TRENDS IN THE SUPREME COURT

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I. INTRODUCTION. This article discusses perceived trends in the Texas Supreme Court. There has recently been significant turnover of Justices on the Texas Supreme Court. It won't do to count votes on recent significant decisions to see which members of the majority are still on the Court. Instead we must look at the longer-acting and slower-changing effects of precedent and stare decisis, and wait for time to tell whether significant 5-4 votes have continued validity.

Here is a summary of trends discussed in this article:

- Broadening exercise of appellate review
  - standing
  - ripeness
  - more interlocutory orders are appealable
  - increased dissent and conflicts jurisdiction
  - de novo review
  - greater appellate control over class actions

- Expanding scope of mandamus
  - abuse of discretion approaches reversible error
  - appeal has become increasingly inadequate
  - more trial court rulings are subject to mandamus

- Moving power from juries to judges
  - Move to narrower "broad form" submission
  - More judicial control over duty and causation
  - Objective standard for gross negligence
  - Tighter control over expert witnesses
  - Pre-suit waiver of jury
  - Standard of review for clear and convincing evidence

- Closer supervision of courts of appeals
  - Supreme Court monitoring factual sufficiency review
  - More freedom to find "no evidence" by changing standard of review
  - Mandamus review of some interlocutory appeals despite finality
  - Eliminating "do not publish" opinions

- Slowed expansion of legal duty
  - Serving alcohol
  - Insurance bad faith
  - Premises liability
  - Requirement of privity for professional liability

- More difficulty in recovering damages
  - No damages for fraud on the community
  - No mental anguish damages for economic torts
  - Tight control over intentional infliction of emotional distress
  - Bifurcated trial for exemplary damages
  - Elevated burden of proof for exemplary damages
  - Greater appellate scrutiny of exemplary damages
  - Limited assignability of claims for damages

- Demise of class actions

- Upholding arbitration when pitted against litigation

- Protecting the Employment at Will Doctrine

II. STATISTICS ON APPELLATE REVIEW. Here are the numbers on petitions for review granted in the past seven fiscal years (FY). The Supreme Court's fiscal year ends on August 31.

	Filed	Petitions Granted	% of Dispositions Granted
FY 1998	977	127	11.5%
FY 1999	883	113	10.8%
FY 2000	1,069	97	9.1%
FY 2001	1,018	96	8.6%
FY 2002	986	116	11.6%
FY 2003	968	112	11.9%
FY 2004	810	82	10.4%

(1998 & 1999 include both petitions for review and applications for writ of error)

The number of petitions files in FY 2004 is the lowest since 1983. In FY 2004, of the 791 peti-

tions disposed of, 82 were granted, or 10.4%. (Statistics taken from Texas Judicial Council Annual Reports)

III. FACTORS AFFECTING GRANTS. In 1997, the Supreme Court promulgated Rule of Appellate Procedure 56.1(a), which indicated that the following factors would be considered in deciding whether to grant a petition for review: (1) court of appeals' dissent on an important point of law, (2) conflict between courts of appeals on an important point of law,(3) construction or validity of a statute, (4) constitutional issues, (5) whether the court of appeals appears to have committed an error of law of such importance to the state's jurisprudence that it should be corrected, and (6) whether the court of appeals has decided an important question of state law that should be, but has not been resolved by the Supreme Court. TRAP 56.1(a).

As a practical matter, the fact that an issue is raised in multiple appeals all pending at the same time is a factor favoring Supreme Court review. *Wichita Falls State Hospital v. Taylor*, 106 S.W.3d 692 (Tex. 2003) (interlocutory appeal), and *Central Counties Ctr. for Mental Health and Mental Retardation Services v. Rodriguez*, 106 S.W.3d 702 (Tex. 2003) (interlocutory appeal), and *Austin State Hospital v. Fiske*, 106 S.W.3d 703, 704 (Tex. 2003) (appeal from final summary judgment), are cases that presented the same question–whether the legislatively-enacted Patient's Bill of Rights waived sovereign immunity for state hospitals. The Supreme Court said "no." The underlying issue was presented in multiple appeals. Plus, in this instance there were conflicting court of appeals' decisions.

Another example is *Austin Nursing Center Inc., et al. v. Lovato*, No. 03-0659, and *Lorentz v. Dunn,, et al.*, No. 03-0790, in which the Supreme Court granted review on June 18, 2004. Both cases raise the question of whether standing established by amending a survival-action pleading after the statute of limitations expires relates back to the original pleading by a party who was not an heir and (2) whether the Medical Liability and Insurance Improvement Act precludes relating back in health-care liability claims. The courts of appeals ruled oppositely on the issue.

IV. PETITIONS FOR REVIEW: WHAT ISSUES ARE BEING GRANTED?

A. GRANTS, BY SUBJECT MATTER. According to Mike and Molly Hatchell's *What Issues Are Being Granted by the Supreme Court?*, at the April 16, 2004 State Bar of Texas Practice Before the Texas Supreme Court Course (ch. 4), recently-granted petitions for review break down into the following areas:

Subject	No. of Grants
negligence	16
procedure	15
jurisdiction	13
contracts	8
property	8
expert testimony	7
governmental entities	7
administrative law	6
hospitals	6
insurance law	6
condemnation	5
damages	5
immunity	5
summary judgment	5
appellate review	4
class actions	4
punitive damages	4
oil and gas	4
tort claims act	4
attorneys	3
constitutional law	3
declaratory judgment	3
evidence	3
venue	3
wrongful death	3
attorneys fees	2
environmental	2
gross negligence	2
health care liability	2
infants	2
jury	2
limitations	2
medical malpractice	2
new trial	2
nuisance	2
probate	2
proportion. responsibility	2
actual malice	1
arbitration	1
assignment of claims	1
juvenile	1
contribution	1
conversion	1
deeds	1
defamation	1
discovery	1
dram shop	1
employment law	1

indemnity	1
intentional torts	1
jury argument	1
malicious prosecution	1
prejudgment interest	1
premises liability	1
principal & agent	1
settlement	1
water	1
workers' comp	1

B. DISSENTING OPINIONS ON DENIAL OF REVIEW. Some Justices of the U.S. Supreme Court have been known to issue opinions dissenting from that court's refusal to review a matter. *See e.g. Durden v. California* 531 U.S. 1184 (2001) (Souter, J., joined by Breyer, J., dissenting from denial of petition for writ of certiorari); *Barry v. Grano*, 485 U.S. 971 (1988) (White, J., and Rhenquist, C.J., dissenting from denial of petition for certiorari). Sometimes an individual justice has issued a memorandum opinion responding to the dissent. *See Janklow v. Planned Parenthood*, 517 U.S. 1174 (1996) (Stevens, J., memorandum opinion explaining the denial of certiorari; Scalia, J., Rhenquist, C.J., Thomas, J., dissenting from denial of petition for certiorari).

Some years ago Justice Lloyd Doggett took to issuing dissenting opinions from the Texas Supreme Court's decision to deny review. *See Fanestiel v. Alworth*, 876 S.W.2d 161 (Tex. 1994) (Doggett, J., dissenting from denial of leave to file petition for writ of mandamus); *Havner v. E-Z Mart*, 846 S.W.2d 286 (Tex. 1993) (Doggett, J., dissenting from order denying application for writ of error as improvidently granted); *Adamo v. State Farm Lloyds Co.*, 864 S.W.2d 491 (Tex. 1993) (Doggett, J., dissenting from denial of application for writ of error).

Justice Hecht has issued dissenting opinions on some denials of petitions for review. *See e.g. In re R.Y.*, 2002 WL 1205415 (Tex. June 6, 2002) (Justice Hecht, joined by Justices Owen and Jefferson, dissenting from the denial of the motion for rehearing of the denial of the petition for review) ("The issue raised by this petition for review is whether, or under what circumstances, it is permissible for a court to order that a parent's possession of a child is solely at the discretion of a managing conservator. Because this is an important, recurring issue over which the courts of appeals are in disagreement, I would grant the petition."); *In re Interest of S.*, 52 S.W.3d 735 (Tex. 2001) (Hecht, J., joined by Owen, J., dissenting from denial of petition for review); *Gaylord Broadcasting Co. v. Francis*, 35 S.W.3d 599 (Tex. 2000) (Hecht, J, dissenting from the denial of a petition for review in a public official–media defendant defamation case on interlocutory appeal); *Texas Workers' Compensation Ins. Fund v. Serrano*, 22 S.W.3d 341 (Tex. 1999) (Hecht, J., dissenting from fenial of petition for review); *Rampart Capital Corp. v. Abke*, 1 S.W.3d 107 (Tex. 1999) (Hecht, J., joined by Owen, J., dissenting from denial of petition for review). Possibly, Justice Hecht's biggest success with this effort was *Maritime Overseas Corp. v. Ellis*, 977 S.W.2d 536, 537 (Tex. 1996) (Hecht, J., dissenting from denial of writ of error). There he vigorously dissented from the denial of writ of error. Eight months later the Supreme Court granted the writ of error, but it eventually affirmed the court of appeals, with Justice Hecht dissenting. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402 (Tex.), *cert. denied*, 525 U.S. 1017 (1998).

C. PUBLISHING VOTES ON DENIAL OF REVIEW. A number of plaintiffs, including Texans for Public Justice, Common Cause, LULAC, ACLU, and the Texas Observer have sued in the Western District of Texas, challenging the Texas Supreme Court's policy of not making public the justices' votes on grant or denial of review. Civil Action NO. DR 02CA26.

V. CONFLICTS JURISDICTION. Tex. Gov't Code § 22.225 provides that "a judgment of a court of appeals is conclusive on the law and facts, and a petition for review is not allowed to the supreme court, in the following civil cases . . . ." Included in the list of cases where the court of appeals' judgment is conclusive are cases of a contested election; an appeal from an interlocutory order; and an appeal from the grant or denial of a temporary injunction; among others. Even where the court of appeals' decision is normally final, Section 22.225(c) gives the Supreme Court appellate jurisdiction in "a case in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case." Tex. Gov't Code §§ 22.225(c); 22.001(a)(2). This is the Supreme Court's "conflicts jurisdiction." House Bill 4, passed in 2003, provides a definition of what constitutes a conflict for purposes of Supreme Court jurisdiction that should expand the range of cases where conflicts jurisdiction exists.

A. THE OLD STANDARD OF CONFLICT. The old standard for conflicts jurisdiction was stated in *Christy v. Williams*, 298 S.W.2d 565, 567 (1957):

> For this Court to have jurisdiction on the ground of conflict it must appear that the rulings in the two cases are 'so far upon the same state of facts that the decision of one case is necessarily conclusive of the decision in the other.' [Citation omitted.] Or, 'in other words, the decision must be based practically upon the same state of facts, and announce antagonistic conclusions.' [Citation omitted.] 'An apparent inconsistency in the principles announced, or in the application of recognized principles, is not sufficient.' [Citation omitted.] We must examine the facts in the case [alleged for conflict] and in the instant case as the facts are reflected in the opinions before us, to determine whether they are so nearly the same that the decision in one of the cases would be conclusive of the decision in the other.

However, "[c]onflicts jurisdiction does not require that the two cases be identical either on the facts underlying the causes of action nor on the procedural facts." *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425, 431 (Tex. 2000). In *Southwestern Refining Co.*, six Justices held that a class action is not so dissimilar from an individual lawsuit as to defeat conflicts jurisdiction. The Court said in *Coastal Corp. v. Garza*, 979 S.W.2d 318, 320 (Tex. 1998):

> In short, cases do not conflict if a material factual difference legitimately distinguishes their holdings. On the other hand, immaterial factual variations do not preclude a finding of jurisdictional conflict. A conflict could arise on very different underlying facts if those facts are not important to the legal principle being announced.

In *Compaq Computer Corp. v. La Pray*, 135 S.W.3d 657, 663 (Tex. 2004), the Court found jurisdiction based on a conflict apparent from the face of the opinion, such that the later case would operate to overrule the earlier opinion, if issued by the Supreme Court.

Once a conflict confers jurisdiction on the Supreme Court for any issue in the case, the case is before the Court for all purposes. *See Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 643-44 (Tex. 1995); *Stafford v. Stafford*, 726 S.W.2d 14, 15 (Tex. 1987).

B. THE NEW STANDARD FOR CONFLICTS JURISDICTION. As noted above, House Bill 4 added Tex. Gov't Code § 22.225(e), to make Supreme Court's conflicts jurisdiction easier to come by:

> (e) For purposes of Subsection (c), one court holds differently from another when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants.

The new statutory definition does not explicitly eliminate, but it clearly does attempt to relax, the previously-required close parallel between the facts underlying the holding in each case. The statement, in *Coastal Corp. v. Garza*, 979 S.W.2d 318, 320 (Tex. 1998), that "cases do not conflict if a material factual difference legitimately distinguishes their holdings," may still hold true. But the two conflicting cases need no longer be diametrically opposite rulings on equivalent facts.

C. CASE LAW REGARDING CONFLICTS JURISDICTION. Too little time has passed since the House Bill 4 statutory amendment for a new pattern of case decisions to develop on conflicts jurisdiction. Additionally, the departure of former justices and arrival of new ones reduces the usefulness of prior case law as a predictor of when the Supreme Court will find conflicts jurisdiction.

Historically, the Texas Supreme Court seldom exercised "conflicts jurisdiction"over interlocutory orders. In the case of *Wagner & Brown, Ltd. v. Horwood*, 53 S.W.3d 347 (Tex. 2001) (interlocutory appeal of class certification), Justice Hecht issued a dissenting opinion upon the denial of rehearing of a petition for review that was dismissed for lack of jurisdiction. He was joined in dissent by Justices Owen and Abbot. Justice Hecht quoted, from Pamela Baron's motion for rehearing, the following assessment of the Supreme Court's record on conflicts jurisdiction:

> In the last few years, however, this Court has accepted conflicts jurisdiction over an interlocutory appeal only three times. See Bland Indep. School Dist. v. Blue, 44 Tex. Sup. Ct. J. 125, [34 S.W.3d 547]

> (2000); Southwestern Refining Co. v. Bernal, 22 S.W.3d 425 (Tex. 2000); Newman v. Obersteller, 960 S.W.2d 621 (Tex. 1997). This Court's exercise of conflicts jurisdiction is thus more rare than a blue moon (5 in the last 10 years), a total eclipse of the sun (6 in the past decade), or the birth of a Giant Panda in captivity (18 in 1999 alone, 15 of which survived). As a simple matter of statistics, given the size of the dockets of the intermediate appellate courts, one would expect far more than three conflicting interlocutory decisions in a decade. This is especially true now given the recent and extensive legislative expansion of the jurisdiction of the courts of appeals over a wider variety of interlocutory orders. Tex. Civ. Prac. & Rem.Code § 51.014(a)(7) (allowing interlocutory appeal of order on special appearance, effective June 1997); § 51.014(a)(8) (allowing interlocutory appeal of order on governmental unit's plea to the jurisdiction, effective June 1997); § 15.003 (permitting appeal of interlocutory order on joinder or intervention, effective August 1995); see also City of Houston v. Lazell-Mosier, 5 S.W.3d 887, 890 n. 8 (Tex. App.--Houston [14th Dist.] 1999, no pet.) (noting "the considerable increase of interlocutory appeals to the already overcrowded dockets of our courts of appeals").
>
> Not only is this Court's conflicts jurisdiction more endangered than the Giant Panda, it is not predictable. Litigants, attorneys, and lower appellate courts cannot know with any reasonable certainty when a case is likely to be accepted on the basis of a conflict. Even the Court itself appears uncertain. In this calendar year alone, the Court has requested full briefing on the merits in nine cases before dismissing them for want of jurisdiction. Not surprisingly, some of the state's leading appellate practitioners have been perplexed in trying to divine the reasoning behind these unexplained dismissal orders. [Footnotes omitted]

Wagner & Brown, 53 S.W.3d at 350-51. (Hecht, J., dissenting).

The last few years reflect, even under the common law rule for conflicts jurisdiction, an upswing in the number of interlocutory appeals the Supreme Court considered based on conflicts jurisdiction. The Court took pains to explain why it had conflicts jurisdiction, and sometimes even why it did not. These explanations are informative, but the reasons expressed as to why conflicts jurisdiction is or is not present sometimes appear to be subjective. In many instances the issue was far from clear, as evidenced by the divergent views of members of the Supreme Court who dissent on jurisdictional grounds. *See Coastal Corp. v. Garza*, 979 S.W.2d 318, 319 (Tex. 1998) (5-3 split, no conflicts jurisdiction); *Surgitek v. Able*, 997 S.W.2d 598, 601 (Tex. 1999) (Court unanimously found conflicts jurisdiction); *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425 (Tex. 2000) (6-3 split in favor of exercising conflicts jurisdiction).

In *Bland I.S.D. v. Blue*, 34 S.W.3d 547 (Tex. 2000), six justices (Hecht, joined by Owen, Baker, Abbott, O'Neill, and Gonzales) found a conflict sufficient to support jurisdiction in an interlocutory appeal from the trial court's denial of a plea to the jurisdiction based on the plaintiffs' lack of standing to sue the school district. The conflict related to whether the trial court can consider evidence in determining a plea to the jurisdiction, or whether the plea should be determined from the pleadings alone. In *Bland,* the court of appeals held that only the pleadings and not the evidence could be considered. The Supreme Court majority found a prior decision where it had remanded a case for the court of appeals to determine whether there was factually sufficient evidence to support the trial court's ruling on a plea to the jurisdiction. Since that disposition could have occurred only if evidence could be considered on a plea to the jurisdiction, six justices in *Bland* found that this conflict supported the Supreme Court's jurisdiction. Chief Justice Phillips strongly disagreed in a dissenting opinion joined by Justices Enoch and Hankinson. The Chief Justice warned against "result-oriented" decisions and the need to resist the temptation to correct errors at a preliminary stage when jurisdiction was not invoked. *Id.* at 558.

In *Tex. Natural Resources Conservation Comm'n v. White,* 46 S.W.3d 864 (Tex. 2001), the Supreme Court was presented with an interlocutory appeal of a refusal to dismiss a claim based on sovereign immunity. The issue was whether a Tex. Natural Resources Conservation Commission's stationary

electric pump was "motor-driven equipment." If so, plaintiff could sue under the Texas Tort Claims Act. The Supreme Court majority found a prior court of appeals case upholding sovereign immunity because a pump is not "motor-driven equipment." Eight Justices (Justice Abbott, joined by Chief Justice Phillips, and Justices Hecht, Enoch, Owen, Baker, Hankinson and Jefferson), agreed that a conflict existed sufficient to support jurisdiction. Justice O'Neil dissented on the question of jurisdiction, saying:

> The issues this case raises are specialized, but important, and I understand the Court's interest in addressing them. Our jurisdiction, however, does not extend to every case in which we have an interest, or even to every case in which we believe the court of appeals erred. In this interlocutory appeal, we have jurisdiction to review the court of appeals' decision only if it directly conflicts with a decision of this Court or of another court of appeals. [Citation omitted] Upon closer inspection, the conflict upon which the Court bases its jurisdiction is no conflict at all. Because I would dismiss this petition for want of jurisdiction, I respectfully dissent.

46 S.W.3d at 870. Justice O'Neill was troubled that 1) the current case was determined on summary judgment, when the nature of the pumping device was not yet fully developed, while the previous case was determined after a trial, and 2) further because the motor in the current case was a portable pump used to remove gasoline fumes while the motor in the previous case was a stationary electric motor-driven pump used to maintain pressure in a city's water system.

In *Tex. Dep't of Crim. Justice v. Miller*, 51 S.W.3d 583, 586 (Tex. 2001), the Court found conflicts jurisdiction when one court of appeals required the trial court to determine whether the plaintiff's pleadings stated a claim under the Tort Claims Act, while another court of appeals said that a claim was made pursuant to the Texas Tort Claims Act without determining whether the plaintiff actually stated a claim.

In *Resendez v. Johnson*, 52 S.W.2d 689 (Tex. 2001), the Supreme Court granted the petitions for review in an interlocutory appeal to consider whether excessive corporal punishment may violate a student's substantive due process rights. But there was no dissent, and the Court concluded that the parties' jurisdictional arguments rely on conflicts that did not exist. Accordingly, the Court withdrew its order granting the petitions as improvidently granted, and dismissed the petitions for want of jurisdiction.

In *McAllen Med. Ctr., Inc. v. Cortez*, 66 S.W.3d 227 (Tex. 2001), the Court unanimously determined that it did not have conflicts jurisdiction because there were material factual and legal differences that legitimately distinguished the holdings of the two courts of appeals under consideration. The Supreme Court's decision to publish its views on the procedural issue of jurisdiction was helpful to practitioners who wish to better understand when conflicts jurisdiction exists.

In *Collins v. Ison-Newsome*, 73 S.W.2d 178 (Tex. 2001), the Court split 5-2-2 on the question of conflicts jurisdiction over an interlocutory appeal from the denial of a school district's motion for summary judgment based on immunity under the Texas Education Code. The Court's majority rejected one potential conflict "because the court in each case based its holding specifically on the sufficiency of the summary-judgment evidence, a highly fact-specific inquiry driven by the different nature of the claims in each case." *Id.* at 182. The Court's majority rejected another potential conflict with a prior *unpublished* opinion of another court of appeals, on the ground that TRAP 47.7 "mandates that unpublished opinions 'have no precedential value and must not be cited as authority by counsel or by a court.'" *Id.* at 180. In *Collins*, the Supreme Court requested full briefing on all issues, and the Court denied the petition for review, rather than dismissing it for want of jurisdiction, and denied the respondent's motion to dismiss. But the Court issued an opinion explaining why a majority of the justices voted that there was no jurisdiction:

> Although the votes of only four justices are needed to grant a petition for review, five votes are needed to render a judgment; thus when conflicts is the sole basis for jurisdiction over an interlocutory appeal, jurisdiction remains an issue until five justices agree that a case meets the conflicts standard. The author of the dissenting opinion has written previously that we should take a broader approach to the conflicts-jurisdiction standard. See, e.g., Coastal Corp. v. Garza, 979 S.W.2d 318, 323-24 (Tex.1998) (Hecht, J., dis-

> senting); Wagner & Brown v. Horwood, 53 S.W.3d 347 (Hecht, J., dissenting from denial of motion for rehearing of petition for review). But a majority of the Court continues to abide by the Legislature's clear limits on our interlocutory-appeal jurisdiction.

73 S.W.2d 182.

Justice Jefferson, joined by Justice Rodriguez, issued a concurring opinion in *Collins* saying that unpublished opinions should be considered on the issue of conflicts jurisdiction since such a use would not violate TRAP 47.7, and because a mere rule of procedure cannot alter the Court's jurisdiction. However, even using that standard Justice Jefferson did not find a conflict sufficient to support jurisdiction. *Id.* at 184-85.

Justice Hecht, joined by Justice Owen, dissented on the jurisdictional issue. Justice Hecht argued that decisions of various courts of appeals did in fact conflict. He also argued that the term "dissent jurisdiction" is a misnomer, since all that is required is a "disagreement" between court of appeals justices. Justice Hecht would permit conflicting opinions from different panels on the same court of appeals to afford the Supreme Court jurisdiction over the appeal of the interlocutory order. Justice Hecht also argued that unpublished opinions can support conflicts jurisdiction. *Id.* at 192. And Justice Hecht concludes that "[t]he Court's refusal to give its 'conflicts jurisdiction' functional content leaves Texas courts and litigants in a wasteful, costly uncertainty that is entirely avoidable." *Id.* at 192.

The Supreme Court's recent elimination of unpublished opinions should resolve the "do not publish" dispute on a going-forward basis. Perhaps not so clear is whether old "DNP" opinions can support conflicts jurisdiction.

In *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849 (Tex. 2002) (a suit on a contract against the State), all justices agreed that conflicts jurisdiction existed where the court of appeals found that the State waived sovereign immunity by engaging in conduct "beyond the mere execution of a contract," including requesting the contractor to perform services beyond the original contract. The Supreme Court found a conflict with *Ho v. University of Texas at Arlington*, 984 S.W.2d 672 (Tex. App.–Amarillo 1998, pet. denied), which found that the only waiver-by-conduct exception to sovereign immunity in contract suits was the state's filing suit. *Ho* is important because it gives the Supreme Court a ready-made conflict any time a court of appeals (other than in Amarillo) finds a "waiver-by-conduct" exception to sovereign immunity other than the State's filing suit.

In *Tex. Dep't of Transp. v. Ramirez*, 74 S.W.3d 864, 867 (Tex. 2002) (per curiam), the court of appeals ruled that the Texas Tort Claims Act permitted a suit against the state for defective highway median design, thereby creating a conflict with a prior Supreme Court decision holding that the Tort Claims Act does not waive sovereign immunity for roadway design, because it is a discretionary act.

In *Texas A & M University-Kingsville v. Lawson*, 87 S.W.3d 518 (Tex. 2002), the Supreme Court had jurisdiction over the denial of a motion to dismiss, where the court of appeals held "that state agencies waive their immunity from suit by accepting some of the benefits of a contract and refusing to pay for them," thus creating a conflict with *Ho v. University of Texas at Arlington*, 984 S.W.2d 672 (Tex. App.–Amarillo 1998, pet. denied).

In *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 686 (Tex. 2003) (5-3), Justice Hecht wrote for the majority that conflicts jurisdiction existed in an appeal from a class certification order in a business dispute with a software manufacturer. Justice O'Neill argued in dissent that the prior Supreme Court case purportedly creating the conflict was a personal injury case that was so different from the business case that a conflict did not arise. *Id.* at 702. Justice O'Neill also argued that the facts of the case were not so far upon the same set of facts as to overrule the earlier case. The dissent characterized the majority opinion as expanding the Court's "interlocutory-appeal jurisdiction beyond the clear parameters the Legislature has imposed." *Id.* at 703.

In *Austin State Hospital v. Fiske*, 106 S.W.3d 703 (Tex. 2003), (per curium), the Court opinion found conflicts jurisdiction over a motion to dismiss a tort claim against a state hospital, because "the court of appeals' decision in this case would operate to overrule Lee had they issued from the same court." The Court cited *Coastal Corp. v. Garza*, , 979 S.W.2d 318 (Tex. 1998), approvingly, on the standard for showing conflicts jurisdiction.

In *University of Texas Southwestern Medical Center at Dallas v. Loutzenhiser*, 140 S.W.3d 351 (Tex. 2004), the Court considered an appeal of an interlocutory order refusing to dismiss a tort claim against a state hospital because, among other things, the plaintiffs did not give notice of the claim as required by statute. Supreme Court jurisdiction was based on a conflict among the courts of appeals as to whether the requirement of notice to the defendant hospital is jurisdictional. *Id*. at 355, n. 17. The Supreme Court held that notice is not jurisdictional, and that the trial court's ruling was therefore not subject to interlocutory appellate review. Thus, the portion of the interlocutory appeal relating to notice should have been dismissed. Justice O'Neil, joined by Justices Schneider and Smith, agreed that conflicts jurisdiction existed on the question of whether the notice requirement is jurisdictional, but wrote a concurring opinion saying that the Supreme Court should not have reached substantive issues raised in the appeal since the Supreme Court decided that there was no jurisdiction to bring an interlocutory appeal to the court of appeals.

In *Snyder Communications, L.P. v. Magana*, 142 S.W.3d 295 (Tex. 2004), the Supreme Court had jurisdiction over the appeal of an order certifying a class, because the trial judge did not perform the rigorous analysis required by *Southwestern Refining Company, Inc. v. Bernal*, 22 S.W.3d 425 (Tex. 2000).

House Bill 4 signaled an intent on the part of the Legislature that the Supreme Court should take a less exacting approach to when conflicts jurisdiction exists. The language of the amendment is more like gentle pressure for the Supreme Court to grant review in more interlocutory appeals. If the Supreme Court remains conservative about these grants, perhaps the Legislature will need to amend Gov't Code § 22.225 to remove interlocutory appeals from the list of disputes where the court of appeals' judgment is conclusive.

VI. SUBJECT MATTER JURISDICTION. The Texas Supreme Court has borrowed from federal law the concepts of standing and ripeness as limitations on the power of courts to adjudicate claims. As explained below, standing and ripeness go to the court's jurisdiction, and so can be raised at any point even during appeal , and thus come within the jurisdictional power of the Supreme Court.

A. STANDING. "The general test for standing in Texas requires that there '(a) shall be a real controversy between the parties, which (b) will be actually determined by the judicial declaration sought.'" *Texas Ass'n. of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993) ["*TAB*"].

In *TAB*, the Supreme Court overruled a 1982 Texas Supreme Court case, and held that standing could be challenged for the first time on appeal, and could be raised sua sponte by the appellate court. *Id.* at 446. The Court ruled that "when a Texas appellate court reviews the standing of a party sua sponte, it must construe the petition in favor of the party, and if necessary, review the entire record to determine if any evidence supports standing." *Id.* at 446.

The standing issue frequently arises when a lawsuit is brought to challenge a state statute or actions of a governmental body, so limits on standing limit the range of litigants who can bring challenges to state law. The standing issue can be crucial in public interest litigation.

Standing became an issue in *McAllen Med. Ctr., Inc. v. Cortez*, 66 S.W.3d 227, 235 (Tex. 2001). The Supreme Court ruled that non-settling defendants have standing to appeal the certification of a settlement class if they can show that they are adversely affected by the class certification–a case-specific consideration.

The issue of standing arose in *West Orange-Cove Consol. I.S.D. v. Alanis*, 107 S.W.3d 558, 583 (Tex. 2003), where the Supreme Court held that the plaintiff appraisal districts had standing to challenge the constitutionality of Texas' system of funding for public education.

B. RIPENESS. In *Waco Independent School Dist. v. Gibson*, 22 S.W.3d 849, 851-52 (Tex. 2000), the Supreme Court described "ripeness" in the following way:

> Under the ripeness doctrine, we consider whether, at the time a lawsuit is filed, the facts are sufficiently developed "so that an injury has occurred or is likely to occur, rather than being contingent or remote." Thus the ripeness analysis focuses on whether the case involves "uncertain or contingent future events that may not occur as anticipated or may not occur at all." By focusing on whether the plaintiff

> has a concrete injury, the ripeness doctrine allows courts to avoid premature adjudication, and serves the constitutional interests in prohibiting advisory opinions. A case is not ripe when determining whether the plaintiff has a concrete injury depends on contingent or hypothetical facts, or upon events that have not yet come to pass. Because that is the case here, the trial court did not have jurisdiction to hear this dispute. [Footnotes omitted]

"While standing focuses on the issue of who may bring an action, ripeness focuses on when that action may be brought." *Gibson*, 22 S.W.3d at 851. "Ripeness is an element of subject matter jurisdiction. . . . As such, ripeness is a legal question subject to de novo review that a court can raise sua sponte." *Mayhaw v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998).

In *Perry v. Del Rio*, 66 S.W.3d 239, 249-50 (Tex. 2001), the Court said that "Ripeness concerns not only whether a court can act--whether it has jurisdiction--but prudentially, whether it should." And ripeness is to be measured at the time of adjudication, rather than when the suit was first filed. *Id.* at 250.

In *McAllen Med. Ctr., Inc. v. Cortez*, 66 S.W.3d 227 (Tex. 2001), the Supreme Court said that an order certifying a settlement-only class is ripe and appealable.

VII. PUBLIC SCHOOL FUNDING. In 2003, the Supreme Court decided *West-Orange Grove Consolidate I.S.D. v. Alanis*, 107 S.W.3d 558 (Tex. 2003), the fifth in a series of cases to be decided by the Supreme Court regarding the constitutionality of the Texas public school finance system. Tex. Const. art. VII, § 1 requires a free public education in Texas:

> A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.

However, Tex. Const. art. VIII, § 1-e provides that "no State ad valorem taxes shall be levied upon any property within this State." Texas public schools are funded by ad valorem taxes levied by local school districts under comprehensive state regulations that, among other things, cap the rates at which districts can tax and redistributes local revenue among districts. In *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 502 (Tex. 1992) [Edgewood III], the Supreme Court ruled that "[a]n ad valorem tax is a state tax when it is imposed directly by the State or when the State so completely controls the levy, assessment and disbursement of revenue, either directly or indirectly, that the [taxing] authority employed is without meaningful discretion." In *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 738 (Tex.1995) [Edgewood IV], the Supreme Court stated that "the State's control of this school funding system had not made local property taxes an unconstitutional state tax because school districts retained meaningful discretion in generating revenue, but we foresaw a day when increasing costs of education and evolving circumstances might force local taxation at maximum rates. At that point, we said, the conclusion that a state property tax had been levied would be 'unavoidable'." *Alanis*, 107 S.W.3d at 562. In *Alanis*, four school districts claimed that they have been forced to tax at maximum rates set by statute in order to educate their students, with the result that these taxes have become indistinguishable from a state ad valorem tax prohibited by Tex. Const. Art. VIII, § 1-e. The case was dismissed on the pleadings by the trial court, and the dismissal was affirmed by the court of appeals on the grounds that the plaintiffs failed to state a cause of action. The Supreme Court reversed and remanded the case, saying that a dismissal on the pleadings required the State of Texas to prove as a matter of law that the plaintiffs' allegations were false, which it did not do.

On remand, Edgewood Independent School District intervened in the litigation and broadened the issues in the case. On November 30, 2004, Travis County District Judge John Deitz Judge Dietz ruled that: (1) the school finance system operates as a state property tax in violation of Article VIII, §1-e because the school districts lack meaningful discretion in setting their tax rates; (2) the money available to school districts is insufficient to allow them to provide a general diffusion of knowledge under Article VII, §1; (3) inequity in facilities funding among school districts violates the efficiency mandate of Article VII, §1; and (4) inequities in maintenance and operations funding did not rise to the level of a constitutional violation. The injunction was conditioned that the Legislature did not cure the constitutional defect

by October 1, 2005. On February 18, 2005, the Supreme Court granted a direct appeal of this decision. *See* Cause No. 04-1144. Petitioner's Reply to Respondent's brief is due on May 31, the day after the current legislative session ends. As the State's Statement of Jurisdiction points out, prior state education appeals have dealt with two issues: whether the school finance system is "efficient," and whether the system amounts to a state property tax. This appeal also includes whether the system provides a "general diffusion of knowledge."

VIII. DISCOVERY SANCTIONS. In *TransamericanNatural Gas Corp. v. Powell*, 811 S.W.2d 913 (Tex. 1991), the Supreme Court announced due process of law standards for imposing "death penalty" discovery sanctions. As explained in *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 850 (Tex. 1992): "first, a direct relationship between the offensive conduct and the sanction imposed must exist; and second, the sanction imposed must not be excessive." In *Spohn Hosp. v. Mayer*, 104 S.W.3d 878, 883 (Tex. 2003), the Supreme Court reversed a trial court for instructing the jury to take, as true, the plaintiff's contention that the hospital ignored four calls from the dying patient seeking aid. The hospital also was prohibited from offering the testimony of two nurses that calls for aid were not ignored. The discovery sanction was imposed because the hospital withheld statements of staff members based on attorney work product, then 31 days before trial changed its mind and produced the statements. Citing *Transamerican*, the Supreme Court held that the sanctions were excessive, and the case was remanded for a new trial.

In *GTE Communications Systems Corp. v. Tanner*, 856 S.W.2d 725, 729 (Tex. 1993), the Court said that "[c]ase determinative sanctions may be imposed in the first instance only in exceptional cases when they are clearly justified and it is fully apparent that no lesser sanctions would promote compliance with the rules." In *Cire v. Cummings*, 134 S.W.3d 835 (Tex. 2004), the Supreme Court held that a trial court did not abuse its discretion in striking a plaintiff's pleadings as a sanction without first testing the effectiveness of lesser sanctions, where the plaintiff violated the trial court's orders by deliberately destroying dispositive evidence sought by the defendant in discovery.

These two recent cases decided by the Supreme Court reflect a continuing vitality of the standards for discovery sanctions set out by the Court in the early 1990s.

IX. MANDAMUS REVIEW. Here are the statistics regarding the granting of review in mandamus cases over a 7 year period:

Mandamus Review Granted

FY 1998	7.18%	(23 of 320)
FY 1999	4.49%	(13 of 289)
FY 2000	2.08%	(6 of 288)
FY 2001	2.84%	(7 of 246)
FY 2002	7.43%	(20 of 269)
FY 2003	5.30%	(14 of 264)
FY 2004	5.48%	(13 of 237)

(1998-1999 are taken from Justice Priscilla Owen's June 21, 2002 speech at the State Bar's PRACTICE BEFORE THE SUPREME COURT OF TEXAS COURSE; later numbers are from the Office of Court Administration's Annual Reports)

Internal court rules require the affirmative vote of five justices to grant a petition for mandamus, as compared to four justices to grant a petition for review. It is apparent that, given the low percentage of mandamus applications granted by the Supreme Court, as a practical matter, the court of appeals is the court of law resort in most mandamus proceedings.

Although the percentage of mandamuses granted by the Supreme Court is low, the range of instances in which mandamus is granted has been expanding. In the last decade, the Supreme Court has issued several mandamuses outside of traditional limits. Former Justice James Baker, when he served on the Court, was a bellweather sounding when the Supreme Court did not abide by traditional restrictions on mandamus. Since Justice Baker's retirement, when mandamus review has been granted, the Court usually reaffirms the traditional restrictions on mandamus, then explains why they do or do not apply.

The lack of clear lines around the mandamus remedy is reflected in a per curiam opinion issued in the case of *In re TXU Elec. Co.*, 67 S.W.3d 130 (Tex. 2001) (per curiam), which said:

> Six members of the Court vote to deny relief for different reasons. Chief Justice Phillips, joined by Justice Enoch and Justice Godbey, would not exercise mandamus jurisdiction because TXU has an adequate remedy at law. Justice Baker, joined by Justice RODRIGUEZ, would

> hold that the relief TXU seeks is against the Commission, over which the Court has no original mandamus jurisdiction. Justice Brister would hold that the portions of the Commission's orders of which TXU complains do not constitute a clear abuse of discretion. Justice Hecht, joined by Justice Owen and Justice Jefferson, would grant relief.
>
> The petition for writ of mandamus is denied.

Chief Justice Phillips issued a concurring opinion, joined by Justice Enoch and Assigned Justice Godbey, saying that he believed the Supreme Court had the power to mandamus a board of state officers, but he opposed mandamus because TXU did not establish that it had no adequate remedy at law. Justice Baker, joined by Justice Rodriguez, concurred in the judgment only, saying that long-standing precedent establishes that the Supreme Court does not have jurisdiction to issue mandamus against a board of state officers. Then-Assigned Justice Brister issued a concurring opinion in which he stated that no adequate remedy at law existed, but that in his view mandamus was not warranted because there was no clear abuse of discretion or violation of a legal duty. Justice Hecht, joined by Justices Owen and Jefferson, dissented, arguing that the Supreme Court had jurisdiction to mandamus the individual members of the Public Utility Commission, and that there was an abuse of discretion and no adequate remedy by appeal. The fact that the justices can have so many views on the availability of mandamus is a symptom of the lack of clear rules on when mandamus is and is not available.

A. TRADITIONAL CONTOURS OF MANDAMUS. In *Johnson v. Fourth District Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985), the Supreme Court said this about the availability of mandamus:

> Although the writ of mandamus is a discretionary remedy, its use is subject to certain conditions. . . . . Namely, the court of appeals may issue writs of mandamus "agreeable to the principles of law regulating those writs." TEX.GOV'T CODE § 22.221(b). Mandamus issues only to correct a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy by law. State v. Walker, 679 S.W.2d 484, 485 (Tex.1984). The court of appeals, therefore, acts in excess of its writ power (abuses its discretion) when it grants mandamus relief absent these circumstances. See Peeples v. Fourth Court of Appeals, --- S.W.2d ---- (Tex.1985); Ginsberg v. Fifth Court of Appeals, 686 S.W.2d 105 (Tex.1985).
>
> A trial court, on the other hand, abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law.

The Court went on to say:

> A relator who attacks the ruling of a trial court as an abuse of discretion labors under a heavy burden. Lutheran Social Services, Inc. v. Meyers, 460 S.W.2d 887, 889 (Tex.1970). The relator must establish, under the circumstances of the case, that the facts and law permit the trial court to make but one decision. This determination is essential because mandamus will not issue to control the action of a lower court in a matter involving discretion.

Johnson, 700 S.W.2d at 917. "In order to find an abuse of discretion, the reviewing court must conclude that the facts and circumstances of the case extinguish any discretion in the matter." *Id.* at 918.

In 1969, Chief Justice Calvert warned against issuing mandamus to control incidental rulings of a trial judge when there is an adequate remedy by appeal. In *Pope v. Ferguson*, 445 S.W.2d 950, 954 (Tex. 1969), Chief Justice Calvert wrote:

> Having entered the thicket to control or correct one such trial court ruling, the appellate courts would soon be asked in direct proceedings to require by writs of mandamus that trial judges enter orders, or set aside orders, sustaining or overruling . . . a myriad of interlocutory orders and judgments; and, as to each, it might logically be argued that the petitioner for the writ was entitled, as a matter of law, to the action sought to be compelled.

In many respects we are now in the thicket. At the Supreme Court level, however, nearly all mandamus petitioners are turned down. The petitions

keep the Court's mandamus staff attorney busy but rarely bear fruit.

B. ABUSE OF DISCRETION. As noted above, at one point in time, abuse of discretion for purposes of mandamus occurred when "the facts and circumstances of the case extinguish any discretion in the matter." *Johnson*, 700 S.W.2d 918. However, that definition of abuse of discretion has been relaxed to the point where it may require little more than a showing that the trial court made a mistake of law. For example, in the mandamus case of *NCNB Tex. Nat'l Bank v. Coker*, 765 S.W.2d 398, 400 (Tex. 1989), the Court said that the "failure to apply the proper standard of law to the motion to disqualify counsel was an abuse of discretion." In *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992), the Court said:

> A trial court has no "discretion" in determining what the law is or applying the law to the facts. Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion, and may result in appellate reversal by extraordinary writ.

In *CSR Ltd. v. Link*, 925 S.W.2d 591, 596 (Tex. 1996), the Supreme Court granted mandamus saying that the trial court abused its discretion in denying a special appearance "[b]ecause the trial court exceeded the limitations imposed by the Due Process Clause of the federal Constitution."

In *Huie v. DeShazo*, 922 S.W.2d 920, 927 (Tex. 1996), the Court said that "[a] trial court has no 'discretion' in determining what the law is or applying the law to the facts."

In *Perry v. Del Rio*, 66 S.W.3d 239 (Tex. 2001), the Supreme Court issued mandamus, because "the district court's failure to follow that law, even though its application was uncertain, was a clear abuse of discretion."

In the case of *In re American Homestar of Lancaster, Inc.*, 50 S.W.3d 480, 483 (Tex. 2001), the Supreme Court said that "[a] trial court has no discretion to determine what the law is or in applying the law to the facts, and, consequently, the trial court's failure to analyze or apply the law correctly is an abuse of discretion." Given this view, abuse of discretion for mandamus purposes amounts to an error of law in a pretrial ruling.

The Supreme Court issued mandamus setting aside a court of appeals mandamus requiring a trial court to disqualify lawyers who viewed privileged information with the permission of the trial judge. *In re Nitla S.A. de C.V.*, 92 S.W.3d 419, 420 (Tex. 2002). The Supreme Court explained that the court of appeals had "misapplied the law." *Id.* at 420.

Occasionally mandamus will issue where the trial court fails to exercise discretion at all. For example, in *Crane v. Tunks*, 328 S.W.2d 434 (Tex. 1959), the trial court was mandamused for granting discovery of allegedly-privileged documents without looking at them to determine which portion were privileged.

C. NO ADEQUATE REMEDY AT LAW. Mandamus will not issue where there is "a clear and adequate remedy at law, such as a normal appeal." *State v. Walker*, 679 S.W.2d 484, 485 (Tex. 1984). Mandamus will issue "only in situations involving manifest and urgent necessity and not for grievances that may be addressed by other remedies." *Holloway v. Fifth Court of Appeals*, 767 S.W.2d 680, 684 (Tex. 1989). As stated in *Canadian Helicopters Ltd. v. Wittig*, 876 S.W.2d 304, 306 (Tex. 1994):

> This requirement is met only when parties are in danger of permanently losing substantial rights. It is not satisfied by a mere showing that appeal would involve more expense or delay than obtaining a writ of mandamus.

In *United Mexican States v. Ashley*, 556 S.W.2d 784 (Tex. 1977), the Supreme Court granted mandamus to overturn a trial court's denial of a special appearance by the country of Mexico. The reason for allowing mandamus review was the involvement of sovereign immunity and comity. *See Canadian Helicopters Ltd. v. Wittig*, 876 S.W.2d 304, 306 (Tex. 1994) (explaining why mandamus was available in *Ashley* despite the remedy of appeal).

In *Canadian Helicopters, Ltd. v. Wittig*, 876 S.W.2d 304, 306 (Tex. 1994), the Supreme Court said that to be entitled to a writ of mandamus, relators must demonstrate that the adverse ruling on forum non conveniens placed them in the position of permanently losing a substantive right.

In *National Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 776 (Tex. 1995), a bare majority of

the Supreme Court granted mandamus to overturn the denial of a special appearance, saying that the "total and inarguable absence of jurisdiction" justified extraordinary relief, and that "[a]n ordinary appeal is inadequate to remedy the irreparable harm to NISA caused by the trial court's denial of the special appearance." Justice Cornyn, joined by Chief Justice Phillips, and Justices Gammage and Enoch, dissented on the ground that the relator had not shown that appeal was an inadequate remedy. *Id.* at 777.

In *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996), the Supreme Court granted mandamus to overturn a trial court's refusal to dismiss a law suit brought against an evangelist, because the case involved "important issues related to constitutional protections afforded by the First Amendment which an appeal cannot adequately protect . . . ," and the trial itself and not just the imposition of an adverse judgment would violate the constitution.

In *CSR Ltd. v. Link*, 925 S.W.2d 591, 596 (Tex. 1996), the Supreme Court granted mandamus to set aside the denial of a special appearance because "[m]ass tort litigation such as this places significant strain on a defendant's resources and creates considerable pressure to settle the case, regardless of the underlying merits. . . . The large number of lawsuits to which CSR could potentially be exposed is significant to our determination that appeal is not an adequate remedy in this case." Justice Baker dissented, saying that mandamus had been held available on special appearance only for "cases involving sovereign immunity, comity and the parent-child relationship." *Id.* at 599.

In the case of *In re Smith Barney, Inc.*, 975 S.W.2d 593, 597 (Tex. 1998), a majority of the Supreme Court declined to issue mandamus to overturn a trial court's refusal to dismiss based on forum non conveniens, on the grounds that there was no abuse of discretion because the trial court followed controlling law. In the process of denying relief, the majority announced that it was overruling the prior Supreme Court case that the trial judge had relied upon. Justice Hankinson concurred, joined by Justices Enoch, Spector, and Baker, criticizing the majority's opinion as creating "an ultra vires interlocutory appeal" since it essentially granted the relief the relator wanted, to overturn the adverse precedent, so that the relator could go back to the trial court and presumably win a dismissal.

In *Deloitte & Touche, LLP v. Fourteenth Court of Appeals*, 951 S.W.2d 394, 398 (Tex. 1997), the Supreme Court considered an argument that the inability to obtain appellate review from the Supreme Court of an interlocutory order (because there was no dissent or conflict) meant that there was no adequate remedy at law. In an Opinion by Justice Enoch, joined by seven justices, the Court commented:

> We do not preclude the possibility that in an interlocutory appeal context we might issue mandamus against a court of appeals for procedural irregularities or for actions taken by a court of appeals so devoid of any basis in law as to be beyond its power. But in such cases, we would not be reviewing questions of law over which the court of appeals has final authority; instead, we would be reviewing extraordinary circumstances causing irreparable harm and precluding an adequate remedy by appeal.

Justice Spector disagreed, arguing against mandamus review even in such a situation. *Id.* at 398.

In the case of *In re Masonite Corp.*, 997 S.W.2d 194, 197 (Tex. 1999), Justices Enoch, Hecht, Owen, Abbott, and assigned Justice Chew voted to grant mandamus to set aside a trial court order transferring venue improperly, saying:

> [O]n rare occasions an appellate remedy, generally adequate, may become inadequate because the circumstances are exceptional. Specifically, a trial court's action can be " 'with such disregard for guiding principles of law that the harm ... becomes irreparable.' "

This formulation subsumes the adequate remedy condition into the abuse of discretion question. The majority went on to justify its position:

> Contrary to the dissent's charge, we do not retreat from Walker v. Packer's requirement that there be no adequate appellate remedy before mandamus will issue. . . . The dissent views this requirement as inflexible, focusing exclusively on whether the parties alone have an adequate appellate remedy. But Walker does not require us to turn a blind eye to blatant injustice nor does it mandate that we be an accomplice to sixteen trials that

> will amount to little more than a fiction. Appeal may be adequate for a particular party, but it is no remedy at all for the irreversible waste of judicial and public resources that would be required here if mandamus does not issue.

In re Masonite Corp., 997 S.W.2d at 198. Justice Baker dissented, joined by Chief Justice Phillips, Justice O'Neill, and Justice Gonzales, on the ground that mandamus was precluded by an adequate remedy of appeal.

In the case of *In re State Bar*, 113 S.W.3d 730, 733 (Tex. 2003), mandamus was available because a district court was interfering with the Board of Disciplinary Appeals' jurisdiction over a lawyer whose license had been suspended. The Court likened the matter to *In re SWEPI, L.P.*, 85 S.W.3d 800 (Tex. 2002), where the Court granted mandamus relief because the probate court in question erroneously interfered with another court's jurisdiction.

In the case of *In re Entergy Corp.*, 142 S.W.3d 316 (Tex. 2004), the Court issued mandamus directing the trial court to grant the relator's motion to dismiss, on the ground that exclusive jurisdiction of the dispute lies with the Public Utilities Commission. The Opinion by Justice Smith reiterates the general rule that mandamus does not lie to correct incidental trial court rulings when there is a remedy by appeal. *Id.* at 320. The Opinion notes that the reluctance to issue extraordinary writs to correct incidental trial court rulings can be traced to a desire to prevent parties from attempting to use the writ as a substitute for an authorized appeal. "This Court has long held that the mere cost and delay of pursuing an appeal will not, in themselves, render appeal an inadequate alternative to mandamus review." *Id.* at 321. The Opinion notes several instances where preliminary rulings by the trial court were subjected to mandamus, but explained that mandamus was issued "not merely because inaction would have caused hardship to the parties, but because special, unique circumstances mandated the Court's intervention." *Id.* at 321. According to the Court, in the present case, the mere fact that the relator would be forced to endure the "hardship" of a full-blown trial, in itself, not sufficient to dictate mandamus relief. However, trial in court would interfere with the important legislatively mandated function and purpose of the PUC, and with this additional factor, mandamus was available. *Id.* at 321.

In the case of *In re Kansas City Southern Industries, Inc.*, 139 S.W.3d 669 (Tex. 2004), the Court was asked to determine whether mandamus is appropriate to resolve a dispute about who is entitled to certain settlement proceeds. The relator argued that its remedy by appeal is inadequate because the trial court's erroneous ruling had improperly deprived it of the "valuable use" of its own money. The Court wrote that the relator's complaint was not "the permanent loss of substantial rights; it is really only a complaint that the normal appellate remedy is too slow. As we have repeatedly held, the cost or delay incident to pursuing an appeal does not make the remedy inadequate." *Id.* at 670. Thus, mandamus was not available. Justice Hecht added a concurring Opinion in which he described the trial court's actions as "astonishing," and that the refusal to issue mandamus should not be taken as affirmation that the trial court acted properly. Since the court of appeals had denied mandamus, there was no compelling reason for the Supreme Court to issue an opinion saying it could not issue mandamus due to an adequate remedy by appeal, other than by way of reminder to the bar.

The Supreme Court has long recognized an exception to the rule that appeal is an adequate remedy in child custody jurisdictional disputes. The Supreme Court came close to articulating the exception in *Geary v. Peavy*, 878 S.W.2d 602 (Tex. 1994):

> In *Dikeman v. Snell*, 490 S.W.2d 183, 186 (Tex. 1973), we held that void or invalid trial court judgments rendered without jurisdiction could be challenged by mandamus, even though the relator failed to pursue an available appellate remedy. We have not directly addressed whether the Dikeman rule survives Walker, and we find it unnecessary to decide that broad issue here. Regardless of whether the Dikeman rule still generally prevails, the unique and compelling circumstances of this case dictate that it be applied here to resolve this jurisdictional dispute that has led to conflicting child custody orders.). *See Little v. Daggett*, 858 S.W.2d 368, 369 (Tex. 1993) ("Ordinarily, mandamus is not an appropriate remedy for errors in subject matter jurisdiction because there is an adequate remedy by appeal. Bell Helicopter Textron v. Walker, 787 S.W.2d 954 (Tex.1990). However, in this case, the order granting visitation was a temporary order. Such orders are not appealable.").

See Rush v. Stansbury, 668 S.W.2d 690, 691 (Tex. 1984) (mandamus granted to require delivery of minor child pursuant to writ of habeas corpus, despite fact that final custody decree was on appeal to court of appeals).

D. PRESENTMENT TO THE COURT OF APPEALS. Tex. R. App. P. 52.3(e) requires that, if the Supreme Court and court of appeals have concurrent jurisdiction, an original proceeding such as mandamus must be presented first to the court of appeals "unless there is a compelling reason not to do so."

In *Thiel v. Harris County Democratic Executive Committee*, 534 S.W.2d 891 (Tex. 1976), the Supreme Court entertained mandamus without prior presentment to the court of appeals, because the case had statewide application, and there existed an opinion on the issue by a divided court of civil appeals in another district.

In *Sears v. Bayoud*, 786 S.W.2d 248, 249-250 (Tex. 1990), the Supreme Court said that the appellate rule "does not stand as an absolute bar to the filing of a petition in the supreme court without having first filed in the court of appeals." In this election-related mandamus the Supreme Court said that the statewide nature of the issue and the nearness of the election permitted the Supreme Court to proceed without presentment to the court of appeals.

In *Republican Party of Texas v. Dietz*, 940 S.W.2d 86, 94-94 (Tex. 1997), the Supreme Court afforded mandamus review without prior presentment to the court of appeals because "[t]he district court's injunction affected a statewide political convention and was based on claims of statewide importance. The state's highest court should determine such issues."

In *Perry v. Del Rio*, 66 S.W.3d 239, 257 (Tex. 2001), the Supreme Court granted a petition for mandamus without prior presentment to the court of appeals due to an impending federal court deadline relating to reapportionment of Congressional districts.

In the case of *In re State Bar*, 113 S.W.3d 730, 733 (Tex. 2003), the Supreme Court did not require presentment of the mandamus request to the court of appeals, because the mandamus request presented issues of statewide importance (the interference by a district court in the regulation of the legal practice), and because the district court who was targeted in the mandamus proceeding had disregarded an earlier Supreme Court judgment affirming the Board of Disciplinary Appeals' decision relating to the attorney in question. The Court said that the relator had presented "compelling reasons" for bypassing the court of appeals and seeking mandamus relief directly from the Supreme Court.

In *In re Newton*, 146 S.W.3d 648 (Tex. 2004), the Supreme Court granted mandamus without requiring presentment to the court of appeals where a Travis County District Judge had, 13 days before an election, granted a TRO to prohibit a Republican PAC from receiving or spending corporate funds on the election, then set the temporary inunction hearing the day after the election.

E. DISCOVERY MATTERS. "[M]andamus will issue to correct a discovery order if the order constitutes a clear abuse of discretion and there is no adequate remedy by appeal." *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941 (Tex. 1998).

1. When Appeal is not Adequate. In *Walker v. Packer*, 827 S.W.2d 833, 843-44 (Tex. 1992), the Supreme Court discussed when there is no adequate remedy at law regarding a discovery dispute. The Court said the "an appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining an extraordinary writ." 827 S.W.2d 842. Here are three instances where there would be no adequate remedy at law:

(1) "the appellate court would not be able to cure the trial court's discovery error. This occurs when the trial court erroneously orders the disclosure of privileged information which will materially affect the rights of the aggrieved party, such as documents covered by the attorney-client privilege, . . . or trade secrets without adequate protections to maintain the confidentiality of the information";

(2) "where the party's ability to present a viable claim or defense at trial is vitiated or severely compromised by the trial court's discovery error." The Supreme Court said that "[i] is not enough to show merely the delay, inconvenience or expense of an appeal. Rather, the relator must establish the effective denial of a reasonable opportunity to develop the merits of his or her case, so that the trial would be a waste of judicial resources."; and

(3) "where the trial court disallows discovery and the missing discovery cannot be made part of the appellate record, or the trial court after proper request refuses to make it part of the record, and the reviewing court is unable to evaluate the effect of the trial court's error on the record before it."

Id. at 844.

In the case of *In re E.I. DuPont de Nemours and Co.*, 136 S.W.3d 218 (Tex. 2004), the Court issued a discovery-related mandamus. The Court held that an affidavit by a legal assistant, attesting to his review of the DuPont human resources database for the legal department as a basis for establishing attorney-client and work product privilege, was sufficient to constitute a prima facie showing of privilege, thus requiring the trial court to conduct an in camera inspection of the documents before disclosing them. As to the adequate remedy at law issue, the Court said: "Mandamus is proper when the trial court erroneously orders the disclosure of privileged information because the trial court's error cannot be corrected on appeal. . . . As DuPont would lose the benefit of the privilege if the documents at issue are disclosed, even if its assertions of privilege were later upheld on appeal, we conclude that this Court may provide mandamus relief in this case." *Id.* at 223.

In the case of *In re CSX Corp.*, 124 S.W.3d 149, 153 (Tex. 2003) (per curiam), the Supreme Court said that "where a discovery order compels production of 'patently irrelevant or duplicative documents,' . . . there is no adequate remedy by appeal because the order 'imposes a burden on the producing party far out of proportion to any benefit that may obtain to the requesting party.'"

2. Abuse of Discretion in Discovery Rulings. In *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992), the Supreme Court said, in the context of discovery mandamus, that "[a] trial court clearly abuses its discretion if 'it reaches a decision so arbitrary and so unreasonable as to amount to a clear and prejudicial error.'" The appellate court cannot substitute its judgment on factual issues or matters committed to the trial court's discretion. But less deference is required for the legal principles controlling the trial court's ruling. There is no discretion in interpreting the law or in applying the law to the facts. *Id*. at 840-41.

In the case of *In re Ford Motor Co.*, 124 S.W.3d 147 (Tex. 2003) (per curiam), Ford sought mandamus relief from a trial court order requiring Ford to produce certain databases for examination by the plaintiffs' counsel and experts. However, the order did not provide specific search procedures for the production but stated that, failing agreement of the parties, the trial court would issue an order detailing the search methodology. Since that second order had not been issued, the Supreme Court denied Ford's mandamus request as being premature. The Opinion seems to serve no purpose other than to signal to the parties that mandamus was not being denied based on the merits of the issue. Absent that explanation, Ford likely would have assumed that the trial court's order was not mandamusable.

3. Interrogatories and Document Production. In the case of *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003) (per curiam), the Court issued mandamus to protect against interrogatories that were overbroad and irrelevant, saying that "[d]iscovery orders requiring document production from an unreasonably long time period or from distant and unrelated locales are impermissibly overbroad."

In the case of *In re Dana Corp.*, 138 S.W.3d 298 (Tex. 2004) (per curiam), the Court was asked to mandamus a trial court order requiring the defendant in asbestos litigation to produce all of its liability insurance policies since 1930. The Supreme Court determined that the order was overbroad, and issued mandamus for the trial court to restrict production to policies that are shown to be applicable to a potential judgment. The Supreme Court held that it was within the trial court's power to order the relator to produce a knowledgeable witness for deposition to testify regarding such insurance policies. The Court looked to federal decisions, interpreting the equivalent federal Rule of Procedure, in arriving at its decision.

4. Trade Secrets. In the case of *In re Continental Gen. Tire, Inc.*, 979 S.W.2d 609, 613 (Tex. 1998), the Supreme Court held that where a party resisting discovery establishes that the information sought is a trade secret, the burden then shifts to the requesting party to establish that the information is necessary for a fair adjudication of its claims. If the requesting party meets this burden, then the trial court should ordinarily compel disclosure of the information, subject to an appropriate protective order. However, in each circumstance, the trial court must weigh the degree of the requesting party's need for the information with

the potential harm of disclosure to the resisting party.

The Supreme Court issued mandamus to protect trade secrets in that case of *In re Bridgestone/Firestone, Inc.*, 106 S.W.3d 730, 732 (Tex. 2003), where the Court held that a tire manufacturer's skim stock formula was not discoverable. In the case of *In re Bass*, 113 S.W.3d 735, 745 (Tex. 2003), the Supreme Court issued mandamus to protect geological seismic data as trade secrets as against non-participating royalty interest owners who failed to establish the existence of a claim against the mineral estate owner justifying discovery of the trade secret data.

The Supreme Court also issued mandamus to protect trade secrets in *In re Kuntz*, 124 S.W.3d 179, 180 (Tex. 2003). The Court's Opinion was written by Justice Smith, in which Chief Justice Phillips, Justice Hecht, Justice Owen, Justice Jefferson, Justice Schneider, Justice Wainwright, and Justice Brister joined. However, Justice Hecht filed a concurring opinion, in which Justice Owen, Justice Schneider, and Justice Wainwright joined. Justice Wainwright filed his own concurring opinion. And Justice O'Neill concurred in the judgment only. According to Justice Smith, the Court was asked to "decide a question of first impression regarding the proper interpretation and application under the Texas Rules of Civil Procedure of the phrase "'possession, custody, or control.'" *Id.* at 180. The Court held that "mere access" to information that is in a party's possession, but that belongs to someone else, does not constitute "physical possession" for discovery purposes. The Court reiterated its long-standing view that "[a] party will not have an adequate remedy by appeal when the appellate court would not be able to cure the trial court's discovery error" (citing *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 942-43 (Tex. 1998), and *Walker*, 827 S.W.2d at 843). Since the trial court's order would require the disclosure of confidential information of a third party, putting the relator in violation of a contractual confidentiality agreement, thus exposing him to damages, appeal was not an adequate remedy. Justice Hecht's concurring opinion goes on to declare the information in question a trade secret, protected from discovery even if requested from the third party. *Id.* at 185. Justice Wainwright's Opinion notes that the third party participated in the trial court proceeding by filing objections, etc., and may not have had a second bite at the apple if this mandamus had not been granted. *Id.* at 188.

F. OTHER RECENT MANDAMUS CASES.

- In the case of *In re Woman's Hosp. of Texas, Inc.*, 141 S.W.3d 144 (Tex. 2004), Justice Owen, joined by Justices Hecht and Brister, filed a concurring and dissenting opinion to the denial of three mandamus petitions, arguing that mandamus relief should be available under former article 4590i when a trial court fails to dismiss a health care liability claim after the time for filing an expert report has come and gone, and a report meeting the statutory requirements has not been supplied. Justice Owen wrote:

  > While I appreciate that the Court may fear that granting mandamus relief in health care liability cases could give rise to arguments in other types of cases that we should alter or relax the standards for granting mandamus relief set forth in Walker v. Packer, any such fear does not justify withholding relief in health care liability cases for at least three reasons. The first is that granting mandamus is entirely consistent with Walker v. Packer and cases following it for the reasons discussed above. The second reason is that the Court is free to reject arguments in other types of cases that we should alter or relax the Walker v. Packer requirements for mandamus as a general proposition. The third and most important reason is that we are faced with clearly articulated legislative policy that health care liability claims are to be dismissed unless there is an adequate expert report, and the Legislature has concluded that this requirement is a necessary part of a plan to confront what the Legislature perceives to be a crisis in this state. [footnote omitted]

- *In re Mitcham*, 133 S.W.3d 274 (Tex. 2004) (per curiam), is a lawyer disqualification case where the Supreme Court denied mandamus, but explained in great detail why the lawyer in question was disqualified as a result of a confidentiality agreement.

- *In re Wood*, 140 S.W.3d 367 (Tex. 2004)–agreement contained an arbitration clause providing that all disputes arising from the agreement will be arbitrated. Thus, the arbitrator and not the court must determine all class action issues. Since the agreement was

under the Federal Arbitration Act, and interlocutory appeal is not available, there is no adequate remedy at law and mandamus is available.

- In the case of *In re Forlenza*, 140 S.W.3d 350 (Tex. 2004), the Court granted mandamus against the court of appeals, which had issued mandamus directing the trial court to dismiss a child custody modification case for lack of jurisdiction. The court of appeals was wrong as to jurisdiction, so the Supreme Court issued mandamus for the court of appeals to set aside its order.

- On June 11, 2004, the Supreme Court granted review of a mandamus proceeding in the case of *In re Living Centers of Texas Inc.*, No. 04-0176, a health care liability case. The principal issue is whether privileges based on a nursing home's peer review committee and quality assurance plan bar discovery of mostly nursing staff employment records. The case was submitted on September 9, 2004, and has not been decided at the time of this article.

X. SUMMARY JUDGMENT APPEALS.

A. FINALITY AND APPEALABILITY. Back in the "early days," appellate courts had problems with finality of judgments. In multi-party or multi-claim cases, a judgment would be signed that failed to adjudicate some claim by some party, resulting in the judgment being interlocutory and non-appealable. In *North East Indep. Sch. Dist. v. Aldridge*, 400 S.W.2d 893, 897-98 (Tex. 1966), the Supreme Court announced 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, appellate courts may presume that the trial court intended to, and did, dispose of all issues raised by the pleadings between parties and all parties legally before it. The Supreme Court also made the following fateful suggestion: "Of course, the problem can be eliminated entirely by a careful drafting of judgments to conform to the pleadings or by inclusion in judgments of a simple statement that all relief not expressly granted is denied." Lawyers dutifully started including this so-called "Mother Hubbard clause" at the end of their judgments, to achieve finality. The clause would read something like "All other requested relief not hereby granted is hereby denied."

The rule announced in *Aldridge* was clearly to be applied to judgments signed after a conventional trial on the merits. However, lawyers started using the Mother Hubbard clause in summary judgment orders, creating much confusion. In some multi-party and multi-claim lawsuits, when someone moved for a partial summary judgment, or a summary judgment as against some parties but not others, and the summary judgment was granted, some diligent lawyer would include in the summary judgment order language purporting to dispose of all claims and parties. This created an appearance that issues were adjudicated that actually were not, and parties sometimes did not know that an appealable order has been entered. In an attempt to draw a bright line rule to simply this confusion, the Supreme Court in *Mafrige v. Ross*, 866 S.W.2d 590 (Tex.1993), said that a summary judgment is final if it contains language purporting to dispose of all claims and parties. The Court said: "If the judgment grants more relief than requested, it should be reversed and remanded, but not dismissed. We think this rule to be practical in application and effect; litigants should be able to recognize a judgment which on its face purports to be final, and courts should be able to treat such a judgment as final for purposes of appeal. " *Id.* at 592. As it turned out, lawyers were sometimes not able to recognize a final summary judgment, and the rule was not practical in application or effect.

After the Supreme Court Rules Advisory Committee had "knocked heads" for a year over how to solve the problem, the Supreme Court decided in *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191 (Tex. 2001), to try a different approach to the problem. The Court overruled *Mafrige* and fashioned a new rule regarding the finality of summary judgment orders. The Court held that the inclusion of "Mother Hubbard" language in an order issued without a full trial cannot be taken as an indication of finality. *Id*. at 194, 203. The Court indicated that, "to determine whether an order disposes of all pending claims and parties, it may of course be necessary for the appellate court to look to the record in the case." *Id.* at 205-06. Thus, the determination of finality is made on a case-by-case basis, rather than according to a bright line formula. The Supreme Court engaged in such analysis in *M.O. Dental Lab v. Rape*, 139 S.W.3d 671 (Tex. 2004) (summary judgment final despite failure to mention defendant who was never served and who had never made an appearance); *Ritzell v. Espeche*, 87 S.W.3d 536 (Tex. 2002) (per curiam); *Jacobs v. Satterwhite*, 65 S.W.3d

653 (Tex. 2001); *Nash v. Harris County*, 63 S.W.3d 415, 416 (Tex. 2001); *Guajardo v. Conwell*, 46 S.W.3d 862, 864 (Tex. 2001) (per curiam). In *Lehmann* the Supreme Court also suggested a new concluding clause that would unmistakably indicate finality: "This judgment finally disposes of all parties and all claims and is appealable." Time will tell if the *Lehman* fix will solve the problem.

B. "NO EVIDENCE" MOTIONS FOR SUMMARY JUDGMENT. In 1986, the U.S. Supreme Court developed the idea of a "no evidence" summary judgment motion. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The Texas Supreme Court declined to follow suit at the state level, in *Casso v. Brand*, 776 S.W.2d 551 (Tex. 1989). In response to a legislative initiative in this direction, in 1997 the Texas Supreme Court turned to its rule-making process to establish a "no evidence" motion for summary judgment procedure in Texas practice, which it engrafted to the end of the existing summary judgment rule:

> (i) No-Evidence Motion. After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.

"To prevail on a no-evidence summary-judgment motion, a movant must allege that there is no evidence of an essential element of the adverse party's claim. Tex.R. Civ. P. 166a(i). Although the nonmoving party is not required to marshal its proof, it must present evidence that raises a genuine fact issue on the challenged elements. See Tex.R. Civ. P. 166a, notes and cmts." *Southwestern Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002). In *King Ranch v. Chapman*, 118 S.W.3d 742, 750-51 (Tex. 2003), the Court said: "A no-evidence summary judgment is essentially a pretrial directed verdict, and we apply the same legal sufficiency standard in reviewing a no-evidence summary judgment as we apply in reviewing directed verdict." In *Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 172 (Tex. 2003), the Court set out the standard of appellate review of a no evidence motion for summary judgment:

> In reviewing a no-evidence summary judgment motion, we examine the record in the light most favorable to the nonmovant; if the nonmovant presents more than a scintilla of evidence supporting the disputed issue, summary judgment is improper. King Ranch v. Chapman, 118 S.W.3d 742, 750 (Tex.2003); Wal-Mart Stores, Inc. v. Rodriguez, 92 S.W.3d 502, 506 (Tex.2002). A no-evidence summary judgment is improper if the respondent brings forth more than a scintilla of probative evidence to raise a genuine issue of material fact. Tex.R. Civ. P. 166a(i); Wal-Mart, 92 S.W.3d at 506. "Less than a scintilla of evidence exists when the evidence is 'so weak as to do no more than create a mere surmise or suspicion' of a fact." King Ranch, 118 S.W.3d at 751 (quoting Kindred v. Con/Chem, Inc., 650 S.W.2d 61, 63 (Tex.1983)). More than a scintilla of evidence exists if it would allow reasonable and fair-minded people to differ in their conclusions. King Ranch, 118 S.W.3d. at 751 (citing Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 711 (Tex.1997)).

XI. JURY CHARGE–BROAD FORM SUBMISSION. In *Hyundai Motor Co. v. Rodriguez ex rel. Rodriguez*, 995 S.W.2d 661, 664 (Tex. 1998), the Court observed that "[t]he goal of the charge is to submit to the jury the issues for decision logically, simply, clearly, fairly, correctly, and completely." In 1973, TRCP 277 was amended to permit broad form submission. In 1988, TRCP 277 was amended to require broad form submission. *See* William V. Dorsaneo, III, *Broad-Form Submission of Jury Questions and the Standard of Review*, 46 SMU L. Rev. 601 (1992). TRCP 277 now provides that"[i]n all jury cases the court shall, whenever feasible, submit the cause upon broad-form questions."

The Supreme Court noted, in *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 390 (Tex. 2000), that "Rule 277 is not absolute; rather, it mandates broad-form submission 'whenever feasible.'"

In *Westgate, Ltd. v. State*, 843 S.W.2d 448, 455 n. 6 (Tex. 1992), the Court said that "[s]ubmitting alternative liability standards when the governing

law is unsettled might very well be a situation where broad-form submission is not feasible."

In *Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 529 (Tex. 1997), the Supreme Court rejected the argument that a broad-form negligence question, without more, can support a judgment against a possessor of land. The Court held that a broad-form negligence question that omitted instructions about the knowledge and risk-of-harm elements of a premises liability claim was improper.

In some multiple-theory cases, submitting claims in broad form tends to obscure the actual fact findings of the jury, making it more difficult for the appellate court to determine whether a jury finding of liability was based on an improper theory of recovery. In *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 388 (Tex. 2000), the Supreme Court held that "when a trial court submits a single broad-form liability question incorporating multiple theories of liability, the error [of including an erroneous ground of recovery] is harmful and a new trial is required when the appellate court cannot determine whether the jury based its verdict on an improperly submitted invalid theory." The *Casteel* question is argued in a case pending decision by the Supreme Court, *Southwestern Bell Tel. Co. v. Garza*, No. 01-1142 (oral argument 10-15-2003). The court of appeals had found that complaint was not preserved, and further that both grounds for recovery in a disjunctive submission were valid claims under Texas law.

In *City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 68 (Tex. 2000), the Court said:

> Because of the broad form submission, it cannot be ascertained whether the jury concluded that the City discriminated by changing Zimlich's job duties, failing to promote him to senior deputy, or failing to promote him to chief deputy. The City has not argued that it would be entitled to a new trial if the evidence was legally insufficient to support one or more of these theories of liability. Therefore, whether the rationale in our decision in Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378 (Tex. 2000) should be extended to cases in which there is no evidence to support one or more theories of liability within a broad form submission is not a question that is before us.

That question will be answered In *KPH Consolidation, Inc. v. Romero*, 102 S.W.3d 135 (Tex. App.--Houston [14th Dist.] Jan. 9, 2003), (*pet. granted* April 23, 2004), where the trial court submitted a single damage question and a single question on the apportionment of liability, that were both predicated on a finding of either ordinary negligence or the malicious credentialing claim. The court of appeals held that there was legally insufficient evidence to support the malicious credentialing claim. The defendant claims reversible error based on *Casteel*, because the appellate court cannot tell if the jury apportioned fault and awarded damages on the basis of the malicious credentialing claim. If the Supreme Court applies the *Casteel* rationale to jury submissions involving valid causes of action but where the evidentiary support is wanting, then plaintiffs in close cases will need to submit separate clusters of liability and damage findings, and there will be a danger for defendants of overlapping damage findings and double-recovery of the same losses.

In the case of *In re A .V.*, 113 S.W.3d 355, 362 (Tex. 2003), the complainant sought to reverse a judgment terminating the parent-child relationship, partially on the ground that one component of the broad form jury verdict lacked evidentiary support. The Supreme Court held that, because the complainant did not make a timely objection, plainly informing the court that a specific element of the claim should not be included in a broad-form question because there is no evidence to support its submission, the complaint was not preserved. In the case of *In re B.L.D.*, 113 S.W.3d 340, 354-55 (Tex. 2003), the Supreme Court held that due process of law does not require an appellate court to review an unpreserved complaint of charge error in parental-rights termination cases.

In *Thomas v. Oldham*, 895 S.W.2d 352 (Tex. 1995), the trial court submitted a broad form damage question, instructing the jury to consider five separate elements of damage but asking for just one total amount. One defendant argued on appeal that the evidence was insufficient to support certain elements of the jury's award of damages. The Supreme Court ruled that because the defendant had not asked for separate damage findings, it could only challenge the legal sufficiency of the evidence supporting the whole verdict. In *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2003), Harris County pointed out to the trial court that particular elements of damage had no support in the evidence and should not be included in the broad-form question. A majority of the

Court reversed a judgment where damage questions were submitted in broad form, and the evidence was legally insufficient to support one element of damages. Three dissenting justices (O'Neill, Enoch and Hankinson) said that the *Casteel* reasoning should be limited to commingled submission of multiple theories of liability, some of which are not supported by substantive law.

The *Smith* case makes it risky for a plaintiff asserting multiple claims to use broad form submission of damage questions. If the principle is extended to "no evidence" challenges to broad form submission of several valid theories of liability, some of which lack evidentiary support, then plaintiffs will probably revert to a separate "cluster" of liability and damage questions for each theory of recovery.

XII. LEGAL SUFFICIENCY OF THE EVIDENCE.

A. SUPREME COURT'S JURISDICTION. Tex. Gov't Code § 22.001(a) limits the Supreme Court's jurisdiction to questions of law. Review of the legal sufficiency of the evidence is a question of law within the jurisdiction of the Supreme Court.

B. STANDARD OF REVIEW. As a backdrop to this discussion, consider the following quotation from Dean Leon Green:

> There is nothing to prevent . . . invasion of the jury's province except the self-restraint of the judges themselves. It is simply an institutional risk. Where impulses are so strong to do ultimate justice, and where the jury and what its members heard, observed and considered are so far removed from the chambers of the court, the brakes of self-restraint are severely taxed. The supreme power in a court system as in any other hierarchy inevitably increases with its exercise.

Leon Green, *Jury Trial and Proximate Cause*, 35 Texas L. Rev. 357, 358 (1957), quoted in Dorsaneo, *Reexamining the Right to Trial by Jury*, 54 S.M.U. L. Rev. 1695, 1696 (2001).

A court of appeals and the Supreme Court can reverse a judgment in favor of a plaintiff, and render a take-nothing judgment, when there is "no evidence" to support the judgment. A "no-evidence" point may be sustained on appeal when the record discloses one of the following: (1) a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla of evidence; or (4) the evidence establishes conclusively the opposite of a vital fact. *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 334 (Tex. 1998).

In *Lozano v. Lozano*, 52 S.W.3d 141, 155 (Tex. 2001), the Supreme Court said:

> more than a scintilla of evidence exists when the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." Burroughs Wellcome Co., v. Crye, 907 S.W.2d 497, 499 (Tex.1995). On the other hand, less than a scintilla of evidence exists when the evidence is "so weak as to do no more than create a mere surmise or suspicion" of a fact. Kindred [v. Con/Chem, Inc., 650 S.W.2d 61, 63 (Tex. 1983)].

As the Supreme Court recently noted, "some suspicion linked to other suspicion produces only more suspicion, which is not the same as some evidence." *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 210 (Tex. 2002).

In reviewing a "no evidence" point, the appellate court "must consider only the evidence and inferences tending to support the jury's finding, viewed most favorably in support of the finding, and disregard all contrary evidence and inferences." *Havner v. E-Z Mart Stores, Inc.*, 825 S.W.2d 456, 458 (Tex. 1992); *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965). In *Formosa Plastics Corp. USA v. Presidio Engineers & Contractors, Inc.*, 960 S.W.2d 41, 48 (Tex. 1997), the Court described the standard of review differently–it said that the court must consider all of the record evidence in a light most favorable to the verdict, and every reasonable inference deducible from the evidence is to be indulged in favor of the verdict. The *Formosa Plastics* articulation of the standard includes a review of all the evidence, not just the evidence tending to support the jury's finding.

A different frame-of-mind is involved in reviewing the question of whether a plaintiff established an issue as a matter of law. In *Collora v. Navarro*, 574 S.W.2d 65, 68 (Tex. 1978), the Supreme

Court stated the standard of review for a directed verdict granted to the plaintiff:

> The rule as generally stated is that the plaintiff is entitled to a directed verdict when reasonable minds can draw only one conclusion from the evidence. The task of an appellate court in such a case is to determine whether there is any evidence of probative force to raise fact issues on the material questions presented. The court must consider all of the evidence in the light most favorable to the party against whom the verdict was instructed, discarding all contrary evidence and inferences. Henderson v. Travelers Ins. Co., 544 S.W.2d 649 (Tex.1976); Echols v. Wells, 510 S.W.2d 916 (Tex. 1974). When reasonable minds may differ as to the truth of controlling facts, the issue must go to the jury. Najera v. Great Atlantic & Pacific Tea Co., 146 Tex. 367, 207 S.W.2d 365 (1948).

The sufficiency of the evidence is reviewed in the context of the Court's charge. If the charge contains error, the rule still applies if the opposing party fails to object to the error in the charge. However, if the charge contains error and the opposing party objects, then the sufficiency of the evidence is measured against the correct articulation of the law. *St. Joseph's Hospital v. Wolff*, 94 S.W.3d 513, 530 (Tex. 2003).

1. Ignoring Standard of Review. Sometimes a Supreme Court decision will draw a dissent on the basis that the majority of the Court has violated the standard of "no evidence" review. For example, Justice O'Neill, joined by Justice Hankinson, dissented in *Southwest Key Program, Inc. v. Gil-Perez*, 81 S.W.3d 269, 275 (Tex. 2002) saying: ". . . the Court conducts an improper legal-sufficiency review by considering evidence contrary to the verdict and ignoring testimony that supports causation. Because there is some evidence to support the jury's causation finding, I would affirm the court of appeals' judgment. Accordingly, I respectfully dissent."

2. Changing Standard of Review. There has been controversy recently over whether the Texas Supreme Court has changed the standard of review of legal sufficiency of the evidence. In a recent article, Professor William Dorsaneo said that--

> three significant procedural developments appear to have changed no-evidence review. First, an unfortunate and misguided rearticulation of the scintilla rule has made it easier for reviewing courts to disregard favorable inferences that support a verdict. . . . Second, the Texas Supreme Court has embraced and extended the principle that undisputed evidence cannot be disregarded. . . . Third, the probative value of expert testimony--its relevance and reliability--has become a question for the court, not the fact finder. . . . The importance of these developments cannot be overemphasized because they alter the fundamental principle that the court is never permitted to substitute its findings and conclusions for that of the jury. [Citations omitted]

William V. Dorsaneo, III, *Judges, Juries, and Reviewing Courts*, 53 SMU L. REV. 1497, 1507 (2000).

3. Circumstantial Evidence/Equal Inference Rule. Circumstantial evidence may be used to establish any material fact, but it must transcend mere suspicion. *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 928 (Tex. 1994). In *Litton Industrial Products, Inc. v. Gammage*, 668 S.W.2d 319, 324 (Tex. 1984), the Court stated the so-called "equal inference rule," that in legal sufficiency review, "[w]hen circumstances are consistent with either of the two facts and nothing shows that one is more probable than the other, neither fact can be inferred." In *Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 392 (Tex. 1997), the Court said:

> The equal inference rule provides that a jury may not reasonably infer an ultimate fact from meager circumstantial evidence "which could give rise to any number of inferences, none more probable than another."

In *Lozano v. Lozano*, 52 S.W.3d 141 (Tex. 2001), a case with multiple Opinions, Chief Justice Phillips reinterpreted the equal inference rule and its role in reviewing circumstantial evidence. In this part of his Opinion he was joined by four other Justices (Enoch, Hankinson, Baker, and Abbott), while Justice Hecht, joined by Justice Owen, disagreed. C.J. Phillips' comments were:

> Properly applied, the equal inference rule is but a species of the no evidence rule, emphasizing that when the circumstantial evidence is so slight that any plausible inference is purely a guess, it is in legal effect no evidence. But circumstantial evidence is not legally insufficient merely because more than one reasonable inference may be drawn from it. If circumstantial evidence will support more than one reasonable inference, it is for the jury to decide which is more reasonable, subject only to review by the trial court and the court of appeals to assure that such evidence is factually sufficient.

Lozano, 52 S.W.3d at 148. C.J. Phillips went on to say:

> Circumstantial evidence often requires a fact finder to choose among opposing reasonable inferences. See, e.g., Farley v. M M Cattle Co., 529 S.W.2d 751, 757 (Tex. 1975). And this choice in turn may be influenced by the fact finder's views on credibility. Thus, a jury is entitled to consider the circumstantial evidence, weigh witnesses' credibility, and make reasonable inferences from the evidence it chooses to believe. Benoit v. Wilson, 150 Tex. 273, 239 S.W.2d 792, 797 (1951).

Lozano, 52 S.W.3d at 148-49. Justice Hecht characterized C.J. Phillips' writing as abolishing the equal inference rule. *Id.* at 157.

4. Considering Contrary Evidence That is Undisputed. In *Universe Life Insurance Company v. Giles*, 950 S.W.2d 48, 51 n. 1 (Tex. 1997), the Court included the following statement in a footnote to the opinion:

> Although we have often stated that a reviewing court must disregard all evidence that is contrary to a jury finding in performing a no-evidence review, that is not to say that courts must disregard undisputed evidence that allows of only one logical inference. See Wininger v. Ft. Worth & D.C. Ry. Co., 105 Tex. 56, 143 S.W. 1150, 1152 (1912); Texas & N.O. Ry. Co. v. Rooks, 293 S.W. 554, 556-57 (Tex. Comm'n. App.1927) (overruling motion for rehearing).

Accord, *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 519-20 (Tex. 2003).

In *Provident American Ins. Co. v. Castaneda*, 988 S.W.2d 189, 205-206 (Tex. 1998), Justice Enoch expressed concerns about the manner in which the Court was considering, in "no evidence" review of an insurance bad faith case, evidence contrary to the jury's verdict. Justice Enoch said:

> The Court sustains Provident's no evidence points by relying on evidence contrary to the jury's verdict, calling it "undisputed". However, even if some testimony is not directly contradicted, it may still conflict with other evidence in the record, and there may still be a fact question on the ultimate issues. The Court fails to carefully articulate rules governing when and for what purpose it may consider evidence contrary to a verdict and thus creates more confusion about the "no evidence" standard.

Giles conception of the role of undisputed contrary evidence was reconfirmed in *In re J.F.C.*, 96 S.W.3d 256 (Tex. 2002), discussed in Section VII.B.7 below.

5. Bad Faith Insurance Cases. The evolution of the duty of good faith and fair dealing in the insurer-insured context is discussed in Section XIII.F below. The discussion of appellate review of exemplary damages in Section XVIII.B below discusses bad faith insurance cases, as well.

Bad faith insurance cases present a reviewing court with the difficulty of differentiating evidence of tort from evidence of contract liability. In *Lyons v. Millers Casualty Ins. Co.*, 866 S.W.2d 597, 600 (Tex. 1993), the Court said that the focus of legal sufficiency review "should be on the relationship of the evidence arguably supporting the bad faith finding to the elements of bad faith." This requires that the evidence, when viewed in a light most favorable to the jury verdict, must "permit the logical inference that the insurer had no reasonable basis to delay or deny payment of the claim, and that it knew or should have known it had reasonable basis for its actions...."

In *State Farm Fire & Cas. Co. v. Simmons*, 963 S.W.2d 42, 51 (Tex. 1998), Justice Spector's majority Opinion stated that "whether an insurer has breached its duty of good faith and fair dealing is a fact issue. . . . In determining whether the

evidence is legally sufficient to support a bad faith judgment, we resolve all conflicts in the evidence and draw all inferences in favor of the jury's findings." This tells courts what to do, but not how to do it.

Sufficiency of the evidence review in insurance bad faith cases has been problematic. As described in Justice Hecht's concurring Opinion in *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 73 (Tex. 1997) (Hecht, J., concurring, joined by C.J. Phillips and Justices Gonzalez and Owen):

> The difficulty in applying this no-evidence standard in bad-faith cases is this. If, on the one hand, a judgment for bad faith may be supported by nothing more than the absence of evidence of a reasonable basis for denying or delaying a claim, then no judgment can be reversed for want of evidence. If all the evidence of a reasonable basis for the insurer's actions--evidence that does not support a verdict of no reasonable basis--is disregarded, then there will never be any evidence of a reasonable basis. If, on the other hand, a judgment for bad faith must be supported by evidence negating the existence of any reasonable basis, then no judgment can survive review. No plaintiff can disprove every reasonable basis conceivable for denying or delaying a claim. Inasmuch as these are the only two alternatives--either affirm every bad-faith finding or reverse every bad-faith finding--we have quite properly referred to the problem as a logical "conundrum". Lyons, 866 S.W.2d at 600.

6. First Amendment Cases Involving Public Officials. The standard of sufficiency of the evidence review in defamation cases involving public officials is a deviation from the ordinary Texas standard. The U.S. Supreme Court's decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964), requires public officials in defamation cases to prove upon clear and convincing evidence that the defendant communicated with "actual malice," which is to say falsely with knowledge of, or reckless disregard for, the falsity of the statement. In *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989), the high court on the Potomac said that, on appeal, the reviewing court "must consider the factual record in full." The high court further said:

> Although credibility determinations are reviewed under the clearly-erroneous standard because the trier of fact has had the "opportunity to observe the demeanor of the witnesses," . . ., the reviewing court must "'examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect' . . . .

Id., at 688. The "clearly erroneous standard" is used for appellate review of the evidence in federal court, but not in Texas appellate courts.

a. Federally-Mandated Standard of Review of "Actual Malice." In the case of *Doubleday & Co. v. Rogers*, 674 S.W.2d 751, 755 (Tex. 1984), the Texas Supreme Court indicated that U.S. Supreme Court decisions mandated a special standard of appellate review of actual malice determinations in defamation cases brought by public officials:

> The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."

The standard of review was further articulated in *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 120 (Tex. 2000):

Federal constitutional law dictates our standard of review on the actual malice issue, which is much higher than our typical "no evidence" standard of review. . . Under this standard, we must independently consider the entire record to determine whether the evidence is "sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.' " . . . Because the trier of fact has the ability to examine the witness's demeanor, we must defer to its credibility determinations. . . . Once we have resolved credibility questions in favor of the jury's verdict, however, we must independently evaluate "'the statements in

issue and the circumstances under which they were made to see ... whether they are of a character which the principles of the First Amendment ... protect.'" . . . It is not enough for us, therefore, to determine that a reasonable jury could have found that Dolcefino acted with actual malice. Beyond that, we ourselves must conclude that the evidence of malice is clear and convincing. . . . [Citations omitted] [Emphasis added]

b. Bentley v. Bunton. The Supreme Court engaged in detailed sufficiency of the evidence review in the public official defamation case of *Bentley v. Bunton*, 94 S.W.3d 561 (Tex. 2002). The case involved issues of whether the public official established falsity of communications as a matter of law, and of whether the record as a whole presented clear and convincing evidence of "actual malice." The case also involved a controversial new proposition that there is a constitutionally-mandated standard of review of damages that permits the Supreme Court to review the sufficiency of damages in such a defamation case.

The Opinion authored by Justice Hecht was in some respects a majority opinion and in others a plurality opinion. In Parts I, III, IV and V-A, B, & C (recitation of the evidence, opinion vs. fact, proof of falsity, actual malice as to defendant Bunton) four other Justices joined (Owen, Baker, Jefferson, and Rodriguez). In Part II (whether to decide the case based on federal and not state constitutional law), Justice Hecht was joined by seven other Justices. In Part V-D (evidence of actual malice not clear and convincing as to co-defendant Gates), only three other Justices joined (Owen, Jefferson, and Rodriguez). In Part VI (sufficiency of the evidence to support damages awarded), only three other Justice joined (Owen, Jefferson and Rodriguez). In Part VII (disposition of the case), six Justices joined. Chief Justice Phillips wrote a concurring and dissenting opinion, joined by Justices Enoch and Hankinson (evidence not clear and convincing as to actual malice for either defendant). Justice Baker wrote a dissenting opinion (both defendants were liable, majority improperly conducted factual sufficiency review on mental anguish damages). Justice O'Neill did not participate in the decision.

(i) Actual Malice Finding. In Part V-A of Justice Hecht's majority Opinion (supported by 4 other Justices—Owen, Baker, Jefferson, and Rodriguez), the Court considered whether the plaintiff had proven that the defendants acted with "actual malice." Justice Hecht wrote:

> [A]n independent review of evidence of actual malice should begin with a determination of what evidence the jury must have found incredible. . . . As long as the jury's credibility determinations are reasonable, that evidence is to be ignored. Next, undisputed facts should be identified. . . . Finally, a determination must be made whether the undisputed evidence along with any other evidence that the jury could have believed provides clear and convincing proof of actual malice. [Emphasis added]

Id. at 599. Thus, Justice Hecht's Opinion gives the reviewing court the power to decide whether the jury's decisions regarding credibility were reasonable. *Id.* at 599-00. This power was not stated as constitutionally-required in *New York Times, Co. v. Sullivan, Harte-Hanks Communications, Inc. v. Connaughton*, and similar cases decided under a federal appellate standard of review (which differs from the one in Texas), nor was it stated in earlier Texas defamation cases. It may be seen as breaking new ground. [Compare p. 585, where the majority concludes that "the jury could reasonably conclude" that Defendant Gates' comments on one occasion endorsed Defendant Bunton's defamatory statements.]

(ii) Sufficiency Review of Damages. Part VI of Justice Hecht's Opinion relates to the sufficiency of the evidence to support damages. Justice Hecht is joined by only three Justices (Owen, Jefferson, and Rodriguez), so it is a plurality opinion and not stare decisis. In the Opinion, Justice Hecht asserts that the First Amendment requires appellate review of amounts awarded for non-economic damages in defamation cases to insure that any recovery compensates the plaintiff only for actual injuries, and is not a disguised disapproval of the defendant. *Id.* at 605. However, Part VI-B of Justice Hecht's Opinion interprets the ordinary Texas appellate standard of review of damage awards and cites *Saenz v. Fidelity & Guaranty Ins. Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996), for the proposition that the Supreme Court can find no evidence to support the damage award assessed by the jury. Justice Hecht's Opinion goes on to find some evidence of damages in the case, but no evidence of the $7 million in mental anguish damages that the jury found. The case was therefore remanded to the court of appeals,

with a minority of the Supreme Court asking for the Court of Appeals to remit part of the damages or remand the case for retrial. *Id.* at 607-08.

Justice Baker issued a dissenting opinion, which in the part relating to damages stated:

> I am appalled at the Court's remarkable holding about the mental anguish damages award. Specifically, the Court improperly conducts a factual sufficiency review on mental anguish damages based on a tenuous and entirely incorrect conclusion that the United States Supreme Court requires such a review. Because I, for one, cannot ignore our well-established legal principles that . . . preclude this Court from conducting factual sufficiency reviews and issuing advisory opinions, I dissent. *Id.* at 618.

c. Business Disparagement. In *Forbes, Inc. v. Granada Biosciesces, Inc.*, 124 S.W.3d 167 (Tex. 2004), the Supreme Court considered a no-evidence summary judgment in a business disparagement case. The plaintiff corporations acknowledged that they were public figures. The defendant was a media defendant. The Supreme Court ruled that the malice requirement of *New York Times v. Sullivan*, applied to business disparagement claims, and that no evidence was presented of actual malice.

d. Satire. In *New Times, Inc. V. Isaacks*, 146 S.W.3d 144 (Tex. 2004) the Supreme Court determined grounds for liability of a media defendant that allegedly defames public figures (a judge and a district attorney) using satire. The problem with the *New York Times v. Sullivan* actual malice test – of making a statement "with actual knowledge that it was false or with reckless disregard "– when applied to satire is that satire is intentionally inaccurate, by humorously altering exaggerating facts so as to ridicule the targeted person. The Supreme Court adopted the test articulated in federal case law, of whether the publisher knew or had reckless disregard for whether the article could be reasonably understood as describing actual facts. *Id* at 157, 163. The Court applied an objective "reasonable person" test, and found no evidence of malice.

7. Clear and Convincing Evidence. In the case of *In re J.F.C.*, 96 S.W.3d 256 (Tex. 2002), the Supreme Court described legal sufficiency of the evidence review of a verdict that requires clear and convincing evidence. The majority opinion was written by Justice Owen, and joined by Chief Justice Phillips, and Justices Hecht, Jefferson and Smith. Justice O'Neill concurred in the judgment only. Justice Hankinson dissented, joined by Justice Enoch. Justice Schneider separately dissented. The majority opinion said:

> The distinction between legal and factual sufficiency when the burden of proof is clear and convincing evidence may be a fine one in some cases, but there is a distinction in how the evidence is reviewed. In a legal sufficiency review, a court should look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true. To give appropriate deference to the factfinder's conclusions and the role of a court conducting a legal sufficiency review, looking at the evidence in the light most favorable to the judgment means that a reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so. A corollary to this requirement is that a court should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible. This does not mean that a court must disregard all evidence that does not support the finding. Disregarding undisputed facts that do not support the finding could skew the analysis of whether there is clear and convincing evidence.
>
> If, after conducting its legal sufficiency review of the record evidence, a court determines that no reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true, then that court must conclude that the evidence is legally insufficient.

Id. at 265-66.

The standard of review of clear and convincing evidence articulated in *In re J.F.C.* is noteworthy in several respects. First, the reviewing court

looks at all the evidence, not just evidence supporting the jury verdict. Second, the appellate court must decide whether a reasonable juror could have formed a firm belief of the truth of the verdict. (Reasonableness has traditionally been a fact question. *See* _____). The appellate court is bound to give credence to evidence supporting the verdict if a reasonable juror could do so. The appellate court can disregard all contrary evidence that a reasonable juror could have disbelieved. But undisputed contrary evidence cannot be ignored. The test is whether no reasonable juror could form a belief or conviction that the matter to be proven is true. It appears that more than just a scintilla of evidence is required to uphold a finding based on clear and convincing evidence, and that contrary evidence must be considered if it is undisputed.

Note that while *J.F.C.* was a parental termination case, that clear and convincing evidence is also required to support exemplary damages. Tex. Civ. Prac. & Rem. Code § 41.003.

C. THE NUMBERS. The Supreme Court most often addresses legal sufficiency challenges in connection with other complaints. See Elizabeth V. Rodd, *What is Important to the State's Jurisprudence?*, State Bar of Texas PRACTICE BEFORE THE SUPREME COURT OF TEXAS, ch. 6, pp. 12-13 (April 4, 2003). The significance is that Supreme Court decisions reversing and rendering judgments gain a lot of attention, but they do not represent a large number of cases.

XIII. LEGAL DUTY. The Texas Supreme Court periodically is called upon to decide whether a defendant owed a duty to an injured party that would justify imposing liability on the defendant for breach of this duty. This is an area where the philosophy of the justices is plainly evident, and directly affects the outcome of the case-in-point, as well as future similar cases, and thus excites comment. The issue of legal duty involves two sub-issues: (1) do judges or juries decide the scope of liability; and (2) if judges decide the scope of liability, through defining legal duty, then how expansive will they be in setting the duty to compensate injured persons for harm? The judge-versus-jury question has implications for appellate courts because judges' decisions on "the law" are more susceptible to reversal on appeal than are juries' decisions on "the facts," and questions of law are within the purview of the Supreme Court.

In recent Texas legal history, the judge versus jury question has reflected trends, sometimes moving in opposite directions. For example, the 1973 amendment to the Tex. R. Civ. P. 277 to allow jury issues to be submitted in "broad form," and the 1988 amendment which required it, effectively obscured the thinking used by juries in arriving at their decisions, so that appellate courts did not have enough information to pick apart the verdict. *See* William V. Dorsaneo, III, *Broad-Form Submission of Jury Questions and the Standard of Review*, 46 SMU L. REV. 601 (1992). The 1983 amendment to Tex. R. Civ. P. 327, and the adoption of Tex. R. Civ. Evid. 606(b) (juror cannot testify to deliberations) insulated jury verdicts from post-trial inquisitions into how the jury reached its verdict, by making all such evidence inadmissible, except for evidence of outside influences. However, the Supreme Court has also tended toward substituting the judge's decision on the scope of duty instead of the jury's determination (in negligence cases) of proximate cause, as a way of determining when compensation would be required for causing harm. See: William W. Kiligarlin and Sandra Sterba-Boatwright, *The Recent Evolution of Duty in Texas*. 28 S.TEX.L. REV 241 (1986); William Powers, Jr., *Judge and Jury in the Texas Supreme Court*, 75 Tex.L.Rev. 1699 (1997) (Supreme Court is "moving away from broad definitions of duty and toward particularized definitions of duty); Phil Hardberger, *Juries Under Seige*, 30 ST. MARY'S L.J. 1 (1998) ("Over the last ten years the court has taken great measures to limit the power of juries . . . "); William V. Dorsaneo, *Judges, Juries and Reviewing Courts*, 53 SMUL.REV. 1497 (2000) ("Supreme Court has . . . modified the respective roles of judges, juries, and reviewing courts . . . by revising its treatment of the duty and causation issues in tort cases").

A. FORESEEABILITY COMPONENT OF LEGAL DUTY. Proximate cause incorporates a component of foreseeability. *Southwest Key Program, Inc. v. Gil-Perez*, 81 S.W.3d 269, 274 (Tex. July 3, 2002). But, there is a foreseeability component to legal duty, as well. *Mitchell v. Missouri-Kansas-Texas Railroad Co.*, 786 S.W.2d 659, 661 (Tex. 1990). The foreseeability component of proximate cause is decided by the jury. The foreseeability component of duty is decided by the judge, and ultimately by the Texas Supreme Court.

The debate goes back to the famous *Palsgraf* case. The majority Opinion written by Chief Justice

Benjamin Cardozo in *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928), considered foreseeability as a component of the legal duty. The court was the one to decide that the injury to the plaintiff was not foreseeable so that no duty was owed by the defendant to the plaintiff. The dissenting opinion, by Justice Andrews, suggested that everyone owes a duty to others not to cause them no harm, and when harm is caused, then compensation should be paid if the harm is foreseeable. This aspect of foreseeability is built into the idea of proximate cause, which is a jury question.

The foreseeability component of duty has been a frequent focus of the Texas Supreme Court's attention over the past 20 years. Of many cases, one example is *Mellon Mtg. Co. v. Holder*, 5 S.W.3d 654 (Tex. 1999), a 3-1-1-3 decision in which the court held that the danger that an office building parking lot would be the scene of a rape, when the victim was abducted elsewhere and was brought to that parking lot for the crime, was not sufficiently foreseeable to impose a legal duty from the landowner to the victim.

B. BALANCING FACTORS IN DETERMINING DUTY. In *Van Horn v. Chambers*, 970 S.W.2d 542, 544 (Tex. 1998), the Court described the situation as follows:

> A negligence cause of action has three elements: 1) a legal duty; 2) breach of that duty; and 3) damages proximately resulting from the breach. Praesel v. Johnson, 967 S.W.2d 391, 394 (Tex. 1998). The existence of a duty is a threshold question of law. St. John v. Pope, 901 S.W.2d 420, 424 (Tex.1995); Bird v. W.C.W., 868 S.W.2d 767, 769 (Tex.1 994). The nonexistence of a duty ends the inquiry into whether negligence liability may be imposed. See St. John, 901 S.W.2d at 424; Graff v. Beard, 858 S.W.2d 918, 919 (Tex.1993).

The Court has characterized the process of common-law duty analysis as "balancing the risk, forseeability, and likelihood of injury against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant." *Read v. Scott Fetzer Co.*, 990 S.W.2d 732, 736 (Tex. 1998); *Greater Houston Transportation Co. v. Phillips*, 801 S.W.2d 523, 527 (Tex. 1990) (the main determinant of duty is foreseeability).

Notwithstanding this formulation, the Supreme Court in recent years tends to think of duty in terms of identifiable relationships, rather than the pure balancing of policies. That is, duty depends on whether the plaintiff is a bystander, or has privity, or is an invitee/licensee/trespasser, etc. The Supreme Court is not willing to say that everyone owes a duty to everyone else not to cause harm, allowing the jury to decide whether liability will be imposed depending on the foreseeability element of proximate cause.

C. DUTY RELATING TO ALCOHOL. In *El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex. 1987), the Court said that "the risk and likelihood of injury from serving alcohol to an intoxicated person whom the licensee knows will probably drive a car is as readily foreseen as injury resulting from setting loose a live rattlesnake in a shopping mall." The Court imposed the duty as a matter of law, rather than leaving it up to each jury to determine on a case-by-case basis whether the harm was foreseeable. *See* William Powers, Jr., *Judge and Jury in the Texas Supreme Court*, 75 TEX.L.REV. 1699, 1713 (1997). After this expansion of duty into the area of commercial sale of alcohol, the Supreme Court had steadfastly refused to expand duty into the area of social hosts.

After *El Chico Corp. v. Pool* was decided, the Texas Legislature passed the Dram Shop Act. Section 2.03 of the Act states that "[t]his chapter provides the exclusive cause of action for providing an alcoholic beverage to a person 18 years of age or older." Tex. Al. Bev. Code § 2.03. The Supreme Court subsequently noted that "the last time we recognized a common-law cause of action against alcohol providers--in that case, against licensed commercial providers for selling alcohol to intoxicated patrons--the Legislature preempted our holding by enacting the Dram Shop Act." *Reeder v. Daniel*, 61 S.W.3d 359, 364 (Tex. 2001). The Supreme Court has subsequently declined to create a judicially-recognized duty for social hosts serving alcohol. *See Graff v. Beard*, 858 S.W.2d 918, 921-22 (Tex. 1993) (a social host has no duty to third parties to prevent adult guests from drinking and driving); *Smith v. Merritt*, 940 S.W.2d 602, 605 (Tex. 1997) (a social host had no duty to a passenger to prevent a nineteen-year-old guest from drinking and driving); *Reeder v. Daniel*, 61 S.W.3d 359, 364 (Tex. 2001) (a social host has no duty not to make alcohol available to persons under age 18). However, in *D. Houston*,

Inc. v. Love, 92 S.W.3d 450, 456-57 (Tex. 2002), the Supreme Court held that if an employer requires its independent contractor while working to consume alcohol in sufficient amounts to become intoxicated, it owes her a duty to take reasonable care to prevent her from driving when she leaves work.

D. DUTY IN RENDERING PROFESSIONAL SERVICES. The Supreme Court has held that lawsuits against professionals for mishandling their work are tort claims for malpractice, not claims for breach of warranty or breach of contract. *Barcelo v. Elliott*, 923 S.W.2d 575, 579 (Tex. 1996) ("In Texas . . . a legal malpractice action sounds in tort and is governed by negligence principles"). Language in *Murphy v. Campbell*, 964 S.W.2d 265, 269 (Tex. 1997), that "[t]here is no more need for an additional remedy for accounting malpractice than there is for medical malpractice. A plaintiff may obtain full redress in an action for negligence or breach of contract," has been universally rejected as authority for the proposition that a malpractice claim can be brought as a contract claim. See cases listed in that case *of In re Sunpoint Securities, Inc.*, 262 B.R. 384, 398 (Bankr. E.D. Tex. April 23, 2001).

Supreme Court cases restrict the range of persons who can sue for malpractice, using the requirement of privity between the plaintiff and the defendant.

In the case of *Bird v. W.C.W.*, 868 S.W.2d 767, 770 (Tex. 1994), the Supreme Court held that no duty runs from a psychologist to a third party to not negligently misdiagnose a patient's condition.

In *Krishnan v. Sepulveda*, 916 S.W.2d 478, 482 (Tex. 1995), the Supreme Court held that a doctor owes no duty that would permit a husband to recover mental anguish damages suffered as a result of his wife's injury that was proximately caused by her doctor's negligent diagnosis of her condition, because such a duty arises out of the doctor-patient relationship. The mother, however, could recover mental anguish damages suffered as a result of her injury which was proximately caused by a doctor's or a hospital's negligence and which includes the loss of her fetus.

In *Barcelo v. Elliott*, 923 S.W.2d 575, 577 (Tex. 1996), the Supreme Court held that an attorney retained by a testator or settlor to draft a will or trust owes no professional duty of care to persons named as beneficiaries under the will or trust.

Edinburg Hosp. Auth. v. Trevino, 941 S.W.2d 76, 77-79 (Tex. 1997), held that a hospital owes no legal duty to a husband to provide competent medical care to his wife or unborn child.

Praesel v. Johnson, 967 S.W.2d 391, 392 (Tex. 1998), the Supreme Court held that a physician owes no duty to third parties to warn an epileptic patient not to drive or to report the patient's condition to state authorities that govern the issuance of drivers' licenses.

Van Horn v. Chambers, 970 S.W.2d 542, 543 (Tex. 1998), survivors of persons killed in a fracas with a mental patient had no cause of action against the physician for alleged negligence in treating, medicating and restraining the patient.

In *Thapar v. Zezulka*, 994 S.W.2d 635, 640 (Tex. 1999), the Court held that a mental-health professional cannot be liable in negligence for failing to warn the appropriate third parties when a patient makes specific threats of harm toward a readily identifiable person. The Court based its ruling on the public policy reflected in a Texas statute prohibiting the release of mental health information.

E. LANDOWNER'S LIABILITY FOR CRIMINAL ACTIVITY. Under Texas law of premises liability, a landowner or operator can be held liable for harm resulting from a condition of the property only by showing:

(1) Actual or constructive knowledge of some condition on the premises by the owner/operator;
(2) That the condition posed an unreasonable risk of harm;
(3) That the owner/operator did not exercise reasonable care to reduce or eliminate the risk; and
(4) That the owner/operator's failure to use such care proximately caused the plaintiff's injuries.

Corbin v. Safeway Stores, Inc., 648 S.W.2d 292 (Tex. 1983). Negligence in the ordinary context "means simply doing or failing to do what a person of ordinary prudence in the same or similar circumstances would have not done or done." *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 753 (Tex. 1998). Negligence in the context of premises liability means "failure to use ordinary care to reduce or eliminate an unreasonable risk of harm created by a premises condition which the owner or occupier [of land] knows about or in the exercise of ordinary care should know about." *Id.* at 753.

In recent years the Court has been faced with claims of a landowner's liability for criminal activities that occur on the property. The Supreme Court stated the duty in *Lefmark Management Co. v. Old*, 946 S.W.2d 52, 53-54 (Tex. 1997):

> As a general rule, a landowner or one who is otherwise in control of the premises must use reasonable care to make the premises safe for the use of business invitees. See Smith v. Henger, 148 Tex. 456, 226 S.W.2d 425, 431 (1950). This duty includes warning invitees of known hidden dangers that present an unreasonable risk of harm. City of Beaumont v. Graham, 441 S.W.2d 829, 834 (Tex. 1969). Ordinarily, this duty does not include the obligation to prevent criminal acts of third parties who are not subject to the premises occupier's control. Walker v. Harris, 924 S.W.2d 375, 377 (Tex.1996); Exxon Corp. v. Tidwell, 867 S.W.2d 19, 21 (Tex.1993); El Chico Corp. v. Poole, 732 S.W.2d 306, 313-14 (Tex.1987). This rule, however, is not absolute. One who controls the premises does have a duty to use ordinary care to protect invitees from criminal acts of third parties if he knows or has reason to know of an unreasonable and foreseeable risk of harm to the invitee. Centeq Realty, 899 S.W.2d at 197; Exxon, 867 S.W.2d at 21; Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 550 (Tex.1985). This duty, we have emphasized, is commensurate with the right of control over the property.

In *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996), the plaintiffs failed to bring forward on summary judgment any evidence that the commission of a crime on the property in question was foreseeable, so liability was rejected..

In *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 756 (Tex. 1998), the Supreme Court stated that "[o]ne who controls ... premises does have a duty to use ordinary care to protect invitees from criminal acts of third parties if he knows or has reason to know of an unreasonable and foreseeable risk of harm to the invitee." The Court continued: "Foreseeability requires only that the general danger, not the exact sequence of events that produced the harm, be foreseeable. . . .When the 'general danger' is the risk of injury from criminal activity, the evidence must reveal 'specific previous crimes on or near the premises' in order to establish foreseeability." *Id.* at 756.

In *Mellon Mortgage Co. v. Holder*, 5 S.W.2d 654 (Tex. 1999), a divided Supreme Court (3-1-1-3), decided that it was not foreseeable that a woman would be abducted several blocks away and brought to the office building parking lot and sexually assaulted. Therefore the landowner owed no duty to the victim.

On May 7, 2004, the Supreme Court granted review in *Western Investments Inc., et al. v. Urena*, No. 03-0919, to decide, in this premises-liability case involving a minor's sexual assault by a tenant at an apartment complex, (1) whether the court of appeals properly reversed summary judgment under *Timberwalk Apartments v. Cain*; and (2) whether *Doe v. Boys Club of Greater Dallas* changed the *Timberwalk* analysis when the crime involves two tenants.

F. INSURANCE BAD FAITH CLAIMS PRACTICES. The Supreme Court first recognized an insurer's tort duty of good faith and fair dealing to its insured in *Arnold v. National County Mutual Fire Ins. Co.*, 725 S.W.2d 165 (Tex. 1987). The duty was described as follows:

> A cause of action for breach of the duty of good faith and fair dealing is stated when it is alleged that there is no reasonable basis for denial of a claim or delay in payment or a failure on the part of the insurer to determine whether there is any reasonable basis for the denial or delay.

Id. at 167.

In *Aranda v. Insurance Co. of N. Am.*, 748 S.W.2d 210, 215 (Tex. 1988), the Court held that a breach of the common-law duty of good faith and fair dealing inherent in the dealings between an insurer and its insured must be the proximate, rather than producing, cause of damage. This established a foreseeability element to the tort.

In *Lyons v. Millers Casualty Insurance Co.*, 866 S.W.2d 597 (Tex. 1993), the Court said that the duty arises from the special relationship between the insurer and the insured resulting from the insurer's disproportionately favorable bargaining posture in the claims handling process.

In *National Union Fire Ins. Co. v. Dominguez*, 873 S.W.2d 373 (Tex. 1994), the Court held that

the plaintiff must show the absence of a reasonable basis for denying or delaying payment of a claim, and that the insurer knew or should have known that there was no reasonable basis.

In *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 18 (Tex. 1994), the Court held that a plaintiff must show more than that the insurer was wrong about the factual basis for denying the claim. The plaintiff must prove that the insurer had no reasonable basis for denying or delaying payment of the claim, and that it knew or should have known that fact.

In *Universe Life Insurance Company v. Giles*, 950 S.W.2d 48, 56 (Tex. 1997), the Court clarified the standard for recovery in bad faith cases, saying that an insurer breaches its duty of good faith and fair dealing by denying a claim when the insurer's liability has become reasonably clear. Four Justices (Hecht, joined by C.J. Phillips, Owen and Gonzalez) joined in a concurring opinion saying that the question of whether an insurer had no reasonable basis to deny a claim should be an issue of law for the court and not a question of fact for the jury.

In *State Farm Lloyds v. Nicolau*, 951 S.W.2d 444, 448 (Tex. 1997), the Court said:

> [W]e have never held that the mere fact that an insurer relies upon an expert's report to deny a claim automatically forecloses bad faith recovery as a matter of law. Instead, we have repeatedly acknowledged that an insurer's reliance upon an expert's report, standing alone, will not necessarily shield the carrier if there is evidence that the report was not objectively prepared or the insurer's reliance on the report was unreasonable.

In *State Farm Fire & Cas. Co. v. Simmons*, 963 S.W.2d 42, 44 (Tex. 1998), the Supreme Court upheld a jury finding of insurance bad faith, and described the process of appellate review in these words:

> In determining whether the evidence is legally sufficient to support a bad faith judgment, we resolve all conflicts in the evidence and draw all inferences in favor of the jury's findings. Id. at 51. Viewing the evidence in this case in the light most favorable to the judgment, the evidence is legally sufficient that State Farm breached its duty of good faith and fair dealing by denying the Simmonses' claim based upon a biased investigation intended to construct a pretextual basis for denial.

In *Mid Century Ins. Co. of Texas v. Boyte*, 80 S.W.3d 546 (Tex. 2002), the Court held that an insurer's duty of good faith and fair dealing did not extend beyond rendition of judgment in a underinsured motorist claim by the insured against the insurance company. Thus, the insurance company's refusal to pay the full UIM claim while that case was on appeal did not give the insured a bad faith cause of action against the insurance company for refusal to pay the full claim until the appeal was concluded.

G. OTHER TORT DUTIES.

In *Greater Houston Transportation Co. v. Phillips*, 801 S.W.2d 523, 527 (Tex. 1990), the Court held that a cab company owed no special duty to admonish its cab drivers not to carry guns.

In *Southwestern Bell Telephone Co. v. DeLanney*, 809 S.W.2d 493, 495 (Tex. 1991), the Court said that "[t]he acts of a party may breach duties in tort or contract alone or simultaneously in both. The nature of the injury most often determines which duty or duties are breached. When the injury is only the economic loss to the subject of a contract itself the action sounds in contract alone."

In *Joseph E. Seagram & Sons, Inc. v. McGuire*, 814 S.W.2d 385, 388 (Tex. 1991), the Court held that there is no duty to warn of the dangers of excessive or prolonged use of alcohol since these dangers are already so widely recognized.

In *Fed. Land Bank Ass'n v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991), the Court adopted the Restatement (2d) of Torts § 552 cause of action for negligent misrepresentation, with liability arising where: (1) the representation is made by a defendant in the course of his business, or in a transaction in which he has a pecuniary interest; (2) the defendant supplies "false information" for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffers pecuniary loss by justifiably relying on the representation.

In *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993), the Supreme Court adopted the Restatement (2d) of Torts § 46(1) cause of action

for intentional infliction of emotional distress, with liability arising where: (1) the defendant acted intentionally or recklessly; (2) the defendant's conduct was extreme and outrageous; (3) the defendant's actions caused the plaintiff emotional distress; and (4) the emotional distress suffered by the plaintiff was severe.

In *Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322 (Tex.1993), the Court held that an occupier of a premises is legally responsible for dangerous conditions on adjacent premises that are actually under its control. Here Wal-Mart was responsible for injuries caused by a ramp it constructed and maintained on neighboring property that it did not actually lease.

Exxon Corp. v. Tidwell, 867 S.W.2d 19, 21 (Tex. 1993), the Supreme Court held that an oil company can be held responsible for crimes committed by third persons against an employee of a lessee-dealer only when the oil company possesses a right of control over the safety and security of the station and is negligent. In *Shell Oil Co. v. Khan*, 138 S.W.3d 288 (Tex. 2004), the Court said that the right to control can be reflected by contract (ordinarily a question of law for the court, or by actual exercise of control (ordinarily a question of fact for the jury). *Id.* at 292. In the *Khan* case, control under the lease was with the lessee. The Court also found no evidence of actual exercise of control. *Id.* at 295. The Court also rejected liability for premises defects. *Id.* at 297.

Cain v. Hearst Corp., 878 S.W.2d 577 (Tex. 1994), the Supreme Court declined to recognize the tort of false light invasion of privacy because false light substantially duplicates the tort of defamation while lacking many of its procedural limitations.

City of McAllen v. De La Garza, 898 S.W.2d 809 (Tex. 1995), the Court applied Restatement (Second) of Torts § 368 to define the duty of a possessor of land who creates or permits an excavation to remain too near a highway. The traveller must be using reasonable care and foreseeably deviates from the highway in the ordinary course of travel.

Caterpillar, Inc. v. Shears, 911 S.W.2d 379, 383 (Tex. 1995), manufacturer has no duty to warn that operating an industrial vehicle with open sides and top presents a degree of risk of serious harm to the operator, because an average person would recognize that fact.

In *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 649 (Tex. 1996), the Court held that the DTPA does not reach upstream manufacturers and suppliers when their misrepresentations are not communicated to the consumer.

In *Golden Spread Council, Inc. v. Akins*, 926 S.W.2d 287, 290 (Tex. 1996), the Court held that the Boy Scouts of America owed no duty to screen the criminal history of adult volunteers.

In *Praesel v. Johnson*, 967 S.W.2d 391, 392 (Tex. 1998), the Supreme Court held that a physician owes no duty to third parties to warn an epileptic patient not to drive or to report the patient's condition to state authorities that govern the issuance of drivers' licenses.

In *Perry v. S.N.*, 973 S.W.2d 301, 309 (Tex. 1998), the Supreme Court held that parents of children who were abused, and the children themselves, cannot maintain a claim for negligence per se or gross negligence based on defendants' violation of the child abuse reporting statute. Because the argument was not brought forward, the Supreme Court did not consider whether Texas should impose a common law duty to report or prevent child abuse.

In *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103 (Tex. 2000), the Court held that there is no separate cause of action in Texas for "false light defamation."

In *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 838 (Tex. 2001), the Supreme Court said that "[w]e have never held that a person may be liable on an undertaking theory without establishing reliance or increased risk of harm, and we decline to do so now."

In *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 726 (Tex. 2001), the Court defined the parameters of the tort on "tortious interference with a prospective business relation." The Court said:

> We therefore hold that to recover for tortious interference with a prospective business relation a plaintiff must prove that the defendant's conduct was independently tortious or wrongful. By independently tortious we do not mean that the plaintiff must be able to prove an independent tort. Rather, we mean only that the plaintiff must prove that the de-

> fendant's conduct would be actionable under a recognized tort. Thus, for example, a plaintiff may recover for tortious interference from a defendant who makes fraudulent statements about the plaintiff to a third person without proving that the third person was actually defrauded. If, on the other hand, the defendant's statements are not intended to deceive, as in Speakers of Sport, then they are not actionable. Likewise, a plaintiff may recover for tortious interference from a defendant who threatens a person with physical harm if he does business with the plaintiff. The plaintiff need prove only that the defendant's conduct toward the prospective customer would constitute assault. Also, a plaintiff could recover for tortious interference by showing an illegal boycott, although a plaintiff could not recover against a defendant whose persuasion of others not to deal with the plaintiff was lawful. Conduct that is merely "sharp" or unfair is not actionable and cannot be the basis for an action for tortious interference with prospective relations, and we disapprove of cases that suggest the contrary. [FN80] These examples are not exhaustive, but they illustrate what conduct can constitute tortious interference with prospective relations.

In *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 783 (Tex. 2001), the Supreme Court upheld a general contractor's liability for the death of an employee of a subcontractor. Justice Hecht in one opinion, and Chief Justice Phillips joined by Justice Rodriguez in another opinion, expressed displeasure with existing Texas law, which makes the general contractor's liability for injury to a subcontractor's employees dependent upon the degree of general contractor's "retained control."

In *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 197 (Tex. 2002), the Supreme Court held that an associate attorney at a law firm owed a fiduciary duty not to profit from assisting a potential client in hiring another lawyer outside the law firm.

In *Rocor Intern., Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 77 S.W.3d 253, 262 (Tex. 2002):

> We see no reason why an insurer's duty to its insured under article 21.21 should not be similarly circumscribed. Accordingly, we hold that an insurer's statutory duty to reasonably attempt settlement of a third party claim against its insured is not triggered until the claimant has presented the insurer with a proper settlement demand within policy limits that an ordinarily prudent insurer would have accepted. A proper settlement demand generally must propose to release the insured fully in exchange for a stated sum, although it may substitute the "policy limits" for that amount. At a minimum, the settlement demand must clearly state a sum certain and propose to fully release the insured. ...[Citation omitted]

In *County of Cameron v. Brown*, 80 S.W.3d 549 (Tex. 2002), the Court reversed the trial court's dismissal of a wrongful death suit under the Tort Claims Act, involving a large block of non-functioning streetlights on an elevated and curving causeway, holding that the plaintiffs' pleadings did not affirmatively negate the possibility of an unreasonably dangerous condition. Two Justices expressed concern, in a concurring opinion, that the decision reflected an ad hoc response to particular circumstances that did not give governmental entities sufficient guidance. Another concurring opinion expressed discomfort with the decision, and a dissenting opinion disagreed with it.

In *Dow Chemical Co. v. Bright*, 89 S.W.3d 602 (Tex. 2002), the Court held that the summary judgment record established as a matter of law that the landowner did not retain a contractual right of control or exercise actual control over an independent contractor's job site, so that the landowner had no liability for injuries to a worker caused by a co-worker's negligence.

In *Texas Home Management, Inc. v. Peavy*, 89 S.W.3d 30 (Tex. 2002), the Court held that an intermediate care facility for the mentally retarded, under contract with MHMR, owed a duty of care to a person murdered by a resident of the facility, because the MHMR contract gave the facility a "special relationship" that imposed on it a duty to control the resident.

Humble Sand & Gravel, Inc. v. Gomez, 146 S.W.3d 170 (Tex. 2004), the Court held that a manufacturer had no duty to warn employees of a customer, using silica flint as a blasting agent, of health hazards in using the product, if the manufacturer could show that employees used

bulk-supplied not bagged silica flint, that a warning would not have reached most workers, and that many workers would have ignored the warning.

On May 14, 2004, the Supreme Court granted review in *Tri v. Tran*, No. 03-0794, involving an alleged sexual assault at a Buddhist temple, to decide (1) whether civil conspiracy constitutes a stand-alone tort and (2) whether negligence per se can be the basis for civil conspiracy.

In *M.O. Dental Lab v. Rape*, 139 S.W.3d 671 (Tex. 2004) (per curiam), the Court held that, as a matter of law, ordinary mud or dirt that accumulated on a concrete slab outside a business did not pose an unreasonable risk of harm.

In *Bostrom Seating, Inc. v. Crane Carrier Company*, 140 S.W.3d 681 (Tex. 2004), a unanimous Supreme Court agreed with the Eastland and Texarkana courts of appeals that the doctrine of strict liability should not be extended to the supplier of a component part used in a product, when the supplier did not participate in the integration of the component into the finished product and the injuries are caused by the design of the product itself, and not a defect in the component.

XIV. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS. In the case of *Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993), the Texas Supreme Court adopted the tort, described in Restatement (Second) of Torts § 46, of 'intentional infliction of emotional distress' in Texas. The elements of the claim are that: (1) the defendant acted intentionally or recklessly; (2) the conduct was extreme and outrageous; (3) the actions of the defendant caused the plaintiff emotional distress; and (4) the emotional distress suffered by the plaintiff was severe. *Twyman*, 855 S.W.2d at 621 (Cornyn, J.). "[L]iability for outrageous conduct should be found 'only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993) (quoting Restatement (Second) of Torts § 46 cmt. d).

"A claim for intentional infliction of emotional distress cannot be maintained when the risk that emotional distress will result is merely incidental to the commission of some other tort." *Standard Fruit & Vegetable Co. v. Johnson*, 985 S.W.2d 62, 68 (Tex. 1998).

Comment (h) to Restatement § 46 discusses the roles of the court and jury in determining whether the defendant's behavior was extreme and outrageous, and says: "It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is necessarily so. Where reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability." Thus, "[w]hether a defendant's conduct is "extreme and outrageous" is a question of law." *Bradford v. Vento*, 48 S.W.3d 749, 758 (Tex. 2001).

In *Diamond Shamrock Ref. & Mktg. Co. v. Mendez*, 844 S.W.2d 198, 202 (Tex. 1992), the Court held that, as matter of law, the manner of terminating employment was not outrageous conduct. In *Wornick Co. v. Casas*, 856 S.W.2d 732, 734 (Tex. 1993), the Court held that the summary judgment evidence conclusively established that employer's behavior was not outrageous. In *GTE Southwest v. Bruce*, 998 S.W.2d 605 (Tex. 1999), the Court held that a regular pattern of abusive behavior in the workplace was legally sufficient to support a verdict of intentional infliction of emotional distress. In *Morgan v. Anthony*, 27 S.W.3d 928 (Tex. 2000), the Supreme Court reversed a summary judgment, saying that evidence of a man harassing a woman in a disable car constituted some evidence of the tort. The Supreme Court also disagreed with the court of appeals' conclusion that the plaintiff's emotional distress had not been severe. *Id.* at 390. In *Bradford v. Vento*, 48 S.W.3d 749, 759 (Tex. 2001), the Supreme Court announced a policy that "[b]usiness managers must have latitude to exercise their rights in a permissible way in order to properly manage their business, even though it may not always be pleasant for those involved," and concluded that a mall manager's statements to police in connection with an argument at the mall as a matter of law was not actionable.

In *Tex. Farm Bureau Mut. Ins. Cos. v. Sears*, 84 S.W.3d 604 (Tex. 2002), the Court overturned a jury verdict of intentional infliction of emotional distress, on the ground that the behavior of an insurance company, in terminating an independent insurance agent for possible kickbacks from contractors, was not extreme and outrageous. In

Tiller v. McLure, 121 S.W.3d 709 (Tex. 2003), the Court held that as a matter of law a defendant's regularly insensitive, unreasonable, course of conduct in a commercial contract dispute was not severe enough to constitute extreme and outrageous conduct. In *Wal-Mart Stores, Inc. v. Canchola*, 121 S.W.3d 735 (Tex. 2003), the Court overturned a jury's verdict based on intentional infliction of emotional distress, because as a matter of law Wal-Mart's conduct in investigating and ultimately terminating Canchola, while unpleasant for the employee, was an "ordinary employment dispute."

In *Standard Fruit and Vegetable Co. v. Johnson*, 985 S.W.2d 62, 68 (Tex. 1998), the Supreme Court called the tort of intentional infliction of emotional distress a "gap-filler" tort, judicially created to permit recovery where a person who suffered severe emotional distress intentionally inflicted in a manner that does not trigger a recognized theory of recovery. In *Hoffman-La-Roche, Inc. v. Zeltwanger*, 144 S.W.3d 438 (Tex. 2004), the Court held that a person cannot recover for intentional infliction of emotional distress when the actionable conduct can be redressed through a statutory-based claim for sexual harassment in the workplace. *Id.* at 444. Additionally, the Court held that the tort of intentional infliction of emotional distress could not be used so as to circumvent legislative limitations on statutory claims for mental anguish. *Id.* at 447.

It can be seen that the Texas Supreme Court, while not always ruling against a claim of intentional infliction of emotional distress, does police the tort closely and does not hesitate to find as a matter of law that behavior was not extreme and outrageous, especially in the employer-employee context.

XV. CAUSATION IN TORT. In order to recover in tort, the plaintiff must show that the defendant owed plaintiff a duty, breached it, and thereby proximately caused damages. *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995). Proximate cause incorporates two elements: foreseeability and cause in fact. *Southwest Key Program, Inc. v. Gil-Perez*, 81 S.W.3d 269, 274 (Tex. 2002).

The test for foreseeability is whether a person of ordinary intelligence would have anticipated the danger his or her negligence creates. *Id.* at 274. Foreseeability does not require the defendant to anticipate the precise manner in which the injury will occur; instead, the injury need only be of a general character that the actor might reasonably anticipate. *Brown v. Edwards Transfer Co.*, 764 S.W.2d 220, 223-24 (Tex. 1988).

To establish cause in fact, or "but for" causation, the plaintiff must show that the defendant's negligence was a substantial factor in bringing about his injury and without which no harm would have been incurred. *Gil-Perez.* at 274. "At some point in the causal chain, the defendant's conduct or product may be too remotely connected with the plaintiff's injury to constitute legal causation." *Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 775 (Tex. 1995).

"[P]roximate cause may not be established by a mere guess or conjecture, but rather must be proved by evidence of probative force." *McClure v. Allied Stores of Texas, Inc.*, 608 S.W.2d 901, 904 (Tex. 1980). However, proximate cause need not be supported by direct evidence, as circumstantial evidence and inferences therefrom are a sufficient basis for a finding of causation. *Farley v. MM Cattle Co.*, 529 S.W.2d 751, 755 (Tex. 1975). The plaintiff is "not required to distinguish all possible inferences, but must only show that the greater probability was that the breach of duty probably caused the injury." *City of Gladewater v. Pike*, 727 S.W.2d 514, 517 (Tex. 1987).

In *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex. 1991), a state highway department employee was driving a truck that was pulling a flashing arrow sign used to warn traffic of highway maintenance crews. The sign malfunctioned, causing the employee to stop his vehicle on the traveled portion of the road. While the employee was attempting to fix the sign, the driver of an oncoming vehicle fell asleep and struck the sign which in turn struck the employee, who was killed. The Supreme Court held, as a matter of law, that any defect in the sign was not the cause in fact because the employee's injuries were too remotely connected with the sign manufacturer's conduct.

In *Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 776 (Tex. 1995), a pump manufactured by Union Pump caused a fire at a plant. After the fire was extinguished, a problem arose with different piece of equipment, and the plaintiff and another worker went to fix it. While returning, the plaintiff slipped and fell off a pipe rack that was allegedly wet from fire-extinguishing liquids. The Supreme Court found that "the forces generated by the fire had come to rest when [the plaintiff] fell off the

pipe rack" and "the circumstances surrounding [the plaintiff's] injuries are too remotely connected with Union Pump's conduct or pump to constitute a legal cause of her injuries." Justice Cornyn's concurring Opinion gives a helpful history the legal concept of "causation" during the 20th century.

In *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995), the Supreme Court held that the employer's failure to investigate and discover a volunteer worker's criminal convictions for DWI was not a cause-in-fact of the employee molesting children. The Court also held that the sexual assaults were not a foreseeable consequence of failing to investigate.

In *Read v. Scott Fetzer Co.*, 990 S.W.2d 732, 737 (Tex. 1999), a 6-to-3 majority of the Court held that "[s]ending a sexual predator into a home poses a foreseeable risk of harm to those in the home. Kirby dealers, required to do in-house demonstration, gain access to that home by virtue of the Kirby name. A person of ordinary intelligence should anticipate that an unsuitable dealer would pose a risk of harm."

In *Lee Lewis Const., Inc. v. Harrison*, 70 S.W.3d 778, 784-85 (Tex. 2002), a majority of the Court upheld a $12+ million verdict, saying that there was some evidence to support the finding that a general contractor's failure to require a subcontractor's employees to wear a life line while installing glass in a tall building was a proximate cause of the employee's death.

In *Excel Corp. v. Apodaca*, 81 S.W.3d 817, 820-22 (Tex. 2002), a unanimous Court held that an employee presented no evidence that, but for the employer's negligence, he would not have developed cumulative trauma disorders.

In *Southwest Key Program, Inc. v. Gil-Perez*, 81 S.W.3d 269, 274-75 (Tex. 2002), a 7-2 majority of the Supreme Court found no evidence that a boys' school's failure to provide protective equipment for use during an impromptu touch football game was a proximate cause of injury to one of the participants.

Marathon Comp. v. Pitzner, 106 S.W.2d 724 (Tex. 2003) (per curiam), the Court found legally insufficient evidence to support a jury verdict that a premises defect caused an air conditioning repairman to fall from the roof. The opinion of Plaintiff's expert, that Plaintiff suffered an electrical shock and fell, was pure speculation and piled inference upon inference.

In *Ford Motor Co. v. Ridgway*, 135 S.W.3d 98 (Tex. 2004), the Supreme Court held that an expert witness's affidavit that he "suspects" that a manufacturing defect (i.e., a faulty electrical system) caused a fire in a truck, but that the actual cause of the fire had not yet been determined, was no evidence of causation. The expert failed to rule out a faulty fuel system (which had been repaired three times) as a possible cause of the fire, and the fuel line had been repaired three times in this truck with 54,000 miles on the odometer.

In *IHS Cedars Treatment Center of DeSoto, Texas, Inc. v. Mason*, 143 S.W.3d 794 (Tex. 2004), on appeal from a summary judgment, the Court held that as a matter of law cause-in-fact did not exist between a mental health facility releasing the plaintiff and another patient simultaneously, and an accident occurring 28 hours later where the plaintiff was a passenger and the other patient was driving at a high speed and swerved to miss a dog, resulting in an accident that paralyzed the plaintiff. Cause-in-fact is not established where the defendant's conduct does no more than furnish a condition which makes the injuries possible. *Id.* At 799.

In *Southwestern Bell Tel. Co. v. Garza*, 2004 WL 3019205 (Tex. Dec. 31, 2004), the Supreme Court determined that the evidence was sufficient to establish that "but for" the employer's worker's compensation claim he would not have been terminated. In *General Motors Corp. v. Iracheta* No. 02-0932 (oral argument 12-3-2003), the Supreme Court is considering whether a defectively-designed fuel system was a producing cause of secondary fire resulting from an auto accident caused by the plaintiff's negligence.

On March 5, 2004, the Supreme Court granted review in *Dillard v. Texas Electric Cooperative et al*, No. 03-0655, to decide whether (1) an "unavoidable accident" instruction applies only to non-human conduct; (2) the jury should have been given a "sole proximate cause" instruction.

XVI. ASSIGNMENT OF LITIGATION-BASED CLAIMS. In *Trevino v. Turcotte,* 564 S.W.2d 682 (Tex. 1978), the Supreme Court invalidated the assignment of a distant heir's interest under a will, for the purpose of giving the assignee the right to contest the will. The Supreme Court created this exception to the general

rule of assignability, because these assignments distorted the assignees' real positions. *Id.* at 710.

In *International Proteins Corp. v. Ralston-Purina Co.*, 744 S.W.2d 932, 934 (Tex. 1988), the Supreme Court held that a tortfeasor cannot take an assignment of a plaintiff's claim as part of a settlement agreement with the plaintiff and prosecute that claim against a joint tortfeasor. The Court said: "As a general rule a cause of action may be assigned, but it is contrary to public policy to permit a joint tortfeasor the right to purchase a cause of action from a plaintiff to whose injury the tortfeasor contributed."

In *Elbaor v. Smith*, 845 S.W.2d 240 (Tex. 1992), the Supreme Court held that Mary Carter agreements, which assign a plaintiff's claims against a nonsettling defendant to a settling defendant, are void as against public policy. The rationale was that such arrangements "nearly always ensure a trial against the non-settling defendant" and "grant the settling defendant veto power over any proposed settlement between the plaintiff and any remaining defendant." *Id.* at 248. They also confuse the jury by presenting "a sham of adversity" between the plaintiff and settling defendant. *Id.* at 249. The Court stated:

> As a matter of public policy, this Court favors settlements, but we do not favor partial settlements that promote rather than discourage further litigation. And we do not favor settlement arrangements that skew the trial process, mislead the jury, promote unethical collusion among nominal adversaries, and create the likelihood that a less culpable defendant will be hit with the full judgment. The bottom line is that our public policy favoring fair trials outweighs our public policy favoring partial settlements.

In *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313, 318 (Tex. App.--San Antonio, 1994, writ ref'd), by adopting the court of appeals' opinion through the "writ refused" disposition, the Supreme Court endorsed the position that legal malpractice claims are not assignable, because the costs to the legal system outweigh the benefits.

In *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 714 (Tex.1996), a defendant settled with a plaintiff and then assigned to the plaintiff the defendant's claim for coverage against his own insurance company. The Supreme Court characterized the judgment as a "sham judgment," and voided the agreement, saying:

> [A] defendant's assignment of his claims against his insurer to a plaintiff is invalid if (1) it is made prior to an adjudication of plaintiff's claim against defendant in a fully adversarial trial, (2) defendant's insurer has tendered a defense, and (3) either (a) defendant's insurer has accepted coverage, or (b) defendant's insurer has made a good faith effort to adjudicate coverage issues prior to the adjudication of plaintiff's claim.

In *PPG Industries, Inc. v. JMB/Houston Centers Partners Ltd. Partnership*, 146 S.W.3d 79 (Tex. 2004), the Supreme Court held (6-3) that claims for damages under the Texas Deceptive Trade Practice Act are not assignable. The reason: "because of the statutory differences between the UCC and the DTPA, the personal litigation by consumers that was the DTPA's primary purpose, the personal and punitive nature of both DTPA claims and DTPA damages, and the risks to the adversarial process . . . ." *Id.* at 6.

The *PPG Industries* case cases indicates that the Supreme Court continues to invoke public policy to invalidate the assignment of claims in litigation that distort the parties' natural positions, or which encourage continued litigation after partial settlement.

XVII. STATUTE OF LIMITATIONS AND REPOSE.

A. ACCRUAL OF CAUSE OF ACTION. Texas follows the "legal injury rule," that "a cause of action accrues when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred." *S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex.1996).

B. WHEN ACCRUAL OF CAUSE OF ACTION IS DEFERRED. In *S.V. v. R.V.*, 933 S.W.2d at 6, the Supreme Court stated that "[a]ccrual of a cause of action is deferred in two types of cases. In one type, those involving allegations of fraud or fraudulent concealment, accrual is deferred because a person cannot be permitted to avoid liability for his actions by deceitfully concealing wrongdoing until limitations has run. The other type, in which the discovery rule applies, comprises those cases in which '"the nature of the

injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable.'"

C. DISCOVERY RULE. Under the "discovery rule,"an action does not accrue until the plaintiff knew or in the exercise of reasonable diligence should have known of the wrongful act and resulting injury. *S.V. v. R.V.*, 933 S.W.2d at 4. This exception applies to cases of fraud and fraudulent concealment, and in other cases in which "the nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable." *Computer Assoc. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 456 (Tex. 1996).

The discovery rule has been applied to legal malpractice claims, on the ground that legal malpractice is inherently undiscoverable because "[i]t is unrealistic to expect a layman client to have sufficient legal acumen to perceive an injury at the time of the negligent act or omission of his attorney." *Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988). And the discovery rule has been applied to negligent tax advice given by a CPA. *Murphy v. Campbell*, 964 S.W.2d 265, 270 (Tex. 1997).

In *S.V. v. R.V.*, a daughter filed suit against her parents for sexual abuse asserting that she had repressed her memory of the abuse and had only recovered it after the statute of limitations had expired. The Supreme Court held that opinions in the area of repressed and recovered memory did not meet the "objective verifiability" element for extending the discovery rule, so the claim was denied.

"A defendant moving for summary judgment on the affirmative defense of limitations has the burden to conclusively establish that defense. . . . When the plaintiff pleads the discovery rule as an exception to limitations, the defendant must negate that exception as well." *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 222-23 (Tex. 1999).

D. COURSE OF TREATMENT. The period of limitations in medical malpractice cases runs from any one of three events: (i) the date the breach or tort occurred; (ii) the date the treatment that is the subject of the claim is completed; or (iii) the date the hospitalization for which the claim is made is completed. *Chambers v. Conaway*, 883 S.W.2d 156, 158 (Tex. 1994). In *Chambers*, the Supreme Court reversed a summary judgment where the plaintiff gave summary judgment proof that her doctor was negligent in failing to diagnose her breast cancer despite her complaint about a lump in her breast and her numerous visits to the doctor for ailments unrelated to that complaint. The Supreme Court concluded, with Justices Hecht and Enoch dissenting, that the doctor allegedly breached this duty on the dates of each doctor's visit. In *Shah v. Moss*, 67 S.W.3d 836 (Tex. 2002), a 5-4 majority of the Court (Justice Baker, joined by Justices Hecht, Owen, Jefferson and Rodriguez) affirmed a summary judgment that limitations had run on a medical malpractice claim because the original negligent act was on a readily ascertainable date, and because "the course of treatment" follow-up examinations did not include the final visit that was nothing more than a yearly exam. Ignoring the final visit, the court of treatment ended more than two years prior to the filing of suit. *Id.* at 845.

E. CONTINUING TORT DOCTRINE. There has been much activity at the court of appeals level, relating to the continuing tort doctrine. The continuing tort doctrine is an exception to the discovery rule. *First Gen. Realty Corp. v. Md. Cas. Co.*, 981 S.W.2d 495, 501 (Tex. App.--Austin 1998, pet. denied). The continuing tort doctrine applies to tortious acts that are inflicted over a period of time and repeated until desisted. *Dickson Constr., Inc. v. Fid. & Deposit Co.*, 960 S.W.2d 845, 851 (Tex. App.--Texarkana 1997, no pet.) (op. on reh'g). Continuing torts create a separate cause of action each day they exist. *Id*. The doctrine provides that a cause of action for a continuing tort does not accrue until that tortious act ceases. *Id*. For instance, in *Newton v. Newton*,. 895 S.W.2d 503, 506 (Tex. App.--Forth Worth 1995, no writ), the continuing tort doctrine was applied to a claim for intentional infliction of emotional distress resulting from a course of behavior over time. *Accord, Jackson v. Creditwatch, Inc.*, 84 S.W.3d 397, 403 (Tex. App.--Fort Worth 2002); *Toles v. Toles*, 45 S.W.3d 252, 262 (Tex. App.--Dallas 2001, pet. denied); *Twyman v. Twyman*, 790 S.W.2d 819, 821 (Tex. App.- - Austin 1990), *rev'd on other grounds*, 855 S.W.2d 619 (Tex. 1993).

The continuing tort doctrine does not apply when the injury is permanent. *Walton v. Phillips Petroleum Co.*, 65 S.W.3d 262, 275 (Tex. App.--El Paso 2001, pet. denied); *Mitchell Energy Corp. v. Bartlett*, 958 S.W.2d 430, 443 (Tex. App.--Fort Worth 1997, pet. denied).

The continuing tort doctrine is presently being considered in *Schneider National Carriers Inc. v.*

Bates, No. 03-0236 (Oral argument on Jan. 14, 2004), in connection with a nuisance claim and other non-nuisance-related claims pertaining to damage to land..

F. OPEN COURTS PROVISION. The "Open Courts" provision of the Texas Constitution, art. I, §13, prohibits the legislature from imposing a limitations period that cuts off a person's right to sue on a well-established common law claim before there is a reasonable opportunity to discover the wrong. *Neagle v. Nelson*, 685 S.W.2d 11, 12 (Tex. 1985). A plaintiff cannot obtain relief under the open courts provision if he does not sue within a reasonable time after learning of the alleged wrong. *Shah v. Moss*, 67 S.W. 3d 836, 847 (Tex. 2002). In *Shah*, the Supreme Court held that a delay in filing suit of more than two years after the plaintiff learned of the injury, was *as a matter of law*, not filing within a reasonable time. *Id.* at 845. The Supreme Court cited decisions by the Ft. Worth Court of Appeals in support of this decision. *Id.* at 847. The Court did not say whether unreasonable delay is always a question of law, and whether a shorter period of delay might present a question of fact that would defeat summary judgment and require a jury to resolve. In [date] Texas voters amended the open courts provision to provide _____.

G. STATUTES OF REPOSE. While both statutes of limitations and statutes of repose set deadlines for plaintiffs to file claims, the period set under a statute of repose is independent of the claim's accrual or discovery. *Trinity River Auth. v. URS Consultants*, 889 S.W.2d 259, 261 (Tex. 1994). Statutes of repose not only cut off rights of action within a specified time after they accrue, but also they can cut off rights of action before they accrue at all. *See Johnson v. City of Fort Worth*, 774 S.W.2d 653, 654 n. 1 (Tex. 1989) (per curiam). In *Holubec v. Brandenberger*, 111 S.W.3d 32, 39 (Tex. 2003), the Supreme Court held that a provision in the Texas Right to Farm Act, Tex. Agric. Code § 251.001, shortening the period for bringing a nuisance action against an agricultural operation to one year, was a statute of repose and not a statute of limitations.

H. MISCELLANEOUS. In *Martinez v. Val Verde County Hospital District*, 140 S.W.3d 370 (Tex. 2004), a unanimous Court held that the six-month period prescribed in the Texas Tort Claims Act for giving notice against a governmental unit is not tolled during a claimant's minority. The tolling-during-minority provision in TCP&RC § 16.001 applies only to statutes of limitations in Chapter 16, subchapter A (limitations of personal actions). The Court noted *Weiner v. Wasson*, 900 S.W.2d 316 (Tex. 1995), where the Court held that a statute of limitations could not operate against a minor's health care liability claim without violating the Open Courts provision of the Texas Constitution, but did not explain why the case was not applicable. However, the State is not required to waive immunity at all, and the fairness of how it does is not for the courts to decide. *Id.* at 372.

XVIII. DAMAGES.

A. ACTUAL DAMAGES.

1. Appellate Review of Amount of Damages. In determining whether damages are excessive, trial courts and courts of appeals should employ the same test as for any factual insufficiency question. *Pope v. Moore*, 711 S.W.2d 622, 624 (Tex. 1986):

> Lower courts should examine all the evidence in the record to determine whether sufficient evidence supports the damage award, remitting only if some portion is so factually insufficient or so against the great weight and preponderance of the evidence as to be manifestly unjust. Courts of appeals also should detail the relevant evidence, and if remitting, state clearly why the jury's finding is so factually insufficient or so against the great weight and preponderance of the evidence as to be manifestly unjust. Pool v. Ford Motor Co., --- S.W.2d ---- (Tex. 1986). Lower courts need not find passion, prejudice, or other improper motive on the jury's part to order a remittitur.

Trial courts may not order a remittitur when factually sufficient evidence supports a damages award. *Larson v. Cactus Util. Co.*, 730 S.W.2d 640, 641 (Tex. 1987).

2. Mental Anguish Damages.

a. When Are They Recoverable?

(1) Reluctance to Grant Mental Anguish Damages. The Supreme Court noted in *City of Tyler v. Likes*, 962 S.W.2d 489, 494-95 (Tex. 1997), that there are two principal reasons courts have been unwilling to recognize mental anguish as compen-

sable in every case in which it occurs. First, it is difficult to predict who will suffer mental anguish, because of the variability of the human response to particular conduct and the inability to distinguish those instances where mental anguish is a reasonably foreseeable consequence. Second, even where mental anguish is forseeable, it is difficult to verify the existence of mental anguish because of its inherently subjective nature.

(2) When Mental Anguish Damages are Recoverable. Texas permits recovery of mental anguish damages in "virtually all personal injury actions." *Krishnan v. Sepulveda*, 916 S.W.2d 478, 481 (Tex. 1995). And Texas recognizes the right of bystanders to recover emotional distress damages suffered as a result of witnessing a serious or fatal accident. *Freeman v. City of Pasadena*, 744 S.W.2d 923 (Tex. 1988). Additionally, there are certain relationships which "give rise to a duty which, if breached, would support an emotional distress award" even absent proof of physical injury. *Boyles v. Kerr*, 855 S.W.2d 593, 600 (Tex. 1993). This includes the physician/patient relationship. *Krishnan v. Sepulveda*, 916 S.W.2d at 481.

(3) Where Mental Anguish Damages Are Not Recoverable. The Supreme Court has held that mental anguish damages are not recoverable in connection with negligent misrepresentation. *Federal Land Bank Assoc. v. Sloane*, 825 S.W.2d 439 (Tex. 1991). Nor can they be recovered for negligent injury of property. *City of Tyler v. Likes*, 962 S.W.2d 489, 494 (1997). Nor can they be recovered in connection with economic losses resulting from legal malpractice. *Douglas v. Delp*, 987 S.W.2d 879, 884 (Tex. 1999). And mental anguish damages are not recoverable under a breach of contract claim. *Stewart Title Guar. Co. v. Acello*, 941 S.W.2d 68, 72 (Tex. 1997).

(4) Intentional Infliction of Emotional Distress. In *Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993), the Supreme Court adopted Section 46(1) of the Restatement (2d) of Torts, permitting the recovery of damages for intentional infliction of severe emotional distress through outrageous conduct. Justice Cornyn, joined by Justice Hightower, wrote the court's plurality opinion. Id. at 620. Justice Gonzalez wrote a solitary concurring opinion. Id. at 626. Justice Phillips wrote an opinion, concurring and dissenting, in which no one joined. Id. at 626. Justice Hecht wrote an opinion, concurring and dissenting, in which Justice Enoch joined. Id. at 629. Justice Spector wrote a dissenting opinion in which Justice Doggett joined. Id. at 640. Justice Gammage, who authored the court of appeals opinion under review in the supreme court, did not participate in the case. Id. at 626.

Justice Cornyn's plurality Opinion divided the vote in the following way:

> Five members of the court–Chief Justice Phillips and Justices Gonzalez, Hightower, Doggett, Spector and Cornyn--agree that the judgment of the court of appeals must be Reversed: Justices Gonzalez, Hightower, and I form a plurality of the court who recognize the tort of intentional infliction of emotional distress in the marital context and who remand this case for a new trial in the interests of Justice; Chief Justice Phillips would recognize the tort, but not apply it to married couples and would reverse and render; Justices Hecht and Enoch would not recognize the tort under any circumstances and would reverse and render. Justices Doggett and Spector would recognize the tort in the marital context but would affirm the judgment of the court of appeals."

Cornyn Opinion at 622, n. 4.

(5) Negligent Infliction of Emotional Distress. In *St. Elizabeth Hospital v. Garrard*, 730 S.W.2d 649, 650 (Tex. 1987), the majority Opinion by Justice Ray, joined by four other Justices, asserted that the tort of negligent infliction of emotional distress had been recognized in Texas since 1890. There had been a long-standing requirement of physical manifestations of the mental anguish, and Justice Ray's majority Opinion abolished that requirement.

Justice Spears filed a concurring and dissenting opinion in which Justices Campbell, Robertson, and Gonzalez, joined, which described the tort more narrowly as relating to the mishandling of a corpse, and argued in favor of retaining the physical manifestation rule for mental anguish damages.

Six years later, in *Boyles v. Kerr*, 855 S.W.2d 593, 597 (Tex. 1993), the Supreme Court restricted the operation of *St. Elizabeth Hospital v. Garrard* to corpse cases, and held that Texas does not recognize a general legal duty to avoid negligently inflicting mental anguish. The majority Opinion was written by Chief Justice Phillips. Gonzalez,

J., concurred, pointing out that beneath all the rhetoric was a concern that the plaintiff's claim sound in negligence, or in intentional tort, so that the claim would be or conversely would not be covered by insurance. Justice Doggett wrote two dissenting Opinions, joined by Justice Mauzy and Justice Gammage, decrying the overturning of *St. Elizabeth Hospital v. Garrard*. Justice Cook, wrote a brief concurring opinion, because he found the majority Opinion confusing.

b. Appellate Review of Mental Anguish Damages. In *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444 (Tex. 1995), the Supreme Court stated the legal sufficiency standard of appellate review for recovery of mental anguish damages. In order to survive a legal sufficiency challenge, plaintiffs must present "direct evidence of the nature, duration, and severity of their mental anguish, thus establishing a substantial disruption in the plaintiffs' daily routine." If there is no direct evidence, the appellate court will apply "traditional 'no evidence' standards to determine whether the record reveals any evidence of 'a high degree of mental pain and distress' that is 'more than mere worry, anxiety, vexation, embarrassment, or anger' to support any award of damages."

The case of *Gunn Infiniti, Inc. v. O'Byrne*, 996 S.W.2d 854, 861 (Tex. 1999), involved a car dealership's sale of a damaged car as if it were undamaged. The Supreme Court found legally insufficient evidence of mental anguish The Court said that the distress shown did not rise to the level of "a high degree of mental pain and distress" that is "more than mere worry, anxiety, vexation, embarrassment, or anger." Nor was there any evidence that there was a substantial disruption in the plaintiff's daily routine.

The factual sufficiency standard of review of mental anguish damages is same as for any factual sufficiency question. *See Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406 (Tex. 1998) (involving damages for physical injury). "When considering a factual sufficiency challenge to a jury's verdict, courts of appeals must consider and weigh all of the evidence, not just that evidence which supports the verdict. . . . . A court of appeals can set aside the verdict only if it is so contrary to the overwhelming weight of the evidence that the verdict is clearly wrong and unjust." *Id.* at 406-07 [citations omitted]

The standard for reviewing whether a trial court should have ordered a remittitur is factual sufficiency. *Rose v. Doctors Hosp.*, 801 S.W.2d 841, 847-48 (Tex. 1990); *Larson v. Cactus Util. Co.*, 730 S.W.2d 640, 641 (Tex. 1987).

B. EXEMPLARY DAMAGES.

1. When Are Exemplary Damages Available? To recover exemplary damages, the plaintiff must recover on an independent tort with accompanying actual damages. *Fed. Express Corp. v. Dutschmann*, 846 S.W.2d 282, 284 (Tex. 1993). Then the plaintiff must additionally prove one of the recognized grounds for recovering exemplary damages: fraud, malice, or wilful act or omission or gross neglect in a wrongful death action brought by a spouse or survivor of the deceased. Tex. Civ. Prac. & Rem. Code § 41.003.

Prior to 1995, Texas permitted the recovery of exemplary damages in negligence cases upon a showing of "gross negligence." In *Burke Royalty Co. v. Walls*, 616 S.W.2d 911, 922 (Tex. 1981), the Supreme Court said that the essential feature of gross negligence is the mental attitude of the defendant -- the defendant must know about the peril, while his acts or omissions show that he did not care. This was a subjective standard. In contrast, Restatement (2d) of Torts § 500, dealing with recklessness, includes both a subjective and an objective standard. In *Williams v. Steves Industries, Inc.*, 699 S.W.2d 570, 573 (Tex. 1985), the Supreme Court suggested that an objective standard could be used as an alternative to the subjective standard for gross negligence. Then, in *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 23 (Tex. 1994), a seven-to-two majority of the Supreme Court retreated from *Williams*, and held that gross negligence required proof of two components: (1) viewed objectively from the actor's standpoint, the act or omission complained of must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others.

In 1995, the Legislature amended Tex. Civ. Prac. & Rem. Code § 41.003 to provide that exemplary damages may be awarded only if the claimant proves, by clear and convincing evidence, that the injuries suffered result from fraud, malice, or wilful act or omission or gross neglect in wrongful death actions. As defined in TCP&RC § 41.003, "malice" required proof of both objective and subjective component of risk and awareness. In

2003, the Legislature amended Section 41.003, so that gross negligence is back to being a separate ground and malice is back to being specific intent to cause substantial harm.

In *City of Gladewater v. Pike*, 727 S.W.2d 514, 5227 (Tex. 1987), the Supreme Court held that, where a city is engaged in a proprietary function (so that the Tort Claims Act does not apply), then "[a]s a general rule a municipality may not be held liable for exemplary damages; however, if the plaintiff can show that there is intentional, willful, or grossly negligent conduct which shows an entire want of care to his rights and that such conduct can be imputed directly to the governing body of the municipality, exemplary damages may be recovered."

2. Appellate Review of Gross Negligence/Malice. The question of whether the evidence supports exemplary damages, and whether the evidence supports the amount of exemplary damages awarded, are two different questions. *Louisiana Pacific Corp. v. Andrade*, 19 S.W.3d 245, 248-49 (Tex. 1999). *See Dillard Department Stores, Inc. v. Silva*, 148 S.W.3d 370, 373 (Tex. 2004) (reasonableness of award of exemplary damages is different from the threshold question of whether exemplary damages should be awarded in the first place).

In *Burke Royalty Co. v. Walls*, 616 S.W.2d 911, 922 (Tex. 1981), the Court described the legal sufficiency standard of review of gross negligence as follows:

> In determining whether there is some evidence of the jury's finding of gross negligence, the reviewing court must look to all of the surrounding facts, circumstances, and conditions, not just individual elements or facts. . . . At first glance there may appear to be some conflict in utilizing the traditional no evidence test and considering all the facts and circumstances to determine gross negligence. The . . . existence of gross negligence need not rest upon a single, act or omission, but may result from a combination of negligent acts or omissions, and many circumstances and elements may be considered in determining whether an act constitutes gross negligence. A mental state may be inferred from actions. All actions or circumstances indicating a state of mind amounting to a conscious indifference must be examined in deciding if there is some evidence of gross negligence. "In making this determination, all evidence must be considered in a light most favorable to the party in whose favor the verdict has been rendered, and every reasonable inference deducible from the evidence is to be indulged in such party's favor."

"Evidence of gross negligence is legally sufficient if, considered as a whole in the light most favorable to the prevailing party, it rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Lee Lewis Const., Inc. v. Harrison*, 70 S.W.3d 778, 785 (Tex. 2002). Evidence of simple negligence is not evidence of gross negligence; conversely, some evidence of care does not defeat a gross negligence finding. *General Motors Corp. v. Sanchez*, 997 S.W.2d 584, 595 (Tex. 1999).

In *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 31 (Tex. 1994), the Supreme Court announced that courts of appeals, when conducting a factual sufficiency review of a punitive damages award, must detail all the relevant evidence and explain why that evidence supports or does not support the punitive damages award. This requirement is not limited just to evidence supporting punitive damages, but rather extends to evidence both for and against punitive damages. *Ellis County State Bank v. Keever*, 915 S.W.2d 478, 479 (Tex. 1996).

In *Louisiana Pacific Corp. v. Andrade*, 19 S.W.3d 245 (Tex.1999), the Supreme Court found no evidence that the property owner had actual, subjective knowledge of the risk that crane touched by the plaintiff was energized that day, and no evidence that the defendant was consciously indifferent to the risk so as to permit recovery for gross negligence.

The sufficiency of the evidence to support a finding of malice is presented in *Southwestern Bell Tel. Co. v. Garza*, No. 01-1142 (oral argument 10-15-2003), which is pending decision in the Supreme Court.

With *Moriel*, and by a later amendment to TEX. CIV. PRAC. & REM. CODE §41.003, the burden of persuasion for exemplary damages is clear and convincing evidence. In *J.F.C.*, 96 S.W.3d 256 (Tex. 2002), the Supreme Court announced the standard of appellate review of the legal sufficiency of the evidence review where the burden of

persuasion is clear and convincing evidence. See discussion in Section VII.B.7 above.

3. Appellate Review of Amount of Exemplary Damages. In *Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981), the Supreme Court listed factors for appellate courts to consider in determining whether an award of exemplary damages is reasonable: (1) the nature of the wrong, (2) the character of the conduct involved, (3) the degree of culpability of the wrongdoer, (4) the situation and sensibilities of the parties concerned, and (5) the extent to which such conduct offends a public sense of justice and propriety. In 1995, the Legislature amended Chapter 41 of the Tex. Civ. Prac. & Rem. Code to add as a sixth factor - - the net worth of the defendant. Tex. Civ. Prac. & Rem. Code § 41.011.

Exemplary damages must be reasonably proportioned to actual damages. "There can be no set rule or ratio between the amount of actual and exemplary damages which will be considered reasonable. This determination must depend upon the facts of each particular case." *Alamo Nat. Bank v. Kraus*, 616 S.W.2d at 910.

The question of whether the amount of exemplary damages awarded by the jury is excessive is a question of fact over which the Supreme Court has no jurisdiction. *Southwestern Investment Company v. Neeley*, 452 S.W.2d 705, 708 (Tex. 1970). However, the Supreme Court does have jurisdiction over the question of whether the court of appeals applied an erroneous standard in determining the excessiveness of damages. *Alamo Nat. Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981).

XIX. CLASS ACTIONS. In the past few years, the Supreme Court has made decisions, relating to class actions, that have changed the familiar way of doing things in Texas. Additionally, the Texas Legislature in 2003 passed House Bill 4, which requires that class counsel attorneys' fees by set using the Lodestar method, and requires that attorneys' fees bear the same ratio of cash to non-cash benefits as does the class members' recovery. In a 2003 amendment to TRCP 42, the Texas Supreme Court "codified" the new requirements developed in case law, implemented the House Bill 4 requirements, and also adopted portions of the procedures for appointing class counsel and setting fees that were contained in recently-enacted federal rules of procedure.

On February 18, 2005, President Bush signed the Class Action Fairness Act of 2005. Under this new law, more state class actions can be removed to federal court. Class counsel fees in coupon-based settlements must be based on the value of the coupons. Attorney's fees in non-coupon-based settlements must be based on time class counsel reasonably expended. The expansion of federal jurisdiction should move more Texas class actions out of state court into federal court.

A. CLASS ACTIONS GENERALLY. The class action is a procedural device intended to advance judicial economy by trying claims together that lend themselves to collective treatment." *Southwestern Refining Co., Inc. v. Bernal*, 22 S.W.3d 425, 437 (Tex. 2000). Under Tex. R. Civ. P. 42(a), a class action is appropriate if: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law, or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. TRCP 42(b)(3) allows a class action only when "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

B. APPEALABILTY. Appellate review of final judgments in class actions is virtually non-existant, because most cases that are certified for class action will settle, sometimes with large attorneys' fees and small recoveries for individual class members. In 1985, the Texas Legislature provided an appeal for interlocutory orders that certify or refuse to certify a class in a suit brought under TRCP 42. Tex. Civ. Prac. & Rem. Code §51.014(a)(3). The Texas Motor Vehicle Commission Code, adopted in 1997, makes class certification orders involving an automobile business licensee appealable to the Supreme Court. Tex. Rev. Civ. Stat. art. 4413(36), § 6.06(g).

House Bill 4 amended TCP&RC §22.225(d) to give the Supreme Court appellate jurisdiction over an interlocutory order that "certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure." Thus, it is no longer necessary to establish conflict or dissent jurisdiction for the Supreme Court to have appellate review of an order certifying or refusing to certify a class. Over time, the Supreme Court has

enlarged the range of interlocutory class action-related orders that are appealable beyond those described in the statute.

In *De Los Santos v. Occidental Chemical Corp.*, 933 S.W.2d 493, 495 (Tex. 1996), the Supreme Court held that an interlocutory order is appealable when it alters the fundamental nature of a class, in this instance by changing a certified class from opt-out to mandatory, thus creating a conflict between the class and its counsel.

In *McAllen Med. Ctr., Inc. v. Cortez*, 66 S.W.3d 227, 231 (Tex. 2001), the Supreme Court said the certification of a settlement-only class against a defendant makes the certification ripe for appeal.

In *Wood v. Victoria Bank & Trust Co., N.A.*, 69 S.W.3d 235, 238 (Tex. 2001), the Supreme Court held that "an order that decertifies a class alters the fundamental nature of the class and changes the status quo ante," and so is subject to interlocutory appeal. But, in *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 358 (Tex. 2001), the Court ruled that an order refusing to decertify a class is not subject to interlocutory appeal.

C. MANDAMUS REVIEW OF CLASS ACTION-RELATED ORDERS. There are class action-related orders that are not subject to interlocutory appeal, and in some instances those orders might be reviewable by mandamus. In the case of *In re Van Waters & Rogers, Inc.*, 62 S.W.3d 197 (Tex. 2001), the Supreme Court granted mandamus to overturn a trial court's order restricting the right of defendants to do discovery regarding certain members of a class. The Court noted:

> [T]he trial court's discovery order denies defendants "discovery that goes to the heart of the litigation." . . . Moreover, the continued abatement of the discovery process after seven years of litigation threatens that evidence critical to the claims made will become unavailable before discovery can be conducted. For these reasons we conclude as we did in Colonial Pipeline that relators do not have an adequate remedy by appeal. [Citation omitted]

In re Van Waters & Rogers, Inc., 62 S.W.3d at 201.

D. PROCEDURAL ISSUES. The Supreme Court decided three class action appeals in year 2000 that changed the terrain of class action litigation in Texas. Changes to TRCP42 made in 2003, some confirming case law decisions, some mimicing changes to the Federal Rules of Civil Procedure, and some required by House Bill 4, have made Texas class actions harder to achieve and have permitted appellate review at an earlier stage.

In *Intratex Gas v. Beeson*, 22 S.W.3d 398 (Tex. 2000), the Court reviewed a class definition, then rejected it. One problem was that the trial court had created a "fail safe" class–meaning that if the plaintiffs lose then the class collapses and the plaintiffs are not bound by the judgment. *Id.* at 405. Also, the trial court abused its discretion because the class definition in the case was not precise, and its members could not be ascertained until the alleged ultimate liability issue was decided. *Id.* at 405. In disposing of the case, the Court noted that it could not modify the class definition without interfering with the trial court's discretion and oversight of the class action, so the Court declined to redefine the class on appeal. Instead, it remanded the case to the trial court for further proceedings consistent with this opinion. *Id.* at 400.

In *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425, 435 (Tex. 2000), the Court said that "[c]ourts must perform a 'rigorous analysis' before ruling on class certification to determine whether all prerequisites to certification have been met. . . . Although it may not be an abuse of discretion to certify a class that could later fail, we conclude that a cautious approach to class certification is essential. The Court also said: "A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting individuals in different ways." *Id.* at 436. The Court concluded that "individual issues predominate over common ones in this class," and certification was an abuse of discretion. *Id.* at 439. In a concurring Opinion, Justice Baker joined by Justice Hecht expressed the view that all components of a personal injury case have to be tried to the same jury. *Id.* at 440-441.

In *Ford Motor Co. v. Sheldon*, 22 S.W.3d 444 (Tex. 2000), the Supreme Court considered the propriety of a class definition. The Court said that

for a class to be properly defined, the class members must be clearly ascertainable by reference to objective criteria. *Id.* at 453. In this case, the Court found that the class definitions failed to meet the clearly-ascertainable requirement of TRCP 42, so the case was remanded to the trial court to decertify the class without prejudice to formulating a different class definition.

The foregoing triad of cases was seen as greatly restricting the availability of class actions in Texas.

In *McAllen Med. Ctr., Inc. v. Cortez*, 66 S.W.3d 227, 232 (Tex. 2001), the Supreme Court held that a trial court must perform a rigorous analysis of a settlement-only class action before certifying the class. The trial court must exercise heightened scrutiny to make certain that absent class members are adequately protected. The fact that the order is preliminary does not insulate it from appellate review–the Supreme Court declared the issue "ripe" for appeal. *Id.* at 234.

In *Compaq Computer Corp. v. LaPray*, 135 S.W.3d 657 (Tex. 2004), the Supreme Court extended the requirement of rigorous analysis of predominance and superiority to (b)(2) classes that contain an element of recovery of damages, and indicated that (b)(2) class would probably have to require notice and an opportunity to opt out in order to be sustained.

In *Snyder Communications, L.P. v. Magana*, 142 S.W.3d 295 (Tex. 2004), the Supreme Court reversed a class certification order in a suit to recover commissions brought by former sales reps of a telecommunications company, because common questions did not predominate over questions affecting individual class members.

The 2003 amendments to TRCP 42 included the essential requirements of these decisions in the new version of the rule.

In 2003, the Legislature enacted House Bill 4. Section 1.01 of House Bill 4 added Chapter 26 to the Texas Civil Practice & Remedies Code, relating to Class Actions. New Section 26.001 directed that "[t]he supreme court shall adopt rules to provide for the fair and efficient resolution of class actions." New Section 26.002 says that "[r]ules adopted under Section 26.001 must comply with the mandatory guidelines established by this chapter."

New TCP&RC § 26.051(a) provides that "[b]efore hearing or deciding a motion to certify a class action, a trial court must hear and rule on all pending pleas to the jurisdiction asserting that an agency of this state has exclusive or primary jurisdiction of the action or a part of the action, or asserting that a party has failed to exhaust administrative remedies." The denial of such a plea to the jurisdiction can be appealed with an order certifying the class action. *Id.* § 26.051(b).

On October 9, 2003, the Texas Supreme Court promulgated amendments to TRCP 42, relating to class actions. These new rules included changes that were mandated by House Bill 4 (setting attorneys' fees using the lodestar method and requiring an equivalence between the ratio of cash vs. non-cash recovery for class members and the cash vs. non-cash components of attorneys' fees). The Supreme Court also adopted portions of the pending changes to Federal Rule of Civil Procedure 24 (class actions), that relate to appointment and payment of class counsel. And the Supreme Court folded into TRCP 42 the procedural requirements that were announced in *Bernal* and other recent cases.

XX. THE RISING TIDE OF ARBITRATION. It is the public policy of both the United States government and the Texas government to uphold pre-dispute agreements for mandatory arbitration of disputes in lieu of litigation in the courts. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217 (1985); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984); *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 268 (Tex. 1992). The Texas Supreme Court's decisions generally support arbitration.

Arbitration initially flourished in labor disputes. Stock brokerage houses moved to arbitration several decades ago. Although Tex. Civ. Prac. & Rem. Code § 171.002(b) & (c) make it difficult to force arbitration in consumer transactions involving $50,000 or less (the arbitration agreement must be in writing, signed by the parties, and by their attorneys), and for tort claims (each party to the claim must, on the advice of counsel, agree in writing to arbitrate and the agreement must be signed by the parties and their attorneys). Arbitration is now moving into $50,000 plus consumer disputes like home building. In the last analysis, the flight to arbitration is a flight from juries. But to opt out of juries, the parties must opt out of litigation altogether, which means they opt out of discovery and they opt out of appellate review.

Arbitration negates the accountability of judicial elections, and abandons the development of stare decisis. When an entire industry opts for arbitration, the consumer has no alternative but to accept arbitration. The long term effects of this trend are uncertain. But in the last analysis, it is the Congress and the Legislature who are controlling this movement, and the courts can only sit and watch as they are slowly replaced by a system of private justice that is immune from judicial oversight.

A. FEDERAL VS. STATE LAW. The ability of the parties to contract to resolve future disputes through binding arbitration is established by federal statute in the Federal Arbitration Act [FAA], 9 U.S.C. § 1-ff, and by state statute in the Texas Civil Practice & Remedies Code ch. 171. The Federal Arbitration Act applies to, and pre-empts state law as to, commercial disputes involving interstate commerce. Section 1 of the FAA defines "commerce" to be "commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation," but excluding workers engaged in interstate commerce. The exclusion has been interpreted narrowly by courts.

The Commerce Clause is the U.S. constitutional basis supporting the federal legislation regarding arbitration. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 304 U.S. 64 (1967). As noted in the case of *In re FirstMerit Bank*, N.A., 52 S.W.3d 749, 754 (Tex. 2001): "[T]he United States Supreme Court has construed the FAA to extend as far as the Commerce Clause of the United States Constitution will reach." The U.S. Supreme Court has determined that even intrastate activities that affect interstate commerce come within Congress's purview under the Commerce Clause. *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941).

The federal statute applies to litigation in state courts, where the matter touches upon interstate commerce. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995) (federal arbitration statute applies to state-law claims in state court and pre-empts all contrary state statutes).

Texas courts have applied the FAA to employment agreements coming before Texas courts. *See e.g., Russ Berry & Co., Inc. v. Gant*, 998 S.W.2d 713, 715 (Tex. App.–Corpus Christi 1999, no pet.), although state law and not the FAA was applied to a non-resident of Texas who hired a Texas resident to repair Texas real estate. *In re L&L Kempwood Associates., LP v. Omega Buildings, Inc.*, 9 S.W.3d 125 (Tex. 1999).

B. DEFENSES TO ARBITRATION. Arbitration agreements are subject to the same defenses as any other contract. *See City of Alamo v. Garcia*, 878 S.W.2d 664, 665-66 (Tex. App.--Corpus Christi 1994, no writ).

1. Defenses to Arbitration Clause vs. Underlying Contract. Defenses such as duress and fraudulent inducement can be brought to the court only if they relate specifically to the arbitration clause itself, as opposed to the underlying contract. *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 756 (Tex. 2001). Defenses that pertain to the entire contract are to be resolved by the arbitrators. *Id*. at 755.

2. Unconscionability. A party can defeat an obligation to arbitrate by establishing that the agreement was unconscionable at the time the agreement was made. Tex. Civ. Prac. & Rem. Code § 171.022. The federal act is similar.

If the FAA governs the arbitration agreement, it is the arbitrator and not the court who determines the unconscionability defense. *In re Foster Mold, Inc.*, 979 S.W.2d 665, 667 (Tex. App.–El Paso 1998, orig. proceeding); *In re Rangel*, 45 S.W.3d 783, 786 (Tex. App.–Waco 2001, orig. proceeding). If the Texas statute and not the FAA applies, it is the *court* who decides whether the arbitration agreement was unconscionable at the time the agreement was made. Tex. Civ. Prac. & Rem. Code § 171.022.

The Supreme Court said, in *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749 (Tex. 2001):

> the basic test for unconscionability is whether, given the parties' general commercial background and the commercial needs of the particular trade or case, the clause involved is so one-sided that it is unconscionable under the circumstances existing when the parties made the contract. The principle is one of preventing oppression and unfair surprise and not of disturbing allocation of risks because of

> superior bargaining power. [Footnotes omitted]

52 S.W.3d at 757.

In the case of *In re Halliburton Co.*, 80 S.W.3d 566 (Tex. 2002), the Supreme court held that "courts may consider both procedural and substantive unconscionability of an arbitration clause in evaluating the validity of an arbitration provision." *Id*. at 571. According to the Court, "[u]nconscionability includes two aspects: (1) procedural unconscionability, which refers to the circumstances surrounding the adoption of the arbitration provision, and (2) substantive unconscionability, which refers to the fairness of the arbitration provision itself." *Id.* at 571.

3. Violation of Public Policy. In *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 239 (Tex. Dec. 31, 2002), the Supreme Court held that "an arbitration award cannot be set aside on public policy grounds except in an extraordinary case in which the award violates carefully articulated, fundamental policy." The opinion suggests that an arbitrator's award might be vulnerable if, for example, the arbitrator completely disregarded the requirements for perfecting mechanic's liens. *Id.* at 239.

C. ARBITRATION OF EMPLOYER-EMPLOYEE DISPUTES. In the mandamus case of *In re Halliburton Co.*, 80 S.W.3d 566 (Tex. 2002), the Supreme Court considered whether an employer can unilaterally impose a dispute resolution program under which all disputes between the company and its employees will be resolved by binding arbitration. Employees were informed that if they remained employed after January 1, 1998, they would be accepting the new dispute resolution program. Employee Myers remained employed past 1-1-98, and was later demoted. Myers sued in state court for discrimination based on race and age. The trial court refused to refer the case to arbitration, and the court of appeals denied the employer's request for mandamus made under the Federal Arbitration Act. The Texas Supreme concluded that: (1) prior case law permits an employer to lawfully make a "take it or leave it" offer to at-will employees; (2) the employee agreed to the terms of the dispute resolution program by remaining employed past the cut-off date; (3) the plan could not be avoided as an illusory promise on the part of the employer because the employer likewise was bound to arbitrate; and (4) the plan was not unconscionable due to one-sided bargaining power or unfairness in the arbitration procedures. The Supreme Court granted mandamus directing the case to arbitration.

Because of increasing fear of the cost, delay and uncertainty in outcome associated with the court system, and given employers' ability to effectively force arbitration upon at-will employees, we can expect more employer-employee disputes to be diverted from litigation to arbitration, with a concomitant loss of public knowledge of, and judicial control over, such disputes.

D. ARBITRATION OF CONSUMER DISPUTES. The Texas Legislature requires that arbitration clauses in consumer transactions of $50,000 or less must be in writing, and signed by the parties and their lawyers. Tex. Civ. Prac. & Rem. Code § 171.002(b). Because few Texas consumers will have a lawyers for small dollar transactions, the statute keeps vendors and service providers from privatizing litigation in consumer disputes that are not governed by the Federal Arbitration Act. Home purchases are a potential problem area, because they exceed $50,000.

E. SUPREME COURT JURISDICTION. An order refusing to refer a matter to arbitration or granting a stay of arbitration is appealable under TEX. CIV. PRAC. & REM. CODE §171.098(a). Under TEX. GOV'T. CODE § 22.225, the court of appeals' jurisdiction is final absent a dissent or conflict.

In *Certain Underwriters at Lloyd's of London v. Celebrity, Inc.*, 988 S.W.2d 731, 733 (Tex. 1998), the Supreme Court held that it had no jurisdiction to consider an appeal of an interlocutory arbitration order, because the court of appeals' jurisdiction was final since there was no dissent and no conflict.

If the arbitration clause is governed by the Federal Arbitration Act, interlocutory appeal is not available but mandamus review is. *In re American Homestar of Lancaster, Inc.*, 50 S.W.3d 480, 483 (Tex. 2001); *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992).

F. TEXAS SUPREME COURT RULINGS ON ARBITRATION. The Texas Supreme Court decisions are generally friendly to arbitration, as the State's public policy requires.

- In *Burlington Northern Ry. Co. v. TUCO, Inc.*, 960 S.W.2d 629 (Tex. 1997), the court of

appeals overturned an arbitration award on the ground of "evident partiality," and remanded the case for trial. The Supreme Court agreed that partiality was established as a matter of law, but reformed the remand to be for further arbitration, and not for litigation.

- In the case of *In re Bruce Terminex Co.*, 988 S.W.2d 702 (Tex. 1998), the Court ruled that a defendant did not waive the right to arbitrate by failing to arrange arbitration after the court referred the case to arbitration. The Court said the burden is on the plaintiff to make such arrangements.

- In the case of *In re Valero Energy Corp.*, 968 S.W.2d 916 (Tex. 1999), the Supreme Court held that a party seeking to enforce arbitration under both the FAA and Texas arbitration statutes should pursue both mandamus (under the FAA) and interlocutory appeal (under Texas law), and that the appellate court should consolidate the two matters and render one decision.

- In the case of *In re Halliburton Co.*, 80 S.W.3d 566 (Tex. 2002), the Supreme Court held that an employer's promise to arbitrate disputes was adequate consideration to support an arbitration program with at-will employees; (2) the supposed disparity in bargaining power between the employer and employee did not render the arbitration program unconscionable; and (3) the arbitration program was not substantively unconscionable. The Court considered, but rejected, a contention that the arbitration policy should not be enforced because it was illusory. Although such a policy would be illusory if the employer were not bound to arbitrate after employment terminated, in this case the obligation to arbitrate survived the termination of employment.

- In *Mariner Financial Group, Inc. v. H.G. Bossley*, 79 S.W.3d 30 (Tex. 2002), the Supreme Court approved vacating an arbitration award based on the arbitrator's evident partiality, when the arbitrator did not disclose a prior adverse relationship with one of the parties' expert witnesses.

- *In re Service Corporation Intern.*, 85 S.W.3d 171, 174-75 (Tex. 2002), the Supreme Court held that delay in moving to compel arbitration and defendants' opposition to plaintiffs' request for a trial setting did not amount to a waiver of arbitration. Neither involved a substantial invocation of the state judicial process. During the delay relators sought no relief from the state court, and their objection to a trial setting reflects an intent to avoid the state judicial process, not invoke it. Moreover, the Supreme Court has held that "[a] party does not waive a right to arbitration merely by delay; instead, the party urging waiver must establish that any delay resulted in prejudice."

- *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234 (Tex. 2002), the Supreme Court held that, where labor and materials for construction of a home were provided under a written agreement containing an arbitration clause, the arbitrator's award of a mechanic's lien was not subject to judicial review based on a claim that arbitrating liens on homestead violates public policy. The court held that the Texas Constitution did not preclude determination of the lien in arbitration.

- *In re First Texas Homes, Inc.*, 120 S.W.3d 868 (Tex. 2003) (per curiam), where a home construction contract provides that all disputes must be arbitrated under the Federal Arbitration Act, alleged violations of the state and federal fair housing acts and allegations of intentional infliction of emotional distress must be arbitrated.

- *In re Wood*, 140 S.W.3d 367 (Tex. 2004), the Court held that, where the agreement contained a FAA arbitration clause providing that all disputes arising from the agreement will be arbitrated, the arbitrator and not the court must determine all class action issues. This ruling was consonant with a 2003 U.S. Supreme Court ruling holding the same way.

XXI. EMPLOYER-EMPLOYEE RELATIONS. The long-standing rule in Texas provides for employment at will, terminable at any time by either party, with or without cause, absent an express agreement to the contrary. *Schroeder v. Texas Iron Works*, 813 S.W.2d 483, 489 (Tex. 1991); *East Line & R.R.R. v. Scott*, 72 Tex. 70, 10 S.W. 99, 102 (1888). "[A]bsent a specific agreement to the contrary, employment may be terminated by the employer or the employee at will, for good cause, bad cause or no cause at all." *Montgomery County Hosp. Dist. v. Brown*, 965 S.W.2d 501, 502 (Tex. 1998). However, firing an employee based on race, color, disability, religion,

sex, national origin, or age can give rise to a claim for discrimination under Texas Labor Code § 21.051.

A governmental entity is liable for damages under the Whistleblower Act if it discriminates against a public employee who reports a violation of law. Tex. Gov't Code §§ 554.001-.009. In a recent case, *Texas Dept. of Transportation v. Needham*, 82 S.W.3d 314, 320 (Tex. May 9, 2002), the Supreme Court held that "as a matter of law, TxDOT is not an appropriate law enforcement authority under section 554.002(b) for a public employee to report another employee's violation of Texas's driving while intoxicated laws," so that the allegedly retaliatory firing in the case was not actionable under the Whistleblower Act.

The parties can create a contract-based employment arrangement instead of an at-will arrangement. However, if the employment terms exceeds one year, to be enforceable it must be in writing and signed by the person to be charged. Tex. Bus. & Com.Code § 26.01(b)(6).

The Supreme Court has generally resisted the use of new or old tort claims to encroach on the employment-at-will doctrine. In *Diamond Shamrock Ref. & Mktg. Co. v. Mendez*, 844 S.W.2d 198, 202 (Tex. 1992), the Court held that, as matter of law, the manner of termination of employment in that case was not outrageous. In *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 612 (Tex. 1999), the Supreme Court has announced that a claim for intentional infliction of emotional distress does not lie for ordinary employment disputes, and would require proof of the most unusual of circumstances. In *City of Midland v. O'Bryant*, 185 S.W.3d 209, 216 (Tex. 2000), the Supreme Court declined to recognize a duty of good faith and fair dealing in the employment context because of the impact it would have on the employment-at-will relationship.

In *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985), the Supreme Court recognized a narrow exception to at-will employment, for an employee who was discharged for the sole reason that the employee refused to perform an illegal act. However, in *Austin v. Healthtrust, Inc.*, 967 S.W.2d 400, 403 (Tex. 1998), the Court refused to recognize a common-law whistleblower exception to at-will employment, saying such an exception would "eviscerate the specific measures the Legislature has already adopted."

In *Texas Farm Bureau Mut. Ins. Cos. v. Sears*, 84 S.W.3d 604 (Tex. 2002), the Supreme Court held that an employer does not owe an at-will employee a duty of ordinary care in investigating alleged misconduct leading to firing. The Court noted: "Engrafting a negligence exception on our at-will employment jurisprudence would inevitably swallow the rule." *Id*. at 609.

In *Wal-Mart Stores, Inc. v. Canchola*, 121 S.W.3d 735, 740 (Tex. 2003) (per curiam), the Supreme Court overturned a jury verdict of disability discrimination under the Texas Commission on Human Rights Act, on the ground that the employee offered no evidence to show that Wal-Mart management was motivated to terminate him because of his heart condition.

In *Mission Petroleum Carriers, Inc. v. Solomon*, 106 S.W.3d 705, 710 (Tex. 2003) (Justice Jefferson wrote the Opinion of the Court, with respect to Parts I, II, III-C, IV & V, in which he was joined by Chief Justice Phillips, Justice Hecht, Justice Enoch, Justice Owen, Justice O'Nneill, and Justice Wainwright, and a plurality Opinion with respect to Parts III-A, III-B & III-D, in which he was joined by Justice Hecht, Justice Owen, and Justice Wainwright), the Supreme Court declined to impose a common-law duty on employers who conduct in-house urine specimen collection pursuant to Department of Transportation (DOT) regulations, in light of the comprehensive regulation of drug testing outlined in the DOT regulations.

In a pro-employee decision, *Light v. Centel Cellular Co.*, 883 S.W.2d 642, 645-46 (Tex. 1994), the Supreme Court held that certain promises made by the employer in a covenant not to compete were illusory because they were dependent on the at-will employee's continued employment. Thus, the employer could avoid performance simply by terminating the employment relationship, while the employee was bound whether she stayed or left. The covenant not to compete was therefore the unenforceable.

XXII. GOVERNMENTAL IMMUNITY. In current parlance, governmental immunity involves sovereign immunity of the State and its subdivisions, and official immunity of employees of the State or its subdivisions. The Texas Supreme Court recognized sovereign immunity for the State of Texas in *Hosner v. DeYoung*, 1 Tex. 764, 769 (1847). In 1969, the Texas Legislature adopted the Texas Tort Claims Act, which provided a waiver of sovereign immunity in certain instances.

In 1985, the Act was codified, and now resides at Chapter 101 of the Texas Civil Practice & Remedies Code.

Over the years, the Texas Supreme Court has grappled with issues of when the Tort Claims Act waives sovereign immunity to allow injured parties to sue the State of Texas. The Court has also repeatedly addressed the issue of when a government employee is immune from suit based on the doctrine of official immunity. The Court has separately had to consider when parties contracting with the government can sue for breach of contract–a matter governed entirely by common law. The Supreme Court's rulings usually support immunity.

Governmental immunity is usually raised by a motion to dismiss for lack of jurisdiction. In *Texas Dept. of Criminal Justice v. Simons*, 2004 WL 1533264, *8 (Tex. July 9, 2004), a unanimous Court held that an "interlocutory appeal may be taken from a refusal to dismiss for want of jurisdiction whether the jurisdictional argument is presented by plea to the jurisdiction or some other vehicle, such as a motion for summary judgment." Thus, the appealability of the interlocutory order is not affected by the procedural mechanism by which the plea to the jurisdiction is presented to the trial court.

A. TEXAS TORT CLAIMS ACT. The State of Texas, its agencies, and subdivisions, such as counties, generally are immune from tort liability unless sovereign immunity has been waived. See Tex. Civ. Prac. & Rem.Code §§ 101.001(3)(A)-(B), 101.025; *Texas Dep't of Transp. v. Able*, 35 S.W.3d 608, 611 (Tex. 2000). The Texas Tort Claims Act expressly waives sovereign immunity in three general areas: use of publicly owned motor-driven equipment, premises defects, and injuries arising out of conditions or use of property. *Able*, 35 S.W.3d at 611. But the Tort Claims Act does not waive immunity for discretionary decisions, such as whether and what type of safety features to provide. See Tex. Civ. Prac. & Rem.Code § 101.056; *State v. San Miguel*, 2 S.W.3d 249, 251 (Tex.1999).

1. Motor-Driven Equipment Standard. In *Texas Natural Resource & Conservation Comm'n v. White*, 46 S.W.3d 864, 868 (Tex. 2001), the Court noted that the Tort Claims Act does not define "motor-driven equipment." It provides only that: "Motor-driven equipment" does not include: (A) equipment used in connection with the operation of floodgates or water release equipment by river authorities created under the laws of this state; or (B) medical equipment, such as iron lungs, located in hospitals. *Id.* at 868. In *White*, the Court concluded that a stationary pump placed by the Railroad Commission and then removed was a "motor-driven pump" for purposes of waiving sovereign immunity. However, removal of the pump was not use of the property, it was "non-use" of the property, so sovereign immunity was not waived. Additionally, the Supreme Court ruled as a matter of law that plaintiff showed no causal link to support liability.

2. Condition or Use of Property. Tex. Civ. Prac. & Rem. Code § 101.021(2) states that "[a] governmental unit in the state is liable for ... personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." However, other sections of the Tort Claims Act provide that the State remains immune from suits arising from its discretionary acts and omissions. *See State v. Rodriguez*, 985 S.W.2d 83, 85 (Tex. 1999). In *Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 341 (Tex.), *cert. denied*, 525 U.S. 1017, 119 S.Ct. 541, 142 L.Ed.2d 450 (1998), the Court held that an unlocked door in a mental health facility that permitted an inmate to escape and thereafter commit suicide, was not a "use" of property. The Court said: "Property does not cause injury if it does no more than furnish the condition that makes the injury possible." *Id.* at 343. In *Dep't of Transp. v. Garza*, 70 S.W.3d 802, 808 (Tex. 2002), the Supreme Court resolved a conflict between courts of appeals, holding that the setting of a speed limit by the Department of Transportation was not a "condition" that would give rise to waiver of sovereign immunity.

3. Use-of-Property Standard. In *Overton Mem'l Hosp. v. McGuire*, 518 S.W.2d 528, 529 (Tex. 1975), the Court found that sovereign immunity had been waived where a hospital provided a hospital bed without side rails, resulting in injury to the patient.

In *Lowe v. Texas Tech. Univ.*, 540 S.W.2d 297, 300 (Tex. 1976), the Court held that immunity was waived where a university football coach ordered a player to remove a knee brace and re-enter the game. The Court found that the State had provided a uniform to a football player that was defective because it did not have a knee brace.

In *Robinson v. Central Texas MHMR Center*, 780 S.W.2d 169 (Tex. 1989), the Court held that the State could be held liable for failing to provide a life preserver to an epileptic patient who drowned while swimming under the supervision of a State employee, because the life preserver was part of the patient's "swimming attire." A 5-1-3 majority of the Court held that the failure to provide the life preserver was a misuse of tangible personal property under the Tort Claims Act.

The foregoing three cases were said to represent "the outer bounds of what we have defined as use of tangible personal property," and to apply "only when an integral safety component is entirely lacking rather than merely inadequate." *Kerrville State Hosp. v. Clark*, 923 S.W.2d 582, 585 (Tex. 1996).

In *Kerrville State Hospital v. Clark*, 923 S.W.2d 582, 584 (Tex. 1996), the Court held that a hospital's administering an oral form of a drug, rather than an injectable form, was non-use of tangible personal property and therefore did not fall under the use-of-property provision of the Act. The Court said:

> This Court has never held that mere non-use of property can support a claim under the Texas Tort Claims Act. Kassen v. Hatley, 887 S.W.2d 4, 14 (Tex.1994). We have recognized that for "use" of tangible personal property to occur under the terms of the Act, one must " 'put or bring [the property] into action or service; to employ for or apply to a given purpose.' "

In *Tex. Dep't of Crim. Justice v. Miller*, 51 S.W.3d 583 (Tex. 2001), the wife of a prison inmate attempted to establish waiver of sovereign immunity based on the fact that the doctors at the state hospital "used" medication in such a way that it masked her husband's meningitis, leading to his death. The Court held that this was not a "use" of property subjecting the State to liability, since the use did not actually cause his death. Although Justice Hecht joined the majority in finding that immunity was not waived, he issued a concurring opinion expressing his exasperation over the difficulty Texas courts have had in finding a stable basis for ruling on "use-of-property" issues. He recounted a decades-long effort to induce the Texas Legislature to find a different formulation for waiver of immunity, and finally suggested that the Court should just abolish the sovereign's judicially-created tort immunity, in order to prod the Legislature into action. 51 S.W.2d at 593. Justice Enoch dissented from the Court's ruling and, in response to Justice Hecht's concurring opinion, Justice Enoch noted that "[t]his Court has, on a number of occasions, pleaded with the Legislature to reconsider the waiver section at issue not only because its application is difficult but because its concept seems almost irrational. . . . But that reality does not give the Court license to make the application of the law more ridiculous than it already is." 51 S.W.2d at 593.

In *San Antonio State Hospital v. Cowan*, 128 S.W.3d 244 (Tex. 2004), the Court held that allowing a psychiatric patient to retain possession of suspenders and a walker, that he used to kill himself, did not waive immunity because the governmental unit did not itself use the property.

In *Texas A&M Univ. v. Bishop*, 2005 WL 120058 (Tex. Jan. 21, 2005), the Court held that faculty advisors permitting a student actor to weald a real knife in a play was not "use" because the faculty advisors did not put or bring the knife into action, or employ the knife or apply it to a given purpose.

It seems certain that use-of-property cases will continue to reach the Supreme Court both on interlocutory appeal and from final judgment. Chief Justice Phillips included in his State of the Judiciary address on March 4, 2003, a reminder to the Legislature that the court in its opinions has repeatedly asked the Legislature to clarify the "use of tangible personal or real property language." So far, these requests have fallen on deaf ears.

4. Discretionary Acts. The Texas Tort Claims Act's waiver of immunity "does not apply to a claim based on ... a governmental unit's decision not to perform an act or on its failure to make a decision on the performance or nonperformance of an act if the law leaves the performance or nonperformance of the act to the discretion of the governmental unit." Tex. Civ. Prac. & Rem.Code § 101.056(2). In *State v. Rodriguez*, 985 S.W.2d 83 (Tex. 1999) the Court held that roadway design is a discretionary act for which sovereign immunity is not waived. In *Tex. Dep't of Transp. v. Ramirez*, 74 S.W.3d 864, 866-67 (Tex. 2002), the Court held that the slope of a roadway median, and the lack of safety features such as barriers or guardrails, reflect discretionary decisions for which sovereign immunity is not waived.

5. Recreational Use Statute. Where sovereign immunity is waived due to a condition or use of

property, but the injured person entered onto land for recreational purposes, the duty of care is set by the Texas Recreational Use Statute, TEX. CIV. PRAC. & REM. CODE § 75.001-.004. Under this statute, the land owner owes the same duty as is owed to a trespasser: to refrain from causing injury wilfully, wantonly or through gross negligence. Although the statute lists activities such as hunting, fishing, boating, camping, picnicking, etc., in *City of Belmead v. Torres*, 89 S.W.3d 611 Tex. 2002), the Supreme Court decided that swinging on a swing was recreational and invoked the statute.

B. OFFICIAL IMMUNITY. "A governmental employee is entitled to official immunity for (1) the performance of discretionary duties (2) that are within the scope of the employee's authority, (3) provided that the employee acts in good faith." *Telthorster v. Tennell*, 92 S.W.3d 457 (Tex. June 27, 2002). When official immunity shields a governmental employee from liability, sovereign immunity shields the governmental employer from vicarious liability. *DeWitt v. Harris County*, 904 S.W.2d 650, 653 (Tex. 1995).

In J. Bonner Dorsey, *Whither the Texas Tort Claims Act: What Remains After Official Immunity?*, 33 ST. MARY'S L.J. 235, 275 (2002), Thirteenth Court of Appeals Justice Dorsey suggests that by adopting the doctrine of official immunity for government employees, in *City of Lancaster v. Chambers*, 883 S.W.2d 650 (Tex. 1994), and then extending the immunity of the employee to the governmental employer, in *DeWitt v. Harris County*, 904 S.W.2d 650 (Tex. 1995), the Supreme Court has greatly restricted the waiver of immunity contained in the Texas Tort Claims Act.

C. BREACH OF CONTRACT SUITS AGAINST THE STATE. In 1898, the Texas Supreme Court established that, when the State of Texas enters into a contract, it waives sovereign immunity as to disputes under that contract. *Fristoe v. Blum*, 45 S.W. 998, 999 (1898). In 1997, the Supreme Court held that although the State may waive sovereign immunity for *liability* when it enters into a contract, it does not, simply by entering into the contract, waive sovereign immunity from *being sued*. *Federal Sign v. Texas Southern University*, 951 S.W.2d 401 (Tex. 1997). Thus, a contracting party can recover a judgment for the State's liability only if the Legislature authorizes the suit. However, the Court indicated in a footnote to the opinion that "[t]here may be other circumstances where the State may waive its immunity by conduct other than simply executing a contract so that it's not always immune from suit when it contracts." *Federal Sign*, 951 S.W.2d at 408 n. 1. Courts of appeals have attempted to rely on this footnote in ruling that, by accepting benefits under a contract for goods or services, the State waives its immunity from a breach-of-contract suit. A number of these case have been reversed. *See e.g., DalMac Constr. Co. v. Texas A & M Univ.*, 35 S.W.3d 654 (Tex. App.--Austin 1999), *rev'd*, 39 S.W.3d 591 (Tex. 2001); *Aer-Aerotron, Inc. v. Texas Dep't of Transp.*, 997 S.W.2d 687 (Tex. App.--Austin 1999), *rev'd*, 39 S.W.3d 220 (Tex. 2001); *Little-Tex Insulation Co. v. General Servs. Comm'n*, 997 S.W.2d 358 (Tex. App.--Austin 1999), *rev'd*, 39 S.W.3d 591 (Tex. 2001). The Supreme Court has "built-in" conflicts jurisdiction in these Footnote 1 appeals, based on *Ho v. University of Texas at Arlington*, 984 S.W.2d 672 (Tex. App.–Amarillo 1998, pet. denied). See Section V.B.3 above.

In *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849 (Tex. 2002), a plurality of the Court wrote that "[w]hen the State contracts with a private party, it waives immunity from liability. . . . . But the State does not waive immunity from suit simply by contracting with a private party." The plurality also wrote that the issue of trial court jurisdiction, including the jurisdiction to entertain a suit against the sovereign, is subject to de novo review on appeal. *Id.* at 855. The concurring opinion by Justice Hecht, joined by Chief Justice Phillips, Justice Owen, and Justice Jefferson, disagreed with the expansive language in the plurality's opinion that appeared to suggest that sovereign immunity was absolute in contract cases. Justice Hecht noted that an exception has long been recognized when the State files suit on the contract. *Id.* at 861. Justice Enoch was the sole dissenter, reiterating his view that the State, by contracting, waives sovereign immunity.

In *Travis County v. Pelzel & Assocs., Inc.*, 77 S.W.3d 246, 247 (Tex. 2002), eight justices reaffirmed the view that a governmental entity which contracts with a private party is liable on its contracts as if it were a private party, but that a governmental entity does not waive immunity from suit simply by contracting with a private party. Justice Enoch dissented, based on the view that by entering into the contract the County waived its sovereign immunity defense. For similar outcomes, see *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591 (Tex.

2001), and *Texas Dep't of Transp. v. Aer-Aerotron, Inc.*, 39 S.W.3d 220 (Tex. 2001).

In *Texas A & M University-Kingsville v. Lawson*, 87 S.W.3d 518 (Tex. 2002), a plurality of the Supreme Court (Justice Hecht, Chief Justice Phillips, Justice Owen, and Justice Jefferson) joined by Justice Enoch concurring, held that the State of Texas could not assert a sovereign immunity defense against enforcement of a litigation settlement agreement which settled a claim under the Texas Whistleblower Act. The plurality relied upon the fact that the State's waiver of immunity to whistleblower claims carried through to a suit to enforce a settlement of whistleblower claims. *Id*. 522-23. Justice Enoch concurred on the ground that he believed that immunity has been waived generally for liability on contracts entered into by the State. The dissenters (Justice Rodriguez, joined by Justices Baker, Hankinson, and O'Neill) said that a suit to enforce a settlement agreement is nothing more than an ordinary contract suit, and that recent Supreme Court cases established that sovereign immunity has not been waived for suits to enforce contracts entered into by the State or its subdivisions. *Id.* at 525-26.

It thus appears that sovereign immunity from being sued for breach of contract is weak in the courts of appeals but strong in the Supreme Court. This no doubt reflects the tension between the basic unfairness of the State promising to pay and then reneging on its promise as against the policy of conserving the State's resources so it can effectively govern. The future will probably see more testing by the courts of appeals of the contours of Footnote 1 in the *Federal Sign* case, and the Supreme Court will have to decide how vigorously its wants to grant review based on conflicts jurisdiction. The establishment of an administrative remedy for contracts signed after August 30, 1999 may reduce the volume of these cases. *See* TEX. GOV'T. CODE §§ 2260.001-008.

D. INTERLOCUTORY APPEALS. In 1997, the Texas Legislature amended the Civil Practice and Remedies Code to permit governmental entities the right to bring an interlocutory appeal from the trial court's denial of a plea to the jurisdiction. TEX. CIV. PRAC. & REM. CODE § 51.014(8). A plea to the jurisdiction is available where the state claims immunity from suit, but not immunity from liability. *Wichita Falls State Hospital v. Taylor*, 2002 WL 32029019 *2 (Tex. March 6, 2003). TEX. CIV. PRAC. & REM. CODE § 51.014(5) permits an officer or employee of the state (or its subdivisions) to appeal from an order denying summary judgment that is based on a claim of official immunity. The court of appeals' jurisdiction is final over such interlocutory appeals, unless there is Supreme Court jurisdiction due to dissent or conflict. See Section V.B above.

The difficulty in applying some of the tests for waiver of sovereign and official immunity may be expected to spill over into the question of conflicts jurisdiction, for the Justices will likely disagree over when the facts in a prior decision are "so nearly the same that the decision in one of the cases would be conclusive of the decision in the other." *See Tex. Natural Resources Conservation Comm'n v. White*, 46 S.W.3d 864 (Tex. 2001) (O'Neill, J., dissenting on whether conflicts jurisdiction arose regarding motor-driven equipment exception to sovereign immunity).

XXIII. EXPERTS. The Texas Supreme Court adopted the U.S. Supreme Court's *Daubert* analysis for Tex. R. Evid. 702, requiring that the expert's underlying scientific technique or principle be reliable, in *E.I. du Pont de Nemours v. Robinson*, 923 S.W.2d 549 (Tex. 1995). The Texas Supreme Court listed factors for the trial court to consider: (1) the extent to which the theory has been or can be tested; (2) the extent to which the technique relies upon the subjective interpretation of the expert; (3) whether the theory has been subjected to peer review and/or publication; (4) the technique's potential rate of error; (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and (6) the non-judicial uses which have been made of the theory or technique. *Robinson*, 923 S.W.2d at 557.

In *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713 (Tex. 1998), the Texas Supreme Court announced that the reliability and relevance requirements of *Robinson* apply to all types of expert testimony. In *Gammill* a unanimous Supreme Court said:

> We conclude that whether an expert's testimony is based on "scientific, technical or other specialized knowledge," *Daubert* and Rule 702 demand that the district court evaluate the methods, analysis, and principles relied upon in reaching the opinion. The court should ensure that the opinion comports with applicable professional standards outside the courtroom and that it "will have a reliable basis

in the knowledge and experience of [the] discipline." [FN47]

Recent Supreme Court cases on expert witnesses include:

- *Helena Chemical Co. v. Wilkins*, 47 S.W.3d 486, 499 (Tex. 2001), the Court held that a plant scientist and consultant was qualified and his testimony reliable on the issue of suitability of grain sorghum seed for dry land farming and its susceptibility to charcoal rot disease.

- *Guadalupe-Blanco River Authority v. Kraft*, 77 S.W.3d 805, 808 (Tex. 2002), the Supreme Court rejected the testimony of a real estate appraiser due to flawed methodology when the comparable sales used by the appraiser "were not comparable to the condemned easement as a matter of law."

- *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623 (Tex. 2002), the Court ruled inadmissible real estate valuation testimony relating to a condemned parcel of land, where the expert calculated his value based on the condemnation project which, under the project-enhancement rule, is not a value for which a landowner may recover.

- *Rehabilitative Care Systems of America v. Davis*, 73 S.W.3d 233, 234 (Tex. 2002), the Court issued a short per curiam opinion on denial of petition for review, indicating that expert testimony is required to establish the appropriate standard of care for a claim of negligent-supervision of a physical therapist.

- *Volkswagen of America Inc. v. Ramirez*, 2004 WL 3019227 (Tex. 2004), the Court ruled that an accident reconstruction expert's testimony constituted no evidence of causation.

- *FFE Transportation Services, Inc. v. Fulgham*, No. 02-1097 (Tex. Dec. 31, 2004) [2004 WL 3019223], the Court held that the trial court's decision on whether expert testimony is required to establish negligence, is subject to de novo review, not abuse of discretion review.

- *Alexander v. Turtur & Associates, Inc.*, 146 S.W.3d 113 (Tex. 2004), the Court held that - expert testimony was necessary to establish causation in a litigation-related legal malpractice case. The Court also held that a legal malpractice claim raised in an amended pleading did not relate back to the original pleading, for statute of limitation purposes, because the new claim was distinct and different from the previously-alleged claim.

- On July 2, 2004, the Supreme Court granted review in *Mack Trucks Inc. v. Elizabeth Tamez, et al.*, No. 03-0526 (pet. granted July 2, 2004), to address the issues of (1) whether the trial court erroneously excluded expert opinion that the petitioner claims used methodology that failed to account for other possible causes of a tanker-truck fire besides a fuel-system defect and (2) whether erred in refusing to hold a second hearing by way of a bill of exception to reconsider excluding the expert.

XXIV. ATTORNEYS IN LITIGATION.

A. CIVIL LAWYERS.

1. Claim For Bad Lawyering is Tort Not Contract. In Texas, a legal malpractice action sounds in tort and is governed by negligence principles. *Barcelo v. Elliott*, 923 S.W.2d 575, 579 (Tex 1996); *Cosgrove v. Grimes*, 774 S.W.2d 662, 664 (Tex. 1989); *Willis v. Maverick*, 760 S.W.2d 642, 644 (Tex. 1988).

2. Privity Requirement. In *Barcelo v. Elliott*, 923 S.W.2d 575, 577 (Tex. 1996), the Supreme Court held that an attorney retained by a testator or settlor to draft a will or trust owes no professional duty of care to persons named as beneficiaries under the will or trust. According to the Supreme Court, this "bright line privity rule" "will ensure that attorneys may in all cases zealously represent their clients without the threat of suit from third parties compromising that representation." *Id.* at 578-79. Justice Cornyn, joined by Justice Abbott, dissented, saying that the Court embraced a rule recognized in only four states, while simultaneously rejecting the rule in an overwhelming majority of jurisdictions. In note 2 on page 579, the Supreme Court expressed "no opinion as to whether the beneficiary of a trust has standing to sue an attorney representing the trustee for malpractice, " referring to *Thompson v. Vinson & Elkins*, 859 S.W.2d 617, 621-23 (Tex. App.--Houston [1st Dist.] 1993, writ denied) (holding that beneficiary lacked standing to sue trustee's attorney). This footnote by the Court suggests that the privity rule may not apply across-the-board to

all legal malpractice situations, although some later court of appeals decisions have seen it to be an absolute rule. However, the Court's medical malpractice claims emphatically limit the doctor's duty to the patient, which may suggest something as to lawyers.

3. Standard of Care. *In Cosgrove v. Grimes*, 774 S.W.2d 662, 664 (Tex. 1989), the Supreme Court disapproved earlier lower court opinions recognizing a "good faith exception" to attorney negligence (negligence excused by the subjective good faith of the attorney), and announced that lawyers in Texas are held to the standard of care which would be exercised by a reasonably prudent lawyer in the same or similar circumstances.

4. Causation. When a legal malpractice case arises from allegedly mishandled litigation, the plaintiff has the burden to prove that, "but for" the attorney's breach of duty, he or she would have prevailed on the underlying cause of action and would have been entitled to a collectible judgment. *Greathouse v. McConnell*, 982 S.W.2d 165, 172-73 (Tex. App.--Houston [1st Dist.] 1998, pet. denied). This is known as the "suit within a suit" requirement. *Id.* at 173.

5. Negligent Misrepresentation. In *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 792 (Tex. 1999), the Supreme Court applied Restatement (2d) of Torts § 552 to lawyers, and ruled that lawyers can be held liable to non-clients for the tort of negligent misrepresentation. Section 552 provides as follows:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

The Supreme Court noted that liability can arise "only when information is transferred by an attorney to a known party for a known purpose, and further said that a lawyer can avoid or minimize the risk of liability to a nonclient by setting forth (1) limitations as to whom the representation is directed and who should rely on it, or (2) disclaimers as to the scope and accuracy of the factual investigation or assumptions forming the basis of the representation or the representation itself." *Id.* at 794.

6. Mental Anguish Damages. In *Douglas v. Delp*, 987 S.W.2d 879, 885 (Tex. 1999), the Supreme Court held that when a plaintiff's mental anguish is a consequence of economic losses caused by an attorney's negligence, the plaintiff may not recover damages for that mental anguish. The rationale for the Supreme Court's decision was that damages measured by the economic loss would be an adequate and appropriate remedy for negligent harm to real or personal property. *Id.* at 885. In the context of the discussion in the Supreme Court's Opinion, it is apparent that the Supreme Court did not accept the rule of some states that mental anguish damages can be recovered when the attorney acts with "heightened culpability." *Id.* at 884-85. However, the careful wording that limits the holding in *Douglas v. Delp* to instances when the mental anguish is a consequence of economic loss, suggests that the Court has left the door open for the recovery of mental anguish damages in cases where "the client's direct injury is not exclusively economic, but is more personal in nature, for example, loss of child custody or loss of liberty." The Court cites cases that "recognize that economic recovery alone would not make the plaintiff whole because of the very personal nature of the injury." *Id.* at 884. Since criminal lawyers have a "free pass" on suits by most convicted clients (see below), it appears that only Texas family lawyers are left in harm's way.

7. DTPA. An attorney can be held liable under the DTPA for unconscionable conduct. *DeBakey v. Staggs*, 612 S.W.2d 924 (Tex. 1981); *Willis v. Maverick*, 760 S.W.2d 642, 647 (Tex. 1988). In *Latham v. Castillo*, 972 S.W.2d 66, 68 (Tex. 1998), the Court held that a claim under the DTPA exists separately from a negligence claim, and that the damages that can be recovered under the DTPA are different from the damages recoverable for legal malpractice.

8. Breach of Fiduciary Duty. In *Burrow v. Arce*, 997 S.W.2d 229, 235 (Tex. 1999), the Supreme Court recognized the right of a lawyer's client to recover a "disgorgement of legal fees"upon proof that the lawyer committed a clear and serious violation of fiduciary duty to the client, even when the client suffered no actual damages. A jury may resolve factual disputes, but the court

must decide "whether a clear and serious violation of duty has occurred, whether forfeiture is appropriate, and if so, whether all or only part of the attorney's fee should be forfeited." *Id.* at 246.

9. Statute of Limitations. Regardless of the fact that the attorney-client relationship is essentially contractual, a claim for legal malpractice is a tort claim governed by a two-year statute of limitations. *Willis v. Maverick*, 760 S.W.2d 642, 644 (Tex. 1988), citing Tex. Civ. Prac. & Rem. Code Ann. § 16.003. *See Murphy v. Campbell*, 964 S.W.2d 265, 270 (Tex. 1997) (accounting malpractice claim is governed by the 2-year statute of limitations). Generally speaking, the limitations period running starts when the tort is committed, notwithstanding the fact that the damages or their extent may not be ascertainable until a later date. *Atkins v. Crosland*, 417 S.W.2d 150, 153 (Tex. 1967) . However, the discovery rule applies to legal malpractice claims. *Willis v. Maverick*, 760 S.W.2d at 646.

When a lawyer commits malpractice in the prosecution or defense of a claim that results in litigation, the statute of limitations is tolled until the case is concluded, and all appeals in the underlying litigation are exhausted. *Hughes v. Mahoney & Higgins*, 821 S.W.2d 154 (Tex. 1991). In *Apex Towing Co. v. Tolin*, 41 S.W.2d 118, 119 (Tex. 2001), the Court held that even replacing the allegedly negligent counsel did not start the statute of limitations running, because the viability of the malpractice claim depends on the outcome of the underlying dispute. However, the rule under the *Hughes* case does not apply to claims brought under the DTPA, because the Legislature adopted a specific statute of limitations for DTPA claims. *Underkofler v. Vanasek*, 53 S.W.3d 343, 346 (Tex. 2001), overruling the Court's prior decision in *Aduddell v. Parkhill*, 821 S.W.2d 158 (Tex. 1991).

B. CRIMINAL LAWYER MALPRACTICE. In *Peeler v. Hughes & Luce*, 909 S.W.2d 494, 497-98 (Tex. 1995), the Supreme Court held that a convicted defendant can recover against his criminal lawyer for legal malpractice related to that conviction only if the defendant has been exonerated on direct appeal, through post-conviction relief, or otherwise. The decision was based both on legal duty and causation. The Court noted that to permit recovery would shift responsibility for the crime away from the convict, would drastically diminish the consequences of the convict's criminal conduct, and would seriously undermine the criminal justice system. The Court also noted that "as a matter of law, it is the illegal conduct rather than the negligence of a convict's counsel that is the cause in fact of any injuries flowing from the conviction, unless the conviction has been overturned." *Id.* at 498.

C. CIVIL APPELLATE LAWYER MALPRACTICE. To prevail in a legal appellate malpractice case, the plaintiff must show but that for the defendant's negligence, the appeal would have succeeded. *Millhouse v. Wiesenthal*, 775 S.W.2d 626, 627 (Tex. 1989). In a case of legal appellate malpractice, causation is a question of law for the court, not a question of fact for the jury. *Millhouse*, 775 S.W.2d at 628.

XXV. POWER TO CONTRACT. In *Churchill Forge, Inc. v. Brown*, 61 S.W.3d 368, 371-372 (Tex. 2001), the Supreme Court upheld the right of a landlord and a tenant to contract that the tenant would be liable for the cost of repair from a fire caused by a co-tenant. Four Justices dissented, arguing that Texas Property Code § 92.006 limits the circumstances under which landlords and tenants may contract for tenants to be responsible for conditions affecting habitability.

In *Centex Homes v. Buecher*, 95 S.W.3d 266 (Tex. 2002), a majority of the Court declared that: (1) the implied warranty of habitability of a home can be waived only to the extent that defects are adequately disclosed ; and (2) the implied warranty of good workmanship may be disclaimed by the parties only when their agreement provides sufficient detail on the manner, performance and quality of the desired construction. *Id.* at 274-75. *Centex* indicates that in connection with the purchase of a home, the waiver of the warranty of habitability must be for known defects, and that common law standards of workmanship cannot be waived, just supplanted by other agreed-upon standards.

In *1464-Eight, Ltd. v. Joppich*, 2004 WL 3019231 (Tex. 2004), the Supreme Court adopted Restatement (Second) of Contracts § 87(1)(a), which provides that an option contract to buy land is enforceable when made in writing, and signed by the seller, and acknowledges receipt of at least nominal consideration, and provided for fair terms within a reasonable time–even where the recited consideration is not paid. Although the Restatement's position is a minority view, the Court concluded that the position was supported by a well-articulated and sound rationale, and constituted the better approach. *Id.* at *9. In a concurring Opin-

ion, Chief Justice Jefferson, joined by Justice Brister, questioned the need to require a recital of consideration if consideration was not going to be paid. The Chief even mused about the possible elimination of the requirement of consideration--not only from option agreements–for all contracts. He cited to Lord Mansfield, who "urged the enforcement of commercial contracts based on moral obligation rather than consideration." *Id.* at *10. And he talked about other steps to eliminate the doctrine of consideration as the foundation of contract law. *Id.* at *11.

XXVI. APPELLATE REVIEW OF GRANTING NEW TRIAL. In *In re Volkswagen of America, Inc.*, 22 S.W.3d 462 (Tex. 2000), Justice Hecht, joined by Justice Owen, dissented from the denial of a petition for writ of mandamus concerning the issue of granting motions for new trial in the interest of justice without additional explanation. The case of *Volkswagen of Am., Inc. v. Ramirez*, 20004 WL 3019227 (Tex. Dec. 31, 2004), presented the question of whether, when a trial court grants a new trial and the case is retried and then appealed, the appellate court can review on appeal from the final judgment the granting of the new trial. The Supreme Court reversed and rendered on the ground of legally insufficient evidence, so the new trial question was not addressed. *Id.* at *3. However, the indications are that it may be possible to review the granting of a new trial in the interest of justice, on appeal from the retrial.

XXVII. STATE CONSTITUTIONAL RIGHTS. The issue of whether the Texas Constitution affords more protection of individual freedom than the Federal Constitution has waxed and waned over the years.

In a 1977 article in the Harvard Law Review, U.S. Supreme Court Justice William Brennan commented:

> It was in the years from 1962 to 1969 that the face of the law changed. Those years witnessed the extension to the states of nine of the specifics of the Bill of Rights; decisions which have had a profound impact on American life, requiring the deep involvement of state courts in the application of federal law.
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> * * *
>
> Of late, however, more and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased. This is surely an important and highly significant development for our constitutional jurisprudence and for our concept of federalism. I suppose it was only natural that when during the 1960's our rights and liberties were in the process of becoming increasingly federalized, state courts saw no reason to consider what protections, if any, were secured by state constitutions. It is not easy to pinpoint why state courts are now beginning to emphasize the protections of their states' own bills of rights. It may not be wide of the mark, however, to suppose that these state courts discern, and disagree with, a trend in recent opinions of the United States Supreme Court to pull back from, or at least suspend for the time being, the enforcement of the Boyd principle with respect to application of the federal Bill of Rights and the restraints of the due process and equal protection clauses of the fourteenth amendment.

William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 493, 495 (1977). *See* Julie F. Segal, *High Court Studies: The Supreme Court of Texas from 1989-1998*, 62 ALBANY L. REV. 1649, 1671 n.188 (1999); Arvel Ponton III, *Sources of Liberty in the Texas Bill of Rights*, 20 ST. MARY'S L.J. 93 (1988).

A. RIGHT TO PRIVACY. In *Texas State Employees Union v. Texas Department of Mental Health & Mental Retardation*, 746 S.W.2d 203, 205 (Tex. 1987), the Court ruled that the Texas Department of Mental Health's mandatory polygraph policy violated employees' privacy rights. Chief Justice Hill wrote for a unanimous court:

> We decide this case pursuant to the Texas Constitution. While the Texas Constitution contains no express guarantee of a right of privacy, it contains several provisions similar to those in the United States Constitution that have been recognized as implicitly creating protected "zones of privacy."

In *City of Sherman v. Henry*, 928 S.W.2d 464, 471-72 (Tex. 1996), the Court held that neither the United States Constitution nor the Texas Constitution privacy guarantees give a police officer the right to engage in adultery. Justice Abbott wrote:

> We conclude that the right to privacy under the United States Constitution does not in-

> clude the right to maintain a sexual relationship with the spouse of someone else. Such conduct is the antithesis of the constitutionally protected rights of marriage and family; a right to engage in that conduct can hardly be said to be "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition." We turn now to Henry's claim to a privacy right under the Texas Constitution. . . . We are thus faced with the task of determining whether Henry's conduct is protected by article I, section 19 of the Texas Constitution.

In *Bell v. Low Income Women of Texas*, 95 S.W.3d 253, 265 (Tex. 2002), Justice O'Neill wrote for a unanimous court that "we have never decided whether the Texas Constitution creates privacy rights coextensive with those recognized under the United States Constitution . . . .?

B. FREEDOM OF SPEECH. In *Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989), Chief Justice Phillips wrote that "our state free speech guarantee may be broader than the corresponding federal guarantee. "In *O'Quinn v. State Bar of Texas*, 763 S.W.2d 397, 402 (Tex. 1988), Justice Kilgarlin wrote:

> We are of course "free to read [our] own constitution more broadly than [the Supreme] Court reads the Federal Constitution, or to reject the mode of analysis used by [the Supreme] Court in favor of a different analysis of its corresponding constitutional guarantee." City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 293, 102 S.Ct. 1070, 1077, 71 L.Ed.2d 152 (1982). This court has determined on several occasions that the Texas Bill of Rights affords protection beyond that provided by the United States Constitution. See, e.g., LeCroy v. Hanlon, 713 S.W.2d 335, 338 (Tex. 1986). One commentator has characterized Texas' free speech right as being broader than its federal equivalent, saying:
>
> > [V]arious states, like Texas, have broader free speech and assembly protections, which are often positively phrased as affirmative grants of rights rather than the simple restriction on government power observed in the first amendment to the federal constitution. These more expansive guarantees, which are within a state's "sovereign right" as recognized by the federal Supreme Court, offer a significant distinction upon which courts rely to construe their state constitutions.
>
> J. Harrington, The Texas Bill of Rights 40 (1987).
>
> Irrespective of whether the guarantee is in fact broader, it is quite obvious that the Texas Constitution's affirmative grant of free speech is more broadly worded than the first amendment's proscription of Congress from abridging freedom of speech. It is equally obvious that the framers of the first Texas Constitution were quite aware of the difference. The original draft of section 4 of the Declaration of Rights of the 1836 Constitution for the Republic of Texas provided: "No law shall ever be passed to curtail the liberty of speech or the press." 1 Gammel, Laws of Texas 868 (1898). But, by the time of its adoption the Fourth Declaration of Rights of the Texas Constitution of 1836 stated: "Every citizen shall be at liberty to speak, write, or publish his opinions on any subject, being responsible for the abuse of that privilege."
>
> We need not decide at this time whether Texas' guarantee of free speech affords greater protection than its corresponding federal right, because neither analysis would permit the engagement of runners to solicit personally legal business.

In *Davenport v. Garcia*, 834 S.W.2d 4, 20 (Tex. 1992) (Opinion by Justice Doggett) (involving freedom of speech), the Texas Supreme Court differentiated constitutional attacks based on the Texas Constitution from attacks based on the U.S. Constitution:

> In interpreting our constitution, this state's courts should be neither unduly active nor deferential; rather, they should be independent and thoughtful in considering the unique values, customs, and traditions of our citizens. With a strongly independent state judiciary, Texas should borrow from well-reasoned and persuasive federal procedural and substantive precedent when this is deemed helpful, [FN53] but should never feel compelled to parrot the federal judiciary. [FN54] With the approach we adopt, the appropriate role of relevant federal case law should be clearly noted, in accord with Michigan v. Long, 463 U.S. 1032, 1040-41, 103 S.Ct. 3469, 3476-77, 77 L.Ed.2d 1201 (1983) (presuming that a

> state court opinion not explicitly announcing reliance on state law is assumed to rest on reviewable federal law). A state court must definitely provide a "plain statement" that it is relying on independent and adequate state law, [FN55] and that federal cases are cited only for guidance and do not compel the result reached. Id. at 1040-41, 103 S.Ct. at 3476-77. See also William J. Brennan, The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights, 61 N.Y.U.L.Rev. 535, 552 (1986). Long offers further reason for developing state constitutional law, since now courts, rather than merely adjudicating state constitutional claims, must be prepared to defend their integrity by both quantitatively and qualitatively supporting their opinion with state authority." Duncan, State Courts, at 838. Consistent with this method, we may also look to helpful precedent from sister states in what New Jersey Justice Stewart Pollock has described as "horizontal federalism." Stewart G. Pollock, Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts, 63 Tex.L.Rev. 977, 992 (1985). [Footnotes omitted]

The greater breadth of the Texas free speech guarantee was reiterated in Justice Doggett's plurality opinion in *Ex parte Tucci*, 859 S.W.2d 1, 5 (Tex. 1993) ("With its broad command that ' "[e]very person shall be at liberty to speak ... opinions on any subject," ' article one, section eight ... provides greater rights of free expression than its federal equivalent").

In *Operation Rescue-Nat'l v. Planned Parenthood*, 975 S.W.2d 546, 556 (Tex. 1998), Justice Hecht wrote, in a majority Opinion supported by five additional justices:

> It is possible that Article I, Section 8 may be more protective of speech in some instances than the First Amendment, but if it is, it must be because of the text, history, and purpose of the provision, not just simply because. Starting from the premise that the state constitutional provision must be more protective than its federal counterpart illegitimizes any effort to determine state constitutional standards. To define the protections of Article I, Section 8 simply as one notch above First Amendment protections is to deny state constitutional guarantees any principled moorings whatever. We reject this approach. [Footnote omitted]

In *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 116-17 (Tex. 2000), Chief Justice Phillips wrote:

> Although we have recognized that the Texas Constitution's free speech guarantee is in some cases broader than the federal guarantee, we have also recognized that "broader protection, if any, cannot come at the expense of a defamation claimant's right to redress."

In *Commission for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 434 (Tex. 1998), Chief Justice Phillips wrote: "This Court has recognized that 'in some aspects our free speech provision is broader than the First Amendment.' "

In *New Times, Inc. v. Isaacks*, 146 S.W.3d 144 (Tex. 2004), then-Justice Jefferson wrote:

> New Times asserts that its statements are protected under the First Amendment to the United States Constitution and Article I, Section 8 of the Texas Constitution. "Where, as here, the parties have not argued that differences in state and federal constitutional guarantees are material to the case, and none is apparent, we limit our analysis to the First Amendment and simply assume that its concerns are congruent with those of article I, section 8." Bentley v. Bunton, 94 S.W.3d 561, 579 (Tex. 2002).

D. PROCEDURAL DUE PROCESS. In the case of *In the Interest of J.W.T.*, 872 S.W.2d 189, 197 (Tex. 1994), the Court considered whether, under the Texas due course of law guarantee, a biological father can be denied an opportunity to establish paternity and claim parental rights over a child born into a marriage between the mother and another man. In an Opinion written by Justice Doggett, the Court said:

> It is wholly under our Texas due course of law guarantee, which has independent vitality, separate and distinct from the due process clause of the Fourteenth Amendment to the U.S. Constitution, that we reach today's decision.

In *University of Texas Medical School v. Than*, 901 S.W.2d 926, 929 (Tex.1995) (a procedural

due process case), the Texas Supreme Court stated that:

> The Texas due course clause is nearly identical to the federal due process clause, which provides: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . U.S. CONST. amend. XIV, § 1. While the Texas Constitution is textually different in that it refers to "due course" rather than "due process," we regard these terms as without meaningful distinction. Mellinger v. City of Houston, 68 Tex. 37, 3 S.W. 249, 252-53 (1887). As a result, in matters of procedural due process, we have traditionally followed contemporary federal due process interpretations of procedural due process issues. . . . Although not bound by federal due process jurisprudence in this case, we consider federal interpretations of procedural due process to be persuasive authority in applying our due course of law guarantee.

E. EQUAL PROTECTION. In *Rose v. Doctors Hosp.*, 801 S.W.2d 841, 846 (Tex. 1990), the Court stated that "Texas cases echo federal standards when determining whether a statute violates equal protection."

In *Richards v. League of United Latin Am. Citizens*, 868 S.W.2d 306, 310-11 (Tex. 1993), the Court held that, like claims under the Fourteenth Amendment Equal Protection Clause, equal protection challenges under the Texas Constitution are reviewed under a multi-tiered system, where the classification under challenge must be rationally related to a legitimate state purpose, unless the classification impinges on the exercise of a fundamental right, or when the classification distinguishes between people on a "suspect" basis such as race or national origin. If fundamental rights or a suspect classification are involved, the state action is subjected to strict scrutiny, requiring that the classification be narrowly tailored to serve a compelling government interest.

In *HL Farm Corp. v. Self*, 877 S.W.2d 288 (Tex. 1994), the Court held that held that a Texas statute denying open-space land designation to land owned by a nonresident alien violated the equal protection clause of Texas Constitution. Justice Hightower wrote: "HL Farm asserts that section 23.56(3) violates various provisions of the Texas and United States Constitutions; however, we will examine our own Texas Constitution first to determine this question." *Id.* at 290.

In *Fort Worth Osteopathic Hosp., Inc. v. Reese*, 148 S.W.3d 94, 98 (Tex. 2004), the Texas Supreme Court rejected the argument that the 14th Amendment equal protection clause applied to unborn foetuses, and declined to consider the application of Texas' Equal Protection clause since it was not argued by the parties.

The Texas Equal Rights Amendment, Tex. Const. art. I, § 3a, was adopted by Texas voters in 1972. It has no federal counterpart. In *In re McLean*, 725 S.W.2d 696 (Tex. 1987), Justice Kilgarlin wrote a plurality opinion setting out a three-step process for evaluating ERA claims (1–Has equality under the law been denied? 2–If so, was it because of membership in a protected class? 3–If so, is the law narrowly tailored to serve a compelling governmental interest?) This three-step analysis was endorsed and used in *Bell v. Low Income Women of Texas*, 95 S.W.3d 253 (Tex. 2002). In *Bell*, the Court observed that the Texas ERA "was intended to enlarge upon the federal equal protection guarantees. . . . It does so by elevating sex to a suspect class and subjecting sex-based classifications to heightened strict-scrutiny review." *Id*. at 262.

In *Bell*, the Court rejected a claim that the Texas Medicare system violated the Texas Equal Rights Amendment, state and federal Equal Protection Clauses, and the right of privacy, for failing to fund abortions for indigent women except in the instance of rape or incest or danger of the mother's death.

XXVIII. ABORTION. The Texas Supreme Court is periodically called upon to make rulings that may have implications in the ongoing dispute over the legality and propriety of abortions.

In *Valenzuela v. Aquino*, 853 S.W.2d 512 (Tex. 1993), the Supreme Court ruled that abortion protestors picketing a physician's home might be liable for invasion of privacy.

In 1993, in *Ex parte Tucci*, 859 S.W.2d 1, 5 (Tex. 1993), the Supreme Court released abortion protestors jailed for violating a TRO creating a 100 foot buffer zone around abortion clinics, on the grounds that the TRO violated the protestors' freedom of expression under the Texas Constitution.

The case of *Operation Rescue-Nat'l v. Planned Parenthood*, 975 S.W.2d 546, 556 (Tex. 1998), was the appeal from the trial on the merits of a permanent injunction involving the parties in the *Tucci* case. Relying heavily on the U.S. Supreme Court's decisions in *Madsen v. Women's Health Center*, 512 U.S. 753 (1994), and *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997), the Texas Supreme Court reformed injunctions imposed against anti-abortion demonstrators protesting near abortion clinics, but upheld an award of punitive damages against the demonstrators.

In 1999, the Texas Legislature adopted a statute prohibiting a physician from perform an abortion on an unemancipated minor except upon forty-eight hours' notice to one of her parents or her guardian, subject to certain exceptions. One exception provided for judicial bypass of parental notification. Following the adoption of this statute, the Texas Supreme Court granted review in a number of expedited appeals of pregnant girls who were denied judicial permission for an abortion. *See In re Doe*, 19 S.W.3d 249 (Tex. 2000); *In re Doe 2*, 19 S.W.3d 278 (Tex. 2000); *In re Doe 1*, 19 S.W.3d 300; *In re Doe* 3, 19 S.W.3d 300 (Tex. 2000) (per curiam); *In re Doe 4*, 19 S.W.3d 322 (Tex. 2000); *In re Doe 4*, 19 S.W.3d 337 (Tex. 2000); *In re Doe*, 19 S.W.3d 346 (Tex. 2000); Hon. Ann Crawford McClure, Richard Orsinger & Robert H. Pemberton, *A Guide to Proceedings Under the Texas Parental Notification Statute and Rules*, 41 S. TEX. L. REV. 755 (2000).

In *Witty v. Am. Gen. Capital Distribs., Inc.*, 727 S.W.2d 503, 505 (Tex. 1987) , the Court held that the term "individual" in Texas' wrongful-death act did not override the common law rule against recovery with respect to a stillborn foetus, and that the term "individual" should not be construed to include a foetus unless the legislature has "specifically so stated."

Senate Bill 319, Act of May 31, 2003, 78th Leg., R.S., ch. 822, 2003 Tex. Gen. Laws 2607, amended Texas Civil Practice and Remedies Code chapter 71 ("Liability in Tort") and Penal Code chapters 1, 19 (homicide), and 22 (assaults) so that they apply to the death of or injury to an unborn child. This effectively grants parents of a stillborn child a cause of action under the Wrongful Death Act. However, these provisions do not apply to the mother of the unborn child, or to the death of a child resulting from a physician or other licensed health care provider's performance of a lawful medical procedure. So medical negligence claims are still not available for causing a foetus to die.

In *Fort Worth Osteopathic Hosp., Inc. v. Reese*, 148 S.W.3d 94, 98 (Tex. 2004), the Supreme Court declined to overrule *Witty* with respect to wrongful-death cases arising before Senate Bill 319 became effective. The Court said that, under *Roe v. Wade*, 410 U.S. 113 (1973), the U.S. Constitution 14th Amendment Equal Protection Clause does not apply to foetuses. The Court refused to address whether the Texas Equal Protection Clause gave different protections, because that argument was not made by the respondents in the case.

In *Bell v. Low Income Women of Texas*, 95 S.W.3d 253 (Tex. 2002), the Court rejected a claim that the Texas Medicare system violated the Texas Equal Rights Amendment, state and federal Equal Protection Clauses, and the right of privacy, for failing to fund abortions for indigent women except in the instance of rape or incest or danger of the mother's death.