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## CASELAW UPDATE - CIVIL LAW TRENDS

### COURSE DESCRIPTION

AN UPDATE AND REVIEW OF CIVIL LAW CASES WITH A DISCUSSION OF RECENT TRENDS AND SIGNIFICANT DECISIONS FROM THE APPELLATE COURTS

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## **I. SCOPE OF THIS ARTICLE**

This paper surveys cases that were decided from January 1, 2010 through December 31, 2010.

## **II. ADMINISTRATIVE LAW**

### **A. *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. Feb. 19, 2010)**

At issue in this case is the ten-day time period for a public body to seek an attorney general's opinion reviewing a decision to withhold documents under the Texas Public Information Act--specifically, when the period begins.

The City of Dallas received a request for information relating to uniform firefighter positions. Six days later, the City responded with a letter asking the requestor to further clarify and specify the request. Six days later, the City received a response specifying the request. While pulling the documents needed to respond to the request, the City found some documents it believed to be protected by the attorney-client privilege. Approximately 24 days after the initial request, the City requested an attorney general's opinion under the Act. The Attorney General responded with an opinion that the City was required to disclose all the documents because its request for an opinion was untimely. The Attorney General reasoned that the ten-day statutory period began running the day of the first request, and the City's request for specification merely tolled the period until the requestor specified the request. Even subtracting six days for the specification, the City had taken more than ten days to request the opinion. Because the request was untimely, the documents were presumed public under the Act, and the City could overcome the presumption only by showing "compelling reason." The Attorney General found no "compelling reason." The City sought declaratory judgment on two issues: (1) the ten-day period began running only when the City received the requestor's clarification; and (2) the attorney-client privilege constituted a "compelling reason" to withhold even if the City had missed the deadline. The district court rejected the City's arguments and ordered that the City disclose the documents, and the court of appeals affirmed.

The Texas Supreme Court reversed. The court held that when a governmental entity asks in good faith for an "unclear or overbroad" information request to be clarified or narrowed, the ten-day period runs from the date of the clarified or narrowed request. Reviewing the statute as a whole, the court found that a government body should have some leeway to reduce the burden of broad requests by asking for clarification. The court noted that neither side was contending that the City was requesting clarification in bad faith to delay the response.

### **B. *Presidio Ind. School Dist. v. Scott*, 309 S.W.3d 927 (Tex. Apr. 23, 2010)**

This case concerns the appropriate district court for a suit between a teacher and a school district appealing a decision by the Commissioner of Education in a dispute between the teacher and the district.

The applicable statute provides, “[e]ither party” may appeal the Commissioner’s decision in the school district’s county or, “if agreed by all parties, a district court in Travis County.” In this case, the district fired a teacher for violating a policy against corporal punishment. The teacher filed a petition for review with the Commissioner, who then reversed the decision and reinstated the teacher. The district appealed. The teacher and the district agreed that the appeal could be heard Travis County District Court, but the Commissioner did not. The Commissioner filed a plea to the jurisdiction, arguing the Commissioner’s consent was required for the case to proceed in Travis County. The district court denied the plea, but the court of appeals reversed. The Texas Supreme Court reversed the court of appeals and remanded to the district court, holding the Commissioner’s consent was not required.

\*This case is also discussed in the Procedure--Pretrial section of this paper.

C. *City of Elsa v. Gonzalez*, No. 0834, 54 Tex. Sup. J. 33 (Tex. Oct. 1, 2010)

At issue in this case is whether the plaintiff made a good-faith report that another public employee violated the law, which is a necessary element of a claim under the Texas Whistleblower Act.

Plaintiff Gonzales was Elsa’s City Manager. When the mayor accepted an appointment as a director of a county program, the City Attorney wrote a letter addressing conflicts of interest that might exist if the Mayor served on the board during his tenure as Mayor. After receiving the letter, the City Council accepted the Mayor’s resignation, and directed Gonzales to notify county authorities and the public of its actions. Gonzales did so. Later, notice was posted for a meeting to discuss Gonzalez’s employment status. At the meeting, Gonzalez objected that the notice was illegal because it was posted only two days before the meeting instead of the required three. Despite Gonzalez’s objection, the City Council held the meeting and terminated Gonzales, stating the ground of “no confidence to administer the City as a result of the City’s financial conditions.” Gonzales sued the City, alleging that it had violated the Open Meetings Act, the Public Information Act and the Whistleblower Act. The city filed a plea to the jurisdiction. The trial court denied the plea, and the court of appeals affirmed.

The Texas Supreme Court reversed. The court noted that the elements of the Whistleblower Act go to jurisdiction as well as merits, because governmental immunity is waived for violations of the Act. The court then found that Gonzalez’s jurisdictional allegations did not provide sufficient facts to determine jurisdiction. Nonetheless, the court found that courts must look to evidence when necessary to determine a plea to the jurisdiction. The Whistleblower Act provides that a government entity may not take action against an employee “who in good faith reports a violation of the law by the employing government entity or another public employee to an appropriate law enforcement authority.” Gonzalez asserted he made two qualifying reports: (1) the delivery of the City Attorney’s letter; and (2) his objection to the open meeting notice. The court found that the City Attorney’s letter did not allege a violation of the law; at most, it suggested that the mayor might violate the law in the future if he retained his position. The court further concluded that the objection did not meet the requirements of the Whistleblower Act because the City Council did not qualify as “an appropriate law enforcement authority.” Accordingly, the court held that the lower courts did not have jurisdiction, and dismissed the case.

- D. *Texas Comptroller of Pub. Accounts v. Attorney Gen. of Texas*, No. 08-0172, 54 Tex. Sup. J. 245 (Tex. Dec. 3, 2010)

This case concerns whether a state agency may legally redact birth dates from documents provided to the public and the media under the Texas Public Information Act, Tex. Gov't Code ch. 552.

The Dallas Morning News sought a copy of the Comptroller's payroll database for state employees. The Comptroller provided the name, age, race, sex, salary, agency, job description, work address, date of initial employment, pay rate and work hours for each employee. But the Comptroller withheld birth dates under an exception in the Act for "information considered confidential by law, either constitutional, statutory, or by judicial decision." Tex. Gov't Code § 552.101. The Comptroller then sought an attorney general's opinion regarding whether the birth dates must be disclosed. In the opinion, the Attorney General attempted to balance the public's right to know the information with the employees' interest in privacy. The Attorney General acknowledged the problem of identity theft and the potential for birth dates to aid identity thieves. Nonetheless, the Attorney General found no proof that harm would result from release of the birth dates, and opined that the Comptroller was required to release the birth dates. The Comptroller sued the Attorney General for a declaration that birth dates were exempt from disclosure. The trial court found for the Attorney General, and the court of appeals affirmed.

The Texas Supreme Court reversed. The court focused on an exception in the Act for "a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Tex. Gov't Code § 552.102(a). The court found that the language of this exception was patterned after a parallel provision in the federal Freedom of Information Act, so it relied on federal authorities for guidance. The court applied a balancing test, and found that the employees' privacy interest in avoiding disclosure of their birth dates outweighed the News's interest in the information. The court reasoned that birth dates could be used to get other sensitive information about individuals and to commit identity theft. The court further noted that disclosure of birthdates would eviscerate other exemptions from disclosure under the Act: the Act specifically exempts home addresses, social security numbers, and personal family information, but someone with birthdates could easily obtain all of this information. The Morning News argued that birthdates allowed the public to investigate the backgrounds of public officials and employees. The court found that personal information about the employees would reveal little about the activities of state agencies, and added that the information the Comptroller had already provided would allow substantial investigation. Accordingly, the court found that the employees' privacy interest outweighed the public interest in investigating individuals employed by the state. The court rendered judgment that the birth dates are exempt from disclosure.

- E. *Tex. Indus. Energy Cons. v. CenterPoint Energy Houston Elec., LLC*, 324 S.W.3d 95 (Tex. Oct. 22, 2010)

In this case, the court affirmed a PUC order allowing a utility to recover from ratepayers certain costs, including some interest costs.

### III. ARBITRATION

A. *East Texas Salt Water Disposal Co., Inc. v. Werline*, 307 S.W.3d 267 (Tex. Mar. 12, 2010)

At issue in this case is whether a district court's order vacating an arbitration award and requiring further proceedings before the arbitrator is immediately appealable.

Plaintiff Werline, a petroleum engineer, worked for the defendant company under a written contract with a clause that allowed him to terminate the agreement and receive two years' wages as severance if the company changed his position. The agreement also provided for arbitration of disputes. Werline invoked the termination-and-severance provision. The parties submitted their dispute to arbitration, and Werline prevailed. The company petitioned a district court for an order vacating, terminating or modifying the award, and Werline counterclaimed for confirmation. The trial court determined the findings in the award to be "so against the evidence" that they "manifest gross mistakes in fact and law." The trial court vacated the award and ordered the matter submitted to a different arbitrator, subject to the court's findings indicating that the employer had not materially breached the agreement. On appeal, the court of appeals reversed, held that there was evidence to support the award and rendered judgment confirming the award. The court of appeals also rejected a challenge to its jurisdiction.

The employer petitioned the Texas Supreme Court for review on one issue: whether the court of appeals had jurisdiction under the Texas Arbitration Act. Section 171.098(a) of the Act provides that an order is appealable if it denies an application to compel arbitration, grants an application to stay arbitration, confirms or denies confirmation of an award, modifies or corrects an award, or vacates an award without directing a rehearing. The employer contended that the judgment was not appealable because it ordered a rehearing. The supreme court disagreed, finding that the judgment was appealable because it denied confirmation of the award. The court reasoned that Texas law favors arbitration, and thus provides very limited judicial review of arbitration awards. A holding allowing the trial court to avoid appeal by ordering re-arbitration would circumvent the policy dictating limited review, the court found. The court affirmed the court of appeals' decision.

B. *In re Merrill Lynch & Co., Inc.*, 315 S.W.3d 888 (Tex. Jun. 25, 2010) \*

This case concerns whether an arbitration agreement requires a court to stay related litigation that may preclude issues the parties have agreed to arbitrate.

Two corporate subsidiaries of MetroPCS, Wireless and Communications, asserted identical claims against Merrill Lynch. Wireless had an arbitration contract with Merrill; Communications did not. Wireless's arbitration agreement with Merrill Lynch included a "class-action carve-out clause," providing that a party belonging to a putative class will not be forced to arbitration until class certification is denied, the class is decertified, or the party is excluded from the class. Wireless claimed to be a member of the classes in two class actions against Merrill Lynch. Merrill Lynch moved to stay all litigation and compel arbitration of Wireless's claims. The trial court initially compelled arbitration against Wireless, then stayed Wireless's claims pending resolutions in the class actions. The trial court denied Merrill Lynch's motion to stay

Communications' claims. Merrill Lynch sought mandamus review of the Communications decision in the court of appeals, and its petition was denied.

The Texas Supreme Court reversed. Citing its own precedent, the court found, "when an issue is pending in both arbitration and litigation . . . arbitration should be given priority to the extent it is likely to resolve issues material to the lawsuit." The court reasoned that the parallel litigation could "undermine or moot" the arbitration, depriving Merrill Lynch of its bargained-for rights. The court also rejected MetroPCS's argument that the stay would be indefinite due to the class action, finding that the agreement established clear parameters for deciding when arbitration could proceed. The court conditionally granted mandamus.

\*Three other arbitration related decisions appear in other sections of this paper: *See* In re Odyssey Healthcare in the Employment section; In re 24R, Inc. in the Employment section; and In re Olshan Found. Repair Co., LLC in the Federal Preemption section.

#### **IV. ATTORNEYS**

##### **A. *In re Columbia Valley Healthcare Sys.*, No. 08-0995, 320 S.W.3d 819 (Tex. Aug. 27, 2010)**

At issue in this case is whether a law firm should be disqualified on the basis of a legal assistant's work on a case which she had previously worked on while employed by opposing counsel.

The underlying case was a medical malpractice suit brought by Yvonne and Alberto Leal, who were represented by Magallanes & Hinojosa, P.C., against Columbia Valley Healthcare System, which was represented by William Gault at Brin & Brin, P.C. Margarita Rodriguez, a legal assistant employed by Magallanes & Hinojosa, had previously worked for Gault and was involved with the Leal case from the inception of suit. When J.A. Magallanes hired Rodriguez, he was aware that she had previously worked on the Leal matter, and he instructed her not to work on that case or any other matter with which she had previously been involved. However, Rodriguez did have contact with the Leal file on several occasions, despite multiple verbal warnings from Magallanes. When Gault became aware that opposing counsel employed Rodriguez, he filed a motion to disqualify and recuse Magallanes & Hinojosa as counsel. The trial court denied the motion, ordering Rodriguez not to be involved in any case which she had worked on while working for Gault, and the court of appeals denied Gault's petition for mandamus.

The Texas Supreme Court noted that a law firm that employs a nonlawyer employee who worked on a matter at a prior firm must employ effective screening measures to avoid disqualification, which include (1) instructing the employee not to perform work on any matter on which she had worked during prior employment and (2) taking "other reasonable steps" to ensure that the assistant does not do so. Additionally, the court made clear that simple informal admonitions are insufficient; there must be formal, institutionalized screening measures in place to protect against conflicts of interest, even for nonlawyers. Additionally, even if screening measures are used, if screening would be ineffective or the employee actually works on the case at the employer's directive and the employer reasonably should know about the conflict of

interest, then the presumption that confidences have been shared will become conclusive, and disqualification is required. The court noted that these requirements apply also to agents who may be independent contractors. Because Magallanes & Hinojosa failed to rebut the presumption of shared confidences, the court conditionally granted mandamus relief and directed the trial court to grant the motion for disqualification.

B. *In re Tex. Atty.*, No. 09-0277, slip op. (Tex. Feb. 10, 2010)

Although the Texas Supreme Court had been scheduled to hear oral argument in this case, which involved the powers of the Board of Disciplinary Appeals in initial attorney disciplinary proceedings before they are complete, the court granted an unopposed motion to dismiss the appeal.

## V. CLASS ACTIONS

A. *Southwestern Bell Tel. Co. v. Mktg. on Hold Inc.*, 308 S.W.3d 909 (Tex. Feb. 19, 2010)

At issue in this case is whether a company in the business of analyzing and auditing telephone bills could serve as class representative for a class of telephone customers suing for overcharges.

While auditing bills for some of its customers, the putative representative, Marketing on Hold, concluded that Southwestern Bell was passing through to its customers more municipal fees than allowed under applicable ordinances. Marketing on Hold received assignments of claims from its customers, providing that the customers would receive 70 percent of any recovery and Marketing on Hold would receive 30 percent. Marketing on Hold then filed a class suit on behalf of 6,900 Southwestern Bell customers. The trial court certified the class, and the court of appeals affirmed.

The Texas Supreme Court reversed on the ground that Marketing on Hold was not an adequate representative for the class. The court first found that the assignments were valid, and the putative representative stood in the shoes of the aggrieved customers. Southwestern Bell requested that the court declare the assignments void on public policy grounds because this type of assignment would increase entrepreneurial class litigation. The court rejected this argument on the facts, finding that Marketing on Hold had a pre-existing relationship with the assignors and thus was not a “stranger/entrepreneur” whose actions disrupt the class suit vehicle and distort the judicial process.” The court then proceeded to analyze three factors determining whether a class will be certified under Tex. R. Civ. P. 42(b)(3): typicality, predominance, and adequacy of representation. The court found Marketing on Hold typical of other members of the class, because the company stood in the shoes of its assignors. The court also approved the trial court’s ruling on predominance, largely because Southwestern Bell’s standardized billing lessened the importance of individualized reliance evidence, and computer programs could reduce the importance of individual differences in damages. But the court found that Marketing on Hold would not be an adequate representative. The assignee had “a materially lesser interest in making itself and the class whole because it was never personally aggrieved by Southwestern Bell’s alleged overcharging, and its maximum recovery is less than half the value of any

individual claim for damages,” the court determined. The court reversed the judgment, decertified the class, and remanded to the trial court.

## VI. CONSTITUTIONAL LAW

### A. *Walters v. Cleveland Reg’l Med. Ctr.*, 307 S.W.3d 292 (Tex. Mar. 12, 2010)

At issue in this case is whether the Open Courts provision in the Texas Constitution trumped the applicable limitations period and allowed the action to proceed in the case of a patient who had a sponge inside her from a surgery ten years earlier.

Plaintiff Walters had a tubal ligation in December 1995, after giving birth. Throughout 1996-2004, she sought treatment for episodes of abdominal problems, and received various diagnoses. In April 2005, a gynecologist discovered a lump in Walters’s abdomen, and referred her to a surgeon. The surgeon and a colleague operated on Walters and found a sponge. The position of the sponge in the abdomen indicated that it had been there for years. In August 2005, Walters sued the doctors and hospital responsible for the tubal ligation more than nine-and-a-half years earlier. The trial court granted summary judgment based on the two-year limitations period for healthcare claims. The court of appeals affirmed, holding Walters had not established that the limitations period violated Open Courts.

The Texas Supreme Court reversed, holding that Walters raised a fact issue on the Open Courts issue. The Open Courts provision, Tex. Const. art. I, § 13, says “[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.” It does not toll limitations, but requires the court to determine independent of limitations what constitutes a reasonable amount of time to bring suit, the court found. Sponge cases are unique, the court reasoned, for three reasons: (1) they are rare; (2) surgical instruments do not remain in patients absent negligence; and (3) sponges are “exceedingly difficult to discover.” The court found that Walters had arguably acted reasonably; doctors she had seen for years after the surgery had not suggested further measures that may have revealed the sponge, and she brought suit soon after discovering it. The court also discussed the ten-year statute of repose for medical-malpractice cases, Tex. Civ. Prac. & Rem. Code § 74.251(b), passed in 2003. The court found that the statute reflects the Legislature’s knowledge of exceptions to the two-year statute, including exceptions the court had recognized in a prior sponge case. The court reasoned that its decision gave effect to the Legislature’s acknowledgement of exceptions to the two-year period. The court reversed and remanded to the trial court for further proceedings.

### B. *Institutional Div. of the Texas Dep’t of Criminal Justice v. Powell*, 318 S.W.3d 889 (Tex. Jul. 2, 2010) \*

At issue here is whether a prison violated a prisoner’s First Amendment rights by disciplining him for pretextual misconduct in retaliation for complaints about mistreatment at the prison.

The Department brought a disciplinary proceeding against Powell, a prisoner in Beeville, for creating a disturbance by failing to walk along a line as instructed. After a hearing, the

Department found that the evidence supported the charges. Powell filed grievances, alleging that the hearing officer had violated his due-process rights by refusing to allow him to call certain witnesses. The Department determined that the hearing officer's denials were proper. Powell then sued the Department. In addition to his due-process claim, Powell added a claim that the disciplinary proceeding amounted to retaliation for complaints Powell's family had made about Powell's treatment in the facility. The trial court granted special exceptions and a plea to the jurisdiction, and dismissed the suit. The court of appeals reversed.

On appeal to the Texas Supreme Court, Powell dropped his due-process claims and stood on his claim that the Department brought the disciplinary proceeding in retaliation for his family's complaints, in violation of the First Amendment. The court first noted that Powell had not raised retaliation as a constitutional claim in the trial court; he had relied on the hearing issues for his constitutional claims. Then the court found that the claims also failed substantively. The court noted that prisoners have a First Amendment right to be free from retaliation for complaints. Citing Fifth Circuit precedent, however, the court found that a retaliatory act is actionable only if it "would chill or silence a person of ordinary firmness from future First Amendment activities." The court noted the record showed no evidence that Powell had been punished for his infraction. As such, the court held the prison's disciplinary action "*de minimis*." The court rendered judgment dismissing the suit.

\*See due process discussion in *Bennett v. Reynolds* (in Damages below).

## **VII. CONTRACTS**

### **A. *Solar Applications Eng'g, Inc. v. T.A. Operating Corp.*, 2010 Tex. LEXIS 889 (Tex. Dec. 3, 2010)**

At issue in this case is whether a lien-release provision in a construction contract was a condition precedent to recovery or a covenant.

T.A. Operating Corporation entered into a contract with Solar Applications Engineering, Inc., a general contractor, to build a truck stop in San Antonio for \$4 million. The contract provided for a sequence of events leading up to completion, which culminated in Solar correcting any deficiencies and submitting a "final application for payment" which was to be accompanied by a complete and legally effective waiver of all lien rights. Upon a dispute over the completion of certain remaining work, Solar filed a lien, and TA terminated Solar and notified Solar that it would be asserting a claim for \$736,800.15 for failure to complete the project on time. When TA refused to make payment after Solar provided the final application for payment for \$472,149, Solar filed suit for breach of contract under the theory of substantial performance, and TA counterclaimed for alleged delays and substandard work. A jury found in favor of Solar, and the trial court awarded \$392,000, offset by \$8,000 for remaining defects. On appeal, the court of appeals initially affirmed but reversed and rendered a take-nothing judgment on rehearing.

The Texas Supreme Court noted that the breach of a covenant gives rise to a cause of action for damages but does not affect the enforceability of the rest of the contract, while the breach of a condition precedent excuses the other party's obligation to perform. The court held

that, in the absence of conditional language and in the interest of preventing forfeiture, the lien release provision should be read as a covenant and not a condition precedent. The court's holding is also supported by the overall scheme of the Texas Property Code, which suggests that the provision should be interpreted as to avoid forfeiture. The judgment of the court of appeals was reversed.

## VIII. DAMAGES

### A. *In re Columbia Med. Ctr. Of Las Colinas*, 306 S.W.3d 246 (Tex. Mar. 12, 2010):

In this case the court considered whether a statutory cap limiting punitive damages in proportion to economic damages required a reduction in a punitive-damages award after the accompanying actual-damages award was reduced on appeal.

The plaintiffs won a medical malpractice judgment at the original trial. The trial court and court of appeals awarded economic damages and punitive damages at the capped amount: twice economic damages plus an amount equaling noneconomic damages up to \$750,000. The Texas Supreme Court reversed part of the economic-damages award. After the Supreme Court's decision, the defendant attempted to tender payment, subtracting the amount the Supreme Court reduced from actual damages and a proportionate amount of punitive damages calculated using the statutory-cap formula. The plaintiffs refused the offer. The defendant then moved the trial court to enter a modified final judgment reducing the punitive award in proportion to the reduction in economic damages. The trial court denied the motion, leaving the punitive award intact. The defendant sought mandamus in the Supreme Court, invoking the court's jurisdiction to enforce its orders.

The court held that the punitive damages had to be recalculated in light of the reduction in economic damages. Even though the court had not specifically dictated a reduction in punitive damages, a reduction was necessary to give full effect to the court's ruling and observe the statutory cap. The court conditionally granted the writ of mandamus.

### B. *Bennett v. Reynolds*, 315 S.W.3d 867 (Tex. Jun. 15, 2010)

This case concerns whether a punitive-damages award of over \$1 million comported with due process in a case of cattle theft where the jury awarded only approximately \$5,300 in actual damages.

Bennett ran cattle on a 914-acre ranch along the Colorado River in San Saba County; a closely held family corporation owned the ranch. Reynolds ran cattle on a 320-acre pasture leased from his mother-in-law and adjacent to the Bennett property. Bennett and Reynolds had an ongoing feud, and each had accused the other of stealing cattle. One of Bennett's former ranch hands confirmed Reynolds's suspicions, telling Reynolds he suspected that Bennett had auctioned some of Reynolds's cattle. The ranch hand had photographed cattle bearing Reynolds's brand on the way to the auction, and had provided the photographs to state cattle-ranching authorities. As a result, authorities indicted Bennett for cattle theft, and Reynolds sued Bennett for conversion. Bennett was acquitted of the criminal charges in 2003, but the civil case proceeded.

At trial, Bennett and Reynolds agreed that Bennett had sold 13 heads of cattle for approximately \$5,300 but disputed “everything else,” including who owned the cattle. The jury found that Bennett and the company that owned the Bennett ranch had converted Reynolds’s cattle with malice and had committed felony theft. The jury awarded approximately \$5,300 in actual damages, \$250,000 in punitive damages against Bennett, and \$1 million in punitive damages against the corporation. Evidence supporting the exemplary-damages verdict included evidence that Bennett had attempted to bribe and threaten the ranch hand, sued the ranch hand for slander, tampered with some of the photographs and meddled with Reynolds’s brand on some cattle. The court of appeals affirmed the trial court’s judgment in accordance with the verdict.

The Texas Supreme Court found that the verdict on liability warranted some punitive damages. Although Bennett argued that the exemplary-damages verdict was based largely on conduct unrelated to the act of conversion, the court generally rejected this argument. While Bennett’s actions did not directly relate to the conversion, they did reflect an effort to cover up the conversion; the court found this a sufficient connection.

Nonetheless, applying a due-process inquiry the United States Supreme Court established in *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003) and prior cases, the court found the award excessive. The *State Farm* inquiry considers whether the harm was physical or merely economic, whether the conduct showed reckless disregard for others’ health and safety, whether the target of the conduct was financially vulnerable, whether the conduct involved repeated actions, and whether the conduct was malicious or accidental. The court found that only one of the *State Farm* factors, malice, favored a large award. “Bennett’s conduct did not cause physical harm, did not endanger the health or safety of others, did not involve repeated actions, and did not threaten financial ruin,” the court concluded. Under similar circumstances, the Texas Supreme Court had held that an exemplary award greater than four-times actual damages did not comport with due process under *State Farm*. See *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299 (Tex. 2006). The court acknowledged that “rigid application of a 4:1 ratio is not universally required,” and greater ratios may be appropriate “where ‘a particularly egregious act has resulted in only a small amount of economic damages.’” But the court ruled this was not such a case, adding that “on this record, even 4:1 seems a stretch.” The court remanded to the court of appeals for a remittitur determination.

The court’s opinion also reached three other notable conclusions: (1) Reynolds’s evidence of malice was legally sufficient to meet the statutory predicate under Chapter 41 of the Civil Practice and Remedies Code, despite Bennett’s argument to the contrary; (2) one *State Farm* factor for determining whether an exemplary verdict is appropriate--legislative penalties for similar misconduct--was largely inapplicable due to a lack of comparable statutory penalties; and (3) Bennett possessed sufficient authority to act on behalf of the ranch-owning corporation to warrant assessing punitive damages against the corporation based on his conduct.

C. *ERI Consulting Eng., Inc. v. Swinnea*, 318 S.W.3d 867 (Tex. May 7, 2010)

Among the issues in this case is whether damages for breach of fiduciary duty related to the sale of a partnership interest could include forfeiture of the consideration the breaching party received in the sale.

An individual plaintiff named Snodgrass was partners with defendant Swinnea for ten years in two different partnerships: ERI, a company that managed asbestos abatement projects for contractors; and another partnership that owned and leased the building where ERI had its offices. In 2001, Snodgrass purchased Swinnea's interest in ERI. In the sale agreement, ERI agreed to employ Swinnea for six years, and Swinnea agreed not to compete to ERI. Unknown to Snodgrass, Swinnea's wife and the wife of another ERI employee had started a new company a month before the sale. The new company began competing with ERI, even though neither wife had experience in asbestos removal. In the meantime, Swinnea's production for ERI declined 30-50 percent. Swinnea told the former ERI employee whose wife co-owned the new company that Snodgrass would "run ERI into the ground" and that the Swinnea and the other employee would be able to "buy this company back 50 cents on the dollar." After Snodgrass discovered the arrangement with the new company through a contractor, Swinnea and his wife started yet another company, which began performing asbestos removal. When Snodgrass fired Swinnea and released him from his non-compete, Swinnea immediately obtained a license to perform asbestos removal and began working for his wife's company. Snodgrass moved ERI out of its offices and filed suit against Swinnea and his wife's second company, among others.

After a bench trial, the trial court found for Snodgrass and ERI on claims for statutory fraud in a real-estate and stock transaction, common-law fraud, breach of the non-compete and breach of fiduciary duty. The court awarded actual damages over \$1 million, and \$1 million in punitive damages. The actual-damage award included over \$700,000 in equitable forfeiture of cash, partnership interests and interests in lease payments transferred in the sale between Snodgrass and Swinnea. The award also included \$300,000 for lost profits. The trial court further found the second company started by Swinnea's wife jointly and severally liable for the judgment as a civil conspirator.

The court of appeals reversed, finding the evidence legally insufficient to support the damages verdict. Among other things, the court of appeals found that equitable forfeiture was unavailable because Swinnea received no fee to be forfeited, and that ERI failed to show Swinnea received any ill-gotten gains subject to disgorgement. The court of appeals also found that the plaintiffs had failed to prove any actual damages. The court of appeals further reversed the conspiracy verdict, finding no evidence of conspiracy.

The Texas Supreme Court held that forfeiture could be available remedy for the violations found, but ordered the case remanded to the trial court for further consideration. The court emphasized that the main purpose of forfeiture is to protect fiduciary relationships by discouraging breaches of fiduciary duty, not to compensate injured principals. "We hold that where willful actions constituting breach of fiduciary duty also amount to fraudulent inducement, the contractual consideration received by the fiduciary is recoverable in equity regardless of whether actual damages are proven, subject to certain limiting principles set out below," the court wrote. The "limiting principles" require a trial court to consider factors determining whether the forfeiture is an appropriate remedy for the particular breach. The court listed several of the factors: "the gravity and timing of the breach of duty, the level of intent or fault, whether the principal received any benefit from the fiduciary despite the breach, the centrality of the breach to the scope of the fiduciary duty, . . . any threatened or actual harm to the principal," the

adequacy of other remedies, and most importantly, whether the remedy fits the circumstances and works to serve “the ultimate goal of protecting relationships of trust.” The court ordered remand to the trial court for further consideration of these factors.

The court also addressed the lost-profits award in some detail. The court found that Snodgrass had introduced evidence that the ERI’s business declined after the sale. But even applying a generous profit margin, lost profits would fall short of the trial court’s award, the court determined. The court reversed the court of appeals’ ruling that the plaintiffs take no actual damages, and ordered that the trial court further consider the amount of the award on remand. The court added that the trial court should further consider the punitive-damages award after determining a revised actual-damages award.

Finally, the court affirmed the court of appeals’ holding that Swinnea’s wife’s second company could not be held jointly-and-severally liable on the civil conspiracy theory. The wife’s second company was formed some time after the sale transaction. As such, the court reasoned that the company could not have participated in inducing the sale transaction and could not have met minds with Swinnea on a conspiracy causing lost profits to ERI.

## **IX. EMPLOYMENT**

### **A. *Waffle House, Inc. v. Williams*, 313 S.W.3d 796 (Tex. Jun. 11, 2010)**

This case concerns whether the sexual harassment statute in the Texas Commission on Human Rights Act preempted common-law claims for negligent hiring and retention where the plaintiff’s common-law-tort injuries were indistinguishable from her sexual-harassment injuries.

Plaintiff Williams worked at Waffle House as a waitress in 2001 and 2002. A cook at the restaurant where she worked, Davis, subjected Williams to a series of offensive comments and unwelcome physical conduct. Davis winked at Williams, stared at her, and displayed a condom to her while laughing. He also physically contacted her in a number of ways: pushing her into counters and a grill, holding her arms to her body while pressing himself against her, rubbing against her breasts with his arm and cornering her on several occasions. Davis’s harassment continued after Williams complained to store managers and district managers.

Williams followed administrative procedures established in the sexual harassment statute and obtained necessary a right-to-sue letters from state and federal regulators. After trial, the jury found for Williams on the elements of both statutory sexual harassment and common-law negligent hiring and retention. The jury also found that Davis had assaulted Williams, although it found that Waffle House had not ratified the assault. Nonetheless, the jury found that Waffle House’s negligent hiring and retention of Davis proximately caused Williams’s injuries. The trial court awarded \$850,000 in damages on the verdict: \$425,000 in past and future compensatory damages, and \$425,000 in punitive damages. The sexual harassment statute limited Williams’s recovery to a maximum of \$300,000. Williams elected to recover on her common-law claim.

Holding Williams limited to statutory relief, the Texas Supreme Court noted that Texas law does not provide a common-law claim for sexual harassment. While Texas does recognize

common-law assault, the court found that Davis's conduct "was assaultive because of the sexually offensive and provocative nature of his verbal and physical contacts with Williams." The court found that the legislature has established an "elaborately crafted statutory scheme" to address sexual harassment. In particular, the statute requires exhaustion of administrative remedies, specifies limitations periods, establishes specific substantive elements, and provides affirmative defenses. "If Williams's common-law claim for negligent supervision and retention is allowed to coexist with the statutory claim, the panoply of special rules applicable to the TCHRA claims could be circumvented in any case where the alleged sexual harassment included even the slightest physical contact," the court posited. The court acknowledged that existing precedent disfavors abrogation of common-law claims, but held that the facts of the case showed the "clear repugnance" between statutory and common-law claims required to establish statutory preemption. The majority of the court rejected an argument in a dissenting opinion that Williams's "assault-based negligence claim was supported by independent facts unrelated to sexual harassment"; the majority found that "Davis's conduct was injurious to Williams because it was sexual harassment, not because it caused any independent physical or other injury."

B. *Marsh USA Inc. v. Cook*, No. 09-0558, 2010 Tex. LEXIS 314 (Tex. Apr. 9, 2010)

This order grants review of a decision by the Dallas Court of Appeals affirming a trial court holding that a covenant not to compete was unenforceable. The appeals-court decision is *Marsh USA Inc. v. Cook*, 278 S.W.3d 378 (Tex. App.--Dallas 2009).

The Dallas court held that the agreement was unenforceable because it was not supported by consideration sufficient to support a non-compete agreement. The employee (Cook) signed the agreement as a condition to his right to exercise stock options that the employer (Marsh) provided to valued employees. For a non-compete provision to be enforceable under Tex. Bus. & Com. Code Ann. § 15.50(a), the employer's interest in restraining the employee from competing must arise from the consideration given in exchange for the non-compete provision, the court found. The court noted, "the most common types of consideration given in return for a covenant not to compete are a company's trade secrets or other confidential information." Marsh argued that offering stock options to valued employees created an interest in protecting the company's goodwill. The court found this interest insufficient because the company's interest in goodwill did not arise from the consideration given for the non-compete agreement. "The *give rise* requirement may be met only if the consideration given by the company creates the interest in restraining competition. This, in turn, will occur only where the interest in restraining competition did not exist before the consideration was given," the court held.

C. *In re Odyssey Healthcare, Inc.*, 310 S.W.3d 419 (Tex. May 7, 2010)

This case concerns the enforceability of an agreement to arbitrate worker-injury claims.

Morales, an El Paso-based employee of Odyssey, claimed she was injured when she tripped over an uneven step at a patient's home. Odyssey did not subscribe to the Texas workers' compensation system, but provided workers with a substitute plan. Morales enrolled in the plan as a condition of her employment. The plan included a clause requiring arbitration. The clause specified that the arbitrators would be selected from a Dallas panel, unless the parties mutually agreed otherwise. After a hearing, the El Paso trial court denied Odyssey's motion to

compel arbitration, finding the requirement of arbitration in Dallas unconscionable. The court of appeals denied writ of mandamus.

The Texas Supreme Court reversed. Morales asserted several reasons why the arbitration clause was unenforceable: substantive unconscionability, a non-waiver provision in the Texas Workers' Compensation Act, an argument that the Federal Arbitration Act violated the Tenth Amendment, and lack of mutual consideration. The court first found that Morales had the burden of proving that the arbitration agreement was unconscionable due to the expense of arbitrating in Dallas, and she had failed to introduce sufficient evidence of her expenses. The court also noted that although the defendant intended to arbitrate in Dallas, the agreement did not specifically mandate a site. The arbitrator would have an opportunity to address Morales's cost argument, the court added. The court further held that the provision in the Texas Workers' Compensation Act preventing pre-injury waivers of employees' causes of action did not prevent arbitration agreements. The court next rejected the argument that the clause was void under the Tenth Amendment because it impaired Texas' ability to structure state-government functions. The court found that it had already held arbitration agreements enforceable in the workers'-compensation context, and accordingly concluded that arbitration did not impair state workers'-compensation functions. Finally, the court determined that the arbitration clause did not fail for lack of mutuality. The agreement provided that termination would not alter arbitration rights or rights to benefits for prior injuries, and the employee would receive 14-days notice of any termination; the court found that these provisions assured mutuality.

\*This case is also discussed in the Workers' Compensation section of this paper.

D. *In re 24R, Inc.*, 324 S.W.3d 564 (Tex. Oct. 22, 2010)

At issue in this case is whether an employment-related arbitration agreement was enforceable despite the employer's right to unilaterally change provisions of an employee handbook distributed with the agreement.

Plaintiff Cabrera worked for a company called Boot Jack (corporate name 24R, Inc.). She signed three separate arbitration agreements in 2003, 2004, and 2005. In 2007, she developed a medical condition; her doctor directed her to eat all meals before six in the evening. Four months later, the company terminated her. Cabrera alleged that the company terminated her because she requested medical accommodations. In the ensuing lawsuit, the trial court denied Boot Jack's motion to compel arbitration, and the court of appeals denied mandamus relief.

The Texas Supreme Court reversed, conditionally granting mandamus and ordering the trial court to grant the arbitration motion. The court held that the parties had exchanged mutually binding promises to arbitrate. Cabrera argued that the agreement was illusory due to provisions in the employee manual that allowed Boot Jack to unilaterally change employment policies. But the court found that the arbitration agreement did not mention any right to change its terms, and did not incorporate by reference the employee manual. The court also noted that the employee manual expressly disclaimed any contractual force, and the arbitration agreement included a clause providing that it would survive termination of employment. The court held that the free-standing arbitration agreement reflected mutually binding promises to arbitrate.

- E. *Hatton v. D.R. Horton, Inc.*, No. 14-09-0054-CV, 2010 Tex. App. LEXIS 939 (Tex. App.--Houston [14<sup>th</sup> Dist.], Feb. 11, 2010)

The Texas Supreme Court has heard arguments on the petition for review in this case regarding the enforceability of employee arbitration agreements. The relevant facts are recited in a companion case, *D.R. Horton, Inc. v. Brooks*, 207 S.W.3d 862 (Tex. App.--Houston [14<sup>th</sup> Dist.], 2006). The facts are similar to those in *In re 24R*. The Fourteenth Court of Appeals upheld an arbitration clause in an “employee acknowledgement form” attached to an employee handbook. Employees challenged the clause as illusory because of provisions allowing the employer to change policies. The court found that while the employer reserved the right to change policies in the handbook, the employee form containing the arbitration clause did not attempt to reserve a right for the employer to avoid arbitration. The court distinguished the case from prior cases in which the employer had retained the right to avoid binding arbitration at its discretion. The employees also challenged the agreement as unconscionable due to the cost of arbitration; the court rejected this argument as moot because the employer had agreed to pay the cost.

## **X. EVIDENCE**

- A. *ERI*, 318 S.W.3d 867 (*see* discussion under Damages above)

In addition to fiduciary-duty damages, this case also concerns whether parol evidence was admissible to show that certain consideration was given in exchange for the sale of a partnership interest.

The damages award involved forfeiture amounts and interests given in consideration for the sale of the asbestos-removal business. The forfeited interests included Swinnea’s interest in lease payments that ERI made to another Snodgrass-Swinnea partnership that owned the real estate where ERI had its offices. At the time of the sale transaction, ERI agreed to continue leasing the property for six years. But the written agreements for sale of ERI did not specify that the lease payments were part of the consideration Swinnea was receiving; Snodgrass established this through testimony. Swinnea contended that the forfeiture of the lease rights was supported only by inadmissible parol evidence.

The Texas Supreme Court rejected Swinnea’s parol-evidence argument. Reviewing the law of parol evidence, the court acknowledged that evidence of oral agreements prior or contemporaneous to a written agreement is generally inadmissible. But the parol evidence rule excepts “consistent collateral agreements”: agreements collateral to an integrated agreement and not inconsistent with its terms. “A collateral agreement between parties concerning the relationship of several distinct obligations between them falls within the exception,” the court found. The collateral agreement providing the lease would serve as partial consideration for the sale did not contradict the written sale agreement, concluded the court. Accordingly, the court held the collateral agreement admissible.

B. *TXI Transp. Co. v. Hughes*, 306 S.W.3d 230 (Mar. 12, 2010)

This case concerns two evidentiary issues: (1) whether the testimony of an accident reconstruction expert was properly admitted; and (2) whether the admission of a witness's immigration status was harmful error.

Four Hughes family members were killed when the family GMC Yukon collided with an eighteen-wheel tractor-trailer rig heavily loaded with gravel on a two-lane stretch of highway 114 outside the City of Paradise. TXI operated the truck, driven by Rodriguez. The family Yukon had crossed from its westbound lane over the center line and into the eastbound lane at the time of the accident. The parties disputed what caused the Yukon to cross the line. The family's expert, an emeritus professor of mechanical engineering at the University of Texas, testified that the gravel truck crossed the line first, forcing the Hughes vehicle to move defensively into the eastbound lane to avoid the rig. The expert based his testimony on review of the police accident report, photographs from the scene, measurements taken at the site, skid tests, an inspection of the Yukon, an analysis of data, and witness's statements and depositions. TXI complained that several of the expert's assumptions and calculations were incorrect, and faulted his selective reliance on witness testimony. The trial court admitted the testimony, and the jury found for the plaintiff. The court of appeals affirmed. The Texas Supreme Court also affirmed, holding that the expert's testimony was reasonably based on the facts he analyzed--including the witness's testimony--and the science he applied.

During the trial, the court admitted "evidence of Rodriguez's immigration status and his misrepresentation of that status in order to live and work in this country." The defense argued this evidence was irrelevant to any issue in the case. The plaintiffs argued the evidence was relevant to claims of negligent hiring and entrustment, because the misrepresentations went to Rodriguez's qualifications and experience as a commercial driver. The court of appeals also found the immigration status admissible to impeach prior testimony Rodriguez had given, asserting that he had never lied to get a driver's license and did not know whether he had a legal right to work in the United States. Despite the plaintiffs' arguments, the supreme court found the admission of the evidence to be harmful error. The court held that Rodriguez's immigration status was not relevant to the negligent entrustment claim, because the possibility that he was an alien did not create a foreseeable risk that he would negligently drive the truck. The court held Rodriguez's immigration status inadmissible as impeachment evidence for two reasons: (1) the impeachment concerned a "collateral matter," a matter "not relevant to proving a material issue in the case"; and (2) immigration status was inadmissible under Tex. R. Evid. 608(b), which generally prohibits inquiry into "specific instances of the conduct of a witness, for the purpose of attacking . . . the witness's credibility." The court concluded: "Such error was harmful, "not only because its prejudice outweighed any probative value, but also because it fostered the impression that Rodriguez's employer should be held liable because it hired an illegal immigrant." The court remanded to the trial court for a new trial.

C. *Wal-Mart Stores, Inc. v. Merrell*, 313 S.W.3d 837 (Tex. Jun. 18, 2010)

This case concerned the admissibility of expert testimony regarding the cause of a fire.

Charles Merrell, Jr. and Latosha Gibson died from smoke inhalation from a home fire. Police investigating the scene found candles, marijuana cigarette butts, a marijuana bong, and a damaged floor lamp, among other fire-damaged property. The fire marshal “declared the fire accidental and of unknown origin.” Merrell’s parents sued Wal-Mart, which allegedly sold the lamp found in the apartment. At trial, the parents’ expert testified that the lamp likely caused the fire. He contended that a fire caused by the lamp was “wholly consistent with our knowledge of fire science.” He opined that other causes were less likely for various reasons. Wal-Mart contended that the expert’s testimony lacked factual substantiation and was conclusory. The trial court admitted the testimony, but granted summary judgment. The court of appeals reversed, finding that the parents had produced evidence on each challenged element of their cause of action.

The Texas Supreme Court reversed and rendered judgment for Wal-Mart. The court found that while the expert had explained that halogen lamps could cause fires, he had not adequately testified that the particular lamp caused this particular fire. The court also found that the expert had failed to adequately explain why other possible causes could not have started the fire. “An expert’s failure to explain or adequately disprove alternative theories of causation makes his or her own theory speculative and conclusory,” the court opined.

\*This case is also discussed in the Products Liability section of this paper.

D. *Jelinek v. Casas*, No. 08-1066, 54 Tex. Sup. J. 272 (Tex. Dec. 3, 2010)

This case concerns whether proffered expert and lay witness testimony adequately established that the failure of doctors and a hospital to prescribe antibiotics caused additional pain and suffering to a patient.

The plaintiffs were family members of Eloisa Casas, who died of cancer shortly after a hospital stay. Casas suffered from two infections. The plaintiffs contended she also suffered from a third infection treatable by certain antibiotics, which Casas was not receiving during parts of her hospital stay. The plaintiffs’ expert testified two doctors were negligent for failing to discover that Casas was not receiving antibiotics. Further, the expert testified that “within ‘reasonable medical probability’” the doctors’ failure prolonged Casas’s hospital stay and increased her pain and suffering. The doctor testified that the medical records indicated the presence of the treatable infection “in medical probability,” but acknowledged there was no direct evidence of the infection. The family members also testified that Casas was upset about not receiving the antibiotics and that the failure to receive them seemed to make certain aspects of her condition worse. The jury found for the plaintiffs, the trial court entered judgment on the verdict, and the court of appeals affirmed.

The Texas Supreme Court reversed. The court noted that given Casas’s cancer and the presence of two known infections, her pain and suffering could have resulted from a number of conditions. Under such circumstances, an expert must do more than draw inferences that the defendant’s negligence caused the injury; he must explain why his inferences are “medically preferable to competing inferences that are equally consistent with the known facts,” the court found. The expert for Casas had acknowledged that her symptoms were consistent with infections not treatable by the antibiotics. Because the symptoms were equally consistent with

either cause, the court found that the expert could not reasonably draw either inference. The court also found that lay witness testimony was inadequate to support a verdict of medical causation in a case involving a complex condition where more than one possible cause exists. Further, the court held that the trial court abused its discretion when it did not award sanctions under former Tex. Health--Public Code Ann. Art. 4590i, because the expert's report failed to provide a "fair summary" of the expert's conclusions on causation as required by the article.

## **XI. FAMILY LAW**

- A. *In re Richard Scheller*, No. 09-1072, 2010 Tex. LEXIS 853 (Tex. Nov. 5, 2010) (per curiam) (publication status pending)

This case concerns whether a grandparent had met his burden of proof by the preponderance of the evidence standard that denial of access to grandchildren would significantly impair the children's physical health or emotional well-being.

When Amanda Scheller passed away in September 2007 she was survived by two young daughters and husband, Richard Scheller ("Scheller"). Both before and after Amanda died, her daughters visited Amanda's father ("Pemberton") and step-mother every four to six weeks in Crockett, Texas. During the year after Amanda's death, Scheller relied on the Pembertons for assistance taking care of his two daughters. The girls currently live in Austin with Scheller and his new wife. The Schellers' relationship with the Pembertons began to deteriorate in 2008 over differences of opinion on various matters. Pemberton filed suit for grandparent access in August 2009. He petitioned for temporary access to the girls and for the court to appoint an expert to evaluate whether denying Pemberton access would significantly affect the girls' physical health or emotional well-being. The trial court issued temporary orders that included granting a grandfather temporary access to and possession of his grandchildren and appointment of an expert. Scheller sought mandamus relief. The court of appeals granted temporary relief and stayed the trial court's temporary orders, but subsequently lifted the stay and denied mandamus relief. Scheller sought mandamus relief from the Texas Supreme Court alleging that the temporary orders for access to and possession of the children and appointment of an expert violated his fundamental liberty interest as a parent to have control and autonomy in making child-rearing decisions.

The Texas Supreme Court cited previous cases<sup>1</sup> in which it had granted conditional mandamus relief when a grandparent had not overcome his "high threshold" burden to prove that denial of access would significantly impair the child's physical health or emotional well-being. The court also cited a U.S. Supreme Court holding in *Troxel v. Granville*<sup>2</sup> that a trial court's order for grandparent access unconstitutionally infringed on the parent's fundamental liberty interest where there was no evidence that the parent was unfit, that the children's health and well-being would suffer, or that the parent intended to exclude grandparent access entirely. Accordingly, the court found that the trial court abused its discretion in issuing the order because

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<sup>1</sup> *In re Derzapf*, 219 S.W.3d 327 (Tex. 2007) (per curiam); *In re Mays-Hooper*, 189 S.W.3d 777 (Tex. 2006) (per curiam).

<sup>2</sup> *Troxel v. Granville*, 530 U.S. 57 (2000) (plurality op.).

the grandfather did not establish by a preponderance of the evidence that denial of access to or possession of the grandchildren would significantly impair their physical health or emotional well-being.

B. *In re B.G.*, 317 S.W.3d 250 (Tex. 2010)

This case concerns whether an inmate's due process rights were violated when the trial court and court of appeals denied appellate review because he failed to meet the statutory deadline for filing appellate points.

The Texas Department of Family and Protective Services sued Williams, an inmate, in February 2005 to terminate his rights to his four children on the ground that he had endangered their well-being. Williams was permitted to discharge his appointed counsel and proceeded to trial *pro se*. The trial court signed a judgment terminated Williams's parental rights on July 18, 2006. The docket sheet reflects that on July 20, 2006, the trial court appointed Claude Welch to represent Williams. It is unclear if Welch was ever appointed or took an action on behalf of Williams. On August 9, 2006, the trial court appointed Brent Watkins to represent Williams. Although the deadlines had passed, Watkins filed Williams's notice of appeal on August 14 and his affidavit of indigence on August 23 and was granted extensions for both. On September 11, forty days after the deadline, Watkins filed a statement of appellate points. On September 12, the trial court held a hearing and found that because Williams had not filed a statement of appellate points by the statutory deadline, and appellate record was not necessary, and that no substantial questions for appellate review were presented. The Twelfth District Court of Appeals affirmed.

Williams petitioned the Texas Supreme Court for review contending that by precluding his appeal, the court violated his due process rights. The court concluded that the late filing should not impede Williams's appeal and since the trial court's determination that Williams had presented no substantial question for appellate review was solely based on the fact that his statements of points was not timely filed, the court ordered that a complete appellate record be prepared and the court of appeals consider the issues raised in his statement of points as if it had been timely filed.

C. *In re J.H.G.*, 302 S.W.3d 304 (Tex. 2010)

This case concerns whether a party's failure to challenge the trial court's extension of the statutory deadline to file statement of points is waived on appeal.

In March 2007, the Texas Department of Family & Protective Services obtained temporary orders of possession of J.H.G. The case was set to be dismissed in March 2008 pursuant to section 263.401(a) of the Family Code. In December 2007, after the mother failed to comply with several court-ordered requirements, TDFPS sought to terminate the mother's parental rights and filed a motion to extend the March 2008 dismissal date. The mother objected but the trial court granted the three-month extension. Trial on the merits was held over the mother's objections. The jury found that the mother failed to comply with the terms of her court-ordered service plan and that termination was in the child's best interest. The trial court rendered judgment terminating the mother's parental rights. The mother timely filed a statement of points

contesting the legal and factual sufficiency of the evidence, but she did not challenge the trial court's extension of the statutory deadline.

Citing section 263.405(b)(2) of the Family Code for the rule that the court of appeals may not address an issue that is not included in a timely failed statement of points, the Texas Supreme Court held that the mother's failure to challenge the trial court's extension of the statutory deadline in her statement of points waived the issue on appeal. The court also cited its decision in *In re Department of Family and Protective Services*<sup>3</sup> and found that the Fifth District Court of Appeals' judgment that the issue was not waived because it bore on the trial court's subject matter jurisdiction was directly contrary. Accordingly, the Court reversed the court of appeals' judgment and remanded the case for consideration on the remaining issues.

## **XII. FEDERAL PREEMPTION**

- A. *MCI Sales and Serv., Inc. v. Hinton*, No. 09-0048, 54 Tex. Sup. J. 386 (Dec. 17, 2010)

At issue in this case is whether federal regulatory pronouncements regarding safety belts on motor coaches, and federal regulations covering motor-coach window glazing, preempted state common-law negligence claims.

The plaintiffs sued for damages resulting from injuries and deaths suffered in a bus accident that occurred on I-35 south of Waco in February 2003. Five people died in the accident, and several others were injured. The owner and operator of the bus filed for bankruptcy, and bus-crash victims pursued claims in bankruptcy court. Separately, the plaintiffs sued the manufacturer, importer and distributor of the buses (MCI). The plaintiffs alleged two design defects against MCI: failure to install passenger seatbelts, and failure to laminate the glass windows in the bus. The jury found that the lack of seatbelts caused injuries to all plaintiffs, and the lack of laminated-glass windows caused injuries to plaintiffs ejected from the bus. The jury awarded over \$17 million in damages.

The Texas Supreme Court rejected MCI's preemption arguments. The court first addressed MCI's argument that federal regulatory pronouncements preempted negligence liability based on failure to install passenger seatbelts. The court began by outlining the regulatory history of the issue. The relevant federal regulators, the National Highway Traffic Safety Administration (the Agency) had never issued regulations on passenger seatbelts in motor coaches. The Agency had issued proposed rules in the 1970s, but had withdrawn them based on a conclusion that they were "not justified from a cost/benefit standpoint, and that seatbelt-usage surveys in intercity buses indicated few passengers would utilize seatbelts if provided." In 1992, the Agency's Chief Counsel had opined in a letter to New York authorities that the Agency's previous determination would preempt proposed New York legislation requiring seatbelts. The Agency was revisiting the issue at the time of the Texas Supreme Court opinion, having issued proposed rules requiring seatbelts. The court held that the Agency's pronouncements did not effectively transform the Agency's lack of regulation on the issue into an affirmative preemption

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<sup>3</sup> *In re Department of Family and Protective Services*, 273 S.W.3d 637 (Tex. 2009).

of state tort law. The court cited a United States Supreme Court holding that federal regulators did not preempt a state-jury determination by declining to regulate based on cost-benefit analysis. The court further found that the Chief Counsel's letter was not federal law and was not "particularly persuasive" regarding the Agency's intent years earlier when it declined to regulate. "Regulatory silence will not preempt a state law absent a clear and manifest statement to forbid all regulation in that area," the court held.

In contrast to the seatbelt issue, the Agency had issued regulations on the selection of window glass in motor coaches. Based on a finding that no material is "superior to the others in all circumstances," the applicable regulation gave manufacturers a choice between laminated glass, tempered glass, and other glazing materials. Nonetheless, the court found preemptive intent absent. The federal statute authorizing the regulations defines federal regulations under the act as "minimum standards." Further, the statute contains a "savings clause": a clause exempting state common-law actions from language in the statute expressly preempting state statutes and regulations not identical to federal regulations under the statute. While the "savings clause" does not save common-law actions in direct conflict with requirements of federal regulations, it does reinforce the nature of the federal regulations as "minimum-standards," the court reasoned. The court found that the NHTSA had not stated a "positive desire" to prevent contrary state decisions, nor had it issued rules sufficiently extensive to evince intent to preempt. On this point, the court cited a Fifth Circuit opinion deciding against preemption in a case addressing the same issue as to windows in sport-utility vehicles. The court acknowledged that some lower courts had reached the opposite conclusion, but found that those courts had interpreted the regulations and applicable United States Supreme Court precedent too broadly.

In summary, the court held: (1) no preemption on seatbelts where the federal regulators had not issued a governing standard; and (2) no preemption on window glazing where federal regulators had issued regulations giving manufacturers a choice of materials, but the court found that those regulations represented minimum standards rather than comprehensive rules with preemptive intent. Note that the United States filed an amicus brief arguing against preemption, and the court cited the brief in its opinion.

B. *In re Olshan Found. Repair Co., LLC*, Nos. 09-0432, 09-0433, 09-0474 and 09-0703, 54 Tex. Sup. J. 300 (Dec. 3, 2010)

This case concerns whether the Federal Arbitration Act preempted the Texas General Arbitration Act for purposes of contracts containing arbitration clauses that specified "arbitration laws in your state" or arbitration "pursuant to the Texas General Arbitration Act."

Four families each alleged that Olshan improperly performed foundation work on the family home. Each of the four families signed a contract for the repairs that included an arbitration clause. Three of the contracts selected "the arbitration laws in your state" as the governing law. The fourth agreement provided for arbitration "pursuant to the Texas General Arbitration Act." The Texas Act requires that arbitration agreements in service contracts for less than \$50,000 be signed by all parties and their attorneys; the families' attorneys did not sign the agreements. Four different trial courts denied Olshan's motions to compel arbitration in the cases, and four courts of appeals affirmed.

The Texas Supreme Court reversed in three of the four cases. The court held that an arbitration clause selecting the “arbitration laws in your state” did not select the Texas Act over the Federal Act. Citing a number of authorities, the court reasoned that the Federal Act was also part of Texas law. The court found that because the parties had selected a body of law including both acts, the Federal Act’s broad policy in favor of arbitration preempted the provision in the Texas Act that would otherwise make the arbitration clauses unenforceable. But as to the clause specifying the Texas Act, the court found the parties had clearly and specifically selected the Texas Act to govern their agreement. “The parties’ intention that arbitration be administered pursuant to the TAA would be thwarted if the FAA preempted the TAA’s specific provisions,” the court concluded.

### **XIII. GOVERNMENTAL IMMUNITY**

#### **A. *Texas Dep’t of Criminal Justice v. McBride*, 317 S.W.3d 731 (Tex. 2010)**

This case concerns whether the Texas Department of Criminal Justice’s request for attorney’s fees and costs is a claim for affirmative relief which waives sovereign immunity.

McBride is an inmate at a Texas Department of Criminal Justice facility. Several years ago the Department charged McBride with possession of an alcoholic beverage and entered findings against him in an administrative disciplinary hearing. McBride filed several grievances pursuant to the Department’s appeals process. The Department eventually closed his case and took no further action. McBride sued, alleging among other things that the Department violated his due process rights by failing to give him a copy of the administrative decision. In its answer, the Department denied McBride’s allegations, asserted sovereign immunity, and requested attorney’s fees. The trial court granted the Department’s plea and dismissed the case. The Thirteenth District Court of Appeals reversed holding that the Department’s claim for attorney’s fees is a claim for affirmative relief which waives sovereign immunity.

The Texas Supreme Court found that the Department’s prayer for attorney’s fees and costs incurred in defending the case was purely defensive in nature, unconnected to any claim for monetary relief. Therefore, a request for attorney’s fees incurred in defending a claim does not waive immunity under *Reata*.<sup>4</sup> Accordingly, the court reversed the court of appeals’ judgment and remanded the case for consideration of McBride’s remaining issues.

#### **B. *Klein v. Hernandez*, 315 S.W.3d 1 (Tex. 2010)**

This case concerns whether a resident physician and a hospital can claim governmental immunity under Chapter 312 of the Texas Health and Safety Code.

Klein was a Baylor obstetrics and gynecology resident at Ben Taub General Hospital in Harris County Texas when he delivered Hernandez’s daughter. Hernandez sued Klein and Baylor College of Medicine alleging malpractice. Baylor and Klein jointly filed a motion for summary judgment, asserting they were entitled to immunity under sections 312.006 and

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<sup>4</sup> *Reata Construction Corp. v. City of Dallas*, 197 S.W.3d 371 (Tex. 2006).

312.007 of the Texas Health and Safety Code. The trial court denied the defendants' motions. Although Hernandez non-suited her claim against Baylor, Baylor joined Klein in appealing the trial court's interlocutory order. The court of appeals dismissed both appeals after concluding it lacked jurisdiction under section 51.014(a)(5) of the Texas Civil Practice and Remedies Code because Klein was not an "officer or employee of the state" and under section 51.014(a)(8) because Baylor was not a "governmental unit." Moreover, Chapter 312 of the Texas Health and Safety Code did not confer immunity upon either Baylor or Klein.

In determining whether the Texas Health and Safety Code provided immunity to Klein, the Texas Supreme Court followed the cardinal rule of statutory construction and focused on Legislative intent. The court concluded that Baylor was a "governmental unit of state government" and a "state agency" for certain purposes, including its services at Ben Taub under Chapter 312. Further, Chapter 312 made Klein a state employee for those same purposes. Thus, as an employee of a state agency, Klein was entitled to an interlocutory appeal. The court reversed and remanded for consideration of the merits of Klein's assertion of immunity.

C. *Univ. of Tex. Southwestern Med. Ctr. at Dallas v. Estate of Arancibia*, 324 S.W.3d 544 (Tex. 2010)

This case concerns whether the notice requirement of section 101.101(a) of the Texas Civil Practices and Remedies Code was jurisdictional or mandatory.

Arancibia underwent laparoscopic hernia surgery at Parkland Memorial Hospital in September 2003. The procedure was performed by two resident physicians and an attendant physician. Two days later, Arancibia was admitted to Parkland's emergency Room and it was revealed that during the hernia repair, her bowel had been perforated in two places, leading to acute peritonitis with sepsis. Arancibia died the next day. Her family initially sued the physicians but later nonsuited them, naming Southwester and Parkland in their stead. Southwestern moved to dismiss alleging that the Arancibias failed to provide timely notice of their claim. The trial court denied the plea and the Fifth District Court of Appeals affirmed.

The Texas Tort Claims act waives immunity from suit to the extent of liability created by the Act. To take advantage of the waiver, plaintiffs must notify the government of a claim within six months. To determine whether the notice requirement was jurisdictional or mandatory, the Texas Supreme Court first examined whether the Legislature's 2005 amendment to the Government Code was prospective or retrospective. The Court concluded that the amendment applied to the case because it was a jurisdictional rule which took away no substantive rights of the parties, but rather spoke to the power of the courts. Because the amendment applied, lack of notice was jurisdictional and the trial court could dispose of the case on a plea of jurisdiction and a governmental unit would have the statutory right of interlocutory appeal if the plea failed. Accordingly, the court held that Southwestern had the right of interlocutory appeal and the Court of Appeals' judgment was affirmed.

D. *The State of Texas v. Brownlow*, 319 S.W.3d 649 (Tex. 2010)

This case concerns whether sovereign immunity protects the State from a claim under the takings clause.

When the State of Texas initiated plans to widen State Highway 35 in Brazoria County, it concluded that the highway expansion required construction of a floodplain mitigation plan. The State elected to build the pond on a part of a tract of land owned by the Brownlows. The parties came to an agreement embodied in an Agreed Judgment by which the State received a permanent easement over the Brownlow's property. In accordance with the construction plan, the State built the pond and used most of the excavated dirt for highway construction purposes in another location. The Brownlows sued the State for inverse condemnation as to the dirt it removed. The State filed a plea to the jurisdiction, asserting sovereign immunity. The trial court granted the plea and dismissed the case. The Fourteenth District Court of Appeals reversed.

The Texas Supreme Court cited its previous holding in *State v. Holland*<sup>5</sup> that sovereign immunity from suit does not protect the State from a claim under the takings clause. The court then found that the Agreed Judgment did not grant the State rights to use the Brownlows' property for other purposes. Thus, by using the excavated dirt to build the highway embankment, the State exercised a right neither granted by the easement nor reasonably necessary for the State to fully enjoy the easement for the purpose it was granted. Accordingly, the Brownlows' suit stated a takings claim and the State did not have sovereign immunity from it.

- E. *University of Texas at Austin v. Hayes*, No. 09-0300, 2010 Tex. LEXIS 896 (Tex. Dec. 3, 2010) (per curiam) (publication status pending)

This case concerns whether the erection of a barricade by the University of Texas was a "special defect" or "premises defect" which would have provided a limited immunity waiver and allow the school to be sued for damages.

On September 12, 2003, The University of Texas at Austin began to close campus areas to prepare for the next day's football game. As part of its preparation, the University closed a service driveway by placing an eight-foot-wide orange and white barricade in front of a metal chain that stretched across the entrance. Although Hayes admits he saw the barricade, he nevertheless rode his bicycle without slowing down significantly into the chain and suffered injuries as a result. Hayes sued the University alleging the chain was a defect of which the University failed to warn. The University filed a plea to the jurisdiction, arguing that Hayes's allegations failed to state claims that establish a waiver of sovereign immunity under the Texas Tort Claims Act. The trial court denied the University's amended plea to the jurisdiction and granted Hayes's motion for partial summary judgment, concluding the University's sovereign immunity had been waived. The University filed an interlocutory appeal. A divided Third District Court of Appeals affirmed.

The Texas Supreme Court first examined whether the barricade constituted a "special defect" which would provide a limited immunity waiver for tort claims under section 101.022(b) of the Texas Tort Claims Act. The court's special-defect jurisprudence turns on the objective expectations of an "ordinary user" who follows the "normal course of travel." Because the court

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<sup>5</sup> *State v. Holland*, 221 S.W.3d 639, 643 (Tex. 2007).

believed that a chain barricading a closed driveway would not pose a threat to an ordinary user in the normal course of travel because an ordinary user would not have traveled beyond the barricade, the court concluded that there was no special defect and therefore, the Texas Tort Claims Act did not waive the University's immunity from suit.

The court then examined whether the barricade constituted a "premises defect" which would also provide a limited immunity waiver for tort claim under section 101.022(b). Because there was no evidence showing that the University had actual knowledge of a dangerous condition at the time of the accident, the court concluded that Hayes failed to establish a premises-defect claim. Accordingly, the court reversed the court of appeals' judgment and dismissed the case for lack of jurisdiction.

F. *Kirby Lake Dev., Ltd., v. Clear Lake City Water Auth.*, 320 S.W.3d 829 (Tex. 2010)

This case concerns whether section 49.066 of the Texas Water Code and section 271.152 of the Texas Local Government Code waived the Clear Lake City Water Authority's immunity from breach of contract claims on written agreements containing essential terms.

The plaintiffs, residential developers ("Developers") in the Clear Lake area of greater Houston, each entered into contracts with the Clear Lake City Water Authority. The Agreements stipulated that the Developers would build water and sewer facilities and would lease the facilities to the Authority free of charge until the Authority purchased them. The Authority agreed to reimburse the Developers for 70% of their construction costs once it received voter-approved bond funds. The Authority was not obligated to reimburse the Developers until a bond sale was approved in an election. In May 1998, the Authority placed a bond authorization measure on the election ballot. Voters rejected the measure. In October 1998, the Authority placed the bond measure on the ballot but separated it into two parts (1) proposal to reimburse the Developers, and (2) proposal to fund the maintenance of a separate water treatment plant the Authority owned. The voters passed the second but rejected the first. The Developers then sued the Authority alleging that it was obligated to reimburse them anyway. A jury found for the Developers and the trial court rendered judgment in accordance with their verdict. The Fourteenth District Court of Appeals reversed, holding that voter approval was a condition precedent to the Authority's purchase obligation.

The Authority held another bond election in September 2004 but omitted the Developers' reimbursement proposition altogether. The Developers sued again, alleging breach of contract to include a reimbursement provision in each bond election. On motion for summary judgment the trial court concluded that the Authority breached the agreement and awarded damages. The Fourteenth District Court of Appeals rejected the Authority's argument that it was immune from suit but reversed the trial court's judgment holding that the Authority had complied with the Agreement by placing the measure on the ballot. The Developers also alleged the Authority's continued possession of the facilities constituted a taking. The Authority filed a plea of jurisdiction. The trial court granted the plea and dismissed the takings claim for lack of jurisdiction. The Fourteenth District Court of Appeals agreed and found that the Developers had consented to the Authority's possession of the facilities and were therefore, barred from an inverse condemnation claim.

The Texas Supreme Court first examined whether section 49.066 of the Texas Water Code waived governmental immunity. The court noted that since its 2006 holding in *Tooke*,<sup>6</sup> the Court has consistently refused to find waivers of immunity implicit in statutory language - rather there must be clear and unambiguous language indicating the Legislature's intent to waive immunity. Noting that every court of appeals to interpret section 49.066 since *Tooke* has concluded that the statute does not waive immunity, the court also found that there was no waiver.

The Court then examined whether section 271.152 of the Texas Local Government Code waived the Authority's immunity. Citing its holding in *Ben Bolt*,<sup>7</sup> the court agreed that the Agreements were written contracts stating their essential terms and entailed services provided directly to the Authority. Accordingly, the court concluded that the Legislature waived the Authority's immunity from suit for breach of contract and reversed in part the court of appeals' judgment and remanded the case to consider the Authority's remaining issues.

G. *University of Texas at El Paso v. Herrera*, 322 S.W.3d 192 (Tex. 2010)

This case concerns whether Congress exceeded its Section 5 abrogation authority when it subjected the states to private-damages under the Family and Medical Leave Act's (FMLA) self-care provision.

Herrera worked for the University of Texas at El Paso as a heating, ventilation, and air-conditioning technician. In March 2005 he sustained an on-the-job injury and subsequently took nine months of leave. UTEP terminated his employment less than one month after he returned to work. Herrera sued UTEP alleging among other things that it fired him for taking personal medical leave under the self-care provision of the FMLA. UTEP filed a plea to the jurisdiction contending that it was barred by sovereign immunity. The trial court denied the plea and a divided Eighth District Court of Appeals affirmed.

The Texas Supreme Court first discussed whether the FMLA's self-care provision validly abrogated state immunity. The court determined that since the self-care provision was not intended to combat gender bias by the states, it did not have to reach a determination of whether the *City of Boerne*'s<sup>8</sup> other two prongs regarding congruence and proportionality were met. Thus, the court concluded that Congress exceeded its § 5 abrogation authority when it subjected the states to private-damages suits under the FMLA's self-care provision. The court then discussed whether UTEP's personnel handbook waived the state's immunity. The court found that a stray line in UTEP's policy manual that allows employees to bring a civil action against an employer is insufficient to waive state immunity. Accordingly, the court held that the trial court erroneously denied UTEP's plea of jurisdiction, reversed the court of appeals' judgment, and dismissed Herrera's FMLA claim for lack of subject-matter jurisdiction.

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<sup>6</sup> *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006).

<sup>7</sup> *Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivisions Property/Casualty Joint Self-Ins. Fund*, 212 S.W.3d 320, 326-27 (Tex. 2006).

<sup>8</sup> *City of Boerne v. Flores*, 542 U.S. 507 (1997).

H. *Texas Dept. of Ins. v. Reconveyance Servs.*, 306 S.W.3d 256 (Tex. 2010)

This case concerns whether suits complaining of *ultra vires* action may be brought against a government unit or against the allegedly responsible government actor in his official capacity.

Reconveyance is a Washington (state) corporation that provides what it describes as “post-closing mortgage release services.” Reconveyance initiated communications with Department employees to determine how the Department would classify its proposed business model. A Department employee responded to Reconveyance’s inquiry noting that he believed that prior lien release services such as those proposed by Reconveyance would be among the costs to be borne by title agents. Apparently because title agents’ fees were already at the statutory maximum, title agents refused to list Reconveyance’s services. Reconveyance sued the Texas Department of Insurance for a declaration that its mortgage release services are not a part of closing the transaction and that these services may be offered for a fee by title companies or agents in Texas. Reconveyance alleged that the Department acted beyond its statutory authority in attempting to prohibit Reconveyance from offering its services. The Department filed a plea to the jurisdiction. The trial court denied the plea and the Department took an interlocutory appeal. The Third District Court of Appeals held that the trial court had jurisdiction because Reconveyance’s pleadings sufficiently alleged an *ultra vires* action. The Department petitioned the Texas Supreme Court for review.

The Texas Supreme Court cited its holding in *Heinrich*,<sup>9</sup> which was decided after the court of appeals issued its opinion, that suits complaining of *ultra vires* action may not be brought against a governmental unit possessed of sovereign immunity, but must be brought against the allegedly responsible government actor in his official capacity. Thus, the court found that the Department retained its sovereign immunity and Texas courts are without subject-matter jurisdiction to entertain Reconveyance’s suit as pleaded. Accordingly, the court reversed the court of appeals’ decision and rendered judgment dismissing the suit.

I. *Maxwell v. Willis*, 316 S.W.3d 680 (Tex. App. - Eastland 2010, no pet.)

This case concerns whether a Texas Tech University program director is entitled to official immunity from a defamation claim when acting as a reasonable public official under the same circumstances.

Maxwell was the Texas Tech University’s Physician’s Assistant (“PA”) Program Director. Willis was enrolled in the University’s PA Program. In 2007, Maxwell investigated rumors that Willis had threatened a classmate with a firearm. Maxwell filed a complaint of misconduct with the University and the University’s Student Conduct Board determined that Willis had violated the student code and recommended he be dismissed from the PA program. Willis sued the University and Maxwell alleging several causes of action. Maxwell filed a

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<sup>9</sup> *City of El Paso v. Heinrich*, 284 S.W.3d 366 (Tex. 2009).

motion for summary judgment and, in part, alleged that Willis's claims were barred by official immunity. The trial court denied Maxwell's motion. Maxwell filed an interlocutory appeal.

The court of appeals held that Maxwell was entitled to official immunity from Willis's defamation claim because a reasonable public official, possessing the same information as Maxwell, could have believed that Willis was dangerous and made the same decision to tell the students that Willis was dangerous. The court of appeals concluded that while Maxwell may have subjectively been motivated by improper concerns, he met the objective standard that a reasonable public official could have made the same decision. Accordingly, the court of appeals reversed and rendered that Willis take nothing on his defamation claim. The remainder of the Willis's causes of action were remanded.

J. *Zellers v. Cortez*, No. 13-09-00596-CV, 2010 Tex. App. LEXIS 3398 (Tex. App. - Corpus Christi 2010, no pet.)

This case concerns consideration of the factual basis of a plaintiff's claims to determine if sovereign immunity applies in the absence of plaintiff's specification of whether his claims are against an government employee in his official or individual capacity.

Zellers was a McAllen police officer. Cortez was and is the Mayor of McAllen. Zellers sued Cortez alleging several intentional torts arising from a January 2007 talk show broadcast. Zellers claimed that while Cortez was being interviewed in connection with issues pending concerning the McAllen Police Officers Union and the City of McAllen, Cortez compared Zellers to Adolf Hitler and Saddam Hussein. Zellers further claimed that around the same time the City of McAllen, at the direction and instruction of Cortez, published ads that in essence accused Zellers of being a liar. Zellers also claimed that Cortez knew that he was of German descent and knew that his veracity and honesty was of the utmost necessity and importance to his career as a police officer. In his petition, Zellers failed to specify whether his claims were against Cortez in his official or individual capacity. Cortez filed a plea to the jurisdiction based on governmental immunity. The trial court granted Cortez's plea to the jurisdiction.

The court of appeals noted that when a petition does not specify the capacity in which a person is being sued, the courts look to the "course of proceedings" to ascertain the nature of the liability. The court of appeals determined that the factual basis of Zellers's claims stemmed from Cortez's actions taken as mayor during negotiations between the City of McAllen and the McAllen Police Officers' Union. Thus, the claims were construed as being brought against Cortez in his official capacity. Accordingly, the court of appeals affirmed the trial court's order granting Cortez's plea to the jurisdiction and dismissed Zellers's claims with prejudice.

K. *Rodriguez-Escobar v. Goss*, No. 13-07-00536-CV, 2010 Tex. App. LEXIS 2770 (Tex. App. - Corpus Christi 2010, pet. filed)

This case concerns distinguishing "governmental discretion" from "medical discretion" in order to determine if a state-employed doctor has official immunity.

Escobar was a psychiatrist at Rio Grande State Center. Goss committed suicide while under Escobar's treatment. Goss's estate brought suit against Escobar alleging medical

malpractice. Escobar asserted official immunity but the trial court refused to present a question to the jury regarding official immunity because there was no evidence as to whether Escobar was a state employee. The jury rendered a verdict in Goss's favor. Escobar appealed.

The court of appeals held that "governmental discretion" must be distinguished from "medical discretion" and that a state-employed doctor had official immunity from claims arising out of the exercise of governmental discretion, but not from claims arising from the exercise of medical discretion. After finding that Escobar relied on his medical discretion during his examination of Goss and that there was no evidence that he exercised anything but his medical discretion, the court of appeals affirmed the trial court's verdict.

#### **XIV. INSURANCE**

##### *A. Texas Health Ins. Risk Pool v. Sigmundik*, 315 S.W.3d 12 (Tex. May 28, 2010)

At issue is whether an insurer can be denied a contractual right of subrogation from settlement payments merely because the insured was not made whole by the settlement.

The Sigmundiks were the wife and children of Thomas Sigmundik, who died as a result of injuries suffered in an oilfield explosion. Thomas Sigmundik spent the last 52 days of his life in the hospital. He was insured under a policy from defendant Texas Health Insurance Risk Pool, which paid over \$335,000 in medical expenses resulting from the accident. The policy included a provision specifying that the Pool would be subrogated to rights of recovery for benefits paid by the Pool. After Thomas Sigmundik's death, his wife filed a negligence action on behalf of herself, the children and the estate. The Risk Pool intervened to claim its subrogation rights.

The case settled for \$800,000. The trial court held a bench trial and allocated the entire settlement to the wife and children. The court cited prior authority from the Texas Supreme Court holding that an insurer may be denied equitable subrogation when necessary to make other injured parties whole. The trial court found that the Risk Pool was on solid financial footing, but allowing subrogation "would work financial hardship" on the family. The court of appeals affirmed.

The Texas Supreme Court reversed. Citing previous authority, the court held that the "make whole" doctrine does not apply to contractual subrogation, as opposed to equitable subrogation. The court noted that the Risk Pool had a contractual lien against the recovery by Thomas Sigmundik's estate, and the trial court had avoided this right by directing all settlement funds to the family rather than the estate. The court held it was improper for the trial court to cut the estate out of a settlement to which it had a valid claim merely because the estate's main beneficiary was an insurance company and the family had greater need for the money. "While the trial court was free to exercise some discretion in dividing the settlement funds, it abused its discretion by awarding the Risk Pool nothing," the court held. The court remanded to the trial court to determine what amount should be allocated to the estate.

- B. *Mid-Continent Cas. Co. v. Global Enercom Mgmt., Inc.*, 323 S.W.3d 151 (Tex. Oct. 1, 2010)

This case concerns whether the “auto use” exclusion in a policy precluded coverage when three workers fell and died after being hoisted up by a rope-and-pulley system powered by a pickup truck.

The injured employees worked for a subcontractor that performed repair work on cellular phone towers constructed by the plaintiff, Global. The subcontract required the subcontractor to indemnify Global for acts and omissions of the subcontractor’s employees in the course of work done under the subcontract. Mid-Continent insured the subcontractor under a commercial general liability policy and a commercial auto policy. Each policy provided coverage to indemnification agreements, so long as the injury or accident occurred “subsequent to the execution” of the indemnification agreement.

The deaths occurred when three workers tried to reach the top of a tower in Arkansas using a rope-and-pulley system rigged to a pickup truck. The subcontractor’s foreman of the project drove the truck, lifting the employees. The system lifted the employees to a height of eighty feet before the rope broke and the employees fell to their deaths. Global signed the subcontract the day after the accident.

The employees sued Global in Mississippi. Global sought indemnification from Mid-Continent as an additional insured under the subcontractor’s policies. Mid-Continent defended the suit, but ultimately refused to indemnify. Global then sued Mid-Continent in Texas for a declaratory judgment affirming the duty to indemnify and defend. Mid-Continent counterclaimed for a declaratory judgment denying coverage. Mid-Continent based its position on two exclusions: (1) an “auto use” exclusion in the commercial policy excluding injuries arising from the use of vehicles, which were defined to include “attached machinery and equipment”; and (2) the “subsequent to execution” clause in both policies providing that an indemnity contract would be covered only if the loss occurred “subsequent to the execution of the contract or agreement.” The trial court granted summary judgment for Global and denied it for Mid-Continent. The court of appeals affirmed, holding neither exclusion applied.

The Texas Supreme Court reversed on the “auto use” exclusion, but affirmed on the “subsequent to execution” exclusion. Applying a three-part test created in prior cases, the court held that “auto use” exclusion applied. First, the court found that the work was within the “inherent nature” of the pickup truck, which was leased for the specific purpose of completing the subcontract; the use was “not unexpected or unnatural” . . . given the vehicle’s location on the job site and its specifications for this type of work.” Second, the accident was within the “natural territorial limits of the truck,” considering it involved “attached machinery and equipment” referenced in the policy and the workers were attached to the vehicle via the pulley system. Third, the accident could not have happened without the role of the truck powering the pulley system. On the “subsequent-to-execution” exclusion, the court held that the subcontract was effectively executed at the time of the accident because one party had signed it and both parties had assented to its terms.

C. *State Farm Lloyds v. Page*, 315 S.W.3d 525 (Tex. Jun. 11, 2010)

This case concerns the extent of mold coverage under the Texas Standard Homeowner's Policy--Form B.

Page, holder of a Texas Standard Homeowner's Policy--Form B, discovered mold and water damage to her home and some personal property in the home. State Farm paid for some remediation and repair to the structure, and for some personal property remediation. But State Farm refused to pay for amounts needed to repair damage to a carpet, and disputed the amount needed to fully remediate and repair the structure.

Page sued State Farm for breach of the policy and several "extra-contractual" claims. State Farm moved for summary judgment, arguing that the policy excluded coverage for all mold damage. The trial court granted summary judgment, disposing of all mold-related claims. The court of appeals reversed, holding that the policy covered mold damage to the dwelling and its contents.

The Texas Supreme Court affirmed in part and reversed in part, holding that the policy covered the mold-based personal property damages but not mold-based dwelling damages. Coverage A, generally covers harm to the dwelling. Coverage B, for personal property in the dwelling, covers only specified "perils," including "accidental discharge, leaking or overflow of water or steam." Both coverage provisions are subject to a list of exclusions, including exclusion 1.f applying to "rust, rot, mold or other fungi . . . ." But the coverage under B for water discharge includes this "exclusion repeal" clause: "Exclusions 1.a. through 1.h. under Section I Exclusions do not apply to loss caused by this peril." The court found that it could give effect to all provisions only by holding that exclusion 1.f. applied to Coverage A for the dwelling, but did not apply to Coverage B for personal property.

D. *Gilbert Texas Const., L.P. v. Underwriters at Lloyd's London*, No. 08-0246, 54 Tex. Sup. J. 367 (Tex. Dec. 17, 2010)

At issue in this case is whether a contractual-liability exclusion in a commercial-general-liability policy applied to preclude coverage for a settlement reached after all claims against the insured other than breach of contract were disposed of by summary judgment.

A building owner sued Gilbert for water damage on the owner's property, which was located next to the site of a Dallas Area Rapid Transit Authority (DART) construction project. Gilbert was the general contractor on the DART project. The building owner alleged both tort and contract claims. The contract claims resulted from Gilbert's alleged assumption of liability under its contract with DART. The trial court granted summary judgment for Gilbert on the tort claims based on government immunity. Gilbert then settled the breach of contract claim and sought indemnity from its insurers. Lloyds, Gilbert's excess insurer, denied coverage.

The policy had an exclusion exempting Lloyds from liability for damages resulting from "the assumption of liability in a contract or agreement." The exclusion had two exceptions: (1) insured contracts, defined as contracts under which the contractor assumed tort liability to pay

damages to a third person or organization; and (2) liability that the insured would have regardless of the contract.

In the suit between Gilbert and Lloyds, the trial court granted summary judgment for Gilbert on coverage. The court of appeals reversed, holding that the contract claims fell within the exclusion and not within exceptions to the exclusion.

The Texas Supreme Court affirmed the court of appeals. Because the only claims remaining against Gilbert at the time of the settlement were contract claims, the court found that the exclusion applied, and the exceptions did not. The court also held that Lloyds was not estopped from denying coverage because it had urged Gilbert to seek summary judgment on immunity without revealing that it would use the contract exception to contest coverage. The court found the facts likely dictated that immunity precluded any tort liability against Gilbert regardless of whether Gilbert asserted the defense in a summary-judgment motion. As such, the court found no evidence that Lloyd's actions affected coverage.

## **XV. JURISDICTION**

### *A. Kelly v. Gen. Interior Constr., Inc.*, 301 S.W.3d 653 (Tex. Jan. 15, 2010)

In this case, the Texas Supreme Court addressed whether a Texas trial court had personal jurisdiction over an Arizona contractor in a dispute over a construction contract where the complaint did not allege that any business was conducted in Texas or that any of the operative facts occurred in Texas.

Diva Consulting, Inc., an Arizona-based general contractor, hired General Interior Construction as a subcontractor for the renovation of a Houston hotel for Meristar Hospitality Corporation, a non-Texas entity. Meristar filed suit against Diva and General Interior after disputes arose between Diva and General Interior regarding allegedly substandard work performed by General Interior and Meristar's alleged failure to pay the entire contract amount. General Interior filed cross-claims against Diva and third-party claims against Daniel Kelly and Laura Hofstatter, officers of Diva, alleging fraud, violations of the Texas Trust Fund Act, and breach of contract. In General Interior's pleadings, there was no mention of Texas apart from the incorporation by reference of the contract between Diva and General Interior, which merely identified the jobsite as the hotel in Houston. Kelly and Hofstatter filed a special appearance, which was denied by the trial court and affirmed in part by a divided court of appeals, which reversed only the breach of contract claim.

The supreme court first noted that a defendant will only be subject to the personal jurisdiction of Texas courts where the exercise of jurisdiction is authorized by the Texas long-arm statute and does not violate due process. The only relevant prong of the long-arm statute, found in section 17.042(2) of the Texas Civil Practice and Remedies Code, extends jurisdiction over a nonresident who "commits a tort in whole or in part" in Texas. As General Interior did not allege that Kelly and Hofstatter committed any tortious acts in Texas, and because Kelly and Hofstatter proved that they did not live in Texas, the court held that the special appearance should have been granted.

The court also noted that General Interior's allegation that Kelly and Hofstatter controlled and directed funds received under Diva's contract with Meristar was insufficient to satisfy jurisdictional due process with respect to the Texas Trust Fund Act because General Interior did not present evidence that such acts occurred, "at least in part," in Texas. The court also pointed to the lack of evidence that any part of the claim originated from Kelly and Hofstatter's conduct in Texas as insufficient to support the trial court's jurisdiction over the fraud claim.

B. *Spir Star AG v. Kimich*, 310 S.W.3d 868 (Tex. Mar. 12, 2010)

In this interlocutory appeal, the Texas Supreme Court held that a Texas court had personal jurisdiction over a German hose manufacturer, Spir Star AG, who sold its products in Texas through a Texas distributor.

Louis Kimich filed suit against Spir Star AG when a hose which had been bought into Texas through Spir Star's Texas distributor ruptured and seriously injured Kimich. The trial court denied Spir Star's special appearance, and the court of appeals affirmed, concluding that Spir Star's continuous and systematic contacts with Texas established general jurisdiction.

The supreme court held that such a conclusion was unnecessary, given that the trial court had specific jurisdiction over Spir Star. The court noted that specific jurisdiction requires some "additional conduct" on the part of the defendant, beyond merely placing the product in the stream of commerce, which indicates an "intent or purpose to serve the market in the forum state." The court held that Spir Star AG specifically targeted Texas as a market for its products, pointing to the fact that it marketed its products exclusively through a Texas distributor and intended to serve Texas consumers, in addition to the fact that Kimich's claim arose from Spir Star AG's Texas contacts. As such, the court concluded that Spir Star AG had "purposefully availed itself of the benefits and protections of Texas law."

Finally, the court concluded that the exercise of jurisdiction over Spir Star AG comports with "traditional notions of fair play and substantial justice," finding that requiring Spir Star AG to defend its claims in Texas would not pose an undue burden and would be more efficient. Furthermore, the court highlighted the fact that Texas has a significant interest in adjudicating matters arising from injuries to a Texas resident from products that are purposefully marketed toward Texas and purchased by Texas companies.

C. *Carroll v. Carroll*, 304 S.W.3d 366 (Tex. Jan. 15, 2010)\*

At issue in this case is whether a county court at law had jurisdiction over a suit to remove a trustee.

The beneficiary, Letha Carroll, and her son Donald sued Letha's other son and trustee, Johnny Carroll, alleging that Johnny failed to provide an accounting, engaged in self-dealing, wasted trust assets, and failed to file income tax returns for a trust established by Letha's deceased husband. The case was transferred to the county court at law, which entered partial summary judgment, removing Johnny Carroll as trustee and ordering him to provide an accounting and turn over trust records. The court also awarded \$1 million in compensatory damages for breach of fiduciary duty, \$2.8 million in exemplary damages, and \$15,000 in

attorney's fees in a final default judgment. Johnny filed a motion for new trial, arguing that he never received notice of the trial setting and did not receive notice of the default judgment until two months after it was signed. The county court at law never ruled on the motion, and it was overruled as a matter of law.

During Johnny's appeal, during which Letha actually filed a brief in support of Johnny, the court of appeals held that the county court at law's failure to rule on the motion for new trial was an implied finding that Johnny had received timely notice of the default judgment. As such, the court treated Johnny's motion for new trial as untimely and denied his restricted appeal. However, the court found no support in the record for punitive damages and struck the \$2.8 million exemplary damages award.

Ultimately, the Texas Supreme Court held that the district court had exclusive jurisdiction pursuant to Texas Property Code section 115.001(a). First, the court noted that the Texas Government Code section 25.0003(f) explicitly states that statutory county courts do not have the jurisdiction which is granted to statutory probate courts by the Texas Probate Code.

Additionally, the court found that a district court may only assign cases which are within a county court at law's jurisdiction to the county court at law. As nothing in the Texas Government Code confers jurisdiction upon a county court at law over proceedings listed in Texas Property Code section 115.001(a), and because the relief originally requested by Letha Carroll was expressly governed by section 115.001(a), the county court at law had no jurisdiction over the claims. Therefore, the court held that the judgment was void and remanded the case back to the county court with instructions to transfer the case back to the district court.

\*This case is also discussed in the Probate Law section of this paper.

D. *Zinc Nacional, S.A. v. Bouché Trucking, Inc.*, 308 S.W.3d 395 (Tex. Apr. 9, 2010)

The issue in this case is whether a non-resident defendant who used a third-party trucking service to transport its goods through Texas to an out-of-state customer had minimum contacts with the State of Texas to establish specific jurisdiction.

Zinc Nacional, S.A., a Mexican manufacturing company, contracts with a Mexican company to transport its products throughout Mexico and the United States but has no employees, representatives, advertisements, or offices in Texas. Zinc Nacional contracted with C.H. Robinson de Mexico, a Mexican company, for the transportation of its goods. For the delivery of eight rolls of grayback paper to New Mexico, C.H. Robinson contracted with Bouché Trucking, Inc., a Texas corporation. During transport, the driver, Jorge Arrellano, was injured, and he brought suit in Texas against Bouché, which filed a third-party complaint against Zinc. Zinc filed a special appearance, which the trial court denied, and the court of appeals affirmed.

The Texas Supreme Court held that "a merchant's decision to ship its good with a third-party shipper that will travel through Texas to a recipient outside of Texas does not, by itself, constitute purposeful availment" for purposes of establishing the minimum contacts necessary to subject the merchant to personal jurisdiction in Texas. As there was no evidence that Zinc Nacional attempted to market its goods in Texas, the Texas trial court did not have specific

jurisdiction. The court reversed and remanded so that the trial court could rule on Bouché's general jurisdiction argument.

E. *In re United Servs. Auto. Assoc.*, 307 S.W.3d 299 (Tex. Mar. 26, 2010)\*

At issue in this case is whether a plaintiff intentionally disregarded the jurisdictional limits applicable to county courts at law such that the tolling provision of section 16.046 of the Texas Civil Practice and Remedies code, which tolls the statute of limitations for cases filed in a trial court that lacks jurisdiction, should not apply.

James Brite filed suit against his former employer, USAA, for age discrimination in violation of the Texas Commission on Human Rights Act (TCHRA) in the Bexar County Court at Law. In his petition, he asserted that his damages exceeded the \$500 statutory minimum but not that they were below the \$100,000 maximum. A judgment awarding almost a million dollars in damages was affirmed by the court of appeals and reversed by the Texas Supreme Court, which dismissed the underlying suit for want of jurisdiction. Brite refiled in Bexar County district court within sixty days, and USAA again filed a plea to the jurisdiction and moved for summary judgment, asserting that Brite's claims were time-barred and that the tolling provision did not apply. The trial court denied both, and the court of appeals denied relief, as well.

The supreme court granted USAA's petition for mandamus relief. First, the court addressed whether the TCHRA's two-year deadline for filing suit is jurisdictional, concluding that it is not and overruling any prior case law stating otherwise. Second, the court held that the statutory tolling provision in section 16.046 of the Texas Civil Practice and Remedies Code applies to a TCHRA claim, in light of an absence of evidence that the Legislature intended otherwise. However, the court held that Brite's first suit was filed as a result of a strategic decision to seek relief from the county court at law and was thus filed with "intentional disregard of proper jurisdiction." Therefore, the court held that the limitations period was not tolled and that Brite's second suit was time-barred. Because the court also concluded that denying mandamus relief would "thwart . . . legislative intent," it conditionally granted USAA's writ and directed the trial court to grant USAA's motion for summary judgment.

\*This case is also discussed in the Procedure—Pre-Trial section of this paper.

F. *In re John G.*, 315 S.W.3d 519 (Tex. Apr. 16, 2010)\*

In this case, the issue is whether the probate court abused its discretion by allowing the exhumation of the body of John G. Kenedy, Jr. to determine whether Ann Fernandez is Kenedy's non-marital child.

The mandamus cases arose out of probate court proceedings in which Fernandez sought to establish that she was the heir to the estates of Kenedy and his sister. Pursuant to Texas Health and Safety Code section 711.004, Fernandez sought to have Kenedy's body exhumed for DNA testing. The probate court judge ordered exhumation, and the John G. & Marie Stella Kenedy Memorial Foundation, as well as the John G. Kenedy, Jr. Charitable Trust, sought mandamus review. The court of appeals denied relief, and the Foundation and Trust each filed a petition for writ of mandamus and temporary relief with the Supreme Court, which were granted

but later abated pending appeal of related district court cases. The abatements were lifted after the district court's summary judgment and anti-suit injunctions were reversed by the court of appeals.

In a related case, the Texas Supreme Court had held that Fernandez's bill of review claims in the district court were barred by limitations; thus, Fernandez could not establish intestacy as a basis for jurisdiction in the probate court, and the probate court could not assert jurisdiction based upon matters incident to an estate where there was no probate matter to which Fernandez's claims would be incident. As such, there was no possible basis for the probate court's jurisdiction, and the probate court lacked jurisdiction to enter any order other than an order dismissing Fernandez's claims. Therefore, the supreme court granted the writ of mandamus and ordered the probate court to vacate its order of exhumation and dismiss Fernandez's claims.

\*This case is also discussed in the Procedure – Trial and Post-Trial section of this paper.

## **XVI. JUVENILE JUSTICE**

### **A. *In re B.T.*, 323 S.W.3d 158 (Tex. Oct. 1, 2010)**

This case concerns the proper procedure for trying a child under the age of eighteen as an adult.

Seventeen-year old B.T. was charged with murdering his teacher. Upon the State's petition for discretionary transfer, which urged the juvenile court to order B.T. to be tried as an adult, the juvenile court ordered a complete diagnostic study, social evaluation, and full investigation of B.T. in accordance with Texas Family Code section 54.02. In her report, Dr. Emily Fallis concluded that B.T. suffered from a mental disease or defect that substantially impaired his capacity to understand the charges against him and the proceedings in juvenile court, but she declined to opine as to B.T.'s capacity to be tried as an adult until he was fit to proceed.

B.T. was then transferred to Vernon State Hospital for ninety days of treatment and counseling and was deemed fit to proceed by Dr. Stacey Shipley, although Dr. Fallis's report remained incomplete. The trial court set the date for B.T.'s transfer hearing, concluding that the information it already possessed was sufficient to allow it to proceed. Both B.T. *and* the State urged the court to delay the hearing until a full diagnostic study could be completed, but the trial court refused and denied B.T.'s motion for reconsideration. Unopposed by the State, B.T. sought mandamus relief from the court of appeals, which was denied.

The Texas Supreme Court held that the trial court abused its discretion when it did not obtain a complete diagnostic evaluation of B.T. prior to the hearing. Based upon a plain reading of section 45.02(d), the court held that the trial court erred in proceeding when Dr. Fallis's report specifically stated that it was incomplete. Though several courts of appeals have held that a trial court did not abuse its discretion in relying upon materials that did not clearly constitute a complete diagnostic study, the court noted that none of those cases involved a commissioned report which declared itself to be insufficient. Finding that B.T. had no plausible appellate

remedy and noting the State's candid admission of the potential for wasted judicial resources, the court conditionally granted the writ of mandamus and directed the trial court to vacate its order.

B. *In re B.W.*, 313 S.W.3d 818 (Tex. June 18, 2010)

At issue in this case is whether a child under the age fourteen could be prosecuted as a prostitute under section 43.02(a)(1), given that a child under fourteen is legally incapable of giving consent to sex with an adult.

Thirteen-year-old B.W. waved over an undercover police officer and offered to engage in sexual relations with him for twenty dollars. The officer agreed, and B.W. got into the officer's car. After arresting and charging B.W. with the offense of prostitution, it was discovered that B.W. was only thirteen, and charges were re-filed under the Family Code. After pleading true to the allegation that she had engaged in delinquent conduct under Texas Family Code section 51.03(a)(1), which constituted the misdemeanor offense of prostitution as defined by Texas Penal Code section 43.02(a)(1), B.W. was placed on probation for eighteen months. The trial court denied B.W.'s motion for a new trial, and the court of appeals affirmed.

The Texas Supreme Court first noted the Legislature's blanket adoption of the Penal Code into the Family Code, which defines "delinquent conduct" as any conduct, apart from traffic violations, which violates the Penal Code or other federal criminal laws and is punishable by confinement. The court also noted the longstanding notion that underage children cannot consent to sex and other statutes highlighting the importance of protecting children from sexual exploitation. In light of a statute unequivocally removing the defense of consent to sexual assault for children under the age of fourteen, the court found that it was unlikely that the Legislature intended to subject child victims under the age of fourteen to prosecution. Therefore, the court held that, because a thirteen-year-old cannot consent to sex as a matter of law, B.W. could not be prosecuted under the Penal Code as a prostitute. In doing so, the court rejected various arguments made by the State suggesting that the court's holding would encourage the exploitation of children and undermine the State's ability to protect them.

C. *In re R.D.*, 304 S.W.3d 368 (Tex. Feb. 12, 2010)

At issue in this case is the preservation of error in juvenile proceedings.

A jury found that R.D. engaged in delinquent conduct of aggravated robbery. At trial, R.D. raised the affirmative defense of duress; however, the jury's finding that "the respondent . . . did engage in delinquent conduct by committing aggravated robbery" subsumed its rejection of R.D.'s duress defense. In accordance with the then-prevailing rule delineated in *In re M.R.*, 858 S.W.2d 365, 366 (Tex. 1993), R.D. filed a motion for new trial to preserve his factual sufficiency challenge. R.D.'s motion generally challenged the sufficiency of the evidence to support the verdict and complained specifically of the deadly weapon finding which supported the "aggravated" enhancement of the offense. The trial court denied R.D.'s motion, and the court of appeals affirmed, holding that R.D.'s failure to specify his evidentiary challenge to the jury's failure to find duress in his motion for new trial waived this issue on appeal.

The Texas Supreme Court stated that, unlike in criminal cases, a motion for new trial is necessary to preserve a factual sufficiency challenge in juvenile proceedings. However, noting that the rules of civil procedure should be liberally construed, the court held that R.D.'s general challenge to the legal and factual sufficiency of the evidence was sufficient under Texas Rule of Civil Procedure 324(b)(2) to preserve the duress issue for appeal. Therefore, the court granted R.D.'s petition for review and reversed and remanded for further proceedings.

## **XVII. MEDICAL MALPRACTICE**

### **A. *Jelinek v. Casas*, No. 08-1066, 2010 Tex. LEXIS 893 (Tex. Dec. 2, 2010)\***

The Texas Supreme Court addressed two issues in this medical malpractice case: (1) whether the evidence sufficiently established that the negligence of two doctors and a hospital in failing to administer antibiotics to a terminal cancer patient for four days caused her injuries and (2) whether the expert report submitted by the plaintiffs was deficient.

Eloisa Casas, a colon cancer patient believing her cancer to be in remission, was admitted to the Rio Grande Regional Hospital with abdominal pain, a fever, and a mildly elevated white-blood-cell count. Casas's primary physician, Dr. Carlos Garcia-Cantu consulted with infectious disease specialist Dr. Michael Jelinek, and after identifying a possible infection, prescribed two antibiotics. Several days after abdominal surgery, during which it was discovered that Casas's cancer had metastasized and was terminal, the antibiotics were accidentally discontinued. Though Casas was eventually released from the hospital, she died a few months later, and several members of her family filed suit against the hospital, Dr. Garcia-Cantu, and Dr. Jelinek, alleging that the defendants' negligence caused Casas to suffer embarrassment, humiliation, and pain. Before trial, the Casases filed an expert report pursuant to former article 4590i of section 13.01 of the Medical Liability and Insurance Improvement Act, which prompted Dr. Jelinek to file a motion for sanctions and dismissal, alleging that the report was deficient because it failed to explain a causal connection between the defendants' negligence and Casas's injury. The trial court denied the motion, and the case proceeded to trial, although Dr. Jelinek and Dr. Garcia-Cantu were nonsuited by the Casases.

At trial, the evidence consisted of testimony from Casas's son and father, as well as an expert, Dr. John Daller. The jury found the defendants liable for Casas's injury and awarded \$250,000 in damages. The appeals of both the hospital, which challenged the sufficiency of the causation evidence, and Dr. Jelinek, challenging the denial of his motion for sanctions and dismissal, were denied by the court of appeal.

The supreme court first held that the causation evidence was legally insufficient to support the jury's verdict. The court found that the lay testimony offered by Casas's husband and son was insufficient to establish causation because it did not precisely identify the cause of her suffering. The court also found that Dr. Daller's conclusory testimony did not provide a causal link between the lapse in antibiotics and Casas's injury.

Second, the court concluded that, under the law in effect at the time of trial, which provided for dismissal and mandatory sanctions for failure to serve an adequate expert report, Dr. Daller's report offered "no more than a bare assertion" that Dr. Jelinek's breach caused Casas's

increased pain and suffering. Therefore, the court held that the trial court abused its discretion by denying Dr. Jelinek's motion and reversed the decision of the court of appeals, remanding to the trial court for an award of attorney's fees and costs.

\*This case is also discussed in the Evidence section of this paper.

B. *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658 (Tex. Aug. 26, 2010)

In this case, the Texas Supreme Court held that a hospital patient's fall, allegedly caused by the negligence of the hospital, constitutes a health care liability claim under the former article 4590i of the Revised Civil Statutes.

While recuperating from back surgery at St. Luke's Episcopal Hospital, Irving Marks fell in his hospital room. He brought suit against the hospital, alleging that his fall resulted from the collapse of the footboard on his hospital bed as he tried to use it to stand up. The trial court concluded that Marks's claim was a health care liability claim as defined in article 4590i, which requires that such a claim be substantiated by an expert report. As Marks had not timely filed an expert report, the trial court granted the hospital's motion to dismiss. Although the decision was initially reversed by the court of appeals, the supreme court granted the hospital's petition for review in light of its decision in *Diversicare General Partner, Inc. v. Rubio*, 185 S.W.3d 842 (Tex. 2005) and remanded to the court of appeals. A divided court of appeals affirmed the trial court's decision.

During the second appeal, the supreme court first compared the case at bar to the facts of *Diversicare*, in which the court held that a nursing-home patient's sexual assault claim was a health care liability claim. The court found that Marks's first three claims, failure to properly train and supervise employees, failure to provide required assistance, and failure to provide a safe environment, asserted a departure from the acceptable standards of health care and were health care liability claims as in *Diversicare*. Regarding Marks's hospital bed claim, which alleged that the hospital was negligent in the assembly and/or maintenance of the bed, the court engaged in a thorough analysis of article 4590i.

The language of article 4590i refers to a "departure from accepted standards of medical care or health care or safety," and the court's discussion centered on the meaning of the term "safety." In ascertaining the Legislature's intent, the court looked to the statute's stated purpose and the context of the statute. After examining the underlying nature of Marks's claim, the court held that when an unsafe or defective condition of medical equipment specific to a particular patient's care injures the patient, the resulting cause of action is a health care liability claim. The court also found that Marks was not entitled to additional time to file his expert report pursuant to the grace period in article 4590i, section 1301(f), (g). Therefore, the court affirmed the dismissal of Marks's claim.

C. *Scoresby v. Santillan*, No. 09-0497, 2010 Tex. LEXIS 805 (Tex. Oct. 22, 2010)

This case concerns the sufficiency of an expert report under section 74.351(r)(6) of the Texas Civil Practice and Remedies Code.

Catarino Santillan brought suit against Drs. Tyler Scoresby and Yadranko Ducic on behalf of Samuel Santillan, alleging that Samuel had sustained significant brain damage as a result of his care at the John Peter Smith Hospital, which had been directed by Drs. Scoresby and Ducic. Although Santillan timely served the defendants with the expert report of Dr. Charles D. Marable, he failed to submit Dr. Marable's curriculum vitae within 120 days of filing the original petition in violation of Texas Civil Practice and Remedies Code section 74.351(a), (b). Drs. Scoresby and Ducic moved to dismiss Santillan's claim, and on the date of the hearing on the motions to dismiss, Santillan served an amended report and Dr. Marable's curriculum vitae, even though the 120-day period had already passed. The trial court denied the motions to dismiss and granted Santillan a thirty-day extension to cure any deficiencies in the expert report.

On appeal, Drs. Scoresby and Ducic argued that Dr. Marable's report was so deficient that it amounted to no report at all under Texas Civil Practice and Remedies Code section 74.351(r)(6) and that the trial court was therefore prohibited from granting the extension. The court of appeals noted that the "no report v. deficient report" issue was a "recurring and elusive" one and had not been squarely addressed by the Texas Supreme Court, although two Supreme Court Justices had addressed the issue in separate concurrences. The court also recognized the divergence among the other Texas appellate districts. Finding, however, that the supreme court's opinion in *Ogletree v. Matthews*, 262 S.W.3d 316 (Tex. 2007) foreclosed the arguments of defendants, the court held that when an expert report has been served and a trial court grants an extension of time, that decision is not subject to appellate review under *Ogletree*. Thus, the court dismissed the appeals for lack of jurisdiction. The supreme court granted the doctors' petitions for review and heard oral argument on November 9, 2010.

D. *Methodist Healthcare Sys. of San Antonio, Ltd. v. Rankin*, 307 S.W.3d 283 (Tex. Mar. 12, 2010)

At issue in this case is whether section 74.251(b) of the Texas Civil Practice and Remedies Code, which grants absolute protection against indefinite potential liability, violates the Texas Constitution's Open Courts provision.

After Emmalene Rankin presented with abdominal pain in July 2006, it was discovered that a sponge had been left inside her during a hysterectomy performed in November 1995. Rankin filed suit against two physicians and a hospital in October 2006 and submitted evidence that she did not know of or have reason to know of the sponge. Based upon section 74.251(b), which establishes a ten-year statute of repose for healthcare-liability claims, the trial court granted the defendants' motion for summary judgment. Rankin appealed, and the court of appeals held that the statute was unconstitutional and reversed.

The Texas Supreme Court first explained the difference between statutes of repose and statutes of limitation and noted that the purpose of statutes of repose is to create a final deadline for filing suit that is not subject to any exceptions. The court also clarified that the enactment of section 74.251(b) reflected the policy choice of the Legislature that the "collective benefits of a definitive cut-off are more important than a particular plaintiff's right to sue more than a decade after the alleged malpractice." Finding section 74.251(b) to be a permissible exercise of the Legislature's power to provide a definitive cutoff to claims after a sufficiently long period, the

court held that it does not violate the Texas Constitution, reversed the decision of the court of appeals, and rendered a take-nothing judgment in favor of defendants.

E. *Walters v. Cleveland Reg'l Med. Center*, 307 S.W.3d 292 (Tex. Mar. 12, 2010) \*

In this companion case to *Rankin*, discussed above, the Texas Supreme Court held that the plaintiff had raised a fact question as to whether the Open Courts provision of the Texas Constitution barred the application of a two-year statute of limitations. As in *Rankin*, a sponge was found inside patient Tangie Walters almost a decade after Dr. Keith Spooner performed her tubal ligation, during which time Walters experienced considerable abdominal pain and various other medical problems. Walters filed suit against Cleveland Regional Medical Center, Dr. Spooner, and Shirley Kiefer, Spooner's surgical assistant. The trial court granted defendants' motion for summary judgment, reasoning that the two-year statute of limitations barred Walters's claim. The court of appeals affirmed.

On appeal, the Texas Supreme Court first discussed *Neagle v. Nelson*, 685 S.W.2d 11 (Tex. 1985), a prior sponge case which upheld an Open Courts challenge to the two-year limitations period, and noted the similarities between *Neagle* and the case at bar. The court recognized the inherent uniqueness of sponge cases: they are rare, they do not occur absent negligence, and the negligence is difficult to discover. Additionally, the court reasoned that the ten-year repose statute would have no purpose unless courts recognized exceptions to the two-year limitations period. As such, the court reversed the court of appeals' judgment and remanded for further proceedings.

\*This case is also discussed in the Constitutional Law section of this paper.

## **XVIII. NEGLIGENCE**

A. *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762 (Tex. Apr. 2, 1010)

This case discusses the liability of a resort for injuries sustained during a bar fight.

After ninety minutes of recurring threats, cursing, and confrontations between the members of a wedding party and the members of a fraternity in a bar at Del Lago resort, a fight broke out, and Bradley Smith sustained brain damage and other injuries when his head hit a wall. Smith brought a premises-liability action against Del Lago, and after a nine-day trial, the jury found Del Lago fifty-one percent liable and the court of appeals affirmed the \$1.48 million dollar award.

On appeal to the Texas Supreme Court, Del Lago first argued that it owed no duty to protect Smith from assault by other customers. The court, however, held that the nature and character of the premises, as well as the fact that the hostility had persisted for an hour and a half, gave Del Lago actual knowledge of the danger, which weighed in favor of imposing a duty on Del Lago to protect Smith. Regarding breach, the court held that a jury could find that Del Lago failed to take reasonable steps to defuse the dangerous situation at the bar. The court also emphasized that the court had abolished both the doctrine of assumption of the risk as a complete bar and the no duty rule, which provided that a plaintiff's knowledge of an open and obvious

danger operates as a complete bar to recovery. After finding the proximate cause evidence was also legally sufficient, the court concluded by holding that Smith's claim was properly submitted as a premises liability case and not a negligent activity case. As such, the court affirmed the judgment of the court of appeals and upheld the jury verdict.

B. *Reyes v. City of Laredo*, No. 09-1007, 2010 Tex. LEXIS 891 (Tex. Dec. 3, 2010)

In this case, the Texas Supreme Court held that a storm-flooded street was not a special defect under the Texas Tort Claims Act and that, because a city had no actual awareness of the flooding, it had no duty to warn motorists.

When Maria Reyes's daughter drowned in a van which was swept away in a flash flood, she brought a wrongful death action against the City of Laredo. The City asserted a defense of governmental immunity and filed a motion to dismiss, which was denied. The court of appeals affirmed.

The Texas Supreme Court first recognized that the government is immune from suits for injuries from premises defects of which it does not have actual knowledge or conditions which constitute "special defects" under section 101.022(a), (b) of the Texas Civil Practice and Remedies Code. Though the court agreed with the court of appeals' holding that a rain-flooded street is not a special defect, the court held that the evidence did not show that the City had actual knowledge that the creek had flooded at the time of the accident. The court found evidence that the City was aware that the creek was rising and that flooding was a potential problem insufficient to satisfy the actual knowledge requirement of section 101.022(b). Therefore, the court reversed and rendered judgment for the City.

C. *Scott & White Mem'l Hosp. v. Fair*, 310 S.W.3d 411 (Tex. May 7, 2010)

At issue in this case is whether naturally occurring ice that accumulates without the assistance or involvement of unnatural contact is an unreasonably dangerous condition sufficient to support a premises liability claim.

While walking to the parking lot from Scott and White Memorial Hospital to retrieve his car, Gary Fair slipped and fell on the icy road and sustained injuries. Fair and his wife brought suit against the hospital, which moved for summary judgment. The trial court granted the hospital's motion, rendering a take-nothing judgment, and the court of appeals reversed.

The Texas Supreme Court recognized that, because the Fairs were invitees, the hospital owed a duty "to exercise reasonable care to protect against danger from a condition on the land that creates an unreasonable risk of harm of which the owner or occupier knew or by the exercise of reasonable care would discover." The court held that, like mud, naturally occurring ice that accumulates without the assistance of unnatural contact is not an unreasonably dangerous condition, noting that numerous courts have consistently concluded the same. Because the hospital established that the ice was in its natural state and because no exceptions to the natural accumulation rule applied, the court reversed the judgment of the court of appeals and rendered a take-nothing judgment.

- D. *Univ. of Tex. at Austin v. Hayes*, No. 09-0300, 2010 Tex. LEXIS 896 (Tex. Dec. 3, 2010). \*

This case concerns the immunity of the University of Texas from a premises liability suit.

While riding his bicycle, Robert Hayes ran into metal chain which had been placed across a University of Texas entrance and in front of a barricade to block access. Hayes suffered injury and filed suit against the university, alleging that the chain constituted a defect of which the university failed to warn. The university filed a plea to the jurisdiction, contending that Hayes did not establish a waiver of sovereign immunity under the Texas Tort Claims Act, TEX. CIV. PRAC. & REM. CODE § 101.022(a), (b), which the trial court denied. The court granted Hayes's motion for partial summary judgment, finding a waiver of sovereign immunity. A divided court of appeals affirmed.

The Texas Supreme Court first described the limited immunity waiver provided by the Texas Tort Claims Act for tort claims that arise from premises defects or special defects, noting the different standards of care for each. Because an "ordinary" user would not have continued along the barricaded entrance, the court held that the chain did not constitute a special defect.

In determining whether the chain constituted a premises defect, the court found that the testimony of a university employee regarding what he "would imagine" about bicyclists approaching the barricade was not evidence that the university had actual knowledge of a dangerous condition. Similarly, evidence that the university typically placed orange cones and reflectors on the barricade and that a police officer noted, after the accident, that the chain was difficult to see did not satisfy the actual knowledge requirement for premises defects. Therefore, without hearing oral argument, the court held that Hayes had not established the existence of a premises defect, reversed, and dismissed the case for lack of jurisdiction.

\*This case is also discussed in the Governmental Immunity section of this paper.

## **XIX. PROBATE LAW**

- A. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494 (Tex. 2010)

This case concerns whether the Texas Probate Code authorizes a probate court to exercise jurisdiction over heirship claims when an estate has been closed for decades and the decedent did not die intestate.

Fernandez believed she was the non-marital child of John G. Kenedy, Jr. Accordingly, she initiated multiple proceedings in both district court and statutory probate court to set aside decades-old judgments and reopen the estates of Kenedy, his wife, and his sister, to declare Fernandez an heir to those estates. The defendants filed motions for summary judgment arguing among other things that Fernandez's heirship claim was barred by limitations, she could not establish an interest in the estates and she could not pursue bills of review. The district court granted summary judgment against Fernandez but did not specify the grounds. The Thirteenth District Court of Appeals held that the district court lacked subject matter jurisdiction and was required to abate its proceedings until the probate court first resolved questions of heirship.

The Texas Supreme Court disagreed and found that Fernandez's pleadings and her direct attack on a previous judgment vested the district court with subject matter jurisdiction. Additionally, the Texas Probate Code does not authorize a probate court to exercise jurisdiction over heirship claims when an estate has been closed for decades and the decedent did not die intestate. Accordingly, the court reversed the parts of the court of appeals' judgment and related to jurisdiction and abatement. Because Fernandez's claims were barred by the applicable statute of limitations, the court rendered judgment reinstating the district court's judgment and concluded that none of Fernandez's claims for heirship or inheritance rights to the Kenedy estate remain viable.

B. *Carroll v. Carroll*, 304 S.W.3d 366 (Tex. 2010) (per curiam)

This case concerns whether sections 25.0003 and 25.1112 of the Texas Government Code provide a statutory county court with concurrent jurisdiction when another court is vested with exclusive jurisdiction. Because the removal of a trustee, an accounting by a trustee, and appointment of a successor trustee are all proceedings concerning a trust which are expressly governed by section 115.001(a) of the Texas Property Code, district courts have exclusive jurisdiction.

Letha and Ray Carroll were parents of Johnny and Donald. Ray Carroll died in 1987 and left an irrevocable testamentary trust with Letha as the beneficiary and Johnny as the trustee. In 2005, Donald and Letha sued Johnny, individually and as trustee, in the 66th District Court of Hill County, alleging that Johnny failed to provide an accounting, engaged in self-dealing, wasted trust assets, and failed to file income tax returns. In February 2006, the case was transferred to the Hill County Court at Law. By partial summary judgment that court removed Johnny as trustee, ordered him to provide an accounting, and ordered the trust records be turned over to Donald, the successor trustee. In a final default judgment signed in October 2006, the county court awarded Donald and Letha damages and fees. Johnny filed a motion for new trial in January 2007. The county court never ruled on the motion and it was overruled by operation of law. Johnny appealed. The Tenth District Court of Appeals denied Johnny's appeal and he filed a petition for review with the Texas Supreme Court, challenging for the first time the county court's jurisdiction.

As an initial matter, the Texas Supreme Court found that Johnny's failure to assert the jurisdictional defect at the appellate level did not preclude the court from reviewing the issue. The court then examined sections 25.0003 and 25.1112 of the Texas Government Code and found that neither section provided a statutory county court with concurrent jurisdiction when another court is vested with exclusive jurisdiction. Additionally, the court found that the removal of a trustee, an accounting by a trustee, and appointment of a successor trustee are all proceedings concerning a trust which are expressly governed by section 115.001(a) of the Texas Property Code and fall under the exclusive jurisdiction of the district court. Thus, the court held that the transfer to the Hill County Court at Law was improper and because it had no jurisdiction over the claims, its judgment was void. Accordingly, the supreme court reversed the court of appeals' judgment, vacated the county court's judgment, and remanded the case with instructions to transfer it back to the 66th District Court of Hill County for further proceedings.

C. *Jefferson State Bank v. Lenk*, 323 S.W.3d 146 (Tex. 2010)

This case concerns a bank's burden to retain statements to satisfy its section 4.406 Business and Commerce Code duties in the event of a customer's death. The burden to report unauthorized transactions, however, rests on the estate administrator and must be done within sixty days of appointment.

In March 2000, when Mickey Marcus died, he had an account at Jefferson State Bank. The following month, Melvyn Spillman presented the Bank with fraudulent letters of administration purporting to appoint him as administrator of the Marcus Estate. The Bank relied on the letters and gave Spillman access to the Marcus account. Throughout the next several months, Spillman withdrew most of the account balance. Spillman was arrested for perpetrating this fraud and several others.

The Marcus estate did not have a representative until September 2003, when the probate court appointed Christa Lenk as administrator. Lenk was aware of Spillman's fraud at the time of her appointment. Following her appointment, there was no contact between Lenk and the Bank for almost two years. In June 2005, Lenk made a written demand for payment in the amount allegedly withdrawn by Spillman, but the Bank refused. Lenk sued the Bank to recover the funds. The Bank filed a motion for summary judgment asserting that Lenk failed to timely notify the Bank of the unauthorized transactions as required by section 4.406 of the Business and Commerce Code. Lenk filed a motion for summary judgment asserting that the Bank failed to satisfy its initial obligation to send or make available the account statements as required by section 4.406 of the Business and Commerce Code. The trial court granted the Bank's motion and entered final judgment in favor of the Bank. The Fourth District Court of Appeals reversed, holding that retaining account statements at the Bank was insufficient to fulfill the Bank's section 4.406 duty.

The Texas Supreme Court found that in the event of a customer's death, banks can satisfy their section 4.406 burden by retaining statements at the bank, but the customer's burden to report unauthorized signatures does not arise until an estate representative is appointed. When Lenk was appointed as the estate administrator in September 2003, she was vested with the authority and duty to act on behalf of the estate. She waited almost two years after her appointment to contact the Bank. The court concluded that there was no reason to extend the bank's potential liability by waiting until the administrator becomes aware of the account and held that the statute of repose in section 4.406 barred Lenk's claims because she failed to notify the Bank of any unauthorized transactions within sixty days of being appointed estate administrator. Accordingly, the court reversed the court of appeals' judgment and rendered judgment in favor of the Bank.

\*This case is also discussed in the Jurisdiction section of this paper.

## **XX. PROCEDURE — APPELLATE**

### **A. *Colquitt v. Brazoria County*, 324 S.W.3d 539 (Tex. 2010)**

This case concerns the notice required for governmental tort suits, and Texas Supreme Court jurisdiction over interlocutory appeals. Section 101.101 of the Texas Civil Practice and Remedies Code entitles governmental units to written notice of a claim within six months of the incident, including the injury claimed, the time and place of the incident, and the incident itself. However, if the governmental unit has actual notice of the claim within six months, the written-notice requirement does not apply.

“Glen Colquitt was injured in a fall while working for a private contractor at the Brazoria County jail.” He filed suit against the County within two months of the incident, claiming negligence and premises liability, but did not otherwise provide notice of his claim. Roughly two years later, the County filed a plea to the jurisdiction, claiming that Colquitt’s failure to provide written notice deprived the trial court of jurisdiction over the case. The trial court denied the motion and the County opted to take an interlocutory appeal. The court of appeals reversed, concluding that § 311.034 of the Code Construction Act created a jurisdictional requirement that “formal or actual notice precede the filing of any lawsuit against [a] governmental unit, even those lawsuits filed within six months of the injury-producing event.”

The Texas Supreme Court first found that it had jurisdiction over the interlocutory appeal due to the appellate court’s final disposition of the case on jurisdictional grounds, and also via Tex. Gov. Code § 22.225 because of a split on the issue among Texas courts of appeals.

The court ruled that a 2005 amendment to Texas Government Code § 311.034 had changed the character of the notice provisions in § 101.101, in that the defense became a plea to the jurisdiction as opposed to a plea in bar. However, the court ruled that the 2005 amendment did not shorten § 101.101’s six-month window for actual or written notice and that furthermore, nothing in § 101.101 requires notice *before* suit. Therefore, the court held that filing within the six-month window, when the petition contains all the information § 101.101 requires, satisfies the purpose of the notice requirement by “alerting the government of the need to investigate.” The court therefore reversed the court of appeals and remanded the case to the trial court.

### **B. *Sweed v. Nye*, 323 S.W.3d 873 (Tex. 2010)**

This case concerns whether a substantively insufficient notice of appeal may still invoke the appellate court’s jurisdiction. Sweed filed suit against a public defender, the El Paso District Attorney, the Office of the District Attorney, the State of Texas and the Texas Attorney General for malicious prosecution and false imprisonment. “Eventually the defendants moved to dismiss for want of prosecution.” The court clerk accidentally sent the notice of the hearing and status conference to the wrong address, and both notices were returned unclaimed. “Sweed did not appear at the hearing, and the trial court granted the motion to dismiss. The dismissal order was signed on November 6, 2006.”

Five-and-a-half months later, Sweed filed a restricted appeal, but the appeal was missing the required statement that he did not participate in the initial hearing. Upon demand by the

court, Sweed filed an amended notice, but did not do so until more than six months after the original judgment. The court of appeals held that the original, defective notice of appeal was insufficient to invoke its jurisdiction, and the amended notice was not timely filed since the deadline for filing a restricted appeal is six months. Therefore the appeals court dismissed the case for want of jurisdiction.

The Texas Supreme Court held that even a defective notice of appeal is sufficient to invoke the appellate court's jurisdiction. TEX. R. APP. P. 25.1(a) states that "an appeal is perfected when a written notice of appeal is filed with the trial court clerk." The court found that "[i]f the appellant timely files a document in a bona fide attempt to invoke the appellate court's jurisdiction, the court of appeals, on appellant's motion, must allow the appellant an opportunity to amend or refile the instrument required by law or our Rules to perfect the appeal."

The State, which had by then conceded that the appellate court should not have dismissed Sweed's appeal, still argued that Sweed's petition should be denied because his underlying case lacked merit. The court stated plainly that the merits of Sweed's case were not a consideration in whether he procedurally invoked the appellate court's jurisdiction. The court remanded the case to the court of appeals for further proceedings.

C. *Hidalgo v. Hidalgo*, 310 S.W.3d 887 (Tex. 2010)

This case concerns a party's ability to advance new arguments on appeal after a change in procedural law which invalidates the party's previous argument.

Leila and Alvin Hidalgo divorced in California, and Leila entered the California decree in Texas as a foreign judgment per TEX. CIV. PRAC. & REM CODE § 35.003. Leila moved to enforce the decree requiring Alvin to purchase her health insurance. Alvin argued that he was now retired, and therefore did not have to continue to provide the insurance.

The trial court entered three orders of interest. The first was an order denying Leila's motion, finding that Alvin was retired and therefore not required to provide the insurance. Leila then filed a motion to amend the order so it would state that Alvin would need to provide insurance again if he returned to work before age 65. The second order, issued ninety-one days after the first, vacated the first order, found that Leila's motion extended the court's plenary power per Tex. R. Civ. Pro. 329(b), and "directed Alvin to pay all the policy premiums then due." This order "effectively granted Leila a new trial." Alvin then filed motions for a new trial and to confirm the first order. The third order, 183 days after the first, and 92 days after the second, set aside the second order and confirmed the first order as the final order.

Leila appealed, arguing that under then-controlling *Porter v. Vick*, a court could vacate a new trial order only within 75 days, which is "the period specified in Rule 328(b) for ruling on a motion for a new trial." The court of appeals initially granted Leila's appeal, finding that the trial court granted the third order more than 75 days after the second, and therefore the third order was void. However, after the appellate ruling, the Texas Supreme Court decided *In re Baylor Medical Center at Garland*, which held that "[w]hen a new trial is granted, the case stands on the trial court's docket 'the same as though no trial had been had.'" Therefore, a trial court could set aside an order granting a new trial any time before entering a final judgment.

Based on the *Baylor* ruling, the appellate court agreed to rehear the case and found that the third order was not void. Furthermore, since Leila’s briefs had focused on procedural, rather than substantive arguments, the appellate court considered her substantive arguments waived. The Texas Supreme Court found that Leila had relied on a then-valid procedural law which rendered the order in question void. Furthermore, the court found that since the appellate court had no reason to reach the merits of a jurisdictionally void order, that Leila had no opportunity to argue the substantive merits of her case, and would therefore be allowed to present her substantive arguments to the court of appeals.

## **XXI. PROCEDURE—PRETRIAL**

### **A. *In re AMD Investor Servs., Inc.*, 304 S.W.3d 371 (Tex. 2010)**

This case concerns the enforcement of forum selection clauses when a party files an answer and motion to dismiss, or delays enforcement of the clause.

Jetta Prescott, contracted with AMD Investor Services to trade commodities on Prescott’s behalf. The Texas Trading Company served as a broker and guaranteed Prescott’s debts to AMD. According to the agreement between Prescott and AMD, if Prescott’s account ever reached a \$50,000 deficit, AMD could close the account and collect the deficit from Texas Trading. Prescott’s account reached an actual deficit of \$57,944.29, and AMD closed the account and collected the deficit from Charles Dawson, Texas Trading’s CEO. Dawson then filed suit against Prescott and obtained a judgment against her.

Prescott then sued both AMD and Texas Trading in Rains County under various theories of fraud, breach of fiduciary duty and negligence. “Texas Trading simultaneously filed an answer and a motion to transfer venue to Hopkins County.” AMD simultaneously filed an answer, a motion to dismiss and alternatively a motion to transfer venue to Hopkins County. AMD based its motion to dismiss on the forum-selection clause in its contract with Prescott, which read:

All actions or proceedings arising directly, indirectly or otherwise in connection with, out of, related to, or from this Agreement or any transaction covered hereby shall be governed by the law of Illinois and may, at the discretion and election of [ADM], be litigated in courts whose situs in [sic] within Illinois.

Instead of appearing at Texas Trading’s motion to transfer, AMD waited approximately three months after filing its motion to dismiss and then requested a separate hearing on that motion. The trial court granted Texas Trading’s motion to transfer, and later denied AMD’s motion to dismiss, reasoning that it would be unreasonable for the plaintiff “to have to pursue the same cause of action against two defendants in two different states.” Subsequently, the appellate court denied AMD’s mandamus petition on the “alternative ground that AMD waived enforcement” of its forum-selection clause.

On appeal to the Texas Supreme Court, Prescott argued that “ADM waived enforcement by failing to request a hearing sooner or appear at the hearing on Texas Trading’s motion to

transfer venue.” Furthermore, Prescott argued that Dawson acted as ADM’s agent and waived the forum-selection clause by filing the first lawsuit against Prescott, and that Texas Trading acted as ADM’s agent and “waived the clause by moving to transfer venue.” Finally, Prescott argued “that it would be unreasonable or unjust to enforce the forum-selection clause.”

The Texas Supreme Court held that AMD did not waive enforcement of the forum-selection clause. The court held that “[s]imultaneously filing an answer and motion to transfer venue with a motion to dismiss falls short of substantially invoking the judicial process to Prescott’s detriment or prejudice. Moreover, the court found that AMD’s three-month delay in requesting a hearing did not compel a finding of waiver given the totality of the circumstances. “[D]espite the gap between filing and requesting a hearing, AMD did nothing “unequivocal” to waive enforcement.”

Finding the remainder of Prescott’s arguments meritless, the court held that the appellate court abused its discretion in failing to enforce the forum-selection clause, and instructed the trial court to grant AMD’s motion to dismiss.

B. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860 (Tex. 2010)

This case explains the effect of a voluntary nonsuit on a court’s jurisdiction.

An insured party sued his insurer, alleging that he was entitled to compensation from the insurer for damages resulting from a collision with an underinsured driver. However, the insured later voluntarily non-suited the claim “without prejudice.” Several months later, “the trial court sent notice that if a final order was not filed within ten days of the notice, the court would dismiss the case for want of prosecution,” and thereafter dismissed the case with prejudice after the ten days expired. The insured claimed he did not receive the initial notice or notice of the dismissal with prejudice. Unaware of the orders, the insured neither contested the rulings nor perfected an appeal.

The insured later refiled in a different court, which dismissed the case based on res judicata upon motion from the insurance company. However, the court of appeals reversed, holding that a voluntary nonsuit removes a trial court’s jurisdiction to dismiss with prejudice, and that the order was therefore void, and not merely voidable.

Noting that the parties agreed that the trial court erred in dismissing the case with prejudice after the nonsuit, the Texas Supreme Court focused on whether the order was void, or merely voidable. The court held that a nonsuit does not instantaneously divest a court of its jurisdiction, despite some case law holding that a nonsuit essentially moots the claim. The court noted that the trial court unquestionably had jurisdiction to enter a dismissal with prejudice upon a voluntary nonsuit in some situations, such as to effectuate a settlement, and that it could retain jurisdiction to hear collateral matters, such as sanctions and attorney’s fees. Finding that the trial court had jurisdiction to enter its order, the court reasoned that while the order may have been erroneous, it was merely voidable, rather than void. Therefore, the order was “subject only to direct attack to avoid becoming a final judgment.” “Because [the insured] failed to attack the trial court’s order directly, it became a final determination on the merits for purposes of res

judicata.” Therefore, the court reversed the appellate court and dismissed the case with prejudice.

C. *City of Dallas v. Carbajal*, 324 S.W.3d 537 (Tex. 2010)

This case involves the sufficiency of notice under the Texas Tort Claims Act, which requires that governmental units receive actual notice of a claimant’s injury within six months of the injury occurring. A claimant can provide formal notice under TEX. CIV. PRAC. & REM. CODE § 101.101(a), or show that the defendant had subjective awareness of the claim under § 101.101(c).

Carbajal drove her car into an excavated gap in the street that was not properly blocked. A Dallas police officer prepared a written report detailing the accident, and stating that the gap was not properly barricaded. The police report read as follows:

Comp[lainant] said that she saw the barricades but none were blocking what she thought was a clear way to get on the freeway. Comp[lainant] said that before she knew it she had driven her veh[icle] into a gap on the street. [I] observed at the listed offense loc[ation] that there were no barricades blocking the gap in the road.

Roughly a year later, Carbajal filed suit against the City of Dallas for injuries sustained in the accident, claiming that the police report provided notice to the City through § 101.101(c)’s subjective awareness provision. The City filed a plea to the jurisdiction, which the trial court and appellate court both denied, holding that the officer’s “perception of the cause of the accident” provided actual notice.

The Texas Supreme Court reversed, noting that it had previously held that the actual notice required by § 101.101(c) was essentially the same as § 101.101(a), “subjective awareness of its fault, as ultimately alleged by the claimant, in producing or contributing to the claimed injury.” The court had held that it was not enough that the City should have investigated, or that it should have known of its fault through the results of any investigation. The notice statute is designed to provide the governmental unit with incentive to gather information to protect itself, and so actual notice of alleged fault is required.

The court found that although the police report clearly stated that the gap was not properly barricaded, it did not indicate fault. Although the report described what caused the accident, it did not say “who failed to erect or maintain the barricades.” Indeed, the court noted that a private contractor or other governmental entity could have been responsible for the road’s condition. Finding that the police report was no more than a routine investigation, and therefore insufficient to provide actual notice to the City, the court reversed the court of appeals and dismissed the case.

D. *Colquitt v. Brazoria County*, 324 S.W.3d 539 (Tex. 2010)

See procedure section for details about this case.

E. *De Gonzalez v. Guilbot*, 315 S.W.3d 533 (Tex. 2010)

“This appeal concern[ed] two issues: (1) the procedure required to revest a state court with jurisdiction after remand from federal court, and (2) the definition of ‘tertiary recusal motion’ in TEX. CIV. PRAC. & REM. CODE § 30.016,” which permits judges to proceed with a case despite a pending “tertiary recusal motion.”

The defendants were found guilty of forging stock certificates in order to claim ownership of certain family businesses then going through probate. Before the trial on damages, the defendants removed to federal court based on diversity. However, upon motion to remand, the federal court found that “Defendants had ‘no objectively reasonable basis to believe removal of [the] case was proper,’” and remanded the case to state probate court, ordering the defendants to pay \$7,500 in attorney’s fees. The Fifth Circuit later upheld the remand order.

Just prior to the plaintiff’s hand-delivery of the remand order to the state court clerk, the defendants filed a motion to recuse the probate judge, Judge Wood. Judge Wood declined to recuse himself, and referred the motion to the Presiding Judge of the Statutory Probate Court, Judge Herman, who assigned the hearing to Judge Burwell. The defendants then filed a second recusal motion against Judge Burwell, and a third against Judge Herman. Judge Herman set all the recusal motions for hearing, but the defendants did not appear. Judge Herman dismissed the motions against Burwell and himself because the motions were filed by the attorney for the Defendants on the attorney’s own behalf, “and Texas law requires that motions to recuse be ‘filed by parties, not by attorneys.’” Furthermore, Judge Herman denied the motion to recuse Judge Wood, since the defendants did not put on any evidence to support that motion. Finally, Judge Herman sanctioned the defendants \$12,000 for frivolous pleadings. Judge Herman eventually referred his recusal motion to Chief Justice Jefferson as required.

Judge Wood held a bench trial after the recusal hearing, and again, the defendants did not appear. Judge Wood entered judgment for the plaintiffs, awarding approximately \$205 million in damages.

On appeal, the defendants argued that the “judgment and sanctions order were void because they were entered (1) before jurisdiction had revested in state court, and (2) while recusal motions were pending. The appellate court accepted only the second argument, holding that while the court had jurisdiction, its orders were void due to pending recusal motions. The appellate court relied on its own ruling in *In re Whatley*, which held that the “tertiary recusal motion” rule, which allows a judge to proceed in a case in spite of pending “tertiary recusal motions,” applied only to the third recusal motion by the same party against the same judge, and therefore did not apply in this case, because the defendants’ three recusal motions were against different judges.

The Texas Supreme Court first agreed with the appellate court that jurisdiction revested in the state court upon hand delivery of the remand order. Although 20 U.S.C. § 1447(c) states that a certified copy of the order of remand shall be mailed to the state court clerk, the court found that the important consideration was what the federal court ordered, not what the federal clerk mailed. Thus, in keeping with § 1447’s aim to “smooth state-federal interactions,” the court ruled that hand-delivery was sufficient to revest the state court with jurisdiction.

The court then overruled the court of appeals, finding that the “tertiary recusal motion” rule in effect at the time of the case, (former rule 30.016(a)),<sup>10</sup> “applies to a third recusal motion filed by the same party against *any* judge,” not just to the third motion against the same judge, as the appellate court had ruled. However, the court did find that although Judge Herman was permitted to proceed despite the third recusal motion, he should not have ruled on his own recusal. Thus, the Court remanded the case to the appellate court pending the recusal hearing on Judge Hermann, and if the motion was overruled, ordered the appellate court to affirm Judge Herman’s judgment.

F. *In re United Servs. Auto. Ass’n*, 307 S.W.3d 299 (Tex. 2010)

This case involves tolling limitations when a suit is filed in a court without jurisdiction to hear the claim. James Brite sued his former employer, alleging age discrimination in violation of the Texas Commission on Human Rights Act (the “TCHRA”). Brite filed in Bexar County court, which has jurisdiction over such actions, but only for claims between \$500 and \$100,000. Brite’s salary was \$74,000 per year, and he had claimed that his loss of income and benefits would likely continue into the future, if not for the rest of his life. Furthermore, he sought front pay, back pay, punitive damages and attorney’s fees.

Before the statute of limitations expired, the employer filed a plea to the jurisdiction, claiming that the amount claimed exceeded \$100,000. The employer noted that Brite’s front and back pay alone exceeded the jurisdictional limits. Brite opposed the motion, and the trial court denied the plea to the jurisdiction twice. “Shortly thereafter, Brite amended his petition to seek damages of \$ 1.6 million, and subsequently claimed in discovery responses that ‘his lost wages and benefits in the future, until age 65, total approximately \$ 1,000,000.00.’ After a jury trial, the trial court awarded Brite \$ 188,406 in back pay, \$ 350,000 in front pay, \$ 300,000 in punitive damages, \$129,387 in attorney’s fees, and prejudgment interest.”

A divided appellate court upheld the verdict, but the Texas Supreme Court reversed, holding that “the amount in controversy when Brite filed suit exceeded \$100,000,” depriving the county court of jurisdiction.

Within sixty days of the Texas Supreme Court’s dismissal, Brite refiled in Bexar County district court. The employer again filed a plea to the jurisdiction, this time alleging that the TCHRA’s two-year statute of limitations had run, that the tolling provision in TEX. CIV. PRAC. & REM CODE § 16.064 did not apply, “and that even if it did, Brite’s original suit was filed with ‘intentional disregard of proper jurisdiction,’ depriving him of that provision’s protection.” The district court denied the motion, and the appellate court denied mandamus relief. The employer appealed to the Texas Supreme Court.

The court first found that while the TCHRA’s two-year statute of limitations was mandatory, it was not “jurisdictional,” and that therefore it was subject to tolling like any other statute of limitations. The court then held that § 16.064 did apply to the TCHRA’s statutory

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<sup>10</sup> The Legislature removed statutory probate judges from 30.016 effective September 1, 2007.

limitations period. The court noted that § 16.064 generally tolls a statute of limitations between the initial filing of a claim and second filing of the same claim in a different court, when the initial court dismissed the claim for lack of jurisdiction, and the plaintiff re-files in the proper court within sixty days of dismissal. However, § 16.064 will not save a claim filed with “intentional disregard” for the original court’s jurisdiction. The court observed that despite a plethora of appellate cases “holding generally that § 16.064 does not apply to special statutory proceedings,” the court had never ruled on the matter, and found that where one statute creates a limitations period, and another tolls the period, the two statutes should be harmonized where possible.

The court then described how once a party moves for relief under the “intentional disregard” exception, the nonmoving party bears the burden of production showing that he did not intentionally disregard the original court’s jurisdiction. Additionally, the court clarified that a good faith mistake of law as to the court’s jurisdiction could satisfy § 16.064, as the Legislature passed the statute in recognition that “the wrong court is frequently and in good faith chosen by capable lawyers . . . .” Thus, § 16.064 is not limited to mistakes of fact. However, § 16.064 would not protect a “strategic decision to seek relief” from an inappropriate court, “which is what happened here.” The court noted that Brite’s original pleading had omitted the statement, required by Rule 47(b), that the amount sought was within the upper limit of the court’s jurisdiction, and that “the record, taken as a whole, establishes that Brite’s trial attorney filed the Original Petition with full knowledge that Brite sought far more than \$ 100,000 in actual damages and purposefully drafted the Original Petition to conceal that fact by omitting the statement required by Rule 47(b).”

Finding that Brite had intentionally disregarded the original court’s jurisdiction, and that subjecting the employer to yet another round of wasted trials would be an exceptional hardship, the court granted the employer’s mandamus petition, ordering the trial court to enter summary judgment for the employer.

G. *Wind Mt. Ranch, LLC v. City of Temple*, No. 09-0026, 54 Tex. Sup. J. 286 (Tex. 2010)

This case held that a bankruptcy order extending the time to pay a note on a piece of property is not subject to the recording requirements of TEX. CIV. PRAC. & REM. CODE § 16.037. An investment company purchased property in Bell County subject to a note and deed of trust and later filed for bankruptcy. The approved bankruptcy plan extended the note’s maturity date from 1993 to 1999. However, neither the plan nor the confirmation order were filed in Bell County. In 2002, the City of Temple obtained a \$936,250 judgment against the investment company for various municipal violations and recorded its abstract judgment in early 2003. Two months after Temple recorded the judgment, Wind Mountain Ranch acquired the note and deed of trust, and then acquired the property at a non-judicial foreclosure sale. The City sued, claiming fraudulent transfer, wrongful foreclosure and conspiracy. The trial court found that since the extension on the note had never been recorded in Bell County, it was void, and that therefore the four-year statute of limitations for foreclosure had lapsed. The appellate court confirmed, holding that the bankruptcy court’s extension was subject to § 16.037, which “allows debtors and creditors to suspend limitations, but requires that extension agreements be recorded.”

The Texas Supreme Court reversed. The court first noted that § 16.037 states that “[t]he party or parties primarily liable for a debt or obligation secured by a real property lien may suspend the statute of limitations on the lien by executing a written extension agreement,” but that “any such agreements are to be filed in the county clerk’s office . . . .” The court found that while agreements by parties to suspend limitations must be filed, bankruptcy orders have no such requirement. Since the court found the language of the code unambiguous, it did not look beyond the plain language. The court found that Wind Mountain had foreclosed on the property before the statute of limitations had lapsed, and that its interest was superior to Temple’s.

H. *Jefferson State Bank v. Lenk*, 323 S.W.3d 146 (Tex. 2010)

In this case, the Texas Supreme Court applied the requirement for customers to timely notify a bank of unauthorized transactions to an estate administrator. After a man’s death, fraudster presented the decedent’s bank with false letters of administration, purportedly appointing him the administrator of the decedent’s estate. The fraudster slowly drained the account of all but \$1,000. Later, when an estate administrator was actually appointed, she did not contact the bank for almost two years after appointment, even though she had known of the fraud when appointed. Section 404.6 of the Texas Business and Commerce Code states that if a bank sends or makes available an account statement, the customer must notify the bank of unauthorized transactions within one year, which can be reduced to sixty days by agreement. The account agreement in this case had reduced the period to sixty days. After the bank refused the administrator’s demand to reimburse the fraudulently withdrawn funds, she filed suit against the bank.

The trial court granted the bank’s motion for summary judgment while denying the administrator’s summary judgment motion. The court of appeals reversed, finding that the bank had not fulfilled its duty to “send or make available” account statements as required by § 4.406(a), by simply retaining the records at the bank.

The Texas Supreme Court reversed the court of appeals, holding that “in the event of a customer’s death, banks can satisfy their section 4.406 burden by retaining statements at the bank, [and that] the customer’s burden to report unauthorized signatures does not arise until an estate representative is appointed.” Since the administrator had not notified the bank of the unauthorized claims within sixty days of being appointed, the court found that § 4.406 barred the administrator’s claims, and rendered judgment in favor of the bank.

I. *Presidio Indep. Sch. Dist. v. Scott*, 309 S.W.3d 927 (Tex. 2010).

This case concerns whether the Commissioner of Education must consent to venue in Travis County for an appeal of his decision between a teacher and a school district, when the teacher and school district otherwise agree. § 21.307(a) permits “[e]ither party” to appeal the Commissioner’s decision in one of two possible venues: (1) a district court in the school district’s county; or (2) “if agreed by all parties, a district court in Travis County.”

After a Presidio teacher used unauthorized corporal punishment, the school provided the teacher with notice of termination and referred the matter to an examiner. After a hearing, the examiner recommended termination for cause, and the board adopted the resolution. The teacher

sought review from the Commissioner of Education, who reversed the board and decided that the teacher should be reinstated or alternatively paid one year's salary. Presidio appealed, and the school and the teacher mutually agreed on Travis County as the venue. However, the Commissioner objected, arguing that because he was joined as a party to the appeal under § 21.307(c), he must also consent to jurisdiction in Travis County. A divided court of appeals upheld the Commissioner's objection, ruling that the Legislature had effectively given him veto power over jurisdiction in Travis County.

The Texas Supreme Court reversed the court of appeals, holding that while the Commissioner was indeed joined as a "party" in the appeal, he was not a "party" for the purpose of consenting to jurisdiction. The court noted that the purpose of 21.307(c) was merely to describe who must appear in court, not to give the Commissioner veto power over appellate jurisdiction. The court found the text of the statute supported this interpretation, noting several instances in the statute where the word "party" did not include the Commissioner, such as in 21.307(a), where "[e]ither party" may appeal the commissioner's decision, as the Commissioner would presumably not appeal his own ruling.

The court also dismissed the Commissioner's argument that the choice of venue permitted forum shopping. Noting that forum shopping generally occurs when one party seeks to obtain an advantage over another by selecting a more favorable forum, the court "fail[ed] to envision a scenario in which forum-shopping occurs when both parties to the dispute agree" to the forum.

Finally, the court held that the Commissioner's role was merely to review the evidence, not to make policy, and that he therefore he did not have any legitimate interest in having his decision upheld. Therefore, the court reversed the court of appeals and remanded the case for further proceedings.

\*This case is also discussed in the Administrative Law Section of this paper.

## **XXII. PROCEDURE—TRIAL AND POST-TRIAL**

### **A. *John G. & Marie Stella Kenedy Mem. Found. v. Fernandez*, 315 S.W.3d 512 (Tex. 2010)**

This case concerns dismissal of an anti-suit injunction when the resolution of underlying litigation has rendered the injunction moot. Plaintiff Fernandez claimed that she was the non-marital child of John G. Kenedy, the last of a long line of prominent Texas ranchers. Fernandez sought to void certain *inter vivos* mineral rights assignments made decades earlier by Mrs. East, Kenedy's sister. East had transferred certain mineral rights to the John G. & Marie Stella Kenedy Memorial Foundation (the "Foundation") in 1960 and 1961, but after East's death, the temporary administrator of East's estate had attempted to set the transfer aside (the "*Garcia*" suit). Fernandez claimed that, as Kenedy's non-marital child, she was a required party to the *Garcia* suit. Since she had not been present, she argued that the judgment was void.

Fernandez' numerous suits regarding her heirship claims included four separate actions in county courts and three in district courts, as well as various motions to transfer to probate court,

or to abate proceedings in district court to file a duplicative action in probate court. Fernandez even filed an exhumation motion for Kenedy's body, seeking DNA proof of paternity. Through each action, Fernandez sought recognition as the relative and heir of John G. Kenedy, his wife and sister for the purpose of collecting from their estates. Among these actions was a bill of review seeking to overturn the *Garcia* decision. Eventually, the district court granted summary judgment against Fernandez on all actions and enjoined any further suits by Fernandez on the matter. Fernandez appealed only the injunction.

The appellate court reversed the injunction, stating that "a district court that lacks probate jurisdiction cannot enjoin a party from proceeding in probate court." However, the Texas Supreme Court found that, given the disposition of the other action Fernandez had filed, that there was no longer any need for the injunction. Having held that the judgment probating East's will was binding, and that the *Garcia* decision was binding, the court found no possibility of Fernandez establishing that East had died intestate after suffering summary judgment losses in all of her cases in district court. Establishing intestacy was a prerequisite for probate court jurisdiction over Fernandez's remaining claims, and since the district court now had sole jurisdiction, its injunctions prohibiting suits in other courts were no longer necessary. Thus, "under the unique circumstances of this case" the court lifted the injunction as moot.

B. *In re Daredia*, 317 S.W.3d 247 (Tex. 2010)

American Express sued Pervez Daredia and Map Wireless in a single action for defaulting on three credit card agreements. Map Wireless did not answer, and the court entered a judgment awarding damages and attorney's fees against Map Wireless, and stating that "[a]ll relief not expressly granted herein is denied. This judgment disposes of all parties and all claims in this cause of action and is therefore FINAL." No party appealed the judgment. However, "[m]ore than fifteen months later, American Express moved for judgment nunc pro tunc to correct what it called 'typographical errors on behalf of the attorney in charge', who 'should have used the word "Interlocutory" in both the motion and judgment', so that the case could proceed against Daredia." Daredia argued that the judgment was final and the court's plenary power had expired. However, the trial court granted American Express's motion and the court of appeals denied Daredia's mandamus request.

The court of appeals had held that the judgment was facially ambiguous because it did not address any of American Express's claims against Daredia, yet unambiguously stated that the judgment was final. However, the Texas Supreme Court noted that even when a judgment lacks sufficient legal grounds to render a decision, it may be final and appealable when rendered through an unambiguous order. Thus, even though the trial court never made any "substantive disposition" of the claims against Daredia, the language stating that the judgment disposed of all claims in the cause of action was unambiguous, and therefore final.

The court agreed that a court may correct clerical errors after lapse of its plenary power. However, it held that the error here was in rendition of judgment, rather than in entering judgment, and was therefore a judicial, rather than clerical error. The court had signed and entered the order that American Express requested, and the error was in the request for rendition of judgment, which could not be corrected nunc pro tunc after a lapse of the court's plenary power. Thus, the court ordered the trial court to vacate its order granting nunc pro tunc relief.

C. *In re Columbia Med. Ctr. of Las Colinas*, 306 S.W.3d 246 (Tex. 2010)

This case concerns the necessary reduction of punitive damages upon reduction of the underlying damage award. The plaintiff widow and sons of Mr. Hogue won a jury verdict on a medical malpractice claim in which Columbia Medical Center caused Mr. Hogue's death. Mr. Hogue's doctor had ordered a "stat" echocardiogram, but the hospital did not begin the procedure for over two-and-a-half hours, and further delayed transfer to an appropriate treatment facility after the critical diagnosis. The trial and appellate court awarded both economic and punitive damages in excess of \$30 million. However, the Texas Supreme Court reversed the "loss of inheritance" damages for lack of sufficient evidence.

After the court's reversal of the loss of inheritance damages, the hospital attempted to tender payment with a corresponding reduction in the punitive damages. Punitive damages are capped by statute at two times economic damages, or the amount of any non-economic damages up to \$750,000. The Hogues refused the payment, and the trial court denied Columbia's motion to reduce the punitive damages, resulting in a punitive damages award that exceeded the statutory cap. Columbia petitioned for writ of mandamus.

The Texas Supreme Court held that although its judgment reducing the underlying award did not expressly mention punitive damages, "regardless of whether an appellate court judgment expressly commands it, trial courts must give effect to statutory caps on damages when the parties raise the issue. Thus, the trial court was required to reduce its punitive damage award.

D. *In re United Scaffolding, Inc.*, 301 S.W.3d 661 (Tex. 2010)

This case determined that new case law regarding trial order requirements would be retroactively applied to preexisting, non-conforming new trial orders. After a successful but frugal jury verdict for injuries suffered in a fall from scaffolding built by the defendant, the plaintiff moved for a new trial. The trial court granted the new trial "in the interest of justice and fairness." The defendant petitioned for mandamus relief, but a divided court of appeals denied relief and the defendant appealed to the Texas Supreme Court.

After the court of appeals issued its opinion, the Texas Supreme Court ruled in another case that "a trial court acts arbitrarily and abuses its discretion if it disregards a jury verdict and grants a new trial, but does not specifically set out its reasons." The court further held that "in the interests of justice and fairness" is not a sufficient reason, and that "a relator challenging such an order does not have an adequate remedy by appeal."

The plaintiffs argued that the trial court did not abuse its discretion because it followed the law as it was at the time. However, the court noted that "an erroneous legal conclusion is an abuse of discretion, even if it may not have been clearly erroneous when made." Thus, the Court granted the defendant's request and required the trial court to "specify its reasons for disregarding the jury verdict and ordering a new trial."

E. *Vaughn v. Drennon*, 324 S.W.3d 560 (Tex. 2010)

This case concerns the application of the *Aldridge* presumption regarding whether a trial court's judgment is final for the purposes of appeal. The Vaughns and Drennons "had repeated disputes about water drainage off the Vaughns' property. The Vaughns sued the Drennons for blocking and diverting the natural flow of water off the Vaughn property with a concrete fence, also alleging trespass and intentional infliction of emotional distress. The Drennons filed a separate lawsuit against the Vaughns for intentional infliction of emotional distress, and the trial court consolidated the two cases."

The Vaughns' suit named the Drennons' grandchildren, the Atwoods, because the Drennons had deeded the property to the Atwoods, reserving a life estate for themselves. Upon a stipulation that the Drennons owned the property at all relevant times, the Vaughns proceeded only against the Drennons. There were no requests for jury instructions regarding the Atwoods, and none were given.

The jury awarded \$4,000 in damages to the Vaughns for the Drennons' fence, and an additional \$25,000 on the IIED claim to Mr. Vaughn, although the jury did not award any damages for trespass. The jury also awarded \$25,000 to each of the Drennons on their IIED claim. The trial judge disregarded the \$4,000 award for the fence, and offset the IIED judgments, awarding \$25,000 to the Drennons. "The judgment made no mention of the Atwoods." The Vaughns did not immediately receive a signed copy of the judgment, and so requested additional time to file a motion for a new trial and notice of appeal, which the trial court granted.

After extensive briefing and oral arguments, the appellate court found that it lacked jurisdiction to hear the appeal, because the judgment did not dispose of the Vaughns' claims against the Atwoods. The Vaughns had asked the appellate court to at least abate the proceedings until the trial court had clarified its opinion, but the appellate court instead dismissed the claim for want of jurisdiction, finding that "[t]here is no language in the judgment expressly disposing of the entire case. The record contains no documents disposing of the claims against the Atwood defendants."

The Texas Supreme Court reversed, stating that the *Aldridge* presumption required that:

When a judgment, not intrinsically interlocutory in character, is rendered and entered in a case regularly set for a conventional trial on the merits, no order for a separate trial of issues having been entered . . . it will be presumed for appeal purposes that the Court intended to, and did, dispose of all parties legally before it and of all issues made by the pleadings between such parties.

The court found that the appellate court had incorrectly applied *Crites v. Collins*, 284 S.W.3d 839, 841 (Tex. 2009), in attempting to overcome the *Aldridge* presumption. *Crites* held that "when there has been no traditional trial on the merits, no presumption arises regarding the finality of a judgment." The court of appeals had found that *Crites* required that a judgment, to be final, "unequivocally express an intent to dispose of all claims and all parties . . . either explicitly or implicitly." However, in the present case, there *had* been a trial on the merits, and

the Court ruled that “[n]othing in *Crites* suggests that the requirement for such express language addressing every claim and party should apply to a judgment that follows a conventional trial on the merits.” The court also found that the trial court and parties had intended the judgment to be final, as evidenced by the trial court granting the motion to extend the time to file for a new trial and appeal. So holding, the court remanded the case to the court of appeals.

### **XXIII. PRODUCTS LIABILITY**

A. *Wal-Mart v. Merrell*, 313 S.W.3d 837 (Tex. June 18, 2010)\*

At issue in this case is whether an expert’s testimony, which attributed the cause of a fire to an exploding halogen lamp bulb, was sufficient to support causation in a negligence suit.

When police initially entered the apartment of Charles Merrell, Jr. and Latosha Gibson, who died from smoke inhalation, they found, among other things, a damaged floor lamp, candles, melted wax, an ashtray, and a marijuana cigarette. The accident was declared an accident of unknown origin, and Merrell’s parents brought wrongful death and survival claims against Wal-Mart, alleging that the lamp, which had allegedly been purchased from Wal-Mart, caused the fire. Merrell’s expert opined that the lamp had caused the fire, contending that the halogen bulb exploded and sent burning glass shards onto a recliner, and dismissed all other possible causes. The court admitted the testimony over Wal-Mart’s objection but granted Wal-Mart’s motion for summary judgment. The court of appeals reversed.

The Texas Supreme Court reversed and rendered a take-nothing judgment. The court held that an expert must adequately disprove alternative theories of causation or his own theory will be considered speculative and conclusory. The court found that Merrell’s expert did not adequately explain why a burning cigarette could not have caused the fire and that Merrell’s own theory of causation “amounted to little more than speculation.”

\*This case is also discussed in the Evidence section of this paper.

### **XXIV. SECURITIES**

A. *Grant Thornton LLP v. Prospect High Income Fund*, 314 S.W.3d 913 (Tex. Jul. 2, 2010)

At issue in this case is whether a group of bond and hedge funds could recover from an auditor for statements made in audit reports.

Prospect owned a group of funds that bought bonds of Epic Resorts, a vacation timeshare company. The funds bought the bonds over a time period beginning in the late 1990s and continuing into 2003. Under the bond indenture, Epic was to maintain sufficient funds on deposit in an escrow account with the bond trustee to make the next required semi-annual interest payment. In April of both 2000 and 2001, Grant Thornton issued audit reports on Epic’s financial statements. In its audit reports, Grant Thornton reported that Epic had made the required escrow deposits; in fact, it had not. Grant Thornton also issued a “negative assurance” statement to Epic, indicating that Grant Thornton had not learned information suggesting that

Epic had violated the indenture. Around December 2001, Epic lost a critical credit relationship; a senior portfolio manager for the funds learned of this in early 2001. In June 2001, Epic missed an interest payment. The funds then forced Epic into bankruptcy in July 2001. The funds' purchases of Epic bonds continued after the default and bankruptcy.

The funds alleged claims of fraud, negligent misrepresentation, negligence, third-party-beneficiary breach of contract, conspiracy to commit fraud and aiding and abetting fraud against Grant Thornton. The trial court granted summary judgment for Grant Thornton on all claims. The court of appeals affirmed the judgment on post-suit transactions, breach of contract and fraud, but reversed on negligent misrepresentation, fraud, conspiracy, and aiding and abetting.

The Texas Supreme Court reinstated the trial court's judgment that the funds take nothing. The court first addressed negligent misrepresentation and fraud claims relating to purchases in 2000 after Grant Thornton's first audit report. Relying on Restatement (Second) of Torts § 552, the court held that a negligent misrepresentation claim against an auditor requires a showing of "near privity": the person relying on the information has to be one of a limited group of persons for whose benefit the auditor intended to provide the information, and the person must rely on the information in a transaction the auditor intends to influence or knows he will influence, or a substantially similar transaction. Because the fund that bought the bonds in 2000 was a market investor with no prior connection to Epic or Grant Thornton, the court held that Grant Thornton could not be liable for negligent misrepresentation. Similarly, the fraud claim failed because Grant Thornton, having no relationship with the funds, had no "reason to expect" that the funds would rely on its audit.

The court also addressed several other issues. As to purchases in 2001, after the funds learned that Epic had lost a key creditor, the court held that the negligent misrepresentation and fraud claims also failed because the funds could not have justifiably relied on Grant Thornton's audits. Regarding the "negative assurance" statement from Grant Thornton, the court found the funds could not rely on the statement because they had not received it. The funds argued that reliance could be imputed because the trustee had received the statement, but the court responded that the funds could not benefit from imputed reliance without also being held bound by the trustee's knowledge of irregularities with the escrow account. The court also addressed "holder" claims: claims that Grant Thornton's statements induced the funds to hold the bonds instead of selling them. The court reserved the question of whether Texas law recognizes holder claims at all, but held that it does not recognize them absent proof of direct communication between auditor and investor. Finally, the court addressed claims for aiding and abetting fraud. Because the aiding-and-abetting claims were based on the same misrepresentations as the fraud claims, the court found that the failure of the underlying fraud claims also doomed the aiding-and-abetting-claims.

## **XXV. WORKERS' COMPENSATION**

### **A. *In re Odyssey Healthcare, Inc.*, 310 S.W.3d 419 (Tex. 2010)**

This case decided whether certain non-waiver-of-rights provisions of the workers' compensation code would defeat an arbitration clause. The plaintiff worked for the defendant, which provided hospice care, and was injured at work when she tripped over an uneven step at a

patient's home. The defendant did not subscribe to workers' compensation, instead providing an "Occupational Injury Benefit Plan." The Benefit Plan, in which the plaintiff enrolled, contained an arbitration clause mandating arbitration of workplace injury disputes.

At trial, the defendant moved to compel arbitration, which the court denied, finding that compelling the plaintiff to arbitrate in another forum would be unconscionable. Similarly, the court of appeals denied the defendant's mandamus petition.

On appeal to the Texas Supreme Court, the plaintiff advanced several arguments against enforcing the arbitration clause, including substantive unconscionability, and a non-waiver provision in the Texas Workers' Compensation Act, Texas Labor Code § 406.033(e). The court noted that it had previously ruled that § 406.033(e) does not void arbitration agreements, as that provision prohibits only the waiving of certain rights, not agreements to resolve certain disputes in a particular forum. For that reason, among others, the court found the arbitration agreement enforceable, and ordered the trial court to compel arbitration.

\*This case is also discussed in the Employment section of this paper.

B. *Leordeanu v. Am. Prot. Ins. Co.*, No. 09-0330, 2010 Tex. LEXIS 894 (Tex. 2010)

This case clarifies the use of the "coming and going" and "dual purpose" rules for determining scope of employment. Liana Lordeanu drove her company car to a business meeting, and then to a client dinner. On her way home from the dinner she planned to stop at a company-provided self-storage unit to store some supplies, but ran off the road and was injured before she arrived.

The insurance provider initially denied Lordeneau's worker's compensation claim, asserting that she was not in the scope of employment at the time of the accident. A jury trial found for Lordeanu, but the court of appeals reversed, finding no evidence to support the jury's verdict.

The Texas Supreme Court reversed the court of appeals, finding for Lordeneau under one of the exceptions to the so-called "coming and going" rule. The court first noted that two rules, the "dual purpose" rule and the "coming and going" rule had evolved separately, but that the Legislature had then codified each rule into § 401.011(12) of the Texas Labor Code, which excludes the following from the scope of employment:

- (A) transportation to and from the place of employment unless:
  - (i) the transportation is furnished as a part of the contract of employment or is paid for by the employer;
  - (ii) the means of the transportation are under the control of the employer; or
  - (iii) the employee is directed in the employee's employment to proceed from one place to another place; or

- (B) travel by the employee in the furtherance of the affairs or business of the employer if the travel is also in furtherance of personal or private affairs of the employee unless:
  - (i) the travel to the place of occurrence of the injury would have been made even had there been no personal or private affairs of the employee to be furthered by the travel; and
  - (ii) the travel would not have been made had there been no affairs or business of the employer to be furthered by the travel.

Section (A) is a codification of the “coming and going” rule, and developed specifically to address travel to and from work. Section (B) is a codification of the “dual purpose” rule and applies when there are both business and personal reasons for a trip. The court found that given the history of the development of the rules, it was not necessary to satisfy both (A) and (B) in every situation.

In particular, the court noted that if section (B) applied to travel home, the travel home could never be in the scope of employment, since a person will always return home, even absent a business reason to do so, violating (B)(ii). Thus, applying section (B) to employees coming home limits section (A) to a “going” rule.

The court of appeals had ruled that subsection (B) applied, and that (B)(ii) was not fulfilled. In reversing, the Texas Supreme Court held that:

[O]nly subsection (A) applies to travel to and from the place of employment, and that subsection (B) applies to other dual-purpose travel. This is consistent with the historical development of the "coming and going" and "dual purpose" rules, their application in our cases, and the reasonable results they were designed to achieve.

Thus, the court reversed the court of appeals, and affirmed the judgment of the trial court.