

AN UPDATE, LTD

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I. SCOPE OF THIS ARTICLE

This article surveys several significant civil and criminal cases decided between Summer 2004 and Summer 2005. In addition, it also discusses certain bills passed during the 2005 legislative session.

I. CIVIL CASES

A. SOVEREIGN IMMUNITY

1. **Gene Duke Builders, Inc. v. Abilene Housing Authority, 168 S.W.3d 215 (Tex App. – Eastland 2005, pet’n filed).**

The parties entered into a construction contract for the repair of housing units. A dispute arose concerning completion and payment. The contractor demanded that its claim be submitted to arbitration. When the housing authority refused to arbitrate, the contractor brought suit to enforce its contractual right to seek arbitration. The district court ordered that the parties submit to arbitration. *Gene Duke Builders, Inc., supra.*

Thereafter, the housing authority filed a plea to the jurisdiction, asserting that it was a “unit of state government” and that the contractor was required to follow the administrative procedures set forth in chapter 2260 of the Texas Government Code. The housing authority also claimed that its immunity from suit had not been waived by the “sue and be sued” language in section 392.065 of the Texas Local Government Code. *Gene Duke Builders, Inc., supra.*

The court first held that a municipal housing authority did not meet the definition of “unit of state government” for purposes of chapter 2260. *Gene Duke Builders, Inc., supra.*

The court also held that the Texas Supreme Court decision of *Missouri Pacific Railroad Company v. Brownsville Navigation District*, 453 S.W.2d 812 (Tex. 1970), was still good law. Therefore, the “sue and be sued” language found in section 392.065 of the Local Government Code represented a clear and unambiguous waiver of immunity from suit for housing authorities. *Gene Duke Builders, Inc., supra.*

In dicta, the court wrote that there may be situations in which “sue and be sued” language does not clearly and unambiguously waive immunity from suit, depending on the text and history of the statute at issue. *Gene Duke Builders, Inc., supra.* However, the court indicated that in most cases, “sue and be sued” language waives immunity from suit.

2. **Lamesa ISD v. Booe, 2005 Tex. App. LEXIS 7137 (Tex. App. – Eastland August 31, 2005)**

In another “sue and be sued” case, the court reaffirmed its holding in *Gene Duke Builders, supra.*, that the language waives immunity from suit.

In this case, a contractor sued a school district when the district refused to pay for roofing repairs. The district filed a plea to the jurisdiction, asserting immunity from suit. The contractor argued that the “sue and be sued” language of section

11.151(a) of the Education Code waived the district's immunity. *Lamesa ISD v. Booe, supra.*

The school district relied on the opinion of the Dallas Court of Appeals in *Satterfield & Pontikes Construction, Inc. v. Irving Independent School District*, 123 S.W.3d 63 (Tex. App. – Dallas 2003, pet'n filed), which held that the "sue and be sued" language was merely a designation to give school districts legal existence in the courts. The Dallas court based its opinion on corporate law principles. *Satterfield & Pontikes Construction, Inc. v. Irving Independent School District, supra* at 66.

The Eastland Court of Appeals disagreed, holding that such a construction contradicts the plain meaning of "sue and be sued" as articulated by the Texas Supreme Court in *Missouri Pacific, supra. Lamesa ISD v. Booe, supra.*

The court also noted the recent passage of House Bill 2039, discussed *infra*, which removed any lingering doubt about the meaning of "sue and be sued" language in the context of breach-of-contract actions. *Lamesa ISD v. Booe, supra.*

3. Texas A&M University v. Bishop, 156 S.W.3d 580 (Tex. 2005)

The primary issue in this case was the extent of the "use of tangible personal property" immunity waiver in the Texas Tort Claims Act.

A student sued the university after being stabbed by another student during the performance of a school play. The student

claimed that the drama club's faculty advisors and the play's director were negligent in deciding to use a real knife and in failing to provide an adequate stab pad. *Texas A&M University v. Bishop, supra* at 581.

The supreme court held that the faculty advisors' alleged failure to properly supervise the props that the director chose did not constitute a use of tangible personal property within the meaning of the TTCA: "In the context of governmental immunity, a governmental unit does not 'use' personal property merely by allowing someone else to use it." *Texas A&M University v. Bishop, supra* at 583.

Also, the play's director was an independent contractor for whose acts or omissions the university was not liable. *Texas A&M University v. Bishop, supra* at 585.

The court concluded that the university's immunity from suit was not waived; therefore, the trial court lacked subject-matter jurisdiction over the student's cause of action. *Texas A&M University v. Bishop, supra.*

4. Hoff v. Nueces County, 153 S.W.3d 45 (Tex. 2004)

The plaintiffs in this case were current and former employees of the sheriff's department. They sued the county for claims arising under the federal Fair Labor Standards Act. The county claimed that it was entitled to immunity under the Eleventh Amendment. The employees argued that the county was not an arm of the State of Texas entitled to Eleventh

Amendment immunity. *Hoff v. Nueces County, supra* at 47.

The court agreed with the employees, holding that Texas counties, which are authorized to levy taxes to pay for debts, sell or lease real property, and issue bonds to provide for funding, possess sufficient independence from the state that they are not “arms of the state” for purposes of the Eleventh Amendment. *Hoff v. Nueces County, supra* at 50.

The court observed that the Eleventh Amendment was “passed to protect states as independent sovereigns, and not to create a new state immunity.” *Hoff v. Nueces County, supra*. at 48.

B. EMINENT DOMAIN & TAKINGS

City of Dallas v. Jennings, 142 S.W.3d 310 (Tex. 2004)

Homeowners sued the City after the City’s sewer main backed up and flooded their home with raw sewage. The homeowners asserted that the City’s maintenance of the sewer line constituted an unconstitutional taking, damaging, or destruction of their property for public use without adequate compensation and that the pipeline created, operated, and maintained by the City constituted a nuisance. *City of Dallas v. Jennings, supra* at 311.

The court disagreed with both claims, holding that there was nothing in the evidence demonstrating either that the City knew the couple’s home would be damaged or that the damage was substantially certain to result from authorized government action. Therefore, there was no intentional taking

for which the homeowners were entitled to compensation. *City of Dallas v. Jennings, supra* at 315.

Further, because the homeowners did not point the court to any statutory waiver of immunity, the City could only be liable for nuisances that rose to the level of a constitutional taking. Because there was no taking, there could also be no nuisance. *City of Dallas v. Jennings, supra* at 316.

C. FACTUAL SUFFICIENCY

City of Keller v. Wilson, 168 S.W.3d 802 (Tex. 2005)

In perhaps the most talked-about case decided by the Texas Supreme Court this past year, the court clarified the standard of review for legal sufficiency challenges in civil cases.

The case arose from a takings claim. The City of Keller developed a plan for storm water drainage. The plan included a drainage ditch near the property of the Wilsons. The Wilsons alleged that this ditch increased flooding on their property. *City of Keller v. Wilson, supra*.

The trial court found in favor of the Wilsons, ruling that there was an intentional taking by the city. *City of Keller v. Wilson, supra*.

The court of appeals reviewed the legal sufficiency of the evidence by considering only the evidence and inferences that supported the finding. The court affirmed the trial court’s judgment. *City of Keller v. Wilson, supra*.

The supreme court reversed, holding that the court of appeals did not properly apply the scope of review. *City of Keller v. Wilson, supra*.

The new standard of review is that “appellate courts must view the evidence in the light favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not.” *City of Keller v. Wilson, supra*.

The court states that evidence contrary to the verdict may be considered when: 1) there is no favorable evidence and 2) contrary evidence renders supporting evidence incompetent or conclusively establishes the opposite. *City of Keller v. Wilson, supra*.

Applying this standard of review, the court held that there was no evidence that the City’s approval of the drainage plan was an intentional taking. *City of Keller v. Wilson, supra*.

City of Keller was decided in June, and it is still too early to know what impact, if any, this new standard of review will have on legal sufficiency challenges.

D. MANDAMUS

In re Prudential Insurance Co. Of America, 148 S.W.3d 124 (Tex. 2004)

In this case the parties to a commercial lease agreed to waive trial by jury in any future lawsuit involving the lease. However, when the tenant later sued

the landlord, the tenant demanded a jury trial. The trial court denied the motion of the landlord to quash the tenant’s demand, and the landlord sought mandamus relief from the supreme court. *In re Prudential, supra* at 127.

It is well-established law in Texas that in order for a party to be entitled to mandamus relief, two requirements must be met. First, the trial court must have committed a clear abuse of discretion. Second, the party seeking mandamus relief must not have an adequate remedy by appeal. *See Walker v. Packer, 827 S.W.2d 833, 839-41 (Tex. 1992)*.

In the *Prudential* case the Texas Supreme Court defined when an appellate remedy is adequate: An “appellate remedy is ‘adequate’ when any benefits to mandamus review are outweighed by the detriments.” *In re Prudential, supra* at 136.

The court stated that the determination of when an appellate remedy is adequate should not be based on any particular formula. Instead, it “depends heavily on the circumstances presented.” *In re Prudential, supra* at 137.

The court stated that mandamus is appropriate to “correct clear errors in exceptional cases” where correction of the error is “simple enough.” *In re Prudential, supra*.

The court further stated that the types of errors in which mandamus review is not only appropriate but necessary are “issue[s] of law, one[s] of first impression, but likely to recur.” *In re Prudential, supra* at 138.

The court also stated that it prefers mandamus relief to interlocutory appeals: “Prudent mandamus relief is also preferable to legislative enlargement of interlocutory appeals. The unavailability of mandamus relief increases the pressure for expanded interlocutory appeals.” *In re Prudential, supra* at 137-38.

The supreme court in this case granted mandamus. Former Chief Justice Tom Phillips, dissenting in the case, believed that the opinion created a more ambiguous standard for when mandamus relief would be appropriate. *In re Prudential, supra* at 143 (Thomas, C.J., dissenting).

It remains to be seen what effect this case will have on future trends in mandamus review: “Whether today’s ruling has fundamentally altered these traditional [mandamus] rules, or is merely an anomaly, remains to be seen.” *In re Prudential, supra* (Thomas, C.J., dissenting).

E. UNAUTHORIZED PRACTICE OF LAW

American Home Assurance Company, Inc. v. Unauthorized Practice of Law Committee, 121 S.W.3d 831 (Tex. App. – Eastland 2003, pet’n granted).

Although this case was decided in 2003, it is included in this article because it is currently under review by the Texas Supreme Court. *See Unauthorized Practice of Law Comm. v. Am. Home Assur. Co., 2005 Tex. LEXIS 278 (Tex. Apr. 8, 2005).*

The issue in this case was whether using lawyers who are employees of an

insurance company to defend insureds under liability policies constituted the unauthorized practice of law. *Am. Home Assur. Co., supra* at 833.

The court reasoned that the purpose of an insurance company is to indemnify its insureds, and the agreement to defend and pay attorney’s fees was collateral to that purpose. The insurance company has a direct financial interest in litigation brought by third parties against those the company insures. *Am. Home Assur. Co., supra* at 842

Because of this relationship between the insurance company and those it insures, the court held that the use of staff attorneys to represent the insured did not violate any ethical or disciplinary rules, and that even if providing attorneys constituted the practice of law, it did not constitute the unauthorized practice of law. *Am. Home Assur. Co., supra* at 842.

II. CRIMINAL CASES

A. ANDERS BRIEFS

Eaden v. State, 161 S.W.3d 173 (Tex. App. – Eastland 2005, no pet’n)

Eaden was convicted of three counts of cocaine delivery and the trial court assessed punishment at 10 years confinement for each offense. Appellant’s counsel filed a motion to withdraw as appellate counsel and accompanied the motion with a frivolous appeal brief in accordance with *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. (1967).

The court took the opportunity in this case to set forth its position when court-appointed appellate counsel claims that an appeal is frivolous.

The court stated the following rules, which apply to court-appointed counsel only:

1) A wholly frivolous appeal is one that lacks any basis in law or in fact. The court resolves doubtful issues in appellant's favor. *Eaden v. State, supra* at 175.

2) If counsel makes a professional, conscientious examination and evaluation of the record and determines that an appeal is wholly frivolous, counsel should so advise the appellate court and request permission to withdraw as counsel on appeal. *Eaden v. State, supra*.

3) Counsel must file a brief in support of the motion to withdraw. *Eaden v. State, supra*.

4) In the brief, counsel must make references to the appellate record as well as to any applicable statutes, rules, and cases that lead counsel to the conclusion that the appeal is frivolous. *Eaden v. State, supra*.

5) The brief must contain references to anything in the record that might arguably support the appeal, even though counsel believes the appeal is frivolous. *Eaden v. State, supra*.

6) Counsel is not required to make arguments that would not be made on behalf of a client who has retained counsel for the appeal; counsel is not required to make arguments for which there is no merit. *Eaden v. State, supra*.

7) If counsel concludes that there are no arguable grounds for appeal, then counsel should so state and should make references to the record, statutes, and cases which support that conclusion. *Eaden v. State, supra*.

8) When discussing the record, counsel must discuss the evidence introduced at trial and must provide the appellate court with ready references to the record. Conclusory statements in the brief are insufficient. *Eaden v. State, supra*.

9) Counsel must furnish a copy of the motion to withdraw and a copy of the brief to appellant and must advise appellant of his right to review the record and to file a pro se brief. In this court, the clerk will notify appellant of the time allowed for him to file a pro se brief in which he may raise any points that he chooses. Counsel must certify or otherwise show this court that appellant has been furnished with a copy of the motion and brief and that appellant has been advised of his right to obtain the record and to file a pro se brief. *Eaden v. State, supra* at 175-76.

10) After appellant has raised the points that he wishes to raise or the time has passed for him to do so, the appellate court must conduct an independent examination of the proceedings and determine whether the appeal is wholly frivolous. *Eaden v. State, supra* at 176.

11) If the court finds that the appeal is wholly frivolous and that there are no arguable grounds for appeal, it will grant the motion to withdraw and affirm the judgment of the trial court. *Eaden v. State, supra*.

12) If the court determines that there are arguable grounds, it will abate the appeal and remand the cause to the trial court with instructions that the trial court appoint new and different counsel to represent appellant on appeal to present those arguable grounds, as well as any others that new counsel might wish to present. *Eaden v. State, supra*.

13) This court will not make a decision on the merits of any issue, except to determine that an appeal is wholly frivolous and that there either are or are not arguable grounds for appeal, in the absence of the appointment of such counsel. *Eaden v. State, supra*.

B. CONFRONTATION CLAUSE

1. Woods v. State, 152 S.W.3d 105 (Tex. Crim. App. 2004)

This was the first case in which the Court of Criminal Appeals addressed the decision of the U.S. Supreme Court in *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177, 124 S. Ct. 1354 (2004).

Prior to the Supreme Court's decision in *Crawford*, hearsay statements were admissible for purposes of the Confrontation Clause if they possessed adequate "indicia of reliability." *Woods v. State, supra* at 113.

In *Crawford*, the Supreme Court drew a distinction between testimonial and non-testimonial statements, holding that where testimonial statements were at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the actual confrontation of the testifying witness. See *Woods v. State, supra* at 113-14. In other words, defendants must be allowed to cross-

examine witnesses who provide testimonial hearsay statements.

The issue then becomes which statements are testimonial in nature. This is the issue that was addressed in *Woods*.

In *Woods*, the defendant was convicted of capital murder. A co-defendant made incriminating statements to two witnesses, and Woods argued that the admission of the statements violated his rights under the Confrontation Clause. *Woods v. State, supra* at 112.

The court disagreed, holding that the statements did not fall within the categories of testimonial evidence described in *Crawford*. The court noted that the statements the Supreme Court were referring to in *Crawford* were formal, memorialized statements often made during the judicial process. *Woods v. State, supra* at 114 n. 34. The statements Woods complained of were "casual remarks that [the co-defendant] spontaneously made to acquaintances." *Woods v. State, supra* at 114.

The court affirmed the conviction.

2. Russeau v. State, 2005 Tex. Crim. App. LEXIS 976 (Tex. Crim. App. June 29, 2005)

In this case, the Court of Criminal Appeals further clarified its position regarding *Crawford v. Washington, supra*.

Appellant was convicted of capital murder. During sentencing, the trial court admitted into evidence disciplinary reports concerning appellant's behavior while in prison. The reports contained statements

written by corrections officers detailing, in graphic nature, appellant's repeated disciplinary offenses during his incarceration. None of the corrections officers who wrote the report testified at appellant's trial. *Russeau v. State, supra.*

The court stated that the Sixth Amendment's Confrontation Clause bars the admission of testimonial statements of a witness who does not appear at trial unless he is unavailable *and* the defendant had an opportunity to cross-examine him. A statement is "testimonial" if it is a solemn declaration made for the purpose of establishing some fact. *Russeau v. State, supra.*

The court held that the reports in question contained testimonial statements and were inadmissible: "Indeed, the statements in the reports amounted to unsworn, *ex parte* affidavits of government employees and were the very type of evidence the Clause was intended to prohibit." *Russeau v. State, supra.*

The court further held that the admission of the reports was harmful error because the reports were highly damaging to appellant and the prosecutor repeatedly emphasized them during his closing argument. *Russeau v. State, supra.*

The court affirmed the conviction, but reversed and remanded the case for a new punishment hearing. *Russeau v. State, supra.*

C. SENTENCING & MITIGATION

Perry v. State, 158 S.W.3d 438 (Tex. Crim. App. 2004)

This case addressed the decision of the U.S. Supreme Court in *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004).

A jury convicted appellant of capital murder. The trial court sentenced appellant to death pursuant to the jury's answers to the special issues submitted at the punishment phase. *Perry v. State, supra* at 439.

Appellant claimed that the trial court should have instructed the jury that the State was required to prove beyond a reasonable doubt that the jury should answer "no" to the mitigation special issue because a "no" answer could impermissibly increase his punishment from life imprisonment to death. He asserted that the *Blakely* decision supported his argument. *Perry v. State, supra* at 447.

In *Blakely*, the Supreme Court stated that the statutory maximum sentence for *Apprendi* purposes "is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict. . . ." *Blakely v. Washington, supra.*

The Court further held in *Blakely* that "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,'" and the judge exceeds his proper authority. *Blakely v. Washington, supra.*

The Court of Criminal Appeals thus concluded that the issue before the court was “whether the jury’s finding on the mitigating special issue [was] a ‘fact legally sufficient to the punishment.’” *Perry v. State, supra* at 447.

The court held that it was not, because Supreme Court precedent establishes that only *aggravating* factors are legally essential to the punishment and, by the time the jury reaches the *mitigation* special issue, the prosecution has already proven all *aggravating* facts. *Perry v. State, supra* at 448.

The court affirmed the conviction. *Perry v. State, supra* at 449.

III. LEGISLATIVE UPDATE

A. HOUSE BILL 2039

This bill amends Local Government Code chapter 271 (sections 271.151 - 271.160) by waiving immunity from suit for local government entities that enter into written contracts for the provision of goods and services. The new subchapter expressly states that it does not waive immunity for negligence or intentional torts. It only applies to the adjudication of claims for breach of contract. The provision also bars awards of attorney’s fees unless recovery is expressly provided for in a written agreement. The effective date is September 1, 2005.

B. HOUSE BILL 1294

This bill amends Civil Practice and Remedies Code section 51.014 by allowing for agreed interlocutory appeals from both

district and county courts. Appellate courts no longer have discretion to review any agreed interlocutory orders on controlling questions of law. Review of the orders is now mandatory. The bill is in effect for any interlocutory orders issued after June 18, 2005.

C. HOUSE BILL 2988

This bill amends the Code Construction Act by making it clear that statutory prerequisites to suit, such as notice requirements, are jurisdictional in nature. Therefore, if these statutory requirements are not met, governmental defendants may file pleas to the jurisdiction and possibly have the case dismissed for lack of jurisdiction.

D. HOUSE BILL 729

This bill allows courts to enter a turnover order without having to specify the property to be seized. The intent of the bill was to make it easier for judgment creditors to seize debtor property.

E. SENATE BILL 241 AND HOUSE BILL 1997

These bills create appellate judicial systems in the Austin and Eastland appellate districts. The systems will provide additional funding to the appellate courts. The system is funded by a \$5.00 fee on each civil suit filed in district, probate, and county courts within the covered counties. Similar funding mechanisms already exist in other appellate districts in Texas.

F. HOUSE BILL 282

This bill increases the fees collected to fund alternative dispute resolution. The maximum fee a commissioners court can charge is raised from \$10.00 to \$15.00 per case.

G. HOUSE BILL 1586

This bill expressly allows the Eastland Court of Appeals to sit elsewhere. The court may “transact its business” in any county in the district the court determines necessary or convenient. Other appellate courts already have this power.

H. HOUSE CONCURRENT RESOLUTION 88

This resolution urges the Texas Supreme Court to adopt rules for determining which court of appeals’ precedent will be applied in cases that are transferred from one court of appeals to another court of appeals if there is a conflict between the precedent of the two courts of appeals.

The Supreme Court Advisory Committee is currently divided on how to address this issue. There are currently two proposed alternatives.

The following proposed rules are taken from the SCAC Subcommittee Report of July 11, 2005.

The first alternative states that the court of appeals to which the case is transferred must decide the case in accordance with the clear precedent of the transferor court under principles of stare

decisis. The court’s opinion must also state whether the outcome would or would not have been different had the transferee court applied its own precedent or view of the law or another court of appeals’ precedent.

The second alternative states that the court of appeals must consider and give due regard to the decisions of the transferor court under principles of stare decisis but may decide the case in accordance with the court of appeals own precedent or view of Texas law. The court may when it issues its opinion, and must on motion for rehearing, state whether the outcome would have been different had the court of appeals decided the case in accordance with the precedent of the court from which the case is transferred.

I. SENATE BILL 7 (2ND CALLED SESSION)

In response to the controversial United States Supreme Court decision in *Kelo v. City of New London*, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005), this bill prohibits the taking of private property by eminent domain through public use for economic development.

The bill states that private property may not be taken through the use of eminent domain if the taking:

- 1) confers a private benefit on a particular private party through the use of the property;
- 2) is for a public use that is merely a pretext to confer a private benefit on a particular private party; or
- 3) is for economic development purposes.

