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OFFICERS

Marcy Hogan Greer, Chair
Fulbright & Jaworski L.L.P.
512-474-5201 Fax: 512-536-4598
mgreer@fulbright.com

David S. Coale, Chair-Elect
KL Gates, LLP
214-939-5595 Fax: 214-939-5849
david.coale@klgates.com

Scott Rothenberg, Vice-Chair
Law Offices of Scott Rothenberg
713-667-5300 Fax: 713-667-0052
scotr35@aol.com

Elizabeth G. (Heidi) Bloch, Treasurer
Brown McCarroll L.L.P.
512-703-5733 Fax: 512-479-1101
ebloch@mailbmc.com

Jeff Levinger
Hankinson Levinger LLP
214-754-9190 Fax : 214-754-9140
jlevinger@hanklev.com

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SECTION WEB SITE: www.tex-app.org

APPELLATE ADVOCATE EMAIL: theappellateadvocate@gmail.com

Kate David, Haynes and Boone, LLP, Houston
Laurie Ratliff, Ikard & Golden, P.C., Austin

ADMINISTRATIVE LAW

City of DeSoto v. White, 288 S.W.3d 389 (Tex. 2009)

The issue in this case is whether a pre-appeal notice provision in section 143.057(a) of the Local Government Code is jurisdictional. *See* TEX. LOCAL GOV'T CODE ANN. § 143.057(a) (Vernon 2008) (providing that a city imposing disciplinary action against or terminating a police officer or firefighter must give notice that if the firefighter or police officer chooses to appeal to a hearing officer instead of the civil service commission, further appeal to the district court is limited).

The City of DeSoto (the “City”) suspended White, a police officer. In its suspension notice, the City failed to comply with the statutory requirement of informing White of the limits on his appellate options. White chose to appeal to a hearing officer as opposed to the Civil Service Commission. The hearing officer rejected White’s argument that there was no jurisdiction based on City’s improper notice. The hearing officer proceeded with the hearing and upheld the suspension.

White filed suit in the district court. The trial court held the hearing officer lacked jurisdiction and granted summary judgment, ordering the City to reinstate White. The Fifth Court of Appeals affirmed, concluding the notice requirement was jurisdictional.

In an opinion by Justice Green, the Texas Supreme Court held that the notice provision was not jurisdictional and reversed the court of appeals’ judgment.

The statute provides two options for review of suspensions. If an officer appeals to the Civil Service Commission, the officer can then appeal de novo to a district court. If the officer appeals

to a hearing officer, the officer waives review by a district court except on grounds that the hearing officer was without jurisdiction or that the order was procured by fraud, collusion, or other unlawful means.

In determining whether the City’s failure to inform White was jurisdictional, the Court noted that the consequence of opening judgments up to delayed attacks has lead the Court to be reluctant to conclude that such provisions are jurisdictional, absent clear legislative intent.

The Court observed that section 143.057(a) mandates that an officer be informed of the limited appellate rights if appealing to a hearing officer. According to the Court, however, just because a statutory right is mandatory does not make compliance with it jurisdictional. In addition, the statute provided no consequence for the failure to properly inform the officer. The Court also noted that the result of concluding the requirement was jurisdictional would have allowed an officer with serious allegations against him to rejoin the police force without adjudication. The Court then determined that when the City fails to give the required notice, the appropriate remedy is to abate the administrative process to allow the City to comply with the notice provision and to allow the officer to make an informed election.

Edwards Aquifer Auth. v. Chem. Lime, Ltd., No. 06-0911, 52 Tex. Sup. Ct. J. 929, 2009 WL 1817239 (Tex. June 26, 2009)

The issue in this case is the proper filing deadline for a permit application. In *Barshop v. Medina County Underground Water Conservation District*, 925 S.W.2d 618 (Tex. 1996), the Court reversed a district court’s determination that the Edwards Aquifer Authority Act (the “Act”) was unconstitutional. In *Barshop*, the Court interpreted the Act as giving historical water users six months after the Edwards Aquifer Authority

(the “Authority”) became effective to file a declaration of historical use.

Consequently, the Authority began operations on June 28, 1996, the day the Court issued *Barshop*. The Authority set the deadline to file permit applications six months after the date of *Barshop*, which fell on December 30, 1996.

Chemical Lime filed its historical use application on January 17, 1997. After initially granting Chemical Lime a permit, the Authority denied the application in November 2000 for failure to timely file.

Chemical Lime filed suit, seeking a declaration that the deadline to file its application should have been set no earlier than six months after the Court denied rehearing in *Barshop* and, in the alternative, that it substantially complied with the deadline. The deadline validity was presented to the trial court on stipulated facts, while substantial compliance was tried to a jury, and both found in favor of Chemical Lime. The Third Court of Appeals affirmed, concluding that the permit application deadline was tied to six months after the mandate in *Barshop* issued, or August 10, 1997.

In an opinion by Justice Hecht, the Court reversed and remanded. The Court concluded that the issue was not determined by the date the Court’s opinion in *Barshop* became effective, but, rather, was determined by the date the Authority became effective.

The Court rejected the “substantial compliance” argument, concluding that the filing deadline was a critical part of the Act. The Act provided no extensions on the deadline and gave the Authority no power to extend the deadline. Accordingly, the Court concluded Chemical Lime failed to comply.

Justice Brister and Justice Willett filed separate concurrences. Both focused on the issue of when the Court’s opinions become effective. Justice Brister concluded the Court’s opinions become effective on the date the Court’s judgment is

issued. Justice Willett concluded an opinion should become effective on the date the mandate is issued.

ARBITRATION

***In re Macy’s Tex., Inc.*, No. 08-0584, 52 Tex. Sup. Ct. J. 983, 2009 WL 1817431 (Tex. June 26, 2009) (orig. proceeding) (per curiam)**

A Macy’s Texas, Inc. (Macy’s) employee injured herself at work. She had previously signed an “Arbitration Acknowledgement,” acknowledging that the “Summary Plan” required arbitration of on-the-job injuries against “the Company,” which the agreement defined as “your particular employer.” Despite the agreement, the employee sued in state court, arguing that she was not employed by any of the entities expressly named in the “Summary Plan.”

The trial court denied Macy’s motion to compel arbitration, and the court of appeals denied mandamus relief.

In a per curiam opinion, the supreme court granted mandamus relief. The Court agreed with the plaintiff that Macy’s did not meet its burden of proving that the company employing plaintiff was affiliated with the companies mentioned in the Plan. But the Court held that—because the Plan stated that “the Company” would mean “your particular employer”—the employee could not “avoid arbitration by raising factual disputes about her employer’s correct legal name.”

***In re Houston Pipeline Co.*, No. 08-0800, 52 Tex. Sup. Ct. J. 1098, 2009 WL 1901640 (Tex. July 3, 2009) (orig. proceeding) (per curiam)**

The issue in this case is whether the trial court abused its discretion in allowing discovery on damages and other potential defendants, instead of deciding a motion to compel arbitration.

Houston Pipeline signed an agreement to purchase gas from O’Connor Hewitt, Ltd. (O’Connor). O’Connor later sued, and Houston Pipeline Co. sought to enforce the arbitration provision.

O'Connor attacked the scope of the arbitration provision, contending that it could not identify all possible defendants or prepare a damage model in the sixty days allowed for discovery under the agreement. The trial court refused to rule on the motion to compel arbitration and, instead, ordered discovery requested by O'Connor. The Thirteenth Court of Appeals denied mandamus relief.

In a per curiam opinion, the Texas Supreme Court granted mandamus relief. According to the Court, when parties dispute the scope of or raise a defense to an arbitration provision, the trial court, not the arbitrator, must decide the issues. While discovery may be conducted under the Texas General Arbitration Act, discovery into the merits is not permitted. The trial court's order allowed discovery into the number of defendants and their liability. The supreme court held these matters are for the arbitration proceeding. The Court held that the order was overbroad and beyond the scope of the issues in the motion to compel.

***In re Morgan Stanley & Co., Inc.*, No. 07-0665, 52 Tex. Sup. Ct. J. 1072, 2009 WL 1901635 (Tex. July 3, 2009) (orig. proceeding)**

In a majority opinion by Justice Medina, the Court held that the trial court, and not the arbitrator, was the proper forum for deciding whether a party lacked the mental capacity to assent to a contract.

Helen Taylor transferred accounts to Morgan Stanley the same year she was diagnosed with dementia. Each account agreement contained an arbitration clause. A few years later, the guardian of Taylor's estate sued several relatives for theft and conversion, among other things, and Morgan Stanley for breach of fiduciary duty, negligence and malpractice, unsuitability of investments, violations of the Texas Security Act, and breach of contract. Taylor later nonsuited her breach of contract claim. When Morgan Stanley & Co., Inc. moved to compel arbitration, the trustee argued that Taylor lacked capacity to contract when she signed the account agreements containing the arbitration clause and that the court was the

appropriate forum to decide the dispute. The trial court agreed with the trustee, and denied the order to compel arbitration. The court of appeals affirmed.

The Texas Supreme Court noted that the Federal Arbitration Act provides that "an agreement to arbitrate is valid except on grounds as exist at law or in equity to revoke the contract" and also "provides that a court may consider only issues relating to the making and performance of the agreement to arbitrate." The Court also pointed out that the United States Supreme Court had not yet decided this issue, but that the Fifth Circuit and Tenth Circuit had, reaching opposite outcomes. The Fifth Circuit held that "the arbitrator should decide a defense of mental incapacity because it is not a specific challenge to the arbitration clause but rather goes to the entire agreement." And the Tenth Circuit concluded that the "mental incapacity defense naturally goes to both the entire contract and the specific agreement to arbitrate in the contract." The Court ultimately decided that the trial court is the proper forum for deciding whether the signor lacked the mental capacity to assent.

Justices Brister and Willett filed concurring opinions, and Justice Hecht filed a dissenting opinion.

CONDEMNATION

***State v. Bristol Hotel Asset Co.*, No. 07-0896, 52 Tex. Sup. Ct. J. 751, 2009 WL 1383717 (Tex. May 15, 2009) (per curiam)**

The State condemned some of Bristol Hotel Asset Company (Bristol)'s property in order to widen a highway. At trial, Bristol's expert testified about temporary damages (business lost during the construction project) and permanent damages (lost property value because of the widened highway). Bristol's expert calculated the difference in market value between the entire hotel property before the taking and the remainder value after the taking as \$1.26 million. This figure included the expert's calculation of the value of the diminished access to the remainder

property. The expert also testified that Bristol suffered \$723,492 in temporary damages for parking spaces that were out of service during the construction process. The jury awarded Bristol \$1.26 million. The trial court rendered judgment on the verdict, and the Fourth Court of Appeals affirmed.

In a per curiam opinion, the supreme court held that Bristol could not recover under the Texas Constitution for the temporary damages created by the State's construction project. Those damages are not "material and substantial" to rise to the level of compensable damages. The Court also held that Bristol's expert's testimony regarding permanent damages was flawed because it was based on diminished access to the remainder property that is not compensable.

***State v. Cent. Expressway Sign Assocs.*, No. 08-0061, 52 Tex. Sup. Ct. J. 978, 2009 WL 1817305 (Tex. Jun 26, 2009)**

The issue in this case is the proper valuation methodology in estimating fair market value in a condemnation proceeding.

The State instituted condemnation proceedings for an easement leased to an advertising company for the purpose of erecting a billboard. The trial court excluded both parties' expert appraisal witnesses before trial. The trial court concluded that the State's expert was not reliable because he did not include advertising revenues in his appraisal. Thus, the only testimony estimating the property value came from the easement owner. The State appealed, and the Fifth Court of Appeals affirmed.

In an opinion by Justice O'Neill, the Court concluded that the State's expert used a reliable valuation methodology and reversed and remanded for a new trial. The Court noted that there are three approaches to valuing property: the cost method, the comparable sales method, and the income method. While the sales method is the favored approach, the income method is

used if the property would be sold based on the rental income.

Under Texas law, income generated can be considered in condemnation proceedings first, when the taking causes a material and substantial interference with access to property, and second, when only part of the land is taken, lost profits may demonstrate the effect on the market value of the remaining land and improvements. If neither situation is present, then the income from a business operated on the condemned land is not recoverable and should not be included in the condemnation award.

The Court refused to create an exception for land on which a billboard is located. The Court noted that profits from billboards depend upon more than the land. Profits are based on securing permits, construction, and maintenance of the billboard and advertising to sell the space.

After analyzing the State's expert's appraisal methodology, the Court concluded that the expert properly reflected a reliable method of appraisal. Because the excluded testimony related to the central issue in the case—valuation of property—the Court concluded that the exclusion of the State's expert was reversible error.

DESIGN DEFECT

***Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306 (Tex. 2009)**

Gish was injured when he fell from the top of a trailer into which he was attempting to load fertilizer. He sued Timpte Industries, Inc. (Timpte), the manufacturer of the trailer, alleging, among other things, that several features of the trailer were defectively designed, rendering the trailer unreasonably dangerous. The trial court granted Timpte's no-evidence summary judgment motion. The Seventh Court of Appeals affirmed the trial court's judgment as to all of Gish's claims except his claim for design defect, concluding that there was "some evidence upon which reasonable factfinders could disagree as to whether the trailer's design was both

unreasonably dangerous and a cause of Gish’s fall.”

After finding that there was no evidence that the design defects alleged by Gish rendered the trailer unreasonably dangerous, the Texas Supreme Court reversed and rendered judgment reinstating the trial court’s judgment. The Court analyzed “risk-utility” factors and decided that, while the utility of the top rail and ladder of the trailer were high, the risk of someone being injured the way Gish was, was “extremely low.” The Court also noted that whether the risk of injury is common knowledge is a question of law and that the risk of falling while trying to balance on a five-inch wide strip of extruded aluminum nearly ten feet above the ground is an obvious risk that is certainly “within the ordinary knowledge common to the community.”

EMPLOYMENT

Nabors Drilling, U.S.A., Inc. v. Escoto, 288 S.W.3d 401 (Tex. 2009)

In an opinion by Justice Green, the supreme court held that an employer has no duty to prevent injury due to the fatigue of its off-duty employee or to train employees about the dangers of fatigue.

Ambriz worked in Nabors Drilling, U.S.A. (Nabors)’s oil fields. One morning, when driving home after working a twelve-hour night shift, Ambriz crossed to the wrong side of the road and collided with a vehicle. The accident resulted in the death of Ambriz and the four people in the other car. The decedents’ families sued Ambriz’s estate and Nabors, alleging that the negligence of both Ambriz and Nabors caused the collision. The jury found that Ambriz was fifty-seven percent responsible and Nabors was forty-three percent responsible, and awarded the plaintiffs \$5.95 million. However, the trial court signed a take-nothing judgment, ruling that Nabors owed the plaintiffs no duty. The Thirteenth Court of Appeals reversed.

The Texas Supreme Court noted that employers in Texas generally do not owe a duty to third parties for the tortious activities of off-duty employees

occurring off the work site. And the Court decided that the limited exception to this rule—when an employer exercises control over the injury-causing conduct of its employee, imposing a duty, for example, when an employer required its employee to consume alcohol while on the job—did not apply in this case where the accident was a result of employee fatigue. In coming to this decision, the Court noted that the exception applies only when an employer has actual knowledge that its employee was impaired when leaving work on the day of the accident. It also noted that fatigue is distinguishable from intoxication because (1) there is no quantitative physical measure of fatigue that could be used to determine whether an employee is impaired, (2) it is not clear that employers could effectively prevent impairment due to fatigue because amounts and types of work will affect employees differently, and (3) an employee’s off-duty conduct will affect when and how the employee may become fatigued. The Court further refused to create a new duty under the circumstances.

Employees Ret. Sys. of Tex. v. Duenez, 288 S.W.3d 905 (Tex. 2009)

In this case, Blue Cross Blue Shield of Texas filed suit on behalf of the Employees Retirement System of Texas (ERS) against the Duenezes, alleging a subrogation claim for benefits ERS had paid to the Duenezes’ health-care providers. ERS filed a plea to the jurisdiction, arguing that it has exclusive jurisdiction over such subrogation claims and asking the trial court to require the Duenezes to exhaust their administrative remedies. Essentially, ERS demanded dismissal of its own claim in court “because it failed to exhaust administrative remedies in front of itself.”

In a majority opinion by Justice Brister, the supreme court dismissed ERS’s petition for review for want of jurisdiction, holding that, under the Texas Employees Group Benefits Act, ERS does not have exclusive jurisdiction over subrogation claims to recover medical benefits paid to a plan participant. Therefore, the ERS (or its agent) is not required to exhaust administrative remedies in front of itself before it can file suit to

collect reimbursement of benefits it has already paid. The Court distinguished the subrogation claim as a claim for reimbursement of benefits already paid, as opposed to a claim for benefits under the plan, over which the ERS does have exclusive jurisdiction. Holding that there was no conflict in the state's jurisprudence in this regard, the Court dismissed the petition for want of jurisdiction.

Justice Wainwright dissented, arguing that the underlying statute afforded the ERS exclusive jurisdiction to handle the subrogation claim. Justice Hecht also dissented, arguing that dismissal was warranted because ERS's interlocutory appeal from the trial court's order denying its motion to dismiss a suit brought by ERS's agent raised no justiciable issue.

FORUM-SELECTION CLAUSE

***In re Int'l Profit Assocs., Inc.*, 286 S.W.3d 921 (Tex. 2009) (orig. proceeding) (per curiam)**

In a per curiam opinion, the supreme court held that mandamus relief was warranted because the trial court abused its discretion by requiring parties seeking to enforce a forum-selection clause to prove, as a condition of enforcing the clause, that they showed the specific clause to the opposing party when they entered the agreement.

Riddell Plumbing, Inc. hired International Profit Associates, Inc. (IPA) to provide consulting services. The written consulting agreement provided that the parties agreed to litigate any disputes that might arise between them in the 19th Judicial District of Lake County, Illinois. When a dispute did arise, Riddell sued IPA in Dallas County. IPA filed a motion to dismiss, citing the forum-selection clause of the consulting agreement. The trial court denied the motion to dismiss, explaining in an official letter to both parties that IPA "did not sustain [its] burden of proving that the page of the contract containing the forum-selection clause was ever presented [to Riddell]." The court of appeals denied IPA's

petition for writ of mandamus without explanation.

The supreme court conditionally granted the writ of mandamus, holding that failing to direct a contracting party's attention to a forum selection clause is not concealment and, without more, does not equate to fraud or overreaching sufficient to invalidate a forum selection clause.

HEALTH-CARE LIABILITY CLAIMS

***Crites v. Collins*, 284 S.W.3d 839 (Tex. 2009) (per curiam)**

After failing to serve a medical expert report within the 120-day deadline required by the Medical Liability Insurance Improvement Act, plaintiffs attempted to nonsuit their claims. But before the trial court entered an order of nonsuit, the defendant filed a motion for dismissal with prejudice and for attorneys' fees and costs as sanctions for plaintiffs' noncompliance with the expert report deadline. A month after the trial court signed an order of nonsuit, it denied defendant's motion. The Fifth Court of Appeals affirmed, concluding that the filing of a notice of nonsuit precludes consideration of a subsequent motion for statutory sanctions.

In a per curiam opinion, the supreme court held that sanctions authorized under the Act remain available following a voluntary nonsuit filed after the expert deadline, as long as the motion is filed and ruled upon within the trial court's plenary power. The Court remanded to the trial court to consider the merits of defendant's sanctions claim.

***In re Collins*, 286 S.W.3d 911 (Tex. 2009) (orig. proceeding)**

In an opinion by Justice O'Neill, the supreme court granted mandamus relief, holding that the trial court abused its discretion by granting a protective order barring the defendants from having ex parte contact with the plaintiff's non-party medical providers, because the plaintiff failed to establish that any of the providers she

authorized to release medical information possessed irrelevant, privileged information.

Kelly Regian sued Dr. Collins, alleging he failed to diagnose her nasopharyngeal carcinoma. In compliance with Section 74.052 of the Texas Civil Practice & Remedies Code, Regian sent Collins written authorization for the disclosure of health information in the possession of her current treating physicians at MD Anderson Hospital and physicians who treated her during the five previous years. In an attachment to this release, Regian listed seven physicians as having health information that was irrelevant, and thus, privileged. After Collins filed his answer, Regian sought a protective order to prevent the defendant from engaging in ex parte communications with her treating physicians, arguing that the order was necessary to prevent verbal fishing expeditions for information not contained in her records, and to ensure that irrelevant information was not sought or disclosed. The trial court granted the protective order, and the court of appeals denied Collins' petition for writ of mandamus.

The Texas Supreme Court concluded that a release executed under section 74.052 authorizes non-party health care providers to orally convey relevant information to defendants and does not regulate or prohibit ex parte communications between a defendant and the non-party health care providers. The Court then held that health care liability claimants seeking to limit access to information released under the statute should face no less of a burden than parties seeking to limit ordinary discovery. The trial court abused its discretion in granting the protective order because Regian did not make the requisite showing of specific and demonstrable injury.

The Court also held that the federal Health Insurance Portability and Accountability Act (HIPAA) does not preempt section 74.052 because HIPAA preempts state law only if it would be impossible for a covered entity to comply with both the state and federal requirements, or if it would undermine HIPAA's purposes. Section 74.052 authorizes disclosure under the exact same terms as HIPAA and, the

Court found, section 74.052 does not undermine HIPAA's purposes as reducing costs of medical care, a concern underlying both section 74.052 and HIPAA.

***Aviles v. Aguirre*, No. 08-0240, 52 Tex. Sup. Ct. J. 1087, 2009 WL 1901637 (Tex. July 3, 2009) (per curiam)**

In a per curiam opinion, the Texas Supreme Court held that an insurer who paid attorney fees on behalf of its insured was entitled to reimbursement of those fees under article 4590i.

This case involved former article 4590i, which, like the current medical malpractice statute, required dismissal of a health-care claim if no timely expert report was served, as well as an award of attorney fees and costs "incurred" by the defendant. The trial court dismissed plaintiff's claims against Dr. Aviles with prejudice after plaintiffs failed to file an expert report. The plaintiffs did not appeal that ruling. The trial court then denied Aviles's motion for reimbursement of attorney fees based on a stipulation by defense counsel that the fees "were paid by the insurance carrier on behalf of the doctor" and "not paid by the doctor personally." The court of appeals affirmed.

The supreme court reversed after deciding that, when Aviles' insurer paid his attorney fees on Aviles' behalf, the insurer was "stand[ing] in the shoes of its insured." The Court then remanded to the trial court to determine an award of reasonable attorney fees and costs.

***Hernandez v. Ebrom*, 289 S.W.3d 316 (Tex. 2009)**

The issue in this case is whether a defendant health care provider can appeal the trial court's denial of his motion to dismiss and for sanctions for the failure to file an expert report after a final judgment, when the defendant did not file an interlocutory appeal.

The defendant filed a motion to dismiss, challenging the plaintiff's expert's report as deficient and conclusory. The trial court denied

the motion. The plaintiff nonsuited, and the trial court signed a final judgment of dismissal. The defendant then appealed the trial court's earlier denial of his motion to dismiss. The Thirteenth Court of Appeals dismissed the appeal for lack of jurisdiction.

In an opinion by Justice Johnson, the Texas Supreme Court reversed and remanded to the court of appeals. The Court noted its recent decision of *Villafani v. Trejo*, 251 S.W.3d 466 (Tex. 2008), where it held that a health care provider may appeal the trial court's denial of its motion to dismiss after a nonsuit. In *Villafani*, the Court reasoned that the purpose of the sanctions survives the nonsuit and thus can be appealed.

Ebrom argued that the failure to pursue an interlocutory appeal waived later complaints. The Court disagreed, noting that section 51.014(a)(9) of the Civil Practice and Remedies Code provides that a party "may" appeal from an interlocutory order that denies relief under section 74.351(b). The Court construed "may" as discretionary and not as mandating an interlocutory appeal. According to the Court, to preclude defendants from pursuing attorney fees and costs associated with challenging an expert report would defeat the purpose of the statute.

The Court noted, however, that if, after a trial court denied a motion to dismiss and for sanctions, the plaintiff prevailed at trial on the merits, the order denying the motion to dismiss would be rendered moot, and the right to appeal would be lost. However, in this case, the plaintiff nonsuited the claims before trial. Thus, the Court held that the court of appeals had jurisdiction over Hernandez's appeal and reversed and remanded for the court of appeals to consider the merits of the appeal.

Chief Justice Jefferson, joined by Justices O'Neill and Medina, dissented. According to the dissent, the legislature intended for the quick dismissal of frivolous claims and, thus, a defendant who asserts the inadequacy of a report must immediately appeal. To allow a defendant to

appeal the dismissal order after a final judgment prolongs litigation, contrary to legislative intent. The dissent would have concluded that the defendant must immediately appeal a trial court's denial of relief under section 74.451(b) and that the failure to appeal waives an appeal after final judgment of that ruling.

IMMUNITY

***Texas Dep't of Transp. v. York*, 284 S.W.3d 844 (Tex. 2009) (per curiam)**

The issue in this case is whether loose gravel on a road is a "special defect" under section 101.022(b) of the Civil Practice and Remedies Code.

Rebecca York was killed after she lost control of her car while crossing a section of loose gravel and collided with an oncoming truck. The day before the accident, the Texas Department of Transportation (TxDOT) had started resurfacing the section of the road on which York traveled, but had not completed the process.

In response to York's surviving spouse's wrongful death suit, TxDOT alleged immunity. The trial court's charge contained a special defect instruction, rather than a premise defect instruction. The jury returned a verdict in York's favor. The Tenth Court of Appeals affirmed, concluding that loose gravel is a special defect.

The supreme court concluded that loose gravel, as a matter of law, is not a special defect, and reversed and dismissed the case. The Court noted that whether a condition is a premise defect or a special defect is a question of law that is reviewed de novo. If a claim is a premise defect, a licensee standard applies, which requires a plaintiff to prove the governmental entity had actual knowledge of a condition that created an unreasonable risk of harm and that the licensee did not have knowledge of the condition. If the claim is a special defect, an invitee standard applies, which requires a plaintiff to prove that the governmental entity should have known of the

condition that created an unreasonable risk of harm.

“Special defect” is not defined, but section 101.022(b) gives guidance by giving an example of “excavations or obstructions.” The Court acknowledged that these examples are not exclusive, but that the question is whether the condition is of the same kind or within the same class as excavations or obstructions. Loose gravel does not form a hole or physically block the road like excavations or obstructions. Accordingly, the Court concluded as a matter of law that loose gravel is not a special defect.

***Tex. Dep’t of Transp. v. Gutierrez*, 284 S.W.3d 848 (Tex. 2009) (per curiam)**

The issue in this case is the same as in *Texas Department of Transportation v. York*. The Court applied its holding in *York* and concluded that Gutierrez’s claim against Texas Department of Transportation based on injuries sustained because of loose gravel on a roadway was barred by immunity. The Court reversed the Fourth Court of Appeals’ judgment and dismissed the case.

***Dallas County v. Posey*, No. 08-0094, 52 Tex. Sup. Ct. J. 782, 2009 WL 1427190 (Tex. May 22, 2009) (per curiam)**

In a per curiam opinion, the supreme court held that a county was immune from a suit brought by a prisoner’s survivors after the prisoner used a telephone cord to commit suicide in a county holding cell.

After a prisoner committed suicide, his parents sued the county, claiming it was negligent in failing to assess the prisoner’s suicide risk and in placing him in a cell with a defective corded telephone. The trial court denied the county’s plea to the jurisdiction, and the Fifth Court of Appeals affirmed.

The issue was whether section 101.021(2) of the Civil Practice and Remedies Code waived the county’s immunity. Section 101.021(2) waives governmental immunity 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.”

The supreme court reversed, noting that the suicide did not arise from the county’s “use” of the property. The Court pointed out that it had held in a prior decision that immunity is not waived when the governmental unit merely allows someone to use the property. Therefore, section 101.021 did not apply, and the Tort Claims Act did not waive the county’s governmental immunity from suit.

***State v. Lueck*, No. 06-1034, 52 Tex. Sup. Ct. J. 947, 2009 WL 1817240 (Tex. June 26, 2009)**

Lueck was fired from the Texas Department of Transportation (TxDOT) after he sent an e-mail to an agency supervisor reporting that, unless TxDOT took action, it would “never be in compliance” with federal highway standards. Lueck sued the State of Texas and TxDOT under the Texas Whistleblower Act, alleging that his email constituted a report of a violation of law to an appropriate law enforcement authority. Under the Whistleblower Act, sovereign immunity is waived when a public employee alleges a violation of chapter 554 of the Government Code. TxDOT filed a plea to the jurisdiction, claiming that its immunity was not waived because Lueck did not make a good-faith report of a violation of law to an appropriate law enforcement authority as required by chapter 554. The trial court granted Lueck’s motion to dismiss TxDOT’s plea to the jurisdiction, and the Third Court of Appeals affirmed.

In an opinion by Justice Green, the Court dismissed the case for lack of subject-matter jurisdiction. It held that, because Lueck’s e-mail only warned of regulatory non-compliance, not a violation of law, and because an agency supervisor is not an appropriate law enforcement authority to whom a report should be made, Lueck’s allegation did not state a claim under chapter 554, and the State’s sovereign immunity was not waived.

INSURANCE

***State Farm Lloyds v. Johnson*, No. 06-1071, 52 Tex. Sup. Ct. J. 1042 (Tex. July 3, 2009)**

After a hailstorm damaged the roof of her home, Johnson filed a claim under her State Farm Lloyds (State Farm) homeowners insurance policy. State Farm's inspector concluded that hail had damaged only the ridgeline of the roof and estimated repair costs at less than the policy's \$1,477 deductible. Johnson's roofing contractor concluded that the entire roof needed to be replaced at a cost of more than \$13,000.

To settle this difference, Johnson demanded appraisal of the "amount of loss" under the appraisal provision in her standard-form policy. State Farm refused to participate in the appraisal, asserting that the parties' dispute concerned causation and not "amount of loss." Johnson filed suit seeking a declaratory judgment concerning the appraisal provision. The trial court granted summary judgment to State Farm, agreeing that no appraisal was warranted. The Fifth Court of Appeals reversed, holding that appraisal was required.

In an opinion by Justice Brister, the supreme court held that the trial court could not conclude as a matter of law that the parties' dispute was about causation rather than something else, because nothing in the record established that Johnson's roof was damaged by anything other than hail. The Court went on to decide that, even if the parties' dispute involved causation, that does not prove whether it is a question of liability (so that no appraisal would be required), damages (requiring an appraisal), or both (requiring an appraisal). The Court affirmed the court of appeals' order granting Johnson's motion for summary judgment to compel State Farm to participate in the appraisal process, but noted that the appraisal may not be binding (if, for example, it was not an honest assessment of necessary repairs).

JUDICIAL ESTOPPEL

***Ferguson v. Bldg. Materials Corp. of Am.*, No. 08-0589, 52 Tex. Sup. Ct. J. 1095, 2009 WL 1901639 (Tex. July 3, 2009) (per curiam)**

In a per curiam opinion, the supreme court held that the doctrine of judicial estoppel did not bar plaintiffs' personal injury suit where plaintiffs initially omitted the suit as a listed asset in a pending bankruptcy.

Ferguson sued several companies for injuries he suffered when an eighteen-wheeler crashed into a building, causing it to collapse on him. After filing the personal injury suit, Ferguson filed for bankruptcy, which required him to disclose his income, assets, and liabilities in a "Statement of Financial Affairs" and a "Schedule of Personal Property." He disclosed the suit in the Statement of Financial Affairs, but he failed to include it in the Schedule of Personal Property. The suit was also disclosed in a creditors meeting. Before Ferguson's final bankruptcy plan was approved, the defendant in Ferguson's personal injury suit filed a motion for summary judgment, claiming that the personal injury action was barred on the basis of judicial estoppel. The trial court granted the motion, and the Eighth Court of Appeals affirmed.

The supreme court reversed, deciding that the doctrine of judicial estoppel did not apply because Ferguson had not taken a clearly inconsistent position in the bankruptcy proceeding.

JURY CHARGE

***Colum. Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851 (Tex. 2009)**

While Hawley was a patient at Columbia Rio Grande Healthcare, L.P. (Columbia), an independent pathologist diagnosed her with stage three cancer. But no one told her she had cancer, and she did not receive treatment until her doctor ordered new tests almost a year later. Hawley sued Columbia, the independent pathologist, and the surgeon who operated on her at Columbia and

sent the specimen to the independent pathologist. She nonsuited the doctors before trial.

The jury found that Columbia's negligence was a proximate cause of Hawley's injuries, and the trial court entered judgment against Columbia in accordance with the verdict. The Thirteenth Court of Appeals affirmed. Columbia filed a petition for review, asserting charge error based on the trial court's refusal to give jury instructions as to (1) new and independent cause, (2) the independent contractor status of the pathologist, and (3) lost chance of survival.

In an opinion by Justice Johnson, the supreme court held that the trial court did not abuse its discretion by refusing to give a jury instruction on new and independent cause, but that it should have given instructions on the independent contractor status of the pathologist and lost chance of survival.

On the first issue, the Court decided that the doctors' extended failures to learn the results of Hawley's tests were concurring rather than superseding causes of the delay of cancer treatments. The evidence showed that the hospital was aware that doctors did not always follow up on specimens sent to the pathology labs and that the hospital implemented a written notification policy in response to complaints from doctors that they were not getting pathology reports. Thus, the Court concluded that it was reasonably foreseeable to the hospital that some physicians might be unaware of a cancer diagnosis and remain unaware unless the hospital ensured that physicians were aware of the cancer diagnosis.

On the second issue, the Court decided that, although Hawley never disputed Columbia's argument that the pathologist was not the hospital's employee, the jury could have incorrectly believed that the pathologist was the hospital's agent. The charge was defective because it instructed the jury that the hospital acts or fails to act only through its employees, agents, nurses and servants, and the liability question asked whether the hospital's negligence was a proximate cause of Hawley's injuries without

mentioning that jurors should not consider the independent pathologist's acts or omissions. Even though the Court distinguished the case from *Casteel* and *Harris County*, it found that the error precluded Columbia from properly presenting the case on appeal, and the harm required reversal.

On the third issue, the Court held that the trial court erred by refusing to include an instruction that Hawley must have had greater than a 50 percent chance of survival when the hospital acted negligently because that would have assisted the jury in determining causation, was an accurate statement of the law, and was supported by the pleadings and evidence. The Court rejected Hawley's argument that the instruction was unnecessary in light of the lawyers' argument to the jury that Hawley had the burden to prove she probably would have survived if timely informed of the diagnosis.

LEGAL MALPRACTICE

***Smith v. O'Donnell*, 288 S.W.3d 417 (Tex. 2009)**

The issue in this case is whether an executor can sue a decedent's attorneys for malpractice committed outside the estate planning context.

Corwin was the executor of his wife's estate. He retained Cox & Smith to advise him on the administration of her estate, in particular regarding the characterization of the couple's assets as separate or community. Corwin contended that he and his wife agreed that certain stock would be his separate property. Without seeking a declaratory judgment, Cox & Smith prepared an estate tax return for Corwin's wife's estate omitting the stock. After Corwin's death, his children sued Corwin's estate, alleging that Corwin misclassified the stock and, thus, underfunded their mother's trust of which the children were beneficiaries. After settling with the children, O'Donnell, the executor of Corwin's estate, sued Cox & Smith alleging malpractice in the characterization of the assets.

The trial court granted the law firm's motion for summary judgment. The Fourth Court of Appeals reversed.

In an opinion by Justice O'Neill, the Texas Supreme Court held that an executor may bring suit against a decedent's attorneys for malpractice committed outside the estate-planning context and affirmed. The Court noted the general rule that an estate's personal representative may bring the decedent's survivable claims on behalf of the estate, including legal malpractice claims. According to the Court, the threat of an executor lawsuit does not impact the attorney-client relationship because the estate's suit is based on the injury to the deceased client. The estate's interests mirror those of the decedent. The Court concluded that there is no reason to deprive an estate of a remedy for a wrongdoing that caused the estate harm by prohibiting the estate from pursuing the survivable claims that the deceased could have brought during her lifetime.

The Court observed that the beneficiaries' claims were brought against Corwin as executor of their mother's estate, and that the claims were not asserted as disgruntled beneficiaries under Corwin's will. Because the beneficiaries had settled, the outcome of O'Donnell's suit against the law firm would not impact their recovery.

Justice Willett, joined by Justice Wainwright, dissented. According to the dissent, the general privity barrier in *Barcelo v. Elliott*, 923 S.W.2d 575 (Tex. 1996) should apply to bar the malpractice claims. The dissent noted that the interests of trust beneficiaries were in direct conflict with Corwin. The suit was allowing the disgruntled children to sue in the estate's name.

LIMITATIONS

***Ditta v. Conte*, 07-1026, 52 Tex. Sup. Ct. J. 823, 2009 WL 1566989 (Tex. June 5, 2009)**

In a majority opinion by Justice Willett, the supreme court held that no statutory limitations period restricts a court's discretion to remove a trustee because "[a] limitations period, while

applicable to suits seeking damages for breach of fiduciary duty, has no place in suits that seek removal rather than recovery."

After a trustee prevailed on a breach of fiduciary duty claim against a co-trustee, he attempted to remove the co-trustee on several bases, including the prior breach of fiduciary duty. The trial court removed the co-trustee, but the First Court of Appeals reversed, holding that the four-year limitations on the breach of fiduciary duty claim barred an action for removal.

The supreme court reversed and remanded, holding that no statute of limitations period applies in a trustee-removal suit.

***Galbraith Eng'g Consultants, Inc. v. Pochucha*, No. 07-1051, 52 Tex. Sup. Ct. J. 974, 2009 WL 1841594 (Tex. June 26, 2009)**

The issue in this case is whether section 33.004(e) of the Civil Practice and Remedies Code, which revives claims barred by limitations, also revives claims barred by a statute of repose.

Homeowners sued their builder for negligence and DTPA violations for damages caused by a defective drainage system. The builder designated an engineer and an installer as responsible third parties under section 33.004(e). Section 33.004(e) allows a plaintiff to join as a defendant a party who is identified as a responsible third party and, if done within sixty days of the designation, limitations cannot be raised as a bar. The engineer filed a motion for summary judgment under the ten-year statute of repose because it was joined more than ten years after completion of the improvement. The trial court granted the engineer's motion. The Fourth Court of Appeals reversed and remanded, concluding that section 33.004(e) revived the claim.

In an opinion by Justice Medina, the supreme court reversed and rendered. The Court explained that section 16.008 of the Civil Practice and Remedies Code bars a claim for damages relating to the design, plan, or inspection of construction

of an improvement to real property more than ten years after substantial completion of the improvement. Statutes of repose provide a definitive date after which an action cannot be filed. Unlike limitations statutes, statutes of repose run from a specified date without regard to accrual of a cause of action. The Court noted that statutes of repose create a substantive right to be free from liability.

Statutes of limitations, on the other hand, are procedural devices that limit the remedy available from an existing cause of action. Limitations begin running upon accrual of a cause of action.

The Court concluded that the legislature did not intend to include statutes of repose in section 33.004(e) when it used the term “limitations.” Statutes of repose create an ending date for liability. Applying section 33.004(e) to such statutes would defeat the purpose of repose statutes. The Court held that “limitations” only refers to statutes of limitations.

PARTNERSHIP

***Ingram v. Deere*, 288 S.W.3d 886 (Tex. 2009)**

The issue in this case is whether there is legally sufficient evidence of the existence of a partnership between Ingram and Deere. Ingram and Deere entered an oral agreement surrounding the operation of a pain clinic. When Ingram prepared a written agreement almost a year and a half after they began working together, Deere refused to sign it, claiming it contradicted their oral agreement. Deere then sued Ingram for various causes of action. The jury found that the two had entered an agreement and awarded damages to Deere. The trial court eventually signed a j.n.o.v. and rendered a take-nothing judgment. The Fifth Court of Appeals reversed and reinstated the judgment.

In an opinion by Justice Wainwright, the supreme court held there was legally insufficient evidence of a partnership, reversed the court of appeals’ judgment, and reinstated the trial court’s take-nothing judgment.

Under the Texas Revised Partnership Act (TRPA), five factors indicate the creation of a partnership: (1) receipt or right to receive a share of the business’s profits, (2) expression of an intent to be partners, (3) participation or right to participate in the control of the business, (4) sharing or agreeing to share in the business’s losses or liability claims by third parties against the business, and (5) contributing or agreeing to contribute money or property to the business. TRPA does not require proof of all of the factors to establish a partnership.

According to the Court, the number of TRPA factors required to form a partnership was a matter of first impression. The Court concluded that whether a partnership exists should be decided under the totality of the circumstances, considering all the evidence bearing on the five factors. On the one hand, evidence of none of the factors will preclude creation of a partnership, and even conclusive evidence of only one factor will not establish a partnership. On the other hand, conclusive evidence of all five factors establishes a partnership as a matter of law.

The Court analyzed the evidence supporting each of the five factors and concluded that Deere failed to provide legally sufficient evidence of any of the five factors. Ingram paid checks and referenced Deere as “contract labor” or “consultant,” which does not support a claim of profit sharing. There was no evidence of an intention to hold Deere out as a partner. Deere did not sign the lease, was not named on the bank account, and did not file taxes as a co-owner. Deere evidenced no right to control the business or that he made executive decisions for the business. There was also no evidence that Deere and Ingram discussed allocation of losses. And, finally Deere failed to produce evidence that he contributed property to the business above that of any other employee.

Justice Johnson concurred, noting that Deere offered no evidence that the parties had equal ownership of the business, a matter on which Deere had the burden of proof.

PROBATE

***Kappus v. Kappus*, 284 S.W.3d 831 (Tex. 2009)**

In an opinion by Justice Willett, the supreme court held that an independent executor's alleged conflict of interest does not require his removal as a matter of law.

On her children's behalf, the deceased's ex-wife sought to remove the independent executor and trustee of the deceased's testamentary trust, alleging that he had a conflict of interest—a good-faith dispute over the executor's percentage ownership of estate assets. The trial court refused to remove the executor and divided the property. On appeal, the ex-wife claimed that the trial court erred as a matter of law in not removing the executor, and the Twelfth Court of Appeals reversed the trial court's decision on removal.

In an opinion by Justice Willett, the supreme court noted that Probate Code section 149C lists several grounds for removing an executor, but does not include "conflict of interest" (either actual or potential). It then refused to "engraft such a test onto the statute," reversed the court of appeals, and reinstated the trial court's order denying the motion to remove.

PROCEDURE—DEFAULT JUDGMENT

***DolgenCorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922 (Tex. 2009) (per curiam)**

The issue in this case is whether a trial court properly entered a post-answer default judgment when defendant's attorney failed to appear for trial because he was in a preferential trial setting in another county.

After announcing ready for a trial in the case in Cameron County, DolgenCorp of Texas, Inc. (DolgenCorp) informed the trial court through an associate of its lead counsel that its lead counsel had a preferential setting in Harris County. Lerma then obtained a transfer to another Cameron County district court. DolgenCorp informed the new judge that its lead counsel was

in trial in Harris County. The new judge required the associate to select a jury, but indicated he would work with the lead counsel's trial schedule in Harris County.

After receiving numerous calls from the Harris County judge and court coordinator that DolgenCorp's lead counsel was in trial in Harris County, the Cameron County judge called Lerma's case for trial. DolgenCorp's attorneys did not appear. The court dismissed the jury, proceeded with a bench trial, and entered a judgment for Lerma.

DolgenCorp filed a motion for new trial, citing *Craddock*. The trial court denied the motion, and the Thirteenth Court of Appeals affirmed.

The Texas Supreme Court reversed and remanded for a new trial. The Court reviewed the evidence presented in support of the *Craddock* factors. First, DolgenCorp's counsel provided evidence that his failure to attend was not intentional. According to the evidence, DolgenCorp reasonably believed the Cameron County court would accommodate his preferential setting. In addition, DolgenCorp's counsel was actually in trial in another county when the suit in Cameron County was called. Second, DolgenCorp set up a meritorious defense by putting on evidence of the cause of the underlying fire through expert testimony. Finally, DolgenCorp offered to pay Lerma's expenses in obtaining the default.

Accordingly, the Court concluded that DolgenCorp established the grounds for a new trial and that the trial court abused its discretion in denying the motion. The Court, however, rejected DolgenCorp's argument that because Lerma failed to present legally sufficient evidence to support a judgment on the merits, the judgment should be reversed and rendered.

PROCEDURE—MOTION FOR NEW TRIAL

***In re Colum. Med. Ctr. of Las Colinas*, No. 06-0416, 52 Tex. Sup. Ct. J. 1016, 2009 WL 1900509 (Tex. July 3, 2009) (orig. proceeding)**

In a majority opinion by Justice Johnson, the supreme court overruled its decision in *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985), and held that trial courts must explain why they are disregarding a jury verdict and granting a new trial; granting a new trial “in the interest of justice” is not sufficient.

Columbia Medical Center of Las Colinas (Columbia) and several employees were sued following a man’s death at Columbia. After a nearly four-week jury trial, the jury returned a unanimous verdict in favor of the defendants. The plaintiff filed a motion for j.n.o.v., and in the alternative for a new trial. The trial court granted the motion for new trial as to Columbia and two nurses, stating that the new trial was ordered “in the interests of justice and fairness.” A final take-nothing judgment was entered in favor of the other defendants.

After the court of appeals denied Columbia’s petition for a writ of mandamus, Columbia asked the Texas Supreme Court to issue a writ of mandamus directing the trial court to specify why it granted a new trial, and, in the alternative, directing the trial court to enter judgment on the jury verdict.

After acknowledging that its past decisions “approved the practice of trial courts failing to specify reasons for setting aside jury verdicts,” the Court overruled its precedent, and held that a trial court must explain why it is granting a new trial. The Court reasoned that the “vague explanation” of granting a new trial “in the interest of justice” “does not enhance respect for the judiciary or the rule of law, detracts from transparency we strive to achieve in our legal system, and does not sufficiently respect the reasonable expectations of parties and the public when a lawsuit is tried to a jury.”

Justice O’Neill authored a dissenting opinion in which she argued that mandamus relief was inappropriate here, where the trial court followed one of the Court’s “most well-established legal principles.” She also argued that, if a change in procedure is warranted, it should be changed by legislative amendment of the rules, rather than by the Court implementing new law on mandamus.

***In re Baylor Med. Ctr. at Garland*, 289 S.W.3d 859 (Tex. 2009) (orig. proceeding)**

The issue in this original proceeding is whether a trial court must state its reasons when granting a motion for new trial following a jury verdict.

A jury returned a defense verdict. The trial court granted a new trial and eventually stated its reason was based on juror affidavits. The trial judge resigned. Two subsequently sitting judges reaffirmed the initial order to grant a new trial, but did so without stating the reasons. The Fifth Court of Appeals denied mandamus relief.

In an opinion by Justice Johnson, the Court granted mandamus relief. Citing *In re Columbia Medical Center of Las Colinas*, the Court held that the trial court abused its discretion in refusing to enter a judgment on the verdict and granting a new trial without specifying the reasons for doing so.

Justice O’Neill, joined by Chief Justice Jefferson and Justices Medina and Green, dissented citing her dissent in *In re Columbia Medical Center of Las Colinas*.

***In re E.I. du Pont de Nemours & Co.*, 289 S.W.3d 861 (Tex. 2009) (orig. proceeding)**

As in *Baylor*, the issue in this original proceeding was whether a trial court must state its reasons when granting a motion for new trial following a jury verdict.

A jury returned a defense verdict. The trial court granted a new trial without stating the reasons. The Ninth Court of Appeals denied relief.

In an opinion by Justice Johnson, the supreme court granted mandamus relief. Citing *In re Columbia Medical Center of Las Colinas*, the Court held that the trial court abused its discretion in refusing to enter a judgment on the verdict and granting a new trial without specifying the reasons for doing so.

Justice O’Neill, joined by Chief Justice Jefferson and Justices Medina and Green, dissented citing her dissent in *In re Columbia Medical Center of Las Colinas*.

PROCEDURE—SERVICE

In re E.A. & D.A., 287 S.W.3d 1 (Tex. 2009)

The issue in this case is whether service of new citation is required for a default judgment based on a more onerous amended petition, or whether service under Rule 21a is sufficient.

After a divorce, the father of the couple’s children sued their mother seeking to modify the right to designate the children’s primary residence. The father failed to file supporting affidavits. The mother was served with citation but failed to answer. The father later amended his petition, seeking to be named the sole managing conservator. The father served the mother by certified mail. The amended petition was returned unclaimed.

The trial court granted a default judgment for the father. The mother then filed a motion to set aside the default judgment and for a new trial. The trial court denied the motions, and the Second Court of Appeals affirmed, holding that Rule 21a did not require citation for service of an amended petition.

In an opinion by Chief Justice Jefferson, the Court reversed and remanded to the trial court, rejecting the mother’s argument that because the amended petition alleged more onerous grounds, she had to be served with citation. The Court explained that Rule 21a does not require a non-answering defendant to be served with citation for a more onerous amended petition. While the non-

answering defendant must be served to support a default judgment, service can be accomplished using one of the methods in Rule 21a.

The Court concluded, however, that the mother was not served in compliance with Rule 21a. The amended petition was returned to the father’s attorney unclaimed. The amended petition did not contain a certificate of service, and the mother provided evidence that she was not served. The Court rejected the father’s argument that the mother had constructive notice of the lawsuit. The father argued that the amended petition was also sent regular mail and was not returned. According to the Court, even evidence that a document was sent regular mail and not returned does not constitute evidence of constructive notice.

Justice Brister, joined by Justices Wainwright and Willett, concurred in the judgment but dissented on the issue of whether Rule 21a requires service of citation on a non-answering party when an amended petition seeks a more onerous judgment.

Ashley v. Hawkins, No. 07-0572, 52 Tex. Sup. Ct. J. 954, 2009 WL 1817241 (Tex. June 26, 2009)

The issue in this case is whether section 16.063 of the Civil Practice and Remedies Code tolls the limitations period when a car accident defendant leaves the state but is otherwise amenable to out-of-state service.

The plaintiff filed suit against the defendant about two months before the end of the two-year statute of limitations for personal injuries and damages related to a car accident. The plaintiff did not serve the defendant until 13 months later—almost one year after limitations had expired. The trial court granted the defendant’s motion for summary judgment based on the plaintiff’s failure to exercise diligence in service. The Ninth Court of Appeals reversed.

In an opinion by Justice Green, the Court reversed and reinstated the summary judgment. Under section 16.063, when a defendant is absent from

the state, the applicable limitations period is suspended during the period of absence. Applying *Kerlin v. Saucedo*, 263 S.W.3d 920 (Tex. 2008), the Court concluded that under the general long-arm statute, a non-resident party is amenable to service through the secretary of state if she engages in business in the state and the proceeding arises out of the business. Engaging in business includes committing a tort in the state. Under the facts, defendant engaged in a tort in the state, thus her presence in the state was established and the tolling provision did not apply. Defendant was amenable to service under the long-arm statute. Accordingly, plaintiff had to serve defendant within two-years of the accident.

The Court overruled *Vaughn v. Deitz*, 430 S.W.2d 487 (1968), which held that the predecessor to section 16.063 applied to an out-of-state defendant, and that a defendant was not present even if amenable to service under the long-arm statute.

The Court further held that the plaintiff failed to exercise diligence in pursuing service after limitations had expired. There were extended periods of time when the plaintiff took no action to serve the defendant, the plaintiff failed to utilize alternate methods of service, and the plaintiff's lawsuit had been placed on the trial court's dismissal docket twice.

PROPERTY RIGHTS

***Holmes v. Beatty*, Nos. 07-0784 & 07-0795, 52 Tex. Sup. Ct. J. 967, 2009 WL 1817398 (Tex. June 26, 2009)**

The issue in this case is the characterization of brokerage accounts and securities certificates issued from those accounts owned by spouses.

The wife died first, and her will named her son from a previous marriage as independent executor of her estate. Her husband died a few months later, and his will named a son from a prior marriage as the independent executor of his estate.

The husband and wife owned valuable brokerage accounts and acquired securities certificates

issued from those accounts. The accounts were created listing "JT TEN," "JT TEN *defined as* 'joint tenants with right of survivorship and not as tenants in common,'" "JTWROS" or "Joint (WROS)." If these acronyms established a right of survivorship, then the husband acquired 100 percent of the accounts upon the wife's death, and the accounts would have passed under his will, which left nothing to the wife's children. If the accounts were not survivorship accounts, then as community property, only fifty percent passed to the husband at the wife's death, and her fifty percent would have passed under her will.

The trial court concluded that some accounts were survivorship accounts and some were not. The Fourteenth Court of Appeals affirmed in part, and reversed and rendered in part and remanded in part.

In an opinion by Chief Justice Jefferson, the Court concluded that the designations created survivorship rights and reversed and rendered and affirmed in part. After giving the history of the survivorship statute, the Court concluded that the brokerage accounts, including those designated only as "JT TEN," created a right of survivorship, and upon the wife's death, the husband inherited her share of the accounts.

The securities certificates required a different analysis. The certificates were generated from the husband and the wife's brokerage accounts when the brokerage companies distributed some securities in certificate form to the husband and wife. The certificates were not signed, and the husband and wife had not disposed of them. The Court held that because the husband and wife never executed an agreement that revoked the brokerage accounts' agreements that created rights of survivorship and because they had not disposed of the certificates, the certificates retained survivorship rights.

RELIGIOUS FREEDOM

Barr v. City of Sinton, No. 06-0074, 52 Tex. Sup. Ct. J. 871, 2009 WL 1712798 (Tex. June 19, 2009)

Barr, as part of a religious ministry, offered men recently released from prison free housing and religious instruction in two homes he owned. In response, the City of Sinton (the “City”) passed a zoning ordinance that not only precluded the use of the homes for that purpose but effectively banned the ministry from the City. Barr sued the City under the Texas Religious Freedom Restoration Act (TRFRA), which provides that “a government agency may not substantially burden a person’s free exercise of religion [unless it] demonstrates that the application of the burden to the person ... is in furtherance of a compelling government interest [and] is the least restrictive means of furthering that interest.” The trial court found that City had not violated TRFRA, and the Thirteenth Court of Appeals affirmed.

In an opinion by Justice Hecht, the supreme court held that City’s zoning ordinance violated the TRFRA. First, the Court decided that zoning ordinances are not categorically exempt from TRFRA. Then it held that the halfway house was a ministry “substantially motivated by sincere religious belief” for purposes of the TRFRA, and that the city ordinance “substantially burdened” the free exercise of religion by prohibiting Barr from operating his halfway house ministry in the two homes he owned adjacent his supporting church. The Court noted that the city manager testified that it was “a fair statement” that alternate locations were “probably ... minimal” and “possibly” “pretty close to nonexistent.” Finally, the Court decided that the City failed to establish a compelling interest for the ordinance, and even if it had, it made no effort to show that it complied with TRFRA’s requirement and that it used the least restrictive means of furthering that interest.

REMEDIES

Dealers Elec. Supply Co v. Scoggins Constr. Co., No. 08-0272, 52 Tex. Sup. Ct. J. 1088, 2009 WL 1901638 (Tex. July 3, 2009)

The issue in this case is whether the McGregor Act provides a supplier’s exclusive remedy for non-payment.

Scoggins entered a public-work contract to build a school. Under the McGregor Act, Scoggins executed a payment bond. Diamond was an electrical subcontractor on the project. Dealers supplied the electrical materials. Scoggins, Diamond, and Dealers entered a joint check agreement to induce Dealers to extend credit to Diamond. After Dealers supplied materials, Diamond walked off the job, leaving Dealers unpaid. Dealers sued Scoggins and Diamond under the Texas Construction Trust Fund Act and for breach of the joint check agreement. Dealers also sued, but later dropped, a McGregor Act claim on the payment bond.

The trial court entered judgment for Dealers. The Thirteenth Court of Appeals reversed and rendered, concluding that the McGregor Act was Dealers’ sole remedy.

In an opinion by Justice O’Neill, the Court reversed and remanded to the court of appeals. The Court concluded that the McGregor Act is the exclusive remedy against the payment bond but not against the contractor.

The Trust Fund Act provides that payments made to a contractor or subcontractor under a construction contract for an improvement to real property are considered trust funds. The suppliers or subcontractors who supply the labor or material are considered the beneficiaries. A trustee is liable to the beneficiary if the trustee uses or diverts trust funds without first fully paying all the current or past obligations incurred by the trustee.

According to the Court, both the McGregor Act and the Trust Fund Act are intended to provide laborers and materialmen a remedy for non-

payment. To interpret the McGregor Act as providing the exclusive remedy for unpaid claims would contravene the intent of the Trust Fund Act. The Court held that the McGregor Act is not a supplier's exclusive remedy.

SHAREHOLDER DERIVATIVE SUIT

In re Schmitz, 285 S.W.3d 451 (Tex. 2009) (orig. proceeding)

The issue in this case is whether a demand letter in a derivative action was adequate when it failed to identify a shareholder and failed to state a claim with particularity. Lancer agreed to a buyout with Lancer's shareholders to receive \$22 per share. A month before the closing, Lancer's board received a letter from a law firm insisting that the merger be cancelled "in light of a superior offer" of \$23 per share. Lancer merged with another company. The law firm filed suit for rescission. Defendants, former directors of Lancer, filed a motion to dismiss for failure to send a proper presuit demand. The trial court and the Fourth Court of Appeals denied relief.

In an opinion by Justice Brister, the supreme court held that the letter failed to meet the statutory requirements and granted mandamus relief. The Texas Business and Commerce Code, article 5.14 provides that "[n]o shareholder may commence a derivative proceeding until ... a written demand is filed with the corporation setting forth with particularity the act, omission, or other matter that is the subject of the claim or challenge and requesting that the corporation take suitable action."

On the issue of naming a shareholder, the Court observed that while article 5.14 does not expressly mention any requirements as to stating a shareholder's name, reading the article as a whole, a demand must include a shareholder's name. Article 5.14 (C)(2) prohibits a suit until 90 days after a demand unless the corporation notifies the shareholder of an earlier rejection.

Thus, a corporation must know the name of the shareholder in order to send notice. The Court further noted that providing the name of the shareholder helps the corporation determine the veracity of the demand and whether to incur the expense and time to investigate a demand. It would be pointless to require a corporation to investigate a demand from someone who could not file suit. Finally, the Court recognized the potential for abuse if a demand fails to name a shareholder. The Court held that a demand must name the shareholder on whose behalf the demand is made.

The Court next addressed whether the demand stated "with particularity" the challenged act or omission. The demand indicated there was another offer for a \$1 more per share, but failed to provide details of the offer. Accordingly, the demand failed to give sufficient details to allow the board to analyze the complaint. The Court recognized that the adequacy of a demand depends on the circumstances of the corporation, board, and transaction subject of the complaint. Under these facts, the demand lacked particularity when it simply stated the price per share difference.