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**SUPREME COURT UPDATE — SUPPLEMENT**  
**May 4, 2005 – July 31, 2005**

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Special thanks to all the *Staff Attorneys* and  
*Law Clerks* at the Supreme Court of Texas  
for their substantial contributions.

**7<sup>th</sup> Annual West Texas Fall Seminar**  
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SUPREME COURT UPDATE — SUPPLEMENT

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Hon. Phil Johnson  
*Justice*  
The Supreme Court of Texas

**I. SCOPE OF THIS ARTICLE**

This article surveys cases that were decided by the Supreme Court of Texas from May 4, 2005 through July 31, 2005. Petitions that have been granted but not yet decided are also included.

**II. ARBITRATION**

**A. Enforcement of Arbitration Agreement**

1. In McKinney, S.W.3d , 48 Tex. Sup. Ct. J. 932 (July 5, 2005) [04-0651].

The issue in this case was whether the Federal Arbitration Act (FAA) required the trial court to compel arbitration. As a child, Keith Rohlack received a cash settlement following his father's death. The money was invested and held in a custodial account with Edward Jones. After turning eighteen, Rohlack re-titled his customer account from a custodial account to one in his own name. At that time, he signed a contract authorizing Edward Jones to act his broker and to provide him with margin loans. On the last page of the contract, above Rohlack's signature, the agreement disclosed that it incorporated "a pre-dispute arbitration clause," referencing the pages on which it could be found. The signature page also acknowledged that Rohlack had "received a copy of this document." Over the next three years, Rohlack's customer account suffered substantial losses from investments in technology stocks on margin. Because of these losses, Rohlack sued Edward Jones and its representative, Delmar "Bo" McKinney, alleging breach of contract, fraud, breach of fiduciary duty, and other claims. In response, Edward Jones filed a plea in abatement and a motion to compel arbitration, urging the court to apply the FAA to the agreement. The trial court denied the motion to compel arbitration, concluding that Rohlack had not agreed to arbitrate despite his signature on the contract; Rohlack testified that he signed the document intending only to change the account name and open a margin account. Edward

Jones sought mandamus relief in the court of appeals, which was denied.

The Supreme Court held that the trial court had erroneously denied Edward Jones's motion to compel arbitration under the FAA. Absent fraud, misrepresentation, or deceit, parties are bound by the terms of the contract they signed, regardless of whether they read it or thought it had different terms. Therefore, Rohlack's contention that he did not understand his signature's significance did not negate his acceptance of the contract terms. Moreover, when parties enter into an agreement based on a writing that is not ambiguous, the court will give effect to the parties' intention as expressed in the writing. Here, the agreement that Rohlack signed recited: "THIS IS A BINDING CONTRACT. I HAVE READ IT CAREFULLY BEFORE SIGNING." It further alerted him on the signature page that it incorporated an agreement to arbitrate and explained elsewhere in the agreement what that meant. Considering these undisputed facts, the only decision that the trial court could have reasonably reached was that Rohlack, by signing the agreement, had consented to arbitrate future disputes. The Supreme Court therefore conditionally granted the petition for writ of mandamus and ordered the trial court to compel arbitration in accordance with the parties' agreement.

**B. Enforcement/Non-Signatories**

1. In re Nexion Health at Humble, Inc., S.W.3d , 48 Tex. Sup. Ct. J. 805 (May 27, 2005) [04-0360].

The issue in this case was whether Medicare funds crossing state lines constitutes interstate commerce for the purposes of the Federal Arbitration Act (FAA).

John Lyman was admitted to Humble Healthcare Center, and his wife, Marjorie,

executed an arbitration agreement with Nexion Health at Humble, Inc. d/b/a Humble Healthcare Center (HHC). John died soon thereafter, and Marjorie filed a petition in the trial court asserting statutory claims for damages under the Texas Wrongful Death Act and the Texas Survival Statute against HHC. The trial court denied HHC's motion to compel arbitration under the Texas Arbitration Act (TAA); HHC filed a motion to reconsider, relying on evidence that HHC was reimbursed by Medicare for services rendered to John and requesting the court to compel arbitration under the FAA. The trial court denied HHC's motion to reconsider. The Fourteenth Court of Appeals denied HHC's petition for writ of mandamus.

The Supreme Court conditionally granted mandamus relief. The Court held that Medicare funds crossing state lines constitutes interstate commerce, bringing a contract within the FAA and allowing arbitration in this case. The Court further held the TAA was preempted by the FAA because the TAA interfered with the enforceability of the arbitration agreement in this case by adding an additional requirement—the signature of a party's counsel—to arbitration agreements in personal injury cases.

2. In re Kellogg Brown & Root, Inc., S.W.3d \_\_\_, 48 Tex. Sup. Ct. J. 678 (May 20, 2005) [03-1129].

In this original proceeding, Kellogg Brown & Root, Inc. (KBR) sought to vacate the court of appeals' order compelling arbitration. Real Party in Interest MacGregor (FIN) Oy contracted with Ingalls Shipbuilding, Inc. to construct elevator trunks for a cruise ship. MacGregor subcontracted with Unidynamics to fabricate and install the elevator trunks. Unidynamics then entered into a sub-subcontract with KBR to fabricate the same elevator trunks. The MacGregor-Unidynamics subcontract contained an arbitration clause but the Unidynamics-KBR sub-subcontract did not.

After the ship buyer declared bankruptcy, Unidynamics instructed KBR to cease work on the elevator trunks. KBR complied and billed Unidynamics for unpaid fabrication services and storage costs. When KBR was not paid in full, it asserted liens on the elevator trunk fabrications, parts, and other materials (collectively, "the collateral"). A dispute then arose between

MacGregor and Unidynamics regarding, among other things, who owned the collateral and who owed KBR for the fabrication services and storage costs. MacGregor and Unidynamics went to arbitration before the International Chamber of Commerce (ICC) to settle their dispute. While the arbitration was proceeding, both parties demanded that KBR release the collateral. KBR refused and filed suit against Unidynamics and MacGregor in Harris County, Texas. KBR claimed that Unidynamics breached its contract and, in the alternative, that it was entitled to recover *quantum meruit* damages against both parties. KBR also sued for declaratory relief, seeking to determine who owned the collateral and, subject to that determination, seeking a declaration that it possessed valid liens against the collateral. MacGregor moved to abate trial court proceedings pending its arbitration or, in the alternative, to compel KBR to pursue its claims in the ongoing arbitration before the ICC. The trial court denied the motion. MacGregor filed a petition for writ of mandamus in the court of appeals; that court conditionally granted mandamus relief and ordered the trial court to issue an order compelling KBR to arbitrate all claims and to stay proceedings pending arbitration. KBR sought mandamus relief in the Supreme Court.

Approximately two months after KBR filed its petition in the Supreme Court, the arbitration between MacGregor and Unidynamics concluded and resolved the ownership dispute to KBR's satisfaction. The mandamus proceeding was not moot, however, because the parties continued to dispute the propriety of compelling KBR to arbitrate its claims against MacGregor and Unidynamics. The live controversy, then, was whether KBR was required to arbitrate the claims that remained after the arbitration between MacGregor and Unidynamics concluded. KBR asserted that it was improperly required to arbitrate its claims; MacGregor argued that arbitration was proper under the doctrine of "direct benefits estoppel"—a type of equitable estoppel applied in the arbitration context.

The Supreme Court held that under the direct-benefits-estoppel doctrine, a non-signatory should be compelled to arbitrate a claim only if it seeks, through the claim, to derive a direct benefit from the contract containing the arbitration provision. The Court did not address KBR's claims against Unidynamics, because the parties ultimately agreed that those claims were not subject to arbitration. As to the *quantum meruit* claim against MacGregor, the Court concluded that KBR's asserted right to payment stemmed directly from the KBR-Unidynamics sub-subcontract rather than the MacGregor-Unidynamics subcontract, which included no provision for paying KBR and effectively precluded KBR from asserting rights under that contract. The Court did not resolve whether KBR's lien-validity claims were arbitrable because the resolution of the ownership dispute eliminated the only rationale that MacGregor had asserted thus far for arbitrating the liens' validity. The Supreme Court conditionally granted mandamus relief and ordered the court of appeals to vacate its order compelling KBR to arbitrate all claims.

### III. ADMINISTRATIVE LAW

#### A. Public Utility Commission/Jurisdiction

1. Tex. Mun. Power Agency v. Pub. Util. Comm'n of Tex., 150 S.W.3d 579 (Tex. App.—Austin, 2004), *petition granted*, 48 Tex. Sup. Ct. J. 609 (May 16, 2005) [04-0751], *consolidated with*, Texas Mun. Power Agency v. Pub. Util. Comm'n of Tex., 150 S.W.3d 579 (Tex. App.—Austin, 2004), *petition granted*, 48 Tex. Sup. Ct. J. 609 (May 16, 2005) [04-0752].

The principal issues are (1) whether Chapter 40 of the Public Utility Regulation Act (PURA) applies to these proceedings even though it became effective after a final order was issued and while a 1999 rate-setting proceeding was pending; and (2) whether the Public Utility Commission has jurisdiction to modify or regulate a power sales contract and a contract sales rate between municipally owned utilities. A dispute arose concerning the PUC's jurisdiction to regulate contracts between the Texas Municipal Power Agency (TMPA) and the City of Bryan. The trial court granted partial summary judgment in favor of Bryan, concluding that as a matter of law,

Chapter 35 of PURA conferred jurisdiction on the PUC to determine whether the terms on which TMPA provided transmission services to Bryan were reasonable. Several orders of the Travis County District Court which favored the PUC and Bryan were consolidated in the court of appeals. The court of appeals affirmed the judgments of the trial court, holding that the sole issue before it was whether Chapter 35 of PURA conferred jurisdiction on the PUC to determine whether the terms by which TMPA allocated wholesale costs for transmission of electricity to Bryan were reasonable, and concluding that because Bryan's complaint falls within the Commission's jurisdiction under Chapter 35, the partial summary judgment in favor of Bryan should be affirmed. On petition for review in the Supreme Court, TMPA asserts that the PUC lacks authority to adjudicate contract rights and to set wholesale transmission rates for municipally owned utilities. Further, TMPA asserts that Chapter 40 applies in these cases because no final agency action has been taken.

The Supreme Court granted TMPA's petition for review and will hear argument on October 18, 2005.

### IV. ATTORNEYS

#### A. Disqualification

1. In re Cerberus Capital Mgmt., L.P., 164 S.W.3d 379 (Tex. May 16, 2005) [04-0732].

The issue was whether the trial court abused its discretion in disqualifying the relators' counsel based on a conflict of interest. Vinson and Elkins (V&E) briefly represented WSNet Holdings, Inc., in an asset purchase transaction. More than a year later, shareholders of WSNet instituted a derivative proceeding against WSNet alleging misconduct related, in part, to the failed asset purchase agreement. V&E obtained permission from WSNet to represent the shareholders. WSNet entered bankruptcy, and the bankruptcy trustee sought to disqualify a V&E lawyer from representing Cerberus Capital Management, L.P., in the shareholder-derivative suit. The trial court held that V&E's prior representation of WSNet was substantially related to the representation in the derivative suit and ordered V&E's disqualification. The court

of appeals denied the relators' request for mandamus relief.

The Supreme Court conditionally granted mandamus relief holding that the trial court abused its discretion in disqualifying V&E because a written waiver of any potential conflict of interest had been executed. Specifically, the waiver letter disclosed V&E's proposed representation of the relators' shareholder derivative suit, the subject matter of its prior work for WSNet, the time period involved, the attorney involved, the nature of the discussion with WSNet's general counsel, and how the prior representation concluded.

## V. CLASS ACTION

### A. Breach of Fiduciary Duty Claims

1. Browning v. Prostok, S.W.3d , 48 Tex. Sup. Ct. J. 701 (May 27, 2005) [03-0784].

The dispute in this case arose out of the Chapter 11 bankruptcy of National Gypsum Company. During the bankruptcy proceedings, a committee representing certain inferior lienholders (collectively, the Junior Bondholders) claimed that National Gypsum's assets were being grossly undervalued by its management, thereby overcompensating more senior lienholders (the Senior Bondholders) at the expense of the Junior Bondholders. The bankruptcy court disagreed and eventually entered an order confirming National Gypsum's proposed reorganization plan. Over two years later, a class of Junior Bondholders (Prostok, *et al.*) filed suit against the officers and directors of National Gypsum, their financial advisors, and one of the Senior Bondholders (TCW), alleging that during the course of the bankruptcy proceedings the defendants had intentionally undervalued National Gypsum by concealing a plan to drastically reduce the company's operating expenses. The trial court granted a joint motion for summary judgment on all claims in favor of the officers and directors and TCW. The court of appeals reversed the trial court's judgment and remanded the claims against the officers and directors, but held that the statute of limitations barred the class claims against TCW.

The Supreme Court reversed the court of appeals' judgment and rendered judgment that the class take nothing. The Court held that class claims represented an impermissible collateral attack on the bankruptcy court's confirmation order. The

Court concluded that while the class action contemplated relief other than revoking the confirmation order, it necessarily challenged the integrity of the bankruptcy confirmation order and resulted in a review of the bankruptcy determinations of the assets to which some claimants are entitled. The Court recognized that when a party does not seek to set aside a judgment, but instead brings suit based on extrinsic fraud, the action is not a collateral attack. However, the Court concluded that the alleged fraudulent conduct in this case, the misrepresentation of the value of National Gypsum, did not prevent the Junior Bondholders from presenting their legal rights in the bankruptcy proceedings. Because the alleged fraudulent conduct was in issue in the prior proceedings, the Court concluded that the alleged fraudulent conduct was intrinsic to the confirmation order. Therefore, the alleged fraud could not properly form the basis of an attack on the confirmation order.

### B. Certification

1. Nat'l W. Life Ins. Co. v. Rowe, 164 S.W.3d 389 (Tex. May 13, 2005) [02-1010].

In this case, the trial court certified a class of policyholders who purchased riders for life insurance covering children up to age 25; the class's claims included breach of contract, fraud, deceptive-trade and Insurance Code violation claims, and other related claims. The class alleged that National Western designed the child rider in a way so that policyholders would not notice they no longer had coverage after their children reached age 25, but would continue to make premium payments. The court of appeals affirmed the class certification.

The Supreme Court reversed the court of appeals' judgment, holding that the class certification did not meet the rigorous scrutiny required by *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425 (Tex. 2000). The trial court did not explain the following: why a policyholder's failure to respond to class notice should give rise to a presumption that the policyholder has no child under 25 and no longer desires child rider coverage; how policyholders with children under 25 or still desiring child rider coverage will be

allowed to exclude themselves from the class; how the court would try actual and punitive damages and limitations issues; why common issues predominate, given the number of individual issues; why Texas law should be applied for class members outside Texas; and why, in a class with many members' claims predating the applicable limitations period by as much as 18 years, a class action is a superior means for resolving the dispute.

## VI. CONSTITUTIONAL LAW

### A. Due Process/Protected Interests

1. City of Houston v. Jackson, 135 S.W.3d 891 (Tex. App.—Houston [1st Dist.] 2004), *pet. granted*, 48 Tex. Sup. Ct. J. 878 (June 14, 2005) [04-0465].

The issues in this case are (1) whether there is evidence of the Fire Chief's intent in failing to implement the Grievance Examiner's recommendation; (2) whether the court of appeals erred by construing section 143.134(h) of the Local Government Code to confer jurisdiction on the trial court; (3) whether section 143.134 violates the due process limitations and Article I, section 13 of the Texas Constitution by allowing the imposition of excessive fines; and (4) whether the court of appeals erred by applying the wrong analysis as to the admissibility of evidence of motive and waiver when the City of Houston raised waiver as an issue.

Jackson, an engineer operator with the City of Houston Fire Department, filed a grievance on August 15, 1996, complaining that his requested transfer to Station 70 had been cancelled. Jackson followed the grievance procedures, but his grievance was denied. Finally, Jackson requested a hearing as provided by section 143.130 of the Local Government Code. After the hearing, Jackson applied for a transfer to Station 11B on November 19, 1996 and accepted a transfer to Station 18D the same day. On November 21, 1996, the Grievance Examiner ordered the Houston Fire Department to "grant a request by [Jackson] [for] a transfer to any other station, besides station 70, which has an opening available at this time." Neither Jackson nor the City appealed the recommendation. At the time of that decision, Station 11B had an opening available, and Jackson had an active request on file to transfer to that station. However, Jackson subsequently failed to

apply for any engineer-operator positions that were available at the time the Grievance Examiner's opinion was entered. Instead, Jackson applied for a transfer to Station 70 even though the Grievance Examiner had specifically held that Jackson could apply to any station other than Station 70.

The Grievance Examiner entered a "Written Clarification Order" on March 13, 1997, stating that Jackson could bypass all applicable eligibility requirements and obtain any transfer within 60 days of the order. The Civil Service Commission did not rule on the order. Jackson then applied for transfers for several positions, none of which were available when he filed the first grievance. On March 26, 1998, Jackson's position at Station 18D was eliminated. Jackson had his choice of assignments from 8 stations, and he elected to be assigned to Station 48D. Jackson then made and withdrew multiple applications to be transferred. In September of 1998, Jackson demanded a transfer to Station 93D and a statutory penalty of \$798,000.

The trial court entered a judgment of \$477,000 in favor of Jackson, based on a jury verdict that the Fire Chief intentionally failed to implement the transfer awarded by the Grievance Examiner and that Jackson had not waived his right to transfer. The court of appeals affirmed the trial court's judgment. The Supreme Court granted the City of Houston's petition for review and will hear argument on October 20, 2005.

### B. Texas Civil Commitment of Sexually Violent Predators Act/Mentally Incompetent Individuals

1. In re Commitment of Michael Fisher, 164 S.W.3d 637 (Tex. May 20, 2005) [04-0112].

This case involves the constitutionality of the Texas Civil Commitment of Sexually Violent Predators Act, Texas Health and Safety Code chapter 841. The State of Texas filed a petition to commit Michael Fisher as a sexually violent predator under the Act. Fisher's attorney requested a competency hearing, but the trial court denied the request because the Act did not provide for such a hearing. The trial court entered judgment on the jury's verdict that Fisher was a sexually violent predator under the Act.

Fisher appealed, arguing that the Act was punitive and could not be applied constitutionally to a mentally incompetent individual. The court of appeals agreed. The court of appeals concluded that the Act was manifestly punitive, both facially and as applied. Accordingly, the court of appeals held that Fisher was entitled to rights under the criminal law, including the opportunity to effectively exercise his right to counsel, the right to be competent at trial, and the right to understand and assist in the trial proceedings. Additionally, the court held that substantive due process required that Fisher be mentally competent to comply with the order of commitment. Moreover, even if the Act were to be found civil or quasi-criminal, the court of appeals concluded that Fisher was minimally entitled to the statutorily specified opportunity to competently exercise his right to counsel. Because the court concluded that Fisher was denied substantive and procedural due process, the court of appeals reversed the trial court's judgment and remanded the case for further proceedings.

The Supreme Court reversed the court of appeal's judgment, holding that the Act is civil, not punitive, and Fisher's due-process rights were not violated. The Court held that the Texas statute, providing for outpatient treatment and monitoring, meets the criteria for a civil-commitment law that the U.S. Supreme Court set out in *Kansas v. Hendricks*, 521 U.S. 346 (1997). Furthermore, the Court noted that because the Act is civil, a sexually violent predator who may be incompetent to stand trial on criminal charges can nonetheless be civilly committed, and thus the Legislature contemplated that not all such alleged predators would be mentally competent.

## VII. CONTRACTS

### A. Interpretation

1. Frost Nat'l Bank v. L&F Distribs., Ltd., S.W.3d , 48 Tex. Sup. Ct. J. 803 (May 31, 2005) [04-0074].

This case involves the interpretation of a term lease with a purchase option provision. Frost National Bank leased fourteen new delivery vehicles to a beer distributor. The parties entered into a sixty-month equipment lease agreement that the distributor subsequently assigned to L&F

Distributors, Ltd. The lease's purchase option provision, known as a terminal rental adjustment clause (TRAC), gave L&F the right to purchase the vehicles "on or before the Expiration" of the lease by giving Frost ninety days' written notice; the provision also provided for payment to be made "on the last day of [the lease's] Expiration [in] an amount in cash equal to the then Fair Market Value as hereafter defined in this section, of such Equipment." The agreement then clarified that Frost would collect an amount equal to twenty percent of the original invoice price of the vehicles when they were sold, whether to L&F or to a third party; specifically, if the vehicles were sold to a third party, Frost would pay L&F any proceeds in excess of that amount, and, should Frost receive less than the twenty percent from the sale, L&F would owe the difference as a final rental payment. Just over a year into the lease term, L&F notified Frost of its intent to exercise the purchase option and sent Frost a \$169,874.99 payment, which amounted to twenty percent of the original invoice price of the vehicles. Frost rejected the payment. L&F sued Frost for declaratory relief; Frost counterclaimed for declaratory relief and breach of contract when L&F stopped paying rent on the vehicles. The trial court granted partial summary judgment for L&F, declaring that Frost breached the lease agreement by refusing to sell the vehicles when L&F tendered payment. The court of appeals affirmed, holding that the lease agreement was unambiguous and allowed L&F to purchase the vehicles with proper notice at any time on or before the end of the lease term.

The Supreme Court reversed, holding that when the purchase option provision was properly construed in conjunction with the rest of the agreement, the provision unambiguously allowed L&F to purchase the vehicles only upon the lease's expiration at sixty months. The Court considered the lease's requirement that payment be made "on the last day of [the] Expiration," and that "Expiration" was contractually defined to occur at sixty months. The Court concluded that the court of appeals' holding that the lease would expire early should L&F exercise the purchase option ignores the agreement's

designation of a different term, “Termination,” to describe the agreement’s being terminated on an earlier or later date than the Expiration. The Court also held that the court of appeals’ construction was “unreasonable, inequitable, and oppressive” because it would allow L&F to require Frost to forgo almost the entire rental value of the equipment and sell it almost new for twenty percent of its value, the same price Frost would receive for selling the equipment at the end of the lease term after collecting rent on it for sixty months.

2. SAS Inst., Inc. v. Breitenfeld, S.W.3d , 48 Tex. Sup. Ct. J. 936 (July 1, 2005) [04-1103].

The issue in this case was the interpretation of a commission contract. John Breitenfeld joined SAS, a software company, as a sales representative in April of 2001. As part of his employment, he signed a commission contract that provided for compensation based on his sales of SAS’s products. In December 2001, Breitenfeld received sales credit for a one-million-dollar sale to Methodist Healthcare System. Accordingly, in February and March of 2002, he was paid a substantial bonus for the sale. But in April of 2002, Methodist Healthcare cancelled its order. Breitenfeld resigned his employment with SAS the following June, without refunding the bonus he had received for the Methodist Healthcare sale. SAS demanded repayment of the bonus, and Breitenfeld refused to pay.

The trial court granted summary judgment in SAS’s favor for repayment of a bonus paid to Breitenfeld under the commission contract. The court of appeals reversed the trial court’s judgment as to repayment of SAS’s bonus and entered judgment for Breitenfeld, allowing Breitenfeld to keep the bonus.

The Supreme Court reversed the court of appeals’ judgment. The Court held that the contract language was unambiguous and the objective intent of the contract was for Breitenfeld to pay back the bonus he received because the sale on which the bonus was based was cancelled.

## **B. Specific Performance**

1. DiGiuseppe v. Lawler, 2004 Tex. App. LEXIS 4977 (Tex. App.—Dallas 2004), *pet. denied*, 48 Tex. Sup. Ct. J. 440 (March 14, 2005), *pet. granted on reh’g*, 48 Tex. Sup. Ct. J. 878 (June 20, 2005) [04-0641].

In this breach-of-contract case, Nick DiGiuseppe seeks specific performance of a real-estate contract he entered into with Roger Lawler. After a jury trial, the jury returned a verdict in DiGiuseppe’s favor. The trial court, on DiGiuseppe’s request, entered specific performance of the contract. No question was submitted to the jury on the issue of specific performance. The issues presented in this case include: (1) whether a question must be submitted to the jury on whether a party to the contract was “ready, willing and able” to perform before specific performance can be awarded; and (2) whether DiGiuseppe presented legally sufficient evidence of monetary damages.

The court of appeals reversed the trial court’s judgment, holding that specific performance could not be awarded because no question had been submitted to the jury regarding whether DiGiuseppe was “ready, willing, and able” to comply with the contract, and such a finding could not be deemed found pursuant to TEX. R. CIV. P. 279. The court of appeals also held that DiGiuseppe did not present legally sufficient evidence to support the jury’s award of monetary damages.

The Supreme Court granted DiGiuseppe’s petition for review and will hear argument on October 20, 2005.

## **VIII. DAMAGES**

### **A. Breach of Contract**

1. Tony Gullo Motors I, L.P. v. Chapa, 2004 Tex. App. LEXIS 7751 (Tex. App.—Beaumont 2004), *pet. granted*, 48 Tex. Sup. Ct. J. 824 (May 16, 2005) [04-0961].

The principal issues in this vehicle-sale case are (1) whether attorney’s fees should have been awarded when the plaintiff did not divide her claim among contract and deceptive-trade practices, on one hand, and tort on the other; (2) whether the court of appeals erred by reinstating the jury’s fraud and deceptive-trade practices

findings; and (3) whether the court of appeals erred in its suggested remittitur halving the punitive damages award.

Nary Chapa claimed Gullo Motors agreed to sell her a vehicle that ultimately was not delivered. She sued the dealership and its sales representative for breach of contract, fraud, and violation of the Deceptive Trade Practices Act. The jury found in her favor, and awarded damages equal to the difference in value between the vehicle promised and the one delivered, mental anguish damages, exemplary damages, additional DTPA damages, and attorney's fees. The trial court, however, concluded that Gullo Motors' actions constituted no more than breach of contract and entered judgment for contractual damages only. The court of appeals concluded that the trial court erred in not entering a judgment consistent with the verdict and reinstated the jury's award. It also held that the punitive damage award was unconstitutionally excessive and suggested a remittitur of half the punitive damage amount. On petition for review in the Supreme Court, Gullo Motors asserts that the court of appeals erred in reinstating the jury's findings of fraud and DTPA violations and in awarding Chapa mental anguish and punitive damages in addition to contract damages. Additionally, Gullo Motors argues the court of appeals' punitive damage amount is excessive in light of Chapa's economic damages and that the punitive damage award is therefore unconstitutional.

The Supreme Court granted Gullo Motors' petition for review and will hear argument on October 19, 2005.

## IX. DEFAMATION

### A. Summary Judgment

1. Freedom Newspapers of Tex. v. Cantu, S.W.3d , 48 Tex. Sup. Ct. J. 916 (June 24, 2005) [04-0115].

The issue in this defamation case was whether the public-figure plaintiff raised a genuine issue of material fact regarding actual malice by presenting evidence that the defendant published a newspaper article containing statements never expressly made by the plaintiff. Conrado Cantu was a candidate for sheriff of Cameron County. During a political debate with his opponent, Cantu stated that "you

have to be bi-cultural" to be sheriff of Cameron County. The next day, an article appeared in the Brownsville Herald, published by Freedom Newspapers, with the headline, "Cantu: No Anglo can be sheriff of Cameron County." Cantu complained to the newspaper, and the next day a followup article appeared, headlined, "Sheriff candidate says racial issue wasn't the point," which referred to comments Cantu made "about his opponent in the Cameron County sheriff's race not being the best man for the job because he's not Hispanic." Cantu brought a defamation suit against Freedom Newspapers, its editor, and the author, asserting that he never used the words attributed to him in the headline and first sentence of the article. In its motion for summary judgment, Freedom Newspapers claimed that the articles were substantially true, or alternatively, that it had not acted with actual malice. The trial court denied the motion, and the court of appeals affirmed the trial court's judgment.

The Supreme Court reversed the court of appeals' judgment and rendered judgment that the plaintiff take nothing. To recover for defamation, a public-figure plaintiff must prove that the defendant published a false and defamatory statement with actual malice. While an altered statement can constitute evidence of actual malice if a reasonable reader could interpret the statement as being the speaker's actual words, the Court held that the context of the article indicated that Freedom Newspapers was merely interpreting or paraphrasing Cantu's remarks. As such, proof that Cantu did not make the exact remark attributed to him, standing alone, was not evidence of actual malice. Rather, Cantu had to present some evidence that Freedom Newspapers misinterpreted his remarks on purpose, or in circumstances so improbable that only a reckless publisher would have made the mistake.

## X. DISCOVERY

### A. Privilege

1. In re Fire Ins. Exch., 2004 Tex. App. LEXIS 8494 (Tex. App.—Beaumont 2004), *argument granted on pet. for writ of mandamus*, 48 Tex. Sup. Ct. J. 824 (June 13, 2005) [04-1010].

The principal issue is whether mandamus relief should be granted to vacate a protective order. During the course of discovery in the underlying litigation, the real party in interest sought production of certain documents. Because the trial court concluded that the documents contained trade secrets or proprietary information, it issued a protective order. Relators objected that the protective order did not limit use of the documents to this case or require the return of the documents at its conclusion. The court of appeals denied mandamus relief, holding that the trial court's order adequately protected Fire Insurance Exchange from the involuntary disclosure of its trade secrets. On petition for writ of mandamus in the Supreme Court, Fire Insurance Exchange asserts that the trial court abused its discretion by granting the protective order and that the court of appeals misapplied the Supreme Court's decisions in *Garcia v. Peeples*, 734 S.W.2d 343 (Tex. 1987), and *Eli Lilly & Co. V. Marshall*, 850 S.W.2d 155 (Tex. 1993).

The Court will hear argument in this case on October 19, 2005.

2. *In re State Nat'l Ins. Co.*, 2004 Tex. App. LEXIS 8590 (Tex. App.—San Antonio 2004), argument granted on pet. for writ of mandamus, 48 Tex. Sup. Ct. J. 933 (July 5, 2005) [04-0888].

The principal issue in this case was whether an insurance company can assert its insured's right to attorney-client privilege in order to protect documents requested by a judgment creditor, to whom the insured's *Stowers* claim was judicially assigned. Also at issue is whether the judicial assignment of the *Stowers* claim waives the insured's right to assert the attorney-client privilege. This dispute arose when the plaintiff prevailed in a personal injury suit against the insured, whose defense was provided by his insurance company. The plaintiff initiated a turnover proceeding against the insured to collect the judgment. Although the insured did not participate in any of the turnover proceedings, the trial court judicially assigned the insured's *Stowers* claim against his insurance company to the plaintiff. When the plaintiff began discovery on the *Stowers* claim, the insurance company asserted that the documents requested were protected by the

insured's attorney-client privilege and that the trial court's order to turn over the insured's *Stowers* claim to the plaintiff did not act as a waiver of the insured's attorney-client privilege. The trial court ordered the insurance company to produce the documents requested. The insurance company filed a petition for writ of mandamus with the court of appeals, which was denied.

The Supreme Court will hear argument in this case on November 15, 2005.

## XI. EMPLOYMENT LAW

### A. Constructive Discharge

1. *Baylor v. Coley*, 147 S.W.3d 567 (Tex. App.—Waco 2004), pet. granted, 48 Tex. Sup. Ct. J. 823 (June 10, 2005) [04-0916].

Two principal issues are presented in this employment dispute case: (1) the correct standard for constructive discharge when an employment contract is involved; and (2) whether the employee preserved her objection to the jury charge by tendering a proposed charge that complied with TEX. R. CIV. P. 278.

Betty Coley was employed as a librarian at Baylor University and was granted tenure in 1981. She resigned in 1994 and then sued Baylor for breach of contract, contending that she had been constructively discharged. The trial court submitted the following definition of constructive discharge to the jury: "An employee is considered to have been discharged when an employer makes conditions so intolerable that a reasonable person in the employee's position would have felt compelled to resign." The jury returned a verdict in Baylor's favor and the trial court entered a take-nothing judgment. The court of appeals reversed the trial court's judgment and remanded the case, holding that Coley's breach-of-contract theory was not properly submitted to the jury. The court of appeals held that the trial court's definition of constructive discharge was inconsistent with the Supreme Court's decision in *Kramer v. Wolf Cigar Stores Co.*, 91 S.W. 775, 777 (Tex. 1906), where the Court held that an employer may be found to have breached an employment contract if the employer "make[s] a material change in the position to which [the employee] was entitled under contract." The court of appeals also held

that Coley preserved her objection to the jury charge by tendering a “substantially correct” charge in accordance with TEX. R. CIV. P. 278.

The Supreme Court granted Baylor’s petition for review and will hear argument on October 19, 2005.

## **XII. FAMILY LAW**

### **A. Initial Child-Custody Determination**

1. Powell v. Stover, S.W.3d \_\_\_, 48 Tex. Sup. Ct. J. 780 (May 31, 2005) [03-1154].

The issue in this case was whether Texas was a child’s “home state” for purposes of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).

Russell Powell moved from Texas to Tennessee to accept a new position with his employer. His wife, Sonia Powell, sold her house in Texas, closed her Texas bank accounts, and moved with the couple’s son, D.B.P., to Tennessee to join Russell. After living in Tennessee for approximately ten months, Sonia moved back to Texas and brought D.B.P. with her. At the time, she was seven months pregnant with D.T.P., who was later born in Texas. Approximately two weeks after arriving in Texas, Sonia filed for divorce in Hardin County, Texas, requesting managing conservatorship of D.B.P. Russell filed for divorce in Tennessee two weeks later. The Tennessee court issued a temporary parenting plan awarding custody of D.B.P. to Russell. Russell then filed in the Texas proceeding a plea in abatement and a motion to dismiss for lack of jurisdiction. The trial court denied both motions, and the court of appeals declined to grant mandamus relief.

Because this case involves an initial child-custody determination, and home-state jurisdiction has priority, the question presented was whether Texas or Tennessee was D.B.P.’s home state on the date the proceeding was commenced. The Texas Family Code defines “home state” as “the state in which a child lived with a parent . . . for at least six consecutive months immediately before the commencement of a child custody proceeding. . . . A period of temporary absence of a parent . . . is part of the period.” TEX. FAM. CODE § 152.102(7). In the Supreme Court, Russell asserted that this language created a bright-line, six-month test focused on the child’s physical presence. Thus,

Russell contended that D.B.P.’s ten-month stay in Tennessee with his parents conferred home-state jurisdiction on the Tennessee court. Sonia, however, asserted that D.B.P.’s time in Tennessee was merely a “temporary absence” from Texas and that Texas remained D.B.P.’s home state throughout his stay in Tennessee because Sonia intended to be there only temporarily.

The Supreme Court held that a child’s “home state” should be determined by applying a bright-line, six-month test focused on the child’s physical presence rather a test that considers subjective factors. In this case, D.B.P.’s physical presence in Tennessee with his parents for over ten months immediately before the commencement of this custody proceeding conclusively established that he “lived” in Tennessee and that Tennessee was D.B.P.’s home state under Texas’s version of the UCCJEA. The Court conditionally granted the petition for writ of mandamus and ordered the trial court to stay the proceeding and communicate with the Tennessee court. The Supreme Court further held that if the Tennessee court does not determine that Texas is a more appropriate forum, the trial court shall dismiss the proceeding.

## **XIII. HABEAS CORPUS**

### **A. Contempt Order**

1. In re Gawerc, S.W.3d \_\_\_, 48 Tex. Sup. Ct. J. 807 (May 27, 2005) [04-1044].

The issue in this habeas corpus proceeding was whether the relator produced sufficient evidence that he was unable to meet the condition for release from his civil contempt incarceration. The trial court found the relator in civil and criminal contempt for failing to comply with a modified child support order, including failure to post a \$50,000 child support bond. After the relator served his criminal contempt sentence and complied with all the conditions for release except filing the child support bond, he filed a petition for writ of habeas corpus alleging he could not meet the final condition for release from his coercive civil contempt custody. Both the trial court and the court of appeals denied the relator’s application for release from custody.

The Supreme Court held that the relator produced uncontroverted evidence that he was unable to purge himself of the condition for release. The relator presented expert testimony that bond companies require collateral of cash or a bank line of credit in the amount of the bond. The evidence showed: (1) the relator did not have the cash or credit required; (2) he had no friends or relatives who would loan him the money; and (3) all the property he owned was subject to an IRS lien in excess of three million dollars. Opposing counsel insinuated, through questioning, that the relator had proceeds from prior questionable real estate sales but presented no evidence that the sales were fraudulent, that the relator still possessed any of the proceeds, or that the relator had any property not subject to the IRS lien. Because the relator established that he did not have the ability to purge himself of the civil contempt, the Court granted the petition for writ of habeas corpus and ordered the relator discharged from custody.

#### XIV. INSURANCE

##### A. Duty to Defend

1. GuideOne Elite Ins. Co. v. Fielder Road Baptist Church, 139 S.W.3d 384 (Tex. App.—Fort Worth 2004), *pet. granted*, 48 Tex. Sup. Ct. J. 878 (June 17, 2005) [04-0692].

In this declaratory-judgment action, two main issues are presented: (1) whether extrinsic evidence should be considered in determining GuideOne Elite Insurance Co.'s duty to defend Fielder Road Baptist Church (FRBC) in an underlying sexual-misconduct action, and (2) whether the Jane Doe pleadings were sufficient to allege a covered "bodily injury." GuideOne issued to FRBC a commercial general liability insurance policy that became effective on March 31, 1993, and expired on March 31, 1994. The policy included a Sexual Misconduct Liability Coverage Form containing the following provision:

We agree to cover your legal liability for damages because of bodily injury, excluding any sickness or disease, to any person arising out of sexual misconduct which occurs during the policy period. We shall have the right and duty to investigate any claim . . . and to defend any suit brought against you seeking

damages, even if the allegations of the suit are groundless, false or fraudulent, and we may make any settlement we deem expedient.

On June 6, 2001, Jane Doe filed a sexual-misconduct action against FRBC and its youth minister, Charles Patrick Evans. In her petition, Jane Doe asserted: "At all times material herein from 1992 to 1994, Evans was employed as an associate youth minister and was under [FRBC's] direct supervision and control when he sexually exploited and abused Plaintiff." FRBC requested that GuideOne defend it in the suit and indemnify it for any settlement or judgment. GuideOne agreed to defend FRBC, subject to its reservation of rights to determine whether there was coverage under the policy.

On September 18, 2001, GuideOne filed this declaratory-judgment action seeking a construction of the policy and a determination that GuideOne had no duty to defend or indemnify FRBC. GuideOne then sought discovery of evidence outside of the insurance policy and pleadings, namely a deposition of FRBC's corporate representative with knowledge of the employment and volunteer relationship between FRBC and Evans. FRBC responded by filing a motion to quash the notice of deposition and for protective order, arguing that the trial court could not consider extrinsic evidence in determining GuideOne's duty to defend. The trial court denied FRBC's motions. FRBC then served a "Stipulation Regarding Employment of Charles Patrick Evans," asserting that Evans "left employment with Defendant FRBC on or about December 15, 1992," which was before the policy became effective. GuideOne and FRBC each filed motions for summary judgment.

The trial court entered a declaratory judgment granting GuideOne's motion in its entirety, denying FRBC's motion in its entirety, and declaring that GuideOne had no duty to defend FRBC. In its judgment, the trial court stated that it referenced the "Stipulation Regarding Employment of Charles Patrick Evans" in reaching its decision. The court of appeals reversed the trial court's judgment, rendered judgment that GuideOne had a duty to defend FRBC, and remanded the case for a

hearing on attorney's fees and costs. The court of appeals concluded that extrinsic evidence could not be considered in determining GuideOne's duty to defend FRBC. Additionally, the court gave the term "bodily injury" its plain meaning and concluded that Jane Doe alleged a claim for damages as a result of bodily injury from sexual misconduct, and thus, her pleadings were specific enough to assert a covered claim. The Supreme Court granted GuideOne's petition for review and will hear argument on October 20, 2005.

## **B. Reimbursement Between Insurers**

1. Liberty Mut. Ins. Co. v. Mid-Continent Ins. Co., certified question accepted, 48 Tex. Sup. Ct. J. 609 (May 13, 2005) [05-0261].

Liberty Mutual and Mid-Continent are primary insurers for a mutual insured. Liberty Mutual also carries the excess policy for the same insured. Both insurers assumed the defense of the insured against a third-party claim. The claim ultimately settled for \$1.5 million, but Mid-Continent only paid \$150,000. Liberty Mutual paid the remaining \$1,350,000 and brought this suit seeking the remainder of Mid-Continent's proportionate share of the settlement, or \$600,000. Following a bench trial, the district court awarded Liberty Mutual \$550,000. Mid-Continent appealed that judgment to the Fifth Circuit.

The Fifth Circuit certified the following three questions to the Texas Supreme Court: "(1) Two insurers, providing the same insured applicable primary insurance liability coverage under policies with \$1 million limits and standard provisions (one insurer also providing the insured coverage under a \$10 million excess policy), cooperatively assume defense of the suit against their common insured, admitting coverage. The insurer also issuing the excess policy procures an offer to settle for the reasonable amount of \$1.5 million and demands that the other insurer contribute its proportionate part of that settlement, but the other insurer, unreasonably valuing the case at no more than \$300,000, contributes only \$150,000, although it could contribute as much as \$700,000 without exceeding its remaining available policy limits. As a result, the case settles (without an actual trial) for \$1.5 million funded \$1.35 million by the insurer which also issued the excess policy and \$150,000

by the other insurer. In that situation is any actionable duty owed (directly or by subrogation to the insured's rights) to the insurer paying the \$1.35 million by the underpaying insurer to reimburse the former respecting its payment of more than its proportionate part of the settlement? (2) If there is potentially such a duty, does it depend on the underpaying insurer having been negligent in its ultimate evaluation of the case as worth no more than \$300,000, or does the duty depend on the underpaying insured's evaluation having been sufficiently wrongful to justify an action for breach of the duty of good faith and fair dealing for denial of a first party claim, or is the existence of the duty measured by some other standard? (3) If there is potentially such a duty, is it limited to a duty owed the overpaying insurer respecting the \$350,000 it paid on the settlement under its excess policy?"

The Supreme Court accepted the certified questions and will hear argument on October 18, 2005.

## **C. Reimbursement for Claims Paid but Not Covered**

1. Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools Inc., S.W.3d , 48 Tex. Sup. Ct. J. 735 (May 31, 2005) [02-0730].

The principal issue was whether excess insurance carriers that disputed coverage, but that nonetheless settled third-party claims against their insured, were entitled to be reimbursed by the insured after it was determined that the insured's claims were not covered. Excess Underwriters provided excess insurance to Frank's Casing Crew & Rental Tools, Inc. Frank's fabricated a drilling platform for ARCO/Vastar. The platform collapsed, and ARCO sued Frank's Casing, among others. Frank's Casing demanded that Excess pay a settlement offer, which Excess funded. Prior to the settlement, Excess had disputed coverage; after the settlement, it brought an action for declaratory judgment against Frank's Casing, seeking reimbursement of the settlement amount. The trial court granted summary judgment in favor of Frank's Casing, holding that Excess had

no right to reimbursement because Frank's Casing had not "unequivocally consented" to reimbursement. The court of appeals affirmed. Both courts concluded that the decision in *Texas Association of Counties County Government Risk Management Pool v. Matagorda County*, 52 S.W.3d 128 (Tex. 2000), was controlling. In *Matagorda County* the Court held that a primary insurer who settles a suit can seek reimbursement from the insured only if the insured "consented to the settlement and the insurer's right to seek reimbursement." *Id.* at 135.

The Supreme Court reversed the court of appeals' judgment and remand this case to the trial court to enter judgment in Excess's favor. The Court held that *Matagorda County* does not foreclose reimbursement in this case. The Supreme Court recognized that the concern in *Matagorda County*—that an insurer holding a unilateral right to settle could accept a settlement that the insured considered out of the insured's financial reach and leave the insured required to reimburse the insurer for that amount—is ameliorated if not eliminated in at least two circumstances: (1) when an insured has demanded that its insurer accept a settlement offer that is within policy limits, or (2) when an insured expressly agrees that the settlement offer should be accepted. In these situations, the insurer has a right to be reimbursed if it has timely asserted its reservation of rights, notified the insured it intends to seek reimbursement, and paid to settle claims that were not covered. When, as in this case, there is a coverage dispute and an insured demands that its insurer accept a settlement offer within policy limits, the insured is deemed to have viewed the settlement offer as a reasonable one. The insurer should be entitled to settle with the injured party for an amount the insured has agreed is reasonable and to seek recoupment from the insured if the claims against the insured were not covered. In cases such as this one, an agreement to reimburse an insurer is implied in law.

Justice Hecht concurred, noting that the distinctions that can be found between this case and *Matagorda County* are immaterial. He would hold that the rule in *Matagorda County* cannot survive the Court's decision in this case and therefore was wrongly decided. The insured's right to consent to settlement does not matter because neither case was

about a settlement forced on an insured. The insureds in both cases wanted the insurer to settle.

Justice O'Neill also concurred, noting that this case significantly differed from *Matagorda County* because the insurers could not settle without their insured's consent under the parties' insurance agreements. Frank's Casing not only consented to the settlement, but initiated it. She concludes that the Court goes too far in holding that a reimbursement obligation is implied "when an insured has demanded that its insurer accept a settlement offer that is within policy limits." She would hold that the *Stowers* test presumes coverage and simply has no application in determining an insurer's reimbursement right when coverage is disputed.

Justice Wainwright also concurred, writing that although *Matagorda County* is not expressly overruled by the Court, the small window *Matagorda County* left open to consider reimbursement is widened by the Court's decision in this case such that the law on reimbursement comports with principles of the common law. Consideration by Texas courts of common-law contract theories and quasi-contract theories is appropriate once again in determining the rights and obligations of the parties. The parties reached an agreement on reimbursement and the Court should decide this case by enforcing their agreement.

#### **D. Surplus Lines Insurance**

1. *Strayhorn v. Lexington Ins. Co.*, 128 S.W.3d 772 (Tex. App.—Austin 2004), *pet. granted*, Tex. Sup. Ct. J. (May 27, 2005) [04-0429].

The issue in this case is whether eligible surplus lines insurers, who cannot prove they placed surplus lines insurance through a licensed Texas surplus lines agent on certain transactions, have engaged in unauthorized insurance and become "unauthorized insurers" liable for the payment of a premium tax imposed by former TEX. INS. CODE art. 1.14-1, § 11.

Surplus lines insurance allows a person who seeks to insure a Texas risk, but is unable to obtain that insurance from a Texas-licensed insurer, to seek the insurance from an insurer who is not licensed in Texas but is an "eligible"

surplus lines insurer. *See* TEX. INS. CODE § 981.001. The Comptroller assessed an “unauthorized insurance” tax premium against three eligible surplus lines insurance companies—Lexington Insurance Company, Landmark Insurance Company, and American International Specialty Lines Insurance Company (the Insurers)—on transactions where the Insurers could not prove they used an Texas surplus lines agent. The Insurers paid their respective taxes under protest and sought a refund in district court. The district court granted the Insurers’ summary-judgment motion and ordered the Comptroller to refund the taxes. The court of appeals reversed the trial court’s judgment, holding that because surplus lines policies must be issued through licensed Texas agents under article 1.14-1, section 11(a) of the Texas Insurance Code, and because the Insurers could not establish they utilized surplus lines agents, they were liable for payment of the tax. The Insurers petitioned this Court for review. The Insurers contend that the unauthorized insurance premium tax does not apply to them because they are eligible surplus lines insurers. The Comptroller asserts that although the Insurers are eligible to issue surplus insurance in Texas, the Insurers were required to prove they issued the policies through licensed Texas surplus lines agents; otherwise, they conducted unlawful and unauthorized insurance and are subject to the tax on a transaction-by-transaction basis.

The Supreme Court granted Strayhorn’s petition for review and will hear argument on September 28, 2005.

## **XV. INTENTIONAL TORTS**

### **A. Fraud**

1. Meyer v. Cathey, S.W.3d , 48 Tex. Sup. Ct. J. 913 (June 24, 2005) [03-0938].

This case involved allegations of fraud and breach of fiduciary duty between business associates. John Cathey sued Larry Meyer, alleging that Meyer failed to pay him amounts promised for his work on various real estate development projects. After a six-week trial, the jury found that Meyer fraudulently induced Cathey to participate in all of the projects, but also that Cathey ratified and waived each incident of fraud. The jury also found that Meyer breached a

fiduciary duty owed to Cathey regarding two of the projects, but that Cathey knew or should have known of the breach on or before May 22, 1995—two years before he filed this suit and, according to Meyer, after the applicable statute of limitations had expired. The trial court entered a take-nothing judgment in Meyer’s favor and granted his post-trial motion for discovery sanctions. A divided court of appeals reversed in part, affirmed in part, rendered in part, and remanded in part.

The Supreme Court held that there was legally insufficient evidence that Meyer owed a fiduciary duty to Cathey and that there was sufficient evidence to support Meyer’s ratification defense to Cathey’s fraud claims. Accordingly, the Court rendered judgment that Cathey take nothing on those claims. The Court also held that Meyer waived his right to recover discovery abuse sanctions and ordered that Meyer take nothing on his motion for sanctions.

## **XVI. JURISDICTION**

### **A. Exhaustion of Administrative Remedies**

1. Van Indep. Sch. Dist. v. McCarty, S.W.3d , 48 Tex. Sup. Ct. J. 776 (May 27, 2005) [03-1123].

This case arose from an interlocutory appeal of the trial court’s denial of a motion to dismiss for lack of subject matter jurisdiction in a retaliatory discharge suit arising under Chapter 451 of the Texas Labor Code. The principal issue was whether a school board waives the exhaustion of remedies requirement by denying an administrative appeal for being untimely after conducting a hearing on the merits of the claim. McCarty worked as a maintenance employee for Van Independent School District for fourteen years before the District decided to terminate his employment. McCarty was informed that the decision could be appealed as long as he filed a notice of his intention to do so within seven days of his termination. McCarty, however, did not file this notice until two weeks after the deadline had passed. Two months later, he filed a second request, which, unlike the first, was scheduled for a formal hearing by the Board. The Board subsequently denied the grievance, basing its

decision on McCarty's untimely hearing request and the evidence presented.

McCarty sued the District, alleging he was terminated in retaliation for filing a workers' compensation claim. In response, the District filed a plea to the jurisdiction contending that McCarty had failed to exhaust his administrative remedies. The trial court denied the plea to the jurisdiction, and the court of appeals affirmed. While the court of appeals recognized that the exhaustion of remedies was a prerequisite to the trial court's subject matter jurisdiction, it concluded that this requirement was waived when the District heard McCarty's grievance and rendered a decision on the merits.

Without hearing oral argument, the Supreme Court reversed the court of appeals' judgment and dismissed the claim for lack of jurisdiction. The Court noted that while waiver may sometimes be established by conduct, that conduct must be unequivocally inconsistent with claiming a known right. Because addressing the merits of a party's complaint is not unequivocally inconsistent with later denying the claim for being untimely filed, the Court concluded that waiver not been established here.

Justice O'Neill filed a dissenting opinion. She wrote that the Court "summarily resolves an issue of first impression by holding that compliance with non-statutory administrative deadlines was a jurisdictional prerequisite to filing suit in this case." She concluded that McCarty exhausted his administrative remedies by requesting the trustees to hold a hearing on his grievance and to waive the non-statutory deadline for filing the request.

## **B. Personal Jurisdiction/Minimum Contacts**

1. Michiana Easy Livin' Country, Inc. v. Holten, S.W.3d \_\_\_, 48 Tex. Sup. Ct. J. 789 (May 27, 2005) [04-0016].

The issue in this DTPA/contract case was whether suit could be brought in Texas based on a nonresident's alleged misrepresentations over a telephone call with a Texas resident. Holten decided to purchase a recreational vehicle from Michiana Easy Livin' Country, Inc., an outlet store that only conducted business in Indiana. Holten placed the call that initiated the transaction and agreed to resolve all disputes in Indiana. However,

once he received the vehicle, Holten filed suit against Michiana in Texas. The trial court denied Michiana's special appearance and the court of appeals affirmed, basing its decision on the following two contacts between Michiana and Texas: (1) misrepresentations Michiana allegedly made in response to a phone call from the plaintiff, and (2) Michiana's arrangements with a shipper to deliver the recreational vehicle in Texas.

The Supreme Court reversed the court of appeals' judgment and rendered judgment dismissing the claims against Michiana for want of jurisdiction. In reaching its decision, the Court evaluated each of the two contacts relied upon by the court of appeals and concluded that neither was sufficient to support jurisdiction. It noted that basing jurisdiction on where a tort was committed would obfuscate the role of judge and jury by equating the jurisdictional inquiry with the underlying merits. Furthermore, the United States Supreme Court has consistently held that this kind of foreseeability is not a sufficient benchmark for exercising personal jurisdiction. As to the second ground—whether jurisdiction was determined by the place of delivery—the Court emphasized that the Fourteenth Amendment prohibits courts from gaining jurisdiction over a foreign manufacturer merely because it knew its allegedly defective product would be shipped to that state. Because a plaintiff has complete control over where the product is delivered, this would also contravene the rule that unilateral activity cannot satisfy the requirement of contact with the forum state.

Justice Medina dissented, joined by Justice O'Neill. Justice Medina wrote that the controlling issue was not the fact that the phone call initiated the dispute, but that a tort was committed in Texas; he noted that it is not the quantity or duration of contacts that matters in the specific jurisdiction context, but the nature of the contacts.

## XVII. MANDAMUS

### A. Insurance-Coverage Claims

1. In re Cent. Mut. Ins. Co., 2003 Tex. App. LEXIS 10817 (Tex. App.—San Antonio 2003), argument granted on pet. for writ of mandamus, 48 Tex. Sup. Ct. J. 609 (May 13, 2005) [04-0014].

This case arises from a multi-car accident that killed and severely injured several people. The plaintiffs sued John Cox, one of the drivers involved, and William Cox, John's father. The plaintiffs later added William's insurer, Central Mutual, as a defendant, and sought a declaration of coverage. Central Mutual filed a plea to the jurisdiction, asserting that the plaintiffs cannot bring a direct action against the defendants' insurer and that the trial court lacked subject matter jurisdiction to issue an advisory opinion. Central Mutual was providing a defense to the Coxes in the suit under a reservation of rights. The trial court denied Central Mutual's plea to the jurisdiction, and the court of appeals denied mandamus relief.

Central then filed this petition for writ of mandamus in the Supreme Court. The principal issue is whether mandamus relief is available when a trial court refuses to dismiss plaintiffs' coverage claims, brought in the original tort action, against the defendants' insurer when the insurer is providing a defense to the defendants. The Court will hear argument on September 27, 2005.

## XVIII. MEDICAL MALPRACTICE

### A. Credentialing Claims

1. Romero v. KPH Consolidation, Inc., S.W.3d , 48 Tex. Sup. Ct. J. 752 (May 27, 2005) [03-0497].

In this malicious credentialing case, the principal issues were: (1) whether there was clear and convincing evidence that the hospital acted with malice in credentialing the surgeon, and (2) if not, whether it was reversible error to allow the jury, in apportioning responsibility for the plaintiff's injuries among the hospital, two physicians, and a nurse, to consider the hospital's alleged malicious credentialing along with the hospital's negligent delivery of blood to the operating room, for which the hospital does not challenge liability here.

Dr. Merrimon Baker, an orthopedic surgeon, performed elective back surgery on Ricardo

Romero at Columbia Kingwood Medical Center (the Hospital). During the surgery, Romero lost a great deal of blood and went into cardiac arrest. He was given blood transfusions and resuscitated, but was left severely and permanently brain damaged. The Romeros sued the Hospital, Dr. Baker, and others; all defendants except the Hospital settled. The Romeros claimed that the Hospital: (1) was negligent via its employees in delivering blood to the operating room for the transfusions, and (2) acted with malice in granting and retaining Dr. Baker's surgical credentials at the Hospital, both of which proximately caused Romero's injuries. The Romeros alleged that Dr. Baker was addicted to a prescription narcotic and had a history of malpractice lawsuits. The Hospital invoked the peer review privilege in response to the Romeros' requests for information pertaining to the credentialing process with respect to Dr. Baker.

The jury found: (1) the Hospital's negligence proximately caused Romero's injuries; (2) there was clear and convincing evidence that the Hospital acted with malice in granting or retaining Dr. Baker's surgical credentials, which proximately caused Romero's injuries; and (3) the Hospital was 40% responsible for Romero's injuries. The court of appeals reversed the trial court's judgment, holding that there was legally insufficient evidence that the Hospital acted with malice in credentialing Dr. Baker; specifically, although there was sufficient evidence of the Hospital's actual awareness that Dr. Baker posed an extreme risk to patients, there was no evidence that the Hospital acted with conscious indifference to the safety of others in granting and retaining Dr. Baker's credentials. The court of appeals remanded the case for a new trial, noting that the single broad-form apportionment question in the jury charge, which was premised on an affirmative liability finding to the negligence *or* malicious credentialing question, made it impossible to determine what percentage of the Hospital's liability was based on the valid negligence claim as opposed to the invalid credentialing claim.

The Supreme Court affirmed the court of appeals' judgment. The Court first determined that there was no evidence of malicious credentialing to support the trial court's judgment; specifically, there could be no evidence that the Hospital was consciously indifferent to the risk posed by Baker's alleged drug abuse because there was no evidence that the Hospital failed to do something it should have done. The Court next determined that it was reversible error to submit the factually-unsupported malicious credentialing claim in the single apportionment question because the jury was significantly influenced by its erroneous inclusion. The Hospital did not fail to preserve error on this point because it correctly objected to the malicious credentialing question and no more was required of it to preserve its complaint. The Court further noted that the reversible error rule in *Crown Life Insurance Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000), and *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002), which was applied in this case, neither encourages nor requires parties to submit separate questions for every possible combination of issues, but rather encourages and requires parties not to submit issues that have no basis in law and fact in such a way that the error cannot be corrected without retrial. The Court finally concluded that any error in the apportionment question affected at the very least the punitive damages findings and for that reason alone, a new trial on the entire negligence claim was required.

Justice O'Neill concurred, joined by Justice Medina. Justice O'Neill wrote that "the peer-review privilege prevented the Romeros from knowing what actions the hospital took or failed to take to protect the public from a physician whose own former chief of staff, a member of the credentialing committee, thought was a menace to patients." She further noted that "unless health-care institutions and providers are in fact, rather than theory, vigilant and proactive in performing the critical competence analysis that the peer-review privilege was intended to promote, the purposes that prompted the privilege's creation will prove to be illusory." Justice O'Neill concluded that, during the surgeon's initial credentialing and while he maintained hospital privileges before Mr. Romero's grievous injury, the hospital should have learned from its own sources and various others

that the doctor (1) had been sued 10 times within an approximate five-year period, (2) was a suspected drug addict, (3) had improperly cared for and treated at least four other patients and (4) was suspended from another hospital for operating on the wrong leg of a patient, a mistake he had made before.

## **B. Damages/Pre-Judgment Interest**

1. Battaglia v. Alexander, S.W.3d , 48 Tex. Sup. Ct. J. 720 (May 31, 2005) [02-0701].

The issues presented in this malpractice case were (1) whether two physicians' professional associations could be held liable when the physicians who owned the associations were themselves not negligent; (2) whether the professional associations should be held jointly and severally liable; and (3) how to calculate prejudgment interest when other parties have settled. Dr. Carl J. Battaglia and Dr. Tommy A. Polk, both anesthesiologists, individually formed their own professional associations and entered into a contract with TOPS Surgical Specialty Hospital to provide anesthesia services for TOPS. Alexander's husband died at the hospital, allegedly as a result of a nurse's improper anesthesia procedure during surgery. Alexander brought a wrongful death suit against Dr. Battaglia and Dr. Polk, both in their individual capacities and against their respective professional associations; Dr. Crowder, the attending anesthesiologist who was an employee of the professional associations; the attending nurse anesthetist; and the hospital. The hospital and the nurse settled before trial. The trial court directed a verdict that Dr. Polk was not liable in his individual capacity, and the jury similarly found that Dr. Battaglia was not liable in his individual capacity. However, the jury also found that Polk's and Battaglia's professional associations, Dr. Crowder, and the nurse each were responsible for the injuries; the jury apportioned liability to each. The jury also found that the professional associations were engaged in a joint venture, that Dr. Crowder was their agent, and that the nurse was their employee. The trial court held the professional associations jointly and severally liable for the

entire amount of the judgment. The court of appeals affirmed.

The Supreme Court affirmed the court of appeals' judgment in part but reversed the part of the judgment pertaining to prejudgment interest. The Court held that liability against the professional associations was not foreclosed by the verdicts in favor of Dr. Polk and Dr. Battaglia in their individual capacities; that legally sufficient evidence existed that the professional associations were negligent; that legally sufficient evidence existed that the professional associations engaged in a joint venture. However, the Supreme Court held that the trial court did not properly calculate prejudgment interest under section 16.02 of former article 4590i (Medical Liability and Insurance Improvement Act). Prejudgment interest under section 16.02 of former article 4590i should not be calculated on damages that a claimant does not actually recover under the trial court's judgment. To the extent past damages found by the trier of fact are offset by a settlement credit, prejudgment interest accrues only on the amount awarded in the judgment. When, as in this case, future damages are also found, the settlement payments should be applied first to past damages, then to future damages.

Justice Brister, joined by Chief Justice Jefferson and Justice O'Neill, concurred in part and dissented in part. He concluded that the statute unambiguously requires prejudgment interest to be calculated before applying settlement credits. Part (a) of former section 16.02 says prejudgment interest "may not be charged" on claims settled within 180 days of notice of claim. Part (b) says that in all other cases "the judgment must include prejudgment interest on past damages found by the trier of fact." The settlement here occurred after the 180-day window, so part (b) governs. All settlements must be deducted before calculating prejudgment interest, regardless of when those settlements occur. As a result, it makes no difference whether the settlement was before or after the 180-day window.

### C. Expert Report

1. Murphy. v. Russell, \_\_\_ S.W.3d \_\_\_, 48 Tex. Sup. Ct. J. 943 (July 1, 2005) [02-1101].

Anesthesiologist Murphy allegedly agreed to administer only a local anesthetic during Russell's biopsy, but nonetheless administered a general anesthetic without Russell's consent. Russell sued, alleging battery, breach of contract, and DTPA violations. Murphy moved for dismissal based on Russell's failure to file an expert report, asserting that Russell's claims were all "health care liability claims" under former art. 4590i and therefore subject to its expert-report requirement. *See* Act of May 5, 1995, 74th Leg., R.S., ch. 140, § 1, 1995 TEX. GEN. LAWS 985, 985-87 (adding expert report requirement, at former TEX. REV. CIV. STAT. art. 4590i, § 13.01(d)) (current version at TEX. CIV. PRAC. & REM. CODE § 74.351). The trial court dismissed the action. The court of appeals reversed the trial court's judgment, reasoning that "Russell does not allege and need not prove that Murphy deviated from any standard of medical care, health care, or safety"; thus, according to the court of appeals, no expert medical report was required.

The Supreme Court reversed the court of appeals' judgment and dismissed the action. The Court reasoned that a failure to obtain consent does not automatically result in liability because there may be reasons for providing treatment without specific care—*e.g.*, an overriding emergency—that do not breach any applicable standard of medical care. The existence or nonexistence of such reasons, the Court explained, is necessarily the subject of expert testimony. Further, even if expert testimony ultimately proves unnecessary to support a verdict and recovery, the expert report requirement is a threshold over which a claimant must proceed to continue a lawsuit. A claimant cannot escape the requirements and cap of former article 4590i "by filing a bare-bones pleading that asserts battery based on lack of consent," or by recasting a malpractice action as a DTPA claim.

#### D. Limitations

1. Austin Nursing Center, Inc. v. Lovato, \_\_\_ S.W.3d \_\_\_, 48 Tex. Sup. Ct. J. 624 (May 16, 2005) [03-0659].

In this case, the Supreme Court held that Pauline Wilson Lovato had capacity to bring a survival claim on behalf of her deceased mother even though she was not appointed personal representative of her mother's estate until after the statute of limitations expired. Lovato filed the survival claim within the limitations period; in her original petition, Lovato alleged that she was the "Personal Representative" of her mother's estate, but that "no administrator [of the estate] ha[d] been appointed." In actuality, Lovato was not appointed administrator of the estate and did not file an amended petition alleging herself to be such until after the statute of limitations had expired. The court of appeals held that Lovato's post-limitations amended pleading related back to the original filing of the case and cured her "defective standing."

The Supreme Court held that the issue was not whether Lovato had standing to bring the survival claim on behalf of her mother's estate, but rather whether she had the capacity to do so. The standing doctrine's requirements were satisfied because the decedent's estate retained a justiciable interest in the controversy after the decedent's death. Lovato acquired the capacity to sue on the estate's behalf when she was appointed administrator, albeit after the statute of limitations had expired. The Court held that Lovato's post-limitations capacity cured her pre-limitations lack thereof, observing that a plaintiff's original petition alleging the correct capacity will suffice for limitations purposes provided that capacity, if challenged, is established within a reasonable time.

2. Lorentz v. Dunn, \_\_\_ S.W.3d \_\_\_, 48 Tex. Sup. Ct. J. 630 (May 13, 2005) [03-0790].

Cynthia Lorentz filed a survival action on behalf of her deceased sister, Caroline Polk, against respondents, James F. Dunn, M.D. and United Clinics of North Texas, P.L.L.C. In her original petition, Lorentz asserted she was administrator of her sister's estate. In actuality, her petition to be appointed the estate's administrator was still pending in county court. The county court did not appoint Lorentz administrator until after the statute

of limitations on the survival action expired. Because Lorentz had not been appointed administrator before the statute of limitations expired, on Dunn's motion, the trial court dismissed Lorentz's suit for want of jurisdiction, holding that she lacked the required standing to file suit. The court of appeals affirmed the judgment.

The Supreme Court reversed the court of appeals' judgment and remanded the case to the trial court for further proceedings. Relying on its decision in *Austin Nursing Center v. Lovato*, \_\_\_ S.W.3d \_\_\_ (Tex. 2005), the Court held that "in a survival action, the decedent's estate has a justiciable interest in the controversy sufficient to confer standing." The issue was therefore one of capacity, rather than standing; for the reasons set forth in *Lovato*, Lorentz's late-acquired capacity as the estate's administrator cured her pre-limitations lack thereof, and the trial court therefore erred in dismissing the case.

#### XIX. NEGLIGENCE

##### A. Civil Conspiracy

1. Tri v. J.T.T. and M.T., 162 S.W.3d 552 (Tex. May 16, 2005) [03-0794].

The principal issues in this case involving allegations of sexual assault at a Buddhist temple were (1) whether the court of appeals erred in remanding with instructions to reform the judgment and impose joint and several liability based on civil conspiracy; and (2) whether liability for negligence must be imposed on an agent for vicarious liability to be imposed on the agent's employer. In this case, two sisters, J.T.T. and M.T., sued several parties for negligence and conspiracy after they were sexually assaulted at a Buddhist temple by a monk who, the sisters claimed, raped them during rituals. The sisters claim the rapes occurred despite knowledge by the monk's superiors of his past unlawful conduct involving other women. The jury found that the negligence of all defendants except Phap Luan Buddhist Cultural Center caused the occurrence in question, and that the negligent defendants were part of a civil conspiracy. The trial court's judgment, however, apportioned damages based only on the jury's finding of negligence, and thus gave no effect to their

conspiracy-related findings. Further, although there were jury findings against him, a take-nothing judgment was rendered in favor of Chon Tri, a monk at the California temple. The Theravad Buddhist Corp., where Chon Tri served as an officer, however, was held vicariously liable for his negligence. The court of appeals reversed in part and affirmed in part the trial court's judgment.

The Supreme Court reversed the court of appeals' judgment. The Supreme Court held that the court of appeals erred in holding that the trial court was required to render judgment based on conspiracy and in directing the trial court to impose joint and several liability based on a conspiracy theory. Texas law has consistently held that there cannot be a civil conspiracy to be negligent. The jury charge permitted the jury to conclude that the conspiracy consisted of acts that were merely negligent. The Supreme Court also held that the record did not reflect that the trial court erred in failing to hold Chon Tri individually liable and that the court of appeals therefore erred in reversing the trial court's judgment. Chon Tri, an agent, was found negligent and the trial court gave effect to that finding by holding his employer liable for his negligence. The legal effect of the jury's negligence finding against the agent remained a matter to be determined by the court, not the factfinder.

## **B. Gross Negligence/Legal Sufficiency of the Evidence**

1. Fifth Club, Inc. v. Ramirez, 144 S.W.3d 574 (Tex. App.—Austin 2004), *pet. granted*, 48 Tex. Sup. Ct. J. 823 (June 6, 2005) [04-0550].

The issues presented in this case are (1) what evidence is required for vicarious liability for an employer of an independent contractor; (2) whether the personal-character exception applies to this case; (3) whether there is legally sufficient evidence of gross negligence of the employer; and (4) whether there is legally sufficient evidence of future mental anguish damages.

Fifth Club, Inc., operates an Austin nightclub known as Club Rodeo ("the Club"). The Club hired David West, a certified peace officer, through a third party to provide security at the Club. Early one morning, Roberto Ramirez went to the Club. Shortly after Ramirez's arrival, Club personnel

asked West to escort Ramirez from the premises. An altercation ensued between West and Ramirez, and Ramirez was seriously injured.

The trial court entered judgment for Ramirez against Fifth Club and West. Pursuant to the jury's verdict, the trial court awarded Ramirez damages for past pain and anguish, future anguish, lost earning capacity, physical impairment, and medical expenses against both West and the Club, as well as exemplary damages against the Club. The court of appeals affirmed the trial court's judgment. The Supreme Court granted Fifth Club's petition for review and will hear argument on October 18, 2005.

2. Qwest Int'l Communications, Inc. v. AT&T Corp., S.W.3d , 48 Tex. Sup. Ct. J. 911 (June 24, 2005) [03-0825].

This case stemmed from three occasions on which Qwest's subcontractors, while laying fiber-optic cable, cut AT&T's cable buried in the same right of way. AT&T sued Qwest. A jury found that the cuts were negligent and awarded AT&T actual damages. The jury also found that Qwest acted with malice in causing two of the cuts, and awarded exemplary damages. The court of appeals affirmed the award.

The Supreme Court reversed the court of appeals' judgment in part, holding that there was legally insufficient evidence of malice and that the award of exemplary damages was therefore improper. The Court noted that the primary evidence relied on by AT&T in support of exemplary damages related to policy decisions by Qwest's management that increased the risk of cuts by requiring workers to lay cable hastily. The Court held that Qwest's "fostering a corporate environment of rapid cable laying operations" did not constitute conduct involving an extreme degree of risk. A company policy promoting a hurried pace does not, by itself, constitute evidence of malice; it is frequently a necessity in a competitive market. Qwest's policy also did not involve an extreme degree of risk because the harm involved—damage to another company's cable—was a fairly commonplace occurrence in the industry, and generally caused only minor inconvenience to

customers. The Court therefore held that, as a matter of law, the jury was not entitled to award exemplary damages.

## XX. OIL AND GAS

### A. Contract Interpretation

#### 1. Valence Operating Co. v. Dorsett, 164 S.W.3d 656 (Tex. May 20, 2005) [03-0836].

The issues in this contract-interpretation case arising from an oil and gas joint operating agreement were: (1) whether the operating agreement permitted Valence, as operator, to commence operations before the expiration of a thirty-day period to give notice to working interest owner Dorsett; and (2) whether the non-consent penalty incurred by Dorsett for choosing not to participate in the costs of drilling was enforceable.

Elmagene Dorsett is a 4.05391 percent working interest owner in over 677 acres of land located in Harrison County, Texas. Valence Operating Company is the operator and majority working interest owner in the land. The relationship between Dorsett and Valence is governed by a modified 1977 Model Form Agreement. The parties to the Agreement have the option on each project to share operating costs and liabilities and, if they have participated in paying for the costs of drilling, to benefit by sharing in production revenues in proportion to their respective percentages of ownership. Under the terms of the contract, parties who elect to participate in the costs are termed “consenting” parties. Parties who elect not to participate are termed “non-consenting” parties. Non-consenting parties are subject to a provision in the Agreement—a “non-consent penalty”—which operates to withhold distribution of revenues to non-consenting parties until the consenting parties have recouped their investment costs and a limited return on their investment.

From 1996 to 2001, Valence drilled eight wells on the land in which Dorsett owned a working interest. Valence sent the required notice of drilling to Dorsett for each new well, but in some cases commenced operations before the thirty day period in which Dorsett could consent to participate in the costs had elapsed. Dorsett did not consent to participate in any of the wells, and Valence

accordingly imposed the non-consent penalty on her.

Dorsett sued, contending that the Agreement required Valence to refrain from commencing operations until the thirty-day notice period had expired. Dorsett argued that Valence’s failure to do so was a breach of contract, which made the non-consent penalty unenforceable against her, and that the penalty was also unenforceable because it was a liquidated damages provision.

The Supreme Court reversed the court of appeals’ judgment and rendered a take-nothing judgment in favor of Valence. First, the Court held that the language in the Model Form Agreement regarding the notice period operated independently of language regarding when Valence was required to commence operations. Thus, the Agreement did not require Valence to refrain from commencing operations until the expiration of the notice period. As a result, Dorsett was a non-consenting party.

Second, the Court held that the non-consent “penalty” was not a liquidated damages provision, but rather a contractually agreed-upon provision designed to reward risk-taking. Furthermore, the non-consent clause could not be a liquidated damages provision because there had been no breach of contract.

Justice Brister joined in the majority opinion but also filed a concurrence to reiterate that the non-consent penalty was not a liquidated damages provision because the penalty operated as a bonus to working interest owners who had taken a financial risk, rather than as a punishment to non-consenting parties.

## XXI. PROCEDURE—APPELLATE

### A. Legal Sufficiency Review

#### 1. City of Keller v. Wilson, S.W.3d , 48 Tex. Sup. Ct. J. 848 (June 10, 2005) [02-1012].

This case arose out of an inverse condemnation claim brought by landowners against the City of Keller. The City approved a drainage plan for an upstream development, which allegedly had the effect of flooding parts of the Wilsons’ land. The Wilsons alleged inverse condemnation of their property, and presented evidence that the City had created a

master drainage plan some years earlier, which required condemning a drainage easement across the Wilsons' property. They also presented expert testimony that, under the plan the City approved, flooding of the Wilsons' property was substantially certain to occur. The City countered with testimony that the same engineers who had proposed the master plan also told the City that the approved plan would not flood the Wilsons' land. A jury awarded the Wilsons almost \$300,000 in damages. The City appealed the judgment, arguing that there was legally insufficient evidence that the City knew flooding of the Wilsons' property was substantially certain to occur when it approved the plan. A divided court of appeals rejected this argument, holding that the Wilsons had presented sufficient evidence of the City's knowledge.

The Supreme Court reversed the court of appeals' judgment, holding that there was legally insufficient evidence of the City's knowledge. The Court observed that the court of appeals had not discussed the engineers' testimony for the City because it believed it must "consider only the evidence and inferences that support the finding, and disregard all evidence and inferences to the contrary." However, the Court held that the standard of review in determining legal sufficiency has never required appellate judges to disregard all evidence in the record that does not support the verdict. Rather, the Court held that the rule has always been that courts must disregard all the evidence that a reasonable juror could disregard. Therefore, because the City presented uncontroverted testimony that the same engineers who recommended the master plan had approved the plan that was implemented, the jury was not free to use the master plan as evidence that the City knew the implemented plan would increase flooding. In determining the City's knowledge, the testimony of the engineers that they had approved the subsequent plan destroyed any probative value of what they might earlier have recommended to the City. Moreover, the Court held that the other evidence cited by the court of appeals in upholding the verdict did not tend to show that the City knew the Wilsons' land would flood; therefore under the only theory pleaded by the Wilsons, the City was not liable for inverse condemnation.

Justice O'Neill, joined by Justice Medina, concurred, writing that "[t]he Court holds that the jury was required to believe the city's testimony that it relied on the engineers' assurances and thus did not know flooding was substantially certain to occur, stating that when a case requires expert testimony 'jurors cannot disregard a party's reliance on experts hired for that very purpose without some evidence supplying a reasonable basis for doing so.'" Justice O'Neill would have held that the jury had a reasonable basis upon which to disregard the city's professed reliance. She concurred, however, because she concluded that in this case the city "cannot be liable for a taking" because "a city's mere act of approving a private development plan cannot constitute a taking for public use."

## **XXII. PROCEDURE—PRETRIAL**

### **A. Legislative Continuance**

1. In re Ford Motor Co., S.W.3d , 48 Tex. Sup. Ct. J. 808 (May 27, 2005) [05-0374].

This petition for writ of mandamus concerned a trial court's denial of a motion for legislative continuance filed under Section 30.003 of the Texas Civil Practice and Remedies Code. On April 1, 2005, Ford Motor Company filed a motion for legislative continuance under Section 30.003. Trial was set to commence on May 16, less than nine months after the lawsuit was filed. The plaintiff, Robin Fuentes, opposed the motion. On April 21, the trial court held a hearing on the motion and four days later denied the motion and re-set the case for trial on May 31. The court of appeals denied Ford's petition for mandamus relief.

Section 30.003 provides that when a lawyer-legislator is retained more than thirty days before the date a civil case is set for trial, a trial court lacks discretion to deny a properly requested motion for legislative continuance unless a constitutional exception applies. In *Waites v. Sondock* the Supreme Court held that a mandatory legislative continuance violates the due process clause of the Fourteenth Amendment of the United States Constitution and Article I, Sections 13 and 19 of the Texas Constitution when the party opposing the continuance

“alleges that a substantial existing right will be defeated or abridged by delay.” 561 S.W.2d 772, 776 (Tex. 1977).

The Supreme Court denied mandamus relief, holding that Ford’s motion for a legislative continuance met the requirements of the statute. Because Ford’s motion was filed more than thirty days before the scheduled trial date and met the statutory requirements, the trial court was without discretion to deny the motion unless Fuentes established her entitlement to an exception.

Fuentes claimed that the constitutional exception applied because she has a right to “access to medical and rehabilitative services to aid in the treatment for, and rehabilitation from, her injuries.” The Court held that because Fuentes does not have a right to have Ford pay for medical services unless or until mandate issues after trial, judgment, and possible appeals, she has no substantial existing right to access to medical care that is enforceable against Ford. Relief from a mandatory legislative continuance requires a higher showing than Fuentes made in this case.

## **B. Statute of Limitations**

1. Dolcefino v. Stephens, *pet. denied*, S.W.3d , 48 Tex. Sup. Ct. J. 945 (July 5, 2005) (Hecht, J., joined by Wainwright, J., dissenting from denial of *pet.*) [03-1013].

This petition arose out of an action brought by certain city officials under the Texas anti-wiretapping statute against a television station and other media defendants who videotaped the officials in a hotel courtyard using a camera disguised as pager, and broadcast the video, without audio, as part of a news report. Justice Hecht would grant review to address two issues. The first concerns whether claimants can avoid dismissal for failure to file their claims within the two-year limitations period by invoking the discovery rule; specifically, when a “video recording has been broadcast on network television in the area in which the claimants reside,” can it still be said that the existence of an unbroadcast audio component of the recording was “inherently undiscoverable”? The second issue concerns the standard for determining consent under the Anti-Wiretapping Act and its proper application—in particular, its application to media

defendants who record public officials in a public place.

2. Lowenberg v. City of Dallas, S.W.3d , 48 Tex. Sup. Ct. J. 869 (June 10, 2005) [04-0671].

The issue in this case was when claims for an illegal tax accrue against a government entity for limitations purposes. In 1994, the City of Dallas enacted a “fire registration fee” applicable to commercial property. Lowenberg was a commercial property owner in Dallas. In 1995 and 1996, the City requested that he pay the fee, but Lowenberg did not comply until April of 1997, when the City fined him \$2,000 for violation of the Fire Code. In July of 1997, Lowenberg filed a class action against the City in federal court; that suit was subsequently dismissed for lack of subject-matter jurisdiction. Lowenberg then re-filed his claim in state court, alleging that the fire registration fee constituted an illegal occupation tax in violation of the Texas Constitution. The trial court certified a class consisting of all persons who paid the fee or fines related to the fee within two years before suit was filed. The trial court granted the class’s motion for summary judgment. On appeal, the court of appeals reversed the trial court’s judgment and rendered a take-nothing judgment against the class. The court of appeals held that Lowenberg’s claim accrued when the ordinance authorizing the fee was enacted, that the two-year statute of limitation applied, and that Lowenberg’s claim was thus barred by limitations.

The Supreme Court reversed the court of appeals’ judgment. The Court first held that the two-year statute of limitations for cases involving the illegal taking of property applied to suits for recovery of illegal taxes. The Court then held that Lowenberg was not injured by the mere enactment of the tax ordinance, but by its collection. Therefore, Lowenberg’s claim accrued when he paid the tax; he was not entitled to sue for an illegal taking of his property before then. Because Lowenberg filed his action in both state and federal court within two years of paying the fee, the Court held that his action was not barred by limitations.

C.

**Venue**

1. In re Tex. Assoc. of Sch. Bds., Inc., S.W.3d , 48 Tex. Sup. Ct. J. 641 (Tex. May 16, 2005) [03-1151].

The principal issue was whether the trial court erred by denying a motion to transfer venue based on whether an indemnity contract was a “major transaction” defined by statute. The Texas Association of School Boards Risk Management Fund (the Fund) contracted with a school district to provide coverage. The Texas Association of School Boards (TASB) is the Fund’s servicing contractor. The school district sustained water damage to its buildings totaling more than \$17 million. TASB denied the claim, and the district brought suit in Duval County against the Fund and TASB. The Fund and TASB filed a motion to transfer venue to Travis County based on a venue provision in the coverage agreement, on the grounds that Section 15.20 of the Civil Practice and Remedies Code permits the venue of suits arising out of a “major transaction” of \$1 million or more to be specified by agreement between the parties. TASB and the Fund asserted that the aggregate stated value of the consideration for the coverage agreement was the school district’s annual contribution, plus the coverage limits under the agreement, which would exceed the statute’s one-million-dollar threshold. The trial court declined to enforce the parties’ venue agreement, and the court of appeals denied mandamus relief.

The Supreme Court denied mandamus relief, holding that the mandatory venue provision in section 15.020 was inapplicable because the coverage agreement was not a “major transaction.” The Supreme Court held that the school district agreed to pay what is in essence a premium of \$41,973. That is the value the parties assigned to the risks the Fund assumed. The premium amount is the aggregated stated consideration value for the coverage agreement—the contribution specified in the agreement for assumption of the risk of loss from the enumerated perils—not the coverage limits.

**XXIII. PROCEDURE–TRIAL AND APPEAL**

**A. Default Judgment**

1. Mathis v. Lockwood, S.W.3d , 48 Tex. Sup. Ct. J. 895 (June 20, 2005) [04-0516].

In this case, the Supreme Court held that the trial court abused its discretion in failing to set aside a default judgment. After she answered but failed to appear for trial, the trial court granted a default judgment against Mary Mathis and in favor of Joseph Lockwood. Mathis later testified before the trial court that she did not receive notice of the trial setting and swore to the same in her motion for new trial. Lockwood’s counsel testified that notice was sent to Mathis’s last-known address, to her former counsel, and that she was called the morning of trial. The trial court refused to set aside the default judgment, and the court of appeals affirmed the trial court’s judgment, holding that Mathis failed to overcome the presumption that she was notified of the trial setting.

The Supreme Court held that no presumption was raised that Mathis received notice of the trial setting. The Court stated that although notice properly sent pursuant to TEX. R. CIV. P. 21a raises a presumption that notice was received, when notice is challenged it must be proved according to the rule. In this case, there was no evidence that notice was sent to Mathis pursuant to Rule 21a; the record contained no certificate of service, no return receipt from certified or registered mail, and no affidavit certifying service. Without a presumption of notice, the Court held that there was no evidence that Mathis received notice of the trial. Accordingly, Mathis’s failure to appear at trial was not intentional or the result of conscious indifference and, under *Craddock v. Sunshine Bus Lines*, 133 S.W.2d 124 (1939), the default judgment should have been set aside. The Supreme Court therefore reversed the court of appeals’ judgment and remanded the case to the trial court for further proceedings.

## XXIV. PROCEDURE—TRIAL AND POST-TRIAL

### A. Finality of Judgments

1. In re Burlington Coat Factory Warehouse of McAllen, Inc., S.W.3d , 48 Tex. Sup. Ct. J. 939 (July 1, 2005) [02-1084].

The principal issue in this case was whether the trial court abused its discretion by allowing execution to issue before a final judgment had been entered. The plaintiff sued Burlington Coat Factory for personal injuries that she received while shopping at one of the company's retail stores. She sought both actual and exemplary damages. After the defendant failed to answer the suit, the trial court entered a default judgment, which included a finding that Burlington was negligent, awarded the plaintiff \$183,000 plus post-judgment interest, and provided that "[a]ll other relief not expressly granted is hereby denied." The default judgment was silent on the exemplary damages claim. The plaintiff then sought a writ of execution on this judgment, which the trial court granted. The defendant asserted that the writ was invalid, arguing that the default judgment was not a final judgment because it did not dispose of the exemplary damages claim.

The Supreme Court concluded that the default judgment was an interlocutory judgment and that the trial court therefore abused its discretion by issuing a writ of execution. The Court noted that although a judgment following a trial on the merits is presumed to be final, there is no such presumption of finality following a summary judgment or default judgment. Thus, while a clause stating that "all other relief not expressly granted is hereby denied" indicates that a post-trial judgment is final, it does not establish finality with regard to a default judgment. The Court further observed that a default judgment that fails to dispose of all claims can be final only if intent to finally dispose of the case is unequivocally expressed in the words of the order itself. Because the default judgment in this case failed to dispose of all claims and failed to "unequivocally express" that it was intended to be a final judgment, the Court concluded that it was interlocutory. The Court conditionally granted the writ of mandamus,

ordering the trial court to vacate its order permitting execution of the judgment.

Justice O'Neill, joined by Justice Johnson, dissented; the dissenting justices concluded that the default judgment contained sufficient indicators of finality. Justice O'Neill wrote that "including in the order a statement that 'all relief not expressly granted is hereby denied' and otherwise treating the order here as final, the trial court implicitly disposed of Garcia's exemplary damages claim. Because the trial court's judgment was not interlocutory, the court did not abuse its discretion in denying Burlington's motion to quash execution."

### B. Jury Instructions and Questions

1. Bed, Bath & Beyond v. Urista, 132 S.W.3d 517 (Tex. App.—Houston [1st Dist.] 2004), *pet. granted*, 48 Tex. Sup. Ct. J. 718 (May 27, 2005) [04-0332].

The issue in this case is whether the trial court's inclusion of an unavoidable accident instruction in the jury charge was reversible error. Rafael Urista was shopping with his family at Bed, Bath & Beyond in Houston when plastic trash cans fell from atop a shelf, allegedly hitting him in the head and knocking him unconscious. Urista sued Bed, Bath & Beyond, claiming that the incident caused him severe back injuries. Over Urista's objection, the trial court included in the jury charge an "unavoidable accident" instruction, which both parties now concede was improper. The jury, in a ten-to-two verdict, found that Bed, Bath & Beyond's negligence did not proximately cause the occurrence. The court of appeals reversed the trial court's judgment and remanded the case for a new trial, holding that the submission of the unavoidable accident instruction was reversible error under both the traditional harmless error rule applied in *Reinhart v. Young*, 906 S.W.2d 471 (Tex. 1995) and the presumed error rule of *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000). The Supreme Court granted Bed Bath & Beyond's petition for review and will hear argument on September 28, 2005.

### C. Voir Dire

1. Hafi v. Baker, 164 S.W.3d 383 (Tex. May 16, 2005) [04-0926].

The issue in this case is whether a veniremember was biased as a matter of law. Keith and Ian Baker sued Dr. Salah El Hafi and Cardiology Clinic, P.A., alleging medical malpractice that caused the death of their mother, Jean Baker. During voir dire, a veniremember informed the plaintiffs' counsel, "[i]f I were in your shoes, I would want to know that I have spent most of my professional career on the defense side"—specifically, "defending malpractice lawsuits." The veniremember agreed that he could relate very much to the defendants' perspective, but protested when counsel suggested that perhaps the plaintiffs "are starting a little bit behind in your eyes."

The trial court denied a motion to strike the veniremember for cause, but the court of appeals reversed the trial court's judgment. The Supreme Court reversed the court of appeals' judgment, holding that the veniremember was not biased as a matter of law. His statements reflected a desire to be honest rather than actual bias. The Court explained that having a perspective on a case based on knowledge and experience does not disqualify a veniremember from sitting on the jury.

## XXV. REAL PROPERTY

### A. Inverse Condemnation

1. City of Keller v. Wilson, S.W.3d , 48 Tex. Sup. Ct. J. 848 (June 10, 2005) [02-1012].

This case arose out of an inverse condemnation claim brought by landowners against the City of Keller. The City approved a drainage plan for an upstream development, which allegedly had the effect of flooding parts of the Wilsons' land. The Wilsons alleged inverse condemnation of their property, and presented evidence that the City had created a master drainage plan some years earlier, which required condemning a drainage easement across the Wilsons' property. They also presented expert testimony that, under the plan the City approved, flooding of the Wilsons' property was substantially certain to occur. The City countered with testimony that the same engineers who had proposed the master plan also told the City that the approved plan would not flood the

Wilsons' land. A jury awarded the Wilsons almost \$300,000 in damages. The City appealed the judgment, arguing that there was legally insufficient evidence that the City knew flooding of the Wilsons' property was substantially certain to occur when it approved the plan. A divided court of appeals rejected this argument, holding that the Wilsons had presented sufficient evidence of the City's knowledge.

The Supreme Court reversed the court of appeals' judgment, holding that there was legally insufficient evidence of the City's knowledge. The Court observed that the court of appeals had not discussed the engineers' testimony for the City because it believed it must "consider only the evidence and inferences that support the finding, and disregard all evidence and inferences to the contrary." However, the Court held that the standard of review in determining legal sufficiency has never required appellate judges to disregard all evidence in the record that does not support the verdict. Rather, the Court held that the rule has always been that courts must disregard all the evidence that a reasonable juror could disregard. Therefore, because the City presented uncontroverted testimony that the same engineers who recommended the master plan had approved the plan that was implemented, the jury was not free to use the master plan as evidence that the City knew the implemented plan would increase flooding. In determining the City's knowledge, the testimony of the engineers that they had approved the subsequent plan destroyed any probative value of what they might earlier have recommended to the City. Moreover, the Court held that the other evidence cited by the court of appeals in upholding the verdict did not tend to show that the City knew the Wilsons' land would flood; therefore under the only theory pleaded by the Wilsons, the City was not liable for inverse condemnation.

Justice O'Neill, joined by Justice Medina, concurred, writing that "[t]he Court holds that the jury was required to believe the city's testimony that it relied on the engineers' assurances and thus did not know flooding was

substantially certain to occur, stating that when a case requires expert testimony ‘jurors cannot disregard a party’s reliance on experts hired for that very purpose without some evidence supplying a reasonable basis for doing so.’” Justice O’Neill would have held that the jury had a reasonable basis upon which to disregard the city’s professed reliance. She concurred, however, because she concluded that in this case the city “cannot be liable for a taking” because “a city’s mere act of approving a private development plan cannot constitute a taking for public use.”

### **B. Tax Assessment**

#### **1. Matagorda County Appraisal Dist. v. Coastal Liquids Partners, L.P., 165 S.W.3d 329 (Tex. May 27, 2005) [03-1200].**

This case arises from Coastal Liquids Partners, L.P.’s challenge to a property-tax assessment. Coastal leases underground caverns to store natural-gas liquids. These caverns are located in underground salt domes from which salt has been leached, leaving an empty cavern suitable for storage of liquified natural gas or other hazardous materials. The Matagorda County Appraisal District appraised the caverns separately from the overlying surface land, classifying the caverns as “improvements” in one year and as “enhancements to land” in other years.

Coastal challenged the District’s tax assessment, contending that the caverns should not be assessed separately from the surface land. After a bench trial, the trial court rendered judgment in favor of the District. The court of appeals reversed the trial court’s judgment, holding that the caverns should be categorized as “land” rather than “improvements” under the Tax Code, and that appraisal of the caverns separately from the surface land constituted an unlawful multiple appraisal.

The Supreme Court reversed the court of appeals’ judgment and remanded the case to that court to consider Coastal’s remaining arguments. The Court held that underground storage caverns are real property separately taxable from the surface estate. The Court also held that because the storage caverns in this case were manmade, they qualified as improvements to land under the Tax Code. Even if the caverns were not improvements, however, the Court held that including them in the

wrong classification on the appraisal records did not constitute proof that Coastal was double-taxed.

### **XXVI. TEXAS SECURITIES ACT**

#### **A. Aider and Abettor Liability**

##### **1. Sterling Trust Co. v. Adderley, S.W.3d , 48 Tex. Sup. Ct. J. 887 (June 17, 2005) [03-1001].**

The principal issue in this case was how the “aider” provision of the Texas Securities Act (TSA) should be interpreted. The TSA imposes liability on a person who sells securities “by means of an untrue statement of a material fact or an omission to state a material fact,” and imposes liability on a person who “materially aids a seller, buyer, or issuer of a security” if the person acts “with intent to deceive or defraud or with reckless disregard for the truth or the law.” TEX. REV. CIV. STAT. art. 581-33F(2).

The plaintiffs in this case were investors who purchased securities in a number of related entities; although Sterling Trust Company was not involved in the sale of the securities, the securities were placed in retirement accounts held by Sterling. When it became clear that the investment vehicles amounted to a pyramid scheme, the investors sued Sterling, arguing that Sterling played an essential role in allowing the investment scheme to continue as long as it did. The investors provided evidence that Sterling’s failure to comply with several of its own internal procedures facilitated the seller’s pyramid scheme and allowed the seller to hide the nature of his scheme from the investors. In addition, the investors provided evidence that Sterling was aware that the seller was commingling investors’ funds by having one or more of the related companies make payments on notes for which another company was indebted, and that at least one of Sterling’s internal memos questioned this practice. Finally, there was evidence that Sterling allowed the seller to unilaterally transfers investors’ funds from one entity to another, despite its own policy requiring documentation of investor approval for new investments.

However, there was no evidence that Sterling was aware of the exact misrepresentations made by the seller; consequently, although the jury found that Sterling “materially aided” the seller’s securities violation, it also found that Sterling “did not know, and in the exercise of reasonable care, could not have known of the untruth or omission” made by the seller. Sterling asserted that this lack of knowledge precluded it from being held liable as an aider under the TSA. The trial court and court of appeals interpreted the TSA to allow aider liability even if the aider was altogether unaware of its role in the securities violation. However, the Supreme Court concluded that, while the aider need not be aware of the particular misrepresentations or omission made by the seller, the TSA requires that the aider be subjectively aware of the primary violator’s improper activity. Specifically, the TSA’s requirement of “reckless disregard for the truth or the law” means that an alleged aider is subject to liability only if it rendered assistance to the seller in the face of a perceived risk that its assistance would facilitate untruthful or illegal activity by the primary violator. Because the jury charge did not instruct the jury of the TSA’s requirement of subjective awareness, the Court reversed the court of appeals’ judgment and remanded the case to the trial court for further proceedings.

## **XXVII. TEXAS SOLID WASTE DISPOSAL ACT**

### **A. Arranger Liability**

1. R.R. Street & Co. v. Pilgrim Enters., Inc., S.W.3d , 48 Tex. Sup. Ct. J. 822 (June 13, 2005) [02-0758].

The issue of first impression in this case was the proper interpretation of the Texas Solid Waste Disposal Act (the Act) as applied to a party liable for having “arranged for” the disposal of solid waste. Pilgrim Enterprises, Inc., an operator of numerous dry-cleaning plants, had a longstanding business relationship with R.R. Street & Co., which supplied Pilgrim with dry-cleaning equipment and chemicals, including perchloroethylene (PCE), and provided advice and services related to the equipment. Over the years, on Street’s advice, Pilgrim had disposed of wastewater contaminated with PCE pursuant to industry practice by pouring

it down the facilities’ drains. In addition, Street’s representative, Harold Corbin, had conducted titration tests in the facilities on a regular basis and had personally disposed of the vials of waste fluid, which contained 1.25 cc of PCE, by pouring the fluid down the drains. During an environmental assessment, Pilgrim discovered that the soil and groundwater at many of its facilities were contaminated with PCE, and Pilgrim therefore entered into a voluntary cleanup agreement with the Texas Natural Resources Conservation Commission (TNRCC). Pilgrim then brought a cost recovery action against Street seeking contribution for its cleanup costs under section 361.344 of the Solid Waste Disposal Act. TEX. HEALTH & SAFETY CODE § 361.344. The trial court held that Pilgrim was entitled to contribution under the Act as a matter of law and awarded Pilgrim \$1.5 million.

On appeal, the court of appeals held that, as a matter of law, Street “arranged for” the disposal of solid waste at Pilgrim’s facilities by providing technical advice and services and by Corbin’s pouring of the chemical mixture down Pilgrim’s sinks and commodes. The court then held that Pilgrim had proven the remaining liability elements of its cost recovery action as a matter of law, so it was unnecessary to remand for a jury trial on liability. The court also held that there were fact issues underlying the amount of damages that should be awarded and therefore reversed the portion of the trial court’s judgment awarding damages and remanded the case for the jury to make the requisite factual determinations.

The Supreme Court reversed. The Court relied on federal case law interpreting federal environmental statutes and held that, in determining whether a party has “arranged for” disposal of solid waste, courts should employ a totality-of-the-circumstances approach to evaluate whether the requisite nexus exists between the party’s conduct and the waste’s disposal. Factors to be taken into consideration are whether the party owned or possessed the waste, had the authority to make disposal decisions, had the obligation to make disposal decisions, exercised control over decisions

regarding the waste's disposal, or actually disposed of the waste. Taking these factors into account, the Court concluded that Street's advice to Pilgrim regarding disposal of contaminated wastewater did not subject it to arranger status as a matter of law because of Street's lack of authority or control over the decisions regarding the disposal. The Court then held that there was a fact question as to whether the PCE mixture Corbin poured down the drains qualified as "solid waste" under the Act and thus whether Street qualified as an arranger based on Corbin's conduct. The Court held that the "domestic sewage exclusion," which exempts material in domestic sewage from the Act's coverage, did not apply to the test fluid to the extent it had leaked from the sewage pipes onto Pilgrim's properties. Because there was a fact issue as to whether the pipes had leaked, the Court remanded the case to the trial court.

## XXVIII. WORKERS' COMPENSATION

### A. Retaliation Claims

1. Haggar Clothing Co. v. Hernandez, 164 S.W.3d 386 (Tex. May 13, 2005) [03-0897].

The issue in this case was whether legally sufficient evidence supported a jury's finding that an employer terminated an employee in retaliation for the employee's filing a workers' compensation claim. Altagracia Hernandez worked as a seamstress for Haggar Clothing Company at its Weslaco plant. On February 19, 1991, she was injured at work when another employee carrying a table accidentally hit her on the chin with the table, knocking her down and causing neck, knee and back pain, as well as brief loss of consciousness. According to Haggar's records, Hernandez officially went on workers' compensation leave on February 25, 1991. On February 26, 1992, Haggar's Weslaco plant manager sent Hernandez a letter by registered mail informing her that her employment with Haggar was being terminated because she had not returned to work after a year. Haggar had a leave-of-absence policy, distributed to its employees in both English and Spanish, which provided that the maximum amount of time an employee could remain on leave, regardless of the reason, was one year. Hernandez did not protest the decision at that time. She sued Haggar in 1994, alleging that Haggar had violated section

451.001 of the Texas Labor Code and unlawfully terminated her for filing a workers' compensation claim in good faith. The jury found for Hernandez on her retaliatory discharge claim and found that the harm to Hernandez resulted from actual malice, awarding Hernandez compensatory and exemplary damages. The court of appeals affirmed, holding that the evidence was legally and factually sufficient to support the jury's findings of retaliation, actual malice, and actual and punitive damages.

The Supreme Court reversed and rendered a take-nothing judgment in favor of Haggar, holding that there was no evidence to support the jury's retaliation finding. The Court recognized that Hernandez had presented evidence that Haggar's policies had the effect of encouraging employees not to report workplace injuries, that management was under economic pressure to minimize workers' compensation claims, and that a Haggar manager had threatened not to pay for some of Hernandez's treatment. Citing *Continental Coffee Products Co. v. Cazarez*, 937 S.W.2d 444, 451 (Tex. 1996), the Court held that an employer who terminates an employee pursuant to the uniform enforcement of a reasonable absence-control policy will not be liable for retaliatory discharge. The Court examined Hernandez's evidence that, three years after Hernandez was terminated, a Haggar employee who was on workers' compensation leave for over a year and never returned to work was not officially discharged from her employment at the end of the one-year period. The Court held that such evidence amounted to no more than a scintilla that Haggar's leave-of-absence policy was not uniformly enforced or that Haggar's explanation for firing Hernandez was false.