TEXAS SUPREME COURT TRENDS

Author:
RICHARD R. ORSINGER
ATTORNEY AT LAW
310 S. St. Mary's St., Ste. 1616
San Antonio, Texas 78205
(210) 225-5567 (Telephone)
(210) 267-7777 (Telefax)
Email: richard@orsinger.com

Of Counsel to McCurley, Kinser,
McCurley, & Nelson, LLP
5950 Sherry Lane, Ste. 800
Dallas, Texas 75225
(214) 273-2400 (Telephone)
(214) 273-2470 (Telefax)
Email: richard@mkmn.com

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CURRICULUM VITAE OF RICHARD R. ORSINGER

Education: Washington & Lee University, Lexington, Virginia (1968-70)
University of Texas (B.A., with Honors, 1972)
University of Texas School of Law (J.D., 1975)

Licensed: Texas Supreme Court (1975); U.S. District Court, Western District of Texas (1977-1992; 2000-present); U.S. District Court, Southern District of Texas (1979); U.S. Court of Appeals, Fifth Circuit (1979); U.S. Supreme Court (1981)

Board Certified by the Texas Board of Legal Specialization
Family Law (1980), Civil Appellate Law (1987)

Organizations and Committees:

Chair, Family Law Section, State Bar of Texas (1999-2000)
Chair, Appellate Practice & Advocacy Section, State Bar of Texas (1996-97)
Chair, Continuing Legal Education Committee, State Bar of Texas (2000-02)
Vice-Chair, Continuing Legal Education Committee, State Bar of Texas (2002-03)
Member, Supreme Court Advisory Committee on Rules of Civil Procedure (1994-present); Chair, Subcommittee on Rules 16-165a
Member, Pattern Jury Charge Committee (Family Law), State Bar of Texas (1987-2000)
Supreme Court Liaison, Texas Judicial Committee on Information Technology (2001-present)
Tx. Bd. of Legal Specialization, Civil Appellate Law Advisory Commission (Member 1994-2001) and Civil Appellate Law Exam Committee (1990-present; Chair 1991-1995)
Tx. Bd. of Legal Specialization, Family Law Advisory Commission (1987-1993)
Member, Supreme Court Task Force on Jury Charges (1992-93)
Member, Supreme Court Advisory Committee on Child Support and Visitation Guidelines (1989, 1991; Co-Chair 1992-93; Chair 1994-98)
President, Texas Academy of Family Law Specialists (1990-91)
President, San Antonio Family Lawyers Association (1989-90)
Associate, American Board of Trial Advocates
Fellow, American Academy of Matrimonial Lawyers
Director, San Antonio Bar Association (1997-1998)
Member, San Antonio, Dallas and Houston Bar Associations

Professional Activities and Honors:

State Bar of Texas *Presidential Citation* "for innovative leadership and relentless pursuit of excellence for continuing legal education" (June, 2001)
State Bar of Texas Family Law Section's *Dan R. Price Award* for outstanding contributions to family law (2001)
State Bar of Texas *Gene Cavin Award for Excellence in Continuing Legal Education* (1996)
State Bar of Texas *Certificate of Merit*, June 1995, June 1996, & June 1997
Listed in the BEST LAWYERS IN AMERICA (1987-to date)

Continuing Legal Education and Administration:

Course Director, State Bar of Texas Practice Before the Supreme Court of Texas Course (June, 2002)
Co-Course Director, State Bar of Texas *Enron, The Legal Issues* (March, 2002)
Course Director, State Bar of Texas Advanced Expert Witness Course (2001, 2002, 2003)
Course Director, State Bar of Texas 1999 Impact of the New Rules of Discovery
Course Director, State Bar of Texas 1998 Advanced Civil Appellate Practice Course
Course Director, State Bar of Texas 1991 Advanced Evidence and Discovery Course
Director, Computer Workshop at Advanced Family Law Course (1990-94) and Advanced Civil Trial Course (1990-91)
Course Director, State Bar of Texas 1987 Advanced Family Law Course
Course Director, Texas Academy of Family Law Specialists First Annual Trial Institute, Las Vegas, Nevada (1987)

Books and Journal Articles:

---Chief Editor of the State Bar of Texas Family Law Section's EXPERT WITNESS MANUAL (Vols. II & III) (1999)
---Author of Vol. 6 of McDonald Texas Civil Practice, on Texas Civil Appellate Practice, published by Bancroft-Whitney Co. (1992) (900 + pages)
---*Obligations of the Trial Lawyer Under Texas Law Toward the Client Relating to an Appeal*, 41 SOUTH TEXAS LAW REVIEW 111 (1999)
---*Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress, in Connection With a Divorce*, 25 ST. MARY'S L.J. 1253 (1994), republished in the AMERICAN JOURNAL OF FAMILY LAW (Fall 1994) and Texas Family Law Service *NewsAlert* (Oct. & Dec., 1994)
---Chapter 21 on *Business Interests* in Bancroft-Whitney's TEXAS FAMILY LAW SERVICE (Speer's 6th ed.)
---*Characterization of Marital Property*, 39 BAY. L. REV. 909 (1988) (co-authored)
---*Fitting a Round Peg Into A Square Hole: Section 3.63, Texas Family Code, and the Marriage that Crosses States Lines*, 13 ST. MARY'S L.J. 477 (1982)

SELECTED CLE SPEECHES AND ARTICLES

State Bar's Advanced Family Law Course: Intra and Inter Family Transactions (1983); Handling the Appeal: Procedures and Pitfalls (1984); Methods and Tools of Discovery (1985); Characterization and Reimbursement (1986); Trusts and Family Law (1986); The Family Law Case in the Appellate Court (1987); Post-Divorce Division of Property (1988); Marital Agreements: Enforcement and Defense (1989); Marital Liabilities (1990); Rules of Procedure (1991); Valuation Overview (1992); Deposition Use in Trial: Cassette Tapes, Video, Audio, Reading and Editing (1993); The Great Debate: Dividing Goodwill on Divorce (1994); Characterization (1995); Ordinary Reimbursement and Creative Theories of Reimbursement (1996); Qualifying and Rejecting Expert Witnesses (1997); New Developments in Civil Procedure and Evidence (1998); The Expert Witness Manual (1999); Reimbursement in the 21st Century (2000); Personal Goodwill vs. Commercial Goodwill: A Case Study (2000); What Representing the Judge or Contributing to Her Campaign Can Mean to Your Client: Proposed New Disqualification and Recusal Rules (2001); Tax Workshop: The Fundamentals (2001); Blue Sky or Book Value? Complex Issues in Business Valuation (2001)

State Bar's Marriage Dissolution Course: Property Problems Created by Crossing State Lines (1982); Child Snatching and Interfering with Possess'n: Remedies (1986); Family Law and the Family Business: Proprietorships, Partnerships and Corporations (1987); Appellate Practice (Family Law) (1990); Discovery in Custody and Property Cases (1991); Discovery (1993); Identifying and Dealing With Illegal, Unethical and Harassing Practices (1994); Gender Issues in the Everyday Practice of Family Law (1995); Dialogue on Common Evidence Problems (1995); Handling the Divorce Involving Trusts or Family Limited Partnerships (1998); The Expert Witness Manual (1999); Focus on Experts: Close-up Interviews on Procedure, Mental Health and Financial Experts (2000); Activities in the Trial Court During Appeal and After Remand (2002)

UT School of Law: Trusts in Texas Law: What Are the Community Rights in Separately Created Trusts? (1985); Partnerships and Family Law (1986); Proving Up Separate and Community Property Claims Through Tracing (1987); Appealing Non-Jury Cases in State Court (1991); The New (Proposed) Texas Rules of Appellate Procedure (1995); The Effective Motion for Rehearing (1996); Intellectual Property (1997); Preservation of Error Update (1997); TRAPs Under the New T.R.A.P. (1998); Judicial Perspectives on Appellate Practice (2000)

State Bar's Advanced Evidence & Discovery Course: Successful Mandamus Approaches in Discovery (1988); Mandamus (1989); Preservation of Privileges, Exemptions and Objections (1990); Business and Public Records (1993); Grab Bag: Evidence & Discovery (1993); Common Evidence Problems (1994); Managing Documents--The Technology (1996); Evidence Grab Bag (1997); Evidence Grab Bag (1998); Making and Meeting Objections (1998-99); Evidentiary Issues Surrounding Expert Witnesses (1999); Predicates and Objections (2000); Predicates and Objections (2001); Building Blocks of Evidence (2002); Strategies in Making a Daubert Attack (2002); Predicates and Objections (2002)

State Bar's Advanced Civil Appellate Practice Course: Handling the Appeal from a Bench Trial in a Civil Case (1989); Appeal of Non-Jury Trials (1990); Successful Challenges to Legal/Factual Sufficiency (1991); In the Sup. Ct.: Reversing the Court of Appeals (1992); Brief Writing: Creatively Crafting for the Reader (1993); Interlocutory and Accelerated Appeals (1994); Non-Jury Appeals (1995); Technology and the Courtroom of the Future (1996); Are Non-Jury Trials Ever "Appealing"? (1998); Enforcing the Judgment, Including While on Appeal (1998); Judges vs. Juries: A Debate (2000); Appellate Squares (2000); Texas Supreme Court Trends (2002)

State Bar's Annual Meeting: Objections (1991); Evidentiary Predicates and Objections (1992-93); Predicates for Documentary & Demonstrative Evidence (1994); "Don't Drink That! That's My Computer!", (1997); The Lawyer As Master of Technology: Communication With Automation (1997); If You Don't Know Where You Are Going, It Doesn't Matter How You Get There: Technology Positioning (1999); Objections Checklist (2000); Evidence from Soup to Nuts (2000)

**Various CLE Providers: State Bar of Texas Advanced Civil Trial Course: Judgment Enforcement, Turnover and Contempt (1990-1991);
State Bar of Texas Advanced Civil Trial Course: Offering and Excluding Evidence (1995); State Bar of Texas Advanced Civil Trial Course: New Appellate Rules (1997); State Bar of Texas Advanced Civil Trial Course: The Communications Revolution: Portability, The Internet and the Practice of Law (1998); State Bar of Texas Advanced Civil Trial Course: Daubert With Emphasis on Commercial Litigation, Damages, and the NonScientific Expert (2000); American Institute of Certified Public Accounts: Admissibility of Lay and Expert Testimony; General Acceptance Versus Daubert (2002); Texas and Louisiana Associations of Defense Counsel: Use of Fact Witnesses, Lay Opinion, and Expert Testimony; When and How to Raise a Daubert Challenge (2002); State Bar of Texas In-House Counsel Course: Marital Property Rights in Corporate Benefits for High-Level Employees (2002); College of Advanced Judicial Studies: Evidentiary Issues (2001); El Paso Family Law Bar Association: Proving It Up and Getting It In: Foreign Law and Foreign Evidence (2001) =**

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TEXAS SUPREME COURT TRENDS©

by
Richard R. Orsinger

Board Certified in Family Law
and Civil Appellate Law
Texas Board of Legal Specialization

I. INTRODUCTION. This article discusses perceived trends in the Texas Supreme Court. The article examines the issues in greater detail, but here is a summary of trends discussed:

- Workload may be affecting output
  - Declining number of cases where review is granted
  - Declining number of majority opinions
  - Declining number of per curiam opinons
  - Less error correcting

- Broadening exercise of appellate review
  - standing
  - ripeness
  - more interlocutory orders are appealable
  - increased dissent and conflicts jurisdiction
  - de novo review
  - class action rulings

- 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

- Closer supervision of courts of appeals
  - Supreme Court monitoring factual sufficiency review
  - More freedom to find “no evidence” by changing standard of review
  - Supreme Court’s mandamus review despite finality in court of appeals
  - Revoking “do not publish” power of courts of appeals

- No or limited expansion of legal duty
  - Serving alcohol
  - Insurance bad faith
  - Premises liability

- Professional liability

C More difficulty in recovering damages
- No damages for fraud on the community
- No mental anguish damages for economic torts
- Bifurcated trial for exemplary damages
- Elevated burden of proof for exemplary damages
- Greater appellate scrutiny of exemplary damages

C Upholding arbitration as against litigation/jury system

C Robust exercise of rule-making authority

II. THE STATISTICS. Here are some statistics on the way the Supreme Court has handled its business in recent years. The Supreme Court's fiscal year ends on August 31. So Fiscal Year (FY) 2002 ends on August 31, 2002. The last annual statistics available are for FY 2001. Information for the current year is through June, 2002.

A. PETITIONS FOR REVIEW. For the past nine years, the number of petitions for review has hovered around the 1,000 mark, plus or minus 100. The nine year average is that 12% of petitions filed were granted. For Fiscal Year ending 8-31-2001, 1,020 petitions for review were disposed of, of which 111 (11%) were granted. Chris Griesel, *Thinking Inside the Box: A Review of the Supreme Court's Caseload Statistics*, State Bar of Texas PRACTICE BEFORE THE SUPREME COURT OF TEXAS ch. 1 (2002) ["Griesel"]. Current court data indicates that, during the first ten months of FY 2002, 830 petitions for review were filed (annualized the figure would be 996). Summary information on dispositions is not available at the time this article is written.

Justice Priscilla Owen shared the following statistics during her June 21, 2002 speech at the State Bar's PRACTICE BEFORE THE SUPREME COURT OF TEXAS COURSE. Justice Owen's count for FY 2001 varies a bit from Chris Griesel's.

Percent of Petitions & Apps Granted

FY 1998	11.5%	(127 of 1,104)
FY 1999	11%	(113 of 1,006)
FY 2000	9%	(97 of 1,063)
FY 2001	9%	(101 of 1,119)

B. DISPOSITIONS OF CAUSES. In FY 2001, the Supreme Court made the following dispositions of cases where it had granted appellate review:

ct of appeals affirmed	20	(21%)
ct of appeals rev'd and case remanded to ct of appeals	13	(13%)
ct of appeals rev'd and rendered	13	(13%)

ct of appeals rev'd in part and
remanded to trial court.....6 (6%)
ct of appeals ruling vacated and
remanded to
ct of appeals.....6 (6%)
ct. of appeals rev'd..... 5 (5%)
ct. of appeals aff'd in part
and reversed in part.....5 (5%)
ct. of appeals aff'd in part and
rev'd and rendered
in part.....4 (4%)

Other dispositions accounted for only 1 or 2 cases each. Griesel, ch. 1.

C. OPINIONS.

1. Total Figures. In FY 2001, the Supreme Court issued 88 disposing (majority, plurality) opinions, of which 29 were Per Curiam. For the first ten months of FY 2002, the Court issued 80 disposing opinions, 20 of which were Per Curiam.

Justice Priscilla Owen shared the following statistics during her June 21, 2002 speech at the State Bar's PRACTICE BEFORE THE SUPREME COURT OF TEXAS COURSE:

Opinions Written

FY 1998: 141
Signed Majority Opinions—91
Per Curiams --50

FY 1999: 118
Signed Majority Opinions--70
Per Curiams —48

FY 2000: 99
Signed Majority Opinions--62
Per Curiams—37

FY 2001: 88
Signed Majority Opinions—59
Per Curiams--29

Several trends are evident. The number of signed majority opinions has steadily declined over the past four years. Similarly, the number of per curiam opinions has declined each year for the past four years.

2. Per Curiam Opinions. The number of per curiam opinions has been on the decline. Some recent per curiam opinions are:

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

In the case of *In re K.M.S.*, 45 Tex. Sup. Ct. J. 877 (June 20, 2002), the Supreme Court took exception to a statement in the court of appeals' opinion that it chose not to follow *Texas Department of Protective & Regulatory Services v. Sherry*, 46 S.W.3d 857 (Tex. 2001). The Supreme Court said that courts of appeals are bound to follow Supreme Court precedent. However, any error did not affect the court of appeals' judgment, so review was denied.

3. Dissenting Opinions. In FY 2001, there were 28 dissenting opinions. The authors were: Justice Owen=10, Justice Hecht= 8, Justice Enoch=3, Justice Abbot=3, Justice Baker=2, Chief Justice Phillips=1, Justice O'Neill=1, Justice Hankinson=0, Justice Al Gonzales=0. In the first ten months of FY 2002, there were 29 dissenting opinions issued. The breakdown of these dissenting opinions by Justice is not available at the time of this writing. Considering the work involved in reading over 1,000 petitions and many responses, plus the regular responsibility to write opinions in one ninth of the cases submitted, writing dissenting opinions is extra work that can be easily avoided. Couple that with the prospect that dissenting opinions are ammunition for members of the Senate Jurisprudence Committee to use in attacking presidential nominees to the federal bench, it would not be surprising to see a decline in the number of dissenting opinions, especially solo opinions and opinions with only one or two justices joining.

4. 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).

These types of opinions, dissenting from denial of review, can be helpful because they show what issues have captured the attention of at least some members of the Court. They are especially helpful when they reflect the thinking of the members of the court who voted not to grant review. Absent this kind of information, the denial of a petition for review is inscrutable to outsiders.

In *Vickery v. Vickery*, 999 S.W.2d 342 (Tex. 1999) (J. Hecht, dissenting), Justice Hecht issued an opinion dissenting from the denial of a petition for review, and he attached to that opinion a copy of the unpublished opinions from the court of appeals, creating an anomoly whereby the court of appeals' unpublished opinions are in the Southwest Reporter.

D. MANDAMUS. During FY 2001, of the 295 mandamus petitions pending, 246 were ruled on. Only 7 petitions (3%) were granted. Out of the 7 petitions granted, 6 writs of mandamus were issued, and 1 was denied. Griesel, ch. 1. During the first ten months of FY 2002, 216 mandamus petitions were filed. A summary of dispositions was not available at the time this article was written.

Justice Priscilla Owen gave the following statistics regarding mandamuses granted over the past four years, in her June 21, 2002 speech at the State Bar's PRACTICE BEFORE THE SUPREME COURT OF TEXAS COURSE:

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 2.67% (7 of 262)

Internal court rules require the affirmative vote of five justices to grant a petition for mandamus. It is apparent that granting mandamus has been on a downward trend. For practical purposes, the court of appeals is the court of law resort in mandamus proceedings.

E. HABEAS CORPUS. During FY 2001, of the 5 habeas corpus petitions pending, 4 were ruled on. Of those four, 3 were denied and 1 was dismissed. No habeas corpus writs were granted. Griesel, ch. 1. During the first ten months of FY 2002, of the 16 habeas corpus petitions pending,

15 were ruled on. A summary of dispositions was not available at the time this article was written.

F. OTHER TYPES OF PROCEEDINGS. Justice Priscilla Owen gave the following statistics regarding other types of review granted by the Supreme Court in recent years, in her June 21, 2002 speech at the State Bar's PRACTICE BEFORE THE SUPREME COURT OF TEXAS COURSE:

Certified Questions

FY 1998 3
FY 1999 1
FY 2000 2
FY 2001 1

Direct Appeals

FY 1998 7
FY 1999 4
FY 2000 4
FY 2001 8

III. PETITIONS FOR REVIEW: WHAT ISSUES GET GRANTED? In 1997, the Supreme Court promulgated Rule of Appellate Procedure 56.1(a), which indicated 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).

Supreme Court staff attorney Ginger Rodd evaluated the Supreme Court's opinions issued during FY 2000. *See* Elizabeth V. Rodd, *What is Important to the Jurisprudence of the State?*, State Bar of Texas PRACTICE BEFORE THE SUPREME COURT OF TEXAS COURSE, Ch. 4 (2002). Ginger noted that during FY 1999-2000, the Supreme Court wrote on: 1) trial procedure 30 times; 2) statutory construction 27 times; 3) appellate procedure 17 times; 4) negligence 9 times; 5) sovereign immunity 9 times; 6) insurance law 8 times; 7) legal sufficiency 8 times; 8) Texas constitutional law 7 times; 9) damages 7 times; 10) worker's compensation 7 times; 11) parental bypass for minor abortions 6 times; 12) family law 6 times; 13) administrative law 6 times; 14) contracts 6 times; 15) U.S. constitutional law 5 times. Rodd, Ch. 4, pp. 8-9. Ginger drew these conclusions from this information: procedure and statutory construction are areas of particular interest to the Court; sovereign immunity is important; legal sufficiency challenges are less significant.

Ginger Rodd made in her paper the following observations about the Supreme Court's grants of petitions during the current fiscal year, as of mid-June 2002:

> Based upon a review of the issues presented in the granted petitions, it seems clear that the Court probably will remain fairly involved with statutory construction issues: at least

> 11 of the 35 cases granted this calendar year may involve statutory construction. Similarly, at least 13 of the cases granted raise procedural issues. Somewhat surprisingly, however, the Court has granted only two petitions that focus on immunity issues. This discrepancy may be because the Court frequently addresses sovereign immunity claims in per curiam opinions. When that happens, the case isn't granted before the Court issues its opinion. Similarly, the Court has granted only two family law cases so far this year. Because judicial bypass cases, in which a minor seeks permission to proceed with an abortion without notifying her parents, are generally decided without oral argument, the number of cases granted may not be a true indicator that the Court's interest in family law cases has declined. Interestingly, the Court has granted 5 cases raising intentional tort issues so far this year, while it issued only 4 intentional-tort opinions in the term discussed in the main body of the paper. And it appears that no-evidence issues may be increasingly gaining the Court's attention: at least 5 of cases granted so far this year raise no-evidence issues.

Elizabeth V. Rodd, *What is Important to the Jurisprudence of the State?*, State Bar of Texas PRACTICE BEFORE THE SUPREME COURT OF TEXAS COURSE, Ch. 4 (2002) (supplemental page).

In several instances it appears that the procedural issues were not the basis for the grant, but were instead a means to the end of reaching an important point of substantive law. This is also true of some legal sufficiency of the evidence reviews, which appear to have been collateral to the main issue that caused the Supreme Court to grant review. *See e.g., Lenz v. Lenz*, 79 S.W.3d 10 (Tex. 2002) (Court had to resolve legal sufficiency argument in getting to important statutory construction issue); *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 210 (Tex. 2002) (review of evidence was ancillary to deciding that an associate attorney owes a fiduciary duty to his or her employer not to personally profit or realize any financial or other gain or advantage from referring a matter to another law firm or lawyer).

In *Van Horn & Assoc., Inc. v. Tatom*, 45 Tex. Sup. Ct. J. 857 [2001 WL 1892191] (Tex. June 20, 2002), the Supreme Court granted review on a case of first impression, then determined that the complaint had not been preserved. However, the Court issued a per curiam opinion signaling the Court's willingness to take on the issue of whether the Covenants Not to Compete Act, Tex. Bus. & Com. Code § 15.50 et. seq., controls the award of attorney's fees in a declaratory judgment action in which a court declares a covenant not to compete unenforceable.

IV. DIRECT APPEALS. Texas Government Code Section 22.001 provides:

> An appeal may be taken directly to the supreme court from an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state.

Tex. Gov't Code § 22.001(c). In the first ten months of FY 2002, ten direct appeals were filed.

The Supreme Court's review on direct appeal is confined to questions of law. Tex. Const. art. V, § 3-b; TEX. GOV'T CODE § 22.001(b); Tex.R.App. P. 57.2; *Perry v. Del Rio*, 67 S.W.3d 85, 91 (Tex.2001). The Supreme Court reviews questions raising constitutional concerns de novo. *Perry*, 67 S.W.3d at 91; *State v. Hodges*, 2002 WL 1906111, *2 (Tex. August 21, 2001).

V. APPEALS OF INTERLOCUTORY ORDERS. Ordinarily, only final judgments are appealable. *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992). However, the Texas Legislature has created a right to appeal some interlocutory orders. Over time, the Legislature has expanded the list of appealable orders, and the Supreme Court has similarly acted, within the scope of its powers, to extend appellate jurisdiction over interlocutory appeals.

A. WHAT INTERLOCUTORY ORDERS ARE APPEALABLE? The main statutory authorization to appeal from an interlocutory order is TEX. CIV. PRAC. & REM. CODE § 51.014, which permits an appeal from an interlocutory order that:

(1) appoints a receiver or trustee;

(2) overrules a motion to vacate an order that appoints a receiver or trustee;

(3) certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure;

(4) grants or refuses a temporary injunction or grants or overrules a motion to dissolve a temporary injunction as provided by [Tex. Civ. Prac. & Rem. Code] Chapter 65;

(5) denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state;

(6) denies a motion for summary judgment that is based in whole or in part upon a claim against or defense by a member of the electronic or print media, acting in such capacity, or a person whose communication appears in or is published by the electronic or print media, arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article 1, Section 8, of the Texas Constitution, or [Tex. Civ. Prac. & Rem. Code] Chapter 73;

(7) grants or denies the special appearance of a defendant under Rule 120a, Texas Rules of Civil Procedure, except in a suit brought under the Family Code; or

(8) grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in [Tex. Civ. Prac. & Rem. Code] Section 101.001.

In recent years, the Legislature has been expanding the types of interlocutory orders that are appealable. The grant or denial of class certification became appealable in 1985. The denial of summary judgment based on official immunity became appealable in 1989. The denial of a media defendant's summary judgment on First Amendment grounds became appealable in 1993. The denial of a plea to the jurisdiction (usually based on governmental immunity) became appealable 1997. A ruling on special appearance became appealable in 1997. 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).

In 2001, the Legislature passed Tex. Civ. Prac. & Rem. Code § 51.014(d), which authorizes interlocutory appeals by consent of the parties, and the trial court, and the court of appeals. The statute reads:

> Section 51.014(d)
>
> (d) A district court may issue a written order for interlocutory appeal in a civil action not otherwise appealable under this section if:
>
> (1) the parties agree that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion;

(2) an immediate appeal from the order may materially advance the ultimate termination of the litigation; and
(3) the parties agree to the order.

* * *

(f) If application is made to the court of appeals that has appellate jurisdiction over the action not later than the 10th day after the date an interlocutory order under Subsection (d) is entered, the appellate court may permit an appeal to be taken from that order.

The Supreme Court has said that the Legislature intended that Section 51.014 be strictly construed as "a narrow exception to the general rule that only final judgments and orders are appealable." *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 354 (Tex. 2001). However, in some areas (such as class action orders) the Supreme Court has expanded jurisdiction beyond the literal words of the statute.

Arbitration is another area with vigorous interlocutory appeal activity. An interlocutory appeal can be taken from a decision of the trial court refusing to refer a matter to arbitration or granting a stay of arbitration in a matter governed by Texas arbitration law. TEX. CIV. PRAC. & REM. CODE § 171.098(a)(1). See Section XVIII.E below. When the dispute falls under the Federal Arbitration Act, there is no interlocutory appeal but there is mandamus review. *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992).

B. SUPREME COURT JURISDICTION IN INTERLOCUTORY APPEALS. Under Tex. Gov't Code § 22.225(b)(3), appellate jurisdiction over interlocutory appeals is generally final in the court of appeals. *See Collins v. Ison-Newsome*, 73 S.W.2d 178, 180 (Tex. 2001). However, Tex. Gov't Code § 22.225 gives the Supreme Court jurisdiction to review the denial of a First Amendment defense of a media defendant, and to review other appealable interlocutory orders where the justices of the courts of appeals disagree on a question of law material to the decision, or where one court of appeals holds differently from a prior decision of another court of appeals or of the Texas Supreme Court.

1. First Amendment Defense by Media Defendant. Tex. Gov't Code § 22.225(e) gives the Supreme Court appellate jurisdiction over an interlocutory appeal from the denial of a motion for summary judgment denying a media defendant protection under free speech or free press clauses of the state or federal constitutions. Tex. Gov't Code § 22.225(e), referring to Tex. Civ. Prac. & Rem. Code § 51.014(6). *See WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998), *cert. denied*, 526 U.S. 1051, 119 S.Ct. 1358, 143 L.Ed.2d 519 (1999) (interlocutory appeal of denial of media defendant's motion for summary judgment).

2. Dissent Jurisdiction. The Texas Government Code gives the Supreme Court dissent-based jurisdiction in a case in which the justices of a court of appeals disagree on a question of law material to the decision. Tex. Gov't Code §§ 22.225(c); 22.001(a)(1). For example, in *Intratex Gas Co. v. Beeson*, 22 S.W.3d 398, 406 (Tex. 2000), the Supreme Court had appellate jurisdiction over a class certification order due to a dissent in the court of appeals.

a. Must Raise Dissent's Point-of-Law in Supreme Court. In *Brown v. Todd*, 53 S.W.3d 297 (Tex. 2001), the Court reiterated a holding from a 1963 case that a dissent in the court of appeals cannot support Supreme Court appellate jurisdiction unless Supreme Court review is sought on the issue of law raised in the dissent in the court of appeals. Because the defendant City of Houston did not complain in its petition for review about the legal issue disputed in the court of appeals' dissenting opinion, it did not invoke the Supreme Court's jurisdiction in an appeal from an interlocutory order. *Id*. at 301.

b. Jurisdiction for Part is Jurisdiction for All. In *Brown v. Todd*, 53 S.W.3d 297 (Tex. 2001), even though the defendant City of Houston did not bring to the Supreme Court a complaint on the point of law raised in the court of appeals' dissenting opinion, the Supreme Court nonetheless exercised jurisdiction over the City's complaints, because the opposing party established dissent-based jurisdiction. The Supreme Court cited several cases to support its exercise of jurisdiction, but the cases cited provide that where the Court has jurisdiction over some of a party's complaints, it has jurisdiction over all of that party's complaints. The Supreme Court did not mention a contrary decision involving jurisdiction over different parties, *Jacobs v. Jacobs*, 687 S.W.2d 731, 732 (Tex. 1985), a divorce appeal where both parties filed applications for writ of error alleging conflicts jurisdiction, but only the husband's conflict was valid so the wife's application was dismissed for want of jurisdiction. The Supreme Court essentially expanded its jurisdiction in *Brown v. Todd*.

c. Includes Dissent from Denial of Rehearing En Banc. In *American Type Culture Collection, Inc. v. Coleman*, 45 Tex. Sup. Ct. J. 1008 (Feb. 13, 2002), the Supreme Court considered an appeal from the denial of a special appearance. Tex. Civ. Prac. & Rem. Code § 51.014(7) permits an appeal from denial of a special appearance, but the decision of the court of appeals is final unless there is a dissent or a conflict. In this case, the only dissent was by Justice O'Connor, who did not sit on the panel deciding the case, but who did issue a dissenting opinion on the denial of a motion for rehearing en banc. "The question is whether, in this case, 'the justices of the court[] of appeals disagree[d] on a question of law material to the decision.'" Tex. Gov't Code §§ 22.001(a)(1), 22.225(c). *Coleman*, at p. *2. In considering this proposition, the Court said:

> In dissenting to the court of appeals' denial of *en banc* review, Justice O'Connor challenged concepts fundamental to the court of appeals' holding. She criticized the panel for creating the concept of "comparative personal jurisdiction." 26 S.W.3d at 53. Disagreeing with the court's jurisdictional analysis pertaining to sales in other states, Justice O'Connor wrote that "[e]vidence showing sales were low in other states, as compared to sales in Texas, should not be a factor to be considered in special appearance cases." *Id.* at 53-54. In her view, the facts upon which the panel found personal jurisdiction were "extremely weak." *Id.* at 53.
>
> Because Justice O'Connor's dissent addressed the merits of the panel's decision and disagreed expressly with a question of law material to the decision, we have jurisdiction to decide this case. Our jurisdiction is based not on the bare fact that a justice dissented from *en banc* review, but on the direct clash between the justice and the court on the appropriate analysis for the case.

Coleman, at p. *2. The decision of the Supreme Court to consider dissents from denials of rehearing en banc for purposes of conflict jurisdiction will expand the range of cases the Supreme Court can review on interlocutory appeal. On some of the larger courts of appeals, it is possible that a litigant

could draw a dissent from one member of the court when no dissent arise on the panel that decided the case. All losers of interlocutory appeals in the court of appeals should now files motions for rehearing en banc to exploit this opportunity to give the Supreme Court jurisdiction of the interlocutory appeal.

3. Conflicts Jurisdiction. The formula for conflicts jurisdiction is well-established. The Government Code gives the Supreme Court conflicts 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). According to case law going back into the dim recesses of the past,

> [f]or 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.

Christy v. Williams, 298 S.W.2d 565, 567 (1957). 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.

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).

Over the years, the Texas Supreme Court has seldom exercised "conflicts jurisdiction"over interlocutory orders. In the case of *Wagner & Brown 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 the 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 an upswing in the number of interlocutory appeals the Supreme Court is considering based on conflicts jurisdiction. The Court is taking pains to explain why it has conflicts jurisdiction, and sometimes even why it does 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 is 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 *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 do not exist. Accordingly, the Court withdrew its order granting the petitions as improvidently granted, and dismissed the petitions for want of 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 *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 *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 *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., dissenting); 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 that 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*, 45 Tex. Sup. Ct. J. 857 (Jun 20, 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).

C. JURISDICTION TO DETERMINE LOWER COURT'S JURISDICTION. Ordinarily, the Supreme Court does not have jurisdiction to review a court of appeals' decision on an interlocutory appeal unless there is a dissent in the court of appeals, conflicts jurisdiction, or a specific statute granting jurisdiction. See Tex. Gov't Code § 22.225; *Hajek v. Bill Mowbray Motors, Inc.*, 647 S.W.2d 253, 254 (Tex. 1983). Even when an appeal is interlocutory, the Supreme Court has jurisdiction to determine whether the court of appeals has jurisdiction of the appeal. *University of Texas Southwestern Medical Center of Dallas v. Margulis,* 11 S.W.3d 186, 187 (Tex. 2000) (per curiam).

Thus, in *University of Texas Southwestern Medical Ctr. of Dallas v. Margulis*, 11 S.W.3d at 187, the court of appeals held that it did not have jurisdiction over an interlocutory appeal by a governmental entity because the entity's motion for summary judgment did not have proof establishing immunity, but instead relied upon deficiencies in the plaintiff's pleadings. The Supreme Court held that jurisdiction did exist, because the motion for summary judgment was based on immunity, even if not properly proven.

In *West Communications Corp. v. AT&T Corp.*, 24 S.W.3d 334, 335-36 (Tex. 2000) (per curiam), the court of appeals believed it had no jurisdiction over an interlocutory appeal from an alleged temporary injunction, because the order did not meet the "traditional requirements" of a temporary injunction of preserving the status quo, requiring a bond, setting a trial date, requiring the clerk to issue a writ of injunction, or limiting the duration of the order until final judgment or further order of the court. The Supreme Court held that "in character and function, the trial court's order grants a temporary injunction and is appealable." *Id.* at 337.

In *McAllen Med. Ctr., Inc. v. Cortez*, 66 S.W.3d 227, 231 (Tex. 2001), the Supreme Court said that when a court of appeals determines that it lacks jurisdiction over an interlocutory appeal, the Supreme Court has jurisdiction to review that decision. Here the court of appeals dismissed an interlocutory class action appeal on the grounds it was not ripe. The Supreme Court reversed, saying that the

certification of a settlement class against a defendant made the certification ripe for appeal.

In *Mayhaw v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998), the Court indicated that the issue of subject matter jurisdiction is subject to *de novo* review.

D. CLASS ACTION APPEALS. Tex. Civ. Prac. & Rem. Code § 51.014(a)(3) permits an appeal from an interlocutory order that certifies or refuses to certify a class in a suit brought under TRIP 42. 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.

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 thus can be raised at any time, and 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 Assen 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 sea sponge by the appellate court. *Id.* at 446. The Court ruled that "when a Texas appellate court reviews the standing of a party sea sponge, 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 a 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.

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.

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 sea sponge." *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. SPECIAL APPEARANCE REVIEW.

A. MANDAMUS REVIEW OF SPECIAL APPEARANCE. Traditionally, mandamus was not available for higher court review of a denial of a special appearance. *Canadian Helicopters Ltd. v. Witting*, 876 S.W.2d 304, 307 (Tex. 1994). However, the Supreme Court did grant mandamus review in several instances where a special appearance was denied. *See National Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 771 (Tex. 1995) (holding appeal is an inadequate remedy when trial court's assertion of personal jurisdiction is clearly incorrect and irreparably harms relator); *CRS Ltd. v. Link*, 925 S.W.2d 591, 595-97 (Tex. 1996) (permitting mandamus relief when personal jurisdiction is clearly and completely lacking and when there are exceptional circumstances, in this case mass tort litigation).

B. NEW INTERLOCUTORY APPEAL. Effective June 20, 1997, the Texas Legislature amended the Civil Practice and Remedies Code to provide for an interlocutory appeal from the grant or denial of a special appearance, except in family law cases. Tex. Civ. Prac. & Rem.Code Ann. § 51.014(a)(7). *Raymond Overseas Holding, Ltd. v. Curry*, 955 S.W.2d 470, 471 (Tex. App.--Fort Worth 1997, orig. proceeding), held that the availability, since June 20, 1997, of an interlocutory appeal from the denial of a special appearance means that mandamus is no longer available to review a special appearance

in an appellate court. Thus, the Supreme Court now has appellate review instead of mandamus review, meaning that the primary procedural restraint on the Supreme Court reaching the merits of a special appearance is no longer an adequate remedy at law but rather the lack of Supreme Court jurisdiction absent a dissent or conflict.

In *Deloitte & Touche, L.L.P. v. Fourteenth Court of Appeals*, 951 S.W.2d 394, 398 (Tex. 1997), the Supreme Court asserted that it has the power to exercise mandamus jurisdiction even where it has no appellate jurisdiction, in "extraordinary circumstances causing irreparable harm and precluding an adequate remedy by appeal." See Section VII.D below. Will the Supreme Court give up its recent pattern of mandamus intervention in cases where it has no appellate jurisdiction over the denial of a special appearance?

It will also be interesting to see whether the Supreme Court confines its grants of review to underlying issues of law, or whether the court will engage in case-specific review of the particular circumstances in reversing lower court decisions on special appearance.

C. NEW STANDARD OF REVIEW. In a mandamus proceeding, the appellate court looks for an abuse of discretion. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992). An appellate court cannot resolve factual disputes in a mandamus proceedings. *Brady v. Fourteenth Court of Appeals*, 795 S.W.2d 712, 714 (Tex. 1990). Since interlocutory review of special appearance denials is now by appeal and not mandamus, a different standard of review arises. The courts of appeals have disagreed on the standard of review on denial of a special appearance. In *American Type Culture Collection, Inc. v. Coleman*, 45 Tex. Sup. Ct. J. 1008 (Tex. Feb. 13, 2002), the Court indicated that on appeal the trial court's determination on special appearance is subject to *de novo* review.

In *BMC Software Belgium v. Marchand*, 45 Tex. Sup. Ct. J. 930 (Jun 27, 2002) (rehearing pending), the Supreme Court said:

> Whether a court has personal jurisdiction over a defendant is a question of law. . . . However, the trial court frequently must resolve questions of fact before deciding the jurisdiction question. . . . . If a trial court enters an order denying a special appearance, and the trial court issues findings of fact and conclusions of law, the appellant may challenge the fact findings on legal and factual sufficiency grounds. . . . . Our courts of appeals may review the fact findings for both legal and factual sufficiency. . . . This Court's review of the trial court's fact findings is limited to legal sufficiency.
>
> Appellate courts review a trial court's conclusions of law as a legal question. . . . The appellant may not challenge a trial court's conclusions of law for factual insufficiency; however, the reviewing court may review the trial court's legal conclusions drawn from the facts to determine their correctness. . . . If the reviewing court determines a conclusion of law is erroneous, but the trial court rendered the proper judgment, the erroneous conclusion of law does not require reversal. [Citations omitted]

Legal sufficiency appellate review is really no different from mandamus review, but factual sufficiency review certainly is. The appellate standard of erroneous conclusions of law may be broader than the mandamus standard of abuse of discretion. So appellate review of denials of special appearance will give courts of appeals greater authority to reverse than they had in mandamus proceedings.

VIII. MANDAMUS REVIEW. Over the past decades, the Supreme Court has gone from granting almost no mandamuses to granting an abundance, and now back to granting very few mandamuses. In recent years, however, the Supreme Court has been broadening the use of mandamus, by expanding or disregarding traditional limitations on its use. The interested reader can look to Justice James Baker's dissenting opinions in mandamus proceedings for instruction on how the Supreme Court has frequently disregarded historical restraints on the mandamus remedy.

The lack of clear lines around the mandamus remedy is reflected in a per curiam opinion recently issued by the Supreme Court in the case of *In re TXU Elec. Co.*, 67 S.W.3d 130 (Tex. Dec 31, 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. 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 has become nothing more than reversible error.

The Supreme Court recently 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.*, 45 Tex. Sup. Ct. J. 571 (Tex. 2002). The Supreme Court explained that the court of appeals had "misapplied the law." *Id.* at *4.

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 a minister, 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.

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.

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.

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.

F. MANDAMUS VS. INTERLOCUTORY APPEALS. There are instances in which the Supreme Court has considered mandamus in situations where an interlocutory appeal was available.

In *Republican Party of Texas v. Dietz*, 940 S.W.2d 86 (Tex. 1997), the Supreme Court reviewed by mandamus a trial court's temporary injunction requiring the Texas Republican Party to provide a booth at its state-wide convention to a group called the "Log Cabin Republicans." Appellate review was available for that temporary injunction. To justify its exercise mandamus jurisdiction, the Supreme Court mentioned that the district court's injunction affected a statewide political convention and was based on claims of statewide importance which the state's highest court should determine. The Court also mentioned the fact that the Republican Party alleged that the district court's injunction violated its First Amendment rights. Although the Court did not reach the Party's First Amendment claims, the Court noted that mandamus jurisdiction may be properly invoked when First Amendment rights are at stake.

In the case of *In re University Interscholastic League*, 20 S.W.3d 690 (Tex. 2000), the Supreme Court mandamused a trial court to vacate an injunction prohibiting the League from disqualifying a

high school from participating in the state baseball tournament then in progress. The Supreme Court found a clear abuse of discretion, and said that, because "the State baseball tournament is currently in progress, the UIL has no adequate remedy at law." *Id.* at 692. It might be said that of course the League had an adequate remedy at law, albeit by accelerated appeal to the court of appeals. Thus, it appears that an immediate need for judicial intervention can render even an accelerated interlocutory appeal inadequate.

In *Deloitte & Touche LLP v. Fourteenth Court of Appeals*, 951 S.W.2d 394 (Tex. 1997), a 7-to-1 majority of the Supreme Court joined in an opinion asserting that the Supreme Court has mandamus power to review a class certification order that had been appealed to the court of appeals, but where lack of dissent or conflict deprived the Supreme Court of appellate jurisdiction. The Opinion authored by Justice Enoch said that the legislative restriction on Supreme Court jurisdiction was not a barrier against the Supreme Court granting mandamus review where there are "extraordinary circumstances causing irreparable harm and precluding an adequate remedy by appeal." 951 S.W.2d at 398. The Opinion suggests that such mandamus review would not be used to review questions of law over which the court of appeals has final jurisdiction. *Id.* at 398.

In the case of *In re Texas Natural Resource Conservation Com'n*, 2002 WL 1988209, *5 (Tex. August 30, 2002), the Supreme Court granted mandamus to set aside a temporary restraining order that was extended by forty-two days without the restrained party's consent, in violation of TRCP 680. The majority found that an accelerated appeal was not an adequate remedy because the appeal would not be concluded until well after the maximum period of restraint under a TRO. Justice Baker dissented, joined by Justices Hankinson and O'Neill, arguing that an accelerated appeal was an adequate remedy.

Taken together, these cases reflect that the Supreme Court on occasion is willing to use mandamus to circumvent the jurisdictional limitations on its appellate authority over interlocutory orders.

The case of *In re Valero Energy Corp.*, 968 S.W.2d 916, 916-17 (Tex. 1998) (per curiam), involved a situation where a party was seeking appellate court review of a refusal to compel arbitration, claiming that both the federal act (mandamus review avaiable) and the state act (interlocutory appeal available) applied. The Court noted that "the better course of action for a court of appeals confronted with an interlocutory appeal and a mandamus proceeding seeking to compel arbitration would be to consolidate the two proceedings and render a decision disposing of both simultaneously, thereby conserving judicial resources and the resources of the parties."

G. OTHER RECENT MANDAMUS CASES.

- In the case of *In re Nitla S.A. de C.V.*, 2002 WL 534089 (Tex. April 11, 2002) (per curiam), the trial court refused to disqualify Nitla's counsel, who had reviewed privileged documents that the trial court ordered the opposing party to produce. The court of appeals issued mandamus, ordering the trial court to disqualify Nitla's counsel. The Supreme Court determined that the court of appeals misapplied the law and thus abused its discretion, and so mandamused the court of appeals to set aside its order.

- In the case of *In re Halliburton Co.*, 80 S.W.3d 566 (Tex. May 30, 2002), the Supreme Court granted mandamus to force an employment dispute into arbitration pursuant to the Federal

Arbitration Act.

- In the case of *In re O'Connor*, 45 Tex. Sup. Ct. J. 970 (Tex. June 27, 2002) [2002 WL 1379069], the Supreme Court granted mandamus to disqualify a judge who was constitutionally disqualified to hear the case. The Court cited the earlier case of *In re Union Pacific Resources Co.*, 969 S.W.2d 427, 428 (Tex. 1998), for the proposition that "[w]hen a judge continues to sit in violation of a constitutional proscription, mandamus is available to compel the judge's mandatory disqualification without a showing that the relator lacks an adequate remedy by appeal."

- In the case of *In re Swepi, L.P.*, (Tex. Aug. 29, 2002) [2002 WL 1981363], the Supreme Court decided that a suit, concerning royalty payments on an overriding royalty interest owned by a partnership in which a decedent and, subsequently, her estate were former partners, is not appertaining to or incident to the estate. Because the probate court not only erroneously concluded that it had jurisdiction, but also actively interfered with the jurisdiction of another court by taking jurisdiction away from that court through the transfer order, mandamus was proper.

- *In re Service Corporation Intern.*, 2002 WL 1981365, *3 (Tex. August 29, 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."

- *In re Texas Natural Resource Conservation Com'n*, 2002 WL 1988209, *1 (Tex. August 30, 2002), the Supreme Court granted mandamus to set aside a temporary restraining order that was extended by forty-two days without the restrained party's consent, in violation of TRCP 680. The majority found that the trial court had abused its discretion and that the relator did not have an adequate remedy by appeal. Justice Baker dissented, joined by Justices Hankinson and O'Neill, on the grounds that the order was effectively a temporary injunction that was subject to accelerated appeal.

IX. 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 *Ritzell v. Espeche*, 45 Tex. Sup. Ct. J. 878 (Tex. Jun 20, 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).

X. 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." TRCP 277 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 cases in broad form tends to obscure the actual fact findings of the jury, making it more difficult to obtain appellate review of the sufficiency of the evidence. 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."

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.

The Supreme Court is beckoning appellate lawyers to bring up the question of whether, in a multi-theory case where the evidence is factually or legally insufficient to support a theory of recovery, the submission of alternate theories of liability in broad form is harmful error. If so, then broad form

submission will be on the retreat in multi-theory cases. If not, then the burden will be on the appellant to show insufficient evidence on all claims in order to secure a reversal.

XI. MONITORING "FACTUAL SUFFICIENCY" REVIEW.

A. JURISDICTION UNDER THE CONSTITUTION. Article I, § 15 of the Texas Constitution provides that the right of trial by jury shall remain inviolate. However, Article V, § 6 of the Texas Constitution states that decisions of courts of appeals shall be conclusive on all questions of fact. Long ago the Supreme Court harmonized these two seemingly contradictory constitutional provisions by deciding that the intermediate courts of appeals, upon proper assignment, must consider the fact question of the weight and preponderance of all the evidence and should order or deny a new trial depending upon whether the verdict appears to be clearly unjust. *In Re King's Estate*, 244 S.W.2d 660, 662 (Tex. 1951).

B. WAS STANDARD OF REVIEW FAITHFULLY OBSERVED? Pursuant to Texas Gov't Code § 22.225, "[a] judgment of a court of appeals is conclusive on the facts of the case in all civil cases." However, as noted in *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 634-35 (Tex. 1986), the case of "In Re King's Estate [1951] established that the supreme court might take jurisdiction, notwithstanding the finality of judgments of the courts of civil appeals on fact questions, in order to determine if a correct standard had been applied by the intermediate courts."

In *Alm v. Aluminum Co. of America*, 717 S.W.2d 588, 594 (Tex. 1986), the court of appeals reversed a jury's negligence verdict for the plaintiff, on factual sufficiency grounds. A 7-2 majority of the Supreme Court reversed the court of appeals, saying "[f]rom our reading of both the statement of facts and the court of appeals' decision, however, it appears that court did not consider all of the evidence in determining the factual sufficiency of the evidence supporting Alm's remaining two theories." On remand the court of appeals reversed the gross negligence part of the jury's verdict. On the second appeal to the Supreme Court, a 5-to-4 majority of the Supreme Court held that the plaintiff had proven gross negligence as a matter of law. *Aluminum Co. of America v. Alm*, 785 S.W.2d 137, (Tex. 1990). Justice Gonzalez, joined by Chief Justice Phillips, C.J., and Justices Cook and Hecht, JJ., dissented, saying:

> Henceforth, whenever five members of this court are displeased with a particular result, they can impose any result they desire, merely by holding that a party proved the necessary facts conclusively, i.e., as a matter of law. This result runs roughshod over the constitutional limitations on our jurisdiction and our concept of fairness to all parties.

Id. at 143.

C. MUST DETAIL EVIDENCE WHEN OVERTURNING JURY VERDICT. The Supreme Court, in *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986), said:

> Our continuing review of courts of appeals decisions in which factual insufficiency points are discussed convinces us that the overwhelming majority of those opinions represent honest efforts by their scriveners to adhere to the guidelines of In Re King's Estate. However, there occasionally appears an opinion in which it seems that the court of appeals has merely substituted its judgment for that of the jury. Those opinions couch their holdings with the

> necessary "factual insufficiency" or "against the great weight and preponderance" language without providing analyses of the evidence or stating bases for the conclusions drawn. One recent opinion is particularly noteworthy in this regard. In it the court of appeals reversed a judgment on factual insufficiency grounds, saying "[t]he jury evidently believed Appellee's argument; we do not." It may well be that the court of appeals in that case and other courts in similar cases considered and weighed all the evidence before arriving at a decision of insufficiency. But, without that mental process being reflected by the opinion, it is impossible for this court to be certain that the requirements of In Re King's Estate have been followed.
>
> In order that this court may in the future determine if a correct standard of review of factual insufficiency points has been utilized, courts of appeals, when reversing on insufficiency grounds, should, in their opinions, detail the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient or is so against the great weight and preponderance as to be manifestly unjust; why it shocks the conscience; or clearly demonstrates bias. Further, those courts, in their opinions, should state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict. It is only in this way that we will be able to determine if the requirements of In Re King's Estate have been satisfied.

In *Lofton v. Texas Brine Corp.*, 720 S.W.2d 804, 805 (Tex. 1986), the Supreme Court remanded a case to the court of appeals, saying "[f]rom our reading of the statement of facts, it appears the court did not fully consider the evidence in determining the sufficiency points." On remand, the court of appeals panel reiterated its original decision to remand a judgment in favor of the plaintiff on factual sufficiency grounds. On the second appeal to the Supreme Court, Justice Doggett wrote that "This court need not defend its opinions from criticism from courts of appeals; rather they must follow this court's pronouncements. Nevertheless, since we assume the majority of the court of appeals panel has honestly had difficulty recognizing some contrary evidence and inferences and applying the correct standards of law, we will briefly present a review of why the lower court's analysis is incorrect." *Lofton v. Texas Brine Corp.*, 777 S.W.2d 384, 386 (Tex. 1989). Justice Gonzalez dissented, noting "that my fear that Pool v. Ford Motor Co. . . . would be used by this court to second guess the courts of appeals has been realized. . . . The court of appeals has twice found the evidence factually insufficient; we have no jurisdiction to review it." *Id.* at 387 (Gonzalez, J., concurring). Justice Hecht, joined by Chief Justice Phillips and Justice Cook, dissented, saying "Stymied by the constitution, the Court cannot decree the result it rather plainly wants to see in this case. To accomplish the desired end, the Court must keep reversing the judgment of the court of appeals until it reaches a result that the Court approves. " *Id.* at 388.

Two years after *Pool*, the Supreme Court reaffirmed its limited role, in the case of *Herbert v. Herbert*, 754 S.W.2d 141, 143 (Tex. 1988), saying:

> When a court of appeals utilizes an incorrect test in reviewing factual insufficiency or great weight points, in spite of that court's constitutional grant of conclusiveness on questions of fact, this court is empowered to reverse the judgment of the court of appeals. [Citations omitted] We recognize the division of powers between our court and the courts of appeals. So long as courts of appeals apply the correct test in evidentiary review, their determination of factual sufficiency points is conclusive.

In *E-Z Mart Stores, Inc. v. Havner*, 797 S.W.2d 116 (Tex. App.--Texarkana 1990), *rev'd*, 825 S.W.2d 456 (Tex.1992), the court of appeals found the evidence legally and factually insufficient to establish causation in a tort suit. On appeal, the Supreme Court found some evidence of causation in fact, and remanded the case to the court of appeals to conduct a new review of the factual sufficiency of the evidence. On remand, the Texarkana court of appeals stated its exclusive constitutional prerogative to decided the factual sufficiency of the evidence, recited the evidence as required by *Pool*, and found the evidence factually insufficient to establish causation, and thus remanded the case for a new trial. *E-Z Mart Stores, Inc. v. Havner*, 832 S.W.2d 368 (Tex. App.--Texarkana 1992, writ denied). The Supreme Court granted writ of error on December 16, 1992, but withdrew the grant on February 3, 1993. Justice Doggett took umbrage at the withdrawal of the grant, and wrote a dissenting opinion joined by Justice Gammage and Spector. *Havner v. E-Z Mart*, 846 S.W.2d 286, 287 (Tex. 1993) (Doggett, J., dissenting to order denying application for writ of error as improvidently granted). Justice Gonzalez countered with an opinion defending the denial of review, saying that "[w]hat we should avoid is the yo-yo effect when a majority of the court keeps reversing the judgment of the court of appeals until it reaches a result that the majority approves," citing the *Lofton v. Texas Brine Corp.* case. *See Havner v. E-Z Mart*, 846 S.W.2d at 286 (Gonzalez, J., concurring in denial of application for writ of error).

D. REQUIREMENT APPLIES TO REVERSALS FOR FAILURE TO FIND. In *Cropper v. Caterpillar Tractor Co.*, 754 S.W.2d 646, 652 (Tex. 1988), the Supreme Court indicated that the *Pool* requirement of specifying the evidence supporting reversal of a jury verdict applies not only to findings the jury made, but also to findings the jury refused to make. In *Cropper*, the court of appeals reversed for the jury's failure to find that the plaintiff was contributorily negligent. In reviewing this decision, the Supreme Court said:

> In his motion for rehearing, Cropper brought to the attention of the court of appeals certain testimony and evidence that was not referred to by the court in its opinion and which somewhat contradicted the version of the facts recited by the court in its opinion. Cf. Garza v. Alviar, 395 S.W.2d 821, 823 (Tex. 1965). Further, the evidence specifically referred to in Cropper's motion lent substantial support to the jury's verdict. Cropper has thus preserved his complaint that the court of appeals' opinion does not comply with the guidelines established by this court in Pool v. Ford Motor Company.

On remand, the Texarkana court of appeals remarked on its exclusive constitutional power to review the factual sufficiency of the evidence, and indicated its belief that it had complied with *Pool* the first time around. The Court again detailed the evidence in the record, and again reversed and remanded based on the jury verdict being against the great weight and preponderance of the evidence. *Caterpillar Tractor Co. v. Cropper*, 767 S.W.2d 813, 816-17 (Tex. App.--Texarkana), *writ denied as improvidently granted*, 777 S.W.2d 709 (Tex. 1989). On the second appeal to the Supreme Court, writ of error was granted, and then later withdrawn. *Cropper v. Caterpillar Tractor Co.*, 777 S.W.2d 709 (Tex. 1989).

In *Jaffe Aircraft Corp. v. Carr*, 867 S.W.2d 27 (Tex. 1993), the Supreme Court reversed the San Antonio Court of Appeals' 2-to-1 decision which had reversed a judgment on the grounds that the jury's failure to find negligence was against the great weight and preponderance of the evidence. The Supreme Court restated the *Pool* requirements–that a court of appeals reversing a judgment based on factual sufficiency of the evidence must cause its opinion to reflect in detail its review of the

evidence. *Id.* at 28. The Supreme Court compared the court of appeals' opinion to the record of the evidence at trial, and recited evidence supporting the jury's verdict that was omitted by the court of appeals in its recitation of the evidence. The Supreme Court noted:

> Having omitted any mention of the above evidence as well as any explanation of how a jury finding that considered it "is so against the great weight and preponderance as to be manifestly unjust," the court of appeals has erred.

Jaffe Aircraft Corp., 867 S.W.2d at 29. Justice Raul Gonzalez filed a concurring opinion in *Jaffe Aircraft Corp.*, in which he counseled against the Supreme Court too vigorously using its power to review the Court of Appeals' decision on factual sufficiency:

> I join in the Court's opinion and judgment but I write separately to once again caution about the danger of our misuse of Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986) to circumvent our limited authority to review a factual insufficiency holding. See Lofton v. Texas Brine Corp., 777 S.W.2d 384, 387 (Tex. 1989) (Gonzalez, J., dissenting). The standard articulated by this Court in Pool, although legally justified, is susceptible to abuse unless exercised with the utmost caution and restraint. This Court has no constitutional authority to review a determination by the court of appeals that a jury finding is either supported by factually insufficient evidence or is against the great weight and preponderance of the evidence. Our review of such a holding is limited to determining that it was lawfully made, not whether it was decided correctly. On rare occasions, I believe that our writings have exceeded this narrow authority. See Lofton v. Texas Brine Corp., 720 S.W.2d 804 (Tex. 1986) (per curiam) (remand for second factual sufficiency review); Lofton, 777 S.W.2d 384 (remand for third factual sufficiency review); See also William Powers, Jr. & Jack Ratliff, Another Look at "No Evidence" and Insufficient Evidence," 69 Tex.L.Rev. 515, 533 (1991).
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> * * *
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> With little effort, however, this Court could, in almost any case, discover some fact in the record which is not set forth in the opinion below. By labeling that fact as "material," we could reverse the judgment of the court of appeals and remand for further proceedings. The respective jurisdictions of the courts of appeals and of this Court are best preserved when we exercise this power sparingly. With that caveat, I join in the opinion of the Court and in the judgment.

Jaffe Aircraft Corp., 867 S.W.2d at 29-30 (Gonzales, J. dissenting).

On remand, Chief Justice Hardberger replaced Justice Garcia on the panel and the court of appeals voted 2-to-1 to affirm the trial court's judgment denying plaintiff any recovery.

In *Dow Chemical Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001), the Supreme Court held that the court of appeals improperly considered only the evidence favorable to the plaintiff's retaliation claim and did not review the evidence supporting the jury verdict. The Supreme Court reversed the court of appeals for conducting an improper factual sufficiency review.

The Supreme Court recently exercised this supervisory role in the case of *In re C.H.*, 45 Tex. Sup.

Ct. J. 1000 (July 3, 2002) [2001 WL 1903109]. There the Supreme Court reversed the court of appeals in a parental termination case, saying:

> Because the court of appeals disregarded much of the evidence supporting the finding that termination would be in C.H.'s best interest, and failed to clearly explain why it concluded a reasonable jury could not form a firm conviction or belief from all the evidence that termination would be in C.H.'s best interest, the court of appeals has erred.

Reversing for error in the court of appeals' factual sufficiency review was ancillary to the main reason review was granted. The Supreme Court said:

> We granted review to resolve the conflict among the courts of appeals about whether the traditional factual sufficiency standard is adequate to review the findings in a termination proceeding, and if not, what the appropriate standard should be.

Id. at *1. The Supreme Court ruled that in light of the clear and convincing standard of proof at trial, the appellate standard of review in parental termination cases should be "whether the evidence is such that a fact finder could reasonably form a firm belief or conviction about the truth of the State's allegations." *Id.* at *8. In a concurring opinion, Justice Hecht commented on a constitutionally-based argument that appellate review should be *de novo*, with very limited deference to the finder of fact. *Id.* at *8. This is an invitation to parents to raise the point on appeal. Such a rule would be a significant encroachment on the power of the jury in parental termination cases, and would serve to eliminate the factual sufficiency barrier to Texas Supreme Court review in termination cases. This reduction in the jury's prerogative already exists in public official defamation cases. See Section XII.B.6 below.

E. REVERSALS OF DAMAGE AWARDS. A *Pool*-like requirement to detail evidence applies to factual sufficiency remittiturs of actual damages. *Pope v. Moore*, 711 S.W.2d 622, 624 (Tex. 1986). See Section XVII.A.2 below.

F. DETAILING EVIDENCE ON EXEMPLARY DAMAGES. In *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 31 (Tex. 1994), the Supreme Court announced that the 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. It is not just evidence supporting punitive damages, but rather evidence both for and against punitive damages, that must be detailed. *Ellis County State Bank v. Keever*, 915 S.W.2d 478, 479 (Tex. 1996). See Section XVII.B below.

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 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).

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*, 2002 WL 1431602, *6 (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).

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.

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 XIV.F below. The discussion of appellate review of exemplary damages in Section XVII.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 recently engaged in detailed sufficiency of the evidence review in the public official defamation case of *Bentley v. Bunton*, 2001 WL 1946127 (Tex. August 29, 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. [Since the Opinions were not on Westlaw at the time this article was written, page references are to the Slip Opinions.]

(i) Falsity as a Matter of Law. According to Justice Hecht's Opinion, in a defamation case brought by a public official (in this case it was a state district judge), the plaintiff must prove by a preponderance of the evidence that the defendant's statements were false. [Hecht Opinion, pp. 34-35] The trial judge ruled as a matter of law that eight examples, offered by Defendant Bunton to support his statements that the plaintiff was criminal and corrupt, did not establish that the defamatory statements were true. [Hecht Opinion, pp. 30, 35] The defendants would be entitled to a new trial if the evidence on those points was disputed. The Supreme Court therefore had to determine "whether [the plaintiff] Bentley proved without contradiction that none of those situations showed that he was criminal or corrupt in any way." [Hecht Opinion, p. 36]

The U.S. Supreme Court decisions, and prior Texas decisions applying them, do not require that proof of falsity be governed by special federal standards of appellate review. As noted above regarding *Collora v. Navarro*, 574 S.W.2d 65, 68 (Tex. 1978), in reviewing a directed verdict granted to the plaintiff, 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." In *Bentley v. Bunton*, Part IV-B of Justice Hecht's majority Opinion (supported by 4 other Justices—Owen, Baker, Jefferson, and Rodriguez), without citing precedent regarding the standard of appellate review, considered evidence contrary to the position of the defendants on the issue of falsity, including: testimony by the plaintiff that he did no wrong; testimony of a defense attorney in a criminal case ruled on by the plaintiff; letters from that criminal defendant's probation officer that were contained in the court's file; testimony of a district attorney from a neighboring county that nothing wrong occurred; testimony of the judge's campaign treasurer that the Texas Ethics Commission gave oral approval to the judge's making campaign contributions to local judicial candidates; testimony from a neighboring district attorney that in three criminal cases the plaintiff made judicial rulings that were wrong but not corrupt or criminal; a viewing by the Supreme Court justices of excerpts of videotaped broadcasts which a majority of the justices did not find to have been misleadingly selected; testimony from the neighboring district attorney that in the twelve years she'd known the plaintiff he'd never engaged in conduct that could remotely be called criminal or corrupt. According to Justice Hecht, this evidence established as a matter of law the charge that the judge was corrupt was "utterly and demonstrably false as a matter of law."

(ii) Actual Malice. 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. . . . <u>As long as the jury's credibility</u>

> 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]

[Hecht Opinion, p. 57] Thus, Justice Hecht's Opinion gives the reviewing court the power to decide whether the jury's decisions regarding credibility were reasonable. [Hecht Opinion, p. 58] This power was not stated as constitutionally-required in *New York Times, Co. v. Sullivan*, *Harte-Hanks Communcations, 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 with Hecht Opinion, p. 33, where the majority concludes that "the jury could reasonably conclude" that Defendant Gates' comments on one occasion endorsed Defendant Bunton's defamatory statements.]

With this federal backdrop, the majority Opinion submerged into the evidence of the case. The majority identified what testimony the jury necessarily rejected, which was Defendant Bunton's claims that he believed the statements to be true, and then said "We see nothing unreasonable in the jury's decision not to believe Bunton." [Hecht Opinion, p. 59] Other statements by Bunton, that he conducted an investigation into the accuracy of his claims, could have been believed by the jury which nonetheless found malice, had to be given credit by the Supreme Court under the peculiar standard of review that applies. However, Justice Hecht's Opinion stated that "we do not consider it to have much weight . . . ." [Hecht Opinion, pp. 60-61] Justice Hecht's Opinion commented that "whether Bunton's actual malice has been proven by clear and convincing evidence is not, we think, a close question. We are convinced, by no small margin . . . ." Justice Hecht, joined by three other justices (Owen, Jefferson, and Rodriguez) found that the evidence of co-defendant Gates' actual malice was not clear and convincing. [Hecht Opinion, p. 66]

Chief Justice Phillips (joined by Justices Enoch and Hankinson), conducted his own independent appellate review and could not find clear and convincing evidence of actual malice by either defendant. [C.J. Phillip's Opinion, p. 2]

Justice Baker filed an opinion expressing the view that evidence of actual malice was clear and convincing as to both defendants.

(iii) 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. [Hecht Opinion, p. 69] 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 of 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. [Hecht Opinion, p. 71]

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. [Baker Opinion, pp. 1-2]

XIII. WHO'S IN CHARGE HERE? An unusual opinion issued in the case of *In re K.M.S.,* 45 Tex. Sup. Ct. J. 877 (June 20, 2002) (rehearing pending). The short per curiam opinion asserted the primacy of the Supreme Court, and that the stare decisis effect of the Supreme Court's decisions could not be ignored:

> PER CURIAM.
>
> ...In its opinion, the court of appeals "decline[d] to follow" Texas Department of Protective & Regulatory Services v. Sherry, 46 S.W.3d 857 (Tex. 2001), in which this Court interpreted various provisions of the Texas Family Code. Id. at 70. The court's refusal to follow Sherry does not affect the disposition of this case. Nevertheless, in reaching their conclusions, courts of appeals are not free to disregard pronouncements from this Court, as did the court of appeals here. Lofton v. Texas Brine Corp., 777 S.W.2d 384, 386 (Tex. 1989) ("This court need not defend its opinions from criticism from courts of appeals; rather they must follow this court's pronouncements."). The petitions for review are denied.

In re K.M.S. reflects a practical reality that besets the Supreme Court: there are fourteen courts of appeals, deciding more than a thousand cases a year. This is too many cases for the Supreme Court to police, so a certain amount of disregard of controlling authority, whether bluntly acknowledged like in *In re K.M.S.*, or buried in unpublished opinions, will pass like water under a bridge. For every *Loftin v. Texas Brine, Corp.*, there are no doubt many cases that deviate from Supreme Court pronouncements but that are not reversed. The elections for court of appeals justices do count.

XIV. 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."

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*, 2002 WL 1431602, *5 (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 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*, 45 Tex. Sup.Ct. J. 943, 946, 2002 Tex. Lexis 102 *8-9 (June 27, 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:

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.

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*, 45 Tex. Sup. Ct. J. 696 (May 23, 2002) (rehearing pending), 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 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.

In *Caterpillar, Inc. v. Shears*, 911 S.W.2d 379, 383 (Tex. 1995), the Court held that a 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 defendant'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]

County of Cameron v. Brown, 45 Tex.Sup.Ct.J. 680 (Tex. May 23, 2002), the Court held that a significant and unexpected change in lighting on a causeway was not unforeseeable as a matter of law.

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*, 2002 WL 1431602, *5 (Tex. July 3, 2002).

The test for foreseeability is whether a person of ordinary intelligence would have anticipated the danger his or her negligence creates. *Id*. at *5. 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 *5. "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 travelled 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*, 45 Tex. Sup. Ct. J. 962, *4 (Tex. June 27, 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*, 2002 WL 1431602, *5 (Tex. July 3, 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.

XVI. STATUTE OF LIMITATIONS.

A. LIMITATION PERIODS. 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. DISCOVERY RULE. Notwithstanding the "legal injury rule," the Texas Supreme Court has held that sometimes 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, called the "discovery rule," 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 applying the discovery rule, so the claim was denied.

C. COURSE OF TREATMENT. The period of limitations in medical malpractice cases runs from 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 proved 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.

D. 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.

XVII. 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 compensable 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 41.00, "malice" requires proof of both objective and subjective component of risk and awareness.

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 the award of 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).

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 a crane touched by the plaintiff's ladder was energized with electricity that day, and no evidence that the defendant was consciously indifferent to the risk so as to permit recovery for gross negligence.

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).

XVIII. 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 preempts 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. May 30, 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. 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. May 30, 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*, 45 Tex. Sup. Ct. J. 815 (Tex. Jun 13, 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.*, 2002 WL 1981365, *3 (Tex. August 29, 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."

C. ARBITRATION OF EMPLOYER-EMPLOYEE DISPUTES. In the mandamus case of *In re Halliburton Co.*, 80 S.W.3d 566 (Tex. May 30, 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.

The Nevada Supreme Court recently declared an arbitration clause procedurally and substantively unconscionable, in *Burch v. Second Judicial Dist. Court of Nevada*, 49 P.3d 647 (Nev. Jul 17, 2002). The homebuyers did not receive a copy of the homeowners' warranty agreement (including arbitration clause) until after the seller had paid the premium to enroll the home in the warranty program and almost four months after they closed on the home. The seller told the buyers that the warranty was "automatic" and offered extra protection for their home, when in fact the warranty limited their protection under Nevada law. The homebuyers did not have an opportunity to read the one-page "application" form, or the thirty-one-page warranty booklet, or to view the warranty video before signing the "application." The arbitration clause was located on page six of the booklet, after five pages of material only relevant to persons residing outside of Nevada. The homebuyers were not sophisticated consumers, they did not understand the warranty's terms, and the disclaimers were not conspicuous. As a result, the arbitration clause was procedurally unconscionable. The agreement was held to be substantively unconscionable because the arbitration clause gave the seller the unilateral and exclusive right to decide the rules that govern the arbitration and to select the arbitrators. *Id*. at 649-650.

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).

XIX. 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*, 45 Tex. Sup. Ct. J. 631, 634 (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) to which a public employee may report an alleged drunk driving incident," 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 *Wornick Co. v. Casas*, 856 S.W.2d 732, 734 (Tex. 1993), the Supreme Court held that summary judgment evidence conclusively established that the employer's behavior was not outrageous conduct. 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*, 2002 WL 1988194 (Tex. August 30, 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 *5.

In *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.

XX. 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. This direction of the Court may be affected by the coming changes in the make-up of the Supreme 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 "motor-driven equipment" 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 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." 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.

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 *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 *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.

It seems certain that use-of-property cases will continue to reach the Supreme Court both on interlocutory appeal and from final judgment.

3. 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.

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*, 45 Tex. Sup. Ct. J. 948 (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 *City of Lancaster v. Chambers*, 883 S.W.2d 650 (Tex. 1994), the Supreme Court considered liability of a law enforcement officer for injury occurring during a high-speed. On summary judgment, the officer claimed no duty, no proximate cause, and official immunity. The Court found that the duty was prescribed by statute, which said that authorized drivers of emergency vehicles have "the duty to drive with due regard for the safety of all persons." *Id.* at 653. The Court found a fact issue with respect to proximate cause. Although criminal conduct can be a superseding cause rending the resulting injuries unforeseeable, "the criminal conduct is not a superseding cause if it is a foreseeable result of the actor's negligence." *Id.* at 653. As to official immunity, such immunity is available to government employees exercising discretionary duties in good faith as long as they are acting within the scope of their authority. *Id.* at 653. The Supreme Court held as a matter of first impression that engaging in a high-speed chase was a discretionary act for police officers. *Id.* at 655. So the issue remained as to the officer's good faith. The Supreme Court said that an officer acts in good faith if "a reasonably prudent officer, under the same or similar circumstances, could have believed that the need to immediately apprehend the suspect outweighed a clear risk of harm to the public in continuing the pursuit." *Id.* at 656. To controvert summary judgment proof to this effect, the plaintiff must show that "no reasonable person in the defendant's position could have thought the facts were such that they justified defendant's acts." *Id.* at 657.

In *Wadewitz v. Montgomery*, 951 S.W.2d 464, 465 (Tex. 1997), the Court considered a summary judgment giving official immunity to a police officer responding to a call for a purse snatching. While proceeding to the scene of the crime, the officer entered a major thoroughfare with a truck blocking his view of oncoming traffic, causing a collision with a passing motorist. Justice Spector, joined by Chief Justice Phillips and Justices Gonzalez, Cornyn, Baker and Abbott, held that the officer did not establish good faith conclusively, and was therefore not entitled to summary judgment. The Court said that the officer's summary judgment proof failed to show that the need to immediately apprehend the suspect outweighed a clear risk of harm to the public in continuing (rather than terminating) the activity. In fact, the officer's deposition testimony reflected that he did not weigh the risk of harm before crossing a lane of traffic he could not see, and the plaintiff provided the affidavit of an expert saying that an officer should never enter a cross-street blindly like the defendant did. *Id.* at 466. In contrast, the defendant's summary judgment evidence did not address the degree, likelihood, and obviousness of the risks created by the defendant's actions. *Id.* at 467. Summary judgment was reversed. Justice Enoch dissented, joined by Hecht and Owen, saying: "Our focus must be on the officer's decision as she initiated her response rather than on each discrete circumstance that confronts her at each moment of her course of action. To second-guess the officer along each freeze-frame of the route to the scene of the crime would deprive that officer of any meaningful official immunity. " *Id.* at 468.

In *Telthorster v. Tennell*, 2001 WL 1898483 (Tex. June 27, 2002), the Supreme Court considered the duty owed by an arresting officer to a suspect who was injured during the arrest. The Court held that official immunity would protect the officer if he or she was acting in good faith. The Court applied the good-faith test of *City of Lancaster v. Chambers*, 883 S.W.2d at 656-57. To win summary judgment, the officer "must show that a reasonably prudent officer, under the same or similar circumstances, could have believed that his conduct was justified based on the information he possessed when the conduct occurred." *Id.* at *6, 8. To defeat a summary judgment, the plaintiff must show more than negligence by the officer; he must show that "no reasonably prudent officer could have believed that the defendant's conduct was justified under the circumstances presented." *Id.* at *8. In this case, the arresting officer's deposition testimony, coupled with an affidavit from an officer of twenty years' experience who was also a law-enforcement academy director–saying that the use of a gun under these fact was a reasonable exercise of discretion–conclusively established official immunity. Justice Enoch concurred, joined by Justices Hecht and Baker, saying that where an arrestee claims only negligence by the arresting officer, then official immunity should apply as a matter of law. *Id.* at *10. Justice Owen concurred, saying that the issue raised by Justice Enoch had not been briefed, and should wait for another day. *Id.* at 11. The Court unanimously rejected the argument that the *Wadewitz* particularized need/ risk assessment analysis should apply.

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*, 45 Tex. Sup. Ct. J. 857 (Jun 20, 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.* *3. 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 *6.

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). Sovereign immunity can be raised by a plea to the jurisdiction. Section 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).

XXI. CLASS ACTIONS. The Supreme Court has made some recent decisions relating to class actions, that have changed the familiar way of doing things in Texas.

"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)(4) allows a class action only when "the court finds that 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."

A. AN ALTERED LANDSCAPE. The Supreme Court decided three class action appeals in year 2000 that changed the terrain of class action litigation in Texas.

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 is 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.

B. INTERLOCUTORY REVIEW ON APPEAL. In 1985, the Texas Legislature provided an appeal for interlocutory orders that certify or refuse to certify a class in a suit brought under Tex. R. 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). Over time the Texas Supreme Court has expanded the power of appellate courts to review class action orders beyond the literal words of the statute. See Section V.D above.

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]the 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.

XXII. 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*, 2002 WL 1027003, 45 Tex. Sup. Ct. J. 691 (Tex. May 23, 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.

XXIII. 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 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 starts running 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 that but 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.

XXIV. 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*, 2001 WL 1946128 (Tex. Aug 29, 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 and quality of the desired construction. *Centex* indicates that in connection with the purchase of home, waivers of warranties must be for known defects, and that common law standards of workmanship cannot be waived, just supplanted by other agreed-upon standards.