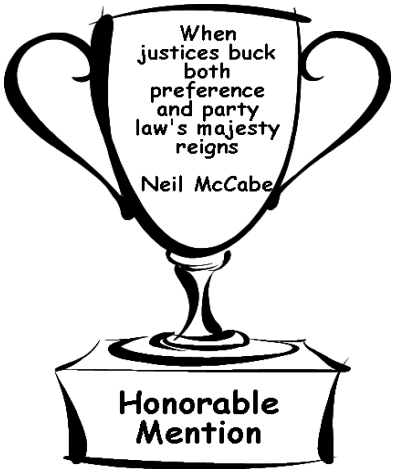
EMPLOYMENT

***Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006).**

This case defines the scope of liability under the anti-retaliation provision of Title VII, which makes it unlawful to "discriminate against" an employee because he or she made a charge of employment discrimination. White operated a forklift in a BNSF railroad yard and was the only woman in her department. When she complained of sexual harassment by her supervisor, BNSF disciplined the supervisor and reassigned White to standard track laborer tasks. BNSF later suspended White without pay for insubordination, but after investigating it reinstated her and awarded her backpay. White sued BNSF alleging that her reassignment and suspension amounted to unlawful retaliation, and a jury awarded her damages. The Sixth Circuit affirmed, concluding that White had shown an adverse employment action.

The Supreme Court affirmed in an opinion by Justice Breyer. It rejected BNSF's argument that the phrase "discriminate against" limits actionable retaliation to activity affecting the terms and conditions of employment, concluding instead that the retaliation need not relate to employment or occur at work. While Title VII's main anti-discrimination provision focuses on actions affecting employment or workplace conditions, the anti-retaliation provision contains no such limiting language and has the broader purpose of deterring any form of effective interference with employees' efforts to secure Title VII's basic guarantees. Yet the anti-retaliation provision does require a showing of harm, and thus it reaches only employer actions that would have been materially adverse to a reasonable employee—*i.e.*, that well might have dissuaded a reasonable employee from making or supporting a discrimination charge. The Court held that White's evidence of reassignment to more arduous duties within the same general job description and of indefinite suspension without pay was sufficient to meet this test.

Justice Alito concurred in the judgment, arguing that the anti-retaliation and anti-discrimination provisions should be read together to reach only employment-related actions. In his view, the Court's materially adverse action test had no basis in the statutory language and would lead to practical problems.



ENVIRONMENT

***Rapanos v. United States*, 126 S. Ct. 2208 (2006).**[3]

This case addressed whether the Clean Water Act (CWA) gives the Army Corps of Engineers jurisdiction to regulate wetlands adjacent to tributaries of navigable waters. The CWA covers "navigable waters," which it defines as "the waters of the United States." The Corps' broad regulations interpret these waters to include tributaries of traditional navigable waters (including any drainage ditch with a high-water mark) as well as wetlands "adjacent to" such tributaries, and they define adjacent to include wetlands neighboring tributaries even when they are separated by man-made means.

Here, the Rapanos petitioners backfilled wetlands lying near man-made drains or tributaries that eventually emptied into traditional navigable waters, and the United States brought civil enforcement proceedings against them for violating the CWA. The Carabell petitioners were denied a permit to fill a wetland separated from a nearby drainage ditch by a man-made berm, and they challenged the exercise of federal regulatory jurisdiction in district court. The district courts upheld federal jurisdiction in both cases, and the Sixth Circuit affirmed on the ground that the wetlands were hydrologically connected to the tributaries.

The Supreme Court vacated and remanded. In an opinion by Justice Scalia (joined by Chief Justice Roberts and Justices Thomas and Alito), a plurality of the Court concluded that the waters of the United States include only relatively permanent standing or flowing bodies of water. Relying on the dictionary, the traditional meaning of "navigable," and the CWA's separate definition of intermittent flows as "point sources," the plurality stated that channels carrying only intermittent flows or providing periodic rainfall drainage do not qualify as waters of the United States. Therefore, it concluded that the Corps' expansive interpretation of waters to include such channels was not a permissible construction entitled to *Chevron* deference. The plurality also rejected the Sixth Circuit's hydrologic connection test, stating that a wetland is not "adjacent to" waters of the United States unless there is a continuous surface connection and no clear demarcation between the two. Only then is the Corps permitted to resolve the ambiguity of where a water ends by including abutting wetlands.

Justice Kennedy concurred in the judgment, concluding that the Court's recent decision in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001), had interpreted the CWA to reach wetlands with a "significant nexus" to traditional navigable waters. Assessing the required nexus in terms of the CWA's purposes, he concluded that a wetland is covered if it, either alone or in combination with similarly situated lands, significantly affects the chemical, physical, or biological integrity of traditional navigable waters. He concluded that the Corps' existing definition of tributaries was too broad to ensure that this test would be met whenever a wetland is adjacent to a tributary. Absent more specific regulations, therefore, he stated that the Corps must establish a significant nexus for such wetlands on a case-by-case basis. Justice Kennedy criticized the plurality's permanence and surface-connection requirements as unsupported by either the language and purposes of the CWA or prior cases.

Justice Stevens (joined by Justices Souter, Ginsburg, and Breyer) dissented, arguing that the Corps' decision to treat wetlands adjacent to tributaries as waters of the United States because they preserve the quality of such waters was a reasonable interpretation entitled to deference. He argued that the Court's unanimous decision in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), had approved the regulations at issue and that Congress had acquiesced in them in 1977. He also argued that these long-standing regulatory standards should not be replaced with Justice Kennedy's significant nexus test.

[3] The authors' firm filed an *amicus* brief in support of the petitioners.

FIRST AMENDMENT

***Beard v. Banks*, 126 S. Ct. 2572 (2006).**

Banks, a Pennsylvania prison inmate, sued prison officials alleging that their policy of forbidding the State's most dangerous and recalcitrant inmates any access to newspapers, magazines, and photographs violated the First Amendment. On cross-motions for summary judgment, the district court ruled for the officials. The Third Circuit reversed.

The Supreme Court reversed and remanded in a splintered decision. Writing for the plurality, Justice Breyer (joined by Chief Justice Roberts, Justice Kennedy, and Justice Souter) concluded that the officials had offered adequate support for the policy. Prior cases had held that because the Constitution sometimes permits greater restrictions on rights in a prison setting, courts owe substantial deference to the professional judgment of prison administrators and should uphold regulations reasonably related to legitimate penological interests. Here, the officials offered evidence that inmates could gain access to newspapers, magazines, and photographs if they demonstrated good behavior, and the plurality concluded that this policy served the officials' legitimate interest in motivating better behavior by particularly difficult prisoners. Because Banks provided no controverting evidence, the district court properly granted summary judgment.

Justice Thomas (joined by Justice Scalia) concurred in the judgment, finding the policy permissible under his concurrence in *Overton v. Bazzetta*, 539 U.S. 126, 138 (2003). He reasoned that sentencing a defendant to imprisonment may carry with it an implied delegation to prison officials to discipline and supervise him. Here, Pennsylvania sentenced Banks against the backdrop of its traditional conception of imprisonment, which afforded no unfettered right to newspapers, magazines, and photographs.

Justice Stevens (joined by Justice Ginsburg) dissented, arguing that the officials had not established as a matter of law that the policy was reasonably related to an interest in inmate rehabilitation. He noted that the officials' deprivation rationale had no limiting principle. In addition, alternative incentives for good behavior were available, and the potentially indefinite nature of the deprivation suggested that the policy swept too broadly. Justice Ginsburg also filed a separate dissent, arguing that the officials had not met the summary judgment standard because a reasonable jury could find that the logical connection between depriving prisoners of some categories of reading material and the rehabilitation rationale was remote.

HABEAS CORPUS

***Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).**[4]

In this case, the Court held that military commissions established by President Bush to try prisoners being held at Guantanamo Bay violate federal statutes and the Geneva Convention. As a threshold matter, the Court also concluded that it was not deprived of jurisdiction to rule in the case by the Detainee Treatment Act of 2005.

Salim Ahmed Hamdan, allegedly Osama Bin Laden's former driver, was captured in Afghanistan in 2001 and transported to Guantanamo Bay in 2002. In 2003, President Bush designated Hamdan as eligible for trial by a military tribunal for war crimes, and in 2004 the charge against Hamdan was identified as conspiracy. Hamdan filed a habeas corpus petition arguing that the military commission was improperly constituted and lacked authority to try him. The district court granted Hamdan's petition, but the D.C. Circuit reversed. In 2005, Congress passed the Detainee Treatment Act, 119 Stat. 2739, which states that "no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba."

[4] The authors' firm filed an *amicus* brief in support of Hamdan.

Justice Stevens delivered the opinion of the Court, writing for a five-justice majority that also included Justices Kennedy, Souter, Ginsburg, and Breyer. On the jurisdictional issue, the Court concluded that the Detainee Treatment Act was not intended by Congress to deprive the Court of jurisdiction over cases already pending when it was passed.

On the substantive issues, the Court held that the military commissions established by President Bush were invalid because they are not expressly authorized by any congressional act. While the President has authority under Article 21 of the Uniform Code of Military Justice (UCMJ) to convene military commissions, Article 21 also requires that those commissions comply with the law of war—specifically, the UCMJ and the Geneva Conventions. The commissions established by the President failed to comply with those laws by, *inter alia*, allowing closed sessions from which the accused and his counsel may be excluded, and thus were invalid. In arriving at that holding, the Court rejected the Government's arguments that: (1) Congress's 2001 Authorization for the Use of Military Force overrode the UCMJ's requirement that commissions conform to the laws of war; (2) the Geneva Conventions are not judicially enforceable; and (3) Hamdan is not entitled to Geneva Convention protections because Al Qaeda is not a signatory. The Court noted that it was not considering or invalidating the President's authority to hold detainees "for the duration of active hostilities." But, it said, "in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction."

In a portion of his opinion joined only by Justices Souter, Ginsburg, and Breyer, Justice Stevens further concluded that Hamdan could not be tried for conspiracy because it is not a violation of the law of war.

Justice Kennedy concurred in part, observing that there was no need in this case to address the questions whether conspiracy is a triable offense under the law of war or whether the Geneva Conventions require that the accused have the right to be present at all stages of trial. Justice Breyer, in a concurrence joined by Justices Kennedy, Souter, and Ginsburg, noted that although the Court was holding that Congress had not authorized the President to establish military commissions that violate the UCMJ and Geneva Conventions, "[n]othing prevents the President from returning to Congress to seek the authority he believes necessary."

Justice Scalia, joined by Justices Thomas and Alito, dissented on the grounds that the Detainee Treatment Act deprived the Court of jurisdiction over the case, and that persons held outside the territory of the United States have no right to the writ of habeas corpus. Justice Thomas, joined by Justices Scalia and Alito, dissented on the grounds that the military commissions were authorized by the President's executive authority as well as the Authorization for the Use of Military Force passed by Congress immediately after the attacks of September 11, 2001. He also agreed with the Government's argument that Hamdan is not entitled to the protections of the Geneva Conventions. Justice Alito wrote a separate dissent expressing his agreement with Justices Scalia and Thomas and concluding that the military commissions do satisfy the requirements of the Geneva Conventions.

Chief Justice Roberts did not participate in the case because he had sat on the panel that decided the case in the D.C. Circuit. He had voted with the majority whose decision was overturned by the Court in *Hamdan*.

***Hill v. McDonough*, 126 S. Ct. 2096 (2006).**

The Supreme Court unanimously ruled that 42 U.S.C. § 1983 may be used to challenge the method of lethal injection if the claim's success would not foreclose lethal injection as a means of execution entirely. Petitioner Hill challenged the three-drug sequence by which Florida intended to execute him. The district court and the Eleventh Circuit construed the § 1983 challenge as a habeas

petition, and denied relief for failure to meet statutory successive petition requirements.

The Supreme Court reversed and remanded in an opinion by Justice Kennedy, allowing Hill to proceed under § 1983. Hill alleged that the first drug in the chemical sequence would leave him conscious enough to experience unnecessary pain, and he sought an injunction barring the State from administering the sequence. The Court rejected the lower courts' conclusion that Hill's claim was functionally a successive habeas petition, noting that Hill did not seek relief that would either render the sequence categorically unconstitutional or that would prevent the state from administering another lethal chemical sequence. The Court acknowledged concerns involving frivolous and eleventh hour objections to execution steps that are not "strictly necessary." Yet it observed that a motion for a stay of execution, like any equitable remedy, must show a significant possibility of success on the merits.

***House v. Bell*, 126 S. Ct. 2064 (2006).**[5]

By a 5-3 vote, the Court invoked the "actual innocence" exception to allow a habeas petitioner to proceed on the merits of his procedurally defaulted claims. House was convicted of murdering Carolyn Muncey in Tennessee and sentenced to death. Blood and semen matches were crucial to the State's case, which suggested a sexual motive. House procedurally defaulted his ineffective assistance of counsel and prosecutorial misconduct claims in state post-conviction proceedings. He then filed a federal habeas petition and sought to excuse his default under the actual innocence exception. At a hearing, House attacked the State's semen and blood evidence and offered proof that Mr. Muncey had confessed to murdering his wife. The district court nonetheless denied relief, and the Sixth Circuit *en banc* affirmed by a vote of 8-7.

The Supreme Court reversed and remanded in an opinion by Justice Kennedy. Before reaching the merits, the Court made several doctrinal observations. First, although a petitioner must proffer new evidence in order to *trigger* the actual innocence exception, courts must consider the evidence *in toto* to determine whether he has *satisfied* it. Second, the actual innocence gateway standard is whether it was more likely than not that no reasonable juror would find the petitioner guilty beyond a reasonable doubt. Third, the Court rejected the State's argument that other AEDPA standards relating to actual innocence applied to a federal petition raising a defaulted claim. Finally, the Court refused to defer broadly to the federal district court's factual determinations.

Turning to the evidence, the Court noted that new DNA tests conclusively established that semen on Mrs. Muncey's nightgown and underwear belonged to Mr. Muncey. The Court rejected the State's position that this evidence was immaterial because motive was not an element of the offense. House also presented expert testimony that Mrs. Muncey's blood, found on his jeans, had leaked from an autopsy sample. Finally, House introduced evidence implicating Mr. Muncey in the murder, including his own confession. The Court concluded that this evidence satisfied the actual innocence gateway standard, but found it insufficient to prove House's "freestanding innocence" claim, which would have entitled him to immediate relief. Instead, it remanded the case to the district court so that House could proceed with his defaulted claims.

Chief Justice Roberts, joined by Justices Scalia and Thomas, dissented from the actual innocence gateway holding. He chided the majority for citing off-target precedent involving entitlement to an evidentiary hearing, which House had already secured. He noted that the district court conducted an extensive inquiry into the reliability of the new evidence and criticized the Court for ignoring the clear error standard of review applicable to factual findings. He would have affirmed the denial on the ground that any reliable new evidence was insufficient to except House

[5] The authors' firm filed an *amicus* brief in support of House.

from restrictions on procedurally defaulted claims.

IMMIGRATION

***Fernandez-Vargas v. Gonzales*, 126 S. Ct. 2422 (2006).**[6]

This case interpreted the "reinstatement provision" of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Section 241(a)(5) of IIRIRA enlarged the class of aliens against whom prior deportation orders could be reinstated and restricted the relief available from those orders. Deported pursuant to a 1981 order, Fernandez-Vargas reentered the country illegally in 1982. In November 2003, the Government reinstated the 1981 order. In an opinion by Justice Souter, the Court affirmed the Tenth Circuit's holding that the new reinstatement provision applied to pre-IIRIRA reentrants and that such application was not impermissibly retroactive.

Fernandez-Vargas argued that the IIRIRA reinstatement provision's failure to specify its temporal reach, as the prior provision had, placed pre-IIRIRA reentrants beyond its scope. The Court concluded, however, that § 245(a)(5) facially applied to any reentrant present in the country, whatever the date of return. It then held that applying the reinstatement provisions to pre-IIRIRA reentrants was not impermissibly retroactive for two reasons. First, Fernandez-Vargas was not punished for past conduct or because he reentered at any particular time, but instead because he chose to remain after IIRIRA's operative date. Second, IIRIRA's effective date provision, six months after the date Congress enacted the statute, gave Fernandez-Vargas ample warning of the law's impending changes.

Justice Stevens dissented, arguing that the 1996 reinstatement provision did not apply to pre-IIRIRA reentrants and that such application would be impermissibly retroactive. He noted that the 1950 reinstatement legislation also omitted an express date restriction and that Congress only added one in response to the INS's erroneous application of the reinstatement provision to pre-enactment reentrants. He concluded that a natural reading of the 1996 provision should mirror the intended meaning of the 1950 legislation upon which it was modeled. As to retroactivity, he observed that prior to IIRIRA, it had been in Fernandez-Vargas's interest to remain in the United States, start a family, and run a business. Before IIRIRA all of these circumstances would have diminished the likelihood that he would be subject to reinstatement or, alternatively, would have increased the availability of relief from it. Because none of those circumstances improved Fernandez-Vargas's position under the IIRIRA reenactment provision, however, Justice Stevens found it impermissibly retroactive.

JURISDICTION

***Empire HealthChoice Assurance, Inc. v. McVeigh*, 126 S. Ct. 2121 (2006).**

In this case, the Supreme Court refused to exercise federal jurisdiction over a federal insurance contractor's suit seeking reimbursement from a beneficiary's tort settlement. Empire, a federal contractor providing insurance under the Federal Employees Health Benefits Act (FEHBA), paid over $150,000 for the medical care of a federal employee injured in car accident. When the employee's estate settled its tort suit, Empire, consistent with its federal contract obligation to seek reasonable recovery in such cases, sought reimbursement in federal court under its insurance contract with the employee. FEHBA expressly contemplates a federal forum only for actions against the United States, and the district court accordingly dismissed the case for want of subject-matter jurisdiction. The Second Circuit affirmed, holding that Empire's reimbursement claim arose under state law.

In an opinion by Justice Ginsburg, the Supreme Court affirmed the Second Circuit. It first determined that Empire's claim could not "arise under" federal law merely because it sought to vindicate a contractual right contemplated by

[6] The authors' firm represented Fernandez-Vargas.

federal statute. The Court reasoned that although FEHBA authorized federal contracts between the Government and carriers, the reimbursement provision appeared in the contract between the carrier and the beneficiary. The Court found FEHBA's limited preemption provision involving "coverage" and "benefits" insufficient to create federal jurisdiction over the reimbursement claim. The Court next rejected Empire's claim that the suit "arises under" federal law simply because federal law is a necessary element of the reimbursement claim. The Court conceded that the "necessary element" rationale may create federal jurisdiction, but stated that Empire's claim was "poles apart" from such a case.

Justice Breyer (joined by Justices Kennedy, Souter, and Alito) dissented. He noted that FEHBA and the program it created were federal, that the plan beneficiaries were all federal employees, that the Federal Government pays all costs and receives all payments, and that the Empire plan is the largest operating under the statute. Moreover, Empire's contract with the Government required it to make "reasonable" attempts to recover amounts to which it was entitled. Because the reimbursement claim concerned application of terms in a federal contract and given the significant interest in national uniformity of reimbursement recovery, he concluded that Empire's claim "arises under" federal common law.

***Kircher v. Putnam Funds Trust*, 126 S. Ct. 2145 (2006).**[7]

In this case, the Supreme Court ruled that an order remanding a case removed under the Securities Litigation Uniform Standards Act of 1998 (SLUSA) is not appealable. SLUSA precludes large state securities class action suits involving "covered" securities and authorizes their removal to federal court. Here, mutual fund investors filed state-law class actions against an insurance company, various mutual funds, and several investment advisors, alleging injury from devaluation of their holdings. The funds filed removal notices claiming that the actions were both precluded and removable under SLUSA. The district court remanded each case to state court, however, holding that it lacked subject-matter jurisdiction because SLUSA did not preclude the investors' claims. The Seventh Circuit reversed, holding that an order remanding a suit as not precluded is substantive and thus distinct from the jurisdictional issue whether the case was properly removed. On the merits, it held that SLUSA did preclude the state claims.

In an opinion by Justice Souter, the Supreme Court vacated and remanded, holding that the statutory bar to federal appellate review of orders remanding for lack of subject-matter jurisdiction applied. The Court noted that where a remand order is based on lack of subject-matter jurisdiction, review is unavailable no matter how plain the error in ordering remand. Analyzing the text and legislative history of SLUSA, the Court agreed with the district court that the preclusion determination is jurisdictional. It also rejected the Seventh Circuit's position that refusing appellate review of remand orders would immunize potentially erroneous SLUSA preclusion rulings from subsequent consideration. Nothing in SLUSA prevented state courts from ruling on preclusion, and the appellate non-reviewability of the remand order would eliminate any potential estoppel effects of the federal adjudication.

Justice Scalia concurred in part and in the judgment, arguing that the correctness of the district court's jurisdictional characterization was not relevant to the reviewability of the remand order. In his view, the only significant element of the district court determination was its belief that the holding was jurisdictional. He would have prohibited appellate courts from reviewing a remand order by recharacterizing any determination underlying it as non-jurisdictional.

[7] The authors' firm filed an *amicus* brief in support of Putnam.

SEARCH & SEIZURE

***Hudson v. Michigan*, 126 S. Ct. 2159 (2006).**

In this case, the Supreme Court considered whether the exclusionary rule bars evidence obtained in violation of the Fourth Amendment's "knock and announce" rule. Having secured a warrant to search Hudson's home for guns and drugs, Michigan police waited only a few seconds after announcing their presence before opening the unlocked door. Michigan conceded that the entry was a Fourth Amendment violation, and Hudson moved to suppress all inculpatory evidence pursuant to the exclusionary rule. The Michigan trial court granted the motion, but on interlocutory review the state appellate court reversed. After his conviction, Hudson renewed his claim on direct appeal, but the state appellate court rejected it and the Michigan Supreme Court declined review.

A sharply divided Supreme Court affirmed. Justice Scalia, writing for the majority, reiterated that the exclusionary rule does not apply to Fourth Amendment violations indiscriminately, but only when its application creates a net social benefit. The Court concluded that the knock and announce violation was not the "but-for" cause of obtaining the evidence because the police had a warrant. Alternatively, any but-for causation would be too attenuated to justify exclusion. Attenuation can occur, the Court reasoned, where suppression would not serve the interest of the implicated constitutional guarantee. The knock and announce rule protects against unnecessary violence, property damage, and sudden invasions of privacy. Because the exclusionary rule has not ever protected an interest in preventing the government from acquiring evidence described in a valid warrant, the Court ruled it inapplicable. The Court also listed exclusion's considerable social costs, including acquitting dangerous criminals, encouraging frivolous Fourth Amendment claims, and exposing officers to violence unnecessarily. Finally, the Court considered exclusion an unnecessary deterrent because (1) other conditions frequently render the knock and announce rule inoperative and (2) civil suits and professional codes effectively check police misconduct.

Concurring in part and in the judgment, Justice Kennedy underscored the ruling's limits, reiterating that the Court only disregarded the exclusionary rule in this instance because the constitutional violation was not a but-for cause of obtaining the evidence. He emphasized that there was no demonstrable pattern of knock and announce violations. Justice Breyer (joined by Justices Stevens, Souter, and Ginsburg) dissented, tracing the development of the knock and announce rule from its 13th century origins. He strongly objected to the Court's assumption that alternative Fourth Amendment checks sufficiently deterred the relevant police misconduct, arguing that *Mapp v. Ohio* had already found them insufficient.

***Samson v. California*, 126 S.Ct. 2193 (2006).**

In this case, the Supreme Court ruled that a suspicionless search of a parolee, conducted after the parolee agreed in writing to be subject to such searches, did not violate the Fourth Amendment. Samson was paroled in California following a firearm conviction. His parole officer searched him without particularized suspicion and found methamphetamines. The trial court refused to suppress the methamphetamine evidence, finding that the search was not arbitrary and capricious, and the jury convicted Samson of a possession charge. The state court of appeal affirmed.

The Supreme Court affirmed in an opinion by Justice Thomas. Using the "totality of the circumstances" test for Fourth Amendment violations, the Court held that the public interest in combating recidivism, encouraging assimilation, and protecting potential victims outweighed Samson's privacy interest as diminished by his parolee status and written waiver. It also rejected the argument that California's rule allowing suspicionless searches was unconstitutional simply because other state and federal rules barred them. Finally, the Court concluded that California's rule against arbitrary,

capricious, or harassing searches was a sufficient check on officials' discretion to search.

Justice Stevens, joined by Justices Souter and Breyer, dissented. He conceded that parolee status diminished Fourth Amendment protection, but rejected the notion that the diminution allowed suspicionless searches. He also accused the majority of erroneously equating the privacy rights (and expectations) of parolees with those of active prisoners. He distinguished Samson's situation from precedent condoning searches of parolees or probationers, noting that the latter cases invoked a special needs exception and involved some quantum of suspicion. He also rejected the argument that Samson waived in writing his legitimate expectations of privacy.

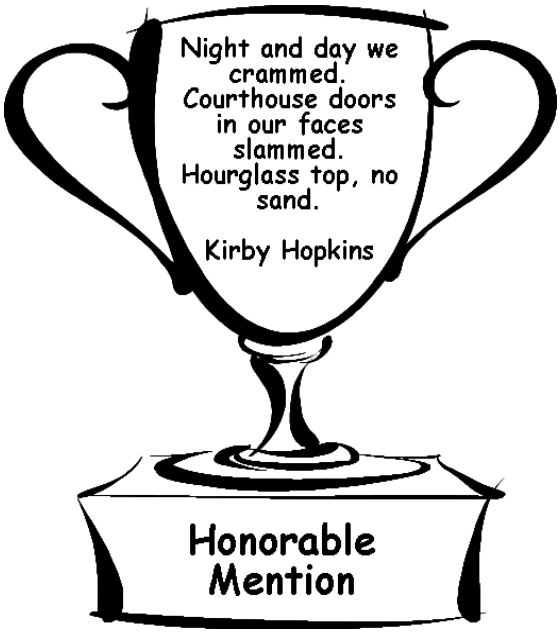
STATUTORY INTERPRETATION

***Woodford v. Ngo*, 126 S. Ct. 2378 (2006).**

This case addressed the Prison Litigation Reform Act's bar to suits by prisoners under 42 U.S.C. § 1983 "until such administrative remedies as are available are exhausted." Ngo, a California prisoner, filed a grievance that prison officials rejected as untimely. He subsequently sued the officials in federal district court under § 1983, but the court held that Ngo had not fully exhausted his remedies and dismissed the suit. The Ninth Circuit reversed, holding that Ngo had exhausted his remedies because none remained available.

In an opinion by Justice Alito, the Supreme Court reversed and remanded. Looking to administrative and habeas corpus law, the Court held that the Act required proper exhaustion of all remedies in accordance with applicable procedural rules, not merely exhaustion of currently-available remedies. It reasoned that this interpretation also served the Act's goals by: giving prisons an opportunity to correct their own errors, reducing the quantity of prisoner suits, and providing an administrative record for suits that do go forward.

Justice Breyer concurred in the judgment, arguing that the exhaustion requirement is not absolute because administrative and habeas law permit several exceptions. Justice Stevens (joined by Justices Souter and Ginsburg) dissented, contending that Congress did not intend to authorize state officials to limit prisoners' constitutionally protected right of access to federal courts. He argued that nothing in the statute's text supported a procedural default sanction, and that state remedies have been exhausted in habeas cases when they are no longer available. In the administrative arena, waiver is only appropriate where the statute directs a federal court to act as an appellate tribunal for an agency's decision. He contended that this principle should not apply to Ngo's § 1983 suit, which was a *de novo* proceeding. Finally, he argued that the Act's purposes would be amply served without adding a default sanction.



Matthew J. Morrison, Beard, Kultgen, Brophy, Bostwick & Dickson LLP, Waco
Richard B. Phillips, Jr., Thompson & Knight LLP, Dallas

ADMINISTRATIVE LAW

***City of Houston v. Clark*, 197 S.W.3d 314 (Tex. 2006).**

In this dispute between a fire department employee and the City, the Supreme Court decided that the City has the right to appeal adverse decisions of independent hearing officers.

Clark was suspended by the acting fire chief for violating dispatch protocols. Clark elected to appeal his suspension to an independent hearing examiner. Clark asserted that his suspension was improper because the acting fire chief did not have the power to suspend fire department personnel. The hearing examiner denied the merits of Clark's appeal, but agreed that the acting fire chief did not have the power to suspend him.

Both parties appealed to the district court, which eventually ruled in Clark's favor on the ground that the acting fire chief was not a "department head" authorized to suspend employees. The City appealed. The court of appeals held that the City did not have a right of appeal from the independent hearing officer's decision, and dismissed the appeal for want of jurisdiction.

The Local Government Code establishes procedures for review of certain disciplinary actions of police and fire officers. The officers can choose between appealing to the Fire Fighters' and Police Officers' Civil Service Commission or to an independent third party hearing examiner. The right of appeal from the decision of the independent hearing officer is more limited than the right of review from the decision of the Commission.

The Court recognized that in many sections of the statute, the right of appeal is limited to the officers. But in the section related to an appeal from an independent hearing officer, the language is more general, and does not limit the right to either party. The Court concluded that the distinction was important. In the sections that restrict appellate rights to the officer, the appellate officer is closely aligned with the City. In those situations, restricting appellate rights to the officer recognizes that close relationship. But the independent hearing officers are not closely aligned to either party.

The Court also recognized that foreclosing the City's right to appeal from the independent hearing officer's decision could render the delegation of authority to the independent hearing officer constitutionally suspect. The Court also reasoned that the history of the hearing examiner provisions supported the conclusion that the City has an appellate right. The Court therefore reversed the dismissal and remanded the case to the court of appeals for further consideration.

***City of Waco v. Kelley*, 197 S.W.3d 324 (Tex. 2006) (per curiam).**

In this case, the Supreme Court reversed the court of appeals decision and remanded the case for further consideration in light of the holding in *City of Houston v. Clark*.

***Blue Cross Blue Shield v. Duenez*, No. 05-0521, 2006 WL 2505984 (Tex. Aug. 31, 2006) (per curiam).**

The Supreme Court held that the Employee Retirement System (ERS) had exclusive administrative jurisdiction over a state employee's claim for attorneys' fees in a health insurance coverage dispute. The Duenezes were covered by Blue Cross Blue Shield (BCBS) through the ERS. They sued BCBS for a declaration that BCBS was obligated to continue payment for private nursing care and included a claim for attorneys' fees. After the Duenezes changed health insurance

carriers, they dropped all claims against BCBS except for the claim for attorneys' fees, which the trial court granted.

BCBS contended that the trial court lacked jurisdiction, because the Duenezes had not exhausted their administrative remedies. The Supreme Court noted that, under the ERS Act, the director of ERS "has exclusive authority to determine all questions relating to enrollment in or payment of a claim from [ERS] group coverages and benefits." The Court therefore held that ERS had exclusive jurisdiction over the Duenezes claim.

The Duenezes argued that their claim was one of legal construction of their plan's coverage, which did not implicate "payment of a claim." The Court held that the action related directly to payment of a claim, and that the Duenezes could not avoid the exhaustion requirement simply by casting their claim as a "coverage determination."

The Court also rejected the Duenezes' claim that administrative exhaustion was not required because they were threatened with irreparable harm and ERS could not have provided relief. The Court held that there was no showing that ERS could not have provided the relief the Duenezes sought in their declaratory judgment action.

APPELLATE PROCEDURE

***Higgins v. Randall County Sheriff's Office*, 193 S.W.3d 898 (Tex. 2006) (per curiam).**

In this per curiam opinion, the Texas Supreme Court reversed the court of appeals' order dismissing the cause for failure to timely file an affidavit of indigency and, alternatively, for the conclusory nature of the appeal.

The Supreme Court held that a court of appeals may not dismiss a cause for any formal defect or irregularity in appellate procedure without first affording the appellant or appellee a reasonable time to correct the defect. In this case, the appellant filed an affidavit of indigency within the time period ordered by the court of appeals to pay the $125 filing fee. The Supreme Court found that the timely-filed affidavit of indigency was sufficient to discharge the filing-fee requirement.

The Supreme Court likewise held that the court of appeals could not dismiss the appeal without giving the appellant a reasonable time to correct the conclusory nature of his appeal. Accordingly, the Supreme Court reversed the court of appeals' opinion and remanded for further proceedings.

***Kiefer v. Touris* 197 S.W.3d 300 (Tex. 2006) (per curiam).**

In this suit, the Texas Supreme Court held that a judgment following a bill of review is not appealable when the judgment sets aside a parentage adjudication but does not make a new parentage adjudication.

When a bill of review sets aside a prior judgment but does not dispose of all issues of the case on the merits, it is interlocutory in nature and does not constitute a final judgment appealable to the court of appeals. *Tesoro Petroleum v. Smith*, 796 S.W.2d 705 (Tex. 1990) (per curiam). Here, although the parentage adjudication was set aside, the trial court did not at the same time enter a new parentage adjudication with its attendant custody and support obligations. Accordingly, since these issues were left undecided, the summary judgment order was not final and appealable, and the court of appeals was without jurisdiction to consider the appeal.

***Childers v. Advanced Foundation Repair, L.P.*, 193 S.W.3d 897 (Tex. 2006) (per curiam).**

In this per curiam opinion, the Texas Supreme Court reversed a court of appeals' holding that a final judgment was interlocutory and not final and appealable.

The trial court granted the defendant's motion to dismiss without prejudice in its final judgment and stated that "[a]ll other claims in this case by

all parties to this case are hereby dismissed without prejudice, such claims to be decided in arbitration pursuant to the arbitration provisions in the contract between these parties. This judgment is final, disposes of all parties and all claims in this case, is appealable, and disposes of this case in its entirety."

The Supreme Court held that this language unequivocally disposed of all parties and all claims. The final judgment, therefore, was appealable.

***Gonzales v. McAllen Med. Center, Inc.*, 195 S.W.3d 680 (Tex. 2006) (per curiam).**

In this per curiam opinion, the Supreme Court held that the appellants were entitled to *some* explanation regarding the court of appeals' basis for overruling their factual and legal sufficiency challenges.

In their opinion, the court of appeals recited the appropriate standard of review and then stated "[c]onsidering the record in its entirety, we hold that appellants' factual sufficiency challenge fails because the jury's verdict was not against the great weight of the evidence. We overrule appellants' first six issues."

Texas Rule of Appellate Procedure requires a court of appeals to "write a brief memorandum opinion no longer than necessary to advise the parties of the court's decision and the basic reasons for it." The Supreme Court concluded that while the court of appeals' opinion apprised the parties of its decision, it did not articulate any reason for it.

Accordingly, the Supreme Court reversed and remanded to the court of appeals with instruction to articulate the basic reasons for its decision.

***In re The Lynd Co.*, 195 S.W.3d 682 (Tex. 2006) (orig. proceeding).**

In this mandamus proceeding, the Supreme Court resolved a split in the courts of appeals regarding whether a trial court's order under Rule 306a properly invokes the court's plenary power if the order does not expressly state the date on which the complaining party received notice of the judgment. The Supreme Court held that the date of notice may be implied from the trial court's order, unless there is no evidence supporting the implied finding or the party challenging the judgment establishes as a matter of law an alternative notice date.

The Supreme Court noted that Rule 306a does not require a trial court to issue a signed order identifying a date of notice, but encouraged trial courts to do so in order to "dispel ambiguities" about the date of notice. If the trial court does not make such a finding, the Court encourages litigants to request such a finding.

***Citizens Nat'l Bank v. Scott*, 195 S.W.3d 94 (Tex. 2006) (per curiam).**

In this per curiam opinion, the Supreme Court reversed and remanded a court of appeal's memorandum opinion, which the Supreme Court concluded did not sufficiently advise the parties of the court's decision and the basic reasons for it, as the court is required to do under Texas Rule of Appellate Procedure 47.4.

After a one day bench trial regarding a breach over a promissory note, the trial court entered judgment in favor of Citizens National Bank against defendants Scott, Engle and Karamatic. Only Scott filed a notice of appeal. In a brief memorandum opinion, the court of appeals stated the facts and cited appropriate case law for a legal sufficiency analysis and then stated:

"After a thorough review of the entire record, we find that the evidence conclusively establishes, as a matter of law, all vital facts to support a finding of payment. We must sustain Scott's legal sufficiency issues because the evidence conclusively establishes the opposite of a vital fact found by the trial judge (*i.e.*, nonpayment)."

This conclusory statement was insufficient to apprise the parties of the court's decision and the basic reasons for it. Merely saying that the court has reviewed all the evidence and reaching a conclusion contrary to that of the trier of fact is not enough. Accordingly, the Supreme Court remanded this matter to the court of appeals for more detailed consideration.

***Univ. of Texas Med. Branch v. Estate of Blackmon*, 195 S.W.3d 98 (Tex. 2006) (per curiam).**

In this case, the plaintiff filed a nonsuit while the defendant's plea to jurisdiction was pending in the court of appeals. The plaintiff argued that its nonsuit deprived the court of appeals of jurisdiction over the defendant's appeal. The Supreme Court agreed.

This matter arose out of Darla Blackmon's death while incarcerated at the Texas Department of Criminal Justice substance abuse facility operated by the University of Texas Medical Branch at Galveston (UTMB). Blackmon's daughter, Sheila Shultz, brought suit against UTMB alleging a waiver of sovereign immunity under the Tort Claims Act's exception for personal injury or death caused by a condition or use of tangible personal property. UTMB filed a plea to the jurisdiction, which the trial court denied, and then brought an interlocutory appeal.

The court of appeals initially reversed the trial court's finding, but then withdrew its opinion upon granting Shultz's motion for rehearing. Thereafter, Shultz filed a nonsuit in the trial court and filed a motion to dismiss the appeal for lack of jurisdiction. The court of appeals denied Shultz's motion to dismiss and issued a new opinion denying UTMB's plea to the jurisdiction. UTMB appealed to the Supreme Court.

Shultz argued that because she filed a nonsuit before she introduced all of her evidence, neither the court of appeals nor the Supreme Court had jurisdiction over this appeal. UTMB argued that a plaintiff cannot nonsuit a claim once a court has rendered a judgment on the merits.

In this case, however, the court of appeals withdrew its judgment for UTMB before the nonsuit was filed. As a result, the nonsuit vitiated only the trial court's interlocutory order denying UTMB's plea to the jurisdiction. That ruling favored Shultz and, consequently, its nullification did not prejudice UTMB. Moreover, the Court noted that UTMB did not raise a claim for affirmative relief that would forestall the nonsuit's effect of rending the merits of the case moot.

***Guest v. Dixon*, 195 S.W.3d 687 (Tex. 2006) (per curiam).**

In this case, the Supreme Court addressed the sufficiency of the affidavit supporting a motion to reinstate a case that had been dismissed for want of prosecution. After Guest's medical malpractice case was dismissed for want of prosecution, she filed a motion to reinstate supported by the affidavit of her former attorney. The motion to reinstate was denied, and Guest filed a notice of appeal 89 days after the dismissal for want of prosecution was signed.

The court of appeals dismissed the appeal for want of jurisdiction, reasoning that the affidavit of Guest's *former* attorney was insufficient under Rule 165a. The rule provides that a timely motion to reinstate extends the deadline to perfect an appeal. The rule also requires that the motion be "verified by the movant or his attorney." The court of appeals concluded that Guest's motion to reinstate did not meet the requirements of Rule 165a because it was supported by the affidavit of Guest's former attorney.

The Supreme Court noted that "procedural rules should be construed and applied so that the right of appeal is not unnecessarily lost to technicalities." The Court concluded that the motion to reinstate was sufficient because it was supported by an affidavit from the attorney who had represented Guest for much of the time the case was pending and who was aware of the facts

regarding its prosecution. The Court therefore remanded the case to the court of appeals for consideration of the merits of the appeal.

***Ross v. Nat'l Center for the Employment of the Disabled*, 197 S.W.3d 795 (Tex. 2006) (per curiam).**

In this default judgment case, the Supreme Court considered the application of the elements of a bill of review where the party challenging the judgment had not been served with citation. Although Ross had never been served with citation, the trial court entered a default judgment against him for $5 million in actual damages and $5 million in punitive damages.

The court of appeals concluded that Ross had not pursued his bill of review remedies with the required diligence, because Ross did not move for a new trial when he received notice of the default judgment. The Supreme Court rejected this approach.

The Court held that Ross was under no obligation to act on the notice of default judgment because he had not been served with citation. And the Court noted that if the notice of the default judgment obligated Ross to act, then service of process would be obsolete. Because the bill of review was timely filed, the bill of review proceeding should not have been dismissed.

The Supreme Court also rejected the argument that dismissal was appropriate because Ross failed to appear for the trial of the bill of review. The Court treated this ground as a sanction, but noted that the trial court did not consider lesser sanctions before dismissing the case. The Court therefore granted the bill of review and set aside the default judgment.

***Ross v. Nat'l Center for the Employment of the Disabled*, No. 05-0534, 2006 WL 2506206 (Tex. Aug. 31, 2006) (per curiam).**

In this proceeding related to the bill of review case, the Supreme Court addressed a turnover order entered to enforce the judgment challenged by the bill of review. Because the default judgment had been reversed, the Court also reversed the turnover order.

***City of San Antonio v. Hartman*, No. 05-0147, 2006 WL 2505981 (Tex. Aug. 31, 2006).**

In this sovereign immunity appeal, the Supreme Court resolved whether a motion for reconsideration en banc in the court of appeals extends the deadline for filing a petition for review. To answer this question the Court had to address two separate issues. First, the Court had to determine whether a motion for reconsideration en banc is a "motion for rehearing" within Texas Rule of Appellate Procedure 53.7. Under Rule 53.7, a timely filed motion for rehearing extends the deadline for filing a petition for review until 45 days after the motion is denied. Although the rule does not specifically mention motions for reconsideration en banc, the Court concluded that a "motion for rehearing" includes motion for reconsideration en banc.

The Court then addressed whether the motion for reconsideration en banc in this case had been timely filed. The motion was filed 26 days after the court of appeals' judgment. The Court first noted that motions for panel rehearing must be filed within 15 days of the court of appeals' judgment. Although there is no specific deadline in the rules for a motion for reconsideration, the Court noted that Rule 49.7 provides that en banc reconsideration may be ordered by a majority of the court at any time while the court retains plenary power. The Court therefore concluded that a motion for reconsideration en banc is timely filed as a long as it is filed while the court of appeals has plenary power.

The Court also addressed the emergency situation exception to the waiver of immunity in the Texas Tort Claims Act. The Court held that emergency situation is not limited to traffic accidents. In this case, the emergency situation was a severe rain storm in San Antonio in October 1998 that caused extensive flooding throughout the city. The

plaintiffs sued the City for wrongful death caused when a car drove into a flooded area and was swept away by flood waters. The plaintiffs contended that the City should have placed barricades to block the intersection where the car was swept away. The Court held that the City was protected by the emergency situation exception.

***Pena v. McDowell*, No. 05-0546, 2006 WL 2505929 (Tex. Aug. 31, 2006) (per curiam).**

In this case, the court of appeals summarily dismissed an inmate's appeal for failure to include a certificate of service in the notice of appeal showing that the Office of the Attorney General had been properly notified of the appeal. The inmate asserted that he did mail a copy of the notice of appeal to the Office of the Attorney General, and the Court noted that the Attorney General "carefully" avoided contradicting that statement. Instead, the Attorney General contended that the appeal was properly dismissed because the name and address of the Attorney General did not appear on the inmate's certificate of service.

The Court held that Texas Rule of Appellate Procedure 25.1(e) does not require a certificate of service. It requires only that actual service of the notice of appeal on all parties to the trial court's judgment. The Court held that the appeal could not be dismissed due to the lack of a certificate of service.

The Court also held that the clerk failed to adequately notify the inmate of the defect in his notice of appeal. The letter simply cited to Rule 25.1(e), but did not explain how it had not been satisfied. The letter did not refer to Rule 9.5(d), which governs certificates of service.

***In re Castillo*, No. 06-0314, 2006 WL 2506026 (Tex. Aug. 31, 2006) (orig. proceeding).**

Justice Errlinda Castillo of the Thirteenth Court of Appeals lost her reelection bid in the Democratic Party primary. Shortly thereafter, the court of appeals decided (without Justice Castillo's participation) that she would no longer be assigned to the court's panels to hear cases beginning on May 31, 2006. The court later modified the plan to allow Justice Castillo to participate in panels through the end of her term. However, beginning in the fall term, she would no longer be assigned initial responsibility for drafting majority opinions. Justice Castillo sought writs of mandamus and prohibition to suspend the "exit plan."

The Court expressed no opinion on the original plan. The Court recognized that the modified plan properly preserved Justice Castillo's right to vote in cases assigned to her panel, and to draft concurring or dissenting opinions in any case. Justice Castillo contended that the restriction on assignments for majority opinions violated the Texas Constitution and the Thirteenth Court's administrative rules.

The Court held that neither the Constitution nor the administrative rules created a right for a justice to be assigned initial drafting of a majority opinion. The Court noted that appellate courts employ various methods for assigning cases, and that the Thirteenth Court's decision did not appear to be an abuse of discretion. The Court therefore denied Justice Castillo's petition.

ARBITRATION

***In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672 (Tex. 2006) (orig. proceeding).**

In this mandamus proceeding regarding the sale of a manufactured home, the plaintiffs sought to avoid an arbitration agreement. The appellants argued that the arbitration agreement lacked consideration, was substantively and procedurally unconscionable and the manufacturer did not prove itself to be a third-party beneficiary entitled to enforce the agreement. The Supreme Court overruled each argument and enforced the arbitration agreement.

The Plaintiffs, Raymond and Crystal Ripple, contracted with Palm Harbor Village (the retailer) to purchase a manufactured home manufactured by Palm Harbor Homes, Inc. During the process of contracting, the Ripples signed an arbitration agreement.

The arbitration agreement provided that all disputes between the retailer and the Ripples arising out of or related to the contract would be resolved through binding arbitration. This arbitration agreement further provided that it inures to the benefit of the manufacturer and stated that the manufacturer "in its sole discretion, may opt out of, and elect not to be bound by, the arbitration by giving written notice of the election to all parties within twenty (20) days after receipt of" notice that another party intended to arbitrate a dispute.

After experiencing problems with their home, the Ripples sued both the retailer and the manufacturer. Both defendants moved to compel arbitration. The trial court refused to enforce the arbitration agreement. A divided court of appeals denied mandamus relief. The defendants filed a petition for writ of mandamus with the Supreme Court.

In arguing against the enforcement of the arbitration agreement, the Ripples contended that (1) there was no valid agreement to arbitrate, (2) the arbitration agreement lacked consideration, (3) the agreement was procedurally and substantively unconscionable, and (4) the manufacturer had not proven that it was a third party beneficiary entitled to enforce the arbitration agreement.

The Supreme Court rejected the Ripples first argument because they had not asserted fraud, deceit, or misrepresentation in signing the arbitration agreement.

The Supreme Court then found that the arbitration agreement was supported by consideration. Bilateral promises to arbitrate are sufficient consideration to support the enforcement of an arbitration agreement. Moreover, as a third-party beneficiary, the manufacturer was not a promisor and therefore was not required to give consideration for the agreement which created its third-party beneficiary status.

The arbitration agreement is distinguishable from *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 230 & n.2 (Tex. 2003) because in *Davidson*, a *direct party* to the arbitration agreement held the unilateral, unrestricted right to terminate an arbitration agreement. Here, the manufacturer was a third-party beneficiary, not a direct party promisor.

Finally, the Supreme Court rejected the Ripples' argument that substantive or procedural unconscionability precluded enforcement of the arbitration agreement. There is nothing inherently unconscionable about an arbitration agreement and the Ripples did not meet their burden of proving that the arbitration agreement was so one-sided as to be unconscionable when its provisions effectively incorporate established principles of contract law. Moreover, with regard to procedural unconscionability, the Ripples failed to bring forth sufficient evidence that they were unfairly surprised or oppressed.

Justice O'Neill filed a concurring opinion in which she would find that the manufacturer's unilateral right to opt-out of the arbitration clause is unconscionable as against the manufacturer and nonbinding on the Ripples. However, she agreed with the majority's opinion that the Ripples' claims against the manufacturer necessarily rely on the terms of the retail contract and raise substantially interdependent and concerted misconduct, and therefore the Ripples are equitably estopped from seeking to avoid arbitration with the manufacturer, citing *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524 (5th Cir. 2000).

***In re D. Wilson Constr. Co.,* consolidated with *American Std. v. Brownsville Indep. Sch. Dist.*, 196 S.W.3d 774 (Tex. 2006).**

In this consolidated appeal, the Supreme Court clarified precisely when the Federal Arbitration Act ("FAA") preempts the Texas Arbitration Act ("TAA").

This litigation arose out of a construction project to build two schools for Brownsville Independent School District ("BISD"). One of the subcontractors, American Standard and the Trane Company ("Trane"), sought injunctive relief against BISD to preserve evidence in personal injury actions that students and teachers brought against Trane in another court. BISD counterclaimed for alleged defects in the construction of the two schools and filed a third-party action against several parties, including general contractors D. Wilson Construction Company ("Wilson") and Stotler Construction Company ("Stotler"). Trane and the third-party defendants filed or joined motions to compel arbitration under the FAA and the TAA.

After a hearing, the trial court denied arbitration, finding that the contract in question was ambiguous. Trane and the third party defendants filed a petition for writ of mandamus under the FAA and an interlocutory appeal under the TAA, and the court of appeals consolidated the two proceedings.

The court of appeals dismissed the interlocutory appeal for want of jurisdiction, finding the TAA inapplicable since the dispute concerned a "transaction involving commerce." The court of appeals also denied the petition for writ of mandamus, holding that the contract was ambiguous.

The Supreme Court first noted that the FAA only preempts *contrary* state law, not consonant state law. The Supreme Court reiterated its four-prong test first set forth in *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67, 69 (Tex. 2005) (per curiam), which provides that the FAA only preempts the TAA if: "(1) the agreement is in writing, (2) it involves interstate commerce, (3) it can withstand scrutiny under traditional contract defenses [under state law], and (4) state law affects the enforceability of the agreement." The Court found that the court of appeals ignored the fourth factor. For the FAA to preempt the TAA, state law must refuse to enforce an arbitration agreement that the FAA would enforce, either because (1) the TAA has expressly exempted the agreement from coverage or (2) the TAA has imposed an enforceability requirement not found in the FAA. Neither applies in this case; therefore, the FAA does not preempt the TAA in this matter. The court of appeals had jurisdiction under both laws.

The Supreme Court went on to hold that the contract was not ambiguous and that neither Trane nor Stotler waived any right to arbitration. Because the contract unambiguously required arbitration, the court of appeals erred in refusing to grant Trane and the third-party defendants' motion to compel arbitration. A writ of mandamus was conditionally granted.

Justice Brister filed a concurring opinion in which he disapproved of the current requirement that litigants pursue parallel mandamus and interlocutory appeal proceedings in arbitration cases. Justice Brister would allow parties to file either one, but not both, to jointly preserve their rights under the FAA and TAA.

***In re Dallas Peterbilt, Ltd.*, 196 S.W.3d 161 (Tex. 2006) (orig. proceeding) (per curiam).**

In this case, the Supreme Court conditionally granted a writ of mandamus to compel a former at-will employee to arbitrate his claims against his former employer. When the employee was hired, he was given a Summary Plan Description of Mutual Agreement to Arbitrate Claims, which outlined a mutual arbitration agreement. The employee claimed he never received the agreement itself, but he did sign a form acknowledging receipt of the summary.

After the employee was fired, he sued his former employer for discrimination, retaliation, defamation, and other torts. The employer moved to compel arbitration. The employee argued that receiving the summary did not constitute proper notice of the arbitration agreement under *In re Halliburton*. He contended that he could not be bound without receiving a copy of the agreement itself.

The Supreme Court disagreed and held that the summary was sufficient to put the employee on notice of the agreement. As in *In re Halliburton*, by continuing to work after receiving notice of the arbitration agreement, the at-will employee accepted the terms of the agreement as a matter of law. The Court concluded that the employer was entitled to compel arbitration.

***In re Palacios*, No. 05-0038, 2006 WL 1791683, (Tex. June 30, 2006) (orig. proceeding) (per curiam).**

In this mandamus proceeding, the Supreme Court recognized a change in Texas law in accordance with federal law. The arbitration agreement at issue involved commerce, and therefore implicated the Federal Arbitration Act. The trial court granted the defendant's motion to compel arbitration and abated the underlying case until the arbitration was completed. The court of appeals affirmed the trial court's order.

The Supreme Court noted that the United States Supreme Court held in 2000 that an order compelling arbitration cannot be reviewed by mandamus unless the underlying case is dismissed. *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 87 n.2 (2000). The Court recognized that Texas courts applying the FAA follow Texas procedure rather than federal procedure. However, the Court also recognized that it would make little sense for state courts to review by mandamus an order that the federal courts could not review at all. The Court noted that mandamus review may be available if the relator can show "clearly and indisputably that the district court did not have the discretion to stay the proceedings pending arbitration." Because Palacios did not meet that burden, the Court denied the petition for writ of mandamus.

ATTORNEY-CLIENT RELATIONSHIP

***Hoover Slovacek LLP v. Walton*, No. 04-1004, 2006 WL 1791694 (Tex. June 30, 2006).**

In this case, the Supreme Court declared that a provision in an attorney fee agreement providing that, in the event the attorney is discharged before completing the representation, the client must immediately pay a fee equal to the present value of the attorney's interest in the client's claim is against public policy and unenforceable.

John B. Walton, Jr. hired Steve Parrott of Hoover Slovacek LLP (Hoover) to recover unpaid royalties from several oil and gas companies. The engagement letter provided that, in the event Hoover was discharged before completing the representation, Walton must immediately pay a fee based on the present value of Hoover's interest in Walton's claim. Walton ultimately discharged Hoover. With new counsel, Walton's total recovery after discharging Hoover was $900,000, from which Walton paid his new lawyer $283,000 in fees and expenses.

Hoover asserted a claim for fees against Walton for $1.7 million, contending the Walton's claim was worth $6 million when Walton discharged Hoover. A jury found for Hoover but only awarded $900,000. The court of appeals reversed and rendered a take-nothing judgment for Walton, concluding that the fee agreement was unconscionable as a matter of law.

The Supreme Court treated this discharge provision as a penalty that imposed an undue burden on the client's ability to change counsel, which violated public policy and was unconscionable as a matter of law. The Court additionally found that this provision violated Rule 1.08(h)(2), which prohibits a lawyer from acquiring a proprietary interest in the subject

matter of the litigation in that the agreement entitled Hoover to a percentage of the claim's value without regard to the ultimate results obtained. This provision encouraged Hoover to be discharged soon after it could establish the present value of the client's claim with sufficient certainty.

The Court struck this provision, but remanded to the trial court to determine what fee, if any, Hoover should be entitled to under the factors set forth in *Mandell & Wright v. Thomas*, 441 S.W.2d 841 (Tex. 1969).

Justice Hecht filed a dissenting opinion in which Justices Medina and Willett joined. The dissenters argued that a fee agreement is not unconscionable because of what *could* happen. A fee agreement is not unconscionable because it *could* be a bad deal for the client.

In this case, the majority's concerns related to hypothetical situations, not what actually occurred in this instance. Walton was sophisticated, not an impoverished client and he could have paid Hoover; the Court should have taken a more individualistic approach to the fee agreement.

***O'Donnell v. Smith*, 197 S.W.3d 394 (Tex. 2006) (per curiam).**

In this legal malpractice case, one of the issues was whether an estate's personal representative can sue the decedent's former attorneys for malpractice. The Supreme Court reversed the court of appeals opinion and remanded the case for further consideration in light of the Court's opinion in *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780 (Tex. 2006).

CONTRACTS

***Sudan v. Sudan*, No. 04-0921, 2006 WL 1792212 (Tex. June 30, 2006) (per curiam).**

In this case, the Supreme Court considered a claim that a settlement agreement was procured by economic duress. In an agreed divorce decree, the ex-husband agreed to pay monthly alimony in lieu of child support for a specified period. After several years, the ex-husband threatened to quit paying the monthly alimony. After speaking to a consultant and an attorney, the ex-wife suggested a final lump sum payment in lieu of the remaining monthly payments.

After the lump sum was paid, the ex-wife filed suit seeking rescission of the lump-sum agreement and for breach of the original settlement agreement, intentional infliction of emotional distress, fraud in the inducement, tortious interference, non-payment of child support, and attorney's fees. The trial court granted summary judgment for the ex-husband on all claims except the non-payment of child support and attorney's fees. Those claims were severed, and the ex-wife appealed. The court of appeals reversed the summary judgment on the ground that the ex-wife had raised a fact issue regarding her claim of economic duress.

The Supreme Court noted that the ex-wife had time to consult an accountant and a lawyer and that she actually suggested the lump-sum payment. As a result, the Court concluded that the ex-wife had not raised a fact issue regarding economic duress, and the Court rendered judgment for the ex-husband.

CORPORATIONS

***Willis v. Donnelly*, No. 04-0409, 2006 WL 1506258 (Tex. June 2, 2006).**

In this decision, the Supreme Court held that, under the circumstances of this case, shareholders in a closely held corporation were not liable to an individual who agreed to a contractual business arrangement with the corporations. The Court reached other issues as well and reversed in part and affirmed in part, remanding the case to the trial court for further proceedings.

Michael Willis decided to open a high-end spa in Houston. Richard Hite was hired as a consultant, with whom Willis formed two corporations to

carry out the plan. The first was Urban Retreat of Houston, Inc. ("URH"). The second company, Willis/Hite Enterprises, Inc. ("WHE"), was incorporated as an umbrella company. URH and WHE were separate corporations, and one was not the subsidiary of the other.

Dan Donnelly ("Donnelly") was a successful hair stylist who owned a business called Hairmasters of Houston, Inc. ("Hairmasters") and who was hired by URH to manage the spa. The terms of Donnelly's compensation as well as certain stock transfers were set forth in a letter agreement "between [WHE], Richard H. Hite, Mike Willis, and [URH], and Daniel Donnelly and [Hairmasters]." A signature line at the end of the agreement was typed for "Mike Willis, Individually," but Willis crossed this signature out and did not sign or initial the agreement. Donnelly signed the agreement after Willis crossed out his name. Willis testified that he crossed his name out to make clear that he did not agree to be bound in his individual capacity.

The spa began operating, but was immediately unprofitable. To keep the business open, Willis infused approximately $2 million. Willis also asked his wife, Francie, to become involved in the spa in hopes that she could help turn it around. Donnelly and Francie did not get along.

Donnelly never received stock by virtue of the contemplated stock transfers in the letter agreement.

A dispute arose among Donnelly, Willis, WHE, and URH related to the management of the spa. Donnelly sought to hold Willis and his wife personally liable under the terms of the letter agreement.

A jury found that Willis and his wife were individually liable because they ratified the agreement. The court of appeals affirmed this finding, but reversed and remanded for a new trial on liability and damages, concluding that the jury has received an erroneous instruction on contract damages.

The Supreme Court first addressed whether the Willises were liable in their individual capacities. The Court noted that Willis was not a party to the letter agreement and incorporated two entities to shield him from such liability. Moreover, at the meeting where the agreement was signed, Willis crossed his signature off the agreement and refused to sign it. As a matter of law, the corporate shield from liability should operate in these circumstances.

The statutory exception the rule against shareholder liability in instances where the shareholder causes the corporation to be used for the purpose of perpetrating a fraud was inapplicable—the jury rejected Donnelly's fraud claim. Moreover, there was no evidence that the Willises expressly or impliedly ratified the letter agreement. The Supreme Court refused to find that a shareholder impliedly ratified the agreement by merely accepting benefits of the letter agreement. If that were the case it would contravene the statutory imperative that, absent actual fraud or an express agreement to assume personal liability, a shareholder may not be held liable for contractual obligations of the corporation. Finally, the Supreme Court rejected Donnelly's argument that Willis could be held personally liable because WHE, a party to the letter agreement, was not incorporated until *after* the letter agreement was executed. The Supreme Court held that in these circumstances, Donnelly must look to the unformed corporation for performance. The contract was made in the name of two corporations, stated that one of the corporations had not been formed, and the individual "promoter," assuming Willis can be characterized as such, struck his name from the agreement, thus indicating that he would not be held personally liable under it.

The Court next addressed whether the jury was incorrectly instructed with regard to contract damages. The trial court instructed the jury on a measure of damages that placed a value on the stock equal to the appraised value of real estate plus the previous twelve months of gross revenue, a measure more favorable to Donnelly than the

value of shared under the Termination provision of the letter agreement. The court of appeals held that the correct measure of damages was the fair market value of the stock at the time of Donnelly's termination. The Supreme Court agreed. Because the incorrect measure of damages allowed Donnelly's experts to opine, and his counsel argue, that damages should include (1) the value of real estate that URH and WHE did not own and (2) the gross revenues of URH without regard to URH's negative earnings and negative book value, this instruction probably caused the rendition of an improper judgment.

Finally, the Supreme Court concluded that there was no fiduciary relationship between Willis and Donnelly. Both were experienced businessmen who dealt at arms-length. There was no evidence that, after the agreement was signed, Donnelly and Willis developed a close personal relationship of trust and confidence that could give rise to a fiduciary relationship. The only conceivable basis for a fiduciary relationship would be a duty owed by a majority shareholder to a minority shareholder. However, Donnelly *never actually became a shareholder*.

The Supreme Court held under these limited circumstances, "where a plaintiff is suing for breach of fiduciary duty based on his purported status as a minority shareholder, but (1) no transfer of stock to the purported minority shareholder ever occurred, (2) the purported majority and minority shareholders were both experienced businessmen who had never met prior to the business arrangement at issue, (3) the two were conducting business under a written agreement that expressly required corporate entities, not the majority shareholder, to issue the stock, and (4) the two were also operating under an oral agreement to postpone the transfer of stock when the alleged breaches of fiduciary duty occurred, Texas law does not recognize the existence of a fiduciary duty."

EMINENT DOMAIN

***City of Tyler v. Beck*, 196 S.W.3d 784 (Tex. 2006) (per curiam).**

In this case, the Supreme Court addressed the statutory requirement to obtain formal service of citation on the opposing party when filing objections to the special commissioners' award. Following the special commissioners' hearing, both the City and the landowners filed objections. Although both sides mailed copies to the other, neither issued formal service of citation. Both participated in the judicial proceedings with knowledge of the other's objections. The trial court dismissed the case for want of prosecution due to the lack of service. The City appealed, but the court of appeals affirmed, holding that conversion of the eminent domain process from an administrative one to a judicial one turned on service of citation.

The Supreme Court reversed, holding that the key is not service of citation, but filing of objections. The general rule is that the trial court may dismiss the case for want of prosecution if the objecting party does not secure service of citation. But the Court recognized that the purpose of the citation requirement is to allow the trial court to obtain jurisdiction over the party served. Because the landowners filed their own objections, they submitted themselves to the jurisdiction of the trial court. The City mailed their objections to the landowners, and because the landowners were before the court, mailing was sufficient. Significantly, the landowners did not claim that they did not have notice of the City's objections.

The Court also held that the City's post-judgment motions were sufficient to extend the deadline for perfecting the City's appeal even though they were not filed by the City's attorney-in-charge.

ENVIRONMENTAL LAW

***City of Marshall v. City of Uncertain*, No. 03-1111, 2006 WL 1565012 (Tex. June 9, 2006).**

In this case, the Supreme Court addressed the availability of a contested-case hearing for amendments to a certificate of adjudication for water use under section 11.122(b) of the Texas Water Code. The City of Marshall received a certificate of adjudication in 1986 affirming its right to divert and use up to 16,000 acre-feet of water from Cypress Creek for municipal use. Municipal use required that the water the City of Marshall supplied had to be potable.

In 2001, the City of Marshall applied to change the purpose of use in the certificate so that it could supply the water for industrial use. The City did not seek to change the amount of water or the rate of diversion. The City of Uncertain and several others filed requests for notice and hearing on the application. The Commission on Environmental Quality determined that section 11.122(b) of the Water Code mandated approval of the amendment without a contested case hearing.

The Supreme Court first considered the history of water law in Texas. The Court noted that section 11.122(b) was adopted as part of Senate Bill 1, "a landmark in natural-resource legislation" that was designed to address long-term water supply issues.

After analyzing the history of water law in Texas, the purposes of Senate Bill 1, and the language of section 11.122(b), the Supreme Court concluded that section 11.122(b) did not mandate approval of the City of Marshall's amendment without assessment of additional criteria imposed by the Water Code and the Commission's rules. However, the Court also recognized that it could be possible for the Commission to determine from the application that the additional criteria would not be implicated by the amendment. The Court therefore remanded the case to the Commission for further consideration.

EXPERT WITNESSES

***Larson v. Downing*, 197 S.W.3d 303 (Tex. 2006) (per curiam).**

In a per curiam opinion, the Supreme Court affirmed the trial court's exclusion of the plaintiff's expert in a medical malpractice claim on the ground that the plaintiff's expert was too far removed from surgical practice and teaching to render an expert opinion in the matter.

Defendant Dr. Mark Larson performed surgery on plaintiff Mary Martha Downing to repair a left orbital blow-out fracture which had entrapped muscle in her left eye. Downing brought suit alleging that because of his negligence she required a subsequent surgery to release the entrapped muscle. Downing retained Dr. Martin Bell as her expert.

Larson challenged Bell's expert qualifications, contending that since it had been fifteen years since he had treated an orbital blow-out fracture, and that while he had used a similar implant to the titanium mesh implant utilized by Dr. Larson, he was not qualified to render an expert opinion under TEX. CIV. PRAC. & REM. CODE § 74.401(c)(2).

Downing responded that Bell had been a practicing physician since 1975, was licensed in four states and one foreign country, was board certified in surgery, plastic and reconstructive surgery, had been chief of plastic surgery at two medical centers, that he had been an assistant clinical professor in plastic surgery at Tulane University and had taught there until about year before Downing's surgery, and that he continued to practice in Arizona.

The trial court excluded Dr. Bell's testimony. A divided court of appeals reversed, holding that a qualified expert witness was not required to have performed the *same* surgery as the defendant, and that the training of residents or students at an accredited school of medicine that Bell had done for years was specifically included in the statutory

definition of "practicing medicine." The court of appeals also observed that there was no evidence that any differences in the two types of implants mattered.

The Supreme Court stated that the exclusion of Dr. Bell's testimony in this case was a "close call." Close calls, the Court explained, must go to the trial court. The trial court was required in this instance to determine whether Bell was "actively practicing medicine in rendering medical services relevant to the claim." When the claim arose, it had been at least eleven years since Bell had performed the surgery at issue, and there was no evidence that he had ever taught the procedure. Accordingly, the trial court was within its discretion in excluding Dr. Bell's testimony.

***Jernigan v. Langley,* 195 S.W.3d 91 (Tex. 2006) (per curiam).**

In this case, the plaintiff, Marie Langley, brought suit against several defendants, including Dr. Floyd Jernigan, related to the treatment of her deceased husband in 1996.

After filing her petition in 1998, the plaintiff timely filed two expert reports. Almost two years later, in 2000, Jernigan moved to dismiss the plaintiff's suit for failure to provide an expert report in compliance with § 13.01 of the MLIIA.

At the hearing on the defendant's motion to dismiss, the plaintiff argued that Jernigan waived his statutory right to seek dismissal because he had waited more than 600 days to challenge the reports. The plaintiff also moved for an extension of time to allow the late filing of a third expert report.

The trial court denied the plaintiff's motion for an extension of time and severed and dismissed the plaintiff's claims against Dr. Jernigan. Ultimately, the Waco Court of Appeals reversed the trial court's dismissal of the plaintiff's claims against Dr. Jernigan, concluding that the plaintiff's reports were adequate under § 13.01 and alternatively, that the trial court abused its discretion in refusing to grant the plaintiff a 30-day grace period under § 13.01(g) because the plaintiff's failure to comply was not intentional or the result of conscious indifference. The Supreme Court reversed the court of appeals and affirmed the trial court's rulings.

Under § 13.01(d)(1) of the MLIIA, the plaintiff's expert report must contain a "fair summary of the expert's opinions as of the date of the report regarding applicable standards of care, the manner in which the care was rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm or damages claimed." If the claimant failed to file an adequate report timely, the defendant may move to dismiss the claims. The trial must grant the dismissal if the report does not constitute a good faith attempt to comply with § 13.01. In order to constitute a good faith effort, the expert report must "discuss the standard of care, breach, and causation with sufficient specificity to inform the defendant of the conduct the plaintiff has called into question and to provide a basis for the trial court to conclude that the claims have merit."

The Supreme Court concluded that because one of the expert reports failed to even mention Dr. Jernigan and the other expert report only fleetingly mentioned Dr. Jernigan, the plaintiff failed to describe in any detail what Dr. Jernigan allegedly did wrong, much less how his alleged error(s) proximately caused the death. Because at least one essential element was missing from the expert reports, the plaintiff did not attempt to comply in good faith with § 13.01. Accordingly, the trial court had no discretion but to conclude that the plaintiff's claims against Dr. Jernigan must be dismissed. The Supreme Court did not discuss whether the trial court's failure to grant a 30-day grace period to comply with § 13.01 was error.

***Cooper Tire & Rubber Co. v. Mendez*, No. 04-1039, 2006 WL 1652234 (Tex. June 16, 2006).**

In this case, the Supreme Court addressed the sufficiency of expert testimony to support a products liability claim against a tire manufacturer.

The plaintiffs asserted that a defective tire caused a rollover accident when the tread separated from the rest of the tire. They offered three expert witnesses who opined that the tire failed because the "skim stock" (the rubber compound that coats the steel belts in a steel-belted radial) was contaminated with hydrocarbon wax. The Court examined each of the opinions and determined that they were insufficient.

For one expert, the Court applied the *Robinson* factors and determined that the opinion was not sufficiently reliable. The Court noted that there were no scientific studies or peer-reviewed articles analyzing the expert's approach. His opinion was also largely based on his subjective analysis and not on qualitative calculations. There was also no evidence regarding the error rate, whether the technique was generally accepted, or non-judicial use. The Court also noted that the expert postulated that the inner surfaces of the tire had been contaminated with wax, but there was no foundational proof for such contamination. The expert also relied on a RAPRA Technology Ltd. report, although he conceded that he didn't understand all of the science in the report. The report noted the presence of hydrocarbon wax, but did not opine regarding the source. The expert postulated that the wax could have come from the cutting equipment, but had no support for that conclusion. Finally, there was no proof that the presence of hydrocarbon wax could cause lack of adhesion as the expert hypothesized.

The second expert testified primarily that the tread separation was not caused by a nail puncture or under-inflation. The Court held that an opinion about what did *not* cause the tread separation could not support an opinion that the tire was defective. Although the expert did mention lack of bonding, he had no support for his conclusions.

The third expert had a degree in chemistry, but no specific experience with tire chemistry. He testified based on the RAPRA report that the presence of wax was the result of contamination, even though the report itself stated that RAPRA had not been able to determine whether the wax was the result of contamination or migration from other parts of the tire. The Court concluded that this expert did not have sufficient expertise, training, or experience in tire chemistry.

Because the expert testimony should not have been admitted, the Court concluded that there was no evidence to support the plaintiffs' contention that the accident was the result of a product defect. The Court therefore reversed the trial court's judgment and rendered judgment for Cooper Tire and Rubber.

INSURANCE

***GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305 (Tex. 2006).**

In this appeal, the Supreme Court declined to create or adopt an exception to the "eight corners rule." The eight corners rule provides that when an insured is sued by a third party, the liability insurer is to determine its duty to defend solely from terms of the policy and the pleadings of the third-party claimant. Resort to evidence outside the four corners of these two documents is generally prohibited.

The plaintiff, Jane Doe, alleged that Patrick Evans sexually harassed her between 1992 and 1994. Fielder Road Baptist Church's insurance policy with GuideOne Elite Insurance Company provided coverage for sexual misconduct for the time period between March 31, 1993 and 1994.

Discovery between GuideOne and Fielder Road revealed that Patrick Evans ceased working at Fielder Road on December 15, 1992, several months before the insurance policy took effect.

The trial court considered this evidence and granted judgment that GuideOne had no duty to defend. The court of appeals reversed, concluding that the trial court erred in considering extrinsic evidence to defeat GuideOne's duty to defend.

The Supreme Court has never recognized an exception to the eight corners rule, but surveyed other jurisdictions that have. Generally, those courts have drawn a narrow exception, permitting the use of extrinsic evidence only when relevant to an independent and discrete coverage issue, not touching on the merits of the underlying third-party claim. GuideOne proposed an exception for "mixed" or "overlapping" extrinsic evidence that touches on *both* the coverage and the merits of the underlying case. The Supreme Court rejected this argument, concluding that such an approach would pose a significant risk of undermining the insured's ability to defend itself in the underlying litigation.

The Court likewise refused to accept a "true facts" exception to the eight corners rule. GuideOne contended that it should not have to defend because it *knows* that Evans was not in fact an employee during the policy's period. The duty to defend does not, however, turn on the truth or falsity of the plaintiff's allegations. The Court dismissed concerns of collusive pleading.

Regardless of the truthfulness of the plaintiff's pleadings, because it alleged facts that, if true, would implicate coverage, GuideOne had a duty to defend (but not necessarily indemnify) Fielder Road in the lawsuit. Accordingly, the Supreme Court affirmed the court of appeals' holding.

Justice Hecht filed a concurring opinion in which Justices Wainwright, Brister and Willet joined. In this opinion, Justice Hecht wrote that while he concurred with the Court's holding, he did not join in the Court's discussion of the various exceptions to the eight corners rule since that discussion is unnecessary to the resolution of the appeal.

***Fiess v. State Farm Lloyds*, Cause No. 04-1104, 2006 WL 2505995, 2006 Tex. LEXIS 806, 49 Tex. Sup Ct. J. 996 (August 31, 2006).**

In answering a certified question from the Fifth Circuit, the Court construes whether an "ensuing loss" provision of an HO-B insurance policy covers mold damage. The Court held that it does not.

The Fifth Circuit certified the following question: Does the ensuing loss provision contained in Section I-Exclusions, part 1(f) of the Homeowners Form B ("HO-B") insurance policy as prescribed by the Texas Department of Insurance effective July 8, 1992 (Revised January 1, 1996), when read in conjunction with the remainder of the policy, provide coverage for mold contamination caused by water damage that is otherwise covered by the policy?

This policy provided that it does not cover loss caused by mold, but continues immediately thereafter, stating that it does "cover ensuing loss caused by . . . water damage . . . if the loss would otherwise be covered under this policy."

Applying the reasoning from the San Antonio Court of Appeals' decision in *Lambros v. Standard Fire Insurance Co.*, in which the Supreme Court refused application for writ of error, the Court held that the ensuing-loss clause applies only to losses caused by an intervening cause (like water damage) that in turn follow from a listed exclusion. If the Court were to conclude the mold damage was covered, it would require the reversal of *Lambros*. The Court held firm to stare decisis, particularly since the insurance regulators did not make any policy changes in reaction to the *Lambros* decision.

Moreover, the fact that the policy includes coverage for losses caused by water damage is not helpful: "if every leak and drip is 'water damage,' then it is hard to imagine any mold, ruse or rot excluded by this policy, and the mold exclusion would be practically meaningless." Utilizing the traditional canon of construction *nonscitur a*

sociis, since "water damage" is proximally preceded and followed by "building collapse" and "glass breakage", surely "water damage" refers to an event more substantial than "every tiny water leak or seep."

The Court further noted that part 1(f) limits the ensuing-loss clause whenever it conflicts with anything else in the policy. The only reasonable interpretation of this proviso is that the second sentence (covering ensuing losses) must yield to the first (excluding mold), not the other way around.

Finally, the majority concluded that its holding here conforms to the interpretations of similar ensuring loss clause by courts in most other American jurisdictions.

Justice Medina filed a dissenting opinion in which Justice O'Neill joined. Justice Medina would hold that the ensuing-loss clause may also be read as an exception to the excluded perils it modifies, and therefore is ambiguous in that it is susceptible to more than one reasonable interpretation. Ambiguities must be construed in favor of the insured, and therefore he would answer the certified question "yes."

Since more than one reasonable interpretation exists, extrinsic evidence may be considered. In this case, the dissenters point to the 1990 revisions which modified the ensuing-loss provisions of the HO-B policy. These revisions were no intended to restrict or change the scope of coverage but merely to simply the policy.

Before 1990, the dissenters contend it was apparent that the "otherwise covered under this policy" language of the ensuing-loss provision referred to provisions of the policy other than those it identified as applicable. Because no change in coverage was intended by the revisions, that same analysis should hold true today. Accordingly, it should follow that "the Texas Standard HO-B policy provides coverage for losses, including mold, caused by water damage ensuing from any of the perils listed in paragraphs 1.f, 1.g, or 1.h, so long as such damage is not excluded by some other provision of the policy besides these three paragraphs."

JURY CHARGE

***Dew v. Crown Derrick Erectors, Inc.*, No. 03-1128, 2006 WL 1792216 (Tex. June 30, 2006).**

This appeal concerned the refusal by the trial court to submit an inferential rebuttal instruction on "new and independent cause."

Paul Dew fell to his death through an opening in an oil derrick platform. The appellee, Crown Derrick Erectors, Inc. was hired to erect an oil derrick owned by Rowan Companies, Inc. and designed by Woolslayer Companies, Inc., both co-defendants at trial. The jury rendered a verdict in the plaintiff's favor against all three defendants. Only Crown Derrick appealed, complaining among other things that the trial court erred in refusing to submit a jury instruction on new and independent cause.

During construction, Crown Derrick discovered that it did not have some of the necessary parts for installing safety gates around one of the ladder openings in the platform. Instead of acquiring the necessary parts, Crown Derrick placed two ropes around the otherwise unprotected and obviously dangerous opening. Crown Derrick then left the jobsite.

One month later, Crown Derrick returned to the jobsite to complete construction. Crown Derrick still did not have the necessary parts to install the safety gate.

Sometime between when Crown Derrick installed the double-rope barrier and Paul Dew died, an electrical junction box may have been used to cover the opening, and still later, a single rope was used to guard the opening.

The day after Crown Derrick returned to the jobsite in September, Paul Dew fell through the opening to his death. No one actually witnessed

the accident and a dispute existed whether even the rope barricade was in place when Mr. Dew fell.

The court of appeals concluded that the inferential rebuttal instruction was needed because a fact issue existed as to whether any intervening act occurred that was an unforeseeable new and independent cause.

A new and independent cause is one that intervenes between the original wrong and the final injury such that the injury is attributed to the new and independent cause rather than the first and more remote cause. In arguing for this instruction, the parties disagreed whether the evidence supported its submission. Specifically, they disagreed about whether Rowan's or someone else's act in altering or removing the ropes was foreseeable and constituted an intervening act that should supersede Crown Derrick's own negligence.

"Generally speaking, if the intervening force was foreseeable at the time of the defendant's negligence, the force is considered to the a 'concurring cause' of the plaintiff's injuries," and "the defendant remains liable for the original negligence." SALES AND EDGAR § 1.04[4]b] at 1-55. On the other hand, if the intervening act is extraordinary and not foreseeable in the normal course of events, it may well be a superseding act. Generally, superseding causes are not only unforeseeable, but their consequences are unexpected.

Here, the Supreme Court explained, it was foreseeable that the double rope barricade could be easily altered or removed and this risk constituted a foreseeable intervening force within the scope of the original risk. Accordingly, Crown Derrick was not entitled to the instruction.

Justice Brister filed a concurring opinion, which Justice Willett joined. In his concurrence, Justice Brister argued that Crown Derrick's theory – that the accident was someone else's fault – was adequately presented in the comparative negligence portion of the charge.

Justice Johnson filed a dissenting opinion, in which Justices Hecht and Green joined. In their dissent, these justices argued that the removal of the barriers without replacement with a comparable barrier was not foreseeable, since OSHA regulations, industry safety policies and Rowan's own internal safety rules require that all openings be protected in some manner to prevent personnel from falling through openings. There was evidence that Rowan's supervisors were aware of the rope barrier, which would support inferences that Rowan's supervisors were aware of the safety rules and inspected the rig to enforce them. Moreover, the dissenters argued, the removal of the double rope barrier was not a continuing cause of Dew's fall.

NEGLIGENCE

***Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788 (Tex. 2006).**

In this case, the Supreme Court addressed an employer's liability for the acts of an independent contractor. Ramirez alleged that a security guard at a club owned by Fifth Club, Inc. slammed his head against a concrete wall. He sued Fifth Club and the security guard for damages. He alleged that the club could be liable for the acts of the independent contractor because it retained control over the details of the independent contractor's work. He also asserted that under the "personal character exception," the club assumed a nondelegable duty by contracting for security services to protect its property.

The Court, in an opinion by Justice Green, noted that employers can direct the general aspects of when and where an independent contractor performs the work without incurring liability for the contractor's actions. But the employer may be liable when the employer controls the details or methods of the contractor's work to such an extent that the contractor cannot perform the work as he chooses.

The Court concluded that the club did not control the contractor's conduct to the extent that it could be vicariously liable. The direction to remove Ramirez from the premises left the choice of method to the contractor.

The Court then addressed the "personal character exception" The Court noted that several states had adopted this exception, and discussed the reasons for the adoption. But the Court was not persuaded by the reasons relied on by other states to adopt the exception. Instead, the Court held that an employer's liability is governed by the control exception, by the nondelegable exception for inherently dangerous activities, and statutorily-imposed duties. Under the facts of this case, none of these exceptions or duties imposed liability on the club for the actions of the contractor.

The Court also concluded that there was no evidence to support Ramirez's claim of negligent hiring.

Finally, the Court addressed the contractor's claim that there was insufficient evidence to support the jury's award of future mental anguish damages. The Court noted that Ramirez and his wife testified that he continued to be depressed, humiliated, non-communicative, unable to sleep, and angry. Because these symptoms were the result of a physical injury, the Court concluded that there was sufficient evidence to support the award of mental anguish damages.

Justice Brister filed a concurring opinion (joined by Chief Justice Jefferson) in which he gave additional reasons for refusing to adopt the blanket "personal character exception." He noted five additional reasons: (1) existing rules already adequately protected public safety; (2) the boundaries of the proposed exception would be too unclear; (3) a blanket rule overlooks the many different circumstances in which security services are retained; (4) police officers have certain duties that no private employer can control; and (5) there are reasons other than limited liability for hiring independent contractors which the blanket rule fails to account for.

Justice Willett (joined by Justice Hecht, Justice Wainwright, and Justice Johnson) dissented in part to the portion of the majority opinion affirming the future mental anguish damages. The dissent noted that Ramirez testified that he didn't know if the incident would affect him in the future. Justice Willett concluded that the evidence was insufficient to establish a high degree future mental pain and distress amounting to more than mere worry, anxiety, vexation, embarrassment, or anger. Therefore, he would have reversed the award of future mental anguish damages.

***Wilhelm v. Flores*, 195 S.W.3d 96 (Tex. 2006) (per curiam).**

The Supreme Court held in this case that a seller of hived bees did not owe a duty to warn a commercial buyer's employees or agents of the danger of bee stings or owe a duty to protect them from being stung.

Curtis Wilhelm decided to sell several bee hives to John Black. Black inspected the hives and returned the next day with two men, Alejandro Mercado and Santos Flores. Mercado was Black's employee and Flores was recruited for the job. Black knew the danger of allergic reactions to bee stings, and provided protective suits, hats, veils and gloves for himself and his men. While Wilhelm was present when the hives were being loaded for transport, there was no evidence that he controlled Black's work, his men or had the right to do so.

After loading several hives, Flores walked away from the area and disappeared into some brush to presumably smoke or relieve himself. When he emerged several minutes later, he complained of being stung. Several minutes later he suffered an allergic reaction and died.

The court of appeals held that Wilhelm had a duty to warn Flores of the danger of bee stings,

including the danger of an allergic reaction. The Supreme Court disagreed.

Even if Wilhelm had hired Black as an independent contractor to move the hives, he would not have owed a duty to Flores because Black controlled Flores. Moreover, the Supreme Court concluded that the danger of a bee sting was obvious.

In this case, Black was merely a buyer of bees; he was not Wilhem's independent contractor, and Wilhelm therefore owed no greater duty to Flores than if Black had been an independent contractor.

***Loram Maintenance of Way, Inc. v. Ianni*, No. 04-0666, 2006 WL 1791692 (Tex. June 30, 2006).**

In this appeal, the Supreme Court found that an employer owed no duty to the plaintiff, an El Paso police officer, for injuries he sustained from Loram's off-duty employee.

Roger Tingle refurbished railroad tracks for Loram, a job requiring extensive travel. Loram employees would often travel with their families, staying in hotels paid for by Loram.

Tingle began using methamphetamines on and off the job for ten months before the accident that led to this lawsuit. There was evidence that Tingle's supervisor and co-workers used methamphetamines, and that Tingle's supervisor had given Tingle time off to purchase more. Tingle became moody and mentally unstable due to his drug use, and in the weeks and days leading to the incident with plaintiff David Ianni, Tingle was seen using the drug at work and had threatened one of his wife's friends with a knife. These incidents were reported to Loram management.

On the day of the incident, Tingle reportedly spoke of attacking his wife. After work, Tingle returned to the motel, paid for by Loram, where his wife was staying. Tingle and his wife got into an argument, during which Tingle forced his wife into a car. When Tingle threatened his wife with a gun, she jumped from the car. This was seen by plaintiff, who intervened. While intervening Ianni was shot by Tingle, seriously injuring him.

Ianni sued Loram. A jury found in favor of Ianni and awarded damages. The court of appeals affirmed the jury's verdict in Ianni's favor, finding that Loram owed Ianni a duty because of its negligent exercise of control over Tingle while he was incapacitated.

The Supreme Court noted that an employer's mere knowledge that an employee is intoxicated or incapacitated is not enough for a duty to arise. Instead, the employer must affirmatively exercise control over the incapacitated employee. Once affirmative action has been taken for the benefit of another, the employer has a duty to act with reasonable care, even if the employer initially had no duty to act.

Here, there was no evidence that Loram took any affirmative action which would give rise to a duty. Rather, Loram employees merely knew that Tingle was agitated when he returned to the motel. Mere knowledge of an impaired condition is not sufficient to impose a duty. Accordingly, the Texas Supreme Court reversed the court of appeals' judgment.

Justice O'Neill filed a concurring opinion in which she admonished the conduct of Loram in tolerating, and sometimes encouraging, methamphetamine use among employees.

***LMB, Ltd. v. Moreno*, No. 05-0764, 2006 WL 2506030 (Tex. August 31, 2006) (per curiam).**

In this premises liability wrongful death case, the plaintiffs relied on the affidavit of a treating physician to establish that the premises owners' negligence was the cause of the decedent's death. The decedent was injured in a parking lot owned by LMB when she was struck by a car after walking out from between two vehicles. In response to LMB's no-evidence motion for summary judgment, the plaintiffs submitted an

affidavit from the decedent's treating physician that concluded that "the death . . . resulted from her weakened condition caused by the accident in question." The doctor also stated that "the conduct of [LMB] substantially caused" the injuries and death. This was the only evidence submitted by the plaintiffs regarding proximate cause.

The Supreme Court held that the doctor's affidavit was not sufficient to establish proximate cause, because it did not identify an act or omission or some premises condition that caused the accident. The affidavit did not set out any facts from which a jury could reasonably infer that LMB knew or should have known of some unreasonably dangerous condition of the premises which caused the accident. Nor did the affidavit identify any conduct by LMB that proximately caused the accident. Because there was no evidence of proximate cause, the Court rendered judgment that the plaintiffs take nothing.

OIL AND GAS

***Seagull Energy E & P, Inc. v. Eland Energy*, No. 04-0662, 2006 WL 1651684 (Tex. June 16, 2006).**

In this case, the Supreme Court considered the effect of an assignment of an oil and gas working interest on the assignor's obligations under the operating agreement.

Seagull Energy and Eland Energy owned operating interests in two oil and gas leases. Seagull Energy operated the leases under an operating agreement and Eland Energy and other lessees agreed to share the cost of operation in proportion to their respective interests. Eland Energy assigned its interests in the leases, but the new owner failed to pay Seagull for its share of operating costs. Seagull Energy sought to collect them from Eland Energy, but Eland refused because it no longer owned an interest in the leases.

The Court noted that the operating agreement did not specifically address the consequences of assignment. The Court then applied the general rule that a party who assigns its contractual rights remains liable unless expressly or impliedly released by the other party to the contract. Because Seagull had not expressly or impliedly release Eland following assignment of its interests, the Court held that Eland remained liable for operating costs.

SOVEREIGN IMMUNITY

***State v. Schumake*, No. 04-0460, 2006 WL 1716304 (Tex. June 23, 2006).**

The Supreme Court resolved a split in the courts of appeals regarding the availability of a premises defect claim against the state under the recreational use statute. The Court held that this statute does permit a premises defect claim against the State and affirmed the court of appeals.

This case arose from the death of a nine-year-old girl, Kayla Shumake, at Blanco State Park. Kayla drowned after being sucked underwater by a powerful undertow while swimming and tubing in the Blanco River. She became trapped in a man-made culvert that diverted water under a nearby park road. Only days before Kayla's death, three other park patrons had encountered the same undertow and nearly drowned due to the same conditions. These prior events were communicated to the Parks Department and to the Austin office of the Parks Department, but the state failed to make the culvert safer or warn of the danger.

Kayla's parents brought a premises liability claim against the state under the recreational use statute. The Parks Department filed a plea to the jurisdiction, arguing that the recreational use statute barred their premises defect claims by eliminating the waiver of governmental immunity provided by the Tort Claims Act for such claims. The trial court denied the plea. The court of appeals affirmed.

Ordinarily, the court of appeals' decision in an interlocutory appeal is final. However, in certain circumstances, such as when a prior decision of another court of appeals conflicts with the court's decision in the interlocutory appeal, the Supreme Court will have jurisdiction to resolve the disagreement or conflict. In this case, four Texas courts of appeals have concluded that the recreational use statute does not permit a premises defect claim against the state while three other courts of appeals have held the opposite. Accordingly, the Supreme Court found that has jurisdiction to resolve this conflict.

This appeal turned on the Supreme Court's statutory construction analysis of the recreational use statute. This statute classifies the invited recreational user of the property as a trespasser, and imposes that limited standard of care upon the landowner. The statute continues, however, by providing that the recreational user's status as a trespasser "shall not limit the liability of an owner, lessee, or occupant of real property who has been grossly negligent or has acted with malicious intent or in bad faith." § 75.002(d).

The state argued that the gross negligence standard, expressed both in the statute and as part of the limited duty of care owed to a trespasser, refers only to contemporaneous activities on the premises, and not to the conditions of the premises.

On its face, the Court noted, this statute makes no distinction between injuries caused by activities and injuries caused by conditions. In response, the state argued that even if this distinction is not express, it is implicit in the classification of the recreational user as a trespasser. The Court held that if it accepted the state's argument, the Legislature's insertion of § 75.002(d) would not have been necessary. Instead, the Court explained, when this provision is compared with the duty of care Texas courts have defined with regard to trespassers, construing them to be the same would render section (d)'s reference to gross negligence redundant.

Gross negligence has been defined by the Supreme Court and the Legislature as an act or omission involving subjective awareness of an extreme degree of risk, indicating conscious indifference to the rights, safety, or welfare of others. Because gross negligence may result from acts *or* omissions, and § 75.002(d) does not distinguish between injuries caused by conditions and activities, the Supreme Court concluded that § 75.002(d) permits a premises defect claim for gross negligence.

Justice Wainwright filed a concurring opinion in which he joined in the Court's finding that the plaintiffs' pled a claim for gross negligence and satisfied the Legislature's requirements for a limited waiver of liability; he did not concur in any broader view of the limited waiver in the recreational use statute.
Justice Brister solely dissented, stating that "no one needs to be warned that it is dangerous for a nine year old child to go tubing in a rushing river during high water." In dissenting, Justice Brister questioned whether the next time someone "almost drowns" at a beach, lake or swimming hole, must the State block swimmers in the future so it never happens again? Should the State clear the rocks from the Blanco River and post warning signs every 50 feet along the edge warning swimmers and tubers?

Justice Brister explained that the recreational use statute favors leaving nature as it is, but encouraging people to enjoy themselves in its surroundings nonetheless.

***City of Grapevine v. Sipes*, 195 S.W.3d 689 (Tex. 2006).**

In this case, the Supreme Court addressed the provision in the Texas Tort Claims act that a governmental unit retains immunity for the absence of a traffic signal unless the absence is not corrected within a reasonable time after notice. Sipes was injured in an automobile collision at an intersection controlled by a temporary stop sign. The City had decided that a traffic light should be installed at the intersection,

but had delayed the installation. Sipes contended that the City's delay in installation created an "absence" of a traffic signal that was not "corrected" within a reasonable time.

The Supreme Court noted a split among the courts of appeals regarding this provision of the Tort Claims Act. Some courts had held that "absence" refers to a sign or warning device that was in place at one time, but had been removed. Other courts had held that "absence" could also refer to a situation in which the governmental unit had decided to install a sign or device, but had not done so within a reasonable time.

The Court examined the context of the word "absence" in the Tort Claims Act. The Court noted that governmental units maintain immunity for the failure to initially install a sign or device if the failure is the result of discretionary action by the governmental unit. The Court reasoned that when the City first installs a sign or device is no less a discretionary decision than whether to install a sign or device.

The Court also noted that a traffic signal that never existed cannot serve to put a governmental unit on notice of something needing correction. The Court concluded that both removal and absence presuppose a preexisting device. Therefore, the Court held that a governmental unit can be liable for failure to correct the absence of a sign or device only when a sign or device had been previously installed.

***Reata Construction Corp. v. City of Dallas*, 197 S.W.3d 371 (Tex. 2006).**

The Court granted the City's motion for rehearing and withdrew its initial opinion in this municipal sovereign immunity case.

Reata Construction was drilling to install fiber optic cable in Dallas, and inadvertently drilled into a 30-inch water main. In the resulting suit, the City intervened and asserted claims against Reata for negligence. But the City asserted that sovereign immunity protected it from Reata's claims against the City.

Reata asserted several reasons that immunity did not protect the City: (1) the City voluntarily subjected itself to the jurisdiction of the Court; (2) the City charter and section 51.075 of the Texas Local Government Code waived sovereign immunity; (3) the City could not claim immunity for its actions in failing to identify the location of the water line prior to 1970 because water services were considered a proprietary function; and (4) if the Texas Tort Claims Act applied, Reata's claim fell within the Act's waiver of immunity.

The Court first held that in choosing to file suit for damages, the City abandoned immunity from suit for claims "germane to, connected with and properly defensive to the claims the City asserts." However, this waiver is limited to claims for damages as an offset to the City's claim for relief.

The Court then concluded that none of the claims fell within the waivers in the Texas Tort Claims Act. Although there were claims of personal injury, they were not asserted to be caused by property the government was using. Therefore, the waiver did not apply.

Based on its opinion in *Tooke v. City of Mexia*, the Court also rejected the claim that the City charter and section 51.075 of the Local Government Code waived the City's immunity.

Justice Brister (joined by Justice Hecht and Justice O'Neill) filed a concurring opinion. He discussed the history of sovereign immunity jurisprudence with a focus on whether sovereign immunity is primarily related to subject-matter jurisdiction or personal jurisdiction. He then offered five additional reasons that the majority's holding was correct.

***Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006).**

In this contract dispute, the Tookes sued the City of Mexia alleging that the city improperly terminated a brush-collection contract. The city asserted that it was protected by sovereign immunity. The Tookes responded by arguing that immunity from suit was waived by section 51.075 of the Texas Local Government Code, which provides that home-rule cities may "plead and impleaded" in state courts. This argument was premised on The Court's earlier decision in *Missouri Pacific Railroad Co. v. Brownsville Navigation District*, 453 S.W.2d 812 (Tex. 1970). In that case the Court held that the navigation district's immunity from suit was waived by a statute providing that it could "sue and be sued."

After an extensive review of the Court's decisions regarding sovereign immunity, the majority addressed the "sue and be sued language." The Court reviewed other statutes which included "sue and be sued" and other similar phrases, and noted that, frequently, the phrases were intended to grant an entity *capacity* to be involved in litigation. The Court noted that in the absence of capacity language, an entity would not be capable of appearing in court in its own name.

The Court also reviewed federal cases in which the "sue and be sued" language was construed as a waiver of immunity and federal cases in which it was not considered a waiver.

Finally, the Court noted that recent statutes in which the legislature intended to waive sovereign immunity were much more clear and direct about the waiver.

The Court concluded that because of its differing usage, it cannot be a general rule that "sue and be sued" language, by itself, operates as a waiver of immunity from suit. "Because the phrase means different things in different statutes, it cannot be said to be clear and unambiguous." Therefore, the Court overruled *Missouri Pacific.*

The Court then addressed whether, in context, the "plead and be impleaded" language in the local government code could be construed as a waiver of immunity. The Court noted that section 51.075 is a two-sentence section that "reveals nothing about an intent to waive immunity."

The Court also rejected the Tookes' other arguments that immunity was waived. First, the Court held that immunity was not waived by partial performance, because the Tookes had been paid for the work they had performed and were seeking lost profits from the cancelled contract. The Tookes also argued that their contract with the City covered a proprietary, rather than a governmental, function. The Court noted that it had never decided whether the proprietary-governmental distinction applies to contract disputes. But it did not reach that question, because the Legislature had statutorily defined "garbage and solid waste removal, collection, and disposal" as a governmental function. Finally, the Tookes argued that "sue and be sued" language in the city charter waived immunity. The Court did not reach the question of whether a city has the authority to waive its immunity, because it held that the language was not a clear and unambiguous waiver.

Finally, the Court noted that the Legislature had recently passed HB 2039 (codified at TEX. LOC. GOV'T CODE § 251.151-251.160) regarding municipal sovereign immunity. The Court interpreted this statute as a rejection of the view that "sue and be sued" and other similar language waived immunity. The statute waived municipal immunity for certain contract suits, but limits the types of damages that can be awarded.

Justice Johnson filed an opinion concurring in part and dissenting in part. He agreed with the majority that "plead and be impleaded" does not clearly waive immunity. However, he disagreed with the majority's decision to overrule *Missouri Pacific.* Justice Johnson would have held that "sue and be sued" is a waiver of immunity unless the statute also contains language retaining immunity or the context of the statute otherwise

demonstrates legislative intent to modify the "plain meaning" of "sue and be sued."

Justice O'Neill also filed a dissenting opinion. She noted that *Missouri Pacific* had stood as "solid precedent" for 36 years. Additionally, until one court of appeals raised questions about it, there was an unbroken line of cases holding that "sue and be sued" waived immunity. She also noted that the Supreme Court had previously cited "sue and be sued" and *Missouri Pacific* as examples of situations in which the legislature had waived immunity from suit. She emphasized the importance of stare decisis, even if a different interpretation seems more reasonable.

Justice O'Neill also noted she found the City's arguments about the meaning of "sue and be sued" compelling, and that, in the absence of *Missouri Pacific*, she would join the majority opinion. She also noted that the navigation district in *Missouri Pacific* had presented the same argument about the meaning of "sue and be sued," but the Court had rejected it. She also discussed that the Legislature had not amended the navigation district statute after *Missouri Pacific* to indicate a contrary intent regarding the meaning of "sue and be sued."

Finally, she rejected the majority's position that HB 2039 could support the Court's interpretation of Legislative intent. She noted that HB 2039 was specifically intended to counteract the court of appeals' opinions that had begun to hold that "sue and be sued" did not waive immunity.

***Satterfield & Pontikes Construction, Inc. v. Irving Indep. Sch. Dist.*, 197 S.W.3d 390 (Tex. 2006) (per curiam).**

The Court remanded the case to the court of appeals for further consideration in light of the Court's opinions in *Tooke v. City of Mexia* and *Reata Construction Corp. v. City of Dallas* and recent statutory changes.

***McMahon Contracting L.P. v. City of Carrollton*, 197 S.W.3d 387 (Tex. 2006) (per curiam).**

The Court remanded the case to the court of appeals for further consideration in light of the Court's opinions in *Tooke v. City of Mexia* and *Reata Construction Corp. v. City of Dallas* and recent statutory changes.

***City of Houston v. Allco, Inc.*, No. 04-0730, 2006 WL 1793296 (Tex. June 30, 2006) (per curiam).**

The Court remanded the case to the court of appeals for further consideration in light of the Court's opinions in *Tooke v. City of Mexia* and *Reata Construction Corp. v. City of Dallas* and recent statutory changes.

***City of Houston v. Jones*, 197 S.W.3d 391 (Tex. 2006) (per curiam).**

The Court remanded the case to the court of appeals for further consideration in light of the Court's opinions in *Tooke v. City of Mexia* and *Reata Construction Corp. v. City of Dallas* and recent statutory changes.

***City of Houston v. Boyer, Inc.*, 197 S.W.3d 393 (Tex. 2006) (per curiam).**

The Court remanded the case to the court of appeals for further consideration in light of the Court's opinions in *Tooke v. City of Mexia* and *Reata Construction Corp. v. City of Dallas* and recent statutory changes.

***PKG Contracting, Inc. v. City of Mesquite*, 197 S.W.3d 388 (Tex. 2006) (per curiam).**

The Court remanded the case to the court of appeals for further consideration in light of the Court's opinions in *Tooke v. City of Mexia* and *Reata Construction Corp. v. City of Dallas* and recent statutory changes.

***Columbus Indep. Sch. Dist. v. Five Oaks Acheivement Center*, 197 S.W.3d 384 (Tex. 2006) (per curiam).**

The Court remanded the case to the court of appeals for further consideration in light of the Court's opinions in *Tooke v. City of Mexia* and *Reata Construction Corp. v. City of Dallas* and recent statutory changes.

***Sisk Utilities, Inc. v. City of Greenville*, 197 S.W.3d 389 (Tex. 2006) (per curiam).**

The Court remanded the case to the court of appeals for further consideration in light of the Court's opinions in *Tooke v. City of Mexia* and *Reata Construction Corp. v. City of Dallas* and recent statutory changes.

***City of Midland v. Goerlitz*, No. 03-0185, 2006 WL 2506045 (Tex. Aug. 31, 2006) (per curiam).**

The Court remanded the case to the court of appeals for further consideration in light of the Court's opinions in *Tooke v. City of Mexia* and *Reata Construction Corp. v. City of Dallas* and recent statutory changes.

***City of Houston v. United Water Servs., Inc.*, No. 04-0547, 2006 WL 2506046 (Tex. Aug. 31, 2006) (per curiam).**

The Court remanded the case to the court of appeals for further consideration in light of the Court's opinions in *Tooke v. City of Mexia* and *Reata Construction Corp. v. City of Dallas* and recent statutory changes.

***Port Neches-Groves Indep. Sch. Dist. v. Pyramid Constructors, L.P.*, No. 05-0737, 2006 WL 2506006 (Tex. August 31, 2006) (per curiam).**

The Court remanded the case to the court of appeals for further consideration in light of the Court's opinions in *Tooke v. City of Mexia* and *Reata Construction Corp. v. City of Dallas* and recent statutory changes.

***Metropolitan Transit Auth. v. M.E.B. Engineering, Inc.*, No. 04-0757, 2006 WL 2506048 (Tex. Aug. 31, 2006) (per curiam).**

The Court remanded the case to the court of appeals for further consideration in light of the Court's opinions in *Tooke v. City of Mexia* and *Reata Construction Corp. v. City of Dallas* and recent statutory changes.

***City of Irving v. Inform Construction, Inc.*, No. 04-0984, 2006 WL 2506050 (Tex. Aug. 31, 2006) (per curiam).**

The Court remanded the case to the court of appeals for further consideration in light of the Court's opinions in *Tooke v. City of Mexia* and *Reata Construction Corp. v. City of Dallas* and recent statutory changes.

***City of Angleton v. USFilter Operating Servs., Inc.*, No. 05-0098, 2006 WL 2505986 (Tex. Aug. 31, 2006) (per curiam).**

The Court remanded the case to the court of appeals for further consideration in light of the Court's opinions in *Tooke v. City of Mexia* and *Reata Construction Corp. v. City of Dallas* and recent statutory changes.

TAX

***Cameron Appraisal Dist. v. Rourk*, 194 S.W.3d 501 (Tex. 2006) (per curiam).**

In this per curiam opinion, the Texas Supreme Court held that litigants must exhaust administrative remedies before bringing suit to set aside tax assessments of their trailers, but do not have to exhaust administrative remedies to assert constitutional complaints.

This appeal arises out of the protests filed by several taxpayers regarding the taxation of trailers. Several taxpayers pursued administrative remedies and filed timely appeals regarding the taxation of trailers while other taxpayers either did not pursue the mandatory administrative

remedies through the appraisal review board or did not timely file an appeal after doing so.

The trial court dismissed the claims by those taxpayers who did not exhaust their administrative remedies, granted summary judgment against the remaining taxpayers because their trailers were taxable as a matter of law, and refused to certify the class action. The court of appeals reversed all three rulings.

A class action cannot be used to alter statutorily mandated administrative procedures. In this case, the Legislature provided for mandatory administrative hearings before the appraisal review board as a prerequisite to appellate relief in the district court.

In reversing the trial court's rulings, the court of appeals concluded that the exhaustion requirements were inapplicable because purely legal and constitutional questions were involved. The Supreme Court disagreed.

In addition to seeking a declaration that the taxation of their trailers was unconstitutional, the litigants were also seeking to have their individual assessments set aside. While the former claim need not be brought administratively, the latter claim must.

The Supreme Court reversed the court of appeals' holding that the litigant need not exhaust their administrative remedies, but affirmed the court of appeals' reversal of the trial court's grant of summary judgment. The Supreme Court remanded to the trial court for determination of whether a class could be certified on the issue of whether the taxpayer's trailers were taxable as a matter of law as "manufactured homes" rather than "recreational vehicles," claims not requiring the exhaustion of administrative remedies.

VENUE

***In re Applied Chemical Magnesias Corp.*, No. 04-1119, 2006 WL 2505989 (Tex. Aug. 31, 2006) (orig. proceeding).**

In this case, the Supreme Court considered whether a declaratory judgment suit to determine the rights of the parties to a contract to acquire surface and mineral leases is an action involving an interest in real property thus making it subject to the mandatory venue provisions of § 15.011 of the Texas Civil Practice and Remedies Code. The Court concluded that it was and conditionally granted the writ of mandamus.

Applied Chemical Magnesias Corporation ("Applied") and Texas Architectural Aggregate, Inc. ("Aggregate") executed a letter agreement for a proposal to excavate marble from Aggregate-owned land in Culberson County. The agreement allowed Applied six months to study the feasibility of mining marble from the site, and provided an option to obtain surface and mineral leases upon proper notice to Aggregate and paying $5,000. After completing the feasibility study, Applied attempted to exercise its option. Aggregate executed the surface lease, but failed to deliver a mineral lease, complaining that Applied had not fully complied with the terms of the agreement. Despite such complaint, Aggregate permitted Applied to begin mining marble from its land.

Aggregate filed a declaratory judgment in San Saba county (where the agreement was negotiated and executed and which is the situs of Aggregate's principal place of business) seeking to clarify the rights and remedies of the parties under the agreement. Applied moved to transfer the action to Culberson County, where the land is located.

Texas Civil Practice and Remedies Code § 15.011 provides that "actions for recovery of real property or an estate or interest in real property…for recovery of damages to real property, or to quiet title to real property shall be brought in the county in which all or party of the property is located."

In holding that the declaratory judgment was subject to § 15.011, the Court explained that Aggregate was using the declaratory judgment mechanism as an indirect means of quieting title to the mineral estate in the land. In other words, this dispute is over whether Applied has a right to mine marble on Aggregate's land. If it does, Applied has a mineral lease, which involves an interest in real property. If it does not, Aggregate has a claim against Applied for damages to its property for the marble that has been removed. Both cases fall within § 15.011's mandatory venue provision.

Christian A. Garza, King & Spalding, LLP, Houston

1. *State Farm Mut. Auto. Ins. Co. v. Perkins*, No. 11-04-00259-CV, 2006 WL 1914627 (Tex. App.–Eastland July 13, 06, no pet. h.).

In this case, the Eastland Court held, as a matter of first impression, that the anti-subrogation rule did not apply to an insurer's claim for reimbursement from the liability insurance proceeds. Perkins was involved in an automobile accident, in which she and her minor children were injured. At the time of the accident, the other driver, Cooper, was driving a dump truck owned by Harold Oaks. Perkins had an auto insurance policy with State Farm. Cooper did not have auto insurance. As a result, State Farm paid $25,000 in uninsured/underinsured motorist (UM) benefits to Perkins for her injuries under the terms of the policies.

Perkins then filed a negligence suit against Cooper and Oaks for personal injury damages arising from the accident. Because Perkins was unable to obtain service on Cooper, her suit was then focused on Oaks (who also happened to have an auto insurance policy with State Farm). State Farm then intervened in the lawsuit seeking reimbursement for the UM benefits it paid to Perkins under her policy. In response, Perkins filed a motion to strike State Farm's subrogation claim, asserting that it could not proceed against its own insured, Oaks, in a subrogation action. With the agreement of Perkins and State Farm, the trial court delayed consideration of State Farm's intervention until the conclusion of the trial of Perkins's case against Oaks.

The trial court then rendered judgment for Perkins. Oaks's policy covered the judgment amount. State Farm's subrogation claim did not involve payments that State Farm had made to Perkins's minor children under the terms of Perkins's policy. The trial court ordered State Farm to pay $25,000 of the proceeds of the judgment amount into the registry of the court pending determination of State Farm's subrogation claim.

Eventually, the trial court signed an order striking State Farm's subrogation claim; the trial court did not specifically state that it had ruled on the merits of the claim, as opposed to ruling only on the procedural requirements for intervention. The trial court did state that it intended the order to represent a final order as to all matters regarding State Farm's request for subrogation against Oaks.

On appeal, State Farm argued that the trial court erred in determining that it was not entitled to subrogation or reimbursement for the benefits paid to Perkins under her UM coverage from the proceeds paid under Oaks's policy. The issue was whether the anti-subrogation rule, or the general equitable rule that an insurer has no right of subrogation against its own insured for the very same risk for which the insured was covered, was applicable. The long-standing rule is based on equity principles and public policy concerns.

Given the relevant facts, the Eastland Court held that allowing State Farm to recover subrogation or reimbursement would not lead to inequitable results. In similar circumstances, courts outside Texas have permitted the insurer to pursue a subrogation claim or a reimbursement claim. Following the reasoning from courts in Illinois and Alaska, the Eastland Court held that the anti-subrogation rule did not bar State Farm's rights to subrogation and reimbursement against its insured, Oaks.

The court thus ruled that State Farm was entitled to receive subrogation or reimbursement for the benefits it paid to Perkins under her proceeds of Oaks's liability policy. Thus, the trial court abused its discretion in striking State Farm's plea in intervention. The trial court's order striking the

plea was reversed and the case was remanded for further proceedings.

2. *Samsung Elecs. Am., Inc. v. Fed. Ins. Co.,* No. 05-04-01316-CV, 2006 WL 2391095 (Tex. App–Dallas Aug. 21, 2006, no pet. h.).

In this case, the Dallas Court held, as a matter of first impression, that alleged biological injury to human cells as a result of exposure to radio frequency was "bodily injury" within the meaning of a comprehensive general liability (CGL) policy. Samsung was named as one of many defendants in class action lawsuits seeking damages for cell phone use. All lawsuits alleged that the defendants' cell phones emit harmful radio frequency radiation that potentially causes injury to human cells when the cell phones are used without a headset.

Samsung tendered the defense of the complaints to Federal Insurance Company ("Federal"), from whom it had purchased the CGL policy. Samsung believed that the class actions alleged "bodily injury" and sought "damages because of bodily injury" under Federal's policies. Federal did not defend Samsung in one class action because the plaintiffs in that action expressly disclaimed damages for personal injury resulting from use of the cell phones. Federal sought a declaratory judgment that its CGL policy did not obligate it to defend or indemnify Samsung in any of the class actions.

In the trial court, Federal and Samsung filed cross motions for summary judgment on Federal's duty to defend and indemnify Samsung. The trial court found in favor of Federal on its motion for summary judgment. The court also granted Samsung's motion in part, holding Federal was not entitled to reimbursement of past defense costs. Samsung appealed the judgment.

On appeal, the parties did not cite, and the Dallas Court did not find, any Texas case interpreting the term "bodily injury" in a CGL policy to include or exclude alleged injury to human cells. The court first recognized that the policies define "bodily injury" as "bodily injury, sickness, disease," that occurs during the policy period. Although the policies do not further define "bodily" and "injury," the Texas Supreme Court had concluded that the term "bodily" implied a physical rather than mental injury and required an "injury to the physical structure of the human body." Since cells are part of the human body and the class actions asserted damage the cells, the court next turned to whether a claim of damage to cells is a covered claim.

The court reviewed numerous jurisdictions that interpreted comparable policy provisions and concluded that "bodily injury" includes injury at the cellular level. Federal failed to present a persuasive argument as to why injury to human cells should not constitute "bodily injury" under its CGL policy. According to the Dallas Court, adopting Federal's narrow construction that the injury must be "diagnosable, identifiable, or a discernable physical injury to the body would require [the court] to read language into the policy that was not there."

Thus, applying the eight corners rule, the Dallas Court concluded that Federal owed Samsung a duty to defend the class action complaints alleging that exposure to radio frequency radiation from the use of cell phones without a headset caused an "adverse cellular reaction" or "cellular dysfunction" that caused "biological injury" and could result in serious health conditions in the future. However, Federal did not owe a duty to defend those class actions in which the complaint did not claim "bodily injury," as defined by the CGL policy, or in which the policy expressly excluded such claims. The Dallas Court affirmed in part, reversed and rendered in part, and remanded.

3. *Stiles v. Mem'l Hermann Healthcare Sys.*, No. 01-05-00473-CV, 2006 WL 1653657 (Tex. App.–Houston [1st Dist.] June 15, 2006, no pet. h.).

In this ERISA case, a hospital employee, Stiles, brought suit against the Memorial Hermann Healthcare System ("Memorial") for alleged breach of contract and fraud after the hospital allegedly refused to pay Stiles's medical bills pursuant to a release agreement. Memorial answered Stiles's suit with a general denial and argued that the trial court lacked subject matter jurisdiction to hear Stiles's claims. Memorial then filed a notice of removal asserting that Stiles's petition stated an action to recover benefits under Memorial's Occupational Health Plan (the "Plan"), thereby triggering complete preemption under ERISA's civil enforcement provisions.

The case was removed to federal court. In Stiles's motion to remand, she contended that Memorial's breach of fraud "related to" the release agreement, distinct from any rights that she held under the Plan. The federal court remanded the case back to the trial court for lack of federal jurisdiction, stating "substantial doubt remains as to whether [Stiles's] claim does in fact fall within the preemptive scope of ERISA." On remand, Memorial moved to dismiss, again arguing lack of subject matter jurisdiction. The trial court granted Memorial's motion, concluding that Stiles's state law claims were "addressed by" and "related to" the Plan, that ERISA "completely preempted" Stiles's state law claims, and that it had no subject matter jurisdiction over the claims.

The critical question on appeal was whether the release agreement was within the precepts of the "relating to" standard for purposes of ERISA preemption. The First Court answered in the negative. Quoting the U.S. Fifth Circuit, the court stated that although "ERISA's preemptive scope may be broad . . . it does not reach claims that do not involve the administration of plans, even though the plan may be a party to the suit or the claim relies on the details of the plan." *Hook v. Morrison Milling Co*., 38 F.3d 776, 778 (5th Cir. 1994). In the instant case, the release reflected that Stiles bargained for a distinct and independent promise from Memorial to pay her medical bills in consideration of her release of any claims against Memorial arising from the incident. The court concluded that the underlying claims of breach of contract and fraud "can be divorced from its connection to the employee benefit plan." *Id*. at 783.

The court also noted that Stiles's state law claims, as pleaded, did not address areas of exclusive federal concern as she was not seeking the right to receive benefits under the terms of an ERISA plan, nor did her claims directly affect the relationship among the traditional ERISA entities. Consequently, Stiles's claims based on the breach of the release agreement did not "relate to" Memorial's ERISA-qualifying Plan so as to preempt state court jurisdiction over her claims. Accordingly, the trial court erred in dismissing Stiles's cause of action for lack of subject matter jurisdiction. The First Court reversed and remanded for further proceedings consistent with its opinion.

4. *Balawajder v. Tex. Dep't of Crim. J. Inst. Div.*, No. 01-04-00820-CV, 2006 WL 2192613 (Tex. App.–Houston [1st Dist.] July 31, 2006, no pet. h.).

This case involved a prison inmate's claim that the Texas Department of Criminal Justice (the "Department") violated his rights under the Texas Religious Freedom Restoration Act (TRFRA), which prevents a government agency from "substantially burden[ing] a person's free exercise of religion" unless the "government agency demonstrates that the application of the burden to the person . . . is in furtherance of a compelling government interest; and . . . is the least restrictive means of furthering that interest." Tex. Civ. Prac. & Rem. Code. § 110.003(a)-(b). Balawadjer, the inmate, is a follower of the Hare Krishna religion. He filed a formal request asking the Department to allow him to practice his religion, which he asserted was substantially burdened when the

Department passed a directive that imposed storage space limitations. Such limitations, according to Balawadjer, prevented him from possessing "hundreds of volumes of Hare Krishna scriptures" that were needed to practice his religion.

Balawadjer then filed a grievance with the Department, which was denied, and then an appeal of that decision, which was also denied. He subsequently filed a lawsuit pursuant to the TRFRA, contending that the directive placed a substantial burden on his free exercise of religion that was neither in furtherance of a compelling governmental interest nor the least restrictive means of furthering that interest. The Department filed a motion for summary judgment, which the trial court granted.

On appeal, the First Court reversed the grant of summary judgment for the Department. According to the court, Balawajder presented sufficient evidence to raise a fact question as to whether the directive furthered the Department's compelling interests in limiting storage space for books, preventing non-uniform treatment to prisoners, and restricting the administrative burden on chaplains. Balawadjer's evidence demonstrated that the exceptions under the directive allowed non-uniform treatment to prisoners who needed legal and educational materials and that other non-uniform treatment was given to specific inmates for various other reasons. By creating exceptions for legal and educational materials and other religious practices, the Department did not prove as a matter of law that prisoners are subject to uniform limitations on the volume of personal property they possess.

With that evidence, Balawajder had rebutted the statutory presumption, thus shifting the burden to the Department. According to the First Court, the Department did not present conclusive evidence to demonstrate compelling interests in (1) not allowing additional storage space for religious materials to the extent that it allows additional storage space for legal and educational materials, and (2) preventing the administrative burden on prison officials to determine whether inmates need additional storage space for religious materials when they are burdened with such a determination for legal and educational materials. Because fact issues remained regarding the Department's compelling interests and the least restrictive means test, reversal of the summary judgment was appropriate.

5. *Abbott v. Tex. Dep't of Mental Health & Mental Retardation*, No. 03-04-00743, 2006 WL 2504417 (Tex. App.–Austin Aug. 30, 2006, no pet. h.).

In this health law case, the Austin Court of Appeals examined the interplay between the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), the federal rules implementing HIPAA, 45 C.F.R. pts. 160 & 164 (the "Privacy Rule"), and the state Public Information Act, Tex. Gov't Code §§ 552.001-.353. A reporter requested public information from the Texas Department of Mental Health and Mental Retardation (the "Department"), seeking information under the Public Information Act for statistics regarding alleged incidents of abuse and sexual assault occurring at facilities operated by the Department. In turn, the Department requested that the Attorney General issue an opinion regarding whether releasing statistical information from individual facilities would violate HIPAA and the Privacy Rule. The Department believed that it was prohibited from disclosing the information because it is "individually identifiable health information."

Subsequently, the Attorney General issued a letter ruling stating that the information requested was not excepted from the requirements of the Public Information Act and must be released. The Department then filed suit challenging the Attorney General's opinion. The district court granted the Department's Motion for Summary Judgment, concluding that the information requested was "confidential," and therefore

exempt from disclosure under the Public Information Act.

On appeal, the Attorney General argued that the Department was required to release the information requested under the Public Information Act. The Department responded that the Public Information Act is not a statute requiring the disclosure of protected health information, and therefore, subsection 164.512(a) does not authorize the release of the information requested. Rather, the Act is a general statute dealing with public information, not protected health information.

The Austin Court of Appeals concluded that the Public Information Act is a statute requiring the disclosure of public information as described in section 164.512(a) of the Privacy Rule. In so doing, the court found that there was nothing in the language of the Privacy Rule (or HIPAA) that limits the application of subsection 164.512(a) to statutes authorizing the disclosure of specifically enumerated types of health information. The court also disagreed with the Department's contention that releasing the information under subsection 164.512(a) in response to a public information request would violate subsection 164.512(c), primarily because the two subsections provide alternative methods in which protected health information may be disclosed and apply in different contexts.

The court further determined that the confidentiality exception did not apply. According to the court, covered entities faced with a request for disclosure involving potentially protected health information must examine the information in light of HIPAA and the Privacy Rule to determined if the information is protected health information that is not subject to disclosure. Hence, if a request for protected health information is made under the Public Information Act, then the exception to non-disclosure found in section 164.512(a) or the Privacy Rule applies, and the agency must determine whether the Act compels the disclosure of whether the information is excepted from disclosure under the Act. The court deemed this construction of the statutes to properly balance the need for privacy under HIPAA and the Privacy Rule and the need for disclosure under the Public Information Act. Because the Texas Supreme Court had not ruled on this issue, the Austin Court found support from the Ohio Supreme Court.

Accordingly, the court concluded that the information requested in the case was subject to disclosure. No exception to disclosure in the Public Information Act applied to the release of statistical information regarding abuse at individual governmental facilities, and the confidentiality exception listed in section 552.101 did not apply because no law rendered the information confidential. The disclosure of the information requested complied with all relevant requirements of the Public Information Act, HIPAA, and the Privacy Rule. Therefore, the Austin Court reversed and rendered judgment for the Attorney General.

6. *Channelview Indep. Sch. Dist. v. A.R.C.I. Ltd.*, No. 01-04-00556, 2006 WL 2192574 (Tex. App.–Houston [1st Dist.] Aug. 3, 2006, no pet. h.).

In this case, the First Court of Appeals applied some of the recent supreme court decisions on governmental immunity. ARCI sued the Channelview I.S.D. for breach of a contract for repair services. Channelview subsequently filed a plea to the jurisdiction, claiming that it was immune from suit. ARCI responded that section 11.151(a) of the Texas Education Code waives Channelview's immunity from suit by authorizing it to "sue and be sued." The trial court denied the plea to the jurisdiction and Channelview appealed.

The First Court of Appeals applied the Texas Supreme Court's recent decisions in *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006), and *Satterfield & Pontikes Constr., Inc. v. Irving Indep. Sch. Dist.*, 197 S.W.3d 390 (Tex. 2006) (per curiam). In the appendix to the *Tooke* decision, the Court listed statutes employing "sue

or be sued" language, including the statute at-issue in this case, section 11.151(a). The supreme court applied the *Tooke* reasoning to *Satterfield*, a companion case also involving the same section of the Education Code. The First Court followed *Tooke* and *Satterfield* to hold that the "sue and be sued" language did not waive Channelview's immunity from suit.

On appeal, ARCI further contended that Channelview waived its immunity by accepting the benefits of the repair contract. Relying on *Tooke*, the court held that the pleadings did not raise a waiver-by-conduct exception to governmental immunity, although the court noted that while the case was pending, the Legislature enacted a limited waiver of immunity from suit for breach of contract. In light of the recently-enacted section 271.151-.160 of the Local Government Code, the First Court remanded to allow ACRI to argue in the trial court that Channelview's immunity was waived under the new statute.

S. Vance Wittie, Sedgwick, Detert, Moran & Arnold LLP, Dallas

PERSONAL JURISDICTION

The intermediate appellate courts continue to struggle with applying jurisdictional principles to diverse factual situations. Several cases involved attempts to assert specific jurisdiction over a defendant when the subject matter of the litigation was primarily in another state.

***Navasota Resources Ltd. v. Heep Petroleum Inc.*, No. 03-05-00246-CV, 2006 WL 1788221 (Tex. App.—Austin June 30, 2006, no pet.).**

The court held that the actions of an agent in negotiating an oil and gas deal in Texas served as a basis of specific jurisdiction in a case involving the deal, even though the transaction concerned leases in Montana.

***Marten v. Silva*, No. 05-05-01470-CV, 2006 WL 2373536 (Tex. App.—Dallas Aug. 17, 2006, no pet. h.).**

The court upheld the denial of the special appearance where the defendant called a Texas resident offering to sell a rare car. When the defendant reneged upon the offer, a lawsuit ensued. The court held that the initiation of contact with a Texas resident and sending requested information to Texas regarding the vehicle supplied sufficient contact to assert jurisdiction.

***Southern Stucco Inc. v. C.G. Multifamily-New Orleans L.P.*, No. 05-05-00977-CV, 2006 WL 2337742 (Tex. App.—Dallas Aug. 14 2006, no pet. h.).**

The court upheld the exercise of jurisdiction over a Louisiana stucco subcontractor sued by a Texas contractor in connection with a project in Louisiana. The court found that contracting with a Texas resident, submission of pay applications, invoices, and multiple communications with the Texas contractor provided a sufficient basis for the exercise of specific jurisdiction.

***Bergenholtz v. Cannata*, 200 S.W.3d 287 (Tex. App.—Dallas 2006, no pet. h.).**

In this case, however, the court upheld the granting of a special appearance on behalf of non-resident attorneys who represented a Texas resident and related entities in litigation in California. The actions of sending advice to the Texas client, along with communications and invoices, did not amount to purposeful availment of the Texas forum. It is not immediately apparent whether *Bergenholtz* can be reconciled with *Navasota Resources* and *Southern Stucco*. In each case the work to be performed was in another state, but required significant communications with a party in Texas.

***Doe v. Roberts*, 198 S.W.3d 466 (Tex. App.—Dallas 2006, no pet. h.).**

This case involved the exercise of general jurisdiction over a priest accused of sexual misconduct. The priest had been ordained in the Dallas Diocese and had remained nominally subject to that diocese even though most of the priest's work was in Missouri and the incident giving rise to the lawsuit occurred there. The court found that the long-term relationship with the Dallas Diocese, though rather sporadic in nature, was sufficiently continuous and systematic to support general jurisdiction.

***CNOOC Southeast Asia Limited v. Paladin Resources (Sunda) Ltd.*, No. 05-05-01256-CV, 2006 WL 2257777 (Tex. App.—Dallas Aug. 8, 2006, no pet. h.).**

The court held that a defendant had waived a challenge to general jurisdiction by entering into a contract with a forum selection clause providing for Texas jurisdiction. The forum selection clause could be applied even where strong evidence

indicated that Texas would be an inconvenient forum for a dispute between the parties, which were all located in Asia. The court reasoned that the parties might well have considered the inconvenience of the forum when they selected it in their contract.

***Niehaus v. Cedar Bridge, Inc.*, No. 03-05-0334-CV, 2006 WL 903732 (Tex. App.—Austin May 5, 2006, no pet.).**

The court reversed the denial of a special appearance on behalf of an executive of a California corporation that was a defendant in breach of a commercial lease litigation. Plaintiff alleged that the executive failed to generally transfer funds from the corporation, which made it unable to meet its lease obligations. None of this activity occurred in Texas. The court held that the indirect effect of the defendant's action on a Texas resident did not support jurisdiction. The court cited *Michiana Easy Livin' Country Inc. v. Holten*, 168 S.W.3d 777, 784 (Tex. 2005), for the proposition that jurisdiction must be based upon the defendant's relation to the forum state and not the plaintiff's relation to that state. Under this formulation the defendant's acts, not the effects of those acts, are the key determinant.

***Virtual Healthcare Services Ltd. v. Laborde*, 193 S.W.3d 636 (Tex. App.—Eastland 2006, no pet.).**

The court rejected the exercise of jurisdiction over the nonresident sole shareholder of a defendant corporation which had failed to pay its franchise tax. Section 171.255 of the Tax Code provides that the directors and officers of the corporation may be liable for debts of the corporation contracted after the corporation's privileges are forfeited for failure to pay the franchise tax. The court rejected the plaintiff's argument that the statute provides notice to corporate officials that they may be haled into Texas court if the corporation loses its privileges.

***Boyo v. Boyo*, 196 S.W.3d 409 (Tex. App.—Beaumont 2006, no pet.).**

The court held that a party seeking relief from a default judgment on the basis of defective service may challenge jurisdiction after setting aside the default. The court found that the filing of the restricted appeal to set aside the default judgment did not amount to a general appearance that would waive a subsequent special appearance. Nor did defendant waive its jurisdictional challenge by failing to specially appear at the trial court before taking a restricted appeal. The court relied upon the text of Rule 120(a) and its provision that a special appearance may be asserted notwithstanding Rule 123, which establishes the time period to answer after a default judgment has been set aside.

SUBJECT MATTER JURISDICTION

***Metropolitan Transit Auth. v. Jackson*, No. 01-04-01128-CV, 2006 WL 2435024 (Tex. App.—Houston [1st Dist.] Aug. 24, 2006, no pet. h.).**

This case was an appeal of an adverse decision of a Texas Workers' Compensation Commission Appeals Panel. Section 410.258 of the Labor Code requires that the court send notice to the Executive Director of the Workers' Compensation Commission 30 days prior to entering a judgment. The trial court's failure to do so in this case rendered its judgment void. Consequently, it retained plenary power over the action to enter a second judgment that complied with the notice statute.

***State v. Lueck*, No. 03-05-0051-CV, 2006 WL 2380449 (Tex. App.—Austin Aug. 18, 2006, no pet. h.).**

This case reaffirmed that the Whistleblower Act waives the state's sovereign immunity for claims arising under the statute. A plaintiff need only plead a violation of the act. The state is not entitled to an evidentiary hearing to pre-try the merits of the case in the context of a challenge to jurisdiction.

***Hirschfeld Steel Co. v. Kellogg, Brown & Root, Inc.*, No. 14-04-00504-CV, 2006 WL 2345924 (Tex. App.—Houston [14th Dist.] Aug. 15, 2006, no pet.).**

The court of appeals held that an action to declare that a warranty was void, and that the revocation of the warranty was effective, was ripe and could be adjudicated, notwithstanding the fact that the defendant had not yet made a warranty claim. The court found that there was a "real and current controversy" concerning the warranty sufficient to render the claim justiciable.

***State v. 1165 Airport Blvd. Office Bldg. Ltd.*, No. 03-05-00630-CV, 2006 WL 2309585 (Tex. App.—Austin Aug. 11, 2006, no pet.).**

The court of appeals held that the Declaratory Judgment Act did not waive the state's sovereign immunity in a case where the other party sought a declaration upholding a contract. The result of the proposed declaratory judgment could have led to a judgment that imposed liability on the state. The court of appeals did permit the litigant to pursue a declaratory judgment to void a report to the comptroller indicating that the plaintiff was indebted to the state, since that action was ostensibly defensive as to the plaintiff and did not seek to impose liability upon the state.

***Patton v. Jones*, No. 03-04-00389, 2006 WL 2082974 (Tex. App.—Austin July 28, 2006, no pet. h.).**

The court of appeals held that subject matter jurisdiction was absent in a case brought by a church's former youth minister who alleged officials at the former church had defamed him and tortiously interfered with his business relations. Under the Free Exercise Clause of the Constitution, courts are forbidden from interfering in ecclesiastical disputes. The governance of the church was inextricably intertwined with plaintiff's tort claims.

***SCI Funeral Services, Inc. v. Hijar*, No. 08-05-00182-CV, 2006 WL 2080646 (Tex. App.—El Paso July 27, 2006, no pet. h.).**

This case involved the issue of standing in a class action. The proposed class representative alleged the funeral home had violated regulations of the Federal Trade Commission and provisions of the Occupation Code requiring a funeral establishment to provide a retail price list of items and services. The court found, however, that the regulations and statute did not create a private cause of action. Plaintiff lacked standing and the court lacked jurisdiction.

VENUE

***Toliver v. Dallas-Fort Worth Hosp.*, 198 S.W.3d 444 (Tex. App.—Dallas 2006, no pet. h.).**

The court held that filing a notice of removal to federal court did not waive a venue motion under Rule 86. Defendants had removed the case to federal court before answering the lawsuit. They asserted a motion to transfer venue only after the case had been remanded. The court found that filing of the notice of removal in state court and other federal court pleadings did not violate Rule 86's due-order-of-pleadings provisions. The court also found that Rule of Civil Procedure 237(a), which establishes a 15-day deadline for answering a lawsuit after remand, did not establish a deadline for filing a motion to transfer venue. The court reasoned that Rule 237(a) did not apply where the defendant had answered the lawsuit in federal court. Even if it did, a failure to timely answer, while subjecting a party to a potential default judgment, does not in itself waive any defense.

***Gordon v. Jones*, 196 S.W.3d 376 (Tex. App.—Houston [1st Dist.] 2006, no pet.).**

This case announces a somewhat surprising rule. Defendant had filed a plea in abatement to transfer the action to a county where an earlier suit between the parties had been filed under the theory of dominant jurisdiction. The court held

that the dominant jurisdiction argument was actually a venue motion and that the due order of pleading requirements of Rule 86 applied. Since defendant had filed other pleadings prior to its plea in abatement, it was found to have waived its attempt to abate the case.

***Huey v. Huey*, No. 05-04-01452-CV, 2006 WL 2458560 (Tex. App.—Dallas Aug. 25, 2006, no pet. h.).**

This case involved a venue dispute in a suit to modify a child custody order. Section 155.201 of the Family Code provides that a court of continuing jurisdiction must transfer a motion to modify an order in a suit affecting parent-child relations to a county where the children had been residing for six months. The court of appeals declined to apply that provision to the case before it where the children had been moved to the county in violation of the court's prior order. The court of appeals stated that it is necessary for the transferee court to be a court of proper venue. It is not a proper venue when the child's residence was caused by the violation of the court's prior order.

***Highland Capital Management L.P. v. Ryder Scott Co.*, No. 01-05-00665-CV, 2006 WL 2076194 (Tex. App.—Houston [1st Dist.] July 27, 2006, no pet. h.).**

This case concerned venue in a securities fraud case. Plaintiff asserted that venue was proper in his county of residence because he had received and examined a publicly-filed document there. The court found that the mere receipt of the document, when defendant did not direct it to that county, did not satisfy the general venue provision permitting an action to be filed when a substantial part of the events giving rise to the lawsuit occurred in that county.

***Fleming v. Ahumada*, 193 S.W.3d 704 (Tex. App.—Corpus Christi 2006, no pet. h.).**

This case involved an attempt to use the venue statutes in the interest of forum-shopping. The parties had settled some litigation in Cameron County. Soon after the settlement, however, one of the parties filed a suit relating to the settlement in Bexar County. The other party filed a motion to transfer the action to Cameron County under the authority of *Mantas v. Fifth Court of Appeals*, 925 S.W.2d 656, 658 (Tex. 1996), holding that a claim to enforce a settlement agreement should be brought in the original court if possible. Plaintiff, on the other hand, relied upon section 15.012 of the Civil Practice and Remedies Code, a mandatory venue provision requiring that an action to stay a proceeding be brought in the county where the action is pending. The San Antonio Court of Appeals found that this provision was not intended to create a loophole by which a party could escape the rule of *Mantas*. Moreover, the Cameron County court had authority to protect its own jurisdiction by enjoining the pursuit of the Bexar County action.

SERVICE OF PROCESS AND DEFAULT JUDGMENT

***Mansell v. Insurance Co. of the West*, No. 14-05-00844-CV, 2006 WL 2505588 (Tex. App.—Houston [1st Dist.] Aug. 31, 2006, no pet. h.).**

The court emphasized that strict compliance with all rules regarding citation is necessary to sustain a default judgment. In that case, the citation misstated the year in which the petition was filed. This variance between the petition and citation was fatal to the judgment and appellant's restricted appeal was sustained.

***Interconnex Inc. v. Ugarov*, No. 01-05-00524-CV, 2006 WL 2506562 (Tex. App.—Houston [1st Dist.] Aug. 31, 2006, no pet. h.).**

The court held that the trial court did not err in refusing to set aside a default judgment. The corporation's registered agent admitted that he had received the citation, but could not explain where and how the suit papers were lost. Conclusory evidence that the failure to answer was not intentional was not sufficient to establish that the failure to answer was not due to conscious indifference.

***Clarendon Nat. Ins. Co. v. Thompson*, 199 S.W.3d 482 (Tex. App.—Houston [1st Dist.] 2006, no pet.).**

In this bill of review action to set aside a default judgment, Clarendon contended that it did not receive notice of the default judgment or of the subsequent order granting non-suit which made the prior order a final judgment. Thus, it did not have an opportunity to file a motion for new trial. Thompson prevailed upon a no-evidence motion for summary judgment, but the court of appeals reversed. It held that where a party is relying on official mistake to set aside the default judgment, it need not establish that it was free from negligence in failing to answer the lawsuit originally, but must show that it was not consciously indifferent. The party does have to negate its negligence in failing to file a motion for new trial. In this case, since Thompson filed a motion for summary judgment, it had the burden to establish as a matter of law that Clarendon was negligent in failing to seek a new trial or that no official mistake existed. Clarendon's proof raised a fact issue on these questions that should have defeated the summary judgment. One notable aspect of the case is the court's holding that the defendant was entitled to separate notice of the order granting a non-suit to the other defendant because it was that order that made the judgment final and triggered the time period for filing a motion for new trial.

***Bennett v. Wood County*, 200 S.W.3d 239 (Tex. App.—Tyler 2006, no pet.).**

This was a tax suit in which the county obtained a default judgment. The court of appeals set aside the judgment, however, because it was based upon an *amended* pleading that had not been served upon the defendant. The amended pleading added a claim for taxes for an additional tract of land and, because it sought a more onerous judgment, the defendant was entitled to separate citation.

DISCOVERY

***Lopez v. La Madeleine of Texas, Inc.*, No. 05-04-00847-CV, 2006 WL 2458557 (Tex. App.—Dallas Aug. 25, 2006, no pet. h.).**

This case required the court of appeals to consider the lesser of two evils. Despite a specific request for photographs and videotapes of the plaintiffs in defendant's possession, defendant failed to produce photographs and videotapes of the plaintiff undergoing his normal daily activities. When plaintiff attempted to embellish his injuries during the trial testimony, defendant was permitted to introduce the undisclosed information. The court did order the defendant to pay the amount of its last settlement offer to plaintiff as a discovery sanction. The court of appeals determined that the trial court had erred in admitting the evidence and had abused its discretion in ordering the sanction. The rules prohibit admission of evidence not produced in response to discovery requests except in limited circumstances which did not apply here. The court rejected defendant's contention that the photographs and videotapes did not constitute a surprise to plaintiff since he was obviously present at the time they were made. Moreover, the court rejected the argument that the prohibition against the use of undisclosed information did not apply where the material was offered for impeachment. Generally, the court found the plaintiff's less than candid testimony did not justify defendant's "lay behind the log" tactics. The monetary sanction, however, was improper. It bore no relation to any actual expenses incurred by plaintiff as the result of the misconduct and amounted to an arbitrary fine.

***Coates v. Ruiz*, 198 S.W.3d 863 (Tex. App.—Dallas 2006, no pet. h.).**

The court of appeals rejected the claim that the trial court had abused its discretion in refusing to order production of certain insurance communications protected by the attorney-client and work product privileges. The court held that the affidavits of personnel were sufficient to

prove that the documents were covered by the privileges in question. Attorneys may wish to review this case when facing the need to "prove up" the various privileges. The court also held that the plaintiff's general assertion of fraudulent conduct was insufficient to invoke the crime/fraud exception to the attorney-client privilege.

***Davenport v. Schable*, No. 05-05-01685-CV, 2006 WL 2244481 (Tex. App.—Dallas Aug. 7, 2006, no pet. h.).**

The court affirmed the award of "death" penalty sanctions. The court order sufficiently recited attempts to impose prior or lesser sanctions. It also adequately showed that the discovery abuses were the responsibility of the party that was sanctioned.

***In re Ben E. Keith Co. Inc.*, 198 S.W.3d 844 (Tex. App.—Fort Worth 2006, orig. proceeding).**

In this food poisoning case, several individuals brought a claim against a chili manufacturer, the distributor, and the grocer. The manufacturer and grocer brought cross-claims against the distributor. The distributor alleged that the trial court had abused its discretion in failing to order the discovery of the claim file of the adjuster for the liability insurer of the manufacturer. It theorized that, because the manufacturer had asserted a claim, the distributor was responsible for reimbursing it for settlements paid to the food poisoning victims, it had waived any privilege relating to the adjuster's file under the offensive use doctrine. The court disagreed, finding that the distributor had failed to show that the discovery of the adjuster's file was the only source of information it had relating to the reasons why the manufacturer settled the claims. The offensive use doctrine applies only where the privileged information cited is the only information available with respect to the claim.

***In re University of Texas Health Center at Tyler*, 198 S.W.3d 392 (Tex. App.—Texarkana 2006, orig. proceeding).**

This unusual mandamus action involved requests for non-party discovery under Rule 205. Claimants in an asbestos wrongful death case wished to obtain some of the decedent's lung tissue, which had been previously obtained by the Health Center. The Health Center retained such samples for research purposes. The court held that Rule 205 allows a party to obtain physical custody of tangible things, such as the tissue samples, for testing purposes. The court rejected the Health Center's contention that the requested discovery imposed an undue burden in relation to the value of the information to be received, noting that the trial court had required adequate safeguards to protect the integrity of the samples.

***In re Toyota Motor Corp.*, 191 S.W.3d 498 (Tex. App.—Waco 2006, orig. proceeding).**

This case involved the manufacturer's attempt to take the oral deposition of children who were in the car at the time of a serious accident. The trial court had quashed the notice of oral depositions based upon a psychiatrist's testimony that the children were subject to post-traumatic stress syndrome and would be harmed by the depositions. Toyota complained that the psychiatrist had not been previously disclosed as an expert witness and that if the children could be examined relating to their reaction to the accident by a psychiatrist, they could surely be deposed. The court of appeals held, however, that the prohibition against testimony by non-disclosed experts applies only at the time of trial and did not foreclose the use of the witness at a preliminary hearing. Further, it found that the trial court did not abuse its discretion and could have concluded that an adversary deposition would be harmful to the children's well-being. The court upheld the trial court's order which permitted only a deposition on written questions.

***In re Hewlett-Packard*, No. 03-06-0028-CV, 2006 WL 1295502 (Tex. App.—Austin May 12, 2006, orig. proceeding).**

This case involved an attempt by Dell to obtain the pre-suit depositions of former employees that had gone to work for Hewlett-Packard. Dell suspected these former employees of violating their confidentiality duties and sought to depose them with regard to their current employment with Hewlett-Packard. Hewlett-Packard intervened, claiming that the depositions would threaten its own trade secrets. The trial court ordered that the depositions could be taken. The court of appeals found that the trial court had abused its discretion. Dell failed to show that the benefit from the proposed depositions, which might or might not lead to the discovery of a valid claim by Dell, outweighed the substantial burden on the participants, especially where the evidence showed a strong likelihood that HP's trade secrets would have to be revealed in the course of the depositions. The court noted that it was almost impossible for a party seeking a pre-suit deposition to meet the requirements of *In re Bridgestone/Firestone*, 106 S.W.3d 730, 733 (Tex. 2003) for the discovery of trade secret information. The *Bridgestone/Firestone* test requires the party seeking the information to show that it is essential to prosecute the claim. The party seeking pre-suit discovery, however, does not even know whether it has a claim, and thus cannot show that the information is essential.

ARBITRATION

***In re Sands Bros. & Co. Ltd.*, No. 03-06-00028-CV, 2006 WL 2348951 (Tex. App.—Dallas May 12, 2006, orig. proceeding).**

This securities case involved claims against a brokerage firm whose client contracts contained an arbitration provision. The trial court had lifted the arbitration stay because the brokerage firm had lost its membership in the NASD, which was one of the organizations selected in the contract for the arbitration. The court of appeals found that the trial court had abused its discretion in lifting the stay because, even though the firm could no longer pursue NASD arbitrations without the plaintiff's written consent, the contract provided for arbitration via other organizations, such as the New York Stock Exchange.

***Kosty v. Southshore Harbour Community Ass'n, Inc.*, No. 01-04-00698-CV, 2006 WL 2042385 (Tex. App.—Houston [1st Dist.] July 20, 2006, no pet. h.).**

The court of appeals held that the trial court, in affirming an arbitration award, had no authority to modify it by adding attorneys' fees for the prevailing party. The issue of attorneys' fees was for the arbitrator only.

***In re Brookshire Bros. Ltd.*, 198 S.W.3d 381 (Tex. App.—Texarkana 2006, orig. proceeding).**

This case involved the application on an arbitration agreement in an employment setting. The underlying plaintiff was injured on the job. Some months after the injury, defendant adopted an arbitration policy and provided notice to plaintiff. The Tyler Court of Appeals held that the trial court did not abuse its discretion in denying the motion to compel arbitration. The injury had occurred before the employer announced the policy and gave notice. Nothing in the notice indicated that it was retroactive, but instead indicated that it "will apply" to claims and provided an "effective date," suggesting that prior claims were not intended to be covered. Moreover, any ambiguity in the notice was to be construed against the drafter. The court also found that applying the arbitration provision to an injury that occurred before its effective date was unconscionable since plaintiff's only option to avoid arbitration would be to quit her job, thereby losing her health and disability benefits for the injuries she sustained.

***In re Citigroup Global Market Inc.*, No. 05-05-01430-CV, 2006 WL 1753076 (Tex. App.—Dallas June 28, 2006, orig. proceeding).**

This case held that a party had waived its right to arbitrate by seeking transfer of litigation pending in federal court to multidistrict litigation. While the removal of a case to federal court does not in itself waive arbitration, defendant's argument for a centralized forum to address all similar claims unmistakably indicated an intent to litigate, rather than arbitrate.

***In re Merrill Lynch, Pierce, Fenner & Smith Inc.*, 195 S.W.3d 809 (Tex. App.—Dallas 2006, orig. proceeding).**

The court of appeals rejected an attempt to compel arbitration for claims raised by a corporation that had not signed the arbitration agreement. The corporation had been founded by two individuals who did sign the agreement. Defendant attempted to compel arbitration based upon equitable estoppel and "direct benefit" estoppel theories. The court of appeals held that the trial court had not abused its discretion in rejecting these arguments. The doctrine of equitable estoppel applies where the nonsignatory seeks to compel arbitration by a signatory party. It does not apply to an attempt by a signatory party to compel a nonparty. The doctrine of "direct benefits" estoppel applies only where the nonsignatory is attempting to derive a benefit from the contract which contains an arbitration provision. Since the corporation was not attempting to derive such a benefit, it was not estopped from contesting arbitration.

***In re Raymond James & Assoc.*, 196 S.W.3d 311 (Tex. App.—Houston [1st Dist.] 2006, orig. proceeding).**

The court of appeals granted a writ of mandamus to compel arbitration in a securities matter. The court of appeals found that underlying plaintiffs had effectively consented to arbitration by signing a New Accounts form that incorporated a Client Agreement that contained an arbitration provision, even though the Client Agreement itself was not signed and the Client Agreement was allegedly not attached to the New Accounts form. The court held that the document actually signed by plaintiffs clearly set forth the incorporation of the Client Agreement and the fact that it contained an arbitration provision. Further, it held that nonsignatory employees of Raymond James could also compel arbitration since the allegations against them involved "interdependent and concerted misconduct" with their employer.

PLEADINGS ISSUES

***Graham Land & Cattle Co. v. Independent Banker's Bank*, No. 13-05-443-CV, 2006 WL 2507448 (Tex. App.—Corpus Christi Aug. 31, 2006, no pet. h.).**

The court of appeals held that the plaintiff was not required to specially except in order to preserve a claim that a summary judgment failed to address the causes of action actually pleaded. The summary judgment must stand upon its own grounds and the non-movant's failure to object cannot overcome any deficiency.

***Emerson Elec. Co. v. American Permanent Ware Co.*, No.05-04-01266-CV, 2006 WL 2348937 (Tex. App.—Dallas Aug. 15, 2006, no pet. h.).**

The court held that the plaintiff had adequately pleaded a breach of contract claim, particularly in the absence of special exceptions. Even if the pleading was lacking, the issues of revocation or rejection (necessary to state a contract claim under the facts) had been tried by consent. The court also found that the failure to obtain a jury finding on revocation or rejection did not vitiate the contract claim, but was a "deemed" finding by the trial court that was supported by sufficient evidence.

***Bowen v. Robinson*, No. 01-05-00605-CV, 2006 WL 2192792 (Tex. App.—Houston [1st Dist.] August 3, 2006, no pet.).**

The court of appeals construed plaintiff's pleadings liberally to determine that plaintiff had successfully pleaded in the alternative. The petition could be read as supporting a claim for breach of a contract to construct a barge canal or as a breach of a partnership agreement. Moreover, plaintiff's damages pleadings, which only mentioned out-of-pocket losses, did not preclude recovery of benefit-of-the-bargain damages. The pleadings rules only required a cause of action to be stated, not the particular damages sought. Further, defendant had waived its complaint by failing to object to the jury instructions which allowed the jury to find benefit-of-the-bargain damages.

SUMMARY JUDGMENT

***AIG Life Ins. Co. v. Federated Mut. Ins. Co.*, 200 S.W.3d 280 (Tex. App.—Dallas 2006, pet. filed).**

This case illustrates the importance of careful drafting. Because the summary judgment motion did not clearly indicate whether it was brought on traditional or no-evidence grounds, the court treated it as a traditional motion for summary judgment and defendant was unable to sustain its burden of showing the absence of a triable fact issue.

***Harden v. David J. Sacks P.C.*, No. 01-01-00200-CV, 2006 WL 2567672 (Tex. App.—Houston [1st Dist.] Sept. 7, 2006, no pet. h.).**

In a suit for legal fees, the defendant client submitted an affidavit that the parties had an oral agreement to cap legal fees at $10,000, an amount he had already paid. The court of appeals found, however, that the trial court had properly determined that the affidavit was inadmissible because it attempted to contradict or vary the terms of the representation agreement, and therefore violated the parol evidence rule.

***Seidner v. Citibank (South Dakota), N.A.*, No. 14-05-01096-CV, 2006 WL 2433987 (Tex. App.—Houston [14th Dist.] Aug. 24, 2006, pet. filed).**

In this credit card debt case, debtor objected to a business record affidavit of the credit card company because the defendant did not state that the attached records were generated in the course of business or were made at or near the time of the acts or events described. The debtor failed to obtain a ruling from the court, however, and the court of appeals held that the debtor waived his complaint since the objection was a matter of form.

***Churchill v. Mayo*, No. 01-04-00787-CV, 2006 WL 2192612 (Tex. App.—Houston [1st Dist.] Aug. 3, 2006, pet. filed.).**

The court of appeals held that the trial court had erred in sustaining objections to a controverting affidavit based on a supposed lack of personal knowledge on the part of the witness. The court of appeals held that the statement that the affiant was "personally acquainted with the facts" was adequate to show personal knowledge. Further, there was no specific requirement that the affidavit state that the averments were "true and correct."

CLASS ACTIONS

***Ridgeway v. Burlington Northern Santa Fe Corp.*, No. 2-05-253-CV, 2006 WL 2440786 (Tex. App.—Fort Worth Aug. 24, 2006, no pet. h.).**

The court of appeals held that the trial court did not err in refusing to certify a class alleging that BNSF's special issue of stock in an attempt to avoid a hostile takeover had subjected shareholders to unnecessary tax liability. The trial court could have legitimately found that the individual issues predominated over the common issues in the litigation. Damages would have to be tried on an individual basis. While the need to try damages separately was not an absolute bar to a

class action, the trial court could consider how variations in damages would affect the manageability of the case as a class action. The court also rejected plaintiff's arguments that the trial court had erred in failing to certify a liability-only class since the difficult damages determination issues made it unlikely that such a class would promote judicial economy.

Did You Know?

Contributors to *The Appellate Advocate* may claim MCLE teaching/writing credit (including ethics) for the time spent researching and writing. There is no limit to the amount of time one may claim, but a cap of fifteen hours per year applies. Additional hours will roll over to the next year, up to another fifteen hours. The credit may be claimed online or by completing a paper form, which the State Bar will send upon request.

If you are interested in submitting an article for publication in *The Appellate Advocate*, please contact one of the following members of the editorial board:

D. Todd Smith
(512) 867-1625
todd@appealsplus.com

Dylan O. Drummond
(214) 939-4400
ddrummond@godwinpappas.com

James C. Ho
(214) 698-3264
JCHo@gibsondunn.com

William C. Little
(409) 835-5011
WilliamLittle@mehaffyweber.com

Ruth E. Piller
(713) 752-8350
rpiller@haysmcconn.com

Brandy M. Wingate
(956) 661-1133
bwingate@jenkens.com

O. Rey Rodriguez, Fulbright & Jaworski L.L.P., Dallas
Kendyl Hanks, Haynes and Boone, LLP, Dallas and New York

ARBITRATION

***Tittle v. Enron Corp.*, No. 05-20380, 2006 WL 2522444 (5th Cir. Sept. 1, 2006).**

In *Tittle*, employees of Enron brought a class action breach of fiduciary duty suit for actions related to the company's collapse. In response to a growing prospect of litigation over claims to fiduciary insurance proceeds, insurers intervened pursuant to Fed. R. Civ. P. 22 in order to determine the proper distribution of $85 million in insurance policy proceeds.

Defendants Lay and Skilling filed a motion to compel arbitration and to stay the insurer's interpleader action, invoking the insurance policy's arbitration clause. The arbitration clause required that any controversy or dispute "arising out of or relating to" the policy be resolved by binding arbitration.

The district court denied the motion to compel arbitration, ruling that the disagreement among insureds over entitlement to insurance proceeds was not covered by the arbitration provision. Because there was a *settlement*, there was no "controversy" or "dispute" relating to the insurance policies that would trigger the arbitration provision. The district court further held that the arbitration clause was intended to apply only to disputes between the insurers and insureds—not disputes only between different insured parties over the insurance proceeds. Because the insurers agreed to settle the claims to the full $85 million policy limit, and tendered the full amount to the court for distribution, the insurers no longer had an interest in the proceeds. Because the only remaining dispute was between competing insureds, the insurance policy's arbitration clause did not apply.

Affirming the district court's refusal to compel arbitration, the Fifth Circuit applied Texas law of contract interpretation and held that to extend the arbitration clause to disputes only between insureds would negate and render meaningless other provisions in the insurance policies. The mere fact that the disputed clause "related to" the insurance policy was not enough to overcome the intent that it apply only to disputes between both insurers and insureds. Therefore, the dispute over the insurance proceeds fell outside the scope of the insurance policy's arbitration clause.

ELEVENTH AMENDMENT SOVEREIGN IMMUNITY
***Black v. North Panola School Dist.*, No. 04-60204, 2006 WL 2381957 (5th Cir. Aug. 18, 2006).**

After prevailing in Mississippi state court on state law claims arising out of an alleged sexual assault on her child by fellow special education students, Black filed a parallel federal court lawsuit and asserted federal claims under 42 U.S.C. § 1983, the ADA, the Rehabilitation Act and Title VII. The district court granted the defendants' motion for summary judgment on *res judicata* grounds.

On appeal, Black asserted, *inter alia*, that the federal claims were not barred by *res judicata* and, in any event, could not have been asserted in state court by merit of Eleventh Amendment sovereign immunity.

The panel noted that federal courts must apply the law of the state from which the judgment emerged in order to determine the preclusive effect of a state court judgment. *Id.* at *2 (citing *Amica Mut. Ins. Co. v. Moak*, 55 F.3d 1093, 1096-97 (5th Cir. 1995)). The panel observed that, "[u]nder Mississippi law, four identities must be present before the doctrine of *res judicata* will apply: (1) identity of subject matter [substance of the suit];

(2) identity of the cause of action [transactional relatedness]; (3) identity of parties; and (4) identity of the quality or character of a person against whom a claim is made." *Id.* at *2-3 (citing *Harrison v. Chandler-Sampson Ins., Inc.*, 891 So.2d 224, 232 (Miss. 2005)). Applying these standards, the panel found that *res judicata* was properly applied to bar Mrs. Black's federal claims. *Id.* at *2 *et seq*.

Relative to Mrs. Black's assertion of Eleventh Amendment immunity as a justification for not raising the federal claims in state court, the panel wrote: "[t]o determine whether NPSD is an arm of the state entitled to Eleventh Amendment immunity, this court examines the district according to the six following factors: (1) whether the state statutes and caselaw view the agency as an arm of the state; (2) the source of the entity's funding; (3)the entity's degree of local autonomy; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has the authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use property." *Id.* at *10 (citing *United States ex. rel. Barron v. Deloitte & Touche, L.L.P.*, 381 F.3d 438, 440 (5th Cir. 2004)). Noting that school boards and districts are generally not arms of the state shielded by Eleventh Amendment immunity, the panel analyzed each of the foregoing factors and concluded that the school district here, in conformity with the general rule, was not entitled to Eleventh Amendment immunity. Concluding that Black could have asserted all her state and federal claims in the original Mississippi state court action, the panel affirmed the *res judicata* summary judgment for the defendants. *Id.* at *7-12.

ERISA PREEMPTION

***Peace v. American General Life Ins. Co.*, No. 05-20195, 2006 WL 2441408 (5th Cir. Aug. 24, 2006) (publication page references unavailable).**

In this case, a panel majority reversed a summary judgment which had held that the plaintiff employee's annuity-funded payout arrangement was an ERISA plan which preempted the employee's state law claims for breach of contract. *Id.* The majority concluded that, because the special arrangement meant to substitute for anticipated retirement benefits from a predecessor company was more in the nature of a one-time payment and did not involve continuing administrative activities by the employer, it did not constitute an ERISA plan. *Id.* (citing *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11, 16 (1987)) The majority wrote, "[t]he lack of ongoing administrative activity makes this single-premium annuity benefit akin to a one-time severance benefit . . . [t]his Court has held that one-time severance payments do not constitute an employee benefit plan under ERISA." *Id.* (citing *Wells v. General Motors Corp.*, 881 F.2d 166, 176 (5th Cir. 1989)).

Judge Owen filed a lengthy and detailed dissent and concluded, *inter alia*, that the annuity-based arrangement was an ERISA plan by merit of the administrative activities performed by the annuity company as well as the employer. Judge Owen also concluded that the employee's claims (brought in 2004) were barred by limitations because, by 1987 when the annuity was transferred to his ownership, he knew or should have known that the annuity would be insufficient to satisfy the payout promises he contended the employer had made.

ESTABLISHMENT CLAUSE

***Staley v. Harris County, Texas*, No. 04-20667, 2006 WL 2349223 (5th Cir. Aug. 15, 2006).**

In this most recent installment of the controversy concerning biblical references on government property, the Fifth Circuit affirmed the district court's holding that a monument on the grounds of the Harris County Civil Courthouse violates the Establishment Clause of the United States Constitution.

In 1953, the Star of Hope Mission, a Houston Christian charity, erected a memorial to William S. Mosher on the grounds of the county courthouse. Mosher was a prominent Houston businessman and philanthropist who had been a long-time supporter of the Star of Hope Mission. On top of the monument is a glass display case, in which an open Bible was displayed to memorialize Mosher's Christian faith. In 1995, Judge John Devine was elected on a platform of putting Christianity back into government. After taking office, Devine solicited private donations to refurbish the monument and the Bible display, and to add a red neon light outlining the Bible in the display case.

Staley, a local attorney and an atheist, filed suit in 2003 requesting a permanent injunction against Harris County requiring the removal of the Bible. She claimed that she walked past the monument when she attended court, and was offended by the perceived message that as a non-Christian she was not a full member of the Houston political community. The district court granted Staley's request.

Affirming, Justice Jolly writing for the Fifth Circuit panel held that the monument as a whole has predominantly religious purpose, and thus violates the Establishment Clause. In an extensive discussion of the United States Supreme Court's recent holdings in *McCreary County, Ky. v. ACLU of Ky.*, ___ U.S. ___, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005) and *Van Orden v. Perry*, ___ U.S. ___, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005), the Fifth Circuit noted the Supreme Court's admonition that a secular purpose must be genuine, and not a sham or secondary to a religious objective, according to an objective observer. The determination of whether the monument has the effect of endorsing religion centers around the fair understanding of the purpose of the monument as may be held by viewers, and from the perspective of an objective person "who is familiar with the history of the government's actions."

In this case, it was clear that the monument was originally intended to honor the contributions of Mosher, and that the Bible display was intended to reflect the importance of Christianity to Mosher's life. The monument stood for thirty-two years without complaint, which would have supported a finding that an objective observer would not have found the monument to be erected for a predominantly religious purpose.

But the monument's more recent history could not be ignored. Judge Devine's restoration efforts following his faith-based campaign caused the monument to "morph" into a religious symbol, which would have been noticed by the objective observer. Noting what appeared to be an "exclusively religious purpose for restoration of the monument," the Fifth Circuit noted that the refurbishment in 1995 had no relevance to the original purpose: to honor Mosher's contributions to the community. Based on these events, the reasonable and objective observer would conclude that the monument had "evolved" into a predominantly religious symbol, and thus violated the Establishment Clause.

Dissenting, Justice Smith argued that the majority "exhibits an appalling hostility to any hint of religion in public spaces." The dissent takes issue with the majority's holding that the conduct of a political official could alter the constitutionality of the monument, arguing that it reflects a misunderstanding of the Supreme Court's holdings in *McCreary* and *Van Orden*, and should be dubbed the "Principle of Devine Intervention."

FOREIGN SOVEREIGN IMMUNITIES ACT

***Af-Cap Inc. v. Republic of Congo*, Nos. 05-50290, 05-50782, 05-51168, 05-50290, 05-50782, 05-51168, 2006 WL 2424778 (5th Cir. Aug. 23, 2006).**

This case concerns a dispute over Af-Cap's (the "bank's") attempt to recover payments from the Republic of Congo on an outstanding loans made to the Congo for building a highway. After the Congo defaulted on the loan, the bank obtained a

judgment in England for amounts due. The Congo did not make payments as required by the English judgment, and thus the bank proceeded with a suit to enforce the judgment in the United States. In 2000, a New York state court entered a judgment against the Congo for over $13 million plus interest.

In 2001 the New York judgment was registered in Texas and a garnishment action was filed against the Congo in Texas state court, where the bank sought to garnish obligations certain Texas entities ("CMS Companies") owed to the Congo. The Congo was owed royalties from the CMS Companies for oil production operations in Congalese territory, but the Congo opted to take "in kind" oil payments as opposed to cash. The Congo argued that the in kind payments could not be garnished.

The Congo removed the action to federal court. The district court held that the Foreign Sovereign Immunities Act ("FSIA") prohibited garnishment of the "in kind" oil payments. The Fifth Circuit vacated, holding that the in kind payments could be garnished *if* they fell within an FSIA exception for property used by the Congo in conjunction with commercial activity in the United States. On remand, the district court held that the Congo did not use the in kind payments for commercial activity, and dissolved the writs of garnishment. In a second appeal, the Fifth Circuit vacated the district court's judgment, holding that the in kind payments had been used in commercial activity when the Congo used some of the obligations to settle a lawsuit with another U.S. entity. On further remand, the district court did not reinstate the writs of garnishment, but instead issued new writs. The court subsequently dissolved the garnishment writs against CMS Companies and entered a new turnover order against the Congo. When the Congo failed to comply with the turnover order, the district court found the Congo in contempt.

On appeal, the Fifth Circuit reconsidered jurisdiction under the FSIA given the district court's change from a garnishment against the CMS Companies to a turnover order directly against the Congo. The FSIA provides the sole basis for *in personum* jurisdiction over a foreign state: (1) where there has been waiver of immunity explicitly or implicitly, or (2) certain situations involving commercial activity. The court held that the commercial activity basis did not apply because when the district court dissolved the writ of garnishment against the CMS Companies, it lost "the original foothold for jurisdiction" because the property held by the CMS Companies—the only property previously conferring jurisdiction under the commercial activity exception—no longer could be considered. The court further found that there was no waiver of immunity because there was no agreement to arbitrate, and the relevant agreements provided for the application of English law, not the laws of the United States. Therefore, the court vacated the turnover order for lack of jurisdiction.

The court also vacated the contempt order, holding that the FSIA bars monetary sanctions. To the extent the district court inferred an intent from Congress to authorize monetary sanctions against foreign states, the court held that the district court's reasoning was in error and should not be followed in future cases.

The bank raised an additional argument on appeal concerning the "fugitive disentitlement doctrine," which provides that the willful flouting of the judicial system by a party seeking appellate relief should not be ignored. The bank argued that the Congo's refusal to comply with the turnover order should be a basis for dismissing the appeal altogether. The court rejected this argument, finding that the Congo had a valid objection to *in personum* jurisdiction, explaining its failure to comply with the turnover order pending appeal. In addition, the court noted that there are no cases applying the fugitive disentitlement doctrine against a foreign state. Therefore the court declined to dismiss the appeal.

***FG Hemisphere Associates, LLC v. Republique du Congo*, 455 F.3d 575 (5th Cir. 2006).**

In a prior and related opinion, the Fifth Circuit considered a question of first impression under the FSIA. This case considered the question of when a district court should determine the situs of entities subject to garnishment actions for the purposes of the FSIA. The court held that a district court must determine the situs at the same time it decides whether a FSIA exception to immunity applies in a garnishment proceeding. The court could not, for example, authorize garnishment of property that *was* in the United States some time before the garnishment order.

PREEMPTION – WARSAW CONVENTION

***Mbaba v. Societe Air France*, No. 05-20452, 2006 WL 2054043 (5th Cir. July 25, 2006).**

Plaintiff Mbaba sued Air France airlines in Texas state court over a dispute pertaining to excess baggage fees charged during an international flight. Mbaba asserted claims for breach of contract, violations of the Texas Deceptive Trade Practices Act and common law fraud. Air France removed the case to federal court, and following discovery the district court granted summary judgment in Air France's favor, holding that the Warsaw Convention preempted Mbaba's state law claims.

Addressing a question of first impression, the Court interpreted the language of the Warsaw Convention as amended by Montreal Protocol No. 4. The Warsaw Convention's primary purpose is to achieve uniformity of rules governing claims arising from international air travel. It expressly applies to international transportation of "persons, baggage, or goods performed by aircraft for hire." Article 24, Paragraph 1 specifically limits claims related to actions for damages related to the carriage of baggage to the procedures of the Convention.

Noting that neither the Fifth Circuit nor the Supreme Court has interpreted the Warsaw Convention since its amendment by the Montreal Protocol, the Fifth Circuit held that Mbaba's claims were preempted by the Warsaw Convention. The court rejected Mbaba's argument that his injuries were not covered by the specific list set forth in the Warsaw Convention: personal injury, lost or damaged baggage, or delay. Citing *El Al Israel Airlines, Ltd v. Tsui Yuan Tseng*, 525 U.S. 155 (1999), the court acknowledged that the Convention does not preempt claims that fall outside its scope. But the court noted that the Warsaw Convention applies to call claims resulting from the carriage of baggage, "however founded." Therefore, while claims for injuries occurring before any of the operations of embarking or disembarking are not governed by the Convention, claims pertaining to baggage fees clearly fall within the Convention's scope. Mbaba's state law fraud, DTPA and contract claims were therefore preempted and not actionable in the courts of the United States.

PRODUCT LIABILITY – AUTO

***Muth v. Ford Motor Co.*, No. 05-50431, 2006 WL 2374465 (5th Cir. Aug. 17, 2006).**

In this rollover case, Muth pleaded and tried his suit on two theories of product liability: design defect relative to the Crown Victoria's roof strength and design defect relative to its seatbelt system. After a seven-day trial, the jury returned a plaintiff verdict for nearly $9 million and the trial court rendered judgment thereon. *Id.* at *1.

On appeal, Ford contended that the trial court had erred in denying Ford's JMOL motion at the close of evidence because Muth had (1) failed to establish that the vehicle was in substantially the same condition at the time of the accident as it was at the time of manufacture (noting evidence suggesting that the windshield had been replaced) and (2) failed to establish any safer alternative design for the restraint system. The panel disagreed with the first challenge and held that "regardless of who carries the burden of proof on a substantial alteration, the supposed alteration must be relevant to the theory of defect." *Id.* at

*3. Here, "the windshield was not a relevant aspect of Muth's design defect case." *Id.* The panel wrote, "Ford cannot reinvent Muth's theory of design defect on appeal and then contend that Muth's evidence was insufficient." *Id.* The panel did agree with Ford that Muth had not presented sufficient evidence of a safer alternative design as to the restrain system noting that, "Muth does not contest this point, stating in his brief that inadequate roof strength design defect was the 'entire focus' of his case." *Id.* at *4.

Notwithstanding the trial court's error in failing to grant Ford's JMOL on the restraint system theory, the panel held that submission of both theories to the jury in a general verdict form was not harmful error. The panel noted that Muth's counsel had not raised the restraint system theory in voir dire, opening or closing and Muth's expert had not relied upon it in his conclusions. Notwithstanding the commingling of supported and unsupported liability theories, the panel found no harmful error here because "Muth presented sufficient evidence of a design defect in the roof strength and we are 'totally satisfied' or 'reasonably certain' that the jury decided in Muth's favor on that defect and that defect alone." *Id.* at *5 (citing *Braun v. Flynt*, 731 F.2d 1205 (5th Cir. 1984) (applying a harmless-error gloss onto the basic principle that a new trial is generally necessary when evidence is insufficient as to one of multiple theories jointly submitted to the jury)).

The panel also rejected Ford's challenge that the trial court had abused its discretion in disallowing certain photographic and video evidence of rollover crash tests. The evidence (which Ford sought to use with its expert) depicted general principles of rollover collisions but also tracked Ford's theory of how the accident occurred — a theory that was squarely at odds with the eye witness testimony. Noting that Ford's photographic and video evidence had not been shown to fairly depict the accident and that "the similarities between Ford's theory of the accident and the conditions of the CRIS test heighten the visual evidence's prejudicial effect . . . this is sufficient to justify the district court's exercise of discretion in limiting Ford's expert to oral testimony only." *Id.* at *7.

Finally, the panel found no abuse of discretion either in the district court's decision to chide Ford's counsel in front of the jury for referring to the excluded visual evidence during examination of Ford's expert or in the court's comment that the materials had been excluded because of the lack of sufficient similarity between the conditions depicted and the accident at issue in the lawsuit. *Id.* at *7-8. The judgment was in all things affirmed. *Id.* at *8.

PRODUCT LIABILITY – PHARMACEUTICALS

***McNeil v. Wyeth*, No. 05-10509, 2006 WL 2411547 (5th Cir. Aug. 22, 2006).**

The panel reversed a summary judgment for Wyeth, the pharmaceutical defendant, on plaintiff's failure-to-warn claims. *Id.* at *1. Over a long term, McNeil was treated for a gastric condition with Reglan, a dopamine blocker. *Id.*

While the warnings included with the drug noted a risk for McNeil's serious neurological side-effects, it did not disclose the allegedly hundred-fold increase in risk associated with long-term use — stating only that the risk was "higher" with long-term use vs. "comparatively rare" at .2% for short-term use. *Id.* at *2, 5.

Reversing the summary judgment, the panel wrote that, "[w]arning the learned intermediary of a much lower risk than the actual risk could render the warning not just misleading, but ineffective . . . [w]hen the risk described on the label is so low as to induce a doctor to undertake the risk, had he not done so if he were warned of the real risk, we cannot say that no reasonable jury could conclude that a warning was inadequate." *Id.* at *3. Noting that the evidence established that Wyeth's indication that the drug be used for no more than twelve weeks was widely disregarded and that this was known to Wyeth, the panel concluded that "a jury could infer that the warning was ineffective and

therefore inadequate." *Id.* at *4. And "because the advertised risk is negligibly low, the mere statement that the risk increases with use does not put a physician on notice that the increase in risk is of a completely different order of magnitude and class of risk. . . [t]hus, a jury could find that the risk of developing EPS from long-term use was not just higher, but that it was 'significantly' higher, and that the label was therefore misleading and inadequate." *Id.* at *5.

REMOVAL – CLASS ACTION FAIRNESS ACT

***Frazier v. Pioneer Americas LLC*, 455 F.3d 542 (5th Cir. 2006).**

This case involved a Louisiana state court personal injury class action against a Canadian entity polluter and the State of Louisiana (via its Departmnt of Environmental Quality or "DEQ") The suit was brought after an illegal amount of mercury escaped from the Canadian entity's Louisiana plant. The Canadian defendant unilaterally removed the action under CAFA, and the plaintiffs unsuccessfully moved to remand. *Id.* at 544.

On appeal, the panel noted that the plaintiffs did not challenge defendants' allegation of prima facie CAFA jurisdiction – minimal diversity and at least $5 million in controversy. *Id.* Noting "there is minimal diversity, and although the petition did not seek recovery of a specified amount, we are satisfied the petition, seeking damages for severe injuries suffered by at least 500 people and attorneys' fees, makes it 'facially apparent' that at least $5 million is in controversy, in the aggregate." *Id.* at 545 (internal footnotes omitted). Thus, the panel concluded that "[w]e need not answer which party has the burden to prove prima facie jurisdiction because that is not at issue here." *Id.*

Instead, the question before the panel was "whether either or both of two CAFA exceptions apply" – the panel observed that the district court properly placed the burden on plaintiffs to establish the exceptions. *Id.* at 546 (citing, *inter alia*, Eleventh Circuit authority to the same effect). The panel wrote, "[w]e hold that plaintiffs have the burden to show the applicability of the §§1332(d)(3)-(5) exceptions when jurisdiction turns on their application." *Id.*

As to plaintiffs' assertion of §1332(d)(5)(A), which excepts from CAFA jurisdiction "any class action in which . . . the primary defendants are States, State officials, or other governmental entities ['states'] against whom the district court may be foreclosed from ordering relief," the panel rejected application of the exception because "the plain text . . . requires that *all* primary defendants be states." *Id.* at 546 (emphasis added) (citing legislative history "which explains that the exception is not meant to create a loophole whereby plaintiffs can avoid CAFA jurisdiction by naming a state as a primary defendant in an action largely targeting non-states").

The panel also rejected the suggestion that the Eleventh Amendment would be contravened by maintaining the suit in federal court. The panel stated that where a state finds itself in federal court by merit of a removal in which it did not participate, "[s]uch a state, having taken no affirmative act, has not waived immunity and can still assert it." *Id.* at 546-47 (citation omitted).

Finally, the panel rejected the argument that the "local controversy exception" in §1332(d)(4) precluded jurisdiction. The panel noted that this section requires that at least one defendant be a citizen of the state in which the action was originally filed. Here, the only defendants were a Canadian entity and the State of Louisiana which, under long-standing law, has no citizenship for diversity purposes. *Id.* at 547. The panel affirmed the district court's order denying plaintiffs' motion to remand.

REMOVAL JURISDICTION – CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

***Certain Underwriters at Lloyd's v. Warrantech Corp.*, No. 04-11168, 2006 WL 2374459 (5th Cir. Aug. 17, 2006).**

Certain Underwriters sued Warrantech Corp. and other defendants in Texas state court for alleged frauds and wrongdoing in their administration of consumer electronics extended service plans insured by Houston General Insurance Company and, ultimately, reinsured by Certain Underwriters. *Id.* at *1. After the defendants removed the case to federal court based on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (9 U.S.C. § 201 *et seq.*), Certain Underwriters unsuccessfully moved to remand. *Id.* Thereafter, Certain Underwriters successfully moved for summary judgment on defendants' *res judicata* and collateral estoppel defenses (which had been tied to a completed reinsurance arbitration between Houston General and Certain Underwriters falling under the Convention) and also successfully moved for summary judgment on Warrantech Corp.'s state-law counterclaims. *Id.* Certain Underwriters reurged their remand requests which the trial court this time granted. *Id.* at *2 ("Finding no 'policy' reasons in support of exercising jurisdiction over this case and concluding that there were 'no other grounds for federal jurisdiction,' the district court remanded all 'unresolved claims and causes of action' to state court.") (quoting the remand order).

On appeal, a majority of the panel concluded that the law requires a "clear statement" that the remand order is based on a non-jurisdictional (or other non-28 U.S.C. §1447(c)) ground in order for the appellate court to have jurisdiction to review the remand. *Id.* at *2. While here the remand order arguably referenced potentially non-jurisdiction-based "policy" rationales for the remand, it also included more definitive language expressing a conclusion that there simply existed no basis for federal jurisdiction. *Id.* Against this backdrop, the majority concluded that the remand order failed the "clear-statement" requirement. The majority stated "we cannot say that the district court 'clearly and affirmatively' stated a non-§ 1447(c) ground for remand" and thus held it was without jurisdiction to review the remand order. *Id.* at *5-6. Relative to the summary judgments on the arbitration-based affirmative defenses, the majority concluded that these were jurisdictional inquiries, not binding on the state court and also unreviewable. *Id.* at *6. Finally, the majority concluded "that the district court, upon resolving the merits of the arbitration-related affirmative defenses, abused its discretion in continuing to exercise supplemental jurisdiction over Warrantech's state-law counterclaims." *Id.* at *6-7. The majority vacated the order dismissing Warrantech's counterclaims and dismissed the remainder of the appeal for want of jurisdiction. *Id.* at *8.

Judge Garza dissented from the majority's threshold holding that the district court's remand order was not reviewable under 28 U.S.C. §1447(d) and concluded that the case actually involved the discretionary remand of supplemental state-law claims after determination of the arbitration-related issues in conformity with the paradigm discussed in *Beiser v. Weyler*, 284 F.3d 665 (5th Cir. 2002). Judge Garza wrote that *Beiser* does not intend a remand based upon a *post facto* determination by the district court that it lacked jurisdiction *ab initio* but, rather, "a discretionary determination that its continued exercise of jurisdiction is no longer prudent after federal arbitration-related issues have been removed from the case." *Id.* at *9 (citation omitted). Concluding that the district court's remand order was not based upon a lack of federal jurisdiction from the outset, Judge Garza would have proceeded to review the remand order as well as the partial summary judgments. *Id.* at *10.

REMOVAL – STATE AS PARTY

***Louisiana v. Union Oil Co. of CA*, No. 05-30488 *et seq.*, 2006 WL 2054046 (5th Cir. July 25, 2006).**

In this certified interlocutory appeal of a district court's denial of the State of Louisiana and the Vermillion Parish School Board's motion to remand for want of diversity jurisdiction, the panel was called upon to decide whether Louisiana was a real party or merely a nominal party whose citizenship could be disregarded in the underlying suit against UNOCAL for harm to mineral-bearing public lands. *Id.* at *1.

Ordinarily, where a state is a party, "'there can be no federal jurisdiction on the basis of diversity of citizenship because a state is not a citizen for purposes of diversity jurisdiction." *Id.* at *2 (citation omitted). The panel quoted from *Acosta v. Master Maint. & Constr., Inc.*, 452 F.3d 373, 379 (5th Cir. 2006) for the premise that "[w]hether a party is [formal or] 'nominal' for removal purposes depends on whether, in the absence of the [party], the Court can enter a final judgment consistent with equity and good conscience, which would not in any way be unfair or inequitable . . ." *Id.* at *2 (internal quotations omitted). The panel also noted that "[a]n alternate articulation of the test is whether or not a named party's 'role in the law suit is that of a depositary or stakeholder.'" (citation and internal quotations omitted).

With these principles in mind, the panel concluded that the State of Louisiana was a real party in interest in the suit, the presence of which defeated jurisdiction. The panel noted that Louisiana owned the land at issue and that the School Board was statutorily empowered to bring its trespass claims on the State's behalf. *Id.* The panel also noted that "[n]ot only does Louisiana own the land, it has a continuing obligation to ensure that any monies the Vermillion Parish School Board may obtain as a result of the suit are used for school purposes." *Id.* (citation omitted).

The panel reversed and remanded to the district court with instructions to remand the entire case to state court. *Id.* at *3.

REMOVAL JURISDICTION – SUBSTITUTION OF PARTIES

***Salazar v. Allstate Texas Lloyd's, Inc.*, 455 F.3d 571 (5th Cir. 2006).**

In this homeowner's insurance case, the panel reversed the district court's denial of plaintiff Salazar's motion to remand and vacated the district court's summary judgment for the substituted out-of-state insurer. *Id.* at 575. (Salazar had sued Allstate Texas – the entity with whom he had dealt for his insurance affairs and attorney-in-fact for Allstate Illinois, the actual underwriter).

The central question presented was "whether a district court can appropriately assert removal jurisdiction by dismissing a nondiverse in-state defendant and replacing it with a diverse foreign defendant, where the nondiverse in-state defendant was the only named defendant in the action when the suit was removed." *Id.* at 573. The panel wrote, "we must decide whether a district court can create removal jurisdiction based on diversity by substituting parties" and ultimately held "[i]t cannot." *Id.*

The panel rejected the contention that Fed. R. Civ. P. 17(a) (dealing with prosecution of claims in the name of the real party in interest) could be used to substitute diverse Allstate Illinois for non-diverse Allstate Texas. *Id.* at 573. The panel noted that Rule 17(a) applies only to plaintiffs – "Every action *shall be prosecuted* in the name of the real party in interest . . . ." The panel wrote, "[b]ecause the rule does not provide a mechanism for ensuring that a defendant is a real party in interest, it cannot support the district court's action." *Id.* (emphasis added).

In the same vein, the panel rejected the notion that Rules 19 (indispensable parties) and 21 (substitution) along with fraudulent joinder

jurisprudence could somehow be combined to authorize the substitution of parties to create diversity jurisdiction. Relative to fraudulent joinder, the panel observed that "because there has never been more than one defendant in this suit, this is not a typical fraudulent joinder case." *Id.* at 574. The panel wrote, "[w]e have not established, under the rubric of fraudulent joinder, that in a single-defendant case, a court can first join a diverse foreign defendant and then perfect jurisdiction by dismissing the problematic nondiverse/in-state defendant." *Id.* The panel observed that "where an entity has not properly been made a party in state court, removal jurisdiction cannot be premised on its presence in the action." *Id.* (citing *Housing Auth. v. Millwood*, 472 F.2d 268, 272 (5th Cir. 1973)).

Finally, the panel joined the Seventh and Third Circuit Courts of Appeals in holding that "Rule 21 does not allow for substitution of parties to create jurisdiction." *Id.* at 575 (citing *Field v. Volkswagenwerck AG*, 626 F.2d 293, 306 (3d Cir. 1980) and *N. Trust Co. v. Bunge Corp.*, 899 F.2d 591, 597 (7th Cir. 1990)).

ROBINSON-PATMAN ACT

***Water Craft Management LLC v. Mercury Marine,* No. 04-31139, 2006 WL 2052285 (5th Cir. July 25, 2006).**

The panel affirmed the district court's judgment in favor of the defendant boat manufacturer in this secondary-line price discrimination case brought by a marine distributor and various dealers. The panel determined that the manufacturer's selective lower pricing to a particular gulf coast dealer was a good faith attempt to meet a competing manufacturer's prices and thus established a "meeting competition defense."

Because the appeal was from a bench trial, the panel applied the clear error standard relative to findings of fact and the *de novo* standard of review relative to legal issues. *Id.* at *2 (citing *In re Mid-South Towing Co.*, 418 F.3d 526, 531 (5th Cir. 2005)).

In affirming the district court's determination that Mercury had lowered its prices for good faith price competition reasons, the panel noted extensive evidence demonstrating price pressures from competitors, information from trade shows, boat pricing in the marketplace and the fact that Mercury was unable to secure business with the particular dealer at issue without reducing its prices. *Id.* at *4 ("The evidence suggests, and the district court found, that Mercury's decision to offer especially low prices to Travis [dealer] was driven entirely by price negotiations in which Travis . . . used its [competing manufacturer] price schedule to extract deep discounts from Mercury. Accordingly, we hold that the district court did not clearly err in finding that Mercury's price discrimination was a good faith response to [the competitor's] lower price.").

The panel rejected plaintiffs' argument that Mercury's meeting competition defense was negated by the fact that Mercury's prices, though lower, did not actually meet the competitor's prices. The panel wrote, "it is the seller's *intent to meet* a competitor's price, not the actual correspondence between prices, that triggers the meeting competition defense." *Id.* at *5 (emphasis in original) In the same vein, the panel concluded that the defense would apply "where the seller knew that its discriminatory price was not as low as its competitor's price, yet nevertheless offered that discriminatory price in a good faith response to the competition." *Id.* The panel affirmed the take nothing judgment for Mercury.

SANCTIONS

***Skidmore Energy, Inc. v. KPMG*, 455 F.3d 564 (5th Cir. 2006).**

In this appeal, the panel affirmed an award of $530,000+ for reasonable attorneys' fees and expenses as Rule 11 sanctions for the filing of what it described as a "wholly frivolous lawsuit." *Id.* at 570. Three fourths of the sanction was imposed against plaintiffs' counsel and the

remaining one-fourth jointly against the plaintiffs. *Id.* at 565-66.

A year after they had been sued in Morocco for their alleged breaches and wrongdoing relative to an oil exploration venture, plaintiffs filed suit in the Northern District of Texas addressing the same matters already being litigated in Morocco. *Id.* at 566. In their suit, plaintiffs claimed damages of $3 billion based on the Sherman Act and RICO violations, as well as numerous business torts and further alleged "*inter alia* that Defendants were involved in financing terrorist organizations, money laundering, and organized crime." *Id.* The complaint was ultimately dismissed.

Defendants moved for Rule 11 sanctions asserting that the suit lacked both legal and factual evidentiary support. After two evidentiary hearings which included testimony by the plaintiffs' representatives and questioning of their counsel by the court, the district court concluded that Rule 11 violations had been committed and awarded defendants' fees and expenses as a sanction.

On appeal, the panel noted that all aspects of a district court's decision to invoke Rule 11 and impose sanctions are reviewed under the abuse of discretion standard. *Id.* at 566. "Appellate review is deferential because the imposition or denial of sanctions of necessity involves a fact-intensive inquiry into the circumstances surrounding the activity alleged to be a violation of Rule 11." *Id.* (stating that "[t]he perspective of a district court is singular"). Only if the district court imposes sanctions based on "(1) an erroneous view of the law or (2) a clearly erroneous assessment of the evidence" will it abuse its discretion; factual determinations as to reasonable hours and rates for calculating reasonable litigation expenses and fees are questions of fact reviewed only for "clear error." *Id.*

The panel upheld the sanctions against both the plaintiffs and their attorney, noting that the sanctions had been imposed for factually (as well as legally) frivolous and sensational pleadings for which plaintiffs (who swore they had read the pleadings prior to filing) could articulate absolutely no evidentiary basis. *Id.* at 568. The district court's decision to award fees and expenses for the duration of the litigation was also affirmed; the panel observed "the district court concluded that all of the defense costs arose from the sanctionable conduct because otherwise the lawsuit would never have been filed at all." *Id.* at 569. The panel rejected the contention that district courts, in all instances, must give the offending party notice of a Rule 11 violation before applying sanctions. *Id.* at 570. "The district court was thus not required to save Appellants from themselves or their attorney." *Id.*

STANDING – ADMINISTRATIVE REMEDIES

***National Athletic Trainers' Assoc., Inc. v. United States Dept. of Health & Human Services*, 455 F.3d 500 (5th Cir. 2006).**

NATA filed suit to enjoin enforcement of a new Medicare regulation that would exclude from reimbursement occupational and physical therapy services provided by non-qualified occupational or physical therapists (*e.g.*, athletic trainers).

The government moved to dismiss the suit for lack of subject matter jurisdiction, asserting that NATA had no standing and that the suit was barred as premature because claims arising under the Medicare Act must first proceed though all available administrative avenues. *Id.* at 501-02 The district court granted dismissal for want of subject matter jurisdiction.

On appeal, the panel agreed that NATA did have prudential standing to challenge the regulation. *Id.* at 503 ("NATA's interest in providing services to Medicare beneficiaries is sufficient to satisfy the zone of interests tests; accordingly, the district court correctly concluded that NATA has standing to challenge the rule.").

The panel also agreed with the district court that NATA's suit was nonetheless barred as "[t]he

Medicare Act limits the jurisdiction of federal courts to review claims brought under the Act by requiring that 'virtually all legal attacks' be brought through the agency." *Id.* at 503 (citing *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 13 (2000)); *see also* 42 U.S.C. §1395ii. While this limitation does not apply where "channeling review through the agency would result in 'no review at all'" of a claim, the panel reasoned that here, physicians had ample incentive to pursue administrative challenges and could do so without implicating any potential sanction through the use of special billing codes and disclosure that the referenced charges related to services by athletic trainers. *Id.* at 503-04 (citing *Ill. Council*, 529 U.S. at 19). Thus, the panel affirmed dismissal of NATA's suit for lack of subject matter jurisdiction. *Id.* at 508.

STANDING – ELECTIONS

***Texas Democratic Party v. Benkiser*, No. 06-50812, 2006 WL 2170160 (5th Cir. Aug. 3, 2006).**

In this elections case arising out of attempts by the Republican Party of Texas ("RPT") to remove Tom Delay's name from the ballot, a panel affirmed the district court's declaratory and injunctive relief prohibiting such removal and prohibiting the RPT from replacing DeLay with a new candidate. "The district court granted the injunction, holding that the RPT, through its leadership, created an unconstitutional pre-election residency requirement." *Id.* at *1. The panel affirmed on the constitutional grounds the district court enumerated and on the alternate state law ground that the RPT's attempts to declare DeLay "ineligible" violated the Texas Election Code. *Id.*

The panel determined that the Texas Democratic Party ("TDP") had both direct and associational standing to pursue the litigation. The panel noted that "[t]o satisfy the standing requirement, a plaintiff must show: (1) an injury in fact; (2) that is traceable to the defendant's challenged conduct; and (3) that is likely to be redressed by a favorable decision in the district court." *Id.* at *2 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

The panel found direct standing because replacing DeLay would cause the TDP economic loss as it would have to raise and expend additional funds and resources to prepare for a new and different campaign in a short time frame. The panel wrote "economic injury is a quintessential injury upon which to base standing." *Id.* (citing *Barlow v. Collins*, 397 U.S. 159, 163-64 (1970)). Additionally, the panel found standing insofar as the TDP faced a potential loss of political power — "[w]hile power may be less tangible than money, threatened loss of that power is still a concrete and particularized injury sufficient for standing purposes." *Id.* at *2. The traceability and redressibility elements were so patent that the panel devoted only short treatment to them. *Id.*

The panel held the TDP also had associational standing on behalf of its candidate. The panel observed that "[a]ssociational standing is a three-part test: (1) the association's members would independently meet the Article III standing requirements; (2) the interests the association seeks to protect are germane to the purpose of the organization; and (3) neither the claim asserted nor the relief requested requires participation of individual members." *Id.* at *3 (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). The panel held that (1) the Democratic party's candidate for Delay's House seat would have standing for similar reasons that the TDP has direct standing, (2) the TDP was clearly seeking to protect its organizational interests, and (3) nothing required the participation of the Democratic candidate himself — "after the primary election, a candidate steps into the shoes of his party, and their interests are identical . . . the type of relief sought, *i.e.* an injunction, will inure to [the Democratic candidate's] benefit." *Id.* at *3. Thus, the panel found the TDP had standing to assert its claims before the district court.

As for the RPT's attempt to declare DeLay ineligible by merit of his by-then-declared new Virginia residence, the panel affirmed the district court's determination that the RPT's application of a residency requirement violated the Qualifications Clause of U.S. Const. art. 1, §2, cl. 2. The panel wrote "[t]he Qualifications Clause only requires inhabitancy when the candidate is elected . . . [g]iven this language, [the RPT Chair] could not constitutionally find that DeLay was ineligible on June 7, the date she made her decision . . . [t]herefore, her application of the ineligibility statute to DeLay was unconstitutional." *Id.* at *4 (footnotes omitted).

The panel rejected the RPT's argument that, while the Qualifications Clause requires inhabitancy on election day, such a determination can be made prospectively in a manner allowed by the Elections Clause. *Id.* at *5. The panel concluded that the RPT's determination of eligibility did not fall within the realm of matters defined as "manner" of election and that there was evidence showing that the RPT did not act reasonably and with political neutrality in declaring DeLay ineligible. The panel also noted that even if construed as a "manner" provision, the RPT's method of application would exclude, or at a minimum handicap, the pool of nonresident prospective candidates and was thus unconstitutional. *Id.* at *6.

The panel also declared that even if it were constitutional for a state actor to make pre-election, prospective judgments about residency, the RPT's declaration of ineligibility would violate Texas law because Delay's future residency was not "conclusively" established by the public record as required by the Texas statutes. *Id.* at *7-8 ("Indeed, [the RPT Chair] admitted in her testimony that the public records could not prove DeLay's residency on election day and that DeLay could move back to Texas before election day.").

Finally, the panel found that injunction was an appropriate remedy. *Id.* at *8-10. The panel affirmed the district court and denied the RPT's requests for stay relief.

SUBSTANTIVE DUE PROCESS

***Hudson v. Texas Racing Commission*, 455 F.3d 597 (5th Cir. 2006).**

Hudson, a licensed owner and horse trainer, was found to have raced a drugged horse at Lone Star Park in Grand Prairie. As a consequence, he was required to, *inter alia*, forfeit the first-place purse the horse had won. Hudson sought review of the decision. *Id.* at 598.

On appeal, Hudson asserted that Texas' absolute insurer rule (16 TEX. ADMIN. CODE § 311.104(b)), which dictates that a trainer shall ensure that any horse that races while in his care and custody is free from all barred drugs, facially and as applied violated substantive due process. The panel noted that the question presented was one of first impression. *Id.*

The panel held that while a horse trainer does have a property interest in his license that is subject to protection under the Due Process Clause, Texas' absolute insurer rule did not create any conclusive presumption of guilt (for actually administering any prohibited substance) and, thus, did not violate substantive due process. The panel noted that "[i]t has long been held that due process does not require proof of guilty knowledge before punishment may be imposed . . . [i]n areas of activity requiring strong police regulation to protect public interests, strict liability may be imposed upon individuals 'otherwise innocent but standing in responsible relation to a public danger.'" *Id.* at 600 (citing *United States v. Dotterweich*, 320 U.S. 277, 281 (1943)).

The panel continued, "[b]ecause horse racing for money can be prohibited all together in Texas, the legislature may condition a license to engage in legalized racing upon compliance with any regulation that is reasonably appropriate to the accomplishment of the Act." *Id.* at 601.

Agreeing with the majority of jurisdictions passing on the issue, the panel concluded that the absolute insurer rule was a reasonable and valid exercise of the state's police power to achieve the goals of ensuring racehorse health, protecting the integrity of horse racing and safeguarding the betting public. *Id.* at 601 ("While the absolute insurer rule may be harsh, it is constitutional.").

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

RECORD ON APPEAL – FINDINGS OF FACT AND CONCLUSIONS OF LAW

***State v. Cullen,* 195 S.W.3d 696 (Tex. Crim. App. 2006).**

The defendant was charged with committing the offense of driving while intoxicated, and he filed several pre-trial motions. After a hearing in which only the investigating officers testified, the trial court granted the defendant's motions to suppress. The State requested findings of fact and conclusions of law, and the trial court respectfully declined. On appeal, the State argued that it is denied its right to appeal a pre-trial order granting a defendant's motion to suppress when the trial court refuses the State's request for findings of fact and conclusions of law because, without such findings, appellate courts are unable to review the decision for an abuse of discretion. The State argued that its right to appeal under Article 44.01(a)(5) of the Code of Criminal Procedure is thwarted when an appellate court reviews a trial court's order granting a motion to suppress evidence based on presumed facts rather than findings of actual facts. The Court of Criminal Appeals noted that the refusal of trial courts to enter findings of fact leaves appellate courts with nothing to review except a one-word ruling and forces the courts of appeals to make assumptions about the trial court's ruling. The ruling could be based on a mistake of law, on the trial court's disbelief of the testimony presented, or even on a clerical error. In this case, the trial court's refusal to act prevented the court of appeals from a meaningful review of the decision to grant the motion to suppress. Without findings of fact and conclusions of law, the court of appeals was left in the undesirable position of having to make assumptions about the reasons for the trial court's decision. Rule 44.4 of the Rules of Appellate Procedure authorizes the court of appeals to remand the case to the trial court, so that the court of appeals is not forced to infer facts from an unexplained ruling.

The Court of Criminal Appeals consequently issued a new rule of law that is effective from the date of the court's opinion: Upon the request of the losing party on a motion to suppress evidence, the trial court shall state its essential findings. By "essential findings," the court meant that the trial court must make findings of fact and conclusions of law adequate to provide an appellate court with a basis upon which to review the trial court's application of the law to the facts. The findings and conclusions need to be recorded in some way, whether written out and filed by the trial court, or stated on the record at the hearing. Moreover, appellate review of the trial court's ruling on a motion to suppress evidence is not *contingent* on the non-prevailing party's request. In other words, the non-prevailing party does not forfeit its right to appellate review of an adverse ruling by failing to request findings of fact and conclusions of law. If the non-prevailing party fails to make the request, and the trial court does not enter findings of fact and conclusions of law of its own accord, the non-prevailing party can still appeal any adverse ruling. The Court of Criminal Appeals looked to TEX. R. CIV. P. 297 to provide guidance to the trial courts about the time to file requested findings of fact and conclusions of law: While the appealing party must file its notice of appeal in accordance with the applicable statutes and rules, the trial court has 20 days from the date of its ruling in which to file findings of fact if it has not already made oral findings on the record. As a result, the time to perfect an appeal under Rule 26.2 of the Rules of Appellate Procedure and Article 44.01 of the Code of Criminal Procedure is unaffected by the requirement that the trial court enter findings and conclusions if requested.

PRESERVATION OF ERROR – FACTUAL SUFFICIENCY IN PLEA OF GUILTY CASE

***McGill v. State,* No. 5-05-904-CR, 2006 WL 2408618 (Tex. App.—Dallas Aug. 22, 2006, no pet. h.).**

The defendant entered a plea of guilty to the offense of possession of cocaine with intent to deliver, acknowledged his guilt for the offense, and stated that he was pleading guilty freely. During the plea hearing, the State requested "the Court to take judicial notice of the entire contents of the court file, including the probable cause affidavit." However, the contents of the file were not in the record before the court of appeals. At the sentencing hearing, the defendant testified on cross-examination that he did not have drugs on his person when he was arrested at a drug house. The defendant asserted that he intended only to buy drugs at the location and had not yet entered the house when he was arrested. The defendant admitted at the sentencing hearing that he had been to prison "a few times" and had been on probation in the past. He admitted to previous convictions for unauthorized use of a motor vehicle, several drug possession offenses, and theft from a person. The defendant was convicted of committing the offense of possession of cocaine with intent to deliver. The defendant claimed on appeal that the evidence was factually insufficient because he testified that he had gone to the drug house to purchase drugs rather than sell them, he did not have any drugs on his person when the police arrested him, and he was unaware that the police found twenty-four grams of cocaine in the house. However, in a guilty plea case, there is no burden on the State to prove guilt beyond a reasonable doubt. For the purposes of federal due process, a plea of guilty is itself a conviction awaiting only a determination of punishment. *See Boykin v. Alabama,* 395 U.S. 238, 242 (1969). Furthermore, an appellate court's review of the record to determine whether the State complied with article 1.15 of the Code of Criminal Procedure is not a factual sufficiency review. The authority of the trial court to acquit a defendant who has pleaded guilty does not create a defendant's right to factual sufficiency review of his guilty plea case. If the reasonable doubt standard under a legal sufficiency analysis may not be employed in reviewing guilty plea cases, a factual sufficiency analysis also may not be employed to determine if the fact finder was rationally justified in finding guilt beyond a reasonable doubt.

PRESERVATION OF ERROR – CHALLENGE TO FACIAL VALIDITY OF STATUTE

***Barnett v. State,* No. 2-05-288-CR, 2006 WL 2309590 (Tex. App.—Fort Worth Aug. 10, 2006, no pet.).**

A City of Arlington police officer observed that a green Jeep was driving down the service road of a highway and that two female passengers were sitting on top of the headrest area of the rear seat of the Jeep, holding onto the roll bar. The officer stopped the vehicle, and the defendant was subsequently arrested for driving while intoxicated. The defendant claimed—for the first time on appeal—that the Arlington city ordinance, which provided the basis for the officer's traffic stop of the defendant, was facially unconstitutional. The constitutionality of a statute as applied must be raised in the trial court in order to preserve error. A defendant is not required to raise in the trial court a constitutional challenge that the statute is facially invalid, because a defendant may raise a constitutional challenge to the facial validity of a statute for the first time on appeal. However, this rule is limited to challenges to the constitutionality of the statute under which a defendant was actually convicted. The defendant should not be permitted to raise the constitutionality of the ordinance providing the justification for the officer to stop the defendant without first presenting the argument to the trial court. *See also Lasher v. State***,** No. 10-02-198-CR, ___ S.W.3d ___, 2006 WL 1910982 (Tex. App.—Waco July 12, 2006) (not yet reported) (refusing to address defendant's challenge to facial validity of Section 2(b) of Article 38.071 of Code of Criminal Procedure).

RIGHT TO APPEAL – TEMPORARY ORDER OF MENTAL HEALTH COMMITMENT

***Queen v. State,* No. 3-06-20-CV, 2006 WL 2309589 (Tex. App.—Austin Aug. 11, 2006, no pet.).**

The defendant was indicted for three counts of indecency with a child by contact and one count of aggravated sexual assault of a child. Two doctors evaluated the defendant, and both determined that he was mentally retarded, incompetent to stand trial, and would not regain competency in the future. The trial court held a hearing at which it considered the doctors' reports and determined that the defendant was incompetent to stand trial. After considering more evidence, the trial court further found that the defendant posed a danger to the community and refused to release him on bail, instead committing him to a residential care facility or mental health facility for 120 days for further examination. The defendant appealed the trial court's order of commitment, arguing that (1) there was no competent evidence to support a finding that he would be a danger to others if released on bail, and (2) the application of article 46B.073 of the Code of Criminal Procedure to commit him to a mental health facility, rather than releasing him on bail, violated his rights to due process and equal protection. Article 46B.011 of the Code of Criminal Procedure provides that a defendant may not take an interlocutory appeal "relating to" a competency determination under Article 46B.005. Therefore, the State claimed that the court of appeals lacked jurisdiction over the defendant's appeal. The defendant claimed that the court of appeals had jurisdiction under Section 574.070 of the Health and Safety Code, which explains where and when a notice of appeal from "an order requiring court-ordered mental health services" must be filed. However, those provisions of the Health and Safety Code do not apply when a defendant has been initially determined to be incompetent under Chapter 46B, released on bail or committed for further examination and treatment in hopes of attaining competency, returned to court and found incompetent under Article 46B.084(a), and then committed under subchapter E of Chapter 46B. Although the provisions of the Health and Safety Code allow for appeals from orders of commitment or court-ordered mental health services, those provisions apply only to orders entered pursuant to subchapter E. The legislature has set out a very specific process by which the competency of a criminal defendant to stand trial is determined. That process hinges on a determination of competency or incompetency made under Article 46B.005, and the legislature has explicitly barred any appeal from such a determination. The legislature has provided further explicit directions allowing for appeals from orders of commitment made under subchapter E, which come after the initial, informal determination that the defendant may lack competency to stand trial, a formal trial or determination of incompetency, commitment or release on bail and re-evaluation under subchapter D. The legislature has not, however, provided for appeal, interlocutory or otherwise, from a temporary commitment under subchapter D, which is preliminary to a more permanent commitment under subchapter E. The provisions of the Health and Safety Code, which allow for appeals from orders of commitment or in-patient mental health services, are not applicable to criminal defendants until a subchapter E proceeding has occurred. By the absence of any similar provisions allowing for appeal and the legislature's explicit bar of appeals from a determination under Article 46B.005, a determination that is an essential part of the competency process and that starts the process of evaluation and commitment, the legislature did not intend to allow interlocutory appeals from orders of temporary commitment made after a determination of incompetence but before a subchapter E proceeding. Under these circumstances, claims such as the defendant's would seem more properly brought by way of a petition for writ of habeas corpus.

RIGHT TO APPEAL – EXTENSION OF DEFERRED ADJUDICATION

***Davis v. State,* 195 S.W.3d 708 (Tex. Crim. App. 2006).**

The defendant entered a plea of guilty to the offense of indecency with a child, and he was placed on "deferred adjudication" probation pursuant to a plea bargain agreement. The trial court subsequently decided to review the progress of the defendant's probation and gave the defendant an opportunity to obtain counsel. When the hearing was convened, the defendant was without counsel, but he had consulted an attorney about the matter and indicated that he was ready to proceed. Testimony at the hearing did not establish any violation of the conditions of probation. The defendant was, however, shown to have given deceptive responses on two out of four polygraph examinations, and the trial court extended the period of the defendant's probation by one year. At a subsequent hearing, in which the defendant was represented by counsel, the defendant's probation was extended by two more years. The State subsequently filed a motion to adjudicate the defendant's guilt, and the defendant entered pleas of true to several of the State's allegations. Therefore, the trial court revoked the defendant's probation, adjudicated the defendant guilty of the original offense, and sentenced the defendant to ten years in prison. The defendant sought to challenge the trial court's previous extension of his probation without the benefit of counsel. Based upon Article 42.12, Section 5(b) of the Code of Criminal Procedure, "the courts of appeals do not have jurisdiction to consider claims relating to the trial court's determination to proceed with an adjudication of guilt on the original charge." *Hogans v. State,* 176 S.W.3d 829, 832 (Tex. Crim. App. 2005). Based upon an analogy to "regular" probation cases in *Basaldua v. State,* 558 S.W.2d 2 (Tex. Crim. App. 1977), and *Rickels v. State*, 108 S.W.3d 900 (Tex. Crim. App. 2003), an order modifying the terms or conditions of "deferred adjudication" probation is not in itself appealable. Since the Legislature has specifically barred appeal from the determination to adjudicate, there is, therefore, no opportunity on appeal to challenge a modification of deferred-adjudication supervision as a basis for overturning an adjudication. Furthermore, a jurisdictional attack on the trial court's determination to adjudicate a defendant's guilt is still an attack on that determination, and it may not be advanced on appeal.

RIGHT TO APPEAL – MUNICIPAL CASES APPEALED TO COUNTY COURT

***Jamshedji v. State,* No. 14-05-551-CR, 2006 WL 2035549 (Tex. App.—Houston [14th Dist.] July 20, 2006, pet. filed).**

The defendant was charged with the offense of speeding, entered a plea of nolo contendere, waived a trial by jury, requested and was granted deferred disposition pursuant to Article 45.051 of the Code of Criminal Procedure, and did not appeal that order. The defendant subsequently appeared before the municipal court, which, after hearing argument from the defendant and the State, revoked the defendant's deferred disposition, adjudged him guilty of the charged offense, and assessed a fine of $115.00 plus $85.00 in court costs. The defendant appealed to the county criminal court, which determined that it lacked jurisdiction and dismissed his appeal. A defendant has the right to appeal a municipal court of record judgment to the court of appeals if the fine assessed exceeds $100.00 and the judgment is affirmed by the county court. *See* TEX. GOV'T CODE ANN. § 30.00027(a) (Vernon 2004). Since the county court dismissed the defendant's appeal, the court of appeals did not have jurisdiction over the defendant's appeal. Furthermore, Texas law does not provide for the direct appeal from a trial court's determination to proceed to adjudication when a defendant violates conditions of community supervision under article 42.12. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5(b) (Vernon Supp. 2006). There is no legal authority or rationale to conclude that a greater right of appeal exists with regard to Article 45.051 than Article 42.12.

RIGHT TO APPEAL – POST-CONVICTION DNA PROCEEDING

***Hooks v. State,* No. 6-05-274-CR, 2006 WL 2265285 (Tex. App.—Texarkana Aug. 9, 2006, no pet. h.).**

During an evening of drinking beer while driving his pickup truck, the defendant hit and killed the victim with the truck. In a voluntary statement given to an investigator, the defendant admitted that he had been driving around, drinking beer since about 4:00 p.m. the day of the accident, and that he hit the victim with his truck. The defendant was subsequently convicted of the offenses of intoxication manslaughter and leaving the accident scene, and those convictions were affirmed on appeal. After his convictions were affirmed, the defendant pursued post-conviction DNA testing, seeking analysis of blood and hair samples, and the defendant appealed from the trial court's denial of his request for DNA testing. On appeal, the defendant claimed that he was denied his right to the effective assistance of counsel at the post-conviction DNA proceeding. The court of appeals held that it would follow the majority of those appellate courts that have held that a defendant could not challenge the effective assistance of his counsel in an appeal from a trial court's ruling in post-conviction DNA proceeding. *See Hughes v. State,* 135 S.W.3d 926, 928 (Tex. App.—Dallas 2004, pet. ref'd); *Morris v. State,* 110 S.W.3d 100, 103 (Tex. App.—Eastland 2003, pet. ref'd); *In re Beasley,* 107 S.W.3d 696, 697 (Tex. App.—Austin 2003, no pet.). *But see Ard v. State,* 191 S.W.3d 342, 345-46 (Tex. App.—Waco 2006, no pet.) (holding ineffective assistance of counsel may be raised in Chapter 64 appeal).

RIGHT TO APPEAL – DNA PROCEEDING IN JUVENILE CASE

***In re R.J.M.,* No. 4-06-265-CV, 2006 WL 2056417 (Tex. App.—San Antonio July 26, 2006, no pet. h.).**

After pleading true to committing the offense of aggravated sexual assault of a child, a juvenile defendant received a ten-year determinate sentence. The defendant subsequently filed a motion asking the juvenile court to appoint counsel to assist him in filing a motion for forensic DNA testing pursuant to article 64.01(c) of the Code of Criminal Procedure. The juvenile court found that there were no reasonable grounds for a motion for forensic DNA testing and denied the motion. The court of appeals held that a juvenile defendant is not permitted to appeal a juvenile trial court's order denying the defendant's motion to appoint counsel to assist him in filing a motion for DNA testing under Chapter 64 of the Code of Criminal Procedure. No statute expressly authorizes a juvenile to appeal a motion asking a juvenile court to appoint counsel to assist in filing a post-adjudication motion for forensic DNA testing. Likewise, chapter 64 of the Texas Code of Criminal Procedure, which governs motions for forensic DNA testing and related appeals in criminal cases, does not authorize such an appeal. As a general rule, because "[d]elinquency proceedings are civil in nature," "the Texas Code of Criminal Procedure does not apply unless the Legislature evinces a contrary intent." *Vasquez v. State,* 739 S.W.2d 37, 42 (Tex. Crim. App. 1987). The legislature has not evinced a contrary intent in chapter 64; in fact, all orders that may be appealed under article 64.05 are orders of a "convicting court." *See* TEX. CODE CRIM. PROC. ANN. arts. 64.01(c); 64.03(a), (c), (d), (e); 64.04 (Vernon Supp. 2006). A juvenile court is not a "convicting court." *See* TEX. FAM. CODE ANN. § 51.13(a) (Vernon Supp. 2006) (except for purposes of penalty enhancement in subsequent felonies, "an order of adjudication or disposition . . . is not a conviction of crime").

RIGHT TO APPEAL – TRIAL COURT'S REFUSAL TO ISSUE WRIT OF HABEAS CORPUS

***Ex parte Williams,* No. 9-06-168-CR, 2006 WL 2434606 (Tex. App.—Beaumont Aug. 23, 2006, no pet.).**

The trial court denied the defendant's petition for writ of habeas corpus without issuing the writ and without conducting an evidentiary hearing. The court of appeals noted that no appeal lies from the refusal to issue a writ of habeas corpus. *See Ex parte Hargett*, 819 S.W.2d 866, 868-69 (Tex. Crim. App. 1991); *Ex parte Noe*, 646 S.W.2d 230, 231 (Tex. Crim. App. 1983). However, the court of appeals noted that this rule has been criticized. *See* 43B George E. Dix & Robert O. Dawson, *Texas Practice: Criminal Practice and Procedure* § 47.54, at 223-24 (2d ed. 2001) ("Perhaps the most bizarre aspect of Texas criminal habeas corpus procedure is the longstanding rule that no appeal lies from either a trial judge or court's refusal to grant or issue the writ of habeas corpus or other action by the judge or court equivalent to such refusal."). Therefore, the court of appeals believed that the rule should be reconsidered. If a trial court presiding over a criminal case refuses to issue a writ, that refusal is in practical effect a denial of the relief requested in the petition—from which a defendant can appeal. The court of appeals acknowledged that a refusal to issue the writ by one judge would not preclude a petition to another judge. Nevertheless, another trial judge with no relationship to the underlying case would be unlikely as a practical matter to issue a writ pre-trial. Article 44.02 of the Code of Criminal Procedure and Rule 31 of the Rules of Appellate Procedure would confer jurisdiction upon a court of appeals to entertain an appeal from a trial court's refusal to issue a writ of habeas corpus. The issue in this appellate review should be whether the petition for a writ of habeas corpus on its face stated a cognizable claim and satisfied the applicable statutory requirements of Chapter 11 of the Code of Criminal Procedure, and if so, whether the trial court was required under the circumstances to consider and resolve the merits of the petition. This approach could serve the writ's purpose without unduly burdening the justice system. The record at this stage would be limited, as are the circumstances presenting a cognizable habeas claim pre-trial. A restricted appellate review should be prescribed. *See* TEX. CODE CRIM. PROC. ANN. art 11.15 (Vernon 2005) ("The writ of habeas corpus shall be granted without delay by the judge or court receiving the petition, unless it be manifest from the petition itself, or some documents annexed to it, that the party is entitled to no relief whatever."); *Lofton v. State,* 777 S.W.2d 96, 97 (Tex. Crim. App. 1989) (If the petition on its face is "so utterly without merit," the trial judge would be justified fully in refusing to issue the writ.).

JUDICIAL NOTICE ON APPEAL

***Gette v. State,* No. 1-05-930-CR, 2006 WL 2291054 (Tex. App.—Houston [1st Dist.] Aug. 10, 2006, no pet.).**

An officer with Rice University Police Department observed the defendant driving on a roadway on the perimeter of the university, and the defendant was "bumping and crossing the center line" of the roadway. The defendant then turned onto entrance eight on the Rice University campus. While turning, the defendant almost hit the curb with his left tires and initially entered the lane for opposing traffic. On campus, the officer observed the defendant driving 26 miles per hour when the posted speed limit was 20 miles per hour. After the officer pulled the defendant over, he detected the odor of alcohol in the car. The defendant admitted he had consumed four drinks earlier. Based on the defendant's performance on some field sobriety tests, the officer decided to take the defendant into custody. The defendant filed a motion to suppress arguing that the officer lacked the authority to perform the stop. Specifically, the defendant argued that the reduced speed limits on Rice University campus were unenforceable. Section 600.003 of the Transportation Code gives private institutions of higher education the authority to "enforce a traffic law of this state under Chapter 545 restricting or

prohibiting the operation of movement of vehicles on a road of the institution." Therefore, Rice University was authorized to enforce the speed limit as long as it (1) made the road open to the public at the time of enforcement; (2) adopted a regulation to enforce the law; (3) posted a sign designating the speed limit; and (4) obtained approval from the City of Houston. The defendant argued that the City of Houston never "authorized the enforcement of a speed limit less than 30 miles per hour on the campus." However, the State filed a motion for the court of appeals to take judicial notice of the City of Houston's ordinance that approved the reduction of speed limits on the Rice campus. Rule 204 of the Rules of Evidence provides that, upon the motion of a party, a court must take judicial notice of ordinances of a municipality once the party has provided the court with sufficient information to enable the court to comply with the request. A number of appellate courts have held that an appellate court, as well as a trial court, may take judicial notice under Rule 204. *See Eckmann v. Des Rosiers,* 940 S.W.2d 394, 399 (Tex. App.—Austin 1997, no writ); *Blackwell v. Harris County,* 909 S.W.2d 135, 140 n. 2 (Tex. App.—Houston [14th Dist.] 1995, writ denied); *Int'l Ass'n of Firefighters Local 624 v. City of San Antonio,* 822 S.W.2d 122, 127 (Tex. App.—San Antonio 1991, writ denied). *But see City of Glenn Heights v. Sheffield Dev. Co., Inc.,* 55 S.W.3d 158, 162-63 (Tex. App.—Dallas 2005, no pet.); *Metro Fuels, Inc. v. City of Austin,* 827 S.W.2d 531, 532 (Tex. App.—Austin 1992, no writ). An appellate court, as well as a trial court, may take judicial notice of an ordinance as long as a party or parties comply with the provisions of Rule 204. The State included along with its motion a copy of the City of Houston ordinance certified by the City Secretary. Therefore, the court of appeals took judicial notice that Rice University received proper authority from the City of Houston to reduce its speed limits on campus to 20 miles per hour.

STATE'S APPEAL – POST-VERDICT MOTION FOR MISTRIAL

***State v. Boyd*, No. 5-05-914-CR, 2006 WL 2468068 (Tex. App.—Dallas Aug. 28, 2006, no pet. h.).**

The defendant was charged with committing the offense of driving while intoxicated, and the information contained an enhancement paragraph, alleging a prior DWI conviction. During trial, the State offered Exhibit No. 2, the videotape of the defendant recorded from the officer's car, and Exhibit No. 3, the videotape of the defendant recorded in the intoxilyzer room. The trial court admitted the two exhibits without an objection from the defendant. During subsequent jury deliberations, a juror brought to the bailiff's attention that State's Exhibit No. 3 was marked with a label that read: "DWI 2nd." The bailiff reported his conversation with the juror to the trial court and stated that the jury had the impression that the case upon which they were deliberating was the defendant's second DWI offense. The trial court brought the matter to the attention of the defendant and the State, but the defendant did not object to the labels on the videotapes. After the trial court prepared an instruction to disregard, both the State and the defendant stated that they had no objection to the instruction. Before the trial court instructed the jury to disregard the label on State's Exhibit No. 3, the bailiff informed the trial court that the jury also brought to his attention that the label on State's Exhibit No. 2 read: "DWI 2nd." Again, the defendant did not object. The trial court *sua sponte,* verbally and in writing, instructed the jury that the labels on the videotapes were not in evidence and contained hearsay. Also, the trial court instructed the jury not to consider and to disregard any inference that the case involved a second DWI offense. Then, the trial court sent the jury home for the evening and instructed them to be back on the following morning. After the jury left for the day, the defendant moved for a mistrial, and the trial court stated that he would consider the motion for mistrial on the following morning. However, no further discussion was had concerning the motion

for mistrial, and the jury returned a guilty verdict on the following morning. Twenty-one days after the jury had returned the guilty verdict, the case was set for a hearing on punishment before the trial court. At that time, the defendant re-urged his motion for mistrial, and the trial court granted it. The State appealed from the trial court's order. The defendant claimed that the court of appeals did not have jurisdiction to reach the merits of the State's appeal because the order appealed from was an order granting a mistrial. The court of appeals noted that the Code of Criminal Procedure provided no authority for the State to appeal an order granting a mistrial. *See State v. Garza,* 774 S.W.2d 724, 726 (Tex. App.—Corpus Christi 1989, pet. ref'd). However, the court further noted that the Texas Court of Criminal Appeals has determined that, when an order is "functionally indistinguishable" from or the "functional equivalent" of an order granting a new trial, a reviewing court can look past the label assigned to the order by the trial court and treat the order as one granting a new trial—from which the State can bring a State's appeal. *See Savage v. State,* 933 S.W.2d 497, 499 (Tex. Crim. App. 1996); *State v. Evans*, 843 S.W.2d 576, 577 (Tex. Crim. App. 1992). The court of appeals held that the timing of the defendant's motion for a mistrial was not pivotal for determining the court's jurisdiction over the State's appeal. Instead, it was the timing of the trial court's order setting aside the verdict of guilty that was determinative of the court's jurisdiction. The trial court's order granting the defendant's motion for a mistrial was functionally indistinguishable from an order granting a new trial, and the court of appeals had jurisdiction over the State's appeal.

Within its State's appeal, the State claimed that the defendant had forfeited his right to relief because he did not object to the evidence, request an instruction to disregard, or obtain a ruling on his motion before the jury returned its verdict. However, the court of appeals held that the preservation of error requirement applies to the party asserting the error—the appellant, not the appellee.

PETITION FOR DISCRETIONARY REVIEW – INEFFECTIVE ASSISTANCE OF COUNSEL

***Ex parte Owens,* No. AP-74,996, 2006 WL 2619989 (Tex. Crim. App. Sept. 13, 2006).**

After the defendant had been convicted of the offense of aggravated sexual assault of a child, the defendant's appellate counsel filed an *Anders* brief and a motion to withdraw from representation. The defendant then filed a separate *pro se* brief, and the court of appeals affirmed the defendant's conviction and dismissed the appellate counsel's motion to withdraw. No petition for discretionary review was filed from the judgment of the court of appeals. The defendant subsequently filed an application for a writ of habeas corpus, in which he claimed that his appellate counsel had failed to notify him of his right to file a petition for discretionary review. In response to the defendant's application for a writ of habeas corpus, the defendant's appellate counsel filed an affidavit, in which he stated that he had not discussed with the defendant the filing of a petition for discretionary review because, in his opinion, a petition for discretionary review would have had no chance of being granted and would simply have extended the time that the defendant would have to wait in prison before filing a writ of habeas corpus. The Court of Criminal Appeals held that the filing of an *Anders* brief in the court of appeals does not relieve appellate counsel of the duty under *Ex parte Wilson*, 956 S.W.2d 25 (Tex. Crim. App. 1997) to inform the defendant that he has a right to file a *pro se* petition for discretionary review with the Court of Criminal Appeals. The harm that occurs from the failure to timely inform the defendant of his right to file a petition for discretionary review is that he is deprived of the benefit of an entire proceeding, or at least of the opportunity to exercise his unfettered right to "attempt to persuade [the court] to exercise [its] discretion." A defendant need not show prejudice under the standard test for ineffective assistance of counsel set forth in *Strickland* v. Washington, 466 U.S. 668 (1984). All that the defendant need establish in the way of a showing of prejudice is that he

would in fact have sought a petition for discretionary review had he been timely informed by his appellate counsel of his right to do so.

Joel M. Androphy, Berg & Androphy, Houston

***U.S. v. Zerilli*, No. 05-2373, 2006 WL 1813907 (6th Cir. June 30, 2006).**

Defendant was convicted of five counts of extortion and two violations of RICO. On appeal the Sixth Circuit affirmed the convictions but remanded for resentencing consistent with *U.S. v. Booker*, 543 U.S. 220 (2005). Initially the district court determined the defendant's guideline offense level at thirty-six and Criminal History Category I, resulting in a guideline range of 188-235 months. The district court granted a ten-level downward departure, based on age and health with a resulting guideline range of 63-78 months. As a result the District Court sentenced the defendant to seventy-one months incarceration. On remand the defendant argued that his sentence was unreasonable, and should be further reduced due to his increased age and his worsened medical condition. The court rejected this argument holding that the district court initially considered the recommended guidelines range, subsequently granted a downward departure from that range, and adequately considered § 3553(a) factors, all resulting in a sentence that was not unreasonable.

***U.S. v. Ebbers*, 458 F.3d 110 (2d Cir. 2006).**

WorldCom CEO, Bernard Ebbers, was convicted of securities fraud, conspiracy to commit securities fraud, and seven counts of making false filings with the SEC in 2005. On appeal Ebbers contended that he was denied a fair trial because the government granted immunity only to witnesses whose testimony incriminated him and not to witnesses whose testimony would exculpate him but who would have invoked the privilege against self-incrimination if called to testify. Generally, a court may order the prosecution to choose between forgoing the testimony of an immunized government witness or granting use immunity to potential defense witnesses. However, to obtain such an order a defendant must make two-pronged showing. The defendant must first show the government has used immunity in a discriminatory way, has forced a potential witness to invoke the Fifth Amendment through overreaching, or has deliberately denied immunity for the purpose of withholding exculpatory evidence and gaining a tactical advantage. Second, the defendant must show that the evidence to be given by an immunized witness will be material, exculpatory and not cumulative and is not obtainable from any other source. The Court doubted that Ebbers satisfied the test, and ultimately the Second Circuit ruled against him because he was unable to show that the absence of his witness' testimony affected the total mix of evidence before the jury.

***U.S. v. Frith*, 461 F.3d 914 (7th Cir. 2006).**

Defendant was convicted of two securities law violations for operating his registered broker-dealership without enough money in its reserve accounts. On appeal the defendant challenged the district court's restitution order, arguing that the order was based on losses from relevant conduct rather than the offenses of conviction. Although the government argued that restitution should be based the defendant's entire course of wrongdoing, the Court noted that the jury found the defendant guilty of two discrete offenses, both committed on one day, and acquitted the defendant of the charged counts covering the longer time period. Thus, there could be no finding that the government's purported restitution amount could be traced to the one day on which the defendant committed his crimes. Therefore, the Second Circuit overturned the restitution order for abuse of discretion.

APPELLATE SECTION

Sign up for the New and Improved Appellate Section Pro Bono Program

Represent people who really need your help!
Get more "face time" with the appellate courts!

The State Bar of Texas Appellate Section is embarking on a newly expanded pro bono program for the delivery of appellate legal services to those members of our community who cannot afford counsel. We are working closely with the Austin Court of Appeals and the Supreme Court of Texas to establish pilot programs for pro bono representation in those courts. Through these pilots, we hope to offer our volunteers more variety and greater appellate experience in those courts. The Austin Court of Appeals pilot is expected to be in place by this fall, and that court has indicated that it will prioritize cases in the program for oral argument. We are also looking into program options involving criminal, habeas corpus, and immigration appeals in the federal system.

As part of our recruiting effort, we are establishing a tiered program to attract a wide variety of appellate practitioners. Our goal is to include as many high-quality appellate attorneys as possible, allowing each lawyer to contribute to the best of his or her ability and time constraints. More senior appellate lawyers have the option of either taking on a case as lead counsel or mentoring more junior practitioners by brainstorming about the issues, reviewing and editing briefs, and assisting with oral argument preparation (*e.g.*, moot courts) without having to undertake full responsibility for the case. Our lawyers can enjoy an enhanced pro bono experience as part of a team that furthers the best possible presentation of the issues to the courts.

The application form on the other side of this sheet requests your basic contact information, as well as your areas of interest. It also allows you to indicate whether you are interested in a hands-on or mentoring role. From this information, we will compile tailored email groups to circulate information regarding cases that have been selected for the program quickly, widely, and equitably. We encourage you to fill out and send this form back to us right away so that you can be part of our exciting pro bono team.

APPELLATE PRO BONO SIGN UP

Name:_____ Work Phone #:_____

Firm/Employer:_____ Fax #: _____

Address:_____ Cell Phone: _____

_____ Email: _____

_____

Preferences (check all that apply):

☐	Lead lawyer	☐	Criminal
☐	Mentor	☐	Habeas Corpus
☐	Appellate courts only	☐	Immigration
☐	Appellate and trial support		

☐ Preference for particular areas of law:_____

_____

_____

Please mail or fax or email to:

Jeff Levinger
Carrington Coleman Sloman & Blumenthal, L.L.P.
200 Crescent Ct., Suite 1500
Dallas, Texas 75201-1848
Telephone: (214) 855-3036
Fax: (214) 855-3736
Email: jlevinger@ccsb.com

NOTES

NON PROFIT ORGANIZATION

STATE BAR OF TEXAS
P.O. Box 12487, Capitol Station
Austin, Texas 78711

U.S. POSTAGE
PAID
Permit No. 1804
Austin, Texas

THE APPELLATE ADVOCATE
State Bar of Texas Appellate Section Report

DATED MATTER—PLEASE EXPEDITE!