SUPREME COURT UPDATE

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

April 1, 2007 – March 31, 2008

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I. SCOPE OF THIS ARTICLE

This article surveys cases that were decided by the Supreme Court of Texas from April 1, 2007 through March 31, 2008. Petitions that have been granted but not yet decided are also included.

II. ADMINISTRATIVE LAW

A. Administrative Procedures Act

1. El Paso Hosp. Dist. v. Tex. Health & Human Servs. Comm'n, 247 S.W.3d 709 (Tex. February 22, 2008) [05-0372].

The Supreme Court granted El Paso Hospitals' motion for rehearing, withdrew its original opinion dated August 31, 2007, and substituted a new one in its place. At issue in this case is whether the Texas Health and Human Services Commission (HHSC) was required to comply with the Administrative Procedures Act (APA) when collecting data to calculate certain Medicaid reimbursement rates. HHSC is charged with establishing methods for administering and adopting necessary rules for operating medicaid assistance programs. Every three years, HHSC collects a twelve-month period of claims data in order to calculate Medicaid reimbursement rates. This process employs a data collection cutoff, which the Hospitals argued is a rule that must be adopted through specific procedures under the APA. In the original suit, fourteen Texas hospitals sued HHSC asking that the data-collection method for calculating prospective Medicaid inpatient services rates be declared invalid, and asking whether HHSC failed to follow the procedures prescribed by other rules that govern a party's appeal of HHSC's proposed rates. The trial court denied all relief, and the court of appeals affirmed its judgment.

In its new opinion, the Court again concluded, after applying the APA's requirements for rule-making, that the data collection cutoff met the requirements of a rule because the cutoff was of general applicability that implemented law or described procedures, amended another one of HHSC's rules, and affected the Hospitals' private rights. Thus, the Court declared the rule invalid and enjoined its enforcement. The Court also concluded that under the rules for appealing HHSC's data-collection methodology, HHSC failed to properly follow the procedures governing the Hospitals' appeal of HHSC's proposed rates. Therefore, the Supreme Court remanded the case to the trial court for proceedings consistent with its opinion.

B. Civil Service

1. City of Waco v. Kelley, 226 S.W.3d 672 (Tex. App.—Waco 2007), *pet. granted*, 51 Tex. Sup. Ct. J. 447 (February 15, 2008) [07-0485].

At issue in this case is the extent of a hearing examiner's authority to evaluate and impose administrative sanctions on assistant chiefs of police or fire departments. Waco's chief of police indefinitely suspended Larry Kelley, the assistant chief of police, but on appeal, the hearing examiner reinstated Kelley at the lower rank of Sergeant after a temporary suspension. The trial court upheld the hearing examiner's decision. The court of appeals, however, determined that the statutory authorization for hearing examiners to determine and impose punishments did not include reducing rank and accordingly reinstated Kelley at the rank of Commander, the rank he held immediately before promotion to assistant chief. Chief Justice Cayce dissented on the grounds that it was improper for the court of appeals to impose a punishment without sufficient facts to determine what punishment the hearing examiner would have imposed had the examiner known demotion was not available. The Supreme Court granted Waco's petition for review and heard argument on April 2, 2008.

C. Exhaustion of Administrative Remedies

1. Christus Health Gulf Coast v. Aetna, Inc., 237 S.W.3d 338 (Tex. August 31, 2007) [05-0710].

At issue in this case is whether the Medicare Act requires health care providers to exhaust the Medicare administrative appeals process prior to bringing a claim to compel payment for the services from a health maintenance organization (HMO) which contracted to provide services to Medicare beneficiaries as part of the Medicare Advantage Program. Aetna owned NYLCare, an HMO Medicare Advantage organization. NYLCare contracted with North American Medical Management of Texas (NAMM) to administer the plan. NAMM then contracted with health care providers, including Christus Health Gulf Coast and several other hospitals to provide services to NYLCare enrollees. NAMM stopped paying the hospitals for their services and notified them and NYLCare that it was no longer able to satisfy its financial obligations. The Texas Department of Insurance subsequently placed NAMM under supervision conservatorship. Aetna, through NYLCare, assumed responsibility for institutional claims incurred by NYLCare members for covered services rendered after NAMM gave notice of its inability to pay. The hospitals sought payment from Aetna for services rendered prior to that date, but Aetna refused demands for payment.

The hospitals sued Aetna, alleging $13,067,759.19 in unpaid services, asserting claims for suit on an account, breach of contract, breach of fiduciary duty, quantum meruit, and claims under the Texas Insurance Code. The trial court granted Aetna's plea to the jurisdiction on the grounds that the hospitals' claims were governed exclusively by the Medicare Act and that because the Hospitals had not pursued Medicare's administrative remedies, the trial court lacked subject matter jurisdiction over the claims. The court of appeals affirmed. The Supreme Court reversed and remanded the case to the trial court.

Citing *Rencare, Ltd. v. Humana Health Plan of Tex., Inc.*, 395 F.3d 555 (5th Cir. 2004), issued two days after the court of appeals' opinion in this case, the Court held that the administrative review process attendant to the relevant portion of the Medicare Act did not extend to claims in which an enrollee had no interest. The Court distinguished between nonpayment due to enrollees' lack of coverage from arising out of nonpayment due to insolvency or a dispute about who was contractually obligated to pay. Therefore, because the hospitals' claims fell within the latter category, the hospitals did not have any administrative remedies to exhaust, and whether the hospitals are entitled to payment from Aetna was a matter within the trial court's jurisdiction.

D. Public Utility Commission/Jurisdiction

1. In re Sw. Bell Tel. Co., 226 S.W.3d 400 (Tex. June 1, 2007) [05-0511].

The issue in this case was whether the Public Utility Commission had primary jurisdiction to resolve threshold questions about the meaning and effect of certain telephone interconnection agreements between Southwestern Bell Telephone Company and the plaintiff local exchange telephone service carriers. The Supreme Court concluded that it did and conditionally granted mandamus relief abating the lawsuit for administrative proceedings in the PUC.

Federal law permits competing local exchange carrier telephone companies (CLECs) to connect with the network owned by the incumbent local exchange carrier (ILEC) that formerly possessed a monopoly on local telephone service. CLECs may negotiate the terms of interconnection agreements with the ILEC. If they are not able to reach an agreement, the PUC may conduct an arbitration to set rates for interconnection services. The plaintiff CLECs in this case each entered interconnection agreements with ILEC Southwestern Bell to obtain access to Southwestern Bell's network. After the agreements were finalized, the PUC conducted two arbitrations between Southwestern Bell and other companies that had not been able to reach agreements on the appropriate rates to be charged. In the arbitration proceedings the PUC set rates for certain services to be supplied by Southwestern Bell at prices between $2.56 and $5.00, which were substantially lower prices than those in the agreed-upon contracts at issue in this case. The CLECs in this case had contracted to pay between $5.00 and $25.00 for the same services. The CLECs brought suit, asserting that Southwestern Bell had been overcharging them

because the rates in their contracts were substantially higher than the rates set in the arbitration proceedings. The causes of action asserted by plaintiffs included Deceptive Trade Practices Act (DTPA) violations, unjust enrichment/money had and received, violations of Texas anti-trust laws, and fraud. Southwestern Bell sought mandamus relief from the Supreme Court to direct the trial court to (1) refer the issues regarding the interconnection agreements to the PUC and (2) abate the case while the PUC reviews the issues.

The Supreme Court granted the mandamus relief requested. It held that the PUC had primary jurisdiction over questions regarding interpretation and enforceability of the parties' interconnection agreements. It noted that the PUC is staffed with experts who routinely consider the validity and enforceability of interconnection agreements. In addition to approving the interconnection agreements in the first instance, the PUC also retains authority to interpret and enforce the interconnection agreements when disputes arise about their meaning or effect. The Court also held that uniform interpretation of the agreements provides great benefit. Conflicting jury verdicts and rulings by different courts in regard to same or similar situations and fact patterns could result in disparate treatment of the CLECs and ILEC. Disparate treatment of companies and lack of uniform decisions regarding contractual obligations could inhibit competition, compromise the PUC's ability to perform its regulatory duties under the Federal Telecommunications Act, and frustrate Congress's goal of providing opportunity for competition in the local-calling market. The Court further held that Southwestern Bell preserved its right to seek mandamus relief because it raised the issue of primary jurisdiction promptly, sought a hearing within the time frame set by the scheduling order, and sought mandamus relief soon after its motion was denied.

2. In re Sw. Bell Tel. Co., L.P., 235 S.W.3d 619 (Tex. August 31, 2007) [05-0951].

At issue in the case is whether the Public Utilities Commission (PUC) has exclusive jurisdiction over claims that Southwestern Bell Telephone (SWBT) improperly collected the Texas Universal Service Fund surcharge from customers. SWBT customers, individually and as representatives of a putative class consisting of all SWBT residential customers in Texas, sued SWBT. The customers sought a declaration that the Service Fund surcharge SWBT collected monthly under chapter 58 of the Public Utility Regulatory Act (PURA) was a rate charged for basic network services and it increased SWBT's rate in violation of a rate freeze agreement. The customers also sought an order requiring SWBT to refund the surcharge to its customers (the "core claims"). SWBT filed a plea to the jurisdiction, arguing that the PUC had exclusive jurisdiction over the core claims, and the trial court denied it. The customers then filed several amended petitions asserting new claims for breach of contract and violations of the Texas Deceptive Trade Practices-Consumer Protection Act. The court of appeals denied mandamus relief.

The Supreme Court concluded that mandamus relief would be an appropriate remedy if the PUC had exclusive jurisdiction over the core claims. The Court then concluded that PURA was intended to serve as a pervasive regulatory scheme that governs the Texas Universal Service Fund. The Court noted that the PUC, as the administrator of the Service Fund, had the authority to grant such relief and the expertise to decide the matter.

As to the later-added claims, the Supreme Court noted that SWBT had not yet filed a jurisdictional plea as to the new claims, and the parties had not briefed or presented those issues to the trial court. Accordingly, the Court declined to discuss whether those claims were within the PUC's exclusive or primary jurisdiction. As to the core claims, the Supreme Court conditionally granted the writ of mandamus and directed the trial court to dismiss those claims for want of jurisdiction.

3. Tex. Mun. Power Agency v. Pub. Util. Comm'n of Tex., S.W.3d , 51 Tex. Sup. Ct. J. 216 (Tex. December 14, 2007) [04-0751, 04-0752].

At issue in these consolidated cases is whether the Public Utility Commission of Texas has jurisdiction to revise a uniform sales rate set by contract between the Texas Municipal Power Agency (TMPA), a municipally owned utility, and

its member cities of Denton, Garland, Greenville, and Bryan. In 1995, the Legislature enacted chapter 35 of the Public Utility Regulatory Act (PURA) to promote competition in the wholesale electricity market. After enactment of chapter 35, the Commission adopted transmission service rules, including a wholesale transmission pricing methodology, which resulted in lower rates than Bryan was required to pay under its previously negotiated "bundled" power sales contract (PSC) with TMPA. Bryan initiated a complaint proceeding before the Commission regarding the contract rates. The Commission issued an order stating that Bryan was not obligated to pay the contract rate, but could pay the rate set by the Commission. TMPA sought judicial review of the Commission's order and challenged the Commission's jurisdiction. TMPA also sought a declaratory judgment regarding the parties' obligations under the PSC. The trial court concluded that the Commission did have jurisdiction and dismissed TMPA's request for declaratory relief. The court of appeals affirmed.

The Supreme Court reversed the court of appeals' judgment and rendered judgment in favor of TMPA, holding that the Commission lacked jurisdiction to unbundle or interfere with the PSC and lacked jurisdiction to modify the uniform sales rate for wholesale electric power under the PSC. The Court also reversed the court of appeals' judgment sustaining the dismissal of declaratory judgment claims filed by TMPA, and remanded those claims to the court of appeals for further consideration.

Justice Brister, joined by Justice Willett, dissented. Justice Brister interpreted chapter 35 of PURA and the Commission's power to ensure that transmission rates are reasonable and nondiscriminatory to give the Commission jurisdiction to determine transmission rates under the PSC. Without such jurisdiction, Justice Brister argued, the Commission could not effectively set the rates that the Legislature ordered it to regulate.

E. Statute of Limitations

1. O'Neal v. Ector County Indep. Sch. Dist., S.W.3d , 51 Tex. Sup. Ct. J. 685 (Tex. March 28, 2008) [07-0084].

At issue in this case is whether a teacher in a pending administrative proceeding may file a parallel suit in state court to avoid a potential limitations bar. Ector County School District employed O'Neal as a teacher under a two-year term contract and as a volleyball coach under an addendum thereto. The District terminated O'Neal's coaching duties under her teaching contract but not the teaching contract itself. O'Neal filed a grievance, which the school board denied as untimely. The Commissioner of Education affirmed. The trial court reversed the decision and remanded to the Commissioner. Three years later, the Commissioner found the District had violated O'Neal's right to a hearing on the contract termination and remanded the case to the Board to determine her recovery. Meanwhile, O'Neal filed a parallel breach of contract suit in a trial court to avoid the statute of limitations running. The trial court dismissed O'Neal's suit for failure to exhaust her administrative remedies, and the court of appeals affirmed. The Supreme Court affirmed the court of appeals judgment, though for a different reason. The Court held that when administrative remedies provide the same relief available in collateral litigation, a parallel suit in state court is neither necessary nor permissible, and the general limitations period does not apply.

III. AGENCY

A. Apparent Authority

1. Gaines v. Kelly, 235 S.W.3d 179 (Tex. August 24, 2007) [05-1092].

In this appeal from a no-evidence summary judgment, the Court considered whether representations, allegedly made by a mortgage broker that a loan would be funded, could be attributed to a lender for purposes of a borrower's fraud claim against that lender. The court of appeals concluded that there was evidence that the mortgage broker had apparent authority to speak for the lender on this subject and reversed the trial court's summary judgment in the lender's favor. The Supreme Court, however, agreed with the trial court that there was no evidence that the

mortgage broker had apparent authority either to negotiate the terms of the loan or otherwise commit the lender. Accordingly, the Court reversed the court of appeals' judgment and rendered judgment that the borrower take nothing.

IV. ARBITRATION

A. Economic Duress

1. In re Gulf Exploration, LLC, 211 S.W.3d 828 (Tex. App.—Eastland 2006), *pet. granted*, 51 Tex. Sup. Ct. J. 77 (November 2, 2007) [07-0055].

The issues in this petition for writ of mandamus are whether the court of appeals had mandamus jurisdiction to review the trial court's order compelling arbitration and whether the court of appeals erred in holding that the parties' dispute is outside the scope of the relevant arbitration clauses.

In 2003, Great Western and a number of working interest owners signed agreements to develop several parcels of land for oil and gas purposes. The agreements specified the land covered and included clauses requiring arbitration of all disputes arising out of or relating to the agreements. In 2004, Great Western acquired land adjacent to the contract area and drilled two commercially successful wells, which the working interest owners contend are offset wells drawing oil from the formation beneath the contract area. Great Western did not give the working interest owners an opportunity to participate in this acquisition.

The working interest owners filed a demand for arbitration contending that Great Western had breached fiduciary, contractual, and common law duties to them. Great Western then filed a declaratory judgment action seeking a declaration regarding the parties' rights, duties, and obligations. The trial court granted the working interest owners' motion to compel arbitration and stay the underlying case. The court of appeals, however, granted Great Western's request for mandamus and ordered the trial court to rescind its order compelling arbitration, holding that the dispute is outside the scope of the arbitration clauses.

The working interest owners argue that Great Western was not entitled to mandamus review of the trial court's order compelling arbitration because the Federal Arbitration Act only provides appellate review of orders *denying* arbitration, not orders *compelling* arbitration. Alternatively, they argue that even if an exception does exist that allows such review if a party can meet a particularly heavy mandamus burden, Great Western did not meet this burden. Finally, the working interest owners contend this dispute is within the scope of the arbitration clauses, and thus the court of appeals erred in vacating the trial court's order compelling arbitration. The Supreme Court granted argument on the working interest owners' petition for writ of mandamus. The Court heard oral argument on January 17, 2008.

2. In re RLS Legal Solutions, LLC, 221 S.W.3d 629 (Tex. April 20, 2007) [05-0290].

The trial court in the underlying employment suit denied RLS Legal Solutions's motion to compel arbitration. The court of appeals held that the denial was not an abuse of discretion because RLS used economic duress to force consent to arbitrate. The Supreme Court, in a per curiam opinion and without hearing oral arguments, disagreed, and directed the trial court to grant the motion compelling arbitration.

Amy Cobb Maida was an employee of RLS. During her employment, Maida signed several agreements to arbitrate disputes with RLS, but refused to sign a new such agreement in November 2001. Maida claimed that RLS withheld the salary that it owed her in order to force her to accept the arbitration provision and that the provision was therefore unenforceable. The Court assumed that Maida made out a case for economic duress, but held there was no evidence that the duress was directed solely at obtaining her agreement to the arbitration provision as distinct from the agreement as a whole. Although Maida objected to the arbitration provision specifically, she also objected to other provisions of the new agreement, and there was no evidence that the arbitration provision was the only provision she was under duress to sign. The Court held that unless the arbitration provision alone was singled out from the rest of the agreement, a claim of duress goes to the validity of the agreement generally and must be decided in arbitration.

B. Enforcement of Arbitration Agreement

1. In re U.S. Home Corp., 236 S.W.3d 761 (Tex. October 12, 2007) [03-1080].

At issue in this case was whether the arbitration clauses in home sales contracts between U.S. Home Corp. and home purchasers were enforceable over several contract defenses. The Supreme Court concluded there was no evidence to support any of the five grounds the trial court listed to justify its decision to deny the defendants' motion to compel arbitration.

The Court first found that evidence that U.S. Home refused to contract with the plaintiffs unless they agreed to arbitration was not enough to prove that the arbitration clauses were contracts of adhesion and procedurally unconscionable. Second, the arbitration agreements were not procured by fraud since the plaintiffs provided no evidence of any misrepresentations, scienter, or reliance and they conceded that no one prevented them from reading the arbitration clause on the back of their single-sheet contract. Third, the arbitration clauses were supported by mutual consideration since both parties agreed to arbitration and neither of the two relevant provisions allowed U.S. Home to cancel the contracts at will or to opt out of arbitration if there was a dispute regarding whether it had properly done so. Fourth, there was no evidence that arbitration would not be unduly burdensome or costly since plaintiffs offered no specific evidence that a party would be charged excessive fees. Fifth, the trial court incorrectly found that mediation, which had not yet occured, was a condition precedent to arbitration. There was no indication the parties intended to dispense with arbitration if mediation did not occur first. Finally, the Court held that because U.S. Home employees' liability arose from and would be determined by reference to the parties' contracts rather than general obligations imposed by law, claims against the employees, even though they were not signatories to the contracts, were also subject to the contracts' arbitration provisions.

C. Enforcement/Nonsignatories

1. In re H&R Block Fin. Advisors, Inc., 235 S.W.3d 177 (Tex. August 24, 2007) [04-0061].

At issue in this case is whether nonsignatories to an arbitration agreement could nonetheless invoke that agreement based on their status as agents of or successors to one of the signatories.

In 1992 and 1996, Robert and Gilda Bonds signed investment account agreements with Olde Discount Corporation that required arbitration of "any and all controversies or claims arising out of the relationship established by this agreement or any corresponding agreement to arbitration." Bullock, an Olde employee, signed these contracts on Olde's behalf. Bullock advised the Bonds about investments and continued to do so after Olde changed its name to H&R Block Financial Advisors, Inc. in 2000. One of Bullock's recommended investments was in Enron Corporation. When the Bonds lost their entire $119,031.92 investment in Enron, they sued H&R Block and Bullock for negligence, gross negligence, fraud, breach of fiduciary duty, and violations of the Texas Securities Act and the Texas Deceptive Trade Practices Act. H&R Block and Bullock moved to compel arbitration and stay the proceedings pursuant to the Federal Arbitration Act. The trial court denied the motion, and the court of appeals denied mandamus relief. The Supreme Court conditionally granted mandamus relief and directed the trial court to order that the Bonds' claims proceed to arbitration.

The Court held that both H&R Block and Bullock could invoke the Bonds' arbitration agreements with Olde. A contracting party that has merely changed its name is still a contracting party. Here, H&R Block showed that Olde changed its name to H&R Block by amending its Articles of Incorporation in 2000. Further, when contracting parties agree to arbitrate all disputes under the contract, they generally intend to include disputes about their agents' actions. Here, any liability Bullock may have had must have arisen from the Bonds' contracts with Olde, as he had no duty to provide investment advice other than in his role as Olde's employee. Therefore,

the contracts' arbitration provisions applied to the Bonds' claims against Bullock as well.

2. In re Kaplan Higher Educ. Corp., 235 S.W.3d 206 (Tex. August 24, 2007) [06-0072].

At issue in this case is whether nonsignatories to an arbitration agreement could nonetheless invoke that agreement based on their status as agents or affiliates of one of the signatories.

A vocational college and 45 of its students agreed to arbitrate any dispute "arising from or relating to" their enrollment agreements. The students claimed they were fraudulently induced to enroll by assurances that they would be eligible for certain electrician licenses upon graduation. The students sued nonsignatories Kaplan, the parent corporation of the vocational college, and Ventura, the college's admissions director, seeking refunds of tuition and other costs. Kaplan and Ventura sought to compel arbitration of these claims. The trial court refused to compel arbitration, and the court of appeals denied mandamus relief. The Supreme Court conditionally granted mandamus relief and directed the trial court to order arbitration.

The Supreme Court held that Ventura and Kaplan could invoke the arbitration clause in the enrollment agreements. Arbitration clauses do not automatically cover all corporate agents or affiliates. For example, an owner acting on its own behalf may not be able to invoke a subsidiary's arbitration clause. Here, however, the ultimate liability would have fallen on the college because any liability on the part of Ventura or Kaplan must have arisen when they procured enrollment agreements on the college's behalf as its agents. Because a party generally cannot avoid unfavorable clauses in contracts simply by suing the other party's agents, the same rule is necessary in the arbitration context to put arbitration agreements on equal footing with other contracts. A contrary rule would require every agent and affiliate of a signatory corporation, even when acting on behalf of the corporation, to sign or be listed in every contract in order to gain the protection of the arbitration clauses therein, which is an impractical result. When a contract clearly provides for arbitration of disputes related to that contract, parties cannot avoid arbitration simply by alleging a nonsignatory agent or affiliate was liable.

3. In re Labatt Food Serv., L.P., 2007 WL 1424092 (Tex. App.—San Antonio 2007), *argument granted on pet. for writ of mandamus*, 51 Tex. Sup. Ct. J. 562 (March 28, 2008) [07-0419].

At issue in this case is whether wrongful death plaintiffs are bound by the decedent's agreement to arbitrate claims against an employer who allegedly causes the decedent's injury. Carlos Dancy, Jr. died while working for Labatt Food Service, L.P. on its premises. Before his death, Dancy signed an agreement in which he agreed to arbitrate all claims against Labatt relating to occupational injury or death. Dancy's parents and four children brought a wrongful death action against Labatt, and Labatt moved to compel arbitration. The trial court denied Labatt's motion, stating on the record that the decision was based on the plaintiffs' status as nonsignatories. The court of appeals denied Labatt's request for mandamus relief. The Supreme Court granted argument on Labatt's petition for writ of mandamus. The date for oral argument is yet to be determined.

4. In re Merrill Lynch Trust Co. FSB, 235 S.W.3d 217 (Tex. August 31, 2007) [03-1059].

The principal issue in this case is whether nonsignatories to an arbitration agreement may enforce the agreement against the signatories under theories of agency or equitable estoppel. Chris Pereyra retained Merrill Lynch, Pierce, Fenner & Smith Inc. and its employee Henry Medina as her financial advisors. Her agreement with Merrill Lynch contained a broad arbitration clause. Among other investments, Medina advised the plaintiff to set up a trust account and name Merrill Lynch Trust Company of Texas (ML Trust) as trustee. The sole asset of the trust was a variable life insurance policy bought from Merrill Lynch Life Insurance Company (ML Life). Both of these Merrill Lynch affiliates had their own contracts with Pereyra, neither of which contained an arbitration clause.

When Pereyra initiated an arbitration proceeding against Merrill Lynch and Medina, she also filed this lawsuit against Medina and ML Trust asserting several torts as well as violations of the Texas Trust Code and Texas Insurance Code. Medina and ML Trust filed a motion to compel arbitration and stay litigation. The trial court denied the motion, and the court of appeals denied mandamus relief.

For the reasons stated in an almost identical case, *In re Merrill Lynch Trust Co.*, 235 S.W.3d 185 (Tex. August 24, 2007), the Court held that the trial court abused its discretion in refusing to compel arbitration with the Medina, and in refusing to stay the litigation against ML Trust.

5. In re Merrill Lynch Trust Co. FSB, 235 S.W.3d 185 (Tex. August 24, 2007) [04-0865].

The principal issue in this case is whether nonsignatories to an arbitration agreement may enforce the agreement against the signatories under theories of agency or equitable estoppel. When Juan Alaniz and his wife opened accounts at the brokerage firm Merrill Lynch, Pierce, Fenner & Smith, Inc. (MLPF&S), they signed cash management agreements that contained arbitration provisions. Henry Medina, an MLPF&S employee who was also a licensed insurance agent, was the plaintiffs' financial advisor. The Alanizes sued Medina and two MLPF&S affiliates, Merrill Lynch Trust Co. (ML Trust) and Merrill Lynch Life Insurance Co. (ML Life) for claims related to an insurance trust. The defendants, who were not signatories to the cash management agreements between the Alanizes and MLPF&S, moved to compel arbitration based on the arbitration provisions in those agreements.

The Supreme Court held that Medina, as an MLPF&S employee, could compel arbitration, since he was acting as the agent of MLPF&S and was within the course and scope of his employment. ML Life and ML Trust, however, could not compel arbitration. As affiliates, no exception that would otherwise allow nonsignatories to compel arbitration applied. The Court rejected compelling arbitration through the equitable theory of substantially interdependent and concerted misconduct. Even so, the Court held that the Alanizes' claims against ML Life and ML Trust must be stayed pending arbitration.

Justice Hecht filed an opinion concurring in part and dissenting in part. Justice O'Neill joined part I of the writing, which stated that because the plaintiffs disavowed all claims against MLPF&S and only alleged claims against Medina for his actions as a licensed insurance agent, Medina could not compel arbitration. In part II, Justice Hecht argued that ML Life and ML Trust could not compel arbitration because the Alanizes limited their allegations to the illegality of the inter-affiliate sale of the life policy.

Justice Johnson, joined by Justice Wainwright, also concurred in part and dissented in part, and argued that Medina as well as ML Life and ML Trust should be allowed to compel arbitration. As to ML Life and ML Trust, Justice Johnson argued that applying *Grigson v. Creative Artists Agency*, 210 F.3d 524 (5th Cir. 2000), the Alanizes should be equitably estopped from asserting they have no arbitration agreement with ML Trust and ML Life to the extent their claims rely on substantially interdependent and concerted misconduct by Medina, ML Trust, and ML Life.

D. Judicial Review

1. Bison Bldg. Materials, Ltd. v. Aldridge, 2006 WL 2641280 (Tex. App.—Houston [1st Dist.] 2006), *pet. granted*, 51 Tex. Sup. Ct. J. 77 (November 2, 2007) [06-1084].

This case raises the issue of whether a trial court's order confirming in part and vacating in part an arbitrator's award is appealable. Aldridge had an agreement with his employer, Bison, to resolve any claims for "work-related illness or injuries" via arbitration. After being injured in the course of his employment, Aldridge signed a document waiving his right to file a legal action against Bison in consideration for receiving certain medical benefits. Unsatisfied with the benefits he received, Aldridge demanded arbitration, asserting various damages. Finding that Aldridge had waived his right to arbitrate his damages claim, the arbitrator dismissed the claim with prejudice.

Bison and Aldridge's arbitration agreement provided that "a party opposing enforcement of an award may bring a separate action in any court of competent jurisdiction . . . where the standard of

review will be the same as that applied by an appellate court reviewing a decision of a trial court sitting without a jury." As such, Aldridge moved in the trial court to set aside the arbitration award; Bison moved to confirm it. The trial court confirmed part of the arbitrator's decision, holding that Aldridge had signed the waiver of right to file a legal action, but vacated the arbitrator's dismissal of the claim, holding that two fact issues remained to be resolved. In a split decision, the court of appeals held the trial court's order was not a final judgment because it necessarily contemplated a rehearing. Because the order was interlocutory, an appeal was not authorized by statute. Accordingly, the court of appeals dismissed the appeal for want of jurisdiction.

The Supreme Court granted Bison's petition for review and heard oral argument on January 16, 2008.

2. E. Tex. Salt Water Disposal Co. v. Werline, 209 S.W.3d 888 (Tex. App.—Texarkana 2006), *pet. granted*, 51 Tex. Sup. Ct. J. 77 (November 2, 2007) [07-0135].

At issue in this case is whether a court of appeals has interlocutory jurisdiction under the Texas Arbitration Act (TAA) to review a trial court's order vacating, directing rehearing, and denying confirmation of an arbitrator's award. Richard Werline and East Texas Salt Water Disposal Company (ETSWD) submitted an employment dispute to arbitration. The arbitrator found that ETSWD materially breached the employment agreement and awarded Werline two years' salary, attorney's fees, and arbitration costs.

ETSWD sought to vacate and/or correct the award at the trial court while Werline sought to confirm it. The trial court held that there was no evidence of a material breach and ruled that the arbitrator's award resulted from evident partiality, willful misconduct, and gross mistake. The court granted ETSWD's motion to vacate the arbitrator's award, expressly denied Werline's competing motion to confirm it, and granted rehearing before a new arbitrator. Werline appealed, and the court of appeals reversed and rendered judgment confirming the award. The appeals court found that it had jurisdiction on the basis that the plain language of the TAA allows the appeal of orders denying confirmation of awards. ETSWD argues that the court of appeals does not have jurisdiction over an order directing a rehearing. The Supreme Court granted ETSWD's petition for review and heard oral argument on January 16, 2008.

V. ATTORNEYS

A. Class Certification

1. Bowden v. Phillips Petroleum Co., 247 S.W.3d 690 (Tex. February 15, 2008) [03-0824].

At issue in this case is 1) whether res judicata can bar litigation of claims not brought within a class action and, if so, whether class representatives who abandoned such claims per se inadequate representatives, and 2) whether the trial court properly certified a class of royalty owners in a suit against their lessor for breach of natural gas leases. Bowden and other royalty owners brought a suit against Phillips Petroleum Company and several of its subsidiaries (collectively "Phillips"), claiming various breaches of contract and implied duties. The trial court certified a class consisting of three subclasses. Subclass 1 alleged Phillips breached implied covenants to market under the leases. Subclass 2 alleged Phillips breached specific gas royalty agreements by improperly calculating royalty payments. Subclass 3 alleged Phillips breach implied duties to market by agreeing to pay unreasonably high service fees to its affiliates under percentage of the proceeds contracts.

The court of appeals held the class representatives impermissibly failed to assert all claims for damages under the leases, the unasserted claims would be barred from subsequent litigation by res judicata, and the class representative's willingness to abandon those claims rendered them inadequate representatives. In addition, the court of appeals found that each subclass failed the class certification requirements. The Supreme Court affirmed in part and reversed in part.

The Court held that unasserted claims in a class action are subject to the same test for res judicata as in other forms of litigation, as previously expressed in *Citizens Insurance Co. v. Daccach*, 217 S.W.3d 430, 451 (Tex. 2007). Class members will be barred from later asserting claims that arose from the same transaction or

subject matter as the class litigation and either could have been or were litigated in that prior suit. However, although the type and number of claims brought by class representatives may implicate class certification requirements, such as typicality and predominance, the choice to abandon certain claims, even in the face of res judicata, does not automatically make class representatives inadequate.

Turning to the subclasses, the Court determined that the court of appeals erred in finding that individual issues would predominate in subclass 1 for the reasons given, but that individual issues would predominate when determining the reasonable price at which Phillips should have marketed gas from each well. For subclass 2, the Court held that the court of appeals erred in finding the Gas Royalty Agreements ambiguous and determined that royalty owners were entitled to a royalty based on the value of gas produced, before processing had removed any valuable components. For subclass 3, the Court held that certification was improper because the class included both proceeds-based and market-value leases and because individual issues would predominate when determining the proper fee Phillips should have charged for each well.

The Court affirmed the court of appeals' decertification as to subclasses 1 and 3 and reversed as to subclass 2.

B. Disbarment

1. In re Caballero, *disciplinary appeal set for oral argument*, 51 Tex. Sup. Ct. J. 329 (January 25, 2008) [07-0484].

At issue in this case is whether the Board of Disciplinary Appeals (BODA) may disbar (rather than suspend) an attorney convicted of an intentional crime when the attorney's sentence has been fully probated. Attorney Rolando Caballero pleaded guilty and was convicted in federal court of mail fraud. He was sentenced to supervised probation for five years and ordered to pay restitution. BODA conducted a full evidentiary hearing and entered a judgment of disbarment after finding that Caballero had been convicted of an intentional crime and his criminal sentence was fully probated. Caballero appealed. Rule of Disciplinary Procedure 8.05 states that when an attorney has been finally convicted of a crime, "the attorney shall be disbarred unless [BODA], under Rule 8.06, suspends his or her license to practice law." Rule 8.06 states that "[i]f an attorney's sentence upon conviction of a Serious Crime is fully probated . . . the attorney's license to practice law shall be suspended during the term of probation." Caballero claims that under the mandatory language of Rule 8.06, BODA has no discretion and was required to suspend rather than disbar him. The Commission for Lawyer Discipline argues that under Rule 8.05, BODA has discretion to either suspend or disbar an attorney sentenced to probation and that Caballero's reading of the statute would render a significant portion of Rule 8.05 meaningless. The Court heard oral argument on April 1, 2008.

2. In re Mercier, 242 S.W.3d 46 (Tex. December 21, 2007) [06-1008].

After attorney Eugene Mercier was convicted of conspiracy to commit barratry, the Board of Disciplinary Appeals suspended his license and ordered that he "shall be disbarred" if the conviction was affirmed. While Mercier's appeal of the criminal conviction was still pending, he appealed the Board's ruling.

After determining that the compulsory rules of discipline applied, the Supreme Court, in a per curiam opinion, concluded that when an attorney's license has been suspended pending a criminal appeal, the rules provide for disbarment only after the conviction becomes final. As a result, the Court held that the portion of the Board's order providing that the attorney "shall be disbarred" if the conviction was affirmed, was premature. Disbarment cannot take place until (1) a conviction is final, (2) the Chief Disciplinary Counsel files a motion, and (3) the attorney is given an opportunity to contest finality. The Court reversed the part of the Board's order regarding disbarment without prejudice to refiling and affirmed the remainder.

C. Fees

1. Bossier Chrysler-Dodge, II, Inc. v. Rauschenberg, 238 S.W.3d 376 (Tex. November 2, 2007) [06-0874].

The issue in this case was whether the case should be remanded for a new trial on attorney's fees after the court of appeals significantly

reduced the damages awarded by the trial court, but did not reduce the attorney's fee award. The Supreme Court recently addressed this issue in *Barker v. Eckman*, 213 S.W.3d 306 (Tex. 2006). Because *Barker* issued before the court of appeals opinion in this case, the court did not have the benefit of that decision. Thus, in a per curiam opinion, the Supreme Court remanded the case to the court of appeals to consider the attorney's fees issue in light of *Barker*.

2. Med. City Dallas, Ltd. v. Carlisle Corp., 196 S.W.3d 855 (Tex. App.—Dallas 2006), *pet. granted*, 50 Tex. Sup. Ct. J. 712 (May 7, 2007) [06-0660].

At issue in this case is whether attorney's fees are recoverable in a breach of warranty action. Medical City replaced the roof on one of its buildings. Carlisle was the manufacturer of the roofing materials and issued Medical City a twenty-year written warranty. After several years of leaks in the roof, Medical City sued Carlisle for breach of warranty. A jury found in Medical City's favor, and the trial court awarded Medical City damages and attorney's fees. The court of appeals affirmed the judgment on the breach of warranty claim, but reversed the award of attorney's fees. The court of appeals held that although attorney's fees are recoverable for a breach of contract claim under Texas Civil Practice and Remedies Code section 38.001(8), Medical City's breach of warranty claim was distinct from a breach of contract claim so attorney's fees were not recoverable. Medical City filed a petition for review with the Supreme Court claiming that attorney's fees are recoverable. The Supreme Court granted Medical City's petition for review and heard oral argument on October 17, 2007.

3. Young v. Qualls, 223 S.W.3d 312 (Tex. May 4, 2007) [05-1091].

This case considers whether an award of attorney's fees should be reconsidered when a remittitur reduces a damage award on appeal. Young and Qualls engaged in a real estate development project in which Young provided the financing to purchase a 75-acre tract of land, and Qualls agreed to develop the property into lots for sale. Although the parties had a written partnership agreement governing a prior project, they relied on an oral agreement for this development. Qualls and his wife worked in an office on the site and cleared the property for development, and Young paid the costs associated with those activities. After about two years, no lots had been sold in the development and Young stopped paying the Quallses' bills and instructed them to vacate the property. Qualls eventually filed this suit for breach of the partnership agreement. The jury found that Young breached the partnership agreement and awarded Qualls $142,550 in damages. Pursuant to the parties' agreement to submit the question of attorney's fees to the court for determination, the judge awarded Qualls $46,331.86 in attorney's fees. The court of appeals affirmed the jury's liability finding, but determined that the evidence supporting the jury's damage award was factually insufficient. The court of appeals suggested a remittitur reducing the damage award to $54,751.50, and Qualls agreed to the reduction.

The Supreme Court held that because it could not tell whether the damage award affected the trial court's determination of attorney's fees, it reversed the court of appeals' judgment on the issue of attorney's fees and remanded the case for a new trial on that issue in accordance with the recent decision of *Barker v. Eckman*, 213 S.W.3d 306 (Tex. 2006).

D. Former-client Conflicts

1. In re Basco, 221 S.W.3d 637 (Tex. April 20, 2007) [05-0771].

The Supreme Court held that the trial court abused its discretion in failing to disqualify an attorney who would have had to question the work product of his former law partner.

Dr. Michael Basco sued Baylor Medical Center at Grapevine for terminating his hospital privileges. One reason provided by Baylor for terminating Basco's privileges was his failure to report a suit against him for medical malpractice. Basco admitted to not reporting the suit but claimed that he did so on the advice of his attorney, Winston Borum. The malpractice case eventually settled. While this case was pending, one of Borum's law partners, James Stewart, left the firm three months after the malpractice case settled and became Baylor's current counsel.

Stewart testified he did not work on the case and did not recall ever discussing it. Basco sought to disqualify Stewart from representing Baylor in his wrongful termination suit based on Stewart's former partnership with Borum.

The trial court denied disqualification and the court of appeals denied mandamus relief. The Supreme Court conditionally granted Basco's writ of mandamus. The Court held that even if a departing lawyer has no connection with a former client of a former firm, they cannot take on a case against that client if it involves questioning the validity of the earlier representation. Here, Stewart would have to question the veracity of Borum's advice given to Basco. The Court held this would be a violation of Texas Disciplinary Rule of Professional Conduct 1.09(a). Accordingly, the Court conditionally granted the writ of mandamus and ordered the trial court to disqualify Stewart and his current firm from representing Baylor.

E. Liability to Non-clients

1. Chu v. Hong, S.W.3d , 51 Tex. Sup. Ct. J. 636 (Tex. March 28, 2008) [06-0127].

In this case, the Supreme Court addressed the remedies available to a spouse when the other spouse defrauds the community estate by giving away community property when divorce is imminent.

Gyu Chul Kim and Chong Hui Hong sold a donut shop that was their community property to Nam and Kyon S. Kim, who were represented by William Chu. Gyu wired the money from the sale to his parents in Korea and filed for divorce from Hong. Hong counterclaimed against Gyu for defrauding the community of the sale proceeds and also sued the Kims and Chu for conversion and conspiracy. The trial court declared the sale void, ordered the Kims to turn the shop over to Hong, allowed Hong and Gyu to each keep the marital property in their possession, and assessed no damages against Gyu, other than attorney's fees of $65,000. The other defendants were jointly assessed the same attorney's fees, along with $247,000 for lost profits and interest and punitive damages of $20,000 against the Kims and $1,500,000 against Chu. Chu appealed, and the court of appeals affirmed in a divided opinion.

The Supreme Court held that the trial court erred in allowing Hong to recover damages from the other defendants without first recovering the community property from Gyu. While a court can order a guilty spouse to return community property, or take that spouse's fraud into account in making a just and right division, a court cannot order the buyers to return the property but allow the guilty spouse to keep the proceeds from the sale. Such a result would vastly increase the community estate and leave both spouses better off as a result of one spouse's fraud. Additionally, the claims Hong asserted against Chu were unsupported by the evidence. Chu could not have converted Hong's property because he received nothing that belonged to Hong. He obtained neither the shop nor the sale proceeds; the only money he received was his legal fee, which was paid by his clients, the Kims. Chu also could not have participated in a conspiracy. Because conspiracy is a derivative tort and there is no independent tort cause of action between spouses for wrongful disposition of community assets, there was no underlying tort in this case to support Hong's conspiracy claim. Hong's claim that Chu aided Gyu in breaching his fiduciary duty to Hong failed for the same reason. Thus, the Court rendered judgment that Hong take nothing against Chu.

F. Predominance

1. Best Buy Co. v. Barrera, S.W.3d , 51 Tex. Sup. Ct. J. 170 (Tex. November 30, 2007) [07-0028].

At issue in this case is whether a class-action suit for "money had and received" is certifiable. Consumers brought a class-action suit for "money had and received" to recover a 15% restocking fee that Best Buy deducted from refunds made on certain returned merchandise. The trial court certified a statewide class of "[a]ll Texas residents who were charged a 15% Restocking Fee when they returned or exchanged an opened notebook computer, camcorder, digital camera or radar detector." The court of appeals affirmed the certification order. The Supreme Court reversed. Relying on *Stonebridge Life Insurance Co. v. Pitts*, 236 S.W.3d 201 (Tex. 2007), the Court reasoned that a claim for "money had and received" is equitable in nature and, thus, Best

Buy was entitled to present facts or defenses that tend to show that the restocking fee "in equity and good conscience" belongs to the company under the particular circumstances of each case. These individualized inquiries into such issues as actual knowledge or unclean hands undermine the predominance requirement of Texas Rule of Civil Procedure 42(b)(3). Because Barrera and the class failed to prove at the outset that individual issues governing a class claim for "money had and received" can be considered in a fair, manageable, and time-efficient manner on a class-wide basis, the Court certified the class.

2. Stonebridge Life Ins. Co. v. Pitts, 236 S.W.3d 201 (Tex. August 31, 2007) [06-0655].

In this class action suit, the Court held that the court of appeals erred in affirming the trial court's certification of a class. Gayle Pitts and others sued Stonebridge Life Insurance Company, asserting a claim for money had and received. The plaintiffs alleged that Stonebridge contacted potential consumers by telephone, offering to sell them accidental death and dismemberment insurance on a sixty- or ninety-day free trial basis. Stonebridge allegedly informed the consumers that their credit cards would be charged if they did not timely cancel but did not tell them that it already possessed their account information. Pitts sought certification of a class to recover the amounts charged by Stonebridge for the insurance. The Supreme Court held that the trial court erred in certifying the class. The Court noted that a claim for money had and received requires proof that the defendant possesses money that "in equity and good conscience" belongs to the plaintiff. The Court concluded that the nature of the claim was such that the predominance requirement in Texas Rule of Civil Procedure 42(b)(3) was not met, and thus ordered the class decertified.

G. Unauthorized Practice of Law

1. Unauthorized Practice of Law Comm. v. Am. Home Assurance Co., S.W.3d , 51 Tex. Sup. Ct. J. 590 (Tex. March 28, 2008) [04-0138].

At issue in this case is whether an insurance company, in discharging its contractual duty to defend, may use employee staff attorneys to represent its insureds against liability claims. After the Unauthorized Practice of Law Commision (UPLC) began investigating a staff attorney employed by American Home Assurance Co. for the unauthorized practice of law, American Home and others sought a declaratory judgment that "neither the insurance companies' employment of staff counsel nor the attorneys' practice as staff counsel constitutes the unauthorized practice of law." UPLC counterclaimed for declaratory and injunctive relief. The trial court granted UPLC's motion for summary judgment, issuing a judgment declaring that the use of staff counsel constituted the unauthorized practice of law. The court of appeals reversed, holding that the insurers' use of staff attorneys did not violate Texas law and remanded for a determination on attorneys' fees.

The Supreme Court reversed on the attorneys' fee issues but otherwise affirmed the court of appeals' judgment as modified, concluding that insurers could employ staff attorneys to defend claims against insureds provided that the insurer's and insured's interests are "congruent" and that staff attorneys disclose their affiliation and conflicts to the insureds. The Court explained that although corporations may not practice law, a company does not engage in the practice of law merely by employing attorneys to provide legal advice regarding the corporation's own affairs or to appear in court on its behalf. The Court established three factors to determine whether a corporation practices law when it provides legal services to a third party: (1) whether the company has "existing or only prospective" interest in the matter for which legal services are provided; (2) whether that interest is a "direct, substantial financial" one; and (3) "most importantly," whether that interest is aligned with the interests of the person to whom the company provides legal services. Though using staff attorneys to represent insureds may give rise to conflicts of interest, the parties presented no empirical evidence or actual incidents of public or private harm resulting from the use of staff attorneys. The Court, however, emphasized that an insurer would engage in the practice of law by using a staff attorney to represent an insured "if an insurer's interest conflicts with an insured's, or the insurer acquires confidential information that it cannot be permitted to use against the insured,

or an insurer attempts to compromise a staff attorney's independent, professional judgment, or . . . the insurer's and insured's interests do not have . . . congruence." Finally, the Court pointed out that whether staff attorneys could use firm names was not an issue before the Court.

Justice Johnson, joined by Justice Green, dissented. According to Justice Johnson, under the State Bar Act, a corporate insurer cannot represent a client in a lawsuit. Because acts of staff attorneys are acts of the insurer, when staff attorneys defend insureds, the insurer violates the Act, is practicing law without a license, and is engaging in the unauthorized practice of law.

VI. CONSTITUTIONAL LAW

A. Commercial Speech

1. Pruett v. Harris County Bail Bond Bd., S.W.3d , 51 Tex. Sup. Ct. J. 612 (Tex. March 28, 2008) [05-0283].

At issue in this case is whether rules promulgated by the Harris County Bail Bond Board restricting solicitation practices of local bondsmen were beyond the delegated powers of the Board or were unconstitutional restrictions on commercial speech. The challenged rules prohibited the solicitation of bail bond business from an individual with an outstanding arrest warrant (the "open-warrant rule"), within twenty-four hours after the execution of an arrest warrant (the "twenty-four-hour rule"), or between the hours of 9:00 p.m. and 9:00 a.m. Monday through Saturday, and before noon or after 9:00 p.m. on Sunday (the "non-business-hours rule"). Carl R. Pruett and National American Insurance Company, the insurance and surety company for which Pruett acts as an agent, filed suit against the Board for declaratory and injunctive relief. The trial court granted Pruett's motion for summary judgment and permanently enjoined enforcement of the rules. The court of appeals affirmed in part and reversed in part, holding that the Board acted within its rule-making authority in promulgating the rules, that the open-warrants and non-business-hours rules were constitutional, and that the twenty-four-hour rule was unconstitutional. The Supreme Court affirmed in part and reversed in part.

The Court held that the rules were within the Board's rule-making authority. The scope of the Board's power under the Texas Occupations Code is unambiguously broad, providing that it can exercise powers "incidental or necessary" to administration of the Act, that it can "supervise and regulate each phase of the bonding business," and adopt other rules necessary to "implement [the] chapter." The Court reasoned that solicitation practices fall within a "phase of the bonding business" over which the Board has regulatory power.

The Court held that the open-warrant rule was an unconstitutional restriction of commercial speech. Although the Board's interests in reducing flight and protecting officers and victims were substantial, the rule failed to materially advance these goals because the unexecuted-warrant information was made broadly available by the county itself, and it failed to justify its discriminatory prohibition on bail bondsmen's communication of that same information. The Court held that the twenty-four hour rule was also unconstitutional because the record did not support the claim that the ban materially advanced the Board's interest in reducing harassment.

Finally, the Court upheld the non-business-hours rule. Rejecting the argument that the rule's exception for bail bondsmen with prior or existing business relationships rendered the provision so irrational as to prohibit the Rule from materially advancing the Board's interest in reducing harassment, the Court reasoned that the record indicated that the Board included the exception in an effort to balance the privacy interests of arrestees and their families against the interests of bail bondsmen in maintaining their professional relationships. The Court credited the Board's common-sense suggestion that a call from a bail bondsman with a prior or existing relationship would be less harassing than one from a complete stranger. Thus, the Court concluded that the rule's "prior or existing business" exemption did not prevent the non-business-hours rule from materially advancing the interests the rule was intended to protect.

B. Religion Clause

1. HEB Ministries, Inc. v. Tex. Higher Educ. Coordinating Bd., 235 S.W.3d 627 (Tex. August 31, 2007) [03-0995].

At issue in this case is whether provisions of the Higher Education Coordinating Act, which restrict the terminology that private post-secondary educational institutions may use to describe themselves and the educational achievements of their students without approval of the Higher Education Coordinating Board, as applied to a religious educational institution, violate the Free Exercise, Establishment, and Free Speech Clauses of the United States and Texas Constitutions. The Board assessed administrative fines against Tyndale Theological Seminary and Bible Institute, a school operated by petitioner HEB Ministries, for using protected terminology, including "seminary"in its title, and for issuing "degrees" without authorization. HEB Ministries sued the Board for declaratory judgment. The trial court concluded that the restriction on the use of the term "seminary" was constitutionally impermissible, but in all other respects granted summary judgment for the Board. The court of appeals reversed the trial court's judgment with respect to the word "seminary" but upheld the remainder of the judgment. The Supreme Court reversed and remanded.

The Court unanimously held that the restriction on the use of the term "seminary" violated the Free Exercise Clause. Because "seminary" has a distinctly religious meaning, the State's regulation targeted religion and was, thus, subject to strict scrutiny. Because the State had no interest in regulating religious education, the statute impermissibly burdened HEB Ministries' free exercise rights.

Justice Hecht, joined by Justices O'Neill, Brister, and Medina, also concluded that the State's regulation of other educational terminology, as applied to a religious educational institution, violated the Establishment and Free Exercise Clauses. By allowing only approved religious institutions access to restricted terminology, the State expressed a preference for one mode of religious education over another and excessively entangled the State in religious education. In addition, because the State effectively restricted all terminology capable of describing educational attainment, the regulations placed a unique burden on religious communication and was not narrowly tailored to achieve its purpose.

Justice Wainwright, joined by Justice Johnson, concurred in part and dissented in part. Justice Wainwright concluded that the State's decision to regulate the granting of degrees was a neutral regulation of general applicability and, thus, did not impermissibly burden HEB Ministries' free exercise rights. However, Justice Wainwright concurred in the result on the grounds that the regulations violated the Free Speech Clause. Tyndale's use of restricted terminology was protected commercial speech, and the State's regulations, barring Tyndale from using all terms useful for describing educational attainment, were not proportionate to the interest served.

Chief Justice Jefferson, joined by Justice Green, concurred in part and dissented in part, concluding that the State's regulations regarding the issuance of degrees were constitutional.

2. Westbrook v. Penley, 231 S.W.3d 389 (Tex. June 29, 2007) [04-0838].

At issue in this case is to what extent pastors may be held liable for providing counseling services under secular negligence standards.

C.L. Westbrook, Jr., a licensed counselor, provided paid marriage counseling to Peggy Lee Penley. Westbrook later became the pastor of a new church, of which Penley became a member. Penley and her husband attended group marriage counseling with Westbrook and other members of the church. Outside these sessions, Penley confided in Westbrook her intention to seek a divorce and her participation in an extramarital affair. Westbrook recommended a divorce attorney but informed Penley he would share this information with the church pursuant to its disciplinary principles, which Penley had acknowledged on joining the congregation. Penley immediately resigned as a member. Nevertheless, Westbrook and three other church elders disseminated a letter to the congregation asking that Penley be shunned because she had "no biblical basis" for her divorce and had "chosen to engage in a biblically inappropriate relationship with another man."

Penley sued Westbrook, the elders, and the church on a number of theories, all of which the trial court dismissed. The court of appeals affirmed in part, but reversed the dismissal of her professional negligence claims against Westbrook. The court of appeals determined these claims involved secular professional counseling and neutral rules generally applicable to such conduct.

The Supreme Court reversed, dismissing the case for want of jurisdiction. The Court noted that in his dual capacity as her pastor and counselor, Westbrook owed Penley conflicting duties; as her counselor he owed her a duty of confidentiality and as her pastor he had an obligation to disclose her conduct. The Court determined that parsing out Westbrook's roles for purposes of determining civil liability, where health and safety are not at issue, would unconstitutionally entangle the court in matters of church governance and impinge on the core religious function of church discipline.

C. Retroactivity Clause

1. Robinson v. Crown Cork & Seal Co., 2006 WL 1168782 (Tex. App.—Houston [14th Dist.] 2006) *pet. granted*, 51 Tex. Sup. Ct. J. 292 (January 7, 2008) [06-0714].

At issue in this case is whether limitations on asbestos-related successor liability enacted in the Texas Civil Practice and Remedies Code are (1) unconstitutionally retroactive as applied to a pending claim for compensatory damages, or (2) facially invalid under Texas Constitution article 3, section 56 as a "special" law. John Robinson sued Crown Cork & Seal, as a successor to Mundet Crown Corp., alleging that he developed mesothelioma as a result of exposure to products distributed by Mundet. During the pendency of the litigation, the Legislature enacted a statute limiting the asbestos-related successor liabilities arising out of mergers and acquisitions occurring before May 13, 1968. The statute limits asbestos-related successor liabilities to the fair market value of the predecessor corporation, adjusted for inflation, and applies only if the successor corporation did not distribute products containing asbestos. The trial court concluded that Crown Cork qualified for the limitation and granted summary judgment in favor of Crown Cork. Robinson appealed, arguing that the statute was unconstitutionally retroactive because it intruded upon Robinson's vested rights and that the statute was an unconstitutional special law because it was so narrowly drawn that only Crown Cork could benefit from its protections. The court of appeals affirmed.

The Supreme Court granted Robinson's petition for review and heard oral argument on February 7, 2008.

D. Spousal Support

1. In re Green, 221 S.W.3d 645 (Tex. April 20, 2007) [06-0496].

In this case, the Supreme Court granted Green's writ of habeas corpus and ordered him discharged.

Alvin Green agreed in a divorce decree to pay contractual alimony to his ex-wife on a monthly basis for a period lasting over a decade. He was incarcerated for criminal contempt for failing to make the payments agreed to in the decree. The payments did not meet the Texas Family Code's definition of spousal maintenance: a spouse can only be ordered to pay maintenance if (1) the spouse has committed a recent act of family violence, or (2) the marriage lasted at least ten years and the receiving spouse cannot support himself or herself due to disability, is the full-time custodian of a disabled child of the marriage, or lacks earning ability adequate to provide support for the spouse's minimum reasonable needs.

Because the money Green owed to his ex-wife was a contractual debt, rather than a legal obligation imposed by Texas law, the Supreme Court held that article I, section 18 of the Texas Constitution—which states, "No person shall ever be imprisoned for debt"—prohibits punishing Green by contempt.

E. Taxation

1. Lowenberg v. City of Dallas, S.W.3d , 51 Tex. Sup. Ct. J. 639 (Tex. March 28, 2008) [06-0310].

This class action involves the question of whether the voluntary payment rule bars claims for reimbursement by taxpayers who paid an illegal occupation tax that imposed criminal penalties for nonpayment. For a brief period in 1995, the City of Dallas charged a tax to owners of commercial buildings in order to generate funds for fire prevention services. Failure to pay the tax

was a Class C misdemeanor punishable by fines. The trial court granted summary judgment for Lowenberg, as class representative, that the tax was an illegal occupation tax, and, after a bench trial on attorney fees, rendered judgment against the City for refunds, interest, and fees totaling $1.85 million. The court of appeals held that the class' claim was barred by the voluntary payment rule because the class members did not pay the tax under duress.

The Supreme Court reversed. The Court agreed that the tax was an illegal occupation tax. With regard to the issue of duress, the Supreme Court concluded that the imposition of a criminal penalty was sufficient to constitute duress and that the class members had not failed to avail themselves of other remedies. The Court rendered judgment in accordance with the judgment of the trial court.

VII. CONTRACTS

A. Condition Precedent

1. Solar Applications Eng'g, Inc. v. T.A. Operating Corp., 191 S.W.3d 173 (Tex. App.—San Antonio 2006), *pet. granted*, 50 Tex. Sup. Ct. J. 667 (April 30, 2007) [06-0243].

In this case, a construction contract between a general contractor and an owner provided that the general contractor must release liens filed against the project prior to final payment. At issue is whether the general contractor must provide lien releases from it and its subcontractors as a condition precedent to suing the owner for breach of contract.

TA hired Solar to build a truck stop in San Antonio. The construction contract contemplated a certain sequence of events leading up to the project's completion and final payment. When construction began, the parties became embroiled in various disagreements so that the process contemplated by the contract for completion and payment was not followed. The parties agree that the project was substantially complete on August 11, 2000. A few weeks later, TA presented Solar with a "punch list" of items that needed to be completed before final payment. After that, disputes arose over completion of the punch list. According to Solar, by late September it had completed "most of the items that were its responsibility, and was working on completing the rest." Solar filed a lien affidavit against the project on October 2, 2000, in the amount of $472,393. On November 13, TA terminated Solar pursuant to the agreement's termination "for cause" provision, stating that Solar had failed to keep the project lien-free, as the contract required, and failed to complete the punch list. On the same day, Solar responded with a payment request for $472,149. TA refused to make payment, contending that Solar had not complied with the contract's lien-release requirement. Solar sued TA for breach of contract to recover the contract balance. TA counterclaimed for breach of contract.

A jury found for Solar, but the court of appeals reversed and rendered a take-nothing judgment in favor of TA because Solar had not complied with the contract as it had not released its liens. The Supreme Court granted Solar's petition for review and heard oral argument on October 16, 2007.

B. Consideration

1. First Commerce Bank v. Palmer, 226 S.W.3d 396 (Tex. June 1, 2007) [05-0686].

This case involved the validity of two guaranty agreements required by a creditor and given by shareholders of a corporate debtor. The trial court refused to enforce the guaranties, finding problems with the underlying consideration, and the court of appeals affirmed. Because there was evidence that the guaranties were signed after the promissory note, the court of appeals concluded that consideration independent of the underlying debt was required. The Supreme Court disagreed, noting that the determination of whether a guaranty agreement is independent of the debt it guarantees is not simply a question of the order in which the documents are signed. Instead, the Court noted that independent consideration is required only when the guarantor's promise is not part of the transaction creating the guaranteed debt. Concluding that the guaranties at issue were not independent transactions but rather part of the corporation's renewal of a prior note, the Court reversed the court of appeals' judgment and remanded the case to the trial court for further proceedings.

C. Fraudulent Inducement

1. Arkoma Basin Exploration Co. v. FMF Assocs. 1990-A, Ltd., S.W.3d , 51 Tex. Sup. Ct. J. 342 (Tex. January 25, 2008) [03-1066].

The issues in this case are (1) whether there was legally sufficient evidence of fraud under Virginia law; (2) whether there was legally sufficient evidence of damages under Texas law; and (3) whether the plaintiffs missed the deadline to appeal the trial court's remittitur.

Eight Virginia limited partnerships hired Arkoma to estimate production from mineral properties in Oklahoma. When the properties failed to produce as predicted, the partnerships sued Arkoma. Applying Virginia law, a Texas jury found clear and convincing evidence of fraud and awarded $5.5 million in damages. The trial court signed a judgment with a reduced verdict of $4.7 million, and it later reduced that further by remittitur to roughly $2.9 million. Both parties appealed, and the court of appeals affirmed the jury's fraud finding. In addition, it restored about $1.5 million of the verdict, holding that part of the remittitur was improper.

The Supreme Court held that only two of the eight partnerships produced legally sufficient evidence of fraud. Virginia law states that fraud can only arise with respect to statements of facts, not opinions. The reserve estimates prepared by Arkoma concerned two different fields. One field had been producing natural gas since 1960, and experts testified that future production could be predicted with some accuracy based on historical production. By contrast, the other field had less than one year of production history, so estimates of future production were inherently far more speculative. Because the estimates with respect to the unproven field were necessarily less reliable, the Court held those were not actionable as mere opinions, but that the estimates with respect to the proven field were actionable as statements of fact.

The Court also found that the two partnerships with actionable claims produced legally sufficient evidence of damages to support the jury's verdict. The Court noted that while the expert's testimony could have been clearer, he employed a technique for valuing reserves commonly employed in the industry, and his opinions were not conclusory as a matter of law.

Finally, the Court held that the trial court's remittitur restarted the appellate timetables making the partnerships' cross-appeal timely. If the deadline for the partnerships to appeal the trial court's remittitur was based on the date of the original judgment, the partnerships' appeal was two days late. However, the appellate deadlines are restarted by "*any* change" to the trial court's judgment. A signed order suggesting remittitur allows two options: a smaller judgment or a new trial. While the plaintiff's choice is unknown at the time of the order, it is immediately clear that the judgment will change. Therefore, an order suggesting remittitur constitutes a modification of the judgment that restarts the appellate timetables.

2. Forest Oil Corp. v. McAllen, 2005 WL 3435061 (Tex. App.—Corpus Christi 2005), *pet. granted*, 50 Tex. Sup. Ct. J. 667 (April 30, 2007) [06-0178].

The principle issues presented in this case are whether plaintiff's disclaimer of reliance on representations made in a settlement contract releasing and reserving certain claims and sending any disputes to arbitration should bar plaintiff's claim he was fraudulently induced into the arbitration provision and, if not, whether plaintiff could have justifiably relied on representations contrary to the contract and made during settlement negotiations for purposes of fraudulent inducement.

James McAllen and other plaintiffs settled their royalty underpayment and underdevelopment suit against oil and gas lessees. They reserved environmental liability and personal injury claims relating to the McAllen Ranch leases, and the parties agreed to arbitrate disputes over the released and reserved claims. The plaintiffs warranted that no promises had been made to them "in executing the releases," that none of them was relying upon any statement or representation of any agent of "the parties being released hereby," and that each had been advised by counsel.

Six years later, McAllen and other signatories and non-signatories to the settlement agreement brought suit against Forest Oil Corporation and its employee Daniel Worden based on various acts and omissions on McAllen's ranch causing environmental damage and other

damages and personal injury. Forest Oil moved to stay litigation and compel arbitration as to McAllen and the signatory plaintiffs. In response, McAllen claimed that he was fraudulently induced into the arbitration provision by representations made by Forest Oil that there were no contamination problems with his land.

The trial court denied the motion without stating the grounds. Forest Oil took an interlocutory appeal, but the court of appeals affirmed, concluding, among other things, that *Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171 (Tex. 1997) did not support the contention that McAllen was not entitled to rely on any alleged representations because of the disclaimers in the settlement agreement. The court also noted the disclaimers went only to the released claims, not the reserved claims, and so McAllen did not disclaim reliance on the representations as to contamination.

The Supreme Court granted Forest Oil's petition for review and heard oral argument on October 16, 2007.

D. Oral Partnership Agreement

1. Ingram v. Deere, 198 S.W.3d 96 (Tex. App.—Dallas 2006), *pet. granted*, 51 Tex. Sup. Ct. J. 126 (November 30, 2007) [06-0815].

The issues in these cross-petitions for review are the following: (1) whether there was legally sufficient evidence to support the jury's finding that the parties had an oral partnership agreement; (2) if so, what their legal obligations to one another were when they terminated their business relationship; and (3) whether the parties owed each other fiduciary duties in their capacity as partners.

In 1997, Ingram and Deere orally entered into an agreement whereby Deere would serve as the medical director for a pain management clinic, which Ingram could not operate without a licensed medical doctor. Both parties acknowledge that they agreed to a revenue-sharing arrangement, although they disagree about the initial distribution. In 1999 at Deere's request, Ingram prepared a written agreement to memorialize their relationship. Deere refused to sign the proffered agreement because it stated that Deere was Ingram's employee and Ingram was the sole owner of the clinic, which Deere contends violated the terms of their oral agreement. Deere ceased working for the clinic at this time.

In 2002, Deere filed suit asserting, among other claims, breach of contract and breach of fiduciary duty. The jury found that Deere and Ingram entered into an oral joint-venture agreement, that Ingram breached this agreement, and that Ingram breached his fiduciary duty to Deere. The jury found Deere suffered $5 million in damages for past and future revenue owed to Deere under the terms of the oral agreement and for Deere's attorney's fees. However, the trial judge rendered a take-nothing judgment in Ingram's favor. The court of appeals affirmed in part and reversed in part, holding there was legally sufficient evidence to support the jury's finding that a joint venture existed but that Ingram owed Deere no fiduciary duty. Consequently, the court reinstated the portions of the jury's award for past joint venture revenue and for Deere's attorney's fees.

Both parties appealed. The Supreme Court granted both parties' petitions for review and heard oral argument on February 5, 2008.

E. Statute of Frauds

1. Baylor Univ. v. Sonnichsen, 221 S.W.3d 632 (Tex. April 20, 2007) [04-0851].

Women's volleyball coach Tom Sonnichsen sued Baylor for fraud and breach of his employment contract. He alleged that Baylor breached an oral promise to enter into a two-year written employment contract with him and that Baylor committed fraud by representing that it would give him such a contract. The trial court entered summary judgment in favor of Baylor on both claims. The court of appeals affirmed summary judgment on the breach of contract claim, holding that an oral promise to enter into a two-year contract is not enforceable under the statute of frauds. The court of appeals reversed the summary judgment on the fraud claim, noting that the statute of frauds would also bar Sonnichsen's fraud claim for the same damages sought in his breach of contract claim but holding that Baylor had not established that Sonnichsen's fraud damages were limited to the benefits of his alleged contract. On remand, Sonnichsen amended his petition, adding a claim for breach of contract rights created by Baylor's representations

and a one-year written contract that Baylor fully executed but did not deliver. Baylor specially excepted to the amended contract claim and also moved for summary judgment on the fraud claim. The trial court sustained the special exception and granted Baylor's motion for summary judgment. In the second appeal, the court of appeals reversed on both points.

The Supreme Court reversed the court of appeals' judgment and rendered judgment that Sonnichsen take nothing. The Court concluded that the trial court correctly sustained Baylor's special exceptions for two reasons: (1) Taking Sonnichsen's pleadings as true, Baylor never delivered the one-year written contract to Sonnichsen. Without delivery, the contract lacked mutual assent and was therefore unenforceable. (2) Sonnichsen's pleadings only alleged an oral promise to enter into a two-year written agreement, which the court of appeals already held was barred by the statute of frauds. The trial court properly granted summary judgment on the fraud claim because Sonnichsen sought to recover the same damages under his fraud claim as he sought for breach of an unenforceable contract.

2. Quigley v. Bennett, 227 S.W.3d 51 (Tex. June 8, 2007) [05-0870].

Robert Bennett, a geologist, agreed to analyze some data for Michael Quigley who was selling some oil and gas leases. Bennett initially agreed to do the work for free as a favor to a colleague but agreed to do additional work when Quigley told him, "Don't worry, Bennett, I'll take care of you." Quigley eventually sold the leases and retained an overriding royalty interest. After producing wells were drilled, Bennett sought compensation, but the two could not come to an agreement. Bennett sued Quigley for quantum meruit and fraud. At trial, he presented evidence that he only worked for an overriding royalty interest. They jury awarded Bennett $1 million for fraud and $2,500 for quantum meruit. Bennett elected to recover on the fraud claim, and the court of appeals affirmed.

The Supreme Court held that the evidence of the value of an overriding royalty interest could not be considered to determine Bennett's damages because such an interest falls within the statute of frauds and the parties had no written agreement. Allowing recovery of the value of a royalty interest when the interest itself could not be recovered would circumvent protections of the statute of frauds. While there was other evidence of Bennett's damages, it was legally insufficient to support the full $1 million award. The Supreme Court reversed the court of appeals judgment and remanded the case to that court.

Justice Brister, joined by Justice Hecht and Justice Willett, concurred in part and dissented in part. He agreed that the $1 million verdict must be set aside under the statute of frauds. However, because the jury charge contained the same instructions for determining damages on the fraud and quantum meruit charges, he would render judgment on the $2,500 quantum meruit verdict.

F. Warranties

1. Gym-N-I Playgrounds, Inc. v. Snider, 220 S.W.3d 905 (Tex. April 20, 2007) [05-0197].

The question presented in this case is whether an "as is" clause in a commercial lease agreement waives the implied warranty of suitability.

Ron Snider founded Gym-N-I Playgrounds, Inc., a playground equipment manufacturing company, and owned the building in New Braunfels where the business was located. Patrick Finn and Bonnie Caddell purchased the company and entered into a lease agreement with Snider for the building. The agreement contained an "as is" clause and expressly disclaimed all implied warranties. In 2000, a fire destroyed Snider's building and its contents. Gym-N-I, through Finn and Caddell, sued Snider for negligence, DTPA violations, fraud, and breach of the implied warranty of suitability, alleging that the building contained faulty electrical wiring and that Snider failed to install and maintain a fire sprinkler system. The trial court granted summary judgment for Snider. The court of appeals affirmed, concluding that the "as is" clause negates the causation element in Gym-N-I's claims for negligence, DTPA violations, and fraud, and that the "as is" clause waives the implied warranty of suitability.

The Supreme Court rejected Gym-N-I's claim that the implied warranty of suitability is waived only to the extent that the tenant agrees to repair certain defects. The Court, held that the "as

is" clause was in effect at the time of the fire, the lease expressly disclaimed the implied warranty of suitability, and the "as is" clause negated Gym-N-I's other causes of action based on the condition of the property. The Court affirmed the court of appeals' judgment.

2. JCW Elecs., Inc. v. Garza, 176 S.W.3d 618 (Tex. App.—Corpus Christi 2005), *pet. granted*, 50 Tex. Sup. Ct. J. 910 (June 25, 2007) [05-1042].

The principle issues in this case are whether the proportionate responsibility statute applies to actions for breach of an implied warranty, whether the jury charge was correct regarding the affirmative defense of suicide, and whether a claimant should be allowed to recover for breach of an implied warranty of fitness when there has been no sale of goods.

Rolando Montez was arrested for public intoxication and while in his prison cell, he hung himself using the phone cord installed in his cell. JCW Electronics owned and installed the phone pursuant to a contract with the city. Montez's family brought suit against both the city and JCW. The jury found JCW breached its implied warranty but found it only 15% responsible for the harm caused, while finding Montez was 60% responsible. JCW moved that the plaintiff take nothing in accord with Texas' proportionate responsibility scheme, which mandates that a plaintiff take nothing in an action based in tort when his own negligence totals more than 50%. The trial court denied JCW's motion for entry of judgment that the plaintiff take nothing and held JCW liable based on fraud and breach of contract theories. The court of appeals modified the judgment of the trial court by premising liability on breach of an implied warranty rather than breach of contract and fraud and refused to apply the proportionate responsibility statute to a breach of implied warranty claim. The Supreme Court granted JCW's petition for review and heard oral argument on October 18, 2007.

VIII. CORPORATIONS

A. Derivative Suits

1. In re Schmitz, 2007 WL 1987721 (Tex. App.—San Antonio 2007), *argument granted on pet. for writ of mandamus*, 51 Tex. Sup. Ct. J. 447 (February 15, 2008) [07-0581].

At issue in this case is whether the trial court should have dismissed a shareholder derivative suit for a shareholder's failure to meet the statutory demand requirements under the Texas Business Corporation Act. In 2005, Lancer Corporation shareholder Virginie Dillingham's attorney faxed a letter attacking a proposed merger between Lancer and another corporation to the Lancer Board of Directors. Several days later, Dillingham filed a derivative action seeking an injunction to halt the merger and declaratory relief against the Board for their alleged efforts to sell Lancer at an inadequate price. The Board filed a motion to dismiss the suit claiming the letter did not constitute a demand as required by statute, and even if it did, Dillingham failed to comply with the statutory 90-day waiting period before filing suit. The trial court denied the Board's motion to dismiss, and the court of appeals denied the Board's request for mandamus. The Board claims that mandamus relief is appropriate because an appeal cannot restore Lancer's right to forgo improper litigation. The Supreme Court granted argument on the Board's petition for writ of mandamus and heard argument on April 2, 2008.

IX. COUNTY OFFICIALS

A. Removal from Office

1. In re Bazan, S.W.3d , 51 Tex. Sup. Ct. J. 673 (Tex. March 28, 2008) [06-0952].

At issue in this case is whether a constable could be removed from office pending the appeal of his felony conviction. Under Texas Local Government Code section 87.031, the conviction of a county officer for any offense involving official misconduct operates as an immediate removal from office. If the officer appeals the conviction, the removal order is superseded unless the trial court determines that the public interest requires the officer's suspension during the appeal. TEX. GOV'T CODE § 87.032. Relying on these provisions, the trial court suspended Constable Eduardo "Walo" Garcia Bazan.

Bazan sought mandamus relief, arguing that the trial court abused its discretion in ordering his suspension because the alleged felonious act predated his re-election to office. He contended that the order was contrary to section 87.001 of the Local Government Code which provides that "[a]n officer may not be removed under this

chapter for an act the officer committed before election to office," and *Talamantez v. Strauss*, 774 S.W.2d 661 (Tex. 1989), in which the Court held that a county officer could not be removed from office for acts predating the officer's election.

The Supreme Court denied mandamus relief, concluding that section 87.001's limitation for pre-election acts applies only to the civil removal proceedings detailed in Chapter 87, not to removals incident to independent criminal prosecutions. The Court reasoned that because convicted felons are constitutionally disqualified from holding office, section 87.00l's limitation for prior acts could only refer to official misfeasance that is, itself, not disqualifying. The Court also overruled *Talamantez*, which had applied section 87.001 more broadly to include felony convictions.

Justice Willett concurred in the judgment. He agreed that Bazan could be removed from office but found the Court's construction of Chapter 87 strained and would have harmonized its provisions differently.

X. DRAM SHOP ACT

A. Proportionate Responsibility

1. F.F.P. Operating Partners, L.P. v. Duenez, 237 S.W.3d 680 (Tex. May 11, 2007) [02-0381].

On September 3, 2004, the Court issued a judgment and opinion affirming the judgment of the court of appeals. On April 8, 2005, the Court granted the petitioner's motion for rehearing. On November 3, 2006, the Court withdrew its opinion and judgment of September 3, 2004 and issued a judgment and opinion reversing the judgment of the court of appeals and remanding the case to the trial court. On May 11, 2007, the Court denied the respondents' motion for rehearing and issued a new opinion in place of the November 3, 2006 opinion. The May 11, 2007 opinion contained only minor changes.

In this case, the Supreme Court determined (1) the extent to which Texas Civil Practice & Remedies Code chapter 33's proportionate responsibility scheme applies to third-party claims brought under the Dram Shop Act (Texas Alcoholic Beverage Code section 2.02) when there is no allegation that the plaintiff was negligent and (2) whether the trial court abused its discretion by severing the dram shop's contribution claim against the drunken driver. Several members of a family suffered serious injuries after being hit by a drunken driver. The family brought suit under the Dram Shop Act against the convenience store that sold alcohol to the intoxicated driver. The convenience store brought a contribution claim against the driver. The trial court severed the contribution claim and granted a partial summary judgment to the plaintiffs. The court of appeals affirmed, holding that the Dram Shop Act imposes vicarious liability on the alcohol seller and that the proportionate responsibility act is inapplicable to third-party dram shop actions in the absence of any allegation that the plaintiffs themselves were negligent.

The Supreme Court reversed and remanded the case to the trial court, holding that the proportionate responsibility scheme of Chapter 33 applies to claims brought under chapter 2 of the Alcoholic Beverage Code. The Court concluded that holding the dram shop responsible to injured third parties for its own and its intoxicated patron's liability is consistent with the express provisions of the proportionate responsibility statute. The Court noted that the Legislature had not expressly excepted dram shop liability from the proportionate responsibility statute, as it had with other statutory causes of action. Further, the Court's decision in *Smith v. Sewell*, 858 S.W.2d 350 (Tex. 1993), governs this case. In *Sewell*, the Court held that the proportionate responsibility statute applies to a first party claim by a drunken patron against a dram shop. Thus, the trial court abused its discretion by failing to submit the patron's negligence and proportion of responsibility to the jury and by severing the provider's claim against the patron from the case.

Chief Justice Jefferson dissented, arguing that the Dram Shop Act imposes a form of vicarious liability. He concluded the Legislature did not intend a dram shop to be included in the apportionment of liability but instead intended a provider to answer in damages for the injury its patron's intoxication inflicts on a third party, even if the provision of alcohol to a clearly intoxicated patron is not the proximate cause of the injury. He would limit *Sewell* to first-party claims and overrule its holding that the provider is properly included within those persons who caused the harm.

Justice O'Neill also dissented. She would hold that when a customer who has been served in violation of the Dram Shop Act injures an innocent third party, the third party may recover from the Dram Shop. However, the intoxicated customer's percentage of responsibility must be apportioned under Chapter 33 to allow the provider to seek reimbursement from the customer. In her view, however, even though the trial court should have submitted the intoxicated patron's percentage of responsibility to the jury for apportionment, its severance order did not amount to reversible error.

B. Safe Harbor Provision

1. 20801, Inc. v. Parker, S.W.3d , 51 Tex. Sup. Ct. J. 668 (Tex. March 28, 2008) [06-0574].

At issue in this case is which party bears the burden of establishing that each of the three elements of the "safe harbor" provision of the Dram Shop Act have or have not been met. John Parker sued 20801, Inc., owner of Slick Willie's Family Pool Hall, under Dram Shop and premises liability theories for injuries suffered during a fight in a Slick Willie's parking lot after both he and his assailant were allegedly served alcohol despite being obviously intoxicated. The trial court granted 20801 motion for summary judgment. The court of appeals affirmed on the premises liability action but reversed on the Dram Shop action. The Supreme Court reversed in part and remanded the case to the trial court.

The Court held that alcoholic beverage providers bear the burden of establishing the first two elements of the safe harbor provision—that they require their employees to attend certain alcohol training programs and that the employee in question actually did attend. However, once these elements have been established, plaintiffs bear the burden of proving that the provider directly or indirectly encouraged the employee to violate the Act. The Court also held that encouragement requires a showing of at least negligence, and that vice-principals are not employees within the meaning of the Act. The Court remanded the case to the trial court to allow Parker to conduct further discovery and present new evidence in accordance with the Court's opinion.

XI. ELECTIONS

A. Candidate Certification

1. In re Torry, 244 S.W.3d 849 (Tex. January 25, 2008) [08-0057].

At issue in this case is whether a county party chair may refuse to certify a candidate's name for placement on a primary ballot on the basis of either the candidate's failure to designate a campaign treasurer or an alleged campaign finance violation. LaRhonda Torry submitted her application and filing fee in person to become a candidate for State Representative, District 147, in the Democratic Party Primary to Gerald Birnberg, Chair of the Harris County Democratic Party. Birnberg accepted Torry's application and filing fee, but he rejected her application five days later. Birnberg explained that when Torry submitted her application, she did not have a campaign treasurer appointment on file with the Texas Ethics Commission as the Election Code requires. Birnberg also stated that Torry accepted the $750 filing fee in cash from a woman who had accompanied Torry to the headquarters to submit her application, and Torry thus violated the Election Code by (1) making a campaign expenditure or accepting a campaign contribution without a campaign treasurer appointment, and (2) accepting a cash contribution exceeding $100. Birnberg concluded that, as a result of these Election Code violations, Torry could not have lawfully paid her filing fee. Torry subsequently appointed a campaign treasurer. Torry filed a mandamus petition with the court of appeals, which that court denied. The Court conditionally granted the writ of mandamus.

The Court held that the Election Code does not authorize a party chair to refuse to certify a candidate's name for placement on the ballot on the basis of the candidate's failure to designate a campaign treasurer or to insert additional certification requirements beyond those prescribed in the Code. Further, assuming without deciding that Torry did violate certain Election Code campaign finance provisions, the Penal Code provided the appropriate punishment, and the Election Code did not authorize Birnberg, as a county party chair, to refuse to certify a candidate for failure to comply with any of these provisions. The Court conditionally granted the writ of mandamus and directed Birnberg to certify

Torry as a candidate for State Representative, District 147, and take all necessary steps to include her name on the Democratic Party primary ballot.

B. Local Option Election

1. In re Davis, 2007 WL 530033 (Tex. App.—Dallas 2007), *argument granted on pet. for writ of mandamus*, 50 Tex. Sup. Ct. J. 1074 (September 4, 2007) [07-0147].

Texas has special election rules relating to the sale of alcohol in local precincts. Under the Texas Alcoholic Beverage Code, whenever a local option status of wet/dry has been put into effect as the result of a local precinct election, this status is to remain in effect until it is changed as the result of a vote in the same territory that comprised the precinct when such status was established. If the boundaries of the justice precinct have changed since the status was adopted, the commissioners court must define the boundaries of the original precinct and a local option election may be held within the territory defined by the commissioners court constituting the original precinct.

The issue in this case is whether the Dallas County Commisioners Court abused its discretion in refusing to order a local option election. The relators submitted a petition requesting an election in the current justice of the peace precinct 3. The Commissioners Court determined that portions of precinct 3 were included within the boundaries of former precincts that voted dry in previous local option elections. The Dallas County Commissioners Court established the historical boundaries for one of the earlier precincts but denied a request from the Dallas County Elections Department to order a local option election. The relator sought mandamus relief in the court of appeals but relief was denied. The Supreme Court granted argument on relator's petition for writ of mandamus and heard oral argument on December 5, 2007.

XII. EMPLOYMENT LAW

A. Constructive Discharge

1. Baylor Univ. v. Coley, 221 S.W.3d 599 (Tex. April 20, 2007) [04-0916].

Betty Coley was a librarian at Baylor University and was tenured at the rank of Assistant Professor. Coley alleged that Baylor effectively demoted her by reassigning her responsibilities to others, thereby breaching her contract and forcing her to resign. The trial judge refused to submit Coley's proposed jury instruction on breach of contract and instead submitted a question on constructive discharge. The jury found no constructive discharge, and the trial court rendered judgment for Baylor. Although the court of appeals held that Coley was not entitled to a separate jury question on breach of contract, it reversed, holding that the jury instruction on the constructive discharge used the wrong standard.

The Supreme Court reversed the court of appeals' judgment and rendered judgment for Baylor. The Court held that there was no evidence that changing Coley's responsibilities at the library was a breach of contract. Coley's tenure contract gave her the right to "continue in her academic position" and to continue to do the "general kinds of things" she was doing when given tenure. Even if her responsibilities changed over time, and were sometimes more clerical than she desired, there was no evidence her responsibilities were anything other than those of an assistant professor. Further, even a substantial change in job assignments could not be the basis for a constructive discharge claim. Constructive discharge occurs when an employer makes conditions so intolerable that a reasonable employee would feel compelled to resign, and the trial court properly instructed the jury using this standard. The Court rejected the argument that Coley had not preserved error, holding that her proposed jury instruction timely and plainly made the trial court aware of the principal legal issue of the constructive discharge standard.

Justice Johnson, joined by Justice Wainwright, concurred, arguing that Coley had not preserved error. There was some dispute between the parties about whether Coley was tenured in a position or in a field. Because Coley's proposed instruction used the word position, it directly assumed a controverted material fact, and thus could not be substantially correct. As the Texas Rules of Civil Procedure preclude reversal unless a substantially correct instruction is requested, the concurrence would have rendered judgment for Baylor without discussing the merits.

B. Law Enforcement Officers

1. VanDevender v. Woods, 222 S.W.3d 430 (Tex. April 27, 2007) [05-0956].

Deputy Sheriff James VanDevender sought a declaratory judgment that Jefferson County and its sheriff, G. Mitch Woods, violated article III, section 52e of the Texas Constitution by failing to pay VanDevender's full salary during his second term as a deputy sheriff after he became disabled. Under that constitutional provision, county law enforcement officers are granted their "maximum salary" while they are "hospitalized or incapacitated" until their "term of office" expires. The trial court and court of appeals held that the Constitution did not entitle VanDevender to salary continuation benefits.

The Supreme Court held that the court of appeals should not have reached the ultimate constitutional question—whether the Constitution's full-pay entitlement extends into an officer's subsequent term of office—without first reviewing whether VanDevender's incapacity resulted from a job-related injury, a precondition to receiving continued salary. Because this threshold issue should be addressed first, the Court vacated the court of appeals' judgment and remanded to that court to consider VanDevender's factual sufficiency argument.

C. Whistleblower Actions

1. City of Waco v. Lopez, 183 S.W.3d 825 (Tex. App.—Waco 2005), *pet. granted*, 50 Tex. Sup. Ct. J. 674 (April 30, 2007) [06-0089].

This case presents three issues: (1) whether the Commission on Human Rights Act (CHRA) is the exclusive remedy for a retaliation claim, (2) whether a city's Equal Employment Opportunity (EEO) policy is a law under the Whistleblower Act (WBA), and (3) whether the WBA applies only to retaliation for reporting violations of law detrimental to the public good.

The City of Waco employed Lopez as an inspector in the New Construction division. Lopez filed a grievance with the City's EEO officer in the Human Resource Department, citing race and age discrimination as reasons for his transfer from one department to another. The following September, Lopez traveled from Waco to Austin in a city owned vehicle and was fired for allegedly making the trip in the city owned vehicle without obtaining prior approval.

Lopez filed suit under the WBA, claiming that the City fired him in retaliation for filing the grievance two months earlier. He claimed the City violated its EEO policy of non-discrimination based on age or race. The City filed a plea to the jurisdiction and motion for summary judgment, arguing that the facts do not, as a matter of law, support a WBA claim. The trial court denied the City's plea and motion. The City appealed and the court of appeals affirmed, holding that the CHRA is not Lopez's exclusive remedy because he is not pursuing a claim under the CHRA, does not allege the City violated the CHRA, and does not allege that the City fired him for reporting a violation of the CHRA. On the second issue, the court of appeals held that the City's EEO policy is a "law" under the WBA because it is a "rule adopted under a statute" and rejected the City's argument that laws under the WBA must pertain to the public good in general. The court of appeals further rejected the City's arguments regarding Lopez's good faith belief that he was reporting the violation of a law to an appropriate law enforcement authority.

The Supreme Court granted the City's petition for review and heard oral argument on September 27, 2007.

2. Montgomery County v. Park, 246 S.W.3d 610 (Tex. November 30, 2007) [05-1023].

At issue in this case was whether a personnel action was adverse for the purposes of the Texas Whistleblower Act. David Park, a lieutenant in the Montgomery County Sheriff's office, reported a County Commissioner's alleged sexual harassment of female county employees to the sheriff. After making this report, Park's role as security coordinator for the county convention center, which involved arranging for off-duty officers to work as security guards at convention center events, was reassigned to the Constable's office. Park received no additional salary as security coordinator, but could use the position to assign himself work at convention center events. Park sued the County under the Whistleblower Act, alleging that the reassignment of his coordinator duties constituted an adverse personnel action in retaliation for his reporting

the alleged sexual harassment. The County moved for summary judgment, which the trial court granted. The court of appeals reversed, and the County appealed. The Supreme Court reversed and rendered judgment for the County.

The Court held that under the Whistleblower Act, a personnel action is adverse if it would likely dissuade a similarly situated, reasonable employee from making a report under the Act. Because Park presented no evidence that the loss of his coordinating duties actually decreased his access to compensation from outside employment or otherwise negatively affected him, the Court held that Park had not suffered an adverse personnel action.

XIII. EVIDENCE

A. Damages

1. Guevara v. Ferrer, 247 S.W.3d 662 (Tex. August 31, 2007) [05-1100].

At issue in this case was whether expert medical evidence was required to support a finding that an automobile accident caused medical expenses of over $1 million. Eighty-six-year-old Aurturo Labao was injured in a car accident and taken by ambulance to a hospital emergency room. He underwent surgery that night, remained in the hospital for three months, underwent another surgery, and then spent two weeks in a continuing care facility. The next month, he was admitted to another medical center for two weeks. Labao later died and his daughter, Corazon Labao Ferrer, sued the driver of the other vehicle, Noemi Guevara. At trial, Labao's medical bills, totaling over $1 million, were admitted into evidence. A few medical records were also admitted into evidence. One indicated he had a significant past medical history of "atrial fibrillation and hypertension as well as acute and chronic renal failure," and the record from his last hospitalization, months after the accident, indicated that he went to the emergency room complaining of "[c]ough and shortness of breath." The jury found damages of over $1.1 million for Arturo's medical expenses, but the trial court granted Guevara's motion for judgment notwithstanding the verdict on the grounds that there was no evidence that Labao's treated conditions were caused by the accident. The court of appeals reversed and remanded for entry of judgment based on the jury's verdict.

The Supreme Court held that expert medical evidence is generally required to prove causation unless competent evidence supports a finding that the causal relationship between the conditions and the accident, and the necessity of the particular medical treatments for the conditions are within the common knowledge and experience of laypersons. In this case, the Court noted that Labao's medical course was not smooth or simple, and that the evidence did not specify the conditions for which he was treated. But, the Court further noted that non-expert evidence of circumstances surrounding the accident and Arturo's complaints was sufficient to allow a layperson of common knowledge and experience to determine that Arturo's immediate post-accident condition, transportation to an emergency room, and examination were causally related to the accident. Thus, the evidence was legally sufficient to support a finding that some, although not all, of his medical expenses were causally related to the accident. The Supreme Court reversed the court of appeals' judgment and remanded the case to that court to consider a remittitur as to expenses for which expert evidence was required.

B. Defendant's Financial Status

1. Reliance Steel & Aluminum Co. v. Sevcik, 2006 WL 563044 (Tex. App.—Corpus Christi 2006), *pet. granted*, 50 Tex. Sup. Ct. J. 1014 (August 24, 2007) [06-0422].

The issue in this case is whether evidence of a defendant's financial status is admissible in a personal injury case where the plaintiff does not seek punitive damages.

Samuel Alvarado, an employee of Reliance Steel, was involved in an automobile accident in which Cathy Loth was injured. All parties agreed that Reliance would be liable for Alvarado's actions under the theory of *respondeat superior*, and Alvarado admitted to his negligence at trial. Although Loth did not seek punitive damages, she was allowed to introduce evidence of Reliance's gross annual sales.

Pursuant to the jury's verdict, the trial court awarded damages to Loth for past and future medical expenses, as well as loss of future earning

capacity. The court of appeals affirmed the judgment of trial court, with the exception of a small adjustment to Loth's past medical expenses. The Supreme Court granted Reliance's petition for review and heard oral argument on December 4, 2007.

C. Interested Party Testimony

1. Wilz v. Flournoy, 228 S.W.3d 674 (Tex. June 29, 2007) [06-0913].

In this constructive trust case, the Supreme Court held that the court of appeals erred in limiting a constructive trust to a thirty-five percent interest in a property where the only evidence that the trustee contributed his own funds to the property was his deposition testimony.

Patricia Wilz and Kenneth Flournoy divorced, and Kenneth was awarded custody of their son, Jon. Jon suffered incapacitating injuries in an automobile accident, and Kenneth sued Ford Motor Company. In a settlement, Kenneth received $379,300 on Jon's behalf and $95,000 personally. Later, Kenneth and his new wife, June, purchased a 110-acre farm for $153,049, paying $49,365.50 in cash and executing a note for the balance. The note called for monthly payments of $961. Between 1991 and 1999, the Flournoys withdrew several thousand dollars from Jon's account, many installments of which were roughly $960. By the end of 2001, the Flournoys had depleted Jon's account, and Jon became a ward of the State.

Patricia later became Jon's guardian, and she sued the Flournoys on Jon's behalf for conversion, breach of fiduciary duty, and constructive fraud. She traced several checks drawn on Jon's account to the Flournoys' personal account. When questioned about these checks, the handling of Jon's funds, and the source of the funds used to purchase the farm, the Flournoys each invoked the Fifth Amendment privilege against self-incrimination. The Flournoys' sole evidence regarding the funds consisted of Kenneth's pretrial deposition, where he said he used his settlement money for the farm's down payment and that $50,000 remained outstanding on the note. When questioned about the truth of this testimony, Kenneth again invoked the Fifth Amendment.

The jury found that Kenneth breached his fiduciary duty and committed constructive fraud and that the Flournoys converted Jon's property with malice. The trial court therefore imposed a constructive trust on the entire farm. The court of appeals reversed, saying that Kenneth's deposition testimony was conclusive proof that he contributed his own funds to the purchase of the farm. The Supreme Court reversed and reinstated the judgment of the trial court because once Patricia traced Jon's funds to the farm, the entire farm would be subject to the trust except for what the Flournoys could show they purchased with their own funds, and the jury was free to disregard Kenneth's deposition testimony on this subject.

D. Nonsuited Parties

1. Bay Area Healthcare Group, Ltd. v. McShane, 239 S.W.3d 231 (Tex. June 8, 2007) [05-1069].

In this medical malpractice action, Deborah Sue McShane and James Patrick McShane sued Bay Area and others for injuries allegedly sustained during the birth and delivery of their daughter, Maggie. A jury found in the hospital's favor, and the trial court signed a take-nothing judgment. The court of appeals reversed, holding that the trial court abused its discretion in admitting evidence that two doctors involved in the incident were originally sued by the McShanes, but were nonsuited before trial.

The Supreme Court reversed the court of appeals' judgment and held that under the Texas Rules of Evidence, a superseded pleading is treated as an admission by a party-opponent and is admissible against that party. The Court noted that pre-Texas Rules of Evidence case law allowed superseded pleadings to be admitted if they contained a statement relevant to a material issue in the case that is inconsistent with the position taken by the party against whom it is introduced. But because the Texas Rules of Evidence now govern the admissibility of evidence in court proceedings, the Court clarified that there is no requirement that the statement be inconsistent with the party's position at trial. The Court held that the court of appeals erred in finding the superseded pleadings inadmissible and did not reach Bay Area's other issues.

With respect to the McShanes cross-point, that Bay Area improperly impeached their expert, the Court agreed with the court of appeals that the McShanes did not preserve the issue for review

because they failed to timely object to the complained-of questions. The Court reversed the court of appeals' judgment and rendered a take-nothing judgment in favor of Bay Area.

XIV. EXPUNCTION OF ARREST RECORDS

A. Statutory Requirements

1. State v. Beam, 226 S.W.3d 392 (Tex. June 1, 2007) [06-0974].

Judy Beam was arrested and charged with a misdemeanor offense. The charge was later dismissed pursuant to a plea agreement, and Beam was granted deferred adjudication on the lesser charge of disorderly conduct. Beam attempted to file a petition for expunction less than two years later. The State argued that the requirements for obtaining an expunction under Code of Criminal Procedure article 55.01(a)(2)(A)(i) apply to misdemeanor arrests, and therefore, the limitations period for bringing an indictment for the underlying misdemeanor offense must expire before the date on which the petition for expunction is filed. The trial court, however, granted Beam's petition for expunction. The State appealed, and the court of appeals affirmed. The Supreme Court reversed the court of appeals' judgment and rendered judgment for the State. The Supreme Court held that the limitations requirement of article 55.01(a)(2)(A)(i) applies to both felonies and misdemeanors, and therefore, Beam did not satisfy the requirements for filing an expunction petition because the limitations period for her misdemeanor offense had not yet expired.

XV. FAMILY LAW

A. Termination of Parental Rights

1. In re D.N.C., S.W.3d , 51 Tex. Sup. Ct. J. 442 (Tex. February 8, 2008) [07-0621, 07-0622, 07-0623, 07-0624, 07-0625].

At issue in this case is whether a challenge to the appointment of a managing conservator is subsumed in a challenge to the termination of parental rights, where the trial court makes no independent findings justifying the conservatorship order. The Department of Family and Protective Services sought the termination of Erica Shanette Colbert's rights to her seven children. The trial court issued an order terminating Colbert's rights under section 161.001(1)(D) of the Family Code. Making no additional findings, the trial court appointed the Department of Family and Protective Services as the children's managing conservator. Colbert challenged the legal and factual sufficiency of evidence to support her termination on appeal, but did not bring a separate challenge against the appointment of the Department as conservator. The court of appeals reversed the termination order on factual-insufficiency grounds and, reasoning that no independent findings had been made under the Family Code sufficient to independently uphold the conservatorship order, likewise reversed the conservatorship order.

The Supreme Court denied the Department's petition challenging the court of appeals' reversal of the conservatorship order, but in a per curiam opinion noted that unlike in *In re J.A.J.*, 243 S.W.3d. 611 (Tex. 2007), where the trial court articulated specific findings sufficient to support the appointment of a non-parent as managing conservator independent of the termination order, the trial court failed to do so in this case. Rather, the only available statutory mechanism for the Department's appointment in this case was as the consequence of the trial court's termination decision.

2. In re J.A.J., 243 S.W.3d 611 (Tex. November 2, 2007) [07-0511].

A trial court terminated a mother's parental rights to her child and appointed the Department of Family and Protective Services the child's sole managing conservator, finding that appointment of a parent as the child's conservator would significantly impair his physical health or emotional development. On appeal, the mother claimed that evidence was insufficient to support the termination decision, but she did not separately challenge the conservatorship appointment. The court of appeals determined that the evidence was insufficient to support termination and reversed the trial court's judgment, including the appointment of the Department as the child's conservator. The Department appealed, arguing that the court of appeals had improperly reversed the conservatorship appointment absent assigned error. The Supreme Court concluded that reversal of a termination judgment does not effect appointment of the Department as conservator

where the trial court makes findings sufficient to independently justify the conservatorship appointment under the Family Code because the elements and the burdens of proof necessary to support termination and conservatorship orders are different. Accordingly, the Court reversed that portion of the court of appeals' judgment that reversed appointment of the Department as the child's sole managing conservator.

XVI. FEDERAL PREEMPTION

A. Labor

1. Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338, 173 S.W.3d 896 (Tex. App.—Dallas 2005), *pet. granted*, 50 Tex. Sup. Ct. J. 929 (July 2, 2007) [06-0034].

Amalgamated Transit Union Local No. 1338 (ATU 1338) is a union that represents many employees of Dallas Area Rapid Transit (DART), a regional transportation authority authorized under the Texas Transportation Code. DART receives federal assistance pursuant to section 13 of the Urban Mass Transportation Act. Section 13(c) conditions this assistance on DART providing fair and equitable arrangements to protect the interests of employees affected by the assistance. Pursuant to procedures approved by the Secretary of Labor under section 13(c), ATU 1338 and DART entered into a general grievance resolution agreement to address disputed salaries and wages. ATU 1338 alleged that DART breached the resolution agreement by failing to implement the pay increase and by taking other unilateral actions inconsistent with the resolution. DART filed a plea to the jurisdiction based on governmental immunity, which the trial court denied. The court of appeals affirmed, holding that the federal section 13(c) preempted DART's state law governmental immunity. The Supreme Court granted DART's petition for review and heard oral argument on November 14, 2007.

B. Multidistrict Litigation Pretrial Courts

1. In re GlobalSantaFe Corp., 2006 WL 3716495 (Tex. App.—Houston [14th Dist.] 2006), *argument granted on pet. for writ of mandamus*, 51 Tex. Sup. Ct. J. 77 (November 2, 2007) [07-0040].

At issue in this case is how much of Texas Civil Practice and Remedies Code chapter 90 is preempted by the federal Jones Act. John Lopez filed suit in state district court under the Jones Act claiming GlobalSantaFe failed to provide a safe and seaworthy vessel, resulting in his exposure to silica. On GlobalSantaFe's motion, the case was transferred to multidistrict litigation pretrial court pursuant to chapter 90. The case was remanded back to the district court based on Lopez's claim of federal preemption. GlobalSantaFe sought mandamus relief. The court of appeals denied relief holding that the Jones Act preempts all of chapter 90. The court reasoned that because the state statute creates barriers to bringing suit to recover for silica-related injuries in state court, chapter 90 irreconcilably conflicts with the federal statute, which broadly provides a cause of action for a seaman injured in the course of employment. GlobalSantaFe argues that while the minimum injury threshold established by chapter 90 conflicts with the Jones Act, the remaining portions of the statute must be enforced to give effect to the Texas Legislature's plan of creating a uniform approach to lawsuits involving silica-related injuries. GlobalSantaFe further points to decisions of the Supreme Court of the United States which establish that state procedural statutes may be applied when Jones Act cases are brought in state courts; because chapter 90 merely establishes which venue should handle pretrial matters, the courts should enforce this procedural statute. The Supreme Court granted argument on GlobalSantaFe's petition for writ of mandamus and heard oral argument on January 16, 2008.

C. Railroads

1. Mo. Pac. R.R. v. Limmer, 180 S.W.3d 803 (Tex. App.—Houston [14th Dist.] 2005), *pet. granted*, 50 Tex. Sup. Ct. J. 801 (June 4, 2007) [06-0023].

This case involves issues of federal preemption with regard to railroad crossings, legal sufficiency standards of review, and procedural rules for preserving error with regard to a jury question combining multiple claims.

Billy Limmer was killed at a railroad crossing owned by Missouri Pacific. Limmer's heirs brought suit. The trial court rejected the railroad's argument that federal law preempted state negligence law because federal funds were used to install and upgrade warning signs at the

crossing. At trial, there was evidence that the crossing was obscured by vegetation and a pile of limestone. The jury found that the crossing was extra-hazardous, that the railroad's failure to provide additional warnings was a proximate cause of the accident, that the railroad's failure to eliminate the sight restrictions was a proximate cause of the accident, and that 85% of the negligence that caused the accident was attributable to the railroad. The railroad objected to the question on sight restrictions, arguing that sight obstructions were not an independent grounds of recovery under Texas law, but did not object to the question regarding apportionment of responsibility.

The court of appeals held that federal law would preempt the Limmers' claims if federal money were spent on the crossing, but that there was insufficient evidence of such expenditure. The court remanded the case because the submission of a separate question on sight obstructions was error and could not be considered harmless since the court was not reasonably certain that the jury was not influenced by the question. The court held that it was not necessary for the railroad to object to the apportionment question in order to preserve error on the submission of the sight restrictions question.

The Supreme Court granted both parties' petitions for review and heard oral argument on November 13, 2007.

XVII. GOVERNMENTAL IMMUNITY

A. Assignability of Claims

1. State v. Oakley, 227 S.W.3d 58 (Tex. June 8, 2007) [06-0050, 06-0172].

Christopher Ochoa and Richard Danziger were indicted for murder in Travis County in 1989. Ochoa agreed to plead guilty and testify against Danziger if the State promised not to seek the death penalty. The jury convicted Danziger at trial, and the trial court sentenced him to life in prison. Seven years after the 1989 indictment, a third person confessed to the murder. DNA evidence exonerated both Ochoa and Danziger. Twelve years after the 1989 indictment, both men were released. During his prison stay, Danziger had been assaulted in prison by another inmate and suffered a severe brain injury.

Ochoa and Danziger, acting through Danziger's representative, won judgments against the City of Austin for wrongful imprisonment. Danziger then sued Ochoa for falsely testifying against him. To settle the claim, Ochoa assigned his false imprisonment claim against the State to Danziger. Danziger then sued the State for wrongful imprisonment as allowed under statute, individually and as an assignee. The trial court rejected the State's plea to the jurisdiction and the Third Court of Appeals affirmed. The State appealed.

The Supreme Court held Danziger could bring a wrongful imprisonment claim against the State on his own behalf. His settlement with the city did not prevent him from seeking recovery from the State; sovereign immunity was no defense. However, the Court held that the same claim could not be brought as an assignee. The Court recognized that wrongfully imprisoned persons trying to resume their lives after years of injustice may want to assign their claims. Ultimately, however, the Court held that the cause of action is a creation of the legislature and the legislature did not make such claims assignable.

B. Contract Claims

1. State v. Holland, 221 S.W.3d 639 (Tex. April 20, 2007) [05-0292].

From 1996 to 1998, the Texas General Land Office contracted with two of Herbert Holland's companies to assist in the design and construction of three coastal water filtration systems using Holland's oil removal process. Holland performed much of the work personally. Holland applied for a patent on this process in 1998, which was issued in 2000. After the facilities were completed, Holland worked with officials at the General Land Office to present these projects at a conference in 1999.

In 2002, Holland began sending letters to the State claiming that the State had infringed on his patent and seeking compensation. The State referred Holland to its administrative contract dispute process, which Holland did not pursue. Holland brought this inverse condemnation claim under Article I, section 17 of the Texas Constitution. The State filed a plea to the jurisdiction and a general denial. The State argued that this was an artfully pleaded contract

claim, barred by sovereign immunity. The State further argued that there was no allegation of an intentional act as required in a takings claim and that patent infringement is not the taking of property. The trial court denied this plea, and the court of appeals affirmed the denial.

The Supreme Court reversed. The Court held that Holland could not state a takings claim for the State's alleged unlawful use of his patent because the State was using the systems pursuant to colorable contract rights so his claim actually sounded in contract. Consequently, the State was immune from suit, and the Court dismissed the case for want of jurisdiction.

C. Declaratory Judgments

1. City of El Paso v. Heinrich, 198 S.W.3d 400 (Tex. App.—El Paso 2006), *pet. granted*, 50 Tex. Sup. Ct. J. 910 (June 25, 2007) [06-0778].

The principle issues presented in this case are whether governmental immunity from suit is waived in a claim for declaratory and injunctive relief requiring the payment of money, or in a claim alleging unauthorized acts under a statute, without court consideration of evidence concerning the alleged acts in light of the controlling law.

Lillie Heinrich began receiving one hundred percent of her deceased husband's final pension amount shortly after his death, which was caused by an injury he received while on duty as an El Paso policeman. Seventeen years later, the pension fund administrator informed her that thereafter she would receive only two-thirds of the amount since her son was no longer a "qualified child" under the controlling fund bylaws.

Heinrich sued the city, the pension fund, and its board, as well as the board members, whom she "named as defendants individually." She claimed the board had originally awarded her one hundred percent of her husband's final pension amount due to his service record, in accordance with the bylaws and the statute enabling the pension fund. Among other things, she argued that the board had violated the statute by reducing that percentage without getting approval from a majority of the fund's voting members. After several amendments to her petition, she claimed not to seek damages but declaratory and injunctive relief to "restore the status quo" from the date of the illegal act and to keep defendants from continuing to act illegally.

By pleas to jurisdiction the city, the fund, and its board asserted governmental immunity. Likewise, by pleas to jurisdiction the individual board members asserted derivative governmental immunity and official immunity. The trial court denied the pleas without specifying its grounds. The court of appeals affirmed, determining that Heinrich's declaratory and injunctive claim was not a disguised claim for money damages barred by governmental immunity. The court also determined that the individual board members did not have official immunity.

The Supreme Court granted the city's, the fund's, its board's, and its board members' petitions for review and heard oral argument on November 13, 2007.

D. Intergovernmental Immunity

1. Nueces County v. San Patricio County, 246 S.W.3d 651 (Tex. January 25, 2008) [07-0166].

At issue in this case is whether a county is protected by governmental immunity from a suit brought by another county seeking to recover illegally collected taxes. San Patricio County sued Nueces County to establish their common boundary line. As part of that suit, San Patricio County sought to recover taxes that Nueces County had collected on the disputed land. The trial court resolved the boundary dispute in San Patricio County's favor, but held that Nueces County was protected by governmental immunity from the tax-recovery suit. The court of appeals affirmed the trial court's boundary determination but reversed its dismissal of the tax-recovery suit, concluding that governmental immunity did not protect Nueces County.

The Supreme Court reversed. Relying on its recent holding in *City of Galveston v. State*, 217 S.W.3d 466, 471 (Tex. 2007), the Court held that governmental immunity presumptively applied in a suit for damages between counties. Furthermore, governmental immunity applies in a suit alleging actions by a county beyond those delegated to it by the state, such as collection of illegal taxes. Thus because Nueces County had not waived its governmental immunity, the Court

dismissed San Patricio's tax-recovery suit for want of jurisdiction.

E. Police Pursuits

1. City of San Antonio v. Ytuarte, 229 S.W.3d 318 (Tex. May 4, 2007) [05-0991].

In this interlocutory appeal from an order denying the City of San Antonio's motion for summary judgment, the Court considered whether the court of appeals sufficiently analyzed the good faith element of immunity in a police pursuit case. The police pursuit began when San Antonio police spotted a suspect in a stolen SUV shortly after an aggravated robbery and car jacking were reported at a convenience store. As the pursuit was terminating, the suspect lost control of the SUV and crashed into a parked car, injuring a bystander, Dolores Ytuarte. Ytuarte filed suit, and the City responded by asserting immunity and moving for summary judgment. The trial court denied the City's motion and the court of appeals affirmed, concluding that the City had not established the officers' good faith as a matter of law.

The Supreme Court, in a per curiam opinion, reversed the court of appeals' judgment. The Court recognized the well established rule in police pursuit cases that "an officer acts in good faith if a reasonably prudent officer under the same or similar circumstance could have believed that the need to immediately apprehend the suspect outweighed a clear risk of harm to the public in continuing (rather than terminating) the pursuit." *Wadewitz v. Montgomery*, 951 S.W.2d 464, 466 (Tex. 1997). The Court further noted that under the good faith standard, the officers must weigh the need to immediately apprehend the suspect against the risk of continuing the pursuit from the perspective of a reasonably prudent officer. *Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). The Court held that the court of appeals failed to apply the *Chambers* and *Wadewitz* analysis when evaluating the summary judgment proof of good faith, and summary judgment evidence clearly indicated that the officers met the good faith standard. Thus, without hearing oral argument, the Court reversed the court of appeals' judgment and rendered judgment dismissing the case.

F. Premises and Special Defects

1. City of Corsicana v. Stewart, S.W.3d , 51 Tex. Sup. Ct. J. 682 (Tex. March 28, 2008) [07-0058].

At issue in this case is whether the City of Corsicana had actual knowledge that a low-water crossing was flooded at the time of an accident. While driving home during heavy rain, Patrick Stewart's car engine failed as he attempted to traverse a flooded crossing. After leaving his car with his minor children inside to seek help, his car was swept away, and the children drowned. The trial court granted the City's plea to the jurisdiction and dismissed the claims, holding that the conditions present did not constitute a premises defect because the City was unaware of the flooding prior to the accident. A divided court of appeals reversed and remanded.

The Supreme Court held that Stewart failed to raise a fact issue regarding the City's actual knowledge of a dangerous condition at the time it occured. Although the City knew the crossing tended to flood during heavy rains and there was evidence of inclement weather in the vicinity on the night of the accident, the Court reasoned that there was no evidence that the City was aware of the weather and road conditions in the proximity of the crossing prior to the accident. The Court, therefore, reversed and dismissed the case for want of jurisdiction.

G. Recreational Use Statute

1. Stephen F. Austin State Univ. v. Flynn, 228 S.W.3d 653 (Tex. June 29, 2007) [04-0515].

This case concerns application of the Tort Claims Act and the Recreational Use Statute. *See* TEX. CIV. PRAC. & REM. CODE §§ 101.021, 101.056 and §§ 75.001-.004. The Tort Claims Act provides a limited waiver of the State's immunity from suit for certain tort claims, including claims of injury or death from premises defects, and the Recreational Use Statute adds additional qualifications when the injury or death occurs on state-owned land being used for recreational purposes.

Diane Flynn was riding her bike on a public easement which crossed the Stephen F. Austin (SFA) campus when she was hit by a stream of water from an oscillating sprinkler. The force of the water knocked her off her bike, causing her

injury. Flynn sued SFA for damages under the Tort Claims Act, alleging that her injuries were proximately caused by SFA's negligent use of real property, negligent operation of the premises, negligent activity, and gross negligence.

The trial court denied SFA's plea to the jurisdiction and motion to dismiss, and the court of appeals affirmed, concluding that neither the discretionary powers exception to the Texas Tort Claims Act nor the Recreational Use Statute applied to Flynn's claim. The Supreme Court agreed that the discretionary powers exception did not apply, but disagreed with the court of appeals' treatment of the Recreational Use Statute. Holding that a landowner who dedicates a public easement for recreational purposes is entitled to the protection of the Recreational Use Statute, the Court reversed the court of appeals' judgment and dismissed the case.

Justice Hecht filed a concurring opinion, asserting that because immunity was not waived under the Recreational Use Statute, the Court did not need to consider whether the discretionary powers exception applied. He further urged that the analysis of the discretionary powers exception should follow the federal courts' interpretation of a similar exception under the Federal Tort Claims Act.

H. Texas Tort Claims Act

1. Mission Consolidated Indep. Sch. Dist. v. Garcia, S.W.3d , 51 Tex. Sup. Ct. J. 621 (Tex. March 28, 2008) [05-0734, 05-0762, 05-0763].

At issue in this case is the interpretation of the election-of-remedies provision in the Texas Tort Claims Act. *See* TEX. CIV. PRAC. & REM. CODE § 101.106(b). Three terminated employees (collectively, "Garcia") brought identical lawsuits against their former employer, Mission Consolidated Independent School District (ISD), and its superintendent. They asserted intentional common-law torts against both defendants and violations of the Texas Commission on Human Rights Act (TCHRA) against the ISD. The ISD filed a plea to the jurisdiction in the trial court, contending that because Garcia sued both the governmental unit and its employee, section 101.106(b) barred the suit against the governmental unit. The trial court denied the plea to the jurisdiction, and the court of appeals affirmed.

In the Supreme Court, Garcia argued that section 101.106(e), which provides that the governmental unit may move to dismiss the employee when both are sued, applied instead of section 101.106(b). However, the Court reasoned that section 101.106(e) would not govern the TCHRA claim because it was not "under" the Tort Claims Act, a predicate to section 101.106(e). A claim is under the Act if it is a tort claim against the government and there is not a statutory waiver of immunity outside the Tort Claims Act. Since the TCHRA contains its own waiver of immunity, claims under it are not under the Act. However, the Court concluded the intentional tort claim against the ISD did fall within the Act. Because immunity for intentional torts is not waived by the Act, that claim would be dismissed.

If section 101.106(b), which does not contain an "under the Act" predicate, applied, then all claims against the ISD were barred "unless the governmental unit consents." Since the Legislature chose to waive immunity under the TCHRA, the governmental unit had consented to the claim and so it, but not the intentional tort claim, stood. Thus, under either section, the TCHRA claim survived the plea to the jurisdiction, but the intentional tort claim did not. Accordingly, the Court reversed the court of appeals' judgment as to the common-law claims against the ISD, affirmed as to the TCHRA claims, and remanded to the trial court to consider the TCHRA claims.

I. Utilities

1. Sw. Bell Tel., L.P. v. Harris County Toll Road Auth., 2006 WL 2641204 (Tex. App.—Houston [1st Dist.] 2006), *pet. granted*, 51 Tex. Sup. Ct. J. 77 (November 2, 2007) [06-0933].

At issue in this case is whether a county toll road authority must reimburse a telecommunications company for relocation costs arising from the construction of a toll road that displaced the utility's cables and equipment.

Southwestern Bell installed and maintained various telecommunication facilities in the right-of-way adjacent to a road pursuant to a broad statutory grant of authority. The Harris County Tollroad Authority converted the road into a

tollway which required Southwestern Bell to relocate its equipment. Southwestern Bell sought reimbursement under a statute requiring the government to include eligible utility relocation costs in the budget of highway right-of-way acquisition and also asserted a claim for inverse condemnation. The court of appeals held that the statutory claim was subject to Harris County's governmental immunity, which was not waived under the statute, and that Southwestern Bell did not have a sufficient property interest in the right-of-way for compensation on the inverse condemnation claim. The Supreme Court granted Southwestern Bell's petition for review and heard oral argument on January 15, 2008.

J. Waiver

1. Abilene Housing Auth. v. Gene Duke Builders, Inc., 226 S.W.3d 415 (Tex. June 1, 2007) [05-0631].

The Housing Authority contracted with Gene Duke Builders, Inc. for repair of its housing units. After a dispute arose, the builder sought to compel arbitration under the contract. The Authority filed a plea to the jurisdiction, claiming that it was a "unit of state government" for purposes of the exclusive contract claim procedures provided by Chapter 2260 of the Texas Government Code. The trial court granted the Authority's plea to the jurisdiction. The court of appeals disagreed and held that the "sue and be sued" clause in Texas Local Government Code section 392.065 waived immunity from suit. The Supreme Court reversed the court of appeals' judgment in light of *Tooke v. City of Mexia*, 197 S.W.3d 325, 344 (Tex. 2006), which held that a "sue and be sued" clause does not waive immunity. The Court also rejected the Housing Authority's claim that it was a "unit of state government" for purposes Chapter 2260. The Court remanded the case to the trial court to allow the parties to address the applicability of the limited, retroactive waiver of immunity from suit for certain contract claims which was enacted in Texas Local Government Code sections 271.151-.160 while this case was pending.

2. City of Arlington v. Matthews, 226 S.W.3d 417 (Tex. June 1, 2007) [06-0251].

Charles Mathews sued the City of Arlington for breach of an employment agreement. The trial court denied the City's plea to the jurisdiction and the court of appeals affirmed, holding that section 51.075 of the Texas Local Government Code which allows a city to "plead and be impleaded" waived the City's immunity from suit. The Supreme Court reversed in light of *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006), and, citing *City of Houston v. Jones*, 197 S.W.3d 391, 392 (Tex. 2006), remanded to the trial court for further proceedings under the limited retroactive waiver of immunity for contract claims enacted in sections 271.151-.160 of the Local Government Code while this litigation was pending.

3. City of Dallas v. DeQuire, S.W.3d , 51 Tex. Sup. Ct. J. 663 (Tex. March 28, 2008) [06-0543].

At issue in this case is whether the City of Dallas waived its immunity from suit. Several Dallas police officers sued the City for breach of contract and violations of departmental policy and civil service rules, seeking damages and declaratory relief. The City filed a plea to the jurisdiction asserting governmental immunity, and sought costs and attorneys' fees. The trial court granted the plea to the jurisdiction, but the court of appeals reversed. The Supreme Court, without hearing oral argument, reversed and remanded the case to the trial court, explaining that the Court had, in the interim, withdrawn and replaced its initial opinion in *Reata Constr. Corp. v. City of Dallas*, which the court of appeals relied on. *See Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371 (Tex. 2006). The Court added, however, that it need not address whether the City's request for attorneys' fees under the Declaratory Judgments Act waived its immunity from suit, concluding that plaintiffs should have the opportunity in the trial court to address any grounds for waiver remaining under its decisions, including whether the City's immunity from suit is waived by sections 271.151-.160 of the Texas Local Government Code, enacted while the case was pending on appeal.

4. City of Elsa v. M.A.L., 226 S.W.3d 390 (Tex. June 1, 2007) [06-0516].

In this case, the Supreme Court reaffirmed that (1) "sue and be sued" provisions in city charters do not waive immunity from suit for

monetary damages, and (2) governmental entities may be sued for injunctive relief under the Texas Constitution.

This case arose after three police officers resigned from the City of Elsa's police force. A local news station reported that the police officers left the force after positive drug tests. The three officers then sued the City, alleging that it had improperly disclosed medical information under the Medical Practice Act, improperly disclosed information not subject to the Open Records Act, and engaged in "deprivations of privacy and confidential rights, privileges and immunities secured by the laws and Constitution of Texas under Article I, Section 8 and 19." The former officers generally alleged entitlement to monetary damages. They also sought equitable and injunctive relief for the alleged constitutional violations. The City filed a plea to the jurisdiction, which the trial court denied. The City then filed an interlocutory appeal of the denial of its plea.

The court of appeals affirmed in part and reversed in part. It affirmed the trial court's denial of the plea as to the statutory claims, holding that a "sue and be sued" provision in the City's charter waived the City's immunity from suit. The court reversed and remanded the trial court's denial of the plea as to the constitutional claims, holding that to the extent the plaintiffs' pleadings sought monetary damages, such claims were invalid but that equitable relief could be sought. The court held that the that the plaintiffs' request for injunctive relief failed to affirmatively demonstrate the trial court's jurisdiction over their claim for prospective injunctive relief because the plaintiffs pleaded only "mere fear or apprehension of possible injury" in the future. It remanded the case to the trial court to allow the plaintiffs to amend their petition and state a less speculative claim for equitable relief.

The Supreme Court reversed the court of appeals' judgment in part and affirmed it in part. The Court held that the City of Elsa possessed sovereign immunity from suits for monetary damages and reversed the court of appeals' judgment in light of *Tooke v. City of Mexia*, 197 S.W.3d 325, 344 (Tex. 2006), which held that a "sue and be sued" provision in a city charter does not, by itself, constitute an unambiguous waiver of governmental immunity. The Court affirmed the part of the court of appeals' holding that refused to dismiss the plaintiffs' claims for injunctive relief based on alleged constitutional violations, concluding that such suits could be brought against governmental entities.

5. City of Pasadena v. Kinsel Indus., Inc., 227 S.W.3d 651 (Tex. June 1, 2007) [06-0353].

After a contractor building a wastewater plant for the City was sued by a subcontractor, it brought third party claims against the City. The trial court denied the City's plea to the jurisdiction. The court of appeals held that the city's immunity from suit was waived by Local Government Code section 51.075 which empowered to City to "plead and be impleaded" and the city charter which empowered the City to "sue and be sued." The Supreme Court reversed the court of appeals judgment in light of *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006). The Supreme Court also remanded in light of the limited retroactive waiver of immunity for contract claims enacted in Local Government Code sections 271.151-.160 while the litigation was pending.

6. City of Texarkana v. City of New Boston, 228 S.W.3d 648 (Tex. June 1, 2007) [04-0797].

The City of New Boston and six other cities sued the City of Texarkana on tort and contract claims arising out of a series of water-supply agreements. The trial court refused to dismiss based on governmental immunity and, in an interlocutory appeal, the court of appeals reversed as to the tort claims but affirmed as to the contract claims. In this per curiam opinion, the Supreme Court denied the petitions but disapproved the court of appeals' holding, citing *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006). The Court also pointed out that the plaintiffs should be permitted to pursue their contract claims in the trial court under the retroactive, limited waiver for contract claims in Local Government Code sections 271.151-.160, which was adopted while the case was pending on appeal.

7. Dallas Fire Fighters Ass'n v. City of Dallas, 231 S.W.3d 388 (Tex. June 1, 2007) [04-0821].

The Dallas Fire Fighters Association sued the City of Dallas for breach of contract. The trial court dismissed the action on the City's plea to the jurisdiction and the court of appeals affirmed. Citing *Tooke v. City of Mexia*, 197 S.W.3d 325, 342 (Tex. 2006), the Supreme Court rejected the Association's claim that the City's immunity was waived by language in the City's charter that the City may "sue and be sued." The Supreme Court nonetheless reversed and remanded the case to the trial court, to allow the parties to address the effect of the limited, retroactive waiver in Local Government Code sections 271.151-.160 which was enacted while the case was pending on appeal.

8. Fort Worth Indep. Sch. Dist. v. Serv. Employment Redev., 243 S.W.3d 609 (Tex. August 24, 2007) [05-0427].

This case involves the "sue and be sued" clause applicable to school districts and the Legislature's retroactive, limited waiver of immunity from suit for claims for breach of certain contracts. Also at issue in this case was whether a vendor suing a school district on a contract had to exhaust administrative remedies and lacked standing to sue.

A vendor sued the Fort Worth Independent School District for breach of a contract to provide alternative education program services. The trial court dismissed the case for want of jurisdiction, but a divided court of appeals reversed, holding that the "sue and be sued" language in Texas Education Code section 11.151(a) waived the district's governmental immunity from suit.

The Supreme Court reversed and remanded the case to the trial court. Citing the analysis set out in in *Tooke v. City of Mexia*, 197 S.W.3d 325, 342 (Tex. 2006), and applied in *Satterfield & Pontikes Constr., Inc. v. Irving Indep. Sch. Dist.*, 197 S.W.3d 390, 391 (Tex. 2006), the Court concluded that section 11.151(a)'s sue-and-be-sued language was insufficiently clear and unambiguous to waive immunity from suit. The Court also held that the parties should have the opportunity to address the applicability of the Legislature's retroactive, but limited, waiver of immunity from suit for claims for breach of certain contracts with local governmental entities enacted while the appeal was pending. *See* TEX. LOCAL GOV'T CODE §§ 271.151-160.

The Court also concluded that a vendor's claim for breach of a contract to provide services was not a complaint of a violation of Texas school laws, and rejected the District's argument that the vendor was required to first seek relief from the Commissioner of Education. The Court rejected claims that the vendor's claims were really for a violation of Education Code § 37.008(g), which the vendor had no standing to assert, rather than for breach of the vendor's contract with the District.

9. Lamesa Indep. Sch. Dist. v. Booe, 235 S.W.3d 710 (Tex. September 28, 2007) [05-0959].

At issue in this case is whether the "sue and be sued" clause applicable to school districts waives governmental immunity from suit. David Booe sued Lamesa Independent School District under implied contract and quantum meruit theories over nonpayment for repairs Booe made to several roofs owned by the District. The District filed a plea to the jurisdiction on the basis of governmental immunity from suit, which the trial court denied. The court of appeals affirmed, and the District appealed. The Supreme Court reversed and remanded the case to the court of appeals. On the basis of its rulings in *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006) and *Satterfield & Pontikes Construction, Inc. v. Irving Independent School District*, 197 S.W.3d 390 (Tex. 2006), issued after the court of appeals' opinion in this case, the Court held that the "sue and be sued" language in section 11.151(a) of the Texas Education Code was not a valid waiver of governmental immunity from suit.

10. State v. Fid. & Deposit Co. of Md., 223 S.W.3d 309 (Tex. May 4, 2007) [04-0180].

When a contractor defaulted on a project to construct a research and technology center for the Texas Department of Transportation (TxDOT), its sureties (collectively "Fidelity") stepped in to complete the project. TxDOT filed suit against Fidelity for various cost overruns, and Fidelity counterclaimed. Fidelity also initiated the administrative process with TxDOT but abandoned that process. The trial court denied

TxDOT's plea to the jurisdiction. The Third Court of Appeals affirmed, holding that (1) TxDOT waived immunity against Fidelity's counterclaims by filing suit, and (2) the dispute-resolution process in the Texas Transportation Code applied only to contracts for construction of bridges and roads, not buildings.

In a per curiam opinion, the Supreme Court vacated the court of appeals' judgment and remanded the case to the trial court. As to the first issue, the Court held that its opinion in *Reata Construction Corp. v. City of Dallas*, 197 S.W.3d 371 (Tex. 2006), which was issued subsequent to the court of appeals' decision, controlled. TxDOT had waived immunity for Fidelity's claims, but only those that were germane to, connected with, and properly defensive to TxDOT's claims, and only in the amount of an offset. As to the second issue, the Court held that the administrative process authorized in the Texas Transportation Code did not apply to the contract at issue.

11. State v. Precision Solar Controls, Inc., 220 S.W.3d 494 (Tex. April 5, 2007) [06-0348].

The State sued Precision, alleging that traffic signal displays made by Precision were defective; Precision counterclaimed for damages for business disparagement. The trial court, on the State's claim of sovereign immunity, refused to dismiss the counterclaims, and the court of appeals affirmed. On the State's motion for rehearing of its petition for review, the Supreme Court withdrew its prior denial of the State's petition, vacated the court of appeals' judgment, and remanded the case to the trial court for further proceedings in light of the Court's new, substituted opinion in *Reata Construction Corp. v. City of Dallas*, 197 S.W.3d 371 (Tex. 2006).

12. Tomball Hosp. Auth. v. Harris County Hosp. Dist., 178 S.W.3d 244 (Tex. App.—Houston [14th Dist.] 2005), *pet. granted*, 50 Tex. Sup. Ct. J. 1014 (August 24, 2007) [05-0986].

Harris County Hospital District allegedly diverted certain District residents eligible for free health care from the District to Tomball Hospital Authority for treatment. The Authority requested reimbursement from the District under the provisions of the Indigent Health Care and Treatment Act. After the District refused reimbursement, the Authority sued the District for violations of the Act and the Texas Constitution. The District filed a plea to the jurisdiction arguing that its governmental immunity barred suit. The trial court granted the plea and dismissed the suit. The court of appeals reversed and remanded holding that the "sue and be sued" clause in section 281.056 of the Health and Safety Code waived immunity from suit, and that neither the county court nor the Health Department had exclusive jurisdiction over the Authority's claims. The question before the Supreme Court is whether, under *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006), section 281.056 and other provisions of the Health and Safety Code authorize and clearly and unambiguously waive governmental immunity for claims for reimbursement under the Indigent Health Care Act. The Court granted the District's petition for review and heard oral argument on December 4, 2007.

13. Trend Offset Printing Servs., Inc. v. Collin County Cmty. Coll. Dist., S.W.3d , 51 Tex. Sup. Ct. J. 662 (Tex. March 28, 2008) [06-0525].

At issue in this case is whether the Collin County Community College District waived its immunity from suit. After the District refused to pay Trend Offset Printing for the first set of course schedules delivered under the parties' written contract, Trend sued for the amount due, lost profits for anticipatory breach, interest, costs, and attorneys' fees. The District successfully moved to transfer venue to Collin County, and then, on a plea to the jurisdiction based on governmental immunity, successfully sought dismissal. The court of appeals affirmed. The Supreme Court agreed with the court of appeals that the "sue and be sued" clause in Texas Education Code section 11.151(a) did not waive the District's immunity from suit. The Court, however, reversed the dismissal and remanded the case to the trial court, concluding that the litigants should have the opportunity in the trial court to address the effect of the interim enactment of Local Government Code sections 271.151-.160, a limited retroactive waiver of immunity. On the venue issue, the Court explained that such venue rulings are unreviewable under statute.

XVIII. INSURANCE

A. Class Action

1. Farmers Group, Inc. v. Lubin, 222 S.W.3d 417 (Tex. April 27, 2007) [05-0169].

The issue in this case is whether section 541.251(a) of the Texas Insurance Code authorizes the Attorney General to bring a *parens patriae* class action law suit on behalf of Texas citizens.

Initially, the State commenced an investigation of Farmers' insurance practices. The Attorney General then sued Farmers alleging deceptive, misleading, and discriminatory homeowners insurance practices in violation of the Texas Insurance Code and the Deceptive Trade Practices Act. Also, the Commissioner of Insurance began an administrative proceeding against Farmers and issued an emergency cease and desist order, ordering Farmers to change its rating practices within three months. Originally, the suit was not brought as a class action but "in the name of the State of Texas and on behalf of the Texas Commissioner of Insurance." Eventually, the State, the Attorney General, the Texas Department Insurance, and Commissioner of Insurance settled with Farmers for $117 million. Under the settlement agreement, the Attorney General amended his pleadings to transform the suit into a class action settlement including all claims that had been or could be made by individual policyholders in Texas. The Attorney General did not designate representative class members, however, and asserted he had statutory authority to bring class actions under the Insurance Code. When they learned of the terms of the settlement agreement, some policyholders filed separate pleas of intervention to object to the settlement and contest class certification.

The trial court certified the class without a class representative. When the intervening policyholders appealed, the court of appeals reversed and remanded, rejecting the State's arguments that the Insurance Code authorized the action. The court of appeals held that the Attorney General is required to comply with private class action prerequisites including typicality and adequacy of representation, and that the Attorney General did not meet these requirements.

The Supreme Court agreed that a rigorous analysis of class certification requirements must take place. The Court, however, held that those requirements cannot be applied in a way that renders attorney general class actions impossible, a result that would frustrate the Legislature's intent. As a result, the Court held that the standard class action requirements must be applied generally to the *claims* asserted by the Attorney General, not the Attorney General himself.

Justice Hecht filed an opinion concurring in part and dissenting in part, arguing that by the plain statutory text, the four traditional class action requirements do not apply to a class action brought by the Attorney General.

B. Duty to Defend

1. Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co., *certified question accepted*, 50 Tex. Sup. Ct. J. 1015 (August 24, 2007) [07-0639].

The certified questions in this case are: (1) When not specified by the relevant policy, what is the proper rule under Texas law for determining the time at which property damage occurs for purposes of an occurrence-based commercial general liability insurance policy? (2) Under the rule identified in the answer to the first question, have the pleadings in lawsuits against an insured alleged that property damage occurred within the policy period of an occurrence-based commercial general liability insurance policy, such that the insurer's duty to defend and indemnify the insured is triggered, when the pleadings allege that actual damage was continuing and progressing during the policy period, but remained undiscoverable and not readily apparent for purposes of the discovery rule until after the policy period ended because the internal damage was hidden from view by an undamaged exterior surface?

The Supreme Court accepted the certified questions from the U.S. Court of Appeals for the Fifth Circuit and heard oral argument on February 7, 2008.

2. Grimes Constr., Inc. v. Great Am. Lloyds Ins. Co., S.W.3d , 51 Tex. Sup. Ct. J. 545 (Tex. February 29, 2008) [06-0332].

Great American Lloyds Insurance Company insured Grimes Construction pursuant to a commercial general liability (CGL) policy. When homeowners sued Grimes for physical and structural damage to their home, Grimes requested that Great American defend the claims. Great American refused and filed a declaratory judgment action that it did not have a duty to defend or indemnify Grimes. Grimes counterclaimed for a declaration of Great American's obligations. Both parties moved for summary judgment. The trial court granted summary judgment for Great American and the court of appeals affirmed.

The issues presented in the case were resolved by *Lamar Homes, Inc. v. Mid-Continent Casualty Co.*, 239 S.W.2d 236 (Tex. 2007), in which the Court held that allegations of unintended construction defects may be sufficient to trigger the duty to defend under a CGL policy. Thus, in a per curiam opinion, the Supreme Court reversed and remanded the case to the trial court for further proceedings consistent with its opinion in *Lamar Homes*.

3. Lamar Homes, Inc. v. Mid-Continent Cas. Co., 239 S.W.3d 236 (Tex. August 31, 2007) [05-0832].

The U.S Court of Appeals for the Fifth Circuit certified three questions to the Supreme Court concerning whether an insurer under a commercial general liability (CGL) policy has a duty to defend its insured, a homebuilder, against a homebuyer's claims of defective construction. The Fifth Circuit asked:

> 1. When a homebuyer sues his general contractor for construction defects and alleges only damage to or loss of use of the home itself, do such allegations allege an "accident" or "occurrence" sufficient to trigger the duty to defend or indemnify under a CGL policy?
> 2. When a homebuyer sues his general contractor for construction defects and alleges only damage to or loss of use of the home itself, do such allegations allege "property damage" sufficient to trigger the duty to defend or indemnify under a CGL policy?
> 3. If the answers to certified questions 1 and 2 are answered in the affirmative, does Article 21.55 of the Texas Insurance Code apply to a CGL insurer's breach of the duty to defend?

The Supreme Court answered the first two questions in the affirmative, concluding that allegations of unintended construction defects may constitute an "accident" or "occurrence" under a CGL policy and that allegations of damage to, or loss of use of, the home itself may also constitute "property damage" sufficient to trigger the duty to defend under a CGL policy. The Court also answered yes to the final question, concluding that the prompt-payment statute, sections 542.051-.061 of the Texas Insurance Code, may be applied when an insurer wrongfully refuses to promptly pay a defense benefit owed to the insured.

In a dissenting opinion, Justice Brister argued that the Fifth Circuit's second question should be answered no because a homebuilder's defective work that damages only the home is not property damage but rather an economic loss that CGL insurance does not cover. The dissent further claimed that the Court's interpretation of the CGL failed to follow the majority rule.

4. Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co., 2006 WL 1892669 (Tex. App.—Houston [14th Dist] 2006), *pet. granted*, 50 Tex. Sup. Ct. J. 1073 (August 31, 2007) [06-0867].

Great American Lloyds Insurance Company and Mid-Continent Casualty issued separate commercial general liability (CGL) policies to Pine Oak Builders for different periods between April 5, 1993 and April 5, 2003. Between 2002 and 2003, five separate homeowners sued Pine Oak for claims related to faulty construction. After Great American and Mid-Continent refused Pine Oak's demand for defense in the five lawsuits, Pine Oak sued to enforce the CGL policies. The insurers filed a motion for summary judgment claiming that they did not have a duty to defend or indemnify Pine Oak in any of the lawsuits because the CGL policies did not cover claims for defective construction and because Pine Oak had not established the date of the

"occurrence" in each lawsuit that would trigger coverage. The trial court granted the insurers' motion for summary judgment. The court of appeals affirmed in part and reversed in part, holding that the insurers separately had duties to defend in certain lawsuits, but not in others.

Several of the issues presented in the case were resolved by *Lamar Homes, Inc. v. Mid-Continent Casualty Co.*, ___ S.W.3d ___, 50 Tex. Sup. Ct. J. 1162 (Tex. 2007). However, this case presents the additional issues of how a policy's trigger date initializing the duty to defend should be determined, and whether extrinsic evidence may be introduced to determine the insurer's duty to defend.

The Supreme Court granted the petition for review and heard oral argument on February 7, 2008.

5. Zurich Am. Ins. Co. v. Nokia, Inc., 202 S.W.3d 384 (Tex. App.—Dallas 2006), *pet. granted*, 51 Tex. Sup. Ct. J. 126 (November 30, 2007) [06-1030], *consolidated for oral argument with* Fed. Ins. Co. v. Samsung Elecs., 202 S.W.3d 372 (Tex. App.—Dallas 2006), *pet. granted*, 51Tex. Sup. Ct. J. 126 (November 30, 2007) [06-1040], *and* Trinity Universal Ins. Co. v. Cellular One Group, 2007 WL 49667 (Tex. App.—Dallas 2007), *pet. granted*, 51 Tex. Sup. Ct. J. 126 (November 30, 2007) [07-0140].

At issue in this case is whether insurers—Federal, Zurich, and Trinity Universal—have a duty to defend cell phone manufacturers when the underlying pleadings allege "no individual issues of injury" but simultaneously claim cell injury from radio frequency radiation exposure.

Samsung was sued in several class action suits for alleged biological injury to human cells due to cell phone usage without headsets. Samsung tendered the defense of the complaints to Federal, its commercial general liability and excess umbrella liability insurance policy provider. Federal defended Samsung in one class action under a reservation of rights but declined to defend Samsung in another because the plaintiffs in that action expressly disclaimed damages for personal injury resulting from the use of the cell phones. Federal sought a declaratory judgment that its policies did not obligate it to defend or indemnify Samsung in any of the class actions and sought reimbursement of the defense costs it had already paid in defending Samsung. Federal and Samsung filed cross motions for summary judgment on Federal's duty to defend and indemnify Samsung. Without stating the grounds, the trial court granted Federal's motion for summary judgment in part, holding Federal had no duty to defend or indemnify Samsung in the class actions but Federal was not entitled to reimbursement of past defense costs. Samsung appealed and the court of appeals reversed the trial court, holding a duty to defend did exist.

The Supreme Court granted Federal's petition for review. The petitions in 06-1030; *Zurich America Insurance Co. v. Nokia, Inc.* and 07-0140; *Trinity Universal Ins. Co. v. Cellular One Group*, involve similar issues and were also granted and consolidated for oral argument. The Court heard oral arguments on February 6, 2008.

C. Duty to Notify

1. Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Crocker, 246 S.W.3d 603 (Tex. February 15, 2008) [06-0868].

This case came to the Supreme Court on certified questions from the Fifth Circuit, which asked whether Texas law requires an insurer to inform an additional insured about the availability of coverage and whether actual knowledge of service of process against an additional insured fulfills the notice-of-suit provisions in the policy. National Union Fire Insurance Company insured Emeritus Corporation and extended coverage to the employees of Emeritus as additional, or omnibus, insureds. Crocker was injured by an Emeritus employee, and she sued both Emeritus and the employee. National Union successfully defended Emeritus but did not defend the employee, who failed to appear for trial. The trial court entered judgment against the employee for $1 million. Crocker then sued National Union to collect on the insurance policy. National Union argued that the employee had not invoked the policy coverage because he had not provided notice to National Union of the pending litigation and that National Union's actual knowledge of a suit pending against the additional insured did not satisfy the notice-of-suit provision. The Supreme Court held that National Union did not owe a duty

to inform the additional insured of coverage and that actual knowledge of service of process on an additional insured does not satisfy a notice-of-suit provision.

D. Fiduciary Duty

1. Nat'l Plan Adm'rs, Inc. v. Nat'l Health Ins. Co., 235 S.W.3d 695 (Tex. September 28, 2007) [05-0006].

At issue in this case is whether a third-party insurance administrator owed a general fiduciary duty to an insurer. National Plan Administrators (NPA) contracted with National Health Insurance Company to perform third-party administrator duties with regard to cancer insurance policies issued by National Health. When National Health decided to exit the cancer insurance market, NPA "rolled" or transferred most of the policies to another carrier. National Health sued NPA for violation of a general fiduciary duty. The jury found NPA did not comply with its general fiduciary duty and that National Health's damages were $744,937. The court of appeals affirmed.

The Supreme Court held that NPA did not owe National Health a general fiduciary duty and reversed the court of appeals' judgment. The Court first examined the Insurance Code and determined that it did not impose a statutory general fiduciary duty on third-party insurance administrators. The Court then considered the contract between NPA and National Health noting that the parameters of an agency relationship are to be established by an agreement between the parties. The Court also noted that this was an arms length business transaction, the parties were represented by counsel, and they were aware of the practice of "rolling" policies. The agreement set out the specific duties NPA was to perform. The agreement also stated that NPA would act as an independent contractor and provide services to third parties. Because the contract allowed NPA to take actions that would have been in violation of a general fiduciary duty to National Health, the Court declined to impose such a duty on NPA. The Court reversed the court of appeals' judgment and rendered judgment that National Health take nothing.

E. Policies/Coverage

1. Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc., S.W.3d , 51 Tex. Sup. Ct. J. 460 (Tex. February 15, 2008) [03-0647].

At issue in this case on rehearing is (1) whether a commercial umbrella insurance policy that was purchased to secure the insured's indemnity obligation in a service contract with a third party also provided direct liability coverage for the third party, (2) whether an insurer was bound to pay the amount of an underlying settlement between an insured and a plaintiff, and (3) whether article 21.55 of the Texas Insurance Code, the "Prompt Payment of Claims" statute, authorized the imposition of penalties and attorney's fees for the insurer's failure to pay the claim timely. ATOFINA Petrochemicals, Inc. contracted with Triple S Industrial Corporation, and included in their service contract a limited indemnity provision and a requirement that Triple S carry certain liability insurance. Matthew Todd Jones, a Triple S employee working at the ATOFINA facility pursuant to the contract between Triple S and ATOFINA, drowned after he fell through the corroded roof of a storage tank filled with fuel oil.

Jones's survivors sued Triple S and ATOFINA for wrongful death. Triple S's primary insurer tendered its $1 million policy limits. ATOFINA then demanded coverage from Evanston, Triple S's excess insurer, as an additional insured. Evanston denied the claim, and ATOFINA brought Evanston into the case as a third-party defendant for a declaration of coverage. While ATOFINA and Evanston's motions for summary judgment were pending, the Jones case settled for $6.75 million. ATOFINA sought to recover from Evanston the $5.75 million not covered by the primary insurer. The trial court granted summary judgment in favor of Evanston. The court of appeals reversed the judgment, holding that the Evanston policy covered ATOFINA, and remanded the case to the trial court for determination of statutory penalties and attorney's fees. Evanston appealed. The Supreme Court reversed in part and affirmed in part the court of appeals' judgment.

The Supreme Court held that ATOFINA was an insured under the Evanston insurance policy and entitled to coverage for the Jones litigation

settlement. The Court determined that the Evanston policy provided coverage for liabilities arising from the additional insured's sole negligence, and that the relationship between the insurance policy and the service contract's indemnity obligations did not preclude such coverage. Further, Evanston's denial of coverage barred it from challenging the reasonableness of ATOFINA's settlement. Finally, the Court concluded that because ATOFINA's claim against Evanston was a third-party claim, it was not entitled to recover damages and attorney's fees under the prompt payment statute.

Justice Hecht authored an opinion concurring in part and dissenting in part, in which Justice Johnson joined. Justice Hecht joined all but the part of the Court's opinion that barred Evanston from challenging the reasonabless of the settlement amount. Justice Hecht concluded that Evanston had presented enough evidence to warrant remanding the issue of reasonableness to the trial court.

2. Fairfield Ins. Co. v. Stephens Martin Paving, L.P., 246 S.W.3d 653 (Tex. February 15, 2008) [04-0728].

The United States Court of Appeals for the Fifth Circuit certified the following question to the Supreme Court: Does Texas public policy prohibit a liability insurance provider from indemnifying an award for punitive damages imposed on its insured because of gross negligence? In the underlying case, Fairfield Insurance Company sued Stephens Martin Paving for a declaratory judgment that it owed no duty to defend or indemnify a claim for exemplary damages under a workers' compensation and employer's liability insurance policy held by Stephens Martin Paving. The Court held that Texas public policy did not prohibit coverage of exemplary damages in the case presented and described some considerations for analyzing public policy in other cases.

The Court looked to the statutory provisions regarding insurance in the workers' compensation scheme to determine whether the Legislature had expressed a policy decision. The Court noted that under workers' compensation law, the Texas Department of Insurance is given the authority to promulgate insurance policies that are to be used by every employer seeking workers' compensation coverage. Those policies, including the ones in the case at issue, contain expressed coverage for exemplary damages arising from gross negligence. As such, the Court held that public policy, expressed through legislative enactments, does not prohibit coverage of exemplary damages in the workers' compensation context. In addition, the Court noted that in the absence of an expressed legislative policy, courts faced with the question of insurance of exemplary damages should balance the interests of freedom of contract against the purpose of exemplary damages, which is to punish a wrongdoer.

Justice Hecht, joined by Justices Brister, Medina, and Willett, joined the majority opinion, but concurred separately to offer further guidance on the public policy interests generally regarding insurance of exemplary damages and the various factors that might weigh for or against such coverage.

Justice Johnson joined part of the majority opinion, but concurred to indicate he did not join the portion of the majority's opinion that discussed factors beyond the workers' compensation context.

3. Financial Indus. Corp. v. XL Specialty Ins. Co., *certified question accepted*, 51 Tex. Sup. Ct. J. 292 (January 11, 2008) [07-1059].

The Supreme Court accepted this certified question from the United States Court of Appeals for the Fifth Circuit: Must an insurer show prejudice to deny payment on a claims-made policy, when the denial is based upon the insured's breach of the policy's prompt notice provision, but the notice is nevertheless given within the policy's coverage period? A party filed suit against Financial Industries Corporation (FIC), but FIC did not notify its insurer, XL, of the suit for seven months. XL denied the claim on the basis that FIC failed to comply with the prompt-notice provision in the policy, and then brought a declaratory judgment action seeking a declaration that it did not owe coverage. The parties agree that the notification was not within the policy's prompt-notice provision but also agree that XL was not prejudiced. The Supreme Court accepted this certified question and heard oral argument on April 1, 2008.

4. PAJ, Inc. v. The Hanover Ins. Co., 243 S.W.3d 630 (Tex. January 11, 2008) [05-0849].

At issue in this case is whether an insured's failure to timely notify its insurer of a claim defeats coverage under the policy if the insurer is not prejudiced by the delay. In 1998, PAJ, Inc. was sued by a competing jewelry company for infringement of several jewelry designs. Apparently unaware that its Commercial General Liability policy covered copyright disputes, PAJ failed to notify its insurer, the Hanover Insurance Company, for six months. The policy contained a prompt-notice provision that required PAJ to notify Hanover of an occurrence or an offense that may result in a claim "as soon as practicable." PAJ sued Hanover, seeking a declaration that Hanover was required to defend and indemnify PAJ in the copyright suit. The parties stipulated that PAJ failed to provide such notice, but that Hanover was not prejudiced by the lack of notice. On cross-motions for summary judgment on the notice issue, the trial court held in Hanover's favor, ruling that it did not have to demonstrate prejudice to avoid coverage. The court of appeals affirmed. PAJ appealed.

The Supreme Court reversed, holding that Hanover was required to demonstrate prejudice in order to avoid coverage under the policy. Relying on *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691, 692 (Tex. 1994) and fundamental principles of contract law, the Court reasoned that only material breaches of contract relieve the non-breaching party from performance. In this instance, materiality required a demonstration of prejudice to the insurer. Because Hanover had stipulated that it suffered no prejudice, it was thus required to defend and indemnify PAJ under the policy.

Justice Willet, joined by Justices Hecht, Wainwright, and Johnson, dissented. The dissent concluded that the policy language created a condition precedent rather than a covenant, and thus the insurer's performance was excused upon non-performance of the notice condition by PAJ. The dissent further reasoned that a prejudice requirement should not be imputed where it neither appears in the insurance policy nor is provided by law.

5. Prodigy Commc'ns Corp. v. Agric. Excess & Surplus Ins. Co., 195 S.W.3d 764 (Tex. App.—Dallas 2006), *pet. granted*, 51 Tex. Sup. Ct. J. 292 (January 11, 2008) [06-0598].

At issue in this case is whether an insurer must show that it was prejudiced by an insured's failure to provide timely notice of a claim before denying coverage on a claims-made policy. Prodigy obtained liability coverage for its directors and officers from AESIC. AESIC issued a claims-made policy with a notice provision that required Prodigy to provide notice of claims made against it "as soon as practicable" but no later than ninety days after the policy period or discovery period. Prodigy was sued for alleged violations of federal securities laws, but the lawsuit proceeded for nearly a year before Prodigy provided AESIC notice of the suit, albeit within ninety days after the discovery period ended. When AESIC refused coverage based on untimely notice, Prodigy sued for breach of contract. The trial court granted summary judgment in favor of AESIC. The court of appeals affirmed, holding that because Prodigy failed to give timely notice of the claim, AESIC properly relied on the notice provision to deny the claim. Prodigy argues that notice was timely because it was given within the ninety-day "safe harbor" provision and that even if notice was untimely, AESIC cannot deny coverage without a showing of prejudice. The Supreme Court granted Prodigy's petition for review and heard oral argument on April 1, 2008.

6. State Farm Lloyds v. Johnson, 204 S.W.3d 897 (Tex. App.—Dallas 2006), *pet. granted*, 51 Tex. Sup. Ct. J. 2 (September 28, 2007) [06-1071].

At issue in this case is whether an insurance policy's appraisal clause giving appraisers the power to determine the "amount of loss" includes the power to consider causation, coverage, and liability. State Farm insured Johnson's home under a policy that required appraisers to resolve disputes over "the amount of loss." After a hail storm damaged Johnson's home, State Farm's inspector determined that the storm damaged only a small portion of the roof and that the cost to repair the small portion was below the policy deductible. Johnson's expert determined that the storm damaged a larger portion of the roof and that the repair costs exceeded the policy

deductible. After State Farm denied Johnson's request for an appraisal, she filed a declaratory judgment action seeking to compel it. State Farm filed a motion for summary judgment arguing that the appraisal clause was not triggered because determining the extent of damage involves an issue of causation, and not "amount of loss." The trial court granted summary judgment in favor of State Farm, but the court of appeals reversed, holding that the dispute over the extent of the hail damage fell under the contract's "amount of loss" provision. The Supreme Court granted State Farm's petition for review and heard oral argument on January 15, 2008.

7. Tanner v. Nationwide Mut. Fire Ins. Co., 232 S.W.3d 330 (Tex. App.—Eastland 2007), *pet. granted*, 51 Tex. Sup. Ct. J. 562 (March 28, 2008) [07-0760].

At issue in this case is whether there was sufficient evidence to support a jury's conclusion that an insured did not engage in willful and intentional conduct requiring coverage under his insurance policy. Richard Gibbons fled from a Texas State Trooper after a routine traffic stop on Interstate 35 south of San Marcos. San Marcos police officers chased him throughout the city while he traveled at speeds ranging in excess of eighty to one-hundred miles per hour. Gibbons committed numerous traffic violations during the chase and made several attempts to maneuver around slower moving vehicles and police officers seeking to block his access. At one point, Gibbons locked his brakes, but struck the Tanners' vehicle on a rural road. All four of the Tanners were injured as a result of the collision. Gibbons fled the accident scene but was apprehended after a police officer shot out his tires. After the Tanners filed suit against Gibbons, his liability carrier, Nationwide Mutual Fire Insurance Company, filed a declaratory judgment action against him and named the Tanners as interested parties. Nationwide argued that Gibbons had no coverage for the Tanners' claims because of the intentional-acts exclusion in his insurance policy, which denied coverage for "[p]roperty damage or bodily injury caused intentionally by or at the direction of an insured, including willful acts the result of which the insured knows or ought to know will follow from the insured's conduct." The jury returned a verdict in favor of the Tanners, finding that Gibbons did not intentionally cause their damages. However, the trial court granted Nationwide's motion to disregard the jury finding, and entered a declaratory judgment that Nationwide owed Gibbons no duty to defend or indemnify. The court of appeals affirmed the trial court's judgment. The Supreme Court granted the Tanners' petition for review, but has not yet set the date for oral argument.

8. United States Fid. & Guar. Co. v. Goudeau, 2006 WL 2506958 (Tex. App.—Houston [1st Dist.] 2006), *pet. granted*, 51 Tex. Sup. Ct. J. 77 (November 2, 2007) [06-0987].

At issue in this case is whether Louis Goudeau was occupying an automobile in a manner that would allow him Uninsured/Underinsured Motorist Insurance (UM/UIM) recovery under his employer's insurance policy. While driving a truck owned by his employer, Advantage BMW, Goudeau stopped to render assistance at the scene of an automobile accident. Goudeau began to walk between the truck and a Trans-Am, when a Ford Explorer ran into the truck's driver-side door, collided with the Trans-Am, and injured Goudeau by pinning him between the truck, the Trans-Am, and the retaining wall. Advantage BMW's UM/UIM coverage, provided by U.S. Fidelity & Guaranty Co. (USF&G), allowed recovery for a qualified "insured." The policy defined an "insured" in part as a "person occupying a covered auto," and further defined "occupying" as "in, upon, getting in, on, out or off." Goudeau sued USF&G for UM/UIM benefits. USF&G, also the worker's compensation carrier for Advantage BMW, intervened in the suit, claiming subrogation as to any benefits Goudeau recovered. The trial court found that Goudeau was not occupying the covered automobile and granted summary judgment for USF&G, but the court of appeals reversed. The Supreme Court granted USF&G's petition for review and heard oral argument on December 6, 2007.

F. Regulation of Insurance Rates

1. Mid-Century Ins. Co. v. Ademaj, 243 S.W.3d 618 (Tex. November 30, 2007) [05-0016].

At issue in this case was the manner in which Mid-Century Insurance Company could lawfully recoup a legislatively imposed fee from insureds. The commissioner of the Texas Department of Insurance authorized automobile carriers to recoup the fee from insureds outside of the Texas Insurance Code's Article 5.101 rate-filing scheme, and Mid-Century did so. Ademaj sued Mid-Century, claiming that Mid-Century illegally collected the fee because the fee was not included in Mid-Century's rate-filing. The trial court held in Ademaj's favor, and the court of appeals affirmed. The Supreme Court reversed and rendered judgment for Mid-Century.

The Court held that the fee did not need to be included in Mid-Century's rate-filing. The Article 5.101 rate-making process produces insurance "premiums," and in the process gives the commissioner the discretion to determine whether payments should be considered part of the Article 5.101 rate, or instead should be considered another payment under Texas Insurance Code Article 21.35B. The Court concluded that Article 21.35B authorized the collection of the payment and that the commissioner made a reasonable determination that the Authority fee should be charged directly, and not as part of the Article 5.101 premium. Because the commissioner's interpretation was reasonable and accorded with the terms of the statute, the Court rendered judgment that Ademaj take nothing.

Justice O'Neill, joined by Justice Medina, concurred. The concurrence construed the statutes to allow charges only if included in a rate or authorized by the Legislature or Commissioner of Insurance. The concurrence disagreed with the majority's conclusion that Article 21.35B authorized charges in addition to the Article 5.101 rate-filing product, but concluded that Mid-Century could charge the fee without including it in the Article 5.101 rate because of the commissioner's explicit authorization.

G. Reimbursement for Claims Paid but Not Covered

1. Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc., 246 S.W.3d 42 (Tex. February 1, 2008) [02-0730].

The Supreme Court granted Frank's Casing Crew & Rental Tools, Inc.'s motion for rehearing, withdrew its original opinion dated May 27, 2005, and substituted a new one in its place. At issue in this case is whether an excess coverage insurer was entitled to reimbursement from the insured for settlement payments when the insured consented to the settlement but not the asserted reimbursement right. Excess Underwriters provided excess liability coverage to Frank's Casing Crew & Rental Tools, Inc., but Excess had no duty to defend under the policy. After Frank's Casing notified Excess of claims asserted by ARCO arising from the collapse of an oil rig, Excess contested coverage of some of the claims. Shortly after the trial began, Frank's Casing approached ARCO and suggested that it make a settlement demand within Excess's policy limits. After ARCO did so and Frank's Casing recommended that Excess should accept it, Excess agreed to fund the settlement but indicated that it would look to Frank's Casing for reimbursement of any amounts that were not covered under the policy. Excess settled the case later that same day, and then filed the present suit in which it sought a declaratory judgment that the claims were not covered and reimbursement of the settlement. The trial court, relying on the recent decision in *Texas Ass'n of Counties Government Risk Management Pool v. Matagorda County*, 52 S.W.3d 128 (Tex. 2000), ultimately determined that Excess was not entitled to reimbursement under that decision because Frank's Casing had not unequivocally agreed to reimburse Excess, and it rendered a take-nothing judgment in Frank's favor. The court of appeals affirmed.

On rehearing, the Court held that *Matagorda County* governed the case, and Excess did not establish either an implied-in-law or an implied-in-fact agreement by Frank's to reimburse the insurer for the settlement. The Court also held that Excess did not establish Louisiana law differed from Texas law on this issue. Justice Hecht, joined by Justice Green, dissented and

would have held that Excess established an equitable implied-in-law right to restitution. Justice Wainwright also dissented, reasoning that Excess established an implied-in-fact reimbursement right.

H. Subrogation

1. Fortis Benefits v. Cantu, 234 S.W.3d 642 (Tex. June 29, 2007) [05-0791].

The primary issue in this case is whether the equitable "made whole" doctrine—the rule that an insurer is not entitled to subrogation of medical benefits unless the insured has been "made whole"—trumps an insurer's contract-based subrogation right.

After Vanessa Cantu sued multiple parties for severe injuries she sustained in an auto accident, her medical insurer, Fortis Benefits, intervened, claiming a subrogation right under the policy. The various defendants settled with Cantu, and Fortis looked only to Cantu for its recovery. A divided court of appeals upheld a trial court finding that because Cantu's medical expenses exceeded the settlement amount plus the benefits Fortis had paid, Fortis's subrogation claim was barred by the equitable "made whole" doctrine.

The Supreme Court held that the "made whole" doctrine must yield to Fortis's right to contractual subrogation under the plain terms of the insurance policy. Fortis was therefore entitled to recover from the settlement the money it had paid pursuant to the insurance contract. The Court also held that the trial court did not err in enforcing the parties' Rule 11 agreement to prevent Fortis from recovering directly against defendant Ford Motor Company.

2. Frymire Eng'g Co., Inc. v. Jomar Int'l Ltd., 194 S.W.3d 713 (Tex. App.—Dallas 2006), *pet. granted*, 50 Tex. Sup. Ct. J. 1015 (August 24, 2007) [06-0755].

At issue in this case is whether equitable subrogation applies when a subcontractor's insurer paid for damages resulting from a design defect in equipment correctly installed by the subcontractor when the subcontractor was contractually liable for damages. Frymire Engineering Company, as a subcontractor of Price Woods, Inc., installed a valve manufactured by Jomar to repair a water line at the Renaissance Dallas Hotel. Although Frymire installed the valve correctly, the valve was defectively designed and it ruptured, causing extensive water damage at the Renaissance. Frymire was required to indemnify Renaissance for any damage under its contract with Price Woods, and Frymire's insurer, Liberty Mutual Insurance Co., compensated Renaissance for the damage. Renaissance released Frymire from all claims relating to the water damage. Frymire and Liberty Mutual brought suit against Jomar, seeking damages in the amount it compensated Renaissance and alleging negligence, products liability, and breach of warranty. The trial court granted summary judgment for Jomar and the court of appeals affirmed, reasoning that Frymire lacked standing to sue and the doctrine of equitable subrogation did not apply. The Supreme Court granted Frymire's petition for review and heard oral argument on December 4, 2007.

3. Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co., 236 S.W.3d 765 (Tex. October 12, 2007) [05-0261].

On certified question from the United States Court of Appeals for the Fifth Circuit, the issue in this case was whether a primary liability insurer that also provides the applicable excess insurance policy is entitled to reimbursement from another primary insurer for payment of more than its proportionate share of a settlement. Mid-Continent, a primary insurer, and Liberty Mutual, a primary and excess insurer, admitted coverage in a suit against their common insured. Liberty Mutual settled for $1.5 million and demanded half from Mid-Continent. However, Mid-Continent agreed to pay only $150,000 which was half of Mid-Continent's calculated settlement value of the case. Liberty Mutual sued Mid-Continent to recover Mid-Continent's pro rata share of the settlement, and the federal district court concluded that Liberty Mutual was entitled to recover $550,000 from Mid-Continent through subrogation.

The Supreme Court concluded that Liberty Mutual had no right of reimbursement via contribution or subrogation. The Court held that a claim for contribution was precluded by the presence of "other insurance" or "pro rata" clauses in the policies: each co-insurer had not contractually agreed to pay each other's pro rata

share. The Court also held that a claim for contractual subrogation was precluded because after being fully indemnified, the insured no longer had any contractual rights against Mid-Continent that Liberty Mutual could assert. The Court also held that Liberty Mutual was not subrogated to the right of the insured under *Stowers* because the claimants did not make a settlement offer within Mid-Continent's policy limits. Finally, the Court concluded that this case did not present a situation where equity required it to prevent a primary insurer from taking advantage of an excess insurer because in paying $350,000 more than its $1 million policy limits, Liberty Mutual seemed to have been motivated by concern for its excess insurance policy.

Justice Willett filed a concurring opinion asserting it was unnecessary to recognize a cause of action where the insured was fully indemnified and the primary insurer complied with its contractual obligations.

I. Underinsured/Uninsured Motorist Policies

1. Nationwide Ins. Co. v. Elchehimi, S.W.3d , 51 Tex. Sup. Ct. J. 626 (Tex. March 28, 2008) [06-0106].

At issue in this case is whether there was actual physical contact between the plaintiff's vehicle and an unidentified motor vehicle, such that the plaintiff's uninsured motorist policy coverage was triggered. Mohamad Elchehimi and his family were injured while driving down a highway when his station wagon collided with a drive axle and attached tandem wheels that had separated from an eighteen-wheel semi-trailer truck. Elchehimi sought insurance coverage for the accident under his policy containing uninsured motorist coverage, purchased from Nationwide Insurance Company. Nationwide denied Elchehimi's claim because the impact between Elchehimi's vehicle and the axle-wheel assembly was not "actual physical contact" with an unknown "motor vehicle" as required by the terms of the policy and the Texas Insurance Code. Elchehimi sued Nationwide for breach of contract and breach of the duties of good faith and fair dealing. The trial court granted summary judgment in favor of Nationwide on the grounds the no "actual physical contact" had occurred, as required by the Insurance Code. A divided court of appeals reversed.

The Supreme Court reversed the court of appeals' judgment and rendered judgment for Nationwide. The Court held that the requirement of "actual physical contact" with a "motor vehicle" was not met by the impact between Elchehimi's vehicle and the axle-wheel assembly. First, the axle-wheel assembly did not on its own meet the definition of a "motor vehicle." The Court also noted that previous decisions had found that contact with cargo or other items separating from unidentified vehicles did not meet the requirement of "actual physical contact." The Court held that contact with only a piece of a vehicle was akin to contact with cargo and, therefore, did not meet the statutory requirement. The Court declined to create an exception not present in the statutory language.

Justice O'Neill, joined by Justice Medina, dissented. The dissent would have adopted the "integral parts" test, as the underlying court of appeals did. The dissent noted the purpose of the "actual physical contact" requirement was to prevent fraudulent claims of accidents involving unidentified vehicles. The "integral parts" test included a temporal continuity element, which would address the same concerns regarding fraudulent claims. Thus, where contact with a piece of an unidentified vehicle could be shown, the anti-fraud purpose would be met and the remedial purpose behind uninsured motorist coverage would be upheld.

XIX. JURISDICTION

A. Condemnation Proceedings

1. PR Invs. & Specialty Retailers, Inc. v. State, S.W.3d , 51 Tex. Sup. Ct. J. 484 (Tex. February 15, 2008) [04-0431].

At issue in this case is whether a trial court retained jurisdiction over an appeal from a special commissioners' hearing in a condemnation proceeding for road expansion when a condemning authority presented one proposed road design to the special commissioners and a different road design to the trial court. PR Investments and Specialty Retailers (collectively PRI) both own property abutting a road expansion project in Houston. The Texas Department of Transportation (TxDOT) proposed two designs

for expanding the road into a six-lane, controlled-access highway—the Corder Plan and the Sparks Plan. At the time of the special commissioners' hearing, TxDOT anticipated using the Sparks Plan, and the special commissioners assessed $166,000 in damages. PRI and TxDOT both appealed to the trial court, pursuant to Texas Property Code section 21.018, for de novo review. Shortly before trial, TxDOT decided to abandon the Sparks Plan in favor of the Corder Plan. The trial court dismissed the case for lack of jurisdiction, and the court of appeals reversed and remanded for further proceedings.

The Supreme Court held that the trial court retained jurisdiction notwithstanding the change in the proposed road design because the trial court's function is to determine the value of the condemned property. The trial court's jurisdiction is appellate only in the sense that it considers the case after the special commissioners have considered the case, not in the sense that it is bound by the factual determinations of the special commissioners. Section 21.018 requires the trial court to consider the value of the condemned property on de novo review, and nothing in the statute suggests that the exact plan for the condemned property should be considered a jurisdictional issue. Therefore, the trial court had no discretion to dismiss the case—when a court possesses jurisdiction, the court must exercise that power. Finally, the Supreme Court noted that on remand the trial court should ensure that the amount of damages imposed on TxDOT for untimely supplementing its discovery responses is commensurate with the harm caused.

B. Minimum Contacts

1. IRA Res., Inc. v. Griego, 221 S.W.3d 592 (Tex. April 20, 2007) [05-0469].

The Griegos sued IRA Resources and other California defendants in a Texas state court for an alleged securities violation. The defendants all filed special appearances, which the trial court denied. The court of appeals reversed as to the other defendants but affirmed for IRA Resources, holding that sufficient minimum contacts existed for specific jurisdiction in Texas.

In a per curiam opinion, the Supreme Court reversed, holding that IRA Resources had not purposely availed itself of the privilege of conducting activities within Texas. First, an agent for a different company established the account for the Griegos with IRA Resources. Second, although IRA Resources maintained an investment account for and sent periodic statements to the Griegos, the bulk of its contacts with Texas were not purposeful. Finally, IRA Resources structured its transaction so as to avoid subjecting itself to jurisdiction in Texas.

The Supreme Court remanded the case to the court of appeals for consideration of whether IRA Resources was subject to general jurisdiction in Texas.

2. PHC-Minden, L.P. v. Kimberly-Clark Corp., 235 S.W.3d 163 (Tex. August 31, 2007) [05-0823].

At issue in this case is whether a Louisiana hospital, either independently or through its parent corporation, had continuous and systematic contacts with Texas giving rise to jurisdiction in Texas. DeWayne Eddington, individually and as representative of Jajah Eddington's estate, sued Kimberly-Clark Corporation asserting product liability, breach of warranty, and negligence claims. He alleged that Jajah's use of Kotex tampons led to the infection that caused her death. On February 28, 2003, Kimberly-Clark filed a third-party petition against PHC-Minden, L.P. (Minden), which owns Minden Hospital, asserting that Minden's negligence proximately caused her death. Minden, a Louisiana hospital and a wholly-owned subsidiary of Province Health Care, filed a special appearance in response. Kimberly-Clark claimed that Province, whose headquarters is in Tennessee, did business in Texas and that its forum-related acts should be imputed to Minden. After a hearing, the trial court concluded it had general jurisdiction over Minden and denied the special appearance. The court of appeals affirmed, reasoning that (1) Minden itself had "continuous and systematic contacts with Texas"; and (2) Minden and Province operated as a single business enterprise, and Minden, through Province, did business in Texas.

The Supreme Court noted that general jurisdiction is "dispute-blind," an exercise of the court's jurisdiction made without regard to the nature of the claim presented. The Court noted that the courts of appeals were in conflict over the

appropriate time period for assessing general jurisdictional contacts. The Court concluded that the relevant period ends at the time suit is filed. Because general jurisdiction is dispute-blind, the incident made the basis of the suit should not be the focus in assessing continuous and systematic contacts. The Court also concluded that Minden's sporadic contacts, which included two trips to Texas, payments to Texas vendors, and contracts with three Texas-based entities, were not the type of continuing and systematic activity upon which general jurisdiction may be based.

The Supreme Court then examined whether Province's Texas contacts could be imputed to Minden. The Court noted that the factors relevant to jurisdictional veil-piercing differ from those pertinent to substantive veil-piercing. In determining the former, the plaintiffs must prove the parent controls the internal business operations and affairs of the subsidiary. But the Court stated that the degree of control the parent exercises must be greater than that normally associated with common ownership and directorship; the evidence must show that the two entities cease to be separate so that the corporate fiction should be disregarded to prevent fraud or injustice. The Court concluded that there was no evidence of control other than that consistent with Province's investor status, so Province's Texas contacts could not be imputed to Minden.

The Supreme Court concluded that Minden did not have continuous and systematic contacts with Texas, nor was there any basis for imputing Province's Texas contacts to Minden. The Court reversed the court of appeals' judgment and dismissed the claims against Minden for want of jurisdiction.

C. Waiver

1. Tellez v. City of Socorro, 226 S.W.3d 413 (Tex. June 1, 2007) [05-0629].

In this per curium opinion, the Supreme Court held that a failure to follow the procedures set forth for zoning challenges in Texas Local Government Code section 211.011(a)-(c) did not deprive the court of appeals of jurisdiction of the case.

Juan Tellez filed suit against the City of Soccorro after the City's Board of Adjustment denied his application for a legal non-conforming use permit for his auto salvage yard. The trial court affirmed the Board's decision but the court of appeals dismissed Tellez's appeal sua sponte, holding that it lacked subject-matter jurisdiction. The court of appeals based this conclusion on Tellez's failure to name the Board itself as a defendant and his failure to specifically allege how the Board's decision was illegal.

The Supreme Court reversed. The Court held that jurisdiction exists under section 211.011 of the Local Government Code "[o]nce a party files a petition within ten (10) days after a zoning board decision." Although subject-matter jurisdiction cannot be waived, the procedural defects noted by the court of appeals could be waived because they were not jurisdictional. Because the City failed to object to either defect, the court of appeals had jurisdiction of the appeal. Accordingly, the Court remanded the case to the court of appeals to consider the merits of Tellez's petition.

XX. MEDICAL MALPRACTICE

A. Comparative Fault

1. Jackson v. Axelrad, 221 S.W.3d 650 (Tex. April 20, 2007) [04-0923].

The principal issue in this medical malpractice case is whether and to what extent a patient has a duty to disclose information concerning medical history to a treating physician, and whether, when the patient is a doctor, his medical training should be taken into account in evaluating the medical history he conveys.

After suffering extreme lower abdominal pains, Dr. David Axelrad, a psychiatrist, went to his physician, Dr. Richard Jackson. Diagnostic tests indicated a viral illness, so Jackson directed Axelrad to take a laxative and two enemas. At the time of his advice, Jackson had not received a blood test that would later reveal an elevated white blood cell count indicative of infection. The first enema caused Axelrad to vomit and experience excruciating pain. Axelrad's wife took him to the emergency room where it was discovered that Axelrad suffered from diverticulitis and a perforated colon.

Axelrad sued Jackson for malpractice in failing to diagnose the diverticulitis and negligently prescribing enemas. Jackson sought a comparative fault jury question on grounds that

Axelrad failed to disclose that his pain was severe and originated in the lower left quadrant of his abdomen and that in 1994 he had undergone a protoscopy that resulted in the recommendation to have a colonoscopy in two years. The trial court submitted Axelrad's comparative fault to the jury, which found him 51% responsible, resulting in a take-nothing judgment. The court of appeals reversed, holding that Axelrad's fault should not have been submitted because there was no evidence of a query designed to elicit the information Axelrad allegedly failed to communicate, and therefore, no evidence to support Jackson's contention that Axelrad had a duty to volunteer the information.

The Supreme Court examined the physician of ordinary prudence standard and determined that the ordinary prudence standard—under same or similar circumstances—includes a party's expertise. As such, the jury could have found that as a doctor, Axelrad's failure to self-diagnose or better convey his maladies caused his injuries. The Supreme Court reversed the court of appeals' judgment because it erred by disregarding the jury's verdict.

B. Damages Cap

1. Phillips v. Bramlett, 2007 WL 836871 (Tex. App.—Amarillo 2007), *pet. granted*, 51 Tex. Sup. Ct. J. 329 (January 25, 2008) [07-0522].

At issue in this case is whether the statutory cap on medical malpractice damages applies to a judgment against a physician when the physician's liability insurer would be subject to a *Stowers* action. Dale Bramlett sued Dr. Benny Phillips, alleging that Phillips's malpractice led to his wife's death from post-surgery complications. The jury awarded Bramlett $14 million in compensatory and punitive damages. Phillips moved for judgment notwithstanding the verdict, arguing that the Medical Liability and Insurance Improvement Act (MLIIA) imposed a mandatory cap on actual damages awarded on a health care liability claim. The trial court denied the motion. The court of appeals upheld the verdict, holding that section 11.02(c) of the MLIIA provided an exception to the cap in cases, like this one, where the doctor's liability insurer would be subject to a *Stowers* claim. Section 11.02(c) states that the liability limitations of "this section" shall not apply to "any insurer where facts exist that would enable a party to invoke" the *Stowers* doctrine. Phillips argues that applying section 11.02(c) to a physician's liability contravenes the plain language of the statute. The Supreme Court granted Phillips's petition for review and heard oral argument on April 22, 2008.

C. Expert Reports

1. Leland v. Brandal, 217 S.W.3d 60 (Tex. App.—San Antonio 2006), *pet. granted*, 50 Tex. Sup. Ct. J. 910 (June 25, 2007) [06-1028].

At issue in this medical malpractice case is whether a plaintiff whose proposed expert is accepted by the trial court, but disqualified on appeal is thereafter entitled to the statutory thirty-day extension to correct any deficiencies in the plaintiff's expert report.

George Brandal suffered a stroke after following the advice of his dentist, John Leland, to stop taking two medications. He and his wife sued Dr. Leland for medical malpractice. The trial court overruled Dr. Leland's objections to the Brandals' expert report. On appeal, the court of appeals held that the Brandals' expert witness, an anesthesiologist, had not explained how he was qualified to express an opinion on the nature and degree of causation, if any, of Brandal's stroke by discontinuing the medication. The court of appeals then held, however, that since the trial court had accepted the expert report, the Brandals had never had the opportunity to invoke the statutory thirty-day extension of time to correct any deficiencies in their expert report. The court of appeals accordingly reversed the judgment of the trial court and remanded the cause for further proceedings.

The Supreme Court granted Leland's petition for review and heard oral argument on November 14, 2007.

2. Ogletree v. Matthews, S.W.3d , 51 Tex. Sup. Ct. J. 165 (Tex. November 30, 2007) [06-0502].

At issue in this case was whether a trial court's order denying a motion to dismiss for a deficient expert report and granting an extension to cure in a health care liability claim gave rise to interlocutory appellate jurisdiction under the Texas Civil Practice and Remedies Code.

Matthews brought a health care liability claim against Dr. Jan Ogletree and Heart Hospital of Austin and served the required expert report within 120 days. Ogletree and the hospital moved to dismiss the report. The trial court denied the motions to dismiss and granted Mathews a thirty day extension to cure the report as allowed under the statute. Both defendants sought interlocutory review of the denied motions to dismiss. The court of appeals held it lacked jurisdiction over Ogletree's appeal and held that the hospital failed to object to the report within the required twenty-one days.

The Supreme Court affirmed the court of appeals' judgment. It concluded that, when a report is served, a trial court has discretion to grant a thirty day extension for deficient reports. Since grants of extensions cannot be appealed under the statute, the Court found that the Legislature did not intend defendants to be able to separate out the grant of an extension from the denial of a motion to dismiss to seek interlocutory review. As a result, the court of appeals was correct to conclude that it lacked jurisdiction over Ogletree's appeal. As to the hospital, the Court rejected its argument that it was not required to object to the report because it was, in effect, no report because it lacked an opinion on causation. The Court concluded that the statute mandates that any objections must be made by defendants whose conduct is implicated in an expert report. Finding the hospital's conduct clearly implicated in the report, the Court held that the hospital waived its objections to the report.

D. Good Samaritan Defense

1. Chau v. Riddle, S.W.3d , 51 Tex. Sup. Ct. J. 523 (Tex. February 15, 2008) [07-0035].

The primary issue in this case is whether the defendant anesthesiologist conclusively established the Good Samaritan defense. Dr. Jefferson Riddle was the on-call anesthesiologist for the labor and delivery suites when Thao Chau underwent an emergency cesarian section. Riddle was called to administer anesthesia to Chau, which he did without incident. The first of Chau's twins was not breathing when he was born, and Riddle was asked to intubate him. Riddle allegedly did so negligently and caused the newborn's brain damage. Chau brought a healthcare liability claim against Riddle and his professional association. Riddle moved for summary judgment in the trial court, arguing both that he conclusively proved the Good Samaritan defense and that there was no evidence of duty or causation. The trial court granted the motion for summary judgment without specifying the grounds, and the court of appeals affirmed, finding that Riddle conclusively proved the Good Samaritan defense. The Supreme Court reversed and remanded to the court of appeals to consider the no-evidence basis for summary judgment.

The Court reasoned that Riddle failed to conclusively prove that he was entitled to the Good Samaritan defense because there was at least an issue of material fact regarding whether he was associated by the attending physician, an exception to the defense. Because Riddle was a part of the labor and delivery team, followed the requests of the attending physician, and one of his duties was arguably intubating newborns, he did not conclusively demonstrate that he was not associated by the attending physician.

E. Informed Consent

1. Schaub v. Sanchez, 229 S.W.3d 322 (Tex. June 22, 2007) [06-0375].

Janie Sanchez sued Doctors Lowry Schaub and Kevin Crawford for failing to obtain her informed consent to perform a stellate ganglion block among other claims. By agreed order, the trial court dismissed with prejudice Sanchez's other malpractice-related claims, leaving only her claim that the doctors "failed to obtain informed consent with regard to the stellate ganglion block." The trial court granted summary judgment in favor of the doctors on grounds that Sanchez had signed forms consenting to the procedure.

The court of appeals reversed, holding that the forms, which did not give specific consent to a stellate ganglion block, incorporated recognized common-law duties regarding informed consent. It reasoned that performing the procedure to which Sanchez had verbally objected might have deviated from accepted medical practices, thus raising a fact issue regarding Sanchez's consent.

The Supreme Court reversed the court of appeals judgment and rendered judgment that Sanchez take nothing. The Court held that the

summary judgment record conclusively negated Sanchez's informed consent claim because Sanchez admitted she was informed of the danger of the treatment. The Court reasoned that Sanchez's claim that she objected to the block sounded in battery or negligence, but by statute, Sanchez would have a claim for lack of informed consent only if she was not informed of the risks of the procedure. Here, Sanchez knew the risks and therefore could not claim lack of informed consent.

F. Interlocutory Appeal

1. Lewis v. Funderburk, 191 S.W.3d 756 (Tex. App.—Waco 2006), *pet. granted*, 50 Tex. Sup. Ct. J. 929 (July 2, 2007) [06-0518].

The issue in this medical malpractice case is whether a party may file an interlocutory appeal from the denial of a motion to dismiss a deficient expert report in a healthcare liability claim under Civil Practice & Remedies Code section 51.014(a)(9). Dewayne Funderburk, as next friend of his daughter, Whitney Funderburk, filed suit against Dr. Rory Lewis and alleged that Lewis negligently treated his daughter's broken wrist. Lewis claimed that Funderburk did not serve an expert report by the 120-day statutory deadline and moved to dismiss; Funderburk denied this claim and argued that he had served Lewis with a letter from a physician.

Several months later the trial court held Funderburk's expert report was deficient, but granted Funderburk's motion for a 30-day extension and denied Lewis's motion to dismiss. After Funderburk served an expert report from a different physician, Lewis filed a motion for reconsideration of the prior ruling, a second motion to dismiss, and an objection to the sufficiency of Funderburk's expert report. After a hearing, the trial court refused to hear the motion for reconsideration and denied Lewis's second motion to dismiss and the objection. Lewis filed a notice of interlocutory appeal. The court of appeals dismissed the case for lack of jurisdiction. The Supreme Court granted Lewis's petition for review and heard oral argument on November 15, 2007.

G. Limitations

1. Kallam v. Boyd, 232 S.W.3d 774 (Tex. June 15, 2007) [05-0027].

Sharon Boyd was diagnosed with colorectal cancer. She began reporting her symptoms to various physicians in November 1998. In February 2002, Boyd requested a referral to have a colonoscopy, which took place in April 2002. Besides learning of her cancer, Boyd was told that the tumor or some precursor abnormality had been present and growing in her colon since 1996.

Boyd sued five health care providers alleging various negligent acts such as misdiagnosis. The defendants moved for partial summary judgment, arguing that the two-year statute of limitations for medical malpractice claims found in former TEX. REV. CIV. STAT. article 4590i, section 10.01 barred Boyd's claims which alleged negligence occurring before August 30, 2000. Boyd had pleaded that the open courts provision precluded any application of this limitations period because she had no reasonable opportunity to discover the wrongs or her injury within that period, and in response to the summary judgment motion Boyd filed evidence that she claimed raised a fact issue regarding whether she had such a reasonable opportunity. The trial court granted the motions for partial summary judgment.

The court of appeals reversed and remanded as to the majority of Boyd's negligence claims, holding that Boyd had raised a fact issue concerning whether she had a reasonable opportunity to learn of the defendants' negligence or her cancer during the limitations period. The Supreme Court granted the defendants' petitions for review. However, Boyd died before oral argument, and the primary issue in the case became whether the open courts provision of the Constitution would allow Boyd's heirs to continue the case. The Supreme Court dismissed the case as improvidently granted to allow the new issue to be fully argued and briefed in the trial court and court of appeals.

H. No Evidence Summary Judgment

1. Hamilton v. Wilson, S.W.3d , 51 Tex. Sup. Ct. J. 686 (Tex. March 28, 2008) [07-0164].

At issue in this case is whether a plaintiff presented sufficient evidence in a medical malpractice suit to defeat a no-evidence summary

judgment motion. Nadine Hamilton filed a health care liability claim against Dr. Selma Wilson, alleging that Wilson negligently tore Hamilton's esophagus during intubation when she continued pushing a tube into Hamilton's throat after encountering a "tight fit." Wilson filed a no-evidence summary judgment motion on the issues of standard of care and causation, and Hamilton responded with the depositions of expert doctors, medical records, and Wilson's deposition. The trial court granted summary judgment and the court of appeals affirmed, concluding that Hamilton's expert's opinion that the tube was in the esophagus, rather than the trachea, was a conclusory belief, lacked factual explanation, and constituted no evidence. The Supreme Court concluded that the expert doctor's opinion was not mere speculation and held that Hamilton produced sufficient evidence of a breach of the standard of care and causation to defeat summary judgment. The Court reversed the court of appeals' judgment and remanded the case back to the trial court for further proceedings.

I. Presuit Discovery

1. In re Jorden, S.W.3d , 51 Tex. Sup. Ct. J. 657 (Tex. March 28, 2008) [06-0369].

At issue in this case is whether a claimant may take presuit depositions under Texas Rule of Civil Procedure 202 in a health care liability claim when Chapter 74 of the Texas Civil Practices and Remedies Code bars most discovery efforts in such claims until an expert report is served. A injured woman's son hired an attorney to investigate the possibility of suing doctors who treated his mother before she died of a heart attack. His attorney petitioned the trial court to depose the mother's primary-care doctor, an emergency room doctor, and representatives of the hospital and clinic where she was treated. The trial court denied the petition for presuit depositions. The court of appeals granted mandamus relief, holding that Chapter 74 did not preclude Rule 202 depositions to investigate the merits of a healthcare liability claim.

The Supreme Court held Chapter 74's prohibition on "all discovery" until after an expert report is served included presuit depositions because such depositions were not among the three exceptions to the prohibition. The Court disagreed with the court of appeals' conclusion that the prohibition on discovery in a health care liability claim applied only to filed suits. Rather, the Court concluded the prohibition extended to a cause of action, which applied to facts and not filings.

In a concurring opinion, Justice O'Neill argued that the legislative purpose in enacting Chapter 74 was to decrease costs associated with meritless claims and sought to do so "in a manner that will not unduly restrict a claimant's rights any more than necessary to deal with the crisis." If the discovery methods allowed under Chapter 74 are fully and effectively utilized but fail to yield information necessary to assess the merits of the potential claim, the trial court should have discretion to allow discovery under Rule 202 if a failure of justice would otherwise result.

J. Statute of Limitations

1. Yancy v. United Surgical Partners Int'l, Inc., 236 S.W.3d 778 (Tex. October 19, 2007) [05-0925].

On May 3, 2000 during a medical procedure, Carletha Yates suffered a cardiac arrest, allegedly caused by the medical personnel's failure to monitor her oxygen while she was under general anesthesia, and is now comatose. On December 10, 2001, Eula Yancy, Yates's mother and guardian of her estate and person, sued Manuel Ramirez, M.D. and Dallas Pain & Anesthesia Associates for negligence. Almost two years later, on September 2, 2003, Yancy added United Surgical Partners International, Inc., Valley View Surgical Center, Inc., and Judith Smith, R.N., as defendants.

United Surgical, Valley View, and Smith asserted that limitations barred Yates's claims, and they moved for summary judgment on that basis. In response, Yancy conceded that she filed Yates's claims outside of the two-year statute of limitations but contended that, due to her continuous incapacity, the two-year statute of limitations violated the open courts provision of the Texas Constitution as applied to her. The trial court granted the motions. The court of appeals affirmed, holding that Yancy failed to present competent evidence of Yates's alleged continuous mental incapacity and, therefore, failed to raise a fact issue about the constitutionality of the statute

of limitations for health care liability claims as applied to her.

The Supreme Court affirmed on different grounds. The Court held that Yancy had the burden to present evidence of Yates's continuous mental incapacity but concluded that she met that burden. The Court noted that one affiant testified that based on her personal observations, assessment, interviews, and review of her medical records, Yates had been in a comatose, vegetative state consistently and uninterrupted since May 3, 2000. When viewed in conjunction with Yates's medical records reflecting a cardiac arrest, a ten-minute period during which Yates was not breathing, and the anesthesiologist's deposition testimony, the Court held that Yancy raised a fact issue as to whether Yates has been continuously mentally incapacitated since the surgery, and the court of appeals erred in concluding otherwise.

The Court then examined Yancy's open courts claim. The Court noted that the open courts guarantee differed from tolling provisions. Unlike the discovery rule, the open courts provision merely gives litigants a reasonable time to discover their injuries and file suit. Court must determine what constitutes a reasonable time. The Court concluded that the open courts guarantee was not violated as applied to Yates. Yancy knew of Yates's incapacity the day it occurred, retained a lawyer and filed suit within the applicable limitations period, and did not offer any explanation for failing to name additional defendants for almost twenty-two months after filing suit.

XXI. MUNICIPAL LAW

A. Annexation

1. City of Rockwall v. Hughes, 246 S.W.3d 621 (Tex. January 25, 2008) [05-0126].

At issue in this case is whether a landowner may compel a city to arbitrate a dispute over the city's denial of a request to include the landowner's land in a three-year annexation plan. Vestor Hughes petitioned the City of Rockwall for approval of a residential development plan within the City's extraterritorial jurisdiction. The City then initiated an expedited annexation process. Hughes requested that the City include the property in a three-year annexation plan, but the City denied the request. Hughes requested arbitration pursuant to Local Government Code section 43.052(i), which provides that a landowner may petition a city for inclusion in a three-year annexation plan and that "[i]f the municipality fails to take action on the petition, the petitioner may request arbitration of the dispute." The City denied the request for arbitration. Hughes sought an order in district court compelling arbitration, but the trial court dismissed the case on the City's plea to the jurisdiction. The court of appeals reversed and remanded, instructing the trial court to compel arbitration.

The Supreme Court held that the plain language of section 43.052(i) does not create a right for a landowner to compel arbitration in a case such as this where a city takes action on the request by denying it. The Court declined to adopt Hughes's proposed construction of the statute under which a landowner could compel arbitration if a city failed to act to include the property in a three-year annexation plan. Such a construction would require the Court to read language into the statute when the Legislature did not put it there. By giving landowners the right to request arbitration if cities fail to take action on their petitions, the Legislature gave them leverage to prevent "pocket vetoes" of their petitions. Further, a quo warranto action remained available for a landowner to seek redress.

Justice Willett, joined by Justices Hecht, O'Neill, and Brister, dissented. The dissent argued that, taken in context, "fails to take action" does not mean "fails to take *any* action," as the Court held, but "fails to take favorable action." The word "favorable" is implicit, honors the phrase's common-sense meaning, and gives full effect to the statute's objective. The dissent also argued that the Court's reading would lead to absurd results. Specifically, the dissent claimed that "fails to take action" as it was used in another section of the Local Government Code clearly meant "fails to take favorable action." The phrase must mean the same thing in both sections.

XXII. NEGLIGENCE

A. Duty to Warn

1. Cent. Ready Mix Concrete Co. v. Islas, 228 S.W.3d 649 (Tex. June 29, 2007) [05-0940].

The principal issue in this case is whether a party who contracts with an independant contractor owes the contractor a duty to warn of the dangers of the endeavor.

Central Ready Mix Concrete operated several ready-mix cement trucks. The drums of these trucks must be periodically cleaned of residual concrete. Central contracted with Eugene Taylor to perform the periodic cleaning. While Taylor's employee, Luciano Islas, was cleaning one of the trucks, he was injured. He then sued Taylor and Central. A jury found that cleaning the truck was an inherently dangerous activity and constituted a peculiar risk. The jury found Central 20% liable, Taylor 70% liable, and Islas 10% liable. The trial court granted Central's motion for a take nothing judgment notwithstanding the verdict on the grounds that there was no evidence to support the judgment against it, but the court of appeals reversed.

On appeal, the Supreme Court reinstated the trial court's judgment. The Court began with the rule that owners generally do not have a duty to ensure that independent contractors perform their work in a safe manner. The Court then rejected the evidence the court of appeals relied on to overturn the trial court's judgment. First, the Court held that the danger of cleaning the trucks was not a concealed hazard about which Central had a duty to warn Taylor. Second, the Court rejected the evidence that Central failed to properly train Taylor and his employees because there was no evidence that Central retained a right to control their training. Third, the Court rejected the idea that Central failed to properly investigate Taylor's background because there was nothing to indicate that an investigation would have uncovered a history of negligence. Accordingly, the Court reinstated the trial court's take nothing judgment for Central.

B. Premises Liability

1. Brinson Ford, Inc. v. Alger, 228 S.W.3d 161 (Tex. June 15, 2007) [05-0722].

Connie Alger fell off a pedestrian ramp when visiting a car dealership and brought this premises liability action for the injuries she sustained. Although there were handrails along most of the ramp as it sloped down to ground level, a small portion of the ramp extended beyond the handrails to the sidewalk. When Alger turned to walk toward her car, she stepped off the unrailed portion of the ramp and fell.

Alger sued Brinson Ford alleging, among other things, that the ramp's configuration was a premises condition posing an unreasonable risk of harm. The dealership filed a motion for summary judgment asserting that there was no evidence of a premises condition that presented an unreasonable risk of harm; alternatively, Brinson Ford contended the evidence established as a matter of law that the condition of the premises did not pose an unreasonable risk of harm. The trial court granted summary judgment in Brinson Ford's favor and a divided court of appeals reversed, holding that fact issues existed as to the premises owner's actual or constructive knowledge of the condition, whether the condition posed an unreasonable risk of harm, and whether the premises owner failed to exercise reasonable care to reduce or eliminate the risk of harm.

The Supreme Court reversed the court of appeals' judgment and rendered judgment for Brinson Ford. It held that, as a matter of law, the ramp did not pose an unreasonable risk of harm because the area of the ramp without handrails met applicable safety standards and was outlined in yellow stripping, the height of the highest point of the unrailed portion of the ramp was less than the average step, and no other customer had ever been injured by the ramp. Thus, the trial court properly granted summary judgment in the dealership's favor, and the court of appeals erred in reversing the trial court's judgment.

2. Del Lago Partners, Inc. v. Smith, 206 S.W.3d 146 (Tex. App.—Waco 2006), *pet. granted*, 51 Tex. Sup. Ct. J. 77 (November 2, 2007) [06-1022].

The issues presented in this case are whether a third-party criminal act was foreseeable under the test for premises liability and whether there was legally sufficient evidence that the premises owner's actions proximately caused the plaintiff's injuries. During a bar fight at the Del Lago Golf Resort & Conference Center, Bradley Smith sustained serious injuries and brain damage. He

sued Del Lago, alleging that it had a duty as the premises owner to protect against the criminal conduct of his unidentified assailant.

After a jury found Smith forty-nine percent responsible and Del Lago fifty-one percent responsible, the trial court entered judgment against Del Lago. On appeal, Del Lago argued that the criminal conduct was not foreseeable, as it did not meet the factors requiring sufficient previous crimes of a similar nature, and that there was no evidence extra security would have prevented Smith's injuries. The court of appeals affirmed the judgment, finding that Del Lago breached its duty to Smith. The Supreme Court granted Del Lago's petition for review and heard oral argument on December 6, 2007.

3. Trammell Crow Cent. Tex., Ltd. v. Gutierrez, 220 S.W.3d 33 (Tex. App.—San Antonio 2006), *pet. granted*, 51 Tex. Sup. Ct. J. 77 (November 2, 2007) [07-0091].

The issues presented in this case are whether a third-party criminal act was foreseeable under the test for premises liability and whether there was legally sufficient evidence that the premises owner's actions proximately caused the plaintiff's injuries. While leaving a movie theater in San Antonio late at night, Luis Gutierrez and his wife were attacked by an armed assailant and Gutierrez was shot and killed. His estate sued Trammell Crow, manager of the theater, alleging that Trammell Crow failed to provide adequate security and breached its duty to protect against third-party criminal actions.

At trial, Trammell Crow presented evidence that, as a police informant, Gutierrez had been the subject of a targeted attack, and, therefore, it had no duty to protect against such an attack. Alternatively, it argued that its actions were not the proximate cause of Gutierrez's death. A jury found in favor of Gutierrez, and the trial court entered judgment against Trammell Crow. Trammell Crow appealed, and the court of appeals affirmed the judgment. The Supreme Court granted Trammell Crow's petition for review and heard oral argument on January 17, 2008.

C. Scope of Duty

1. Bushnell v. Mott, S.W.3d , 51 Tex. Sup. Ct. J. 681 (Tex. March 28, 2008) [06-1044].

At issue in this case is whether the owner of a dog not known to be vicious owes a duty to attempt to stop the dog from attacking a person after an attack has begun. Genevia Bushnell was attacked by three dogs owned by Janet Mott in Mott's presence and on Mott's property. Bushnell claimed that after the attack began, Mott did nothing to attempt to stop the attack. The trial court rendered a take nothing summary judgment in favor of Mott, which the court of appeals affirmed, holding that Bushnell failed to present more than a scintilla of evidence demonstrating that Mott had actual or constructive notice that her dogs could cause harm and that she was negligent in preventing such harm. Bushnell appealed.

The Supreme Court held that Bushnell's original affidavit indicating that Mott did nothing to stop her dogs after they began attacking raised a material fact issue concerning whether Mott failed to exercise ordinary care over her dogs once the attack began. Accordingly, the Court reversed the court of appeals' judgment and remanded the case to the trial court for further proceedings.

2. Nabors Drilling, U.S.A., Inc. v. Escoto, 200 S.W.3d 716 (Tex. App.—Corpus Christi 2006), *pet. granted*, 51 Tex. Sup. Ct. J. 126 (November 30, 2007) [06-0890].

At issue in this case is whether an employer has a duty to (1) prevent a fatigued employee's off-duty accident, and (2) train its employees regarding the dangers of fatigue. After working a 12-hour night shift, a Nabors employee struck an on-coming car killing himself and the four occupants of the other car. The families and estates of those other occupants brought suit against Nabors. The jury found Nabors negligent and found damages, but the trial court entered a judgment notwithstanding the verdict in favor of Nabors, reasoning that Nabors owed no duty to the occupants of the other car. The court of appeals reversed and rendered judgment in favor of the plaintiffs. The CA concluded that Nabors was aware of the dangers of its employee's fatigue prior to the accident, but failed to train him and permitted him to drive home. The Supreme Court

granted Nabors' petition for review and heard oral argument on February 5, 2008.

D. Strict Liability

1. New Tex. Auto Auction Servs., L.P. v. Gomez de Hernandez, S.W.3d , 51 Tex. Sup. Ct. J. 664 (Tex. March 28, 2008) [06-0550].

The principal issues in this case are (1) whether auto auctioneers can be "sellers" subject to strict liability, and (2) whether an auctioneer was negligent for selling a vehicle with tires subject to a defective-tire recall notice. New Texas Auto Auction sold a vehicle to another auctioneer. The tires on the vehicle had been recalled prior to the sale but had not been removed. The second auctioneer later sold the vehicle to a dealer, which then sold it to Jose Hernandez Gonzales. Gonzales was killed in an auto accident, allegedly due to the vehicle's tire failure. Gonzales's wife sued New Texas alleging the tire defect caused the accident and asserting claims of strict liability, based on the auctioneer being a seller, and negligence, based on New Texas' failure to remove the defective tires. The trial court granted New Texas' motion for summary judgment, but the court of appeals reversed.

The Supreme Court held that the auctioneer could not be strictly liable. The Second Restatement of Torts section 402A, which the Court adopted in 1967, states that those who sell defective products are strictly liable. While the Court noted it had applied the section broadly to manufacturers, distributors, lessors, bailors, and dealers, it limited the scope of those "engaged in the business of selling" to those who actually placed a product in the stream of commerce. Moreover, the Third Restatement of Torts, adopted in 1998, expanded strict liability to those "engaged in the business of selling or otherwise distributing products," but in a comment, it specifically excluded auctioneers. The Court concluded that strict liability did not apply to New Texas because it was not in the business of selling automobiles. The Court also held that New Texas had no duty in negligence as it had no duty to discover and repair defects. Further, the car was sold "as is," which generally means the buyer accepts the risk of potential defects. Thus, the Court reinstated the trial court's take-nothing judgment for New Texas.

E. Substantial-Factor Causation

1. Borg-Warner Corp. v. Flores, 232 S.W.3d 765 (Tex. June 8, 2007) [05-0189].

Arturo Flores, who spent much of his career as a brake mechanic, sued Borg-Warner and others, alleging that the asbestos contained in brake pads the defendants manufactured caused him to develop asbestosis. At trial, Flores presented the testimony of two experts. One diagnosed Flores with asbestosis based on his work as a brake mechanic coupled with an adequate latency period. She acknowledged that everyone is exposed to asbestos in the ambient air and that Flores's pulmonary function tests showed mild obstructive lung disease, which was unrelated to asbestos exposure. The other expert testified that brake mechanics could be exposed to respirable asbestos either by grinding brake pads or blowing out accumulated dust in the brake housing; most of the asbestos is destroyed by the heat of friction, but some survived. He had not researched Borg-Warner products and did not have any specific knowledge about them. The jury found in Flores's favor, and Borg-Warner appealed. The court of appeals affirmed, holding that there was legally sufficient evidence of negligence.

The Supreme Court reversed the court of appeals' judgment and held that Flores failed to present evidence of substantial-factor causation. The Court examined the *Lohrmann* "frequency, regularity, and proximity" test, *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986), but noted that those terms did not, in themselves, capture the emphasis Texas jurisprudence has placed on causation as an essential predicate to liability. The Court noted that Restatement section 431's "substantial factor" test had informed its causation analysis on several occasions. The Court also noted that some evidence of dose was critical to proving Flores's asbestosis claim. The Court held that the record established that mechanics in the braking industry could be exposed to respirable asbestos fibers. But without more, this testimony was insufficient to establish that the Borg-Warner brake pads were a substantial factor in causing Flores's disease, as

asbestosis appears to be dose-related. The record, however, revealed nothing about how much asbestos Flores might have inhaled. The Court concluded that "in a case like this, proof of mere frequency, regularity, and proximity is necessary but not sufficient, as it provides none of the quantitative information necessary to support causation under Texas law."

The Court rejected the idea that substantial-factor causation must be reduced to mathematical precision, noting that defendant-specific evidence relating to the approximate dose to which the plaintiff was exposed, coupled with evidence that the dose was a substantial factor in causing the asbestos-related disease, will suffice. Without proof that the Borg-Warner brake pads were a substantial factor in bringing about his injuries, Flores's negligence and strict liability claims failed. The Supreme Court reversed the court of appeals' judgment and rendered judgment for Borg-Warner.

XXIII. OIL AND GAS

A. Pooling Agreements

1. Wagner & Brown, Ltd. v. Sheppard, 198 S.W.3d 369 (Tex. App.—Texarkana 2006), *pet. granted*, 50 Tex. Sup. Ct. J. 1015 (August 24, 2007) [06-0845].

Jane Sheppard owns a 1/8 mineral interest in a 62.72-acre tract of land and executed a form oil and gas lease to C.W. Resources for a three year term in exchange for 1/4 royalty. Wagner & Brown and C.W. Resources (Wagner) separately leased from third parties most of the remaining 7/8 mineral interest in the Sheppard Tract. Wagner pooled the Sheppard Tract with other leased tracts, creating the Landers Gas Unit. This unit was comprised of a 116.65-acre pooled unit, and two wells were drilled on this unit.

Six months after the Landers Unit was established, the Sheppard Lease terminated, according to its terms, when Wagner failed to pay Sheppard royalties under the 120-day clause included in the lease. Upon discovering this failure to timely pay Sheppard royalties, Wagner advised Sheppard's attorney of the clerical error and unsuccessfully sought to reinstate her lease. Sheppard filed suit seeking damages and a declaratory judgment that, as an unleased co-tenant, she is no longer bound by the agreement, and is entitled to a full 1/8 share of production from the two wells on the Sheppard Tract.

On a summary judgment motion, the trial court held that Sheppard's mineral interest was no longer subject to the agreement. The case then proceeded to a bench trial on damages and Wagner's right to deduct leasehold, land/legal, and overhead expenses from Sheppard's share of production. The trial court awarded Sheppard $395,749.53 in damages, subject to an offset of $168,559.85 for paid royalties and attorney's fees. The court of appeals affirmed the trial court's judgment in all respects.

The Supreme Court granted Wagner's petition for review and heard oral argument for December 5, 2007.

B. Railroad Commission Authority

1. Seagull Energy E & P, Inc. v. R.R. Comm'n of Tex., 226 S.W.3d 383 (Tex. May 4, 2007) [03-0364].

The issue in this case was whether the statute that granted the Railroad Commission authority to regulate production of commingled oil and/or gas deposits included the authority to regulate drilling, and if so, whether the Railroad Commission could consider the commingled deposits as though they were one reservoir when regulating drilling and production in the commingled field. *See* TEX. NAT. RES. CODE § 86.081. The Supreme Court concluded that the Railroad Commission could consider the commingled deposits as one reservoir when determining correlative rights and could deny an exception to the well-spacing requirements prescribed by the field rules unless there was proof of confiscation as to the commingled reservoir as a whole. The Court noted that section 86.081 had been amended after the case began as a result of the litigation and was meant to clarify the scope of the Commission's authority. The Court further concluded that this application of the statute did not violate vested property rights.

XXIV. PROBATE: WILLS, TRUSTS, ESTATES, AND GUARDIANSHIPS

A. Right of Survivorship

1. A.G. Edwards & Sons, Inc. v. Beyer, 235 S.W.3d 704 (Tex. September 28, 2007) [05-0580].

The issue presented in this case is whether the Probate Code bars a beneficiary from seeking ownership of joint account funds against the estate of the deceased owner of the account when no written agreement exists. Alicia Beyer and her father, Federico Beyer, contacted an A.G. Edwards representative to create a joint account with right of survivorship. A.G. Edwards agreed to create the account and took steps to do so. After her father's death, Alicia discovered that the account had not properly been created, and that she did not have a survivorship interest in the account funds. Alicia sued A.G. Edwards for negligently failing to properly create the account. The trial court entered judgment on a verdict against A.G. Edwards and the court of appeals affirmed. The Supreme Court affirmed the judgment against A.G. Edwards but reversed the court of appeals judgment as to attorneys' fees.

The Court held that Alicia's claim was not governed by Texas Probate Code section 439(a), which applies to right of survivorship accounts. Although the statute requires a written agreement as proof of the right of survivorship, Alicia's claim was not that she was entitled to the account funds as the survivor to the account. Rather, her claim was that A.G. Edwards breached its duty by failing to properly create an account with a right of survivorship. As such, she was allowed to present evidence other than the written agreement itself in order to prove her claim. The Court reversed and remanded on the issue of segregation of attorney's fees based on recoverable and unrecoverable claims.

B. Teachers Retirement System Benefits

1. Holmes v. Kent, 221 S.W.3d 622 (Tex. April 20, 2007) [04-0729].

When Linda Ann McWhorter retired from her position as a teacher, she designated her then-husband Tommy Joe Holmes as the beneficiary of an optional annuity from the Teachers Retirement System of Texas (TRS). The annuity is governed by a detailed statutory scheme limiting and specifying how and when a beneficiary designation may be changed in favor of a new beneficiary and allowing TRS to prescribe forms for such alterations. Following her retirement, McWhorter and Holmes divorced. McWhorter signed a form to re-designate her son, Alan Kent, and his wife as beneficiaries of all of her retirement benefits, and later submitted to TRS the final divorce decree divesting Holmes of any right, title, interest, or claim in or to McWhorter's TRS benefits. TRS notified McWhorter that the form was not the proper form, and that the language of the decree was inadequate. TRS further suggested appropriate language, provided the forms for a change of beneficiary, and alternatively suggested that the beneficiary could be changed by submission of Holmes's notarized consent in lieu of an altered divorce decree. McWhorter did nothing further before her death a little over a year later. She left everything to Kent in her will.

Following McWhorter's death, TRS began making annuity payments to Holmes. The Kents brought this action against Holmes seeking enforcement of the divorce decree to change the beneficiary and requesting a constructive trust on the payments received and an injunction against future payments. The trial court granted summary judgment for Holmes. The court of appeals agreed that McWhorter had not met the statutory requirements to change the beneficiary of the annuity, but also held that because the divorce decree divested Holmes of any right to the annuity, her estate was entitled to a constructive trust unless McWhorter intended to give Holmes the payments notwithstanding the decree. The court remanded the case for a determination of McWhorter's intentions.

The Supreme Court, in a per curiam opinion without hearing oral arguments, rendered judgment for Holmes, agreeing with the court of appeals that McWhorter never met the statutory requirements for a change of beneficiary because she failed to submit the proper forms, and she failed to submit either Holmes's notarized consent or a divorce decree with appropriate language. However, the Supreme Court disagreed with the court of appeals that a constructive trust could be imposed since it would circumvent the statutory scheme, alter TRS's statutory obligations, and

create unnecessary uncertainty and litigation surrounding a decedent's intentions.

C. Will Construction

1. In re Estate of Nash, 220 S.W.3d 914 (Tex. April 20, 2007) [05-0538].

In this will construction case, Shelley Tedder sought a declaration that she was entitled to the estate of her former step-father, Marvin Nash. Nash divorced Tedder's mother, Vicky Nash, approximately two years before his death. He never changed the will he wrote some ten years earlier which named Tedder as the contingent beneficiary if Vicky did not survive him. Tedder believed she was entitled to Nash's estate because section 69 of the Probate Code, which provides that provisions in a will favoring a former spouse should be construed as if the former spouse failed to survive that testator, applies to the entire will. Nash's heirs at law, on the other hand, believed section 69 applied only to those will provisions that favored the former spouse and sought a declaratory judgment that Tedder take nothing.

The trial court admitted Nash's will to probate and declared that Tedder was entitled to Nash's entire estate. Nash's heirs at law appealed, and the court of appeals reversed. The Supreme Court affirmed the court of appeals' judgment. The Supreme Court held that section 69 of the Probate Code requires only those will provisions that favor a former spouse to be read as if she predeceased the testator and the contingent bequest to Tedder did not favor a former spouse. Because Vicky did not predecease Marvin, the contingent bequest did not become operative. Therefore, Tedder did not take under the will and it instead passed to Nash's heirs at law.

XXV. PROCEDURE—APPELLATE

A. Dismissal

1. Houser v. McElveen, 243 S.W.3d 646 (Tex. January 11, 2008) [06-0504].

At issue in this case is whether the court of appeals erred in dismissing Bruce Houser's appeal. Houser, a pro se inmate, sued for mandamus compelling the county clerk to probate his father's will. The trial court dismissed the petition. Houser deposited his notice of appeal in the prison mailbox 35 days later. The court of appeals dismissed the appeal as not having been timely perfected because the notice of appeal was not filed within 30 days as required by the Rules of Appellate Procedure. The Supreme Court held that the court of appeals should not have dismissed the appeal. The Court noted that the court of appeals should have extended the time for filing the notice of appeal if, within 15 days of the deadline, Houser filed his notice of appeal with a plausible statement of circumstances indicating that failure to file within the deadline was not intentional, but inadvertent. In his notice of appeal, Houser stated that he had timely mailed a motion for new trial to the trial court. Although the motion for new trial was not in the trial court's record, Houser could have reasonably believed that the trial court clerk would have received it by the time he filed his notice of appeal. Had the motion for new trial been received, Houser's notice of appeal would have been timely. The Court concluded that Houser's statement indicated his failure to timely file his notice of appeal was not intentional but inadvertent, and thus he was entitled to an extension of time. The Court reversed the court of appeals' judgment and remanded the case to that court.

2. Springer v. Springer, 240 S.W.3d 871 (Tex. November 2, 2007) [06-0382].

At issue in this divorce action was whether Springer's appeal could be dismissed by the court of appeals when he filed an affidavit of indigence one month after his notice of appeal. Springer filed a timely notice of appeal, but failed to pay the filing fee or file an affidavit of indigence "with or before" the notice of appeal as required by Texas Rule of Appellate Procedure 20.1(c)(1). Although Springer filed the affidavit of indigence one month later, the court of appeals dismissed his appeal for failure to pay the filing fee or file a timely affidavit of indigence. The Supreme Court reversed.

The Court held that Texas Rule of Appellate Procedure 44.3 applies to bar dismissal when an affidavit of indigence is untimely because Rule 44.3 prohibits a court of appeals from dismissing "an appeal for formal defects or irregularities in appellate procedure without allowing a reasonable time to correct or amend the defects." Here, Springer corrected the defect in procedure by filing the affidavit of indigence. Thus, even if the

affidavit was untimely, it could not be the basis for dismissal under Rule 44.3.

3. Sprowl v. Payne, 236 S.W.3d 786 (Tex. November 2, 2007) [06-0533].

At issue in this paternity action was whether Sprowl's appeal could be dismissed by the court of appeals when she filed an affidavit of indigence approximately one week after her notice of appeal. Sprowl filed a timely notice of appeal, but failed to pay the filing fee or file an affidavit of indigence "with or before" the notice of appeal as required by Texas Rule of Appellate Procedure 20.1(c)(1). Although Sprowl filed the affidavit of indigence one week later, the court of appeals dismissed her appeal for failure to pay the filing fee or file a timely affidavit of indigence. The Supreme Court reversed.

The Court held that Texas Rule of Appellate Procedure 44.3 applies to bar dismissal when an affidavit of indigence is untimely because Rule 44.3 prohibits a court of appeals from dismissing "an appeal for formal defects or irregularities in appellate procedure without allowing a reasonable time to correct or amend the defects." Here, Sprowl corrected the defect in procedure by filing the affidavit of indigence. Thus, even if the affidavit was untimely, it could not be the basis for dismissal under Rule 44.3.

B. Jurisdiction

1. Allstate Ins. Co. v. Fleming, S.W.3d , 51 Tex. Sup. Ct. J. 231 (Tex. December 14, 2007) [05-0645].

At issue in this case was whether Allstate Insurance Company properly invoked the Supreme Court's jurisdiction under section 22.225 of the Texas Government Code. Cevia Fleming sued Allstate and several of its affiliates, and the trial court issued a partial summary judgment. The insurers brought an interlocutory appeal to the court of appeals. After losing at the court of appeals, the insurers appealed from the interlocutory order again. The Supreme Court noted that for it to review an interlocutory order, a dissenting opinion must have been filed in the court of appeals, or the court of appeals' decision must conflict with a decision from another court of appeals or the Supreme Court. Because there was no court of appeals dissent or requisite conflict, the Supreme Court dismissed the petition for want of jurisdiction.

2. Chambers v. O'Quinn, 242 S.W.3d 30 (Tex. December 14, 2007) [06-1073].

At issue in this case was whether the court of appeals had jurisdiction to review an order compelling arbitration under the Texas Arbitration Act as part of the appeal of a final judgment in the case. The court of appeals concluded that mandamus was the appropriate remedy and dismissed the appeal, reasoning that because mandamus relief had previously been denied by another court of appeals and the Texas Supreme Court, it lacked appellate jurisdiction to review the issue. The Supreme Court held, in a per curiam opinion, that denial of a writ of mandamus without comment on the merits cannot deprive another appellate court of jurisdiction over considering the matter in a subsequent appeal. Accordingly, the Court reversed the court of appeals' judgment and remanded the case for review on the merits.

3. County of Dallas v. Sempe, S.W.3d , 51 Tex. Sup. Ct. J. 611 (Tex. March 28, 2008) [05-0022].

At issue in this case is whether the petitioner properly invoked the Supreme Court's jurisdiction under section 22.001 of the Texas Government Code. The County of Dallas brought an interlocutory appeal from an order denying its plea to the jurisdiction, arguing that the court of appeals' decision conflicted with decisions of the United States Supreme Court. After granting the petition for review, the Supreme Court concluded that the petition failed to demonstrate that justices of the court of appeals disagreed on a question of law material to the decision or that the court of appeals' opinion conflicted with a prior decision of the Court or of another Texas court of appeals in order to confer jurisdiction on the Court. The Court withdrew the order granting the petition for review as improvidently granted and dismissed the petition for want of jurisdiction.

4. Houston Mun. Employees Pension Sys. v. Ferrell, S.W.3d , 51 Tex. Sup. Ct. J. 154 (Tex. November 30, 2007) [05-0587].

At issue in this case was whether members of the Houston Municipal Employees Pension System (HMEPS) could bring a declaratory judgment action to declare their rights under the statute that created HMEPS. Ferrell and twenty-nine other plaintiffs sought a declaratory judgment stating that HMEPS was required to credit certain time to their pension accounts. HMEPS sought dismissal of the action for want of jurisdiction on the grounds that the statute creating HMEPS explicitly provided that all disputes involving the pension system would be resolved by the pension board, and the board's decision would be "final and binding on all parties." The trial court denied HMEPS's jurisdictional plea, and the court of appeals affirmed.

Noting that there is no right to judicial review of an administrative order unless a statute explicitly provides that right or the order violates a constitutional right, the Supreme Court held that the plaintiffs had no right to judicial review of HMEPS's decision. Accordingly, the Court reversed the court of appeals' judgment and dismissed the plaintiffs' action for want of jurisdiction.

Justice Brister, joined by Justice O'Neill, concurred, but wrote separately to point out that the Legislature, exercising their constitutional prerogative, chose not to give jurisdiction to the courts to interpret this statute.

5. Liberty Mut. Ins. Co. v. Griesing, S.W.3d , 51 Tex. Sup. Ct. J. 230 (Tex. December 14, 2007) [04-0902].

At issue in this case was whether Liberty Mutual Insurance Company properly invoked the Supreme Court's jurisdiction under section 22.225 of the Texas Government Code. Betty Griesing sued Liberty Mutual and several of its affiliates, and the trial court issued a partial summary judgment. The insurers brought an interlocutory appeal to the court of appeals. After losing at the court of appeals, the insurers appealed from the interlocutory order again. The Supreme Court noted that for it to review an interlocutory order, a dissenting opinion must have been filed in the court of appeals, or the court of appeals' decision must conflict with a decision from another court of appeals or the Supreme Court. Because there was no court of appeals dissent or requisite conflict, the Supreme Court dismissed the petition for want of jurisdiction.

6. Ramos v. Richardson, 228 S.W.3d 671 (Tex. June 29, 2007) [06-0336].

Armando Ramos, an inmate, and members of his family brought medical malpractice actions, pro se, against Dr. Ian Richardson and Valley Baptist Medical Center. The trial court dismissed the actions for failure to comply with the expert report requirements of section 74.351 of the Texas Civil Practice and Remedies Code. The deadline to file notices of appeal was on March 21, 2005. Ramos and his family claimed Ramos delivered signed notices of appeal to the prison's outgoing mailbox on March 9, 2005 for prison authorities to place in the United States mail, but the notices of appeal were not stamped "filed" by the clerk's office of the court of appeals until March 22, 2005. The court of appeals dismissed the appeal, holding it was without jurisdiction because the notices of appeal were not timely filed.

On appeal to the Supreme Court, Ramos and his family argued their notice of appeal was timely filed under the "mailbox rule" because the notice was placed in the prison mailbox prior to the filing deadline. The Supreme Court agreed and reinstated the appeal stating, "we have held on more than one occasion that an inmate who does everything necessary to satisfy timeliness requirements must not be penalized if the document is ultimately filed tardily because of an error on the part of officials over whom the inmate has no control."

7. Tex. A&M Univ. Sys. v. Koseoglu, 233 S.W.3d 835 (Tex. September 7, 2007) [05-0321].

Sefa Koseoglu worked as a contract employee at the Texas Engineering Experiment Station, a division of the Texas A&M University System. Koseoglu sued the University System, the Station, and Mark McLellan, his supervisor, for allegedly breaching his employment contract. Both Texas A&M and McLellan filed pleas to the jurisdiction asserting sovereign immunity. The trial court denied the pleas to the jurisdiction.

The Supreme Court considered whether a plaintiff who, on appeal, loses a plea to the jurisdiction based on sovereign immunity is entitled to a remand for an opportunity to cure the jurisdictional pleading defect. In addition, the Court analyzed section 51.014(a) of the Texas Civil Practice and Remedies Code to determine whether appellate courts have jurisdiction to consider a government official's appeal of a trial court's denial of a plea to the jurisdiction based on sovereign immunity.

The Court held that Texas A&M's sovereign immunity from suit barred Koseoglu's breach of contract claim. However, it also held that the case need not be remanded to allow Koseoglu to amend his pleadings. "[A] pleader must be given an opportunity to amend in response to a plea to the jurisdiction only if it is possible to cure the pleading defect." The Court concluded that Koseoglu could not state a cause of action that could survive Texas A&M's sovereign immunity and thus dismissed Koseoglu's claim against Texas A&M. The Court also held that section 51.014(a)(8) allows a state official to bring an interlocutory appeal challenging the denial of a plea to the jurisdiction and vests appellate courts with jurisdiction to hear those appeals. Accordingly, the Court reversed the judgment the court of appeals and dismissed Koseoglu's claim against McLellan.

8. Tex. Parks & Wildlife Dep't v. E. E. Lowrey Realty, Ltd., 235 S.W.3d 692 (Tex. September 28, 2007) [05-0157].

E.E. Lowrey Realty sued the Texas Parks and Wildlife Department and two of its employees, alleging negligence and breach of contract claims relating to a fire that occurred at a storage facility Lowrey owned. TPWD and its employees filed a joint plea to the jurisdiction asserting sovereign immunity which the trial court denied. The Supreme Court first considered whether the Texas Civil Practice and Remedies Code authorizes interlocutory review of a state entity's jurisdictional plea on claims brought against government officials in their official capacity. Relying on *Texas A&M University System v. Koseoglu*, ___ S.W.3d ___, 50 Tex. Sup. Ct. J. 1213 (Tex. 2007), the Court held that the code vests appellate courts with jurisdiction to consider a government employee's interlocutory appeal of a trial court's denial of a plea to the jurisdiction. Therefore, the Court dismissed Lowrey's claims against the TPWD employees.

The Court then considered whether a plaintiff, whose plea to the jurisdiction based on sovereign immunity was denied, is entitled to a remand for an opportunity to cure the jurisdictional pleading defect. The Court held that Lowrey, who did not obtain legislative consent to sue, could not pursue a breach of contract suit against the State. With regard to Lowrey's negligence claims, the Court concluded that Lowrey failed to establish a waiver of sovereign immunity for property damage arising from the use of motor-driven vehicles or equipment. Again citing *Koseoglu*, the Court held that merely pleading more facts in support of his claims would not overcome TPWD's immunity from suit. Accordingly, the Court dismissed Lowrey's claims against TPWD.

C. Perfecting Appeal

1. Warwick Towers Council of Co-Owners v. Park Warwick, L.P., 244 S.W.3d 838 (Tex. January 25, 2008) [07-0384].

In this appeal, the Supreme Court addressed whether an insurance company may perfect an appeal by filing the notice of appeal in its insured's name. St. Paul Fire and Marine Insurance Company was the insurer of several condominium owners who sued a hotel for water damage caused to their property. After paying the condominium owners, St. Paul asserted its subrogation rights in the condominium owners' lawsuit. The trial court dismissed the condominium owners' claims, and the owners settled the rest. St. Paul then filed a notice of appeal in its insured's name. The court of appeals did not reach the merits of the appeal, however, holding that St. Paul did not properly perfect its appeal because it failed to name itself as an appellant. In a per curiam opinion, the Supreme Court reversed, holding that the notice of appeal filed in the insured's name constituted a bona fide attempt to invoke the appellate court's jurisdiction, and thus, remanded the case back to the court of appeals.

D. Preservation of Error

1. Equistar Chems., L.P. v. Dresser-Rand Co., 240 S.W.3d 864 (Tex. May 4, 2007) [04-0121].

The primary issue in this case was whether the court of appeals erred in concluding that the economic loss rule barred product-liability damages awarded by the trial court. Because the economic loss rule argument was not preserved in the trial court, the Supreme Court held that the court of appeals erred in reversing the trial court's judgment on that basis.

In the mid 1970s, Equistar Chemicals bought two gas compressors from Dresser-Rand Company. Impellers, which resemble large fan blades, are essential parts of the compressors. Dresser-Rand installed new impellers over the years to improve the performance of the gas compressors. In April 1999, one of the impellers failed, causing major damage to the compressor, its turbine and adjacent parts of the plant. A replacement impeller subsequently failed in May 1999, again causing extensive damage. Equistar sued Dresser-Rand to recover for the damage caused by the impeller failures. A jury assessed the damages at $3.6 million and apportioned 80% of the fault to Dresser-Rand. The court of appeals reversed the trial court's judgment, holding that the economic loss rule barred recovery because (1) the compressor was the subject of the relevant contract of sale between the parties and therefore the relevant product for purposes of the economic loss rule; (2) damage to the compressor itself was economic damage recoverable only through a contractual breach of warranty cause of action; and (3) the claim for damage to the compressor, whether caused by original or replacement parts, was barred when the statute of limitations ran on claims arising from breaches based on the original 1975 contract for sale of the compressor.

The Supreme Court reversed the court of appeals' judgment. It held that Dresser-Rand failed to preserve error on the economic loss rule by failing to object to a jury charge question that asked the jury to consider all damages without excluding damages to the product itself. The jury was instructed to consider the cost of repairs "to restore the Equistar Chemicals' ethylene plant to the condition it was in immediately prior to the occurrence(s) in question." Thus, the question did not distinguish damages to the product itself, which would not be recoverable under the economic loss rule, and damages to surrounding property, which would be recoverable. Dresser did not object to the damages question. If Dresser believed that the jury charge presented an improper measure of damages, it was required to timely object and make the trial court aware of its complaint in order to preserve error for appeal. Because there was no objection to the charge, the Supreme Court measured the damages by the question and instruction given and concluded that there was legally sufficient evidence to support the verdict.

E. Presumptions

1. Tarquis v. Skadden, S.W.3d , 51 Tex. Sup. Ct. J. 691 (Tex. March 28, 2008) [07-0321].

At issue in this case is whether a court of appeals may presume that missing parts of the record might support the trial court's subject-matter jurisdiction when the record itself shows the presumed facts are untrue.

In March 1999, Ana Maria Tarquis Alfonso filed for divorce in Spain, and one month later Michael Skadden filed for divorce in Harris County. When Tarquis failed to appear in Texas, the trial court named both parents managing conservators of their only child and entered a standard possession order. More than four years later, Skadden sought to enforce the Texas decree. Tarquis argued the 1999 judgment was void for lack of subject-matter jurisdiction because Texas was not the child's home state. The trial court dismissed the case for lack of personal jurisdiction. The court of appeals reversed, finding the trial court had both personal jurisdiction and subject-matter jurisdiction over the child custody issues in the 1999 divorce decree. While Skadden's own affidavit and trial testimony established that Texas was not the child's home state, and none of the other jurisdictional bases in the Family Code applied, the court of appeals nonetheless held that the trial court had subject-matter jurisdiction to enter the child custody provisions by presuming that something omitted from the clerk's record supported jurisdiction.

The Supreme Court held that a court of appeals cannot presume something that the record shows is untrue in order to support a trial court's

judgment. For a collateral attack to be successful, the record must affirmatively reveal the jurisdictional defect. Because the record affirmatively showed that Texas was not the child's home state and that none of the other jurisdictional bases were applicable, the court of appeals should not have presumed otherwise. As subject-matter jurisdiction can never be waived, the trial court properly refused to enforce the child custody provisions of the divorce decree.

F. Scope of Review

1. BFI Waste Sys. of N. Am., Inc., v. N. Alamo Water Supply Corp., S.W.3d , 51 Tex. Sup. Ct. J. 54 (Tex. October 12, 2007) [06-0602].

Various local governmental and private entities sued a landfill operator, alleging breach of a prior settlement agreement, and won a verdict and injunction. The court of appeals reversed the injunction but awarded damages under the verdict. The court, however, also addressed an issue admittedly not raised in the instant litigation concerning a permit issued by one of the governmental entities in connection with the prior agreement. In a per curiam opinion, the Supreme Court denied the parties' petitions but, noting one party's concern that the court of appeals' footnote could prejudice future litigation, specifically stated that the footnote was not within the issues before the court of appeals and thus could not determine the validity of the permit.

G. Standards of Review

1. Goodyear Tire & Rubber Co. v. Mayes, 236 S.W.3d 754 (Tex. June 15, 2007) [04-0993].

In this case, the Supreme Court corrected the court of appeals' misapplication of the proper standard of review when considering evidence with a motion for summary judgment. Here, the summary judgment record contained uncontraverted evidence that an employee, when he was not at work, awoke at 3:00 a.m. and drove a company truck to a nearby convenience store. During the trip, the employee fell asleep at the wheel and hit the plaintiff's truck head-on. There was no conflicting evidence to raise a genuine issue of material fact over whether, at the time of the accident, the employee was acting in furtherance of his employer's business. The court of appeals erred in considering only the evidence favorable to the plaintiff while ignoring undisputed evidence in the record that cannot be disregarded. Instead, the court of appeals should have considered whether reasonable and fair-minded jurors could differ in their conclusions in light of all of the evidence presented. The Court reversed the court of appeals' judgment and rendered judgment that the plaintiff take nothing.

XXVI. PROCEDURE—PRETRIAL

A. Choice of Law

1. In re AutoNation, Inc., 228 S.W.3d 663 (Tex. June 29, 2007) [05-0311].

In this employment case, the Supreme Court decided that non-competition covenants governing a Texas resident employed in Texas did not need to be construed by Texas courts and according to Texas law, where forum-selection and choice-of-law clauses called for a Florida venue and Florida law.

Garrick Hatfield worked for a Texas subsidiary of AutoNation, Inc., a Florida-based automobile dealership. His employment agreements contained non-compete covenants and forum-selection and choice-of-law clauses calling for a Florida venue and Florida law. In January 2005, Hatfield resigned with the intention of joining a Texas competitor. AutoNation sued Hatfield in Florida to enforce the non-compete covenants. Hatfield subsequently filed suit in Texas. The Texas trial court declined to dismiss or stay the action and enjoined AutoNation from pursuing the Florida suit. The court of appeals denied AutoNation mandamus relief, holding that the enforcement of non-compete covenants was a matter of fundamental Texas public policy.

The Supreme Court conditionally granted AutoNation's petition for mandamus because mandamus is appropriate to enforce forum selection clauses, and no precedent or statute required suit to be brought in Texas when a forum-selection clause mandates venue elsewhere. The Court reasoned that deferring to the first-filed Florida action honors the parties' contractual agreement and also comports with principles of state-to-state comity.

Justice O'Neill concurred, writing that had there been a clear showing that application of the forum-selection clause would have undermined Texas public policy, she might have agreed with

the court of appeals' analysis. The mere indication, however, that the Florida court would apply Florida law did not justify Texas courts' interference with the contract.

2. Sonat Exploration Co. v. Cudd Pressure Control, Inc., 202 S.W.3d 901 (Tex. App.—Texarkana 2006), *pet granted*, 51 Tex. Sup. Ct. J. 206 (December 14, 2007) [06-0979].

At issue in this case is which state's law governs a contractual indemnity obligation, as well as the procedural implications of the Supreme Court's virtual representation doctrine. Cudd contracted with Sonat to perform various services at Sonat's oilfields. Sonat and Cudd agreed to indemnify each other and provide insurance for claims brought by either company's employees. For Texas and New Mexico operations, their contract specified that Texas law would apply, but for Louisiana operations, their contract contained no such provision. After an accident at one of Sonat's Lousiana sites, injured Cudd employees from Texas brought Texas tort claims against Sonat in a Texas court. After the employees settled with Sonat for $28 million, Sonat sought indemnity from Cudd. Cudd refused, and Sonat sued Cudd on the contractual indemnity obligation. The trial court applied Texas law. Before appealing to the court of appeals, Sonat and Cudd agreed not to appeal the trial court's choice of Texas law. Then Lumbermens Mutual Casualty Company, Cudd's insurer who had not litigated at the trial court, sought to appeal the choice of Texas law. In *In re Lumbermens Mutual Casualty Co.*, the Supreme Court allowed Lumbermens to "invoke the virtual-representation doctrine to raise on appeal the choice-of-law issue its insured abandoned." 184 S.W.3d 718, 729 (Tex. 2006). On remand, the court of appeals heard Lumbermens' choice-of-law arguments and reversed the trial court's judgment, concluding that Louisiana law governed the contract. Sonat petitioned the Supreme Court, seeking reversal of the choice-of-law decision, including the scope of binding power with respect to Cudd and Lumbermens. The Supreme Court granted the petition for review and heard oral argument on February 6, 2008.

B. Discovery

1. Ford Motor Co. v. Castillo, 200 S.W.3d 217 (Tex. App.—Corpus Christi 2006), *pet. granted*, 51 Tex. Sup. Ct. J. 126 (November 30, 2007) [06-0875].

At issue in this case is whether Ford Motor Company may discover evidence of jury misconduct concerning a presiding juror's note that provoked the parties' settlement. During jury deliberations, and while settlement discussions were ongoing, the presiding juror sent out a note asking "What is the maximum amount that can be awarded?" The parties learned of the note and quickly settled. After the jury was released, Ford's counsel filed a Motion to Delay Settlement requesting permission to undertake discovery into the possibility of outside influence. This motion was supported by four affidavits from jurors describing the circumstances of the note. The trial court denied Ford's motion and directed it to pay the settlement. Ford appealed the settlement and discovery decisions, but the court of appeals affirmed. Ford argues that the trial court should have allowed discovery on the issue of potential outside influence, and that the settlement agreement was enforced improperly. The Supreme Court granted Ford's petition for review and heard oral argument on February 5, 2008.

2. In re Allied Chem. Corp., 227 S.W.3d 652 (Tex. June 15, 2007) [04-1023].

In this mass tort case, the Supreme Court detailed the limits of a trial court's discretion to postpone discovery responses until shortly before trial.

About 1900 plaintiffs sued over 30 defendants for injuries arising from exposure to a combination of pesticides produced or stored at nearby facilities. The defendants include the facilities' owners, operators, and remediators as well as suppliers and manufacturers of raw materials used at the facilities. 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. Allied Chemical sought mandamus relief from plaintiffs' failure to answer the interrogatories and from the trial court's order consolidating five plaintiffs and setting the case for trial. After the Supreme Court

granted a stay, the trial court, at the plaintiffs' request, withdrew the consolidation order.

The Court held that mandamus was proper even though the plaintiffs were no longer consolidated because their failure to answer the interrogatories was still at issue. The Court determined that the plaintiffs had the burden to plead and prove they were injured and by whom. Plaintiffs cannot file suit against numerous defendants, allege a "toxic soup" caused their injuries, and demand that defendants prove otherwise. As a result, the Court vacated the trial court order setting any of the plaintiffs' claims for trial until the defendants had an opportunity to prepare for trial after learning which plaintiffs could connect Allied Chemical products to their injuries.

Chief Justice Jefferson, joined by Justice O'Neill, Justice Wainwright, and Justice Johnson dissented arguing the case was moot. After the trial court deconsolidated the case, the plaintiffs supplemented their discovery responses to identify causation witnesses. Since no disputed controversy remained, the dissent objected to the Court's opinion. Justice Wainwright, in a separate dissenting opinion noted that Allied Chemical could have, but did not, filed a motion for summary judgment or motion to compel, which would have properly put the dispute for the Court.

Justice Hecht, in a concurring opinion, responded to the dissent's argument that the case was moot. He asserted that while some plaintiffs had filed supplemental discovery responses, the remaining 1,888 plaintiffs had not.

3. In re Allstate County Mut. Ins. Co., 227 S.W.3d 667 (Tex. June 15, 2007) [06-0878].

After a $13,000 settlement offer failed, a driver and a passenger sued the other vehicle's driver, her insurance carrier, and the insurer's adjuster. The plaintiffs made eighty-nine requests for production, fifty-nine interrogatories, and sixty-five requests for admission. Among other things, they asked for: (1) transcripts of all testimony ever given by any of the insurer's agents on the topic of insurance; (2) every court order finding the insurer wrongfully adjusted the value of a damaged vehicle; (3) personnel files of every one of the insurer's employees that had ever been found to have wrongfully assessed the value of a damaged vehicle; and (4) legal instruments documenting Allstate's status as a corporation and its net worth. The insurer and its agent objected to the discovery and moved for summary judgment, claiming the plaintiffs had no direct action against a third party's insurer. The trial court denied summary judgment, overruled their objections, and ordered them to respond. The court of appeals denied mandamus relief without explanation.

The Supreme Court conditionally issued a writ, directing the trial court to vacate its discovery order and reconsider the scope of permissible discovery in light of its opinion. The Court advised that discovery is a tool for focusing the trial process, not a weapon for making litigation more expensive. Discovery orders may not be overly broad and trial courts must make an effort to impose reasonable discovery limits.

4. In re Bexar County Criminal Dist. Attorney's Office, 224 S.W.3d 182 (Tex. May 4, 2007) [05-0613].

David Crudup filed a malicious prosecution lawsuit against Cynthia Blank and her son, who had accused Crudup of threatening to kill him. The Bexar County Criminal District Attorney's Office (DA's Office) had dropped terroristic threat charges against Crudup after the Blanks refused to testify. The DA's Office turned over its prosecution file to Crudup for use in the civil trial, but it filed a motion for protective order and to quash a subpoena requesting that three of its employees testify. The trial court granted the motion. The court of appeals issued a writ of mandamus for Crudup, ordering the trial court to vacate its order. The court held that Crudup had a substantial need for testimony to prove an essential element of malicious prosecution and that the DA's Office had not met its burden of proof to show that the testimony sought was protected by the work product privilege.

In an opinion authored by Justice Willett, the Supreme Court granted a conditional writ of mandamus to the court of appeals to vacate its writ and to reinstate the trial court's order. The Court held that DA testimony was not necessary to prove the procurement prong of malicious prosecution. It then held that the DA's work in preparing the criminal prosecution against Crudup

constituted work product, so he could not compel testimony regarding the DA's mental impressions, thought processes, and procedures. Further, the DA's Office did not waive its work-product privilege against testifying by producing the prosecution file. Given the nature of what Crudup sought and his inability to show both "substantial need" and "undue hardship" under Rule of Civil Procedure 192.5(b)(2), he could not force DA personnel to discuss their mental processes or other case-related communications and preparation, even if the subpoenaed testimony related to documents already produced

Justice Willett wrote a separate concurrence to note the policy interests served by limiting the scope of the work-product waiver resulting from the DA's disclosure to the documents themselves, not to live testimony concerning the thoughts and communications underlying each document's contents.

In a dissent joined by two justices, Justice Johnson wrote that the work-product privilege could not be asserted to quash a subpoena *duces tecum*. He acknowledged that some of the testimony Crudup sought might be privileged, but much relevant, non-privileged evidence could be adduced via testimony.

Justice Green did not participate in the decision.

5. In re BP Prods. N. Am., Inc., 244 S.W.3d 841 (Tex. January 25, 2008) [07-0119].

At issue in this case is whether a trial court could set aside an otherwise valid discovery agreement reached pursuant to Texas Rule of Civil Procedure 191.1. In consolidated litigation concerning a fire at BP Products' Texas City oil refinery, the plaintiffs' noticed the depositions of two high-ranking officials at BP's parent company: John Browne, the Chief Executive Officer, and John Manzoni , the head of marketing and refining. BP Products initially moved to quash both depositions, but the parties ultimately executed a Rule 191.1 discovery agreement. Under the agreement, BP products would present Manzoni for a limited deposition and plaintiffs would refrain from noticing the deposition of any other executive with one exception: if, during Manzoni's deposition, plaintiffs developed new evidence of Browne's unique and superior knowledge, plaintiffs could take Browne's deposition subject to certain time and manner restrictions. Plaintiffs took Manzoni's deposition, and, contending that they had met the standard provided in the agreement, issued a new notice to take Browne's deposition. BP Products moved to quash. The trial court denied the motion to quash, and set aside the parties discovery agreement, ordering Browne's deposition to go forward without the time and manner restrictions contained in the agreement. The trial court cited changed circumstances, estoppel, and misrepresentation as bases for setting aside the agreement. BP Products sought mandamus review. The court of appeals denied mandamus relief.

The Supreme Court conditionally granted mandamus relief, holding that there was no basis on the record before it to set aside the parties Rule 191.1 agreement. The Court indicated that, given the importance of Rule 191.1 agreements in facilitating effective case management, trial courts should not lightly set such agreements aside, particularly where one of the parties has partially performed its obligations. Finding no basis on which to set aside the parties agreement, the Court ordered the trial court to enforce it.

6. In re Christus Spohn Hosp. Kleberg, 222 S.W.3d 434 (Tex. April 27, 2007) [04-0914].

In this case the Supreme Court considered whether privileged documents inadvertently disclosed to a party's own testifying expert are discoverable under Texas Rule of Civil Procedure 192.3(e)(6), which mandates disclosure of all documents provided to a party's testifying expert, or whether they are instead subject to Texas Rule of Civil Procedure193.3(d), which provides that a party who inadvertently produces privileged material does not waive a claim of privilege if a party asserts the privilege within ten days of learning of the inadvertent disclosure.

When Mona Palmer notified Christus Spohn Hospital Kleberg of her intent to file a health care liability claim, the hospital's internal investigator, Sandra Northcutt, conducted an investigation. That investigation generated a number of documents which formed the basis of this mandamus action. The documents were mistakenly sent to the hospital's only testifying

expert, Nurse Kendra Menzies. Palmer's counsel sought to depose Menzies, and issued a subpoena duces tecum requesting all documents furnished to and reviewed by Menzies in connection with her consultation in the lawsuit. Menzies brought the Northcutt documents to the deposition. The hospital sought to recover the documents mistakenly produced to Menzies pursuant to Rule 193.3(d), known as the "snap-back" provision. At the hearing on the issue, Nurse Menzies testified that she had not read the documents but did "glance" at them. The trial court then overruled the hospital's claim of privilege, and the court of appeals denied the hospital's petition for writ of mandamus.

The Supreme Court held that the inadvertent nature of the production in this case preserved the privilege under Rule 193.3(d) and entitled the hospital to recover the documents upon realizing its mistake, provided that hospital's designated expert does not testify at trial. However, as long as the hospital stands upon its testifying expert designation, Rule 192's plain language and purpose and the policy considerations that surrounded its amendment, compel the conclusion that the documents may not be snapped back. Because the hospital indicated an intent to rely upon the expert to whom the documents were disclosed, the Court denied the hospital's petition for writ of mandamus without prejudice to any right the hospital might have to designate another testifying expert and recover the privileged documents.

7. In re SCI Tex. Funeral Servs., Inc., 236 S.W.3d 759 (Tex. October 12, 2007) [06-0385].

This case involves a discovery dispute in a potential class-action suit when the class had not yet been certified. Prior to class certification, the trial court ordered class-wide discovery, sanctioned SCI for inadequate discovery responses, and barred SCI from contesting the plaintiffs' method of calculating damages. The Supreme Court recognized that much of the class-wide discovery was no longer relevant and the sanctions were incongruous because the court of appeals (in a separate appeal) reversed certification and held that the plaintiffs had no cause of action against SCI for damages. Nevertheless, the Court held that under the proper class-wide, precertification discovery rule, trial courts must limit precertification discovery to the particular issues governing certification in each case. In this case, the question of law at issue, whether private parties have standing to assert violations of the funeral disclosure rules, did not require the broad discovery the plaintiffs sought (200,000 funeral service contracts and 2.5 million invoices). As a result, the Court held that the trial court abused its discretion by compelling discovery that was not narrowly tailored to the relevant dispute.

The Court also addressed whether mandamus relief should be denied based on laches because SCI waited nearly six months after the trial court's final sanctions before seeking mandamus relief. The Court held SCI's explanations for waiting—that it took three months to get the reporter's record of the numerous discovery hearings, and three more months to brief both the discovery and the certification appeals so they could be filed together (although in separate proceedings)—were sufficient to establish that SCI had not "slumber[ed] on [its] rights." Accordingly, the Court conditionally granted the writ of mandamus and directed the trial court to vacate its deemed factual findings and discovery orders in light of the court of appeals' decertification.

C. Forum Non Conveniens

1. In re Gen. Elec. Co., 2007 WL 625010 (Tex. App.—Houston [1st Dist.] 2007), *argument granted on pet. for writ of mandamus*, 50 Tex. Sup. Ct. J. 910 (June 22, 2007) [07-0195].

Austin Richards allegedly contracted asbestosis from long-term exposure to asbestos through his job as a mason and through working on his home. He is a life-long resident of Maine, worked exclusively in Maine, was diagnosed with the disease in Maine, and has treating physicians in Maine. He has never visited Texas, has no relatives or acquaintances in Texas, owns no property in Texas, and was not exposed to asbestos in Texas. He nevertheless filed suit in Texas against numerous manufacturers of asbestos-containing products; three of the twenty-three manufacturers are headquartered in Texas, thus precluding removal to federal court.

Three of the defendants moved for dismissal based on forum non conveniens pursuant to the newly-amended Texas Civil Practice and Remedies Code section 71.051. They argued that Maine was a more appropriate forum for this action than Texas. The trial court denied the motion, writing in a letter to the parties that Texas was a better forum in the interest of justice. The trial court reasoned that if Richards filed suit in Maine, the defendants would most likely remove to federal district court based on diversity, and that court would then transfer the case to the notoriously slow-moving federal asbestos MDL court. Because Richards has only a short time to live, and because the defendants would not waive their right to remove to federal court, the trial court ruled that the interests of justice dictated that Richards' case could go to trial swiftly only in Texas. On the relators' motion for rehearing, the trial court vacated its earlier order but still denied the motion without listing grounds.

The court of appeals refused to grant mandamus relief. The Supreme Court granted argument on the petition for writ of mandamus and heard oral argument on November 14, 2007.

2. In re Pirelli Tire, L.L.C., 247 S.W.3d 670 (Tex. November 2, 2007) [04-1129].

The issue in this case was whether the trial court abused its discretion in denying Pirelli Tire's motion to dismiss a lawsuit filed in Cameron County, Texas, on forum non conveniens grounds. The lawsuit stemmed from a truck rollover on a Mexican highway that caused the death of Valentin Hernandez Aran. A Cameron County dealer purchased the truck at an auction in Arkansas and sold it eleven days later in Texas to a Mexican citizen who immediately imported it to Mexico, where it remained continuously until the accident. Aran's family, all citizens of Mexico like Aran himself, filed the suit in Cameron County. The Arans alleged that a defective tire manufactured in Iowa by Pirelli, a Delaware corporation, caused the accident. In a plurality opinion authored by Justice O'Neill and joined by Justice Hecht, Justice Brister, and Justice Medina, the Court held that the trial court abused its discretion in denying Pirelli's motion to dismiss on forum non conveniens grounds. The Court concluded that former section 71.051(a) of the Civil Practice and Remedies Code, which governed forum non conveniens motions in suits brought by claimants who were not legal residents of the United States, and allowed dismissal "in the interest of justice," did not confer unlimited discretion on trial courts. The Court held that courts should be guided by factors the United States Supreme Court articulated in *Gulf Oil Corp. v. Gilbert*, 830 U.S. 501 (1947), in evaluating whether dismissal on forum non conveniens grounds was warranted. Applying those factors, the Court held that the trial court abused its discretion. The Court further held that Pirelli had no adequate remedy by appeal.

Justice Willett, joined in part by Justice Wainwright, agreed that the trial court abused its discretion, but concluded that the majority's application of the *Gulf Oil* factors erroneously imported statutory factors set out in former section 71.051(b) of the Code into subsection (a). Justice Johnson, joined by Chief Justice Jefferson, dissented, reasoning that under former section 71.05(a) the trial judge had discretion to dismiss the case on forum non conveniens grounds. Because Pirelli had not conclusively established that an adequate alternative forum existed, the trial judge had not abused his discretion. Justice Green did not participate in the decision.

D. Nonsuit

1. Tex. Mut. Ins. Co. v. Ledbetter, S.W.3d , 51 Tex. Sup. Ct. J. 711 (Tex. April 4, 2008) [06-0814].

The issue in this case is whether recipients of worker's compensation benefits can defeat a compensation carrier's statutory right of subrogation by settling claims against a third-party tortfeasor solely in the name of the deceased's estate and nonsuiting their own claims.

Charles Ledbetter's family members sued third parties alleged to be responsible for his death, which occurred while he was working. The case settled for $4.5 million. Ledbetter's worker's compensation carrier, Texas Mutual, filed a petition in intervention seeking subrogation for past and future benefit payments to his widow and minor son. The family's attorney nonsuited all of their claims except those of Ledbetter's estate. None of the settlement proceeds were allocated to the widow or Ledbetter's children. Roughly half

of the $4.5 million was allocated to Ledbetter's estate for pain and suffering before his death, with the remainder allocated to the family's attorney and the ad litem. This allocation completely eliminated Texas Mutual's subrogation interest. The trial court granted the family's nonsuit and struck the carrier's intervention. The court of appeals held that it was error to strike the carrier's intervention and to allocate the settlement to the estate, but it declined to set aside the nonsuit and reinstate Ledbetter's widow and minor son as parties.

The Supreme Court held that the widow and minor son must be reinstated as parties as they had no right to nonsuit Texas Mutual's claim for subrogation. While parties have an absolute right to nonsuit their own claims, they have no right to nonsuit someone else's claims they are trying to avoid. In addition, the trial court erred when it struck Texas Mutual's intervention and distributed the entire settlement to the Ledbetter estate, the family's attorney, and the ad litem. Compensation carriers are entitled to the first money a worker receives from a tortfeasor, which Texas Mutual failed to receive when the trial court denied its subrogation claim against the settlement proceeds. As a result, Texas Mutual had a claim for conversion against everyone involved—the plaintiffs, their attorney, and the defendants. As between those parties, the plaintiffs and their attorney should satisfy Texas Mutual's claim from the unlawfully-obtained funds, as the tortfeasors would pay twice if Texas Mutual recovered from them.

E. Res Judicata

1. Kerlin v. Sauceda, 164 S.W.3d 892 (Tex. App.—Corpus Christi 2005), *pet. granted*, 51 Tex. Sup. Ct. J. 447 (February 15, 2008) [05-0653].

This case is the latest in a string of lawsuits over title to Padre Island. The present suit was filed in 1993 by descendants of the land's original grantees, Padre Nicholas Balli and his nephew Juan Jose Balli, against Gilbert Kerlin, Windward Oil and Gas Corp., and P.I. Corp. (collectively, "the Kerlin group"). In general, the suit asserted that in the 1930s, Kerlin misled Balli's descendants in securing deeds conveying their interests in the island in the guise of clearing title to the property and in settling an earlier lawsuit. They asserted claims for breach of contract, breach of fiduciary duty, fraud, and conspiracy to commit fraud, and sought damages, a declaratory judgment, an accounting, and the establishment of a constructive trust. Their petition asserted that the discovery rule and the defendants' fraudulent concealment of information had prevented them from previously filing the suit. Kerlin asserted several defenses including res judicata, estoppel, limitations, laches, and the statute of frauds. A jury found that Kerlin was estopped from denying the validity of royalty interests in the Balli descendants' favor established in the deeds obtained by Kerlin, but that Kerlin had obtained an individual interest in the deeds. It also found that Kerlin had breached fiduciary duties and conspired to commit fraud against the Balli descendants. Based on the jury findings, the trial court imposed a constructive trust on mineral interests in some of the property and ordered a partial accounting of profits wrongfully withheld by Kerlin. The court of appeals affirmed the judgment against Kerlin, but also held that the trial court erred in failing to order a full accounting for all profits Kerlin obtained as the result of his breach of fiduciary duty. The Supreme Court granted Kerlin's petition for review and heard oral argument on April 22, 2008.

F. Sanctions

1. Low v. Henry, 221 S.W.3d 609 (Tex. April 20, 2007) [04-0452].

In this case, the Court addressed the imposition of a monetary penalty under chapter 10 of the Texas Civil Practice and Remedies Code. Chapter 10 requires a pleading's signatory to certify that he or she conducted a reasonable inquiry into the allegations and concluded that each allegation or other factual contention in the pleading has, or is likely to have, evidentiary support.

Thomas Henry filed a wrongful death suit on behalf of his client a few days before the limitations deadline. The petition primarily alleged product defect claims involving a defective drug but also included some medical malpractice claims. Many of the allegations against two physicians involved the prescription and provision of the drug to the decedent. On the

same day Henry filed the suit, he moved to withdraw. The doctors answered the petition, presented undisputed evidence that neither of them prescribed the drug to the patient, and moved for sanctions. The trial court ordered Henry to pay a $50,000 penalty for violating Chapter 10. An en banc court of appeals reversed in a split decision, holding in part that because part of the pleading's alternative allegations met the requirements of Chapter 10 and because alternative pleadings are permitted by the Texas Rules of Civil Procedure, sanctions under Chapter 10 were unjustified. The court of appeals also held that the trial court's findings were not specific enough to meet Chapter 10's requirements.

The Supreme Court reversed the court of appeals' judgment and held that under Chapter 10 the signer of a pleading or motion certifies that each claim, allegation, and denial is based on the signer's best knowledge, information, and belief after reasonable inquiry. "Group" or alternative pleadings do not relieve the party from meeting Chapter 10's express requirements. Finally, the amount of the penalty for a violation of Chapter 10 "must be limited to what is sufficient to deter repetition of the conduct or comparable conduct by others similarly situated" and should be guided by a list of nonexclusive factors, which includes the costs and fees incurred. The Court concluded that the trial court was within its discretion to award sanctions under Chapter 10 but remanded the case in the interest of justice to allow the parties to present evidence responsive to the enumerated guidelines and to allow the trial court to consider the amount of the penalty imposed in light of the Court's opinion.

G. Service of Citation

1. Hubicki v. Festina, 226 S.W.3d 405 (Tex. June 1, 2007) [05-0357].

In this case, the trial court authorized substituted service under Texas Rule of Civil Procedure 106(b) by first class mail and by certified mail, return receipt requested, on Frank Maryan Hubicki at a post office box associated with a house he owned in Mexico, Casa Tranquilidad. Hubicki did not answer, and the trial court rendered a default judgment against him for $2,302,000 in actual damages, $4,000,000 in punitive damages, $37,210.12 in prejudgment interest and $37,000 in attorney's fees. The trial court authorized the alternative service after the plaintiff, Festina, had unsuccessfully attempted service by certified mail as provided by Rule 106(a)(2). Festina's motion seeking alternative service was supported by an affidavit from its process server attesting that Hubicki was "currently in Mexico and can usually be found" at Casa Tranquilidad. After the default judgment was rendered, Hubicki filed this restricted appeal, arguing that error was apparent on the face of the record because it failed to demonstrate that the alternative service was reasonably effective to give him notice of the suit as Rule 106(b)(2) requires.

The Supreme Court agreed. The Court noted that, although the process server's affidavit stated that Hubicki was "currently" in Mexico, Festina did not attempt service until almost a month after the affidavit's date. The Court also observed that Festina's petition alleged that Hubicki had a residence address in Dallas. Consequently, the Court concluded that there was no evidence that Hubicki was in Mexico when Festina attempted service. The Court held that, as a matter of law, Festina failed to establish that alternative service at Casa Tranquilidad was reasonably calculated to provide Hubicki with notice of the proceedings in time to answer and defend. The Court therefore reversed the court of appeals' judgment and remanded to the trial court.

2. Prouxl v. Wells, 235 S.W.3d 213 (Tex. August 1, 2007) [06-0258].

In this case, the court of appeals held that limitations barred Denis Prouxl's suit against Michael Wells because, as a matter of law, Prouxl was not diligent in serving Wells with process. The Supreme Court reversed, holding that the summary judgment evidence failed to conclusively establish that the plaintiff did not exercise diligence in effectuaing service.

The Court explained that, when a defendant seeks summary judgment based upon untimely service, the burden is initially on the plaintiff to explain the delay in service. If the plaintiff provides an explanation, the defendant is not entitled to summary judgment unless the defendant presents conclusive evidence that the

plaintiff's explanation is insufficient to establish diligence. The Court held that Wells had not met that burden because Prouxl had presented evidence of more than thirty attempts to serve Wells over a nine-month period between the time suit was filed and the time Prouxl finally secured substituted service on Wells. The Court held that the short periods of delay that Prouxl did not explain were not comparable to those in other cases in which a plaintiff's lack of diligence was established as a matter of law. Accordingly, the Court reversed the court of appeals' judgment and remanded to the trial court.

H. Standing

1. DaimlerChrysler Corp. v. Inman, S.W.3d , 51 Tex. Sup. Ct. J. 422 (Tex. February 1, 2008) [03-1189].

At issue in this case is whether plaintiffs, suing as representatives of a class of ten million owners of DaimlerChrysler-manufactured automobiles, had standing to pursue economic damages on account of "defective" Gen-3 seatbelt buckles. Class representatives Inman, Castro, and Wilkins sued DaimlerChrysler in state court, seeking class certification and damages for negligence, negligent misrepresentation, breach of express and implied warranties, and violations of the Deceptive Trade Practices Act. The plaintiffs alleged that the Gen-3 seatbelt buckles were too easy to inadvertently unlatch and therefore dangerous. Inman's seatbelt might have released twice, but he was not sure and was not injured either time. Castro and Wilkins never had any problems. None of the plaintiffs knew of anyone harmed on account of a Gen-3 buckle. The plaintiffs affirmatively disclaimed damages for personal injury, and sought damages only to replace the buckles with more suitable ones. After denying DaimlerChrysler's motion for summary judgment, the trial court certified the class. On appeal, DaimlerChrysler argued that the plaintiffs lacked standing to bring the claims and alternatively that the class should be decertified. The court of appeals reversed the trial court's class certification, but rejected DaimlerChrysler's standing arguments.

The Supreme Court reversed and ordered the case be dismissed for lack of jurisdiction because the plaintiffs did not have standing. The Court held that the plaintiffs presented evidence of hypothetical injury, the possibility of which was too remote to satisfy standing requirements that a plaintiff be personally aggrieved and suffer concrete injury. Thus, the Court distinguished between the injury required to warrant standing to assert a claim and the claim's merits. DaimlerChrysler received only 50 complaints of improper release, so the Court likened this case more to the Fifth Circuit's *Rivera v. Wyeth-Ayerst Laboratories*, 283 F.3d 315 (5th Cir. 2002) (holding that plaintiff, having suffered no damage herself, had no standing to sue drug company for a refund of her purchase of prescription painkiller when the company received only 12 complaints of liver failure) than *Cole v. General Motors Corp.*, 484 F.3d 717 (5th Cir. 2007) (holding that plaintiffs did have standing to sue for economic damages for GM's delay in fixing air-bag sensing modules when GM received 306 complaints). Because the plaintiffs lacked standing, the trial court should have dismissed the entire action and not reached the issue of class certification.

Chief Justice Jefferson, joined by Justices O'Neill, Green, and Johnson, dissented, arguing that plaintiffs had standing, and that the majority, by conflating standing with the merits of the plaintiffs' claims, had both created a new requirement for class certification and allowed an appellant to raise a ground in its appeal that it had not raised or brought to the attention of the trial court. The dissent asserted that in this case the plaintiffs, like those in the *Cole* case, alleged their own economic injury for replacement cost and loss of use. The dissent would otherwise affirm the court of appeals' reversal of trial court's certification based on the trial court's failure to perform a choice of law analysis.

2. S. Tex. Water Auth. v. Lomas, 223 S.W.3d 304 (Tex. April 27, 2007) [05-0855].

At issue in this case is whether a group of Kingsville residents have standing to sue South Texas Water Authority (STWA). Romeo Lomas, individually, and other City of Kingsville residents organized as a private non-profit association under the name WATER, and brought suit against STWA. Lomas and WATER contended the rates charged under a contract between the City of Kingsville and STWA are

excessive and discriminatory, causing Kingsville ratepayers to bear a disproportionate percentage of the operating expense of service compared to other users of STWA services. Lomas and WATER asserted standing as third-party beneficiaries of the water-supply contract, claiming the contract was intended to provide a direct benefit to the citizens of Kingsville. They also contended they had standing to bring suit as consumers and taxpayers. WATER additionally asserted associational standing. Finding neither plaintiff had standing, the trial court granted summary judgment in STWA's favor. The court of appeals reversed in part, holding that Lomas had individual standing to pursue monetary and declaratory relief, WATER had associational standing to pursue declaratory relief, and both parties had standing as third-party beneficiaries of the water-supply contract.

The Supreme Court reversed and held that the plaintiffs failed to meet the requirements necessary to establish standing under any of the theories they asserted. The contract does not mention Lomas, WATER, or residents of the City of Kingsville in general other than to specify the water's intended use for sale to municipal and industrial customers. The mere description of a product's intended use cannot confer third-party-beneficiary status on intended users. Also, Lomas did not suffer an injury peculiar to himself as all the City residents suffered the same harm, nor did Lomas fit within the limited exception to the particularized-injury rule that confers standing on taxpayers who seek injunctive relief to prevent the illegal expenditure of public funds. Finally, because neither Lomas nor any other WATER member demonstrated individual standing to contest the water-supply contract, WATER lacked associational standing to sue on behalf of its members.

I. Statute of Limitations

1. Elledge v. Friberg-Cooper Water Supply Corp., 240 S.W.3d 869 (Tex. August 24, 2007) [06-0677].

Friberg-Cooper Water Supply Corp. sued Elledge on an unjust enrichment claim more than two years, but less than four years, after the cause of action arose. The trial court granted summary judgment in favor of Elledge on the grounds that the two-year statute of limitations had run. The court of appeals reversed, holding that the four-year limitations period applicable to debts also applies to unjust enrichment claims. In a per curiam opinion, the Supreme Court pointed to two prior opinions in which the Court indicated that the two-year statute of limitations governs unjust enrichment claims. Relying on this precedent, the Court reversed the judgment of the court of appeals and affirmed the trial court's judgment.

2. Ford v. Exxon Mobil Chem. Co., 235 S.W.3d 615 (Tex. August 31, 2007) [06-0293].

At issue in this case was whether the four-year statute of limitations for fraud barred both Ford's fraud claim and his equitable action to remove a cloud on title.

Ford sued Mobil Chemical Company (predecessor of ExxonMobil Chemical Company) in 1998 for real estate fraud claiming Mobil falsely represented that its pipeline easement covered three tracts of his land when in fact it covered only one. On summary judgment, the trial court awarded Ford $36,167 and ordered the pipeline removed. The court of appeals reversed the damage award because it was time-barred but affirmed the removal order, holding that quiet title actions have no statute of limitations. The Supreme Court reversed the removal order, affirmed the damage award, and rendered judgment for ExxonMobil.

The Supreme Court held that both Ford's fraud claim and quiet title claim were barred by limitations. Fraud claims must be brought within four years of the time the fraud should have been discovered through reasonable diligence. The recorded instruments in a grantee's chain of title generally raise an irrebuttable presumption of notice. Here, Ford's fraud claim stemmed from a discrepancy among several recorded instruments concerning the three tracts at issue. Ford admitted learning of the discrepancy by simply reading the documents. Because Ford failed to bring suit within four years of the time this discrepancy arose, his fraud claim was time-barred. An equitable action to remove cloud on title has no statute of limitations if a deed is void or has expired by its own terms. A deed that is merely voidable, however, is not eligible for such

equitable treatment because the claimant has an adequate legal remedy. Because deeds obtained by fraud are voidable rather than void, the deed in this case was subject to the four-year statute of limitations. Therefore, Ford's quiet title action was also time-barred. A contrary rule would allow parties to evade the statute of limitations in virtually every real estate case by recasting their claims as equitable actions to remove clouds on title.

3. Igal v. Brightstar Info. Tech. Group, Inc., S.W.3d , 51 Tex. Sup. Ct. J. 184 (Tex. December 7, 2007) [04-0931].

At issue in this case is: (1) whether the statutory requirement for filing a Texas Workforce Commission (TWC) wage claim within 180 days after the wages were due is jurisdictional, and (2) whether the TWC's dismissal of such a wage claim for late filing bars a common-law contract action under res judicata. Saleh Igal's contract was terminated by his employer, Brightstar, approximately nine months before it was due to expire. Six months after the contract expiration date (and 15 months after it was terminated), Igal filed a wage claim with TWC. TWC denied his claim, finding that he was not fired without cause, any wages due accrued 15 months prior, and therefore the claim was untimely filed so TWC did not have jurisdiction over the claim. Igal then filed suit alleging a common law breach-of-contract action. The trial court ruled that Igal was barred from bringing his claim based on the res judicata effect of the prior administrative action. The court of appeals affirmed. The Supreme Court affirmed the court of appeals' judgment.

The Court held that the 180-day filing requirement was not jurisdictional, and, thus, TWC incorrectly held that it did not have jurisdiction over Igal's wage claim. The Court further held that the statute of limitations ruling by TWC was a decision on the merits for res judicata purposes and should be granted preclusive effect. The fact that an administrative scheme provided claimants an alternative remedy in state court did not prevent res judicata from applying to an agency's final judgment. To pursue a common law contract claim after having already initiated an administrative wage claim, a claimant must withdraw the administrative claim before the agency has issued a final judgment. Igal did not.

Justice Brister, joined by Chief Justice Jefferson and Justices O'Neill and Medina, dissented. The dissent concluded that although the statutory filing requirement was not jurisdictional, TWC believed it had no jurisdiction when issuing its order. Thus, it did not believe it was issuing an order on the merits, and the Court should not read the order to say otherwise. In addition, a statute of limitations ruling should only be granted res judicata effect where a second forum would apply the same statute of limitations. Where as here, a second forum has a different statute of limitations that has not yet run, a claimant should be able to file an action.

XXVII. PROCEDURE—TRIAL AND POST-TRIAL

A. Default Judgment

1. Levine v. Shackelford, Melton & McKinley, LLP, S.W.3d , 51 Tex. Sup. Ct. J. 315 (Tex. January 11, 2008) [06-0553].

At issue in this case is the standard of review necessary to sustain a default judgment. Three law firms sued Sol Levine for legal fees totaling over $150,000. The deadline for filing an answer was November 29, 2004. Levine's attorney agreed to file a general denial by that date but did not do so. He again failed to meet an extended deadline, and after repeated discussions, emails, and contact with the opposing party, had still not filed an answer with the trial court on December 17, 2004, when the trial court signed a default judgment.

Levine subsequently made several motions to set aside the default judgment and obtain a new trial, all of which were denied by the trial court. The court of appeals held Levine showed a pattern of conduct that disregarded steps that a person of reasonable sensibilities would have taken to ensure an answer was filed, and affirmed the trial court's default judgment. The Supreme Court denied Levine's petition for review. In a per curiam opinion, the Court then denied Levine's motion for rehearing noting that while the court of appeals incompletely described the standard as a negligence standard, the proper standard for reviewing default judgments announced in *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d

124 (Tex. 1939), is not one of negligence but one of intentional or conscious indifference. While the court of appeals articulated an incorrect standard, the evidence did amount to conscious indifference.

B. Jury Argument

1. Living Ctrs. of Tex., Inc. v. Peñalver, S.W.3d , 51 Tex. Sup. Ct. J. 370 (Tex. January 25, 2008) [06-0929].

At issue in this case is whether the plaintiffs committed incurable error during closing argument by comparing the defendant nursing home to World War II Germans who committed atrocities as part of the T-4 project. The nursing home admitted to its negligence in dropping an elderly woman, whose injuries from the fall resulted in her death, and a trial was held solely on the issue of damages. During closing argument, the plaintiffs' attorney compared the nursing home to the T-4 perpetrators, who experimented on and killed elderly and infirm persons, to argue that the amount of damages proposed by the nursing home was insufficient. The nursing home did not object to the argument. The court of appeals found that the argument was improper but was not incurable, and that without an objection from the nursing home, reversal was not warranted.

The Supreme Court, in a per curiam opinion, found that the T-4 argument was incurable because it compromised the basic premise of the jury trial system guaranteeing the provision of impartial, equal justice. Because of the argument's system-damaging effect, it was incurably harmful and Living Centers of Texas was entitled to reversal.

C. Jury Instructions and Questions

1. Columbia Rio Grande Healthcare, L.P. v. Hawley, 188 S.W.3d 838 (Tex. App.—Corpus Christi 2006), *pet. granted*, 51 Tex. Sup. Ct. J. 126 (November 30, 2007) [06-0372].

During a surgery performed at Columbia Rio Grande Hospital, part of Alice Hawley's colon was repaired and another part was removed for pathological testing. The testing revealed stage 3 colon cancer, but that information was not communicated to Hawley until almost one year later. By then, the tumor was inoperable. She and her husband sued the hospital for negligence. A jury awarded the Hawleys over $2 million in damages, and the court of appeals affirmed.

The hospital petitioned the Court for review, raising four primary issues: (1) whether the trial court erred by refusing an instruction on a new and independent cause when Alice's physicians failed to inform her of the test results; (2) whether the trial court erred by refusing a "lost chance" instruction when the evidence of Alice's survival chances was conflicting; (3) whether, by failing to instruct the jury to disregard the independent pathologist's negligence, the trial court commingled valid and invalid liability theories; and (4) whether damages should have been capped.

The Supreme Court granted the hospital's petition for review and heard oral argument on January 17, 2008.

2. Ford Motor Co. v. Ledesma, 242 S.W.3d 32 (Tex. December 21, 2007) [05-0895].

In this products liability case, the Supreme Court addressed whether the instructions given to the jury concerning manufacturing defects and producing cause properly reflected Texas law. Tiburcio Ledesma was driving a recently purchased Ford truck when he lost control of the vehicle and struck two parked cars and the curb. Ledesma sued Ford, claiming that a manufacturing defect caused the drive shaft to separate from the transmission before the accident, leading to the loss in steering control; Ford countered that the drive shaft was damaged as a result of the accident, which was caused by Ledesma's negligent driving. The jury found in favor of Ledesma, and the court of appeals upheld the result.

The Supreme Court reversed, holding that the trial court incorrectly instructed the jury as to the meaning of "manufacturing defect" and "producing cause." However, the Court held that the trial court's definition of "manufacturing defect" failed to include a required element: that the product deviated from its design in a way that rendered it unreasonably dangerous. Furthermore, the Court held that the trial court improperly charged the jury as to "producing cause," which should be defined as a substantial cause of the event without which the event would not have occurred. Additionally, the Court upheld the trial

court's ruling on the admissibility of Ledesma's expert testimony. The Court reversed the court of appeals' judgment because the incorrect jury charge constituted reversible error but remanded for a new trial because the submitted instructions were merely defective rather than immaterial and followed previously acceptable pattern jury charges.

D. Recusal

1. In re McKee, S.W.3d , 51 Tex. Sup. Ct. J. 128 (Tex. November 30, 2007) [06-0055].

At issue in this case is whether a presiding judge of an administrative region erred in assigning another judge to hear a recusal motion, after the presiding judge had voluntarily recused himself from the same case. Following Presiding Judge Ovard's assignment of a judge to hear a recusal motion, Dr. Edgar Geer McKee sought mandamus relief, claiming the assignment was void because of Judge Ovard's own voluntary recusal in the same case. The Supreme Court denied McKee's request for mandamus on the ground that mandamus was not appropriate for review of denial of a motion to recuse and because assignment of judges by a presiding judge was a purely administrative task that did not normally require recusal.

E. Rule 11 Agreements

1. Knapp Med. Ctr. v. De La Garza, 238 S.W.3d 767 (Tex. November 2, 2007) [06-0575].

At issue in this case was whether Texas Rule of Civil Procedure 11 permitted the enforcement of an alleged oral settlement agreement. Dr. De La Garza sued a hospital, alleging defamation and other claims. He settled the lawsuit for the hospital's insurance policy limits. De La Garza then filed a second suit, contending that the hospital reneged on its separate agreement to contribute an additional sum to the settlement. The lower courts found there to be evidence of an agreement and rendered judgment for De La Garza. Rule 11, however, requires that agreements between attorneys or parties touching any pending suit be in writing, signed, and filed of record or be made in open court and entered of record as a condition to enforcement. Because the alleged agreement between De La Garza and the hospital was not in writing or dictated into the court's record, the Supreme Court held it could not be enforced and, accordingly, rendered judgment that De La Garza take nothing.

F. Voir Dire

1. Murff v. Pass, S.W.3d , 51 Tex. Sup. Ct. J. 688 (Tex. March 28, 2008) [07-0294].

At issue in this case is whether members of a venire were disqualified from serving on a jury when they stated, after a confusing line of questioning, that they would hold the plaintiff to the wrong standard of proof. During voir dire, counsel asked a series of confusing questions about various standards of review. One venireperson, in the course of questioning, stated that "greater weight and degree of credible evidence" sounded more like clear and convincing evidence than preponderance of the evidence and stated he would hold the plaintiff to a clear and convincing standard. A large number of venirepersons raised their hands indicating that they agreed. Opposing counsel objected, and the trial court observed that the venire was becoming confused. The trial court stated the correct standard of proof (preponderance of the evidence) and later, all members of the venire agreed that they would follow the judge's instructions, which would contain a description of the standard of proof. The trial court refused to disqualify the venirepersons and the defendants prevailed at trial. The court of appeals reversed, holding that the venire members were disqualified as a matter of law. The Supreme Court held that the trial court did not abuse its discretion in refusing to disqualify the venirepersons and determining that they were only confused and not unable to follow the court's instructions. The Court reversed the court of appeals' judgment and rendered judgment in favor of the defendants.

XXVIII. PRODUCTS LIABILITY

A. Indemnity

1. Owens & Minor, Inc. v. Ansell Healthcare Prod., Inc., S.W.3d , 51 Tex. Sup. Ct. J. 643 (Tex. March 28, 2008) [06-0322].

At issue in this case is whether section 82.002 of the Texas Civil Practice and Remedies Code requires a manufacturer in a products liability action to indemnify and hold harmless an

innocent seller for the seller's entire cost of defending the lawsuit or only for the portion of the seller's defense associated with the manufacturer's own products. A United States District Court held that a manufacturer meets its section 82.002 requirements when offering to defend and indemnify an innocent seller against claims involving its own products. On appeal, the United States Court of Appeals for the Fifth Circuit certified the question to the Texas Supreme Court.

The Supreme Court held that section 82.002 requires a manufacturer to indemnify sellers only for costs arising from the manufacturer's own products. The Court held that the duty under the statute is premised on a nexus between the given manufacturer and its product, and that the Legislature could not have intended to require a manufacturer to defend a competitor's product.

Justice Brister concurred, stressing that the nexus between a manufacturer and its product is established in a plaintiff's pleadings. Justice Brister noted that the goal of the statute is to discourage plaintiffs from suing innocent sellers at all, and that the Court's opinion moved in that direction.

Justice O'Neill, joined by Justices Medina, Johnson, and Willett, dissented. The dissent asserted that a manufacturer's duty to indemnify an innocent seller could not be limited to costs the seller can link to that manufacturer's particular products. Under the dissent's interpretation, section 82.002 obligates manufacturers to indemnify innocent sellers against all claims the plaintiff alleged, for which they could then seek contribution from any remaining manufacturers.

XXIX. REAL PROPERTY

A. Ad Valorem Tax Exemptions

1. Galveston Cent. Appraisal Dist. v. TRQ Captain's Landing, L.P., 212 S.W.3d 726 (Tex. App.—Houston [1st Dist.] 2006), *pet. granted*, 51 Tex. Sup. Ct. J. 41 (October 12, 2007) [07-0010].

At issue in this case is whether a community housing development organization may, as holder of equitable title, obtain an ad valorem tax exemption for properties legally owned by its subsidiaries.

In 2003, the American Housing Foundation, a Texas non-profit and a qualified community housing development organization, formed CD Captain's Landing, LLC and became its sole member. CD, in turn, purchased TRQ Captain's Landing, L.P., which owned the Captain's Landing Apartments, by obtaining a 99% limited partnership interest directly along with a 100% membership interest in TRQ Galveston, LLC, which held the remaining 1% interest as general partner. Once the transaction was complete, CD filed an application with the Galveston Central Appraisal District seeking a 2003 ad valorem tax exemption for the apartments under section 11.182 of the Texas Tax Code, which allows exemptions for certain real property owned by community housing development organizations. The District denied the exemption on the grounds that CD did not own the apartments for the purposes of section 11.182. TRQ Captain's Landing and the Housing Foundation sought judicial review in district court, claiming that they were entitled to an exemption as the equitable owners of the property. The trial court upheld the Appraisal District's decision, but the court of appeals reversed.

The Supreme Court granted the Appraisal District's petition for review and heard oral argument on January 15, 2008.

B. Home Equity Loans

1. LaSalle Bank Nat'l Ass'n v. White, 246 S.W.3d 616 (Tex. December 21, 2007) [06-1016].

At issue in this case is whether a loan violated the Texas Constitution's prohibition on homestead property designated for agricultural use being pledged to secure a home-equity loan. Lorae White executed a home-equity note secured by her homestead property. At disbursement, the bank used a portion of the loan to pay off constitutionally valid purchase-money and property-tax liens against the property (the "refinance portion"). The remainder (the "cash-out portion") was paid directly to White. When White failed to make her loan payments, the bank filed for foreclosure. White filed this suit seeking a declaratory judgment that the loan violated the Texas Constitution, and therefore the bank forfeited the principal and interest on the loan. The trial court found that the home equity loan violated the Constitution because it was secured

by homestead property designated for agricultural use and entered judgment for White. The court of appeals affirmed.

The Supreme Court reversed in part, reasoning that although the home equity loan was unconstitutional, the bank was entitled to equitable subrogation as to the refinance portion of the loan, but forfeited any right to recover the cash-out portion of the loan. Although the Texas Constitution invalidates unconstitutional home equity liens, it does not expressly displace equitable common law. Therefore, it does not displace equitable subrogation. Furthermore, in prior cases, the Court upheld equitable subrogation when a refinance, though unconstitutional, was used to pay off valid liens.

C. Mechanic's Liens

1. Reliance Nat'l Indem. Co. v. Advance'd Temps., Inc., 227 S.W.3d 46 (Tex. June 8, 2007) [05-0558].

In this appeal the Court considered whether a temporary employment agency, which places workers at a construction project under a contract with a subcontractor, "furnishes labor" within the meaning of Chapter 53 of the Texas Property Code, thus qualifying for a mechanic's lien. Because the temporary agency qualified as one who "furnished labor," the Supreme Court affirmed the court of appeals' decision reversing the trial court.

During construction of an apartment complex, the general contractor, Lamar, subcontracted with Cesar Gonzalez to frame, drywall, and roof the apartment project. Because Gonzalez did not have an adequate work force, he sought additional workers from Advance'd Temporaries, Inc. After a few months, Lamar terminated Gonzalez's work. Although Lamar paid Gonzalez, Gonzalez failed to pay the full amount owed to Advance'd. Advance'd thereupon gave notice of its claim under the mechanic's lien statute and filed an affidavit claiming a mechanic's lien. Advance'd also sued Gonzalez for the balance owed under its contract after it was unable to collect from Gonzalez's or Lamar's surety bond, and joined Lamar's surety, Reliance National Indemnity Company. The trial court rendered judgment against Gonzalez, but denied Advance'd recovery against the other parties. The court of appeals reversed and remanded, holding that Advance'd had furnished labor and was entitled to recover under the mechanic's lien statute.

The Supreme Court affirmed the court of appeals' judgment, holding that Advance'd "furnished labor" under the statute. *See* TEX. PROPERTY CODE §53.021(a). Advance'd hired construction workers as its employees, who then labored on a construction of an improvement in this state, by virtue of a contract with an owner, contractor, or subcontractor, thus satisfying the statutory requirement of the mechanic's lien statute. *Id*. The Court reasoned that Advance'd was no different from a supplier who furnishes lumber, pipe, or shingles, but instead of materials, Advance'd furnished labor. Thus, the Court concluded that the temporary workers were Advance'd's employees, and Advance'd furnished labor by providing these workers to Gonzalez for work on the construction project.

D. Property Descriptions

1. AIC Mgmt. v. Crews, 246 S.W.3d 640 (Tex. January 25, 2008) [05-0270].

At issue in this case is whether a county civil court at law in Harris County has jurisdiction to hear a title dispute involving property worth more than $100,000 and whether the description contained in the property conveyances was so insufficient that the conveyances were void as a matter of law. In 1989, the City of Houston brought a tax suit against Crews for what was described as "Tract 12" out of a particular abstract. Following the tax judgment, the property was conveyed to the City via constable's deed, which contained the Tract 12 description. AIC Management purchased the land in 1997, and three years later, the City brought eminent domain proceedings against AIC. Crews intervened, arguing that the property description had been too vague to convey title. Aldine Independent School District, another taxing authority, also intervened seeking unpaid taxes. AIC cross-claimed against Aldine. The trial court granted summary judgment in favor of Crews and Aldine and dismissed AIC's cross-claim against Aldine. The court of appeals affirmed.

The Supreme Court held that section 25.1032(c)(1) of the Government Code grants

Harris County civil courts at law jurisdiction over title disputes even if the property is worth more than $100,000, the usual amount-in-controversy limit. The Court further held that property descriptions in constable's deeds must meet the same standard as those in any other property conveyance: the conveyance or an associated document must contain a description that is sufficient to locate the property on the ground. Although it was unclear from the present record where Tract 12 was located, the Court reversed the summary judgment in favor of Crews because with additional information, such as a tax map from 1989, locating Tract 12 on the ground might be possible. The record did not conclusively demonstrate that the description was too vague to convey title as a matter of law. Finally, the Court reversed the dismissal of AIC's cross-claims against Aldine and remanded the case to the trial court.

Justice Willett concurred and wrote only to note that it was inappropriate for the Court to consider legislative history in its analysis of section 25.1032(c)(1) because the statute's language was unambiguous.

XXX. SANCTIONS

A. Imposition

1. In re Michelle Moore, 235 S.W.3d 210 (Tex. August 31, 2007) [06-0544].

The issue in this case is whether the court of appeals abused its discretion in imposing $47,178 in sanctions upon Michelle Moore. Moore filed a suit affecting the parent-child relationship (SAPCR) seeking custody of I.E.T. The real party in interest, Lisa Santos gave birth to I.E.T. while she was living with Moore's son, but was legally married to another man. In the first SAPCR, Moore alleged that she had standing as I.E.T.'s paternal grandmother. When the trial court granted temporary custody to Moore, Santos sought mandamus relief from the court of appeals. The court held that Moore lacked standing under the Family Code, but denied Santos's request for sanctions because Moore was entitled to a presumption of good faith. Despite the court of appeals' ruling that she lacked standing, Moore refused to give up possession of I.E.T., prompting Santos to file a suit seeking habeas corpus relief from the 214th District Court to regain possession of the child. Three days later, Moore filed a second SAPCR in the 319th District Court, this time alleging standing as a person in possession of the child for at least six months. The 214th District Court denied Santos's request for habeas corpus relief and ordered the proceedings transferred to the 319th Court. The 319th Court issued a temporary restraining order preventing Santos from removing I.E.T. from Moore's possession. Santos again sought mandamus relief from both orders. The court of appeals granted mandamus relief as to both orders. It also ordered Moore to pay Santos's attorney's fees and costs for what it characterized as Moore's "disregard" for the court's prior order.

The Supreme Court held that the court of appeals abused its discretion, noting that Moore alleged a new basis for standing in the second SAPCR, and that both trial courts had declined to remove I.E.T. from Moore's possession. Accordingly, the Court conditionally issued a writ of mandamus directing the court of appeals to vacate its sanctions order.

XXXI. WATER LAW

A. Condemnation

1. Canyon Reg'l Water Auth. v. Guadalupe-Blanco River Auth., 211 S.W.3d 351 (Tex. App.—San Antonio 2006), *pet. granted*, 50 Tex. Sup. Ct. J. 929 (July 2, 2007) [06-0873].

After initially agreeing to allow the Water Authority to expand its fresh-water intake infrastructure at the dam-end of Lake Dunlap, the River Authority reversed course and filed suit to enjoin any expansion. The Water Authority counter-claimed, arguing that its existing easement allowed it to expand and, in the alternative, it had power to condemn any needed right-of-way. On cross-motions for summary judgment, the trial court held that the Water Authority could build the new intake, the Water Authority's intended use was paramount to any prior public use that might be affected, and the River Authority could seek compensation for any taking that resulted. The trial court certified its order for interlocutory appeal.

The court of appeals reversed, holding that the easement allowed only one underwater intake. The court of appeals concluded that the River Authority's affidavit conclusively showed the new

intake would practically destroy the public's prior recreational use of that part of Lake Dunlap affected by the new intake and that any new intake would impede access to the dam. The court of appeals found that the Water Authority failed to address whether the purpose of the new intake could otherwise be accomplished without destroying the public's prior recreational use of Lake Dunlap. The court of appeals rendered judgment for the River Authority.

The Supreme Court granted the Water Authority's petition for review and heard oral argument on November 15, 2007.

B. Conservation Districts

1. Edwards Aquifer Auth. v. Chem. Lime, Inc., 212 S.W.3d 683 (Tex. App.—Austin 2007), *pet. granted*, 51 Tex. Sup. Ct. J. 329 (January 25, 2008) [06-0911].

In 1993, the Legislature passed the Act creating the Edwards Aquifer Authority. The Act required the Authority to give preference to existing users of aquifer water by allowing them to file for an Initial Regular Permit (IRP). To obtain an IRP, the users had to file a "Declaration of Historical Use" establishing beneficial use of water withdrawn between June 1972 and 1993. Prior to the Act taking effect, landowners brought suit challenging the Act's facial constitutionality. *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 623 (Tex. 1996). The trial court enjoined enforcement of the Act, but on June 28, 1996, the Supreme Court held the Act was facially constitutional and dissolved the TC's injunction. The Authority set the new deadline for filing IRP applications as December 30, 1996, six months after *Barshop* issued.

Chemical Lime, founded in 1907, has used water from the aquifer throughout its history and undisputedly makes beneficial use of the water. The aquifer is the plant's sole water source. Less than two months before the December 30 deadline, the Authority sent Chemical Lime an IRP application, which Chemical Lime returned after the December 30 deadline. The Authority fully processed Chemical Lime's IRP application, but nearly four years later in November 2000, the Authority notified Chemical Lime that its permit was being denied for late filing. Chemical Lime met with the Authority's general manager, but six months later the Authority denied Chemical Lime's request that their application be reconsidered. Chemical Lime then filed suit.

The trial court held that the December 30, 1996 deadline for filing IRP applications was not valid and the correct deadline was February 16, 1997. Thus, the trial court found Chemical Line's application was timely. The court of appeals issued three opinions. First, on February 10, 2006, the court rendered judgment in favor of the Authority, holding that the Act and the Authority became fully effective on June 28, 1996, the date of the *Barshop* decision, and thus upheld the December 30, 1996 application deadline. The court then withdrew the earlier opinion and concluded that the Act did not become effective until the Supreme Court issued its mandate and that the correct deadline was six months after *Barshop*'s mandate issued. Finally, three months later, the court issued another opinion reaching the same conclusions as the second opinion, but also addressed contradictory statements in the June 2 opinion regarding the date *Barshop*'s mandate issued.

The Supreme Court granted Edwards Aquifer's petition for review and heard oral argument on April 1, 2008.

2. Guitar Holding Co., L.P. v. Hudspeth County Underground Water Conservation Dist., 209 S.W.3d 172 (Tex. App.—El Paso 2006), *pet. granted*, 50 Tex. Sup. Ct. J. 929 (July 2, 2007) [06-0904].

At issue in this case is whether a water district may promulgate rules for transferring water that are based on the amount of water previously used by landowners.

Prior to 2002, landowners could pump five acre feet of water per acre owned from the Bone Spring-Victorio Peak Aquifer. The Hudspeth County Underground Water Conservation District enacted rules under which the amount of water landowners are now allowed to pump is based on the amount of water they had pumped from 1992-2002, rather than the amount of land owned. Several landowners became interested in selling their water for use by cities, making the amount of water they may pump very crucial. Guitar Holding Company owns over 35,000 acres of land, but only irrigated fifty-seven of those acres

during the pertinent ten-year period. Therefore, under the Water District's new rules, although Guitar sought permits to pump much more water, it was granted a permit to pump based on those fifty-seven acres. Guitar brought suit claiming the new rules, by allowing landowners who had previously irrigated the land to continue to pump large amounts of water that were to be sold outside the District, denied it equal protection and violated the Water Code. The trial court upheld the Water District's decisions and the court of appeals affirmed.

The Supreme Court granted Guitar's petition for review and heard oral argument on December 5, 2007.

XXXII. WORKERS' COMPENSATION

A. General Contractors

1. HCBeck, Ltd. v. Rice, 2006 WL 908761 (Tex. App.—Fort Worth 2006), *pet. granted*, 50 Tex. Sup. Ct. J. 801 (June 4, 2007) [06-0418].

This personal injury case concerns whether a general contractor "provided" insurance so as to be immune from suit by the subcontractor's employee when the general contractor required the subcontractor to obtain workers' compensation coverage under an Owner Controlled Insurance Program, the subcontractor obtained such coverage, and the owner payed the premiums.

FMR hired HCBeck to perform as the general contractor for a construction project on its property. HCBeck subcontracted a portion of the work to Haley Greer. Greer employed Charles Rice, who sustained injuries while performing under the subcontract, collected workers' compensation, and brought a negligence action against HCBeck. HCBeck moved for summary judgment, claiming it had "provided" workers' compensation insurance to Greer through FMR's "Owner Controlled Insurance Program," and that Rice was its "deemed employee." HCBeck claimed it was immune from suit and that Rice's exclusive remedy was to recover workers' compensation benefits. Rice also filed a motion for summary judgment, claiming that HCBeck did not provide workers' compensation to Greer because the subcontract did not obligate HCBeck to provide coverage and that FMR actually "provided" the coverage. The trial court granted HCBeck's motion for summary judgment and supplemental motion for summary judgment, and denied Rice's reciprocal cross motion for summary judgment. The court of appeals reversed the trial court's judgment, rendered partial judgment for Rice on the issue of HCBeck's immunity from suit and remanded the case back to the trial court. HCBeck appealed.

The Supreme Court granted HCBeck's petition for review and heard oral argument on October 18, 2007.

B. Indemnification

1. Energy Serv. Co. of Bowie, Inc. v. Superior Snubbing Servs., Inc., 236 S.W.3d 190 (Tex. August 24, 2007) [05-0202].

At issue in this case is whether the 1989 amendments to the Worker's Compensation Act preclude a contractor, as a third-party beneficiary of a contract with the subscribing employer, from seeking indemnification for amounts paid in settlement damages to the subscriber's employee. Former article 8306 section 3(d) stated that a subscribing employer was not liable to indemnify others for an employee's personal injury claim unless it agreed to do so "in a written agreement expressly assuming such liability, executed by the subscriber prior to such injury or death." Current section 417.004 of the Texas Labor Code provides that the employer "is not liable to the third-party for reimbursement damages . . . unless the employer executed, before the injury or death occurred, a written agreement with the third-party to assume the liability." The Court held that the Legislature intended no substantive change, and that the contractor could recover.

Energy Service Company and Superior Snubbing Services provided oilfield services to Mitchell Energy Corporation. Through two written and signed indemnity contracts, Energy agreed to indemnify Mitchell and its contractors, one of which was Superior, for personal injury claims by Energy employees, and Superior agreed to indemnify Mitchell and its contractors, one of which was Energy, for personal injury claims by Superior employees. No agreement existed directly between Superior and Energy. A Superior employee, Daryll Faulk, sued Mitchell and Energy for work-related injuries. Mitchell and Energy settled with Faulk, and then sued Superior for indemnity. Superior contended that

section 417.004 barred Energy's claim because the new Act requires a written signed agreement between an employer and a third-party, and Superior and Energy never signed a written agreement with each other. The trial court disagreed and granted summary judgment for Energy. The court of appeals reversed.

After reviewing the legislative history of the Workers' Compensation Act and the limits set by the Texas Oilfield Anti-Indemnity Act, the Supreme Court reversed and remanded, holding that the Legislature made no substantive change in the 1989 amendments to the Act. Therefore, the third-party contractor need not sign an agreement directly with the employer in order to receive indemnification from the employer.

Justice Johnson, joined by Justices Wainwright, Green and Willett, dissented. Based on the "literal, plain, and common meaning" of the statute, the "key concern" of employer immunity from liability underlying the Act, and the "crisis" of costs to employers that led to the 1989 amendments, the dissent argued that the statute precludes a non-signatory third-party from receiving indemnification. Justice O'Neill did not take part in the decision. Pursuant to section 22.005 of the Texas Government Code, the Honorable Douglas S. Lang of the Court of Appeals for the Fifth District at Dallas sat by commission of Governor Rick Perry.

C. Liens

1. Daughters of Charity Health Servs. v. Linnstaedter, 226 S.W.3d 409 (Tex. June 1, 2007) [05-0108].

At issue in this case is whether hospitals are barred from maintaining hospital liens once they are reimbursed for their services in accordance with the Workers' Compensation Act. Donal Linnstaedter and Kenneth Bolen (the employees) were involved in a car accident while driving their employer's vehicle within the course of their employment. They were admitted and treated at Providence Health Center. Providence filed a hospital lien for the charges incurred by the employees and received payment from the employees' workers' compensation carrier for the amounts allowed under the workers' compensation fee guidelines. The hospital then filed a lien against any cause of action filed by the employees. The employees filed suit against the driver of the other vehicle and later settled the claim. They brought this suit against the hospital to recover the amount paid to the hospital to discharge its lien. The trial court found in the employees' favor and the court of appeals affirmed.

The Supreme Court affirmed the judgment of the court of appeals, holding that the Texas Labor Code prohibits liens against workers' compensation patients. Hospitals that treat workers' compensation patients are bound by the Labor Code's caps on reimbursement, and they are barred from asking the patients for more.

D. Payment of Benefits

1. Morales v. Liberty Mut. Ins. Co., 241 S.W.3d 514 (Tex. December 7, 2007) [05-0754].

At issue in this case is whether a worker's employment status is a question of compensability or a question of coverage. Guadalupe Morales was fatally injured while working. His wife, Margarita, filed a workers' compensation claim. After the parties were not able to resolve the issue, a hearing examiner found that Guadalupe was an independent contractor, not an employee of any company, and denied benefits. The Texas Workers' Compensation Commission (TWCC) appeals panel affirmed. The Texas Workers' Compensation Act in the Texas Labor Code provides for two avenues of judicial review of TWCC appeals panel decisions. If the issues involve compensability, then suit must be filed where the employee resided at the time of injury or death (in this case, El Paso). If the issue is not one of compensability, such as coverage, then suit must be filed in Travis County. Margarita sought judicial review by filing suit in El Paso and Travis Counties. The El Paso court granted the insurer's plea to the jurisdiction, and the court of appeals affirmed. Margarita nonsuited the Travis County suit.

The Supreme Court held that Guadalupe's employment status was a question of compensability because it directly concerned the issue of whether Guadalupe suffered a "compensable injury." It was not, as the insurers had argued, a question of coverage. Because the issue was one of compensability, the suit was properly filed in El Paso County. The Court

reversed the court of appeals judgment and remanded the case to the El Paso trial court.

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