
SUPREME COURT UPDATE — SUPPLEMENT
August 1, 2005 – September 28, 2005

Phil Johnson
Justice
The Supreme Court of Texas

Cassandra Robertson
Staff Attorney
The Supreme Court of Texas

Kara Belew
Heather Holmes
Law Clerks
The Supreme Court of Texas

Georgie Gonzales
Executive Assistant
The Supreme Court of Texas

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

7th Annual West Texas Fall Seminar
Odessa Country Club
Odessa, Texas
October 7, 2005

TABLE OF CONTENTS

I. SCOPE OF THIS ARTICLE	1
II. ADMINISTRATIVE LAW	1
A. Judicial Review	1
1. <u>City of Houston v. Clark</u> , 142 S.W.3d 350 (Tex. App.—Houston [14th Dist.] 2004), <i>pet. granted</i> , 48 Tex. Sup. Ct. J. 1012 (Aug. 29, 2005) [04-0930]	1
III. CONSTITUTIONAL LAW	1
A. Due Process	1
1. <u>NCAA v. Yeo</u> , S.W.3d , 48 Tex. Sup. Ct. J. 1016 (Tex. August 26, 2005) [03-0753]	1
B. Open Courts	2
1. <u>In re Union Carbide Corp.</u> , 145 S.W.3d 805 (Tex. App.—Houston [14th Dist.] 2004), <i>argument granted on pet. for writ of mandamus</i> , 48 Tex. Sup. Ct. J. 1005 (August 26, 2005) [04-1120] <i>consolidated for argument with</i> <u>In re ExxonMobil Corp.</u> , 145 S.W.3d 805 (Tex. App.—Houston [14th Dist.] 2004), <i>argument granted on pet. for writ of mandamus</i> , 48 Tex. Sup. Ct. J. 1005 (August 26, 2005) [04-1121]	2
IV. DAMAGES	2
A. Breach of Contract	2
1. <u>Willis v. Donnelly</u> , 118 S.W.3d 10 (Tex. App.—Houston [14th Dist.] 2003) <i>pet. granted</i> , 48 Tex. Sup. Ct. J. 1045 (Sept. 16, 2005) [04-0409]	2
V. DISCOVERY	3
A. Able Supply Interrogatories	3
1. <u>In re Allied Chemical Corp.</u> , 2004 WL 2554872 (Tex. App.—Corpus Christi 2004) <i>argument granted on pet. for writ of mandamus</i> , 48 Tex. Sup. Ct. J. 1005 (Aug. 26, 2005) [04-1023]	3
VI. EMPLOYMENT LAW	3
A. Employer Liability for Employee’s Actions	3
1. <u>Loram Maintenance of Way, Inc. v. Ianni</u> , 141 S.W.3d 722 (Tex. App.—El Paso 2004), <i>pet. granted</i> , 48 Tex. Sup. Ct. J. 1042 (September 16, 2005) [04-0666]	3
B. Texas Commission on Human Rights Act	4
1. <u>Ysleta Indep. Sch. Dist. v. Monarrez</u> , S.W.3d , 48 Tex. S. Ct. J. 1014 (Tex. August 26, 2005) [02-1185]	4
VII. INSURANCE	4
A. Bad-Faith Liability	4
1. <u>Progressive County Mut. Ins. Co. v. Boyd</u> , S.W.3d , 48 Tex. Sup. Ct. J. 1020 (Tex. August 26, 2005) [04-0055]	4

VIII. JURISDICTION	5
A. Personal Jurisdiction/Minimum Contacts	5
1. <u>Moki Mac River Expeditions v. Drugg, 2004 WL 100389 (Tex. App.—Dallas, 2004), <i>pet. denied</i>, 48 Tex. Sup. Ct. J. 703 (May 27, 2005), <i>pet. granted on reh'g</i>, 48 Tex. Sup. Ct. J. 47 (Sept. 6, 2005) [04-0432]</u>	5
IX. MANDAMUS	5
A. Discovery Issues	5
1. <u>In re Allied Chemical Corp., 2004 WL 2554872 (Tex. App.—Corpus Christi 2004) <i>argument granted on pet. for writ of mandamus</i>, 48 Tex. Sup. Ct. J. 1005 (Aug. 26, 2005) [04-1023]</u>	5
X. OIL AND GAS	6
A. Contract Interpretation	6
1. <u>Tittizer v. Union Gas Corp., S.W.3d , 48 Tex. Sup. Ct. J. 1023 (Tex. August 26, 2005) [04-0100]</u>	6
XI. PROCEDURE—PRETRIAL	7
A. Forum Non Conveniens	7
1. <u>In Re Pirelli Tire, L.L.C., 2004 WL 2786028 (Tex. App.—Corpus Christi 2004), <i>argument granted on pet. for writ of mandamus</i>, 48 Tex. Sup. Ct. J. 1042 (Sept. 16, 2005) [04-1129]</u>	7
B. Multidistrict Litigation Panel	7
1. <u>In re Union Carbide Corp., 145 S.W.3d 805 (Tex. App.—Houston [14th Dist.] 2004), <i>argument granted on pet. for writ of mandamus</i>, 48 Tex. Sup. Ct. J. 1005 (August 26, 2005) [04-1120] <i>consolidated for argument with</i> In re ExxonMobil Corp., 145 S.W.3d 805 (Tex. App.—Houston [14th Dist.] 2004), <i>argument granted on pet. for writ of mandamus</i>, 48 Tex. Sup. Ct. J. 1005 (August 26, 2005) [04-1121]</u>	7
C. Statute of Limitations	7
1. <u>Barker v. Eckman, 2004 WL 163462 (Tex. App.—Houston [1st District] 2004), <i>pet. granted</i>, 48 Tex. Sup. Ct. J. 1042 (September 19, 2005) [04-0194]</u>	7
XII. PROCEDURE—TRIAL AND POST-TRIAL	8
A. Error Preservation	8
1. <u>Tittizer v. Union Gas Corp., S.W.3d , 48 Tex. Sup. Ct. J. 1023 (Tex. August 26, 2005) [04-0100]</u>	8
XIII. SUMMARY JUDGMENT	9
A. Harmless Error	9
1. <u>Progressive County Mut. Ins. Co. v. Boyd, S.W.3d , 48 Tex. Sup. J. 1020 (Tex. August 26, 2005) [04-0055]</u>	9

SUPREME COURT UPDATE — SUPPLEMENT

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 August 1, 2005 through September 28, 2005. Petitions that have been granted but not yet decided are also included.

II. ADMINISTRATIVE LAW

A. Judicial Review

1. City of Houston v. Clark, 142 S.W.3d 350 (Tex. App.—Houston [14th Dist.] 2004), *pet. granted*, 48 Tex. Sup. Ct. J. 1012 (Aug. 29, 2005) [04-0930].

The principal issue in this case is whether Chapter 143 of the Local Government Code gives a City the right to appeal a hearing examiner's decision to district court. In 1999, an acting fire chief of the Houston Fire Department suspended dispatcher Donald Clark. Clark appealed the suspension to an independent hearing examiner. The hearing examiner dismissed the suspension on the ground that Chapter 143 of the Local Government Code did not give an acting fire chief statutory authority to suspend Clark. The City filed suit in the district court, challenging the hearing examiner's decision. In the district court, both the City and Clark filed motions for summary judgment. The district court granted Clark's summary judgment motion and denied the City's motion. On appeal, the Houston Court of Appeals [1st District] reversed and remanded the case for further review of whether the hearing examiner had jurisdiction to dismiss Clark's suspension. On remand, the district court issued a declaratory judgment that the acting fire chief did not have statutory authority to suspend Clark. The City appealed to the Court of Appeals. The Houston Court of Appeals [14th District] concluded that the district court lacked subject matter jurisdiction because Chapter 143 of the Texas Local Government Code did not give the City a right to appeal the hearing examiner's decision to the district court.

The Supreme Court granted the City of Houston's petition for review and will hear argument on November 16, 2005.

III. CONSTITUTIONAL LAW

A. Due Process

1. NCAA v. Yeo, S.W.3d , 48 Tex. Sup. Ct. J. 1016 (Tex. August 26, 2005) [03-0753].

The principal issue in this case was whether a student athlete's reputation is an interest protected by the due course of law provision of the Texas Constitution. Joscelin Yeo, an acclaimed swimmer from the Republic of Singapore, was disqualified from swimming for the University of Texas at Austin in an impending NCAA championship competition due to eligibility issues arising from her transfer from the University of California at Berkeley. Yeo sued to enjoin UT from disqualifying her from the competition, which was only two days away. The trial court issued a temporary restraining order granting Yeo's requested relief. The next day, the NCAA attempted to intervene, but the trial court struck its intervention. The following morning, the NCAA unsuccessfully sought mandamus relief with the court of appeals, and UT's interlocutory appeal from the temporary restraining order was also dismissed by the court of appeals. Yeo then swam at the championship meet.

At a trial on the merits, the trial court rendered judgment in favor of Yeo, finding that UT had violated her due process rights under the Texas Constitution, thereby depriving her of protected liberty and property interests. The NCAA appealed from the order striking its intervention, and UT appealed from the judgment. The Third Court of Appeals in Austin affirmed on both issues. The Texas Supreme Court reversed and rendered judgment that Yeo take nothing.

The Supreme Court rejected Yeo's argument, and the court of appeals' holding, that her athletic reputation deserved due process protection due its significance and economic value, and the Court held that whether an interest receives due process protection depends on its nature, not its weight. The Court agreed with the U.S. Supreme Court that a person's interest in a reputation alone does not qualify for due process protection under the Constitution. Accordingly, the Court held that the nature of a person's interest in a reputation does not vary with the value or virtue of that reputation. As such, the Court concluded, regardless of how good her reputation was, Yeo had no interest in it that would give rise to due process protection.

The Supreme Court further held that Yeo's claimed interest in future financial opportunities was too speculative for due process protection. Due process protection requires establishing an actual legal entitlement. The Court also declined to equate a student's interest in intercollegiate athletics with an interest in graduate education.

The Court concluded that since Yeo had not asserted a protected interest under the Texas Constitution, her case should be dismissed. While it did not reach the NCAA's arguments regarding intervention, the Court expressly disapproved of the court of appeals' determinations that the NCAA's interests were not sufficiently implicated to warrant intervention and that intervention would have unduly complicated the case.

B. Open Courts

1. In re Union Carbide Corp., 145 S.W.3d 805 (Tex. App.—Houston [14th Dist.] 2004), argument granted on pet. for writ of mandamus, 48 Tex. Sup. Ct. J. 1005 (August 26, 2005) [04-1120] consolidated for argument with In re ExxonMobil Corp., 145 S.W.3d 805 (Tex. App.—Houston [14th Dist.] 2004), argument granted on pet. for writ of mandamus, 48 Tex. Sup. Ct. J. 1005 (August 26, 2005) [04-1121].

These cases concern whether a pretrial court can create an inactive docket for "unimpaired" asbestos claimants.

In 2003 the Texas Legislature created a Judicial Panel on Multidistrict Litigation (MDL Panel) for the purpose of transferring civil actions involving common questions of fact to pretrial

courts for consolidated or coordinated pretrial proceedings. TEX. GOV'T CODE §§74.161-164. The Supreme Court promulgated Rule of Judicial Administration 13 in response, providing pretrial courts with the power to efficiently manage and dispose of pretrial issues. TEX. R. JUD. ADMIN. 13.

The MDL Panel transferred the asbestos cases herein to the 11th Judicial District Court of Harris County as the pretrial court. Relators, defendants in the underlying action, moved to establish an inactive docket for "unimpaired" claimants, meaning plaintiffs unable to satisfy the American Bar Association's Standard for Non-Malignant Asbestosis-Related Claims. Placement on the inactive docket would stay these plaintiffs' claims and toll the statute of limitations. Such claims would be stayed until: (1) a plaintiff manifests the impairment necessary to satisfy the ABA standard, (2) the court resolves the impaired plaintiffs' claims, or (3) the court determines the number of impaired plaintiffs' claims does not preclude the hearing of unimpaired plaintiffs' claims.

The pretrial court denied the motion on the grounds that such an inactive docket would violate Texas law, including the Open Courts provision of the Texas Constitution, art. I, § 13, and Rule of Judicial Administration 13. Relators petitioned the 14th Court of Appeals for mandamus relief, which was denied.

Oral argument is set for November 16, 2005.

IV. DAMAGES

A. Breach of Contract

1. Willis v. Donnelly, 118 S.W.3d 10 (Tex. App.—Houston [14th Dist.] 2003) pet. granted, 48 Tex. Sup. Ct. J. 1045 (Sept. 16, 2005) [04-0409].

The issues presented in this breach of contract and breach of fiduciary duty case include: 1) whether a majority shareholder owes a fiduciary duty to a contractually promised minority shareholder; and 2) whether, when a contractual promise of shareholder status is breached, a promisee is entitled to recover for both breach of contract and breach of fiduciary duty.

Urban Retreat—a Houston day spa formed in 1989 by Michael Willis, its majority shareholder—hired Dan Donnelly, a successful hairstylist, to establish and run its salon. Donnelly signed an employment contract, which included various formulas for receiving compensation in company stock. In 1994, Donnelly's employment ended. Donnelly did not receive any stock and Urban Retreat made no profits. Willis sued Donnelly to collect on two promissory notes and Donnelly counterclaimed, seeking damages for breach of his employment contract and breach of fiduciary duty. The jury awarded Donnelly \$1,707,684.30 for breach of each claim and awarded Willis \$26,982.56 for the promissory notes. The court of appeals affirmed the breach of fiduciary duty claim, finding sufficient support for a majority/minority shareholder relationship, and reversed and remanded the breach of contract claim, holding that the trial court had applied the wrong measure of damages. The court of appeals also held that Donnelly must exercise an election of remedies between his breach of contract claim and his breach of fiduciary duty claim.

The Supreme Court granted Willis's petition for review and will hear argument on November 17, 2005.

V. DISCOVERY

A. *Able Supply* Interrogatories

1. In re Allied Chemical Corp., 2004 WL 2554872 (Tex. App.—Corpus Christi 2004) *argument granted on pet. for writ of mandamus*, 48 Tex. Sup. Ct. J. 1005 (Aug. 26, 2005) [04-1023].

In this case, approximately 1900 plaintiffs and intervenors sued more than 30 defendants for injuries arising from exposure to a combination of pesticides produced or stored at a nearby facility. The defendants include the facility's owners, operators, and remediators as well as suppliers and manufacturers of raw materials used at the facility. Allied Chemical served the plaintiffs with interrogatories asking each plaintiff to provide information that showed a causal connection between the alleged injuries and Allied Chemical's products, citing *In re Able Supply Company*, 898 S.W.2d 766, 770 (Tex. 1995) as the applicable standard. Allied Chemical argued that *Able Supply* requires testimony from a qualified medical expert

to establish the required nexus. The plaintiffs argued that their responses to the interrogatories complied with *Able Supply*. The responses clarified that none of the plaintiffs' treating physicians attributed their medical conditions to exposure to specific pesticides.

The principal issues presented in this petition for mandamus relief are (1) whether the trial court abused its discretion in setting the case for trial without requiring the plaintiffs to provide responses linking each plaintiff's injuries to a particular pesticide product and (2) whether Allied Chemical has an adequate remedy by appeal.

Oral argument is set for November 16, 2005.

VI. EMPLOYMENT LAW

A. Employer Liability for Employee's Actions

1. Loram Maintenance of Way, Inc. v. Ianni, 141 S.W.3d 722 (Tex. App.—El Paso 2004), *pet. granted*, 48 Tex. Sup. Ct. J. 1042 (September 16, 2005) [04-0666].

The issues in this personal injury case are (1) in what circumstances an employer can be liable to the public for the off-duty actions of its employee; (2) whether there was sufficient evidence to hold Loram liable for gross negligence; and (3) whether expert testimony was reliable.

Police officer David Ianni was shot by Roger Tingle. Tingle worked for the railroad maintenance company Loram Maintenance of Way. Tingle traveled with Loram and stayed at motels near the maintenance sites with the other Loram employees and his wife Patrice. Tingle and his co-workers worked long shifts with little vacation time. Tingle was using methamphetamines for ten months before the incident to help him stay awake at work. Tingle's supervisors and co-workers were also using methamphetamines, and Tingle had been given time off by a supervisor to purchase more of the drug. In the week before the incident, Tingle threatened one of his wife's friends, Cheryl Sipper, with a knife. He was stopped by one of the other employees. Sipper told one of Tingle's supervisors about the threat and she and Patrice tried to get Loram to take Tingle off the

job because of his drug-induced behavior. Other concerns were also brought to Tingle's supervisor prior to the incident. At work, on the day of the incident, Tingle threatened to attack his wife. While off duty, Tingle had an argument with his wife at the motel, threatened her with a gun, and put her in their vehicle. Patrice jumped out of the vehicle and Officer Ianni approached Tingle's car, trying to intervene. Tingle got out of the car and shot Officer Ianni, severely injuring him.

The jury found that Loram's negligence caused Ianni's injuries, and two Loram supervisors were vice-principals, making Loram liable for gross negligence for the supervisors' actions. The jury also found that Ianni sustained \$800,000 in actual injuries, and \$500,000 should be assessed as punitive damages. The trial court entered judgment on the jury's verdict, and the court of appeals affirmed.

The Supreme Court granted Loram's Petition for Review and will hear argument on November 29, 2005.

B. Texas Commission on Human Rights Act

1. Ysleta Indep. Sch. Dist. v. Monarrez, S.W.3d , 48 Tex. S. Ct. J. 1014 (Tex. August 26, 2005) [02-1185].

In this wrongful termination suit, the Court examined the legal sufficiency of the evidence to support the finding that Ysleta ISD engaged in gender discrimination when it fired two male employees for violating time-clock procedures. To prevail on a claim of gender discrimination, the plaintiffs had to prove that (1) they were members of a class protected by the Texas Commission on Human Rights Act (males); (2) they were qualified for their positions; (3) they were terminated; and (4) they were treated less favorably than similarly situated members of the opposing class (females).

Although there was evidence that female employees had also violated time-clock procedures and been disciplined less severely, the Court concluded there was no evidence that these female employees were "similarly situated." The Court further noted that to prove discrimination based on disparate discipline, the disciplined and undisciplined employees' misconduct had to be of "comparable seriousness." Examining the evidence of the respective misconduct, the Court concluded

that there was no evidence that the male employees had been terminated for conduct the female employees would not have been.

VII. INSURANCE

A. Bad-Faith Liability

1. Progressive County Mut. Ins. Co. v. Boyd, S.W.3d , 48 Tex. Sup. Ct. J. 1020 (Tex. August 26, 2005) [04-0055].

The principal issue in this case was whether the court of appeals correctly reversed the trial court's bad-faith summary judgment. Progressive County Mutual Insurance Company denied reimbursement for damages sustained by Barry Boyd's automobile, and Boyd sued for breach of contract, bad faith, and related extra-contractual claims. The trial court severed the bad-faith and extra-contractual claims from the breach of contract claim and granted Progressive's motion for summary judgment on the severed claims. The breach of contract suit then went to trial, and the jury found in favor of Progressive. The court of appeals affirmed the judgment in favor of Progressive in the breach of contract suit, but reversed the trial court's summary judgment as to the bad-faith and extra-contractual claims. In reversing the summary judgment as to the extra-contractual claims, the court of appeals noted that (1) summary judgment cannot be affirmed on grounds not raised in the trial court, (2) the jury's subsequent breach of contract finding was not before the trial court at the time it granted summary judgment on the extra-contractual claims, and (3) the conversion, DTPA, article 21.21, and article 21.55 sections 3(a) and 3(c) claims were improperly addressed by Progressive's motion for summary judgment, as Progressive erroneously asserted that these claims were recharacterizations of the bad-faith claim when in fact they required different elements of proof.

The Texas Supreme Court noted that the breach of contract claim was fully litigated after summary judgment was granted on the extra-contractual claims. It concluded that the subsequent trial, jury finding, and take-nothing judgment, which was affirmed on appeal as to Boyd's coverage claim, negated Boyd's

extra-contractual claims. The Court therefore held that the subsequent events, being properly before the court of appeals and the Supreme Court, should be considered in determining harm from the trial court's grant of summary judgment. TEX. R. APP. P. 44.1; TEX. R. APP. P. 61.1. After taking the subsequent jury findings into the analysis, the Court determined that there was no remaining issue of material fact. It therefore held that if the trial court erred in granting the motion for summary judgment, the error was harmless. The Court therefore reversed the court of appeals' judgment and rendered judgment that Boyd take nothing.

VIII. JURISDICTION

A. Personal Jurisdiction/Minimum Contacts

1. Moki Mac River Expeditions v. Drugg, 2004 WL 100389 (Tex. App.—Dallas, 2004), *pet. denied*, 48 Tex. Sup. Ct. J. 703 (May 27, 2005), *pet. granted on reh'g*, 48 Tex. Sup. Ct. J. 47 (Sept. 6, 2005) [04-0432].

This is a wrongful death suit against Moki Mac River Expeditions, a Salt Lake City based river rafting outfitter, arising out of a hiking trail accident in the Grand Canyon. The primary issue is whether the quality and nature of a Utah corporation's contacts with customers in Texas are sufficient to satisfy due process and support personal jurisdiction.

Andy Drugg, age thirteen, died while hiking during one of Moki Mac's river-rafting trips in Arizona after slipping and falling off a ledge in the Grand Canyon. The Druggs brought suit in Texas for wrongful death and for intentional and negligent misrepresentation based upon statements made in two brochures that Moki Mac sent to a customer in Texas and in an acknowledgment-of-risk form signed by the Druggs. The trial court denied Moki Mac's special appearance. The court of appeals affirmed on the basis of specific jurisdiction, finding that 1) the Druggs' misrepresentation claims arise from, and relate to, Moki Mac's minimum contacts with Texas, 2) Moki Mac satisfied the purposeful availment requirement by targeting customers in Texas, and 3) these circumstances do not violate notions of fair play or due process.

The Supreme Court granted Moki Mac's petition for review and will hear oral argument on November 17, 2005.

IX. MANDAMUS

A. Discovery Issues

1. In re Allied Chemical Corp., 2004 WL 2554872 (Tex. App.—Corpus Christi 2004) *argument granted on pet. for writ of mandamus*, 48 Tex. Sup. Ct. J. 1005 (Aug. 26, 2005) [04-1023].

In this case, approximately 1900 plaintiffs and intervenors sued more than 30 defendants for injuries arising from exposure to a combination of pesticides produced or stored at a nearby facility. The defendants include the facility's owners, operators, and remediators as well as suppliers and manufacturers of raw materials used at the facility. Allied Chemical served the plaintiffs with interrogatories asking each plaintiff to provide information that showed a causal connection between the alleged injuries and Allied Chemical's products, citing *In re Able Supply Company*, 898 S.W.2d 766, 770 (Tex. 1995) as the applicable standard. Allied Chemical argued that *Able Supply* requires testimony from a qualified medical expert to establish the required nexus. The plaintiffs argued that their responses to the interrogatories complied with *Able Supply*. The responses clarified that none of the plaintiffs' treating physicians attributed their medical conditions to exposure to specific pesticides.

The principal issues presented in this petition for mandamus relief are (1) whether the trial court abused its discretion in setting the case for trial without requiring the plaintiffs to provide responses linking each plaintiff's injuries to a particular pesticide product and (2) whether Allied Chemical has an adequate remedy by appeal.

Oral argument is set for November 16, 2005.

X. OIL AND GAS

A. Contract Interpretation

1. Tittizer v. Union Gas Corp., S.W.3d , 48 Tex. Sup. Ct. J. 1023 (Tex. August 26, 2005) [04-0100].

This case involved a dispute over the amount of royalties an oil and gas lessee owed landowners on a pooled unit. Three issues were presented: (1) whether the oil and gas leases authorized the lessee to execute a pooling designation with a retroactive effect for royalty calculation purposes; (2) whether the doctrines of estoppel and invited error precluded the lessee's argument with respect to the effective date of the pooled unit; and (3) whether the lessee properly preserved an appeal of the attorney's fees award despite misnaming the award recipient in its brief.

The Gislens (the drillsite lessors) and other adjoining landowners (the non-drillsite lessors) entered oil and gas leases with lessee Union Gas Corporation. The leases entitled all landowners within the pooled unit to a pro rata share of production calculated from the effective date of the pooled unit, which was the date of recordation of the Designation of Pooled Unit. The Designation was recorded August 7, 2000. The Designation, however, purported to change the effective date of the pooled unit to the date of first production, which occurred March 27, 2000. If the Designation's effective date controlled, the non-drillsite lessors would be entitled to a pro rata share of production from the pooled unit beginning March 27. If the leases' effective dates controlled, the non-drillsite lessors would not be entitled to a share of royalties, and the Gislens' royalties would not be reduced until the date of recordation on August 7.

The trial court awarded the Gislens full royalties for the March 27 through August 7 production period, and also awarded the non-drillsite lessors, including Tittizer, their pro rata share of royalties for the same period. On appeal, Union Gas complained that the trial court wrongfully ordered it to pay double royalties for the March 27 to August 7 period. The court of appeals reversed in part the trial court's judgments, ordering that the Gislens alone were entitled to royalties from production between March 27 and August 7. The court of appeals also held that

Union Gas failed to attack the award of attorney's fees to Tittizer, so it did not consider the reasonableness of that \$150,000 award.

The Supreme Court affirmed the court of appeals' conclusion as to the effective date of the pooled unit because the unambiguous terms of the lease did not authorize Union Gas to execute a pooling designation with a retroactive effective date. Under the lease, the terms of which are contractual and govern the validity of pooling, unitization was effective only upon recordation of the Designation. Thus, Tittizer was only entitled to her pro rata share of production after August 7.

The Court also held that Union Gas was not estopped from arguing on appeal that the effective date of the pooled unit was the date of recordation, even though Union Gas argued at trial that the effective date was the date of first production. Union Gas's goal at trial was to avoid double liability and its argument in the trial court was contingent upon uniform application of the effective date to all parties. The trial court did not grant Union Gas's requested uniform relief, but instead established a different effective date for the Gislens than it did for the non-drillsite lessors. The invited error doctrine was inapplicable because Union Gas did not invite the trial court to rule in the manner it did. Additionally, Union Gas's position at trial was neither unequivocal nor clearly adverse to its position on appeal—Union Gas still sought a uniform determination applicable to all royalty owners to avoid double liability.

Lastly, the Supreme Court reversed the court of appeals' holding that Union Gas did not appeal the award of Tittizer's attorney's fees. In its point of error on attorney's fees, Union Gas erroneously referred to the "Gislens" instead of "Tittizer." Looking to the context of the litigation and the text of the argument in Union Gas's brief, which did include references to "Tittizer," it was clear Union Gas intended to raise the point of error with respect to Tittizer. Because the court of appeals erred in failing to address this point, the Supreme Court remanded the case to the court of appeals to consider Union Gas's challenge to the reasonableness of the award of attorney's fees to Tittizer.

XI. PROCEDURE—PRETRIAL

A. Forum Non Conveniens

1. In Re Pirelli Tire, L.L.C., 2004 WL 2786028 (Tex. App.—Corpus Christi 2004), argument granted on pet. for writ of mandamus, 48 Tex. Sup. Ct. J. 1042 (Sept. 16, 2005) [04-1129].

This case involves a product liability suit stemming from the rollover of a truck in Mexico resulting in the death of Valentin Hernandez Aran. The Real Parties in Interest brought suit against Pirelli Tire in Cameron County, Texas, claiming a defective tire manufactured by Pirelli Tire caused the accident. Pirelli moved for dismissal on the grounds of forum non conveniens, alleging that all important events, information and witnesses related to the accident were located in Mexico. *See* TEX. CIV. PRAC. & REM. CODE § 71.951(a). The trial court denied Pirelli Tire's motion, and the court of appeals denied mandamus relief. The principal issue presented in this petition for mandamus relief is whether the trial court abused its discretion in denying Pirelli Tire's motion to dismiss under Texas Civil Practice and Remedies Code section 71.951(a) on the basis of forum non conveniens.

Oral argument is set for December 5, 2005.

B. Multidistrict Litigation Panel

1. In re Union Carbide Corp., 145 S.W.3d 805 (Tex. App.—Houston [14th Dist.] 2004), argument granted on pet. for writ of mandamus, 48 Tex. Sup. Ct. J. 1005 (August 26, 2005) [04-1120] consolidated for argument with In re ExxonMobil Corp., 145 S.W.3d 805 (Tex. App.—Houston [14th Dist.] 2004), argument granted on pet. for writ of mandamus, 48 Tex. Sup. Ct. J. 1005 (August 26, 2005) [04-1121].

These cases concern whether a pretrial court can create an inactive docket for “unimpaired” asbestos claimants.

In 2003, the Texas Legislature created a Judicial Panel on Multidistrict Litigation (MDL Panel) for the purpose of transferring civil actions involving common questions of fact to pretrial courts for consolidated or coordinated pretrial proceedings. TEX. GOV'T CODE §§74.161-164. The Supreme Court promulgated Rule of Judicial Administration 13 in response, providing pretrial courts with the power to efficiently manage and dispose of pretrial issues. TEX. R. JUD. ADMIN. 13.

The MDL Panel transferred the asbestos cases herein to the 11th Judicial District Court of Harris County as the pretrial court. Relators, defendants in the underlying action, moved to establish an inactive docket for “unimpaired” claimants, meaning plaintiffs unable to satisfy the American Bar Association's Standard for Non-Malignant Asbestosis-Related Claims. Placement on the inactive docket would stay these plaintiffs' claims and toll the statute of limitations. Such claims would be stayed until: (1) a plaintiff manifests the impairment necessary to satisfy the ABA standard, (2) the court resolves the impaired plaintiffs' claims, or (3) the court determines the number of impaired plaintiffs' claims does not preclude the hearing of unimpaired plaintiffs' claims.

The pretrial court denied the motion on the grounds that such an inactive docket would violate Texas law, including the Open Courts provision of the Texas Constitution, art. I, § 13, and Rule of Judicial Administration 13. Relators petitioned the 14th Court of Appeals for mandamus relief, which was denied.

Oral argument is set for November 16, 2005.

C. Statute of Limitations

1. Barker v. Eckman, 2004 WL 163462 (Tex. App.—Houston [1st District] 2004), pet. granted, 48 Tex. Sup. Ct. J. 1042 (September 19, 2005) [04-0194].

The Barkers owned and operated a business boarding Brahman bulls. The Barkers and the Eckmans agreed that the Barkers would collect semen from three Brahman bulls partially owned by the Eckmans and credit them for their proportionate share of all semen sales from the three bulls. The Barkers allegedly failed to fulfill their part of the bailment agreement and the Eckmans sued. The trial court found that the Barkers failed to comply with the bailment agreement and awarded the Eckmans \$111,983.58 in damages for breach of contract and \$220,000 in attorney's fees. The court of appeals held that all but \$16,180.14 of the judgment was barred by the applicable statute of limitations, but affirmed the award of attorney's fees in light of the original jury award and not

the reduced award. Both parties submitted petitions for review. The Supreme Court granted the petitions for review to determine whether the court of appeals (1) correctly held that all but \$16,180.14 of the Eckmans' damages was barred by the statute of limitations and (2) properly reviewed the award of attorney's fees.

The Supreme Court granted the Barkers' petition for review and will hear argument on November 17, 2005.

XII. PROCEDURE—TRIAL AND POST-TRIAL

A. Error Preservation

1. Tittizer v. Union Gas Corp., S.W.3d , 48 Tex. Sup. Ct. J. 1023 (Tex. August 26, 2005) [04-0100].

This case involved a dispute over the amount of royalties an oil and gas lessee owed landowners on a pooled unit. Three issues were presented: (1) whether the oil and gas leases authorized the lessee to execute a pooling designation with a retroactive effect for royalty calculation purposes; (2) whether the doctrines of estoppel and invited error precluded the lessee's argument with respect to the effective date of the pooled unit; and (3) whether the lessee properly preserved an appeal of the attorney's fees award despite misnaming the award recipient in its brief.

The Gislens (the drillsite lessors) and other adjoining landowners (the non-drillsite lessors) entered oil and gas leases with lessee Union Gas Corporation. The leases entitled all landowners within the pooled unit to a pro rata share of production calculated from the effective date of the pooled unit, which was the date of recordation of the Designation of Pooled Unit. The Designation was recorded August 7, 2000. The Designation, however, purported to change the effective date of the pooled unit to the date of first production, which occurred March 27, 2000. If the Designation's effective date controlled, the non-drillsite lessors would be entitled to a pro rata share of production from the pooled unit beginning March 27. If the leases' effective dates controlled, the non-drillsite lessors would not be entitled to a share of royalties, and the Gislens' royalties would not be reduced until the date of recordation on August 7.

The trial court awarded the Gislens full royalties for the March 27 through August 7 production period, and also awarded the non-drillsite lessors, including Tittizer, their pro rata share of royalties for the same period. On appeal, Union Gas complained that the trial court wrongfully ordered it to pay double royalties for the March 27 to August 7 period. The court of appeals reversed in part the trial court's judgments, ordering that the Gislens alone were entitled to royalties from production between March 27 and August 7. The court of appeals also held that Union Gas failed to attack the award of attorney's fees to Tittizer, so it did not consider the reasonableness of that \$150,000 award.

The Supreme Court affirmed the court of appeals' conclusion as to the effective date of the pooled unit because the unambiguous terms of the lease did not authorize Union Gas to execute a pooling designation with a retroactive effective date. Under the lease, the terms of which are contractual and govern the validity of pooling, unitization was effective only upon recordation of the Designation. Thus Tittizer was only entitled to her pro rata share of production after August 7.

The Court also held that Union Gas was not estopped from arguing on appeal that the effective date of the pooled unit was the date of recordation, even though Union Gas argued at trial that the effective date was the date of first production. Union Gas's goal at trial was to avoid double liability and its argument in the trial court was contingent upon uniform application of the effective date to all parties. The trial court did not grant Union Gas's requested uniform relief, but instead established a different effective date for the Gislens than it did for the non-drillsite lessors. The invited error doctrine was inapplicable because Union Gas did not invite the trial court to rule in the manner it did. Additionally, Union Gas's position at trial was neither unequivocal nor clearly adverse to its position on appeal—Union Gas still sought a uniform determination applicable to all royalty owners to avoid double liability.

Lastly, the Supreme Court reversed the court of appeals' holding that Union Gas did not

appeal the award of Tittizer’s attorney’s fees. In its point of error on attorney’s fees, Union Gas erroneously referred to the “Gislars” instead of “Tittizer.” Looking to the context of the litigation and the text of the argument in Union Gas’s brief, which did include references to “Tittizer,” it was clear Union Gas intended to raise the point of error with respect to Tittizer. Because the court of appeals erred in failing to address this point, the Supreme Court remanded the case to the court of appeals to consider Union Gas’s challenge to the reasonableness of the award of attorney’s fees to Tittizer.

XIII. SUMMARY JUDGMENT

A. Harmless Error

1. Progressive County Mut. Ins. Co. v. Boyd, S.W.3d , 48 Tex. Sup. J. 1020 (Tex. August 26, 2005) [04-0055].

The principal issue in this case was whether the court of appeals correctly reversed the trial court’s bad-faith summary judgment. Progressive County Mutual Insurance Company denied reimbursement for damages sustained by Barry Boyd’s automobile, and Boyd sued for breach of contract, bad faith, and related extra-contractual claims. The trial court severed the bad-faith and extra-contractual claims from the breach of contract claim and granted Progressive’s motion for summary judgment on the severed claims. The breach of contract suit then went to trial, and the jury found in favor of Progressive. The court of appeals affirmed the judgment in favor of Progressive in the breach of contract suit, but reversed the trial court’s summary judgment as to the bad-faith and extra-contractual claims. In reversing the summary judgment as to the extra-contractual claims, the court of appeals noted that (1) summary judgment cannot be affirmed on grounds not raised in the trial court, (2) the jury’s subsequent breach of contract finding was not before the trial court at the time it granted summary judgment on the extra-contractual claims, and (3) the conversion, DTPA, article 21.21, and article 21.55 sections 3(a) and 3(c) claims were improperly addressed by Progressive’s motion for summary judgment, as Progressive erroneously asserted that these claims were recharacterizations

of the bad-faith claim when in fact they required different elements of proof.

The Texas Supreme Court noted that the breach of contract claim was fully litigated after summary judgment was granted on the extra-contractual claims. It concluded that the subsequent trial, jury finding, and take-nothing judgment, which was affirmed on appeal as to Boyd’s coverage claim, negated Boyd’s extra-contractual claims. The Court therefore held that the subsequent events, being properly before the court of appeals and the Supreme Court, should be considered in determining harm from the trial court’s grant of summary judgment. TEX. R. APP. P. 44.1; TEX. R. APP. P. 61.1. After taking the subsequent jury findings into the analysis, the Court determined that there was no remaining issue of material fact. It therefore held that if the trial court erred in granting the motion for summary judgment, the error was harmless. The Court therefore reversed the court of appeals’ judgment and rendered judgment that Boyd take nothing.