

**QUICK, QUICK, SLOW:  
A BRIEF DANCE THROUGH  
RECENT APPELLATE BUSINESS TORTS OPINIONS**

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## **I. INTRODUCTION**

Ballroom dancers make even complex, hypertechnical steps look easy. This paper aims to do the same. We start with a “Quick” section of five appellate steps to add to your to your everyday repertoire. Then, we move to another “Quick” section that scoots through some useful online appellate resources for trial lawyers involved in business tort cases. We end on a “Slow” section examining some recent appellate opinions in more detail. (Although this paper attempts to avoid overlap with other presentations at this year’s seminar, some duplication is unavoidable.)

Let’s get started!

## **II. QUICK: FIVE APPELLATE STEPS TO ADD TO YOUR EVERYDAY REPERTOIRE**

Some recent appellate cases have thrown a spotlight on basic, everyday steps we may forget to practice on a regular basis.

### **A. Schedule an Annual Checkup for E-mail and E-Discovery Issues.**

Much like getting an annual physical (I know I’m mixing my metaphors here), implementing an annual legal check-up of your client’s e-mail practices and policies, as well as document retention practices and policies, can catch developing problems and re-focus everyone on things they should (and should not) be doing throughout the year. It may be that most of the checking-up can be performed by in-house counsel or other client contacts, but some involvement by outside counsel can be invaluable.

The annual legal check-up might include a survey of both the policies (what written policies exist? what oral instructions do employees receive from supervisors or during initial training?) and actual practices of various departments with regard to e-mail and document retention. To the extent that differences exist between written policies in different locations (geographically or physically, *i.e.*, in different manuals or training materials), analyze the reasons (if any) for the differences and decide whether any changes need to be made. To the extent that oral instructions or actual practices vary or add to written policies, evaluate whether the written policies should be revised or supplemented. Alternatively, instruction or training may be needed to bring the oral instructions or actual practices into conformity with the written policies. If additional personnel are needed to assist in-house and outside counsel with this evaluation process, consider whether the selected employees meet the criteria for attorney-client privilege.

With regard to e-mail, the annual check-up might also include a “refresher” for employees about best practices and applicable policies. It never hurts to remind people that e-mails should include only

information essential to the task at hand. Basically, an e-mail should hew to the “Dagnet” principle of providing “just the facts.” For example:

- (1) An e-mail should ask questions or report the facts without inserting the author’s own opinions or commentary.
- (2) The e-mail should avoid ambiguity and be accurate. This includes the “Subject” line. (A re-read before sending helps meet this goal.)
- (3) The e-mail should be sent to a “need to know” distribution list. Not every person in the department needs to receive every e-mail.
- (4) The e-mail should add to a chain only if it is truly part of the original conversation.
- (5) The e-mail should be written keeping in mind that it may be read by a wide audience down the road.

The central question should be, “Is it necessary?” Is it necessary to say what you’ve said in the e-mail? Is every person on the e-mail a necessary recipient? Is it necessary to change the “subject” line to accurately reflect a change in the discussion topic? If you’re changing the “subject” line, is it necessary to include the chain of prior e-mails at all? Is it necessary to inform someone by forwarding a prior e-mail, or should a new e-mail be generated?

One flippant or stray sentence in an e-mail can foment dispute and become the time- and money-consuming focus of litigation. Here are two examples:

- An architect for SJW Property and a civil engineer were working on a real estate development project. The architect e-mailed the civil engineer with the instruction: “Do not send Jay Palmer a plan showing the lease space next to Target and/or the Chick-[F]il-A plan .[SJW] Property Commerce does not want him having that information.” *SJW Prop. Commerce, Inc. v. Southwest Pinnacle Props., Inc.*, --- S.W.3d ---, 2010 WL 3704928, at \*6 n.11 (Tex. App.—Corpus Christi-Edinburg Sept. 23, 2010, no pet. h.). Although the first sentence conveys necessary information, it is questionable whether the second sentence was required.
- In response to a letter from Celtic’s counsel regarding the alleged rights and obligations of two parties – Celtic and CRMC – under two leases, CRMC’s counsel responded to Celtic’s letter by May 24, 2005 e-mail. *Cleveland Regional Med. Ctr., L.P. v. Celtic Props., L.C.*, -- S.W.3d ----, 2010 WL 3782270, \*10 (Tex. App.—Beaumont Sept. 30, 2010, no pet. h.). The May 24 e-mail discussed both leases, the “Sleepy Hollow” lease and the “East Dallas” lease. *Id.* In an e-mail response, Celtic’s counsel stated: “Sorry this drug out so long. *I*

agree with your analysis in your May 24th e-mail. Please calculate the adjustment on the East Dallas lease for payment and I will do the same. I look forward to hearing from you.” *Id.* (emphasis added). It’s questionable whether the first sentence was necessary, or could have been phrased better. Furthermore, at trial and on appeal, the parties vigorously disputed whether the e-mails were admissible and whether “I agree with your analysis in your May 24<sup>th</sup> e-mail” referred to the analysis of both leases or just the East Dallas lease. *Id.* at \*10-12.

Finally, the annual legal check-up provides an opportunity to review the client’s policies and procedures for implementing litigation holds. Once a litigation hold letter is received by in-house counsel or other client contact, what procedure is in place to implement the hold? What steps are taken to supervise and follow-up as litigation progresses? What training or information are employees provided with regard to litigation hold procedures and the potential consequences of non-compliance? Taking the time to perform an annual legal check-up can save an enormous amount of time, money, and headache in the long run.

#### **B. Check the Court Docket Regularly.**

Any time that a case is dormant for more than two weeks, a dispositive motion has been filed, or a trial has been held, you should calendar reminders every two weeks to check the court’s docket. Particularly where an online docket is available, monitoring the case for any new developments – including a dispositive order or judgment – is essential.

On occasion, notice of a judgment or other appealable order is not received. Texas Rule of Civil Procedure 306(a)(4) and Texas Rule of Appellate Procedure 4.2(a)(1) provide a “back up” plan, but only for a limited time. Basically:

- If within twenty days after the judgment or other appealable order is signed, a party adversely affected by it or his attorney has either received the notice of judgment from the clerk of the court or actual knowledge of the judgment/order, then get cracking because the regular deadlines apply. *See* TEX. R. CIV. P. 306(a)(4).
- If the adversely affected party and his attorney neither receive the clerk’s notice of judgment nor acquire actual knowledge of the judgment/order within twenty days after the judgment/order is signed, then the periods set forth in Rule 306a (regarding plenary power and post-judgment motions) begin on the date that the party or attorney received the clerk’s notice or acquired actual knowledge, whichever

occurred first, PROVIDED THAT the Rule 306a period shall not begin more than 90 days after the judgment/order was signed. TEX. R. CIV. P. 306(a)(4); TEX. R. APP. P. 4.2(a)(1).

- If the deadlines can no longer be extended through Rule 306(a)(4), then you may have a restricted appeal or bill of review proceeding.

A restricted appeal is available only if the appellant did not participate in the hearing that resulted in the judgment/order and did not file any post-judgment motions or a request for findings of fact and conclusions of law. *Alexander v. Lynda’s Boutique*, 134 S.W.3d 845, 848 (Tex. 2004). So, if the party participated in the trial court hearing or trial, or filed a timely motion for new trial, then a restricted appeal is not available. *P & A Real Estate, Inc. v. American Bank of Tex.*, --- S.W.3d ---, 2010 WL 3636328, \*1 (Tex. App.—Dallas Sept. 21, 2010, no pet. h.). Where available, a restricted appeal may be filed within six months of the date the judgment/order was signed. TEX. R. APP. P. 26.1(c). However, the error must be apparent on the face of the record in order to obtain relief. *Alexander*, 134 S.W.3d at 848.

A bill of review is available even if the petitioner participated in the proceedings below. A bill of review generally is available after the regular time for appeal but within four years of the date the judgment or other appealable order was signed. *See Ross v. National Ctr. for the Emp’t of the Disabled*, 197 S.W.3d 795, 798 (Tex. 2006). However, in order to obtain review, the petitioner must establish:

- (1) a meritorious ground of appeal;
- (2) which the petitioner was prevented from making by fraud, accident, or wrongful act of the opposing party or official mistake;
- (3) unmixed with any fault or negligence on the petitioner’s part.

*Petro-Chemical Transport, Inc. v. Carroll*, 514 S.W.2d 240, 245-46 (Tex. 1974); *Clarendon Nat’l Ins. Co. v. Thompson*, 199 S.W.3d 482, 487 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

In order to establish the absence of negligence, a party must prove that he/she and his/her counsel were diligent in making use of available means to set aside the judgment. *Mosley v. Dallas County Child Protective Servs.*, 110 S.W.3d 658, 660 (Tex. App.—Dallas 2003, pet. denied). Means to set aside a judgment where the clerk fails to send notice of the judgment are provided through Texas Rule of Civil Procedure 306(a)(4) and Texas Rule of Appellate Procedure 4.2(a)(1). Thus, means to find out that a judgment has been entered where the clerk fails to send notice of the judgment arguably include:

- calling the court’s clerk and asking him/her to check the docket;

- calling the district clerk’s office and asking a deputy clerk to check the docket;
- visually checking the docket or file at the courthouse; and
- regularly accessing the online docket sheet.

Where no activity has occurred in a case for more than a couple of weeks, or where a dispositive motion has teed up the possibility that a final judgment or order will be signed, regular checks of the docket are essential in order to preserve the opportunity and right to seek appellate review.

**Tip:** A corollary to this rule is to beware the severance order. An interlocutory summary judgment, for example, may become a final summary judgment – with all the usual post-judgment deadlines – through a severance order. Not only must you be on the lookout for the severance itself, you must be careful to file any post-judgment papers in the severed cause. This requires a change of case number, may require a change of caption, and may also require a change in the certificate of service. Filing a post-judgment motion or notice of appeal under an incorrect cause number can be effective as a bona fide attempt to invoke appellate jurisdiction, so long as there is “no suggestion of confusion regarding the judgment from which the [appellant] sought appeal.” *City of San Antonio v. Rodriguez*, 828 S.W.2d 417, 418 (Tex. 1992) (per curiam). Avoid the question of what constitutes “confusion regarding the judgment” being appealed, and double-check to make sure that your post-judgment motions and notice of appeal in a severed case include the correct cause number and caption.

**C. At the Beginning of Every Case, Determine the Proper Measure of Damages.**

The best practice would be to draft the jury charge, or even sketch the jury charge, at the beginning of the case (or at least before taking the first deposition). This rarely happens. If you can only afford to tackle one part of the jury charge process at the outset of a case, do this: determining the proper measure of damages. This task is indispensable whether your client is the plaintiff or defendant.

Damages must be measured by a legal standard. *Jackson v. Fontaine’s Clinics, Inc.*, 499 S.W.2d 87, 90 (Tex. 1973). To the extent a plaintiff seeks damages not measured by the proper legal standard, summary judgment is appropriate. Moreover, the proper legal standard must be used to guide the fact finder in determining what sum would compensate the injured party. *Id.* Thus, at trial, the jury must be told how to

measure the damages sought. *Id.*; see also, e.g., Texas Pattern Jury Charges *Business, Consumer, Ins., Emp’t* 115.2 cmt. “Instruction required” (stating “PJC 115.2 may not be submitted without an instruction on the appropriate measure of damages” [emphasis in original]).

Whether viewed in the context of a summary judgment motion, a *Daubert/Robinson* challenge, or the jury charge, knowing the proper measure of damages is critical. Likewise, assembling evidence of the proper measure of damages is essential. If you are the plaintiff and your fact and expert evidence uses an improper measure of damages, you will be unable to establish an essential element of your claims. If you are the defendant, you need to know whether the plaintiff has an essential element problem, but also you want any controverting evidence to focus on the proper measure of damages.

**D. Tailor Your Certificates of Service.**

Texas Rule of Civil Procedure 21a provides that a “certificate by a party or an attorney of record . . . shall be prima facie evidence of the fact of service.” The certificate of service may be used to create a rebuttable presumption that a party was properly served. TEX. R. CIV. P. 21a. However, if your certificate of service does not state the manner of service or the person to whom the documents were sent, it won’t be of much use. See *Cooper v. Litton Loan Servicing, LP*, --- S.W.3d ---, 2010 WL 2854444, \*3 (Tex. App.—Dallas July 22, 2010, no pet. h.).

For example, a generic certificate of service might state:

The undersigned hereby certifies that a true and correct copy of the foregoing document has been served on all counsel of record on this \_\_\_\_ day of October, 2010, in accordance with the Texas Rules of Civil Procedure.

OR

The undersigned hereby certifies that, on this \_\_\_\_ day of October, 2010, a true and correct copy of this Response has been served on Plaintiffs through their counsel of record by U.S. mail, facsimile, or hand delivery.

Neither certificate establishes whether the document was served by hand delivery as opposed to mail or fax (which adds three days to the period in which the receiving party has a right or is required to act). See TEX. R. CIV. P. 21a. Neither certificate establishes that the document sent to “counsel of record” was properly addressed. *Id.* The first certificate, discussing service of “the foregoing document,” also creates ambiguity as to whether the service copy included any documents attached behind the certificate of service. The second certificate does not specify that any service by mail was accomplished

“by certified or registered mail,” as required by Rule 21a. *Id.* These certificates may not violate Rule 21a, but equally they may not establish much of a rebuttable presumption regarding service.

The better practice is to tailor your certificate of service so that it reflects how the document was served and to whom the service copies were sent. For example:

I hereby certify that, on August 18, 2010, a true and correct copy of this Response, including any attachments, is served on Plaintiffs by first-class U.S. mail, certified, return receipt requested, to the following counsel of record:

Joe Q. Attorney  
The Law Offices of Joe Q. Attorney  
100 Main Street, Suite 1A  
Dallas, Texas 75201

**Tip:** Be aware that Texas Rule of Appellate Procedure 9.5(e) expressly requires a certificate of service to include: (1) the date and manner of service; (2) the name and address of each party served; and (3) if the person served is a party’s attorney, *the name of the party represented by that attorney.*

**E. Double-Check the Applicable Requirements When Drafting Proposed Orders.**

Unless you’re asking the trial court simply to deny the opposing party’s motion, a proposed order generally involves considerations beyond the prayer in your motion or response. In addition to knowing the particular relief you want, be aware of any governing requirements for an order of the sort you’re drafting. For instance, double-check whether any rules or case law prohibit or require the inclusion of any verbiage or items. Also, double-check the level of specificity required and what standard of review applies. These items will give you a frame of reference as you craft the order’s language.

Here are just a few examples of things to consider when drafting a proposed order or judgment:

- In general, summary judgment objections should be ruled upon prior to the summary judgment in order to preserve error. *E.g., Choctaw Props., L.L.C. v. Aledo Indep. Sch. Dist.*, 127 S.W.3d 235, 241 (Tex. App.—Waco 2003, no pet.). Consider adding language to your proposed summary judgment order(s) that the objections are being sustained prior to the signing of any summary judgment order. *E.g., Keeton v. Carrasco*, 53 S.W.3d 13, 23 (Tex. App.—San Antonio 2001, pet. denied) (stating in summary judgment order that objections to the summary judgment evidence “are sustained prior to proceeding with the merits of the

motion for summary judgment and severance”). Also, remember that many proposed summary judgments recite generally that the trial court is deciding the issues “[h]aving considered the motion for summary judgment, the response, the reply, the summary judgment evidence, and the arguments of counsel . . . .” If you have objected to summary judgment evidence, and particularly if the trial court has declined to expressly rule on your objections, consider the impact of this statement on your position.

- No interlocutory appeal is generally available from a trial court’s determination of a venue question, except in a multiple-plaintiff situation where the movant asserts that one or more plaintiffs cannot independently establish proper venue. TEX. CIV. PRAC. & REM. CODE §§ 15.003, 15.064. If the movant challenges venue on some grounds that are not appealable on an interlocutory basis and other grounds that allow interlocutory appeal, the trial court’s order must specify the basis for its ruling. Otherwise, the appellate courts cannot determine whether jurisdiction exists for an interlocutory appeal. *Basic Energy Servs. GP, LLC v. Gomez*, --- S.W.3d ---, 2010 WL 2770276, \*3 (Tex. App.—San Antonio July 14, 2010, no pet. h.).
- Under Texas Rule of Civil Procedure 299a, findings of fact should not be recited in a judgment, but instead should be filed as a separate document. If findings are made in the judgment and they conflict with findings filed separately under Texas Rules of Civil Procedure 297 and 298, then the latter findings control for appellate purposes. *See* TEX. R. CIV. P. 299a. However, in the absence of a conflict with findings filed separately under Rules 297 and 298, findings improperly included in a judgment still have probative value and are valid as findings. *See In re C.A.B.*, 289 S.W.3d 874, 881 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2009, no pet. h.); *In re U.P.*, 105 S.W.3d 222, 229 n. 3 (Tex.App.-Houston [14<sup>th</sup> Dist.] 2003, pet. denied).
- In granting a new trial, the trial court must set forth reasons that are clearly identified and reasonably specific. *In re United Scaffolding, Inc.*, 301 S.W.3d 661, 662 (Tex. 2010); *In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P.*, 290 S.W.3d 204, 218 (Tex. 2009). Using the rule’s language to state that a new trial is “in the interest of justice” is not sufficiently specific. *Id.*

**Tip:** As always, watch out for invited error when drafting a proposed order or judgment. To the extent that your proposed

order contains any relief adverse to you, or any other type of relief that you contest or plan to appeal/challenge, you need to preserve your opposition to that relief. To do so, there are two recognized methods: (1) make an express statement on the record when submitting your proposed order/judgment; or (2) sign the proposed order/judgment as “Agreed as to form only.” See *First Nat’l Bank v. Fotjik*, 775 S.W.2d 632, 633 (Tex. 1989); *Morse v. Delgado*, 975 S.W.2d 378, 381 (Tex. App.—Waco 1998, no pet.).

To the extent that your “express statement” is in writing accompanying a proposed order, don’t put the statement in a cover letter that may or may not make its way into the clerk’s file. Instead, file your proposed order as Exhibit A to a document entitled something like “Submission of Proposed Order,” and include your express statement in that filed document. The express statement should make clear your continued disagreement with all or specific parts of your proposed order. The express statement also should note if the proposed order is being submitted in response to a request by the trial court. For example:

Plaintiffs disagree with the findings of the jury and have filed a motion for new trial. However, the Court has indicated that it will deny the motion for new trial and has requested each party to prepare a form of proposed judgment. Accordingly, and subject to Plaintiffs’ continuing opposition, Plaintiffs hereby submit a proposed form of judgment. Plaintiffs agree only as to the form of the proposed judgment, but disagree and should not be construed as concurring with the content and result.”

See, e.g., *Fotjik*, 775 S.W.2d at, 633.

### III. QUICK: APPELLATE RESOURCES FOR THE TRIAL LAWYER

Here is a quick overview of some useful appellate resources for any lawyer handling a business torts case at the trial level:

#### A. Audio and Video of Oral Arguments

Be aware of business torts cases percolating through the Texas Supreme Court, 5<sup>th</sup> Circuit, and the United States Supreme Court. Listening to argument audio or watching argument video can bring the arguments to life in a way that briefs can’t. Get inspired, and gain insight with regard to how an

appellate court may view the claims and questions presented in your case.

#### 1. Streaming video webcasts, and post-argument audio, of Texas Supreme Court arguments

Live streaming video of oral arguments in the Texas Supreme Court are available at <http://www.stmarytx.edu/law/index.php?site=supremeCourtWebcasts>, and also can be accessed via links on the Court’s website (<http://www.supreme.courts.state.tx.us>). The video arguments are archived through the St. Mary’s School of Law website.

A schedule of upcoming oral arguments is available at <http://www.supreme.courts.state.tx.us/Opinions/Submissions.asp>. The Court also posts audio recordings (in MP3 format) of all oral arguments, usually within a few hours of the oral argument. Audio files are available at <http://www.supreme.courts.state.tx.us/oralarguments/audio.asp>.

#### 2. Post-argument audio of Fifth Circuit arguments

Audio of oral argument at the Fifth Circuit is posted on the court’s website fairly promptly. On the left side of the court’s homepage (<http://www.ca5.uscourts.gov/>), click “Oral Arg Recordings Page.” You can search the oral argument database by date range, appeal number, appeal name, or attorney name.

#### 3. Same week audio of United States Supreme Court arguments

Previously, the United States Supreme Court released audio of oral arguments at the end of each term. Beginning this term, the Court is releasing audio of oral arguments on Friday of each argument week. Check out the new releases at [http://www.supremecourt.gov/oral\\_arguments/argument\\_audio.aspx](http://www.supremecourt.gov/oral_arguments/argument_audio.aspx). Argument previews, case summaries, briefs, and other background materials can be found at SCOTUSblog (<http://www.scotusblog.com>).

#### B. Supreme Court Rules Advisory Committee Materials

To stay up-to-the-minute on proposed changes to the Texas Rules, check out the Supreme Court Advisory Committee Materials, available on the Texas Supreme Court’s website. Under “General Information” on the right-hand side of the Court’s homepage (<http://www.supreme.courts.state.tx.us>), click on “Rules and Standards.” This link will redirect you to a treasure trove of background materials regarding the Texas Rules, including transcripts of the Supreme Court Advisory Committee meetings for most years back to 1996. In addition, electronic versions of the Rules – including the Rules of Appellate Procedure, Rules of Civil Procedure, Rules of Evidence, Code of Judicial Conduct, Court Reporters Rules, and Disciplinary Rules of Professional Conduct

– are available here (<http://www.supreme.courts.state.tx.us/rules/rules.asp#advisories>)

### **C. E-notices in the Texas Courts of Appeals**

E-filing is in the works in the Texas appellate court system. But even now, there are valuable court tools available online. For example, the Texas appellate courts make their dockets available online. You can sign up to receive automatic notices by e-mail whenever the docket in a particular case is updated.

This is a terrific way to follow business torts cases as they work their way through the courts of appeals. Even if you are not directly involved in an appeal, you are permitted to sign up for e-notices, which allows you to track activity in appeals that may impact cases you're working on. For example, if you cite a "hot off the presses" opinion in a motion or brief, sign up for e-notices on the case to track any further developments on rehearing or higher review.

These notices are not foolproof. Sometimes, automatic notices are generated when a minimal, technical, "housekeeping" kind of change is made. Also, as with any other computerized record, errors can be made and omissions can occur. That said, the automatic e-notices are an efficient tool to keep apprised of activity in pending appeals.

#### **1. Dallas Court of Appeals**

The Dallas Court of Appeals was one of the first Texas appellate courts to develop a website, which is run through Courtstuff (<http://courtstuff.com/5th/>). In order to sign up for e-notices, open the online docket for the particular case you are interested in (using the "Search" and "Search Case Information" features). Scroll down to the bottom of the case's docket information, where there are several listed options, including "[Subscribe for vNotices! on this case \(Must Register first! - see below\).](#)" If you previously registered, just click on the link and send the e-mail that pops up. If you are not registered, click on the link further down that says, "[Register an email address so Subscribe for vNotices!](#)" and follow the directions.

#### **2. Other courts of appeals and Texas Supreme Court**

The other Texas courts of appeals and the Texas Supreme Court use a unified system called CaseMail in order to provide e-notices. There is a "CaseMail" area on the right-hand side of these courts' homepages, from which you can launch various features. Alternatively, you can sign up for CaseMail via the docket page for the particular case you are interested in. At the top (right-hand side) of each docket page there is a "CaseMail" link. You have to register for CaseMail one time, but that registration will be good across the CaseMail system thereafter.

### **D. Jury Instructions and Questions**

In addition to the Texas Pattern Jury Charges, other pattern instructions and questions are available online. The Fifth Circuit Pattern Jury Instructions are available online at <http://www.lb5.uscourts.gov/juryinstructions/>. Instructions cover such diverse subjects as RICO claims, employment claims, the differences between employees and independent contractors, the definitions of debt and equity, and the distinction between business loss and hobby loss. In addition, the Fifth Circuit has provided, on the same webpage, a very helpful list of links to other circuits' pattern/model jury instructions.

Although not officially endorsed by the State Bar of Texas, the State Bar's Oil, Gas, and Energy Resource Law Section has promulgated a set of Oil & Gas Pattern Jury Instructions and Questions. These can be accessed on the Section's website at <http://www.oilgas.org/DrawOnePage.aspx?PageID=13>.

Finally, though not part of the jury charge, there is a "Texas Uniform Jury Handbook" prepared by the Texas Young Lawyers Association and published by the State Bar of Texas. If you're curious about what jurors are learning about jury service (including explanations on events at trial, such as jury instructions), check out the adaptation of the brochure on the Harris County District Court website: <http://www.justex.net/JurorInfo.aspx>. Or, take a look at the information provided for jurors at Texas Judiciary Online (<http://www.courts.state.tx.us/tjc/jury-home.asp>).

### **E. Online Information About the Texas Courts of Appeals**

The Texas appellate courts' websites also provide a wealth of information about the various courts' internal operating procedures and preferences. Most, if not all, of the Texas appellate courts' homepages contain links to:

- the court's Internal Operating Procedures;
- information about courtesy e-copies of briefs and other filings;
- information about applicable fees,
- a list of counties within that court's jurisdiction; and
- information about the court's current justices.

To the extent that a Texas court of appeals has local rules, those will be available on the court's website, as well.

In addition, different courts of appeals include distinctive information on their websites.

#### **1. Houston First Court of Appeals**

This court provides information and preferred procedures regarding "Filing Documents (and Motions)," available at [http://www.1stcoa.courts.state.tx.us/rules/mot\\_sheet.asp](http://www.1stcoa.courts.state.tx.us/rules/mot_sheet.asp), or by clicking "Filing

Documents” under “Practice Before the Court” on the right-hand side of the court’s homepage. The Court also provides tips on common problems with civil filings, available at <http://www.1stcoa.courts.state.tx.us/rules/problems.asp>, or by clicking “Civil Filing Problems” under “Practice Before the Court.”

## **2. Fort Worth Court of Appeals**

This court provides a worksheet for lawyers filing original proceedings (such as mandamus). The worksheet is available at <http://www.2ndcoa.courts.state.tx.us/orig.htm> or by clicking “Original Proceedings” under “Practice Before the Court” on the right-hand side of the court’s homepage. In addition, this court provides its docket activity statistics going back to Fiscal Year 1997. The link (<http://www.2ndcoa.courts.state.tx.us/docket.asp>) is available on the court’s homepage on the right-hand side under “About the Court.”

## **3. Austin Court of Appeals**

This court does not have local rules applicable to lawyers, but has posted a memorandum online detailing its general procedures and guidelines. The memorandum is available at <http://www.3rdcoa.courts.state.tx.us/rules/procedures.asp>, or by clicking “Local Practices” under “Practice Before the Court” on the right-hand side of the court’s homepage.

## **4. San Antonio Court of Appeals**

This court has drafted a seventeen-page document describing its internal operating procedures in more detail than most of the appellate courts. This is a wealth of information that you should mine if you have an appeal in this court. The IOPs are available at <http://www.4thcoa.courts.state.tx.us/forms/iopforcases.pdf>, or by clicking “Procedures-IOPs” under “Practice Before the Court” on the right-hand side of the court’s homepage. In addition, the court has a short – but important – list of Court Preferences. The preferences are available at <http://www.4thcoa.courts.state.tx.us/rules/preferences.asp> or by clicking “Court Preferences” under “Practice Before the Court” on the homepage.

## **5. Dallas Court of Appeals**

This court has a growing list of briefs and oral arguments posted on its site. In the middle of the court’s homepage (<http://courtstuff.com/5th/>), there is a link to “Electronic copies of selected briefs and oral arguments are available.”

## **6. Texarkana Court of Appeals**

This court does not have local rules, but has published its internal policies regarding the number of copies it prefers and its practices with regard to motions for extensions of time. The policies are available online at <http://www.6thcoa.courts.state.tx.us/rules/tips.asp>, or by clicking “Tips & Guidelines”

under “Practice Before the Court” on the right-hand side of the court’s homepage. In addition, the court’s Centennial History is available by clicking the Centennial History link under “General Information” on the right-hand side of the court’s homepage.

## **7. Amarillo Court of Appeals**

This court has valuable videos from the court’s own “Nuts and Bolts” seminar. There is a video on briefing, as well as a Q&A panel. In addition, the website has written materials on briefing, oral argument, and processing a case. Although these materials are tailored for the Amarillo Court of Appeals, they are useful resources in any Texas court of appeals. The video and written materials are available at <http://www.7thcoa.courts.state.tx.us/video.asp> or by clicking “Nuts and Bolts Seminar” under the “Practice Before the Court” section on the right-hand side of the court’s homepage.

## **8. El Paso Court of Appeals**

The court’s internal operating procedures contain detailed information about its mediation program, and a useful insight with regard to the court’s use of memorandum opinions. The IOP’s are accessible by the link under “Practice Before the Court” on the right-hand side of the court’s homepage (<http://www.8thcoa.courts.state.tx.us/>).

## **9. Beaumont Court of Appeals**

This court helpfully lists court holidays for the current and next year online, under the “About the Court” heading on the right-hand side of the court’s homepage (<http://www.9thcoa.courts.state.tx.us/>).

## **10. Waco Court of Appeals**

This court provides a great deal of information about its oral argument practices and procedures. Most of the information can be located through the “Oral Argument” link under “Practice Before the Court,” but additional information is provided through the “FAQs” link under “About the Court,” both on the homepage’s right side (<http://www.10thcoa.courts.state.tx.us/>).

## **11. Eastland Court of Appeals**

This court provides information about oral argument practices in appeals that have been transferred to Eastland from other courts of appeals. The details are in the court’s FAQs page at <http://www.11thcoa.courts.state.tx.us/court/faq.asp>.

## **12. Tyler Court of Appeals**

This court has drafted some “Helpful Tips and Guidelines” to aid lawyers in the absence of local rules. My personal fave is Tip #7 – “Extension Motions: When Requesting Brief Extensions, Give the Court More than a Handful of Kibbles N’ Bits.” Check these out at <http://www.12thcoa.courts.state.tx.us/court/tips.asp>, or by clicking “Tips & Guidelines” under “Practice Before the Court” on the right-hand side of

the court's homepage. The court also provides mediation information under the same "Practice Before the Court" section. The court's mediation questionnaire is available on the "Forms" page.

### **13. Corpus Christi-Edinburg Court of Appeals**

Be aware that, although this court used to have local rules, the court suspended them and now operates only under the Texas Rules of Civil Procedure. This, and other useful tidbits about the court's policies and procedures, can be found in the IOPs, located through the link under the "Practice Before the Court" section of the homepage's right side.

### **14. Houston Fourteenth Court of Appeals**

Detailed information about this court's appellate mediation program is located at <http://www.14thcoa.courts.state.tx.us/rules/adr.asp>. You also can pull up this page by clicking "Mediation ADR" under "Practice Before the Court" on the right-hand side of the court's homepage.

## **IV. SLOW: SELECTED CASES IN DETAIL**

Let's conclude with a more detailed look at some of the more important (or perhaps just more interesting) appellate business torts opinions from the past year.

### **A. Jurisdictional 101 for Corporations**

This year has seen the issuance of several opinions – state and federal – addressing jurisdictional issues relating to corporate entities. Earlier this year, the Texas Supreme Court issued two opinions regarding personal jurisdiction over corporations:

#### **1. Purposeful availment (or not) through use of a third-party shipper that will travel through Texas to a non-Texas recipient**

Zinc Nacional, a Mexican company, sold its paper product to customers located in New Mexico, Nevada, and Florida. *Zinc Nacional, S.A. v. Bouché Trucking, Inc.*, 308 S.W.3d 395, 396 (Tex. 2010) (per curiam). Zinc sent a shipment to a New Mexico customer through a shipper, C.H. Robinson. *Id.* C.H. Robinson trucked a load of paper from Zinc's facility in Monterrey, Mexico to Laredo, Texas, under a purchase order specifying the following shipping terms: "F.O.B. Mid-Bridge Laredo." *Id.* A Texas shipper, subcontracted by C.H. Robinson, picked up the load in Laredo for trucking to New Mexico. *Id.* at 396-97. During this transportation, the trailer rig overturned in Texas and injured the driver, who sued the Texas shipper. *Id.* at 397. The Texas shipper filed a third-party petition against Zinc Nacional, which challenged personal jurisdiction. *Id.*

The fact that a seller knows his goods will end up in the forum state does not support jurisdiction unless the seller also made attempts to market its goods there. 308 S.W.3d at 397. Personal jurisdiction requires that

the merchant directed sales *to* the forum state, not merely *through* it. *Id.* at 397-98. Accordingly, a merchant's decision to ship its goods with a third-party shipper that will travel through Texas to a non-Texas recipient does not, by itself, constitute purposeful availment to support the exercise of personal jurisdiction. *Id.* at 398.

Zinc Nacional had three or four customers for other products in Texas, and received some raw materials from Texas. 308 S.W.3d at 398. However, these facts were unrelated to the paper being shipped to the New Mexico customer, and thus, were irrelevant to the question of specific jurisdiction. *Id.* The evidence established that Zinc Nacional did not have offices, employees, agents, or representatives in Texas and did not advertise or market its paper products in Texas. *Id.* Accordingly, the Court reversed the court of appeals' judgment on specific jurisdiction. *Id.* The Court remanded the case to the court of appeals for consideration of the question of general jurisdiction, which had been raised but not addressed below. *Id.* The Court noted that the facts unrelated to the paper shipment might have some bearing on the existence of general jurisdiction. *Id.*

#### **2. Personal jurisdiction through use of a distributor-intermediary to intentionally target Texas as a marketplace**

A foreign manufacturer sold its products in Texas through a Texas distributor. *Spir Star AG v. Kimich*, 310 S.W.3d 868, 871 (Tex. 2010). Does the use of that distributorship insulate the manufacturer from the reach of a Texas court when one of the products injures a Texas citizen? In a unanimous opinion, the Court held that a manufacturer is subject to specific personal jurisdiction in Texas when it intentionally targets Texas as the marketplace for its products, and that using a distributor-intermediary for that purpose provides no haven from the jurisdiction of a Texas court. *Id.* at 874. In the case at hand, the Court agreed with the court of appeals that finding personal jurisdiction over the foreign manufacturer comports with traditional notions of fair play and substantial justice. *Id.* at 878-79.

#### **3. The principal place of business for purposes of federal diversity jurisdiction is measured by the "nerve center" test. *Hertz Corp. v. Friend*, 130 S.Ct. 1181 (2010).**

The United States Supreme Court decided the proper standard to apply in determining a company's "principal place of business" for purposes of federal diversity jurisdiction. A company's principal place of business for diversity purposes can be only one state. However, prior to *Friend*, various circuits used different tests to determine the identity of that state: (1) the place of operations test; (2) the nerve center

test; (3) the center of activity test; and (4) the totality of corporate activities test.

The Court unanimously adopted the nerve center test, defining a corporation's principal place of business as the place where its "high level officers direct, control, and coordinate the corporation's activities." *Id.* at 1192. This "normally [will] be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, *i.e.*, the "nerve center," and not simply an office where the corporation holds its board meetings (for example, attended by directors and officers who have traveled there for the occasion)." *Id.* The Court acknowledged that this approach is "imperfect," (*id.*), but adopted it based on the diversity statute's language, the desire for "administrative simplicity" in the jurisdictional test, and the statute's legislative history. *Id.* at 1192-94.

The impact was immediately apparent. Hertz Corporation is incorporated in Delaware, with its corporate headquarters in New Jersey. However, the company has the highest percentage of rental facilities in California. Accordingly, the highest percentage of rentals, revenue generation, and employees are located in California. The "place of operations" test applied by the California district court (to which Hertz had removed the case under diversity jurisdiction) and the Ninth Circuit established Hertz's "principal place of business" as California, which destroyed diversity. The "nerve center" test employed by the Supreme Court would shift the principal place of business to New Jersey, which the evidence established was Hertz's center of direction, control, and coordination, and corporate headquarters. *Id.* at 1195. However, in an effort to allow Friend to present evidence under the "new" standard, the Court declined to make this ultimate finding and remanded the case for further proceedings. *Id.*

## **B. Expert and Other Evidence**

In cases in which the *Robinson* factors are difficult to apply, it may be appropriate to analyze whether the expert's opinion actually fits the facts of the case, rather than focusing entirely on the reliability of the underlying technique used to generate the challenged opinion. *TXI Transp. Co. v. Hughes*, 306 S.W.3d 230, 235 (Tex. 2010). In *TXI*, several members of plaintiff's family were killed when their vehicle collided with a gravel truck. *Id.* at 233. The Court considered the reliability of an accident reconstruction expert's testimony. The Court noted that the factors enunciated in *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995), are non-exclusive and are particularly difficult to apply in vehicular accident cases involving accident reconstruction testimony. *Id.* at 235. In such cases, rather than focus entirely on the reliability of the

expert's underlying technique, it may be more appropriate for a court to analyze whether the expert's opinion actually fits the facts of the case. *Id.*

The Court's opinion goes on to provide an in-depth analysis of the supporting arguments and objections to the accident reconstruction expert's opinion. *Id.* at 235-39. The opinion also contains an interesting comparison of two earlier decisions: *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32 (Tex. 2007) (concluding that a complaint about expert's testimony went to its weight, not its admissibility), and *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W. 3d 897 (Tex. 2004) (concluding an expert's testimony was unreliable because it was based on a subjective interpretation of the facts rather than scientific analysis). *Id.* at 239-40.

Justice Wainwright dissented from this portion of the Court's opinion (*i.e.*, the part regarding expert testimony). His dissent was based on his "serious concerns about the admissibility of the expert's causation testimony because, among other reasons, the expert has not sufficiently addressed the [conflicting] eyewitness testimony." *Id.* at 245 (Wainwright, J., dissenting).

Also in *TXI*, the Court determined that the evidence admitted at trial regarding the illegal immigrant status of a gravel truck driver amounted to an appeal to racial and ethnic prejudices that constituted harmful error. 306 S.W.3d at 245. The Court first examined whether the status was relevant: (1) to the negligent hiring/supervision claim with respect to the Federal Motor Carrier Safety Regulation Act (FMCSRA), which requires carriers to ensure that prospective drivers have a commercial license, have a working knowledge of English, and possess the training or experience to safely operate a commercial vehicle; or (2) as impeachment evidence. *Id.* at 240-42. The Court concluded that the status was not relevant in either of these areas. *Id.*

As for harm, the Court examined the extent, quality, and quantity of references to the driver's illegal status in the trial overall, as well as his placement in the presentation of the case. 306 S.W.3d at 242-45. The Court agreed with the dissent in the court of appeals that the "repeated injection into the case of Rodriguez's nationality, ethnicity, and illegal-immigrant status, including his conviction and deportation, was plainly calculated to inflame the jury against him." *Id.* at 244. Accordingly, the Court concluded that the admission of the evidence was harmful and remanded the case for a new trial. *Id.* at 245.

**C. Availability of Common-Law Claims in a Sexual Harassment Suit**

A claim for sexual harassment by a co-worker under the Texas Commission on Human Rights Act (TCHRA) abrogates common-law negligence claims against an employer for allowing the co-worker's tortious or criminal conduct to occur. *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 803 (Tex. 2010). Put another way, a plaintiff may not recover negligence damages against her employer for harassment covered by the TCHRA. *Id.* at 798-99.

In *Waffle House*, the Court took some pains to identify the boundaries of its decision:

- The Court will construe the enactment of a statutory cause of action as abrogating a common-law claim if there exists “a clear repugnance” between the two causes of action. *Id.* at 802.
- The Court noted that, in the present case, “the alleged negligence is rooted in facts inseparable from those underlying the alleged harassment.” *Id.* at 799.
- The TCHRA claim and the common law claims involved inconsistent procedures, standards, elements, defenses, and remedies. *Id.*
- TCHRA does not foreclose an assault-based negligence claim arising from independent facts unrelated to sexual harassment. *Id.*
- *Waffle House* does not bar a tort claim against the harasser/assailant individually. *Id.* The Court did not address the question of whether the plaintiff had a viable claim against the co-worker who allegedly harassed her. *Id.* at 803.

**D. Forum Selection Clauses in Multi-Signatory Agreements**

A forum-selection clause in an exhibit that specifically referenced only one defendant-signatory applied to the other defendant, who also was a signatory to the contract. *In re Lisa Laser USA, Inc.*, 310 S.W.3d 880 (Tex. 2010).

HealthTronics entered into a distribution agreement with a German medical laser manufacturer (“Lisa Germany”) and its affiliated California distributor (“Lisa USA”). 310 S.W.3d at 881. The distribution agreement included separately attached exhibits; Exhibit F contained a forum-selection clause. *Id.* at 882. The clause specified Alameda County, California courts as having exclusive jurisdiction and venue “over any dispute arising out of this agreement . . .” *Id.* However, the preamble to Exhibit F provides that “[t]he following standard terms and conditions of sale apply to sales by Seller [Lisa Laser USA, Inc.] to HealthTronics, Inc. . . . pursuant to the Distribution Agreement between the parties, a copy of which is

attached hereto and incorporated herein by this reference . . .” *Id.* The defendants moved to dismiss the HealthTronic’s suit in Travis County, but the motion was denied, as was a subsequent mandamus petition in the court of appeals. *Id.* at 882-83.

The Court noted that neither the distribution agreement (without exhibits) nor Exhibit F could be considered separate agreements. 310 S.W.3d at 885. Accordingly, the Court read the forum-selection clause’s reference to “this agreement” to refer to the entire distribution agreement, and rejected HealthTronics’ argument that the forum-selection clause was limited to claims specifically related to “sales by Seller . . . to HealthTronics.” *Id.* at 885-86.

The Court also rejected HealthTronics’ argument that the clause should not apply to Lisa Germany because it is not mentioned in Exhibit F. 310 S.W.3d at 886. The Court noted that HealthTronics’ claims against Lisa Germany were for breaches of the distribution agreement, to which Lisa Germany was a signatory and which incorporated Exhibit F. *Id.* The Court stated that HealthTronics could not claim that Lisa Germany owed obligations under the distribution agreement while simultaneously claiming that the forum-selection clause did not apply to those claims. *Id.* at 886-87. The Court did not provide an explanation as to why such a position was necessarily inconsistent or why HealthTronics’ position on the limited scope of the forum-selection clause would “defeat” the contract. *See id.* Because the Court determined that the forum-selection clause applied to the claims and parties at issue, the Court conditionally granted mandamus relief. *Id.* at 887.

**E. Premises Liability Issues**

Smith pursued a premises liability claim against Del Lago Partners, Inc. after he received a skull fracture and brain damage inflicted by another patron at a bar in the Del Lago resort. *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 766-67 (Tex. 2010). Two main questions arose: (1) did Del Lago have a duty to protect invitees from criminal acts by third parties in this case; and (2) was it proper to try the plaintiff’s case as a premises liability case rather than a negligent activity case?

**1. Duty when the owner knows or has reason to know of a risk of harm to invitees that is unreasonable and foreseeable**

Del Lago contended that it had no duty to protect one bar patron from an assault by another. 307 S.W.3d at 767. Generally, a premises owner has no duty to protect invitees from criminal acts by third parties. *Id.* However, an exception exists when the owner knows or has reason to know of a risk of harm to invitees that is unreasonable and foreseeable. *Id.*

The Court noted that the factors examined in a previous case (*Timberwalk Apts., Partners, Inc. v. Cain*, 972 S.W.2d 749 (Tex. 1998)) were not the exclusive reasons that a criminal act might be foreseeable. 307 S.W.3d at 768. The nature and character of the premises can make criminal activity more foreseeable. *Id.* In addition, criminal misconduct may be foreseeable because of immediately preceding conduct. *Id.* at 769. The Court found that an hour and a half of verbal and physical confrontations provided actual and direct knowledge of an imminent violent brawl between bar patrons which created a duty to protect one patron from being assaulted by another. *Id.*

In this case, the fight occurred in a bar at closing time following ninety minutes of heated discussions and shoving matches between intoxicated patrons. *Id.* at 766-67. Del Lago observed this behavior, but did not attempt to reduce it, and indeed, continued to serve alcohol to the patrons involved. *Id.* at 766. The Court held that a duty arose to protect the plaintiff-patron from an assault “because Del Lago had actual and direct knowledge that a violent brawl was imminent between drunk, belligerent patrons and had ample time and means to defuse the situation.” *Id.* at 769. The Court noted that the duty extended only to reduce or eliminate an *unreasonable* risk of harm, and found that, under the circumstances, the plaintiff-patron faced an unreasonable risk of harm. *Id.* at 770. The Court also considered the burden of imposing the duty on Del Lago, which is a “huge, multi-use facility” that provided private security throughout the resort through a trained security force. *Id.*

The Court also found the evidence legally sufficient to support findings of breach and causation. 307 S.W.3d at 771-72. The majority rejected the argument that the judgment should be reversed because the plaintiff-patron was aware of the risks and/or was himself negligent. *Id.* at 772-74. The majority pointed out that assumption of the risk is no longer a complete defense to tort liability, and that Texas’ proportionate responsibility statute precludes recovery only if the plaintiff’s percentage of responsibility is greater than 50 percent. *Id.* at 772.. The plaintiff’s awareness of the risk is relevant to determine his comparative negligence, but is not a complete bar to recovery. *Id.* The jury found that Del Lago was 51 percent negligent and that the plaintiff-patron was 49 percent negligent. *Id.* As for causation, the majority detailed the evidence supporting the jury’s finding of causation. *Id.* at 774-75.

The Court also spent time identifying what holdings are *not* being made (307 S.W.3d at 767, 769, 770, & 774):

- Not holding that a bar proprietor always or routinely has a duty to protect patrons from other patrons;

- Not holding that a duty to protect bar clientele necessarily arises when a patron becomes inebriated or when words are exchanged between patrons that lead to a fight;
- Not holding that Del Lago’s duty arose because of prior similar conduct, but instead because it was aware of an unreasonable risk of harm at the bar on that very night;
- Not announcing a general rule about duty, but rather a holding on the facts of the case at hand; and
- Not holding that a landowner can never avoid liability as a matter of law in cases of open and obvious dangers.

Justice Hecht dissented (joined by Justice Johnson). Justice Hecht characterized the majority opinion as holding “that a possessor of land must protect an entrant from a potentially dangerous condition that any reasonable person could clearly see, fully appreciate, and easily avoid.” 307 S.W.3d at 796 (Hecht, J., dissenting). Instead, Justice Hecht would have rendered judgment for Del Lago under section 343A(1) of the Restatement (Second) of Torts, which provides that a possessor of land is not liable to invitees for physical harm caused by any activity on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness. *Id.* at 797. Justice Johnson (joined by Justice Hecht) provided additional discourse on these issues in his own dissent. *Id.* at 777-87 (Johnson, J., dissenting).

Justice Wainwright also dissented, finding that the case presented a negligent activity case and called for different considerations in determining duty and breach. 307 S.W.3d at 787, 791 (Wainwright, J., dissenting).

## **2. Claims of inadequate security are treated as premises liability claims**

The Court also addressed whether the case was properly tried as a premises liability case, rather than a negligent activity case. 307 S.W.3d at 776. Smith asserted both theories against Del Lago, but Del Lago objected to the submission of a negligent activity theory. *Id.* at 775. Putting aside error preservation issues, the majority noted that the Court has repeatedly treated cases involving claims of inadequate security as premises liability cases. *Id.* at 776. Though the lines between the two types of theories are sometimes unclear, negligent activity encompasses a malfeasance theory based on the owner’s affirmative, contemporaneous conduct causing the injury, while premises liability encompasses a nonfeasance theory based on the owner’s failure to take measures to make the premises safe. *Id.* Smith’s primary complaint was Del Lago’s nonfeasance: its failure to remedy an

unreasonably dangerous condition for ninety minutes and failure to react promptly once the fight started. *Id.* Additionally, Smith was able to argue the negligent-activity-type aspects of the case under the jury question given, which asked if Del Lago failed to exercise ordinary care to make an unreasonably dangerous condition safe. *Id.* at 776-77.

As noted above, in his dissent, Justice Wainwright explained his view that the case presented a negligent activity case and did not support the premises liability recovery authorized by the majority. 307 S.W.3d at 791 (Wainwright, J., dissenting).

## **F. Jury Questions and Instructions**

In *Regal Fin. Co. Ltd. v. Tex Star Motors*, the Texas Supreme Court threw some jury charge curveballs. --- S.W.3d ---, 53 Tex. Sup. Ct. J. 1034, No. 08-0148 (Aug. 20, 2010). Eight justices formed the majority, while Justice Johnson dissented.

The opinions involve a UCC Article 9 claim and a jury instruction on the term “commercially reasonable.” Article 9 requires a secured creditor to prove it disposed of the collateral in a commercially reasonable manner before the creditor may recover any deficiency. 53 Tex. Sup. Ct. J. at 1036. Article 9 provides several non-exclusive examples of commercially reasonable dispositions, including a disposition “in conformity with reasonable commercial practice among dealers in the type of property that was the subject of the disposition[s].” *Id.* The question on the Article 9 claim provided only one instruction on the meaning of commercially reasonable: “A sale is commercially reasonable if it conforms to reasonable commercial practices among dealers in the type of property that was the subject of the sale.” *Id.*

There were no proper objections to the jury instruction at issue. Accordingly, the Court did not consider or decide whether the instruction given was proper or whether additional instructions were required in order to properly and fully instruct the jury. Instead, Texas law required that the sufficiency of the evidence be measured against the definition as it was given. But, the threshold question was whether the definition limited the jury to “conformity with industry practice” as the sole method of establishing “commercially reasonable” in this case. *Id.* at 1036.

The majority opinion answered “no.” 53 Tex. Sup. Ct. J. at 1036-38. Furthermore, in its analysis of the sufficiency of the evidence, the Court used other legal standards for “commercial reasonableness,” even though none of those standards were included in the charge. *Id.* at 1038-40. The Court’s holdings on these two points have broader implications with regard to Texas jury instructions.

### **1. By using the term “if” instead of the phrase “only if,” the instruction did not limit the jury**

### **to the stated method in determining whether the sale was commercially reasonable.**

“If” does not mean the same thing as “only if” even though there is only one definition/example given in the instruction. *See* 53 Tex. Sup. Ct. J. at 1037-38. This holding has far-reaching implications because the Texas Pattern Jury Charge uses “if” to define many terms. *See, e.g.*, PJC §§ 101.4, 101.5, 101.24, 101.25, 101.26, 101.27, 101.28, 101.29, 101.30, 101.31, 101.32, 101.33, 101.42.

For example, the PJC defines “apparent authority” as follows:

Apparent authority exists ***if*** a party (1) knowingly permits another to hold himself out as having authority or, (2) through lack of ordinary care, bestows on another such indications of authority that lead a reasonably prudent person to rely on the apparent existence of authority to his detriment.

PJC § 101.4 (emphasis added); *see also Regal Fin.*, 53 Tex. Sup. Ct. J. at 1043 (Johnson, J., dissenting). Under the majority opinion in *Regal*, this instruction would not limit the jury to the listed methods in determining whether apparent authority exists. If you want the appellate courts to review your case and the jury’s findings under the standard that these are the only two ways that the jury can find apparent authority, do you now need to object in the trial court, propose a substantially correct instruction, and cite to *Regal*? Under *Regal*, perhaps the instruction should say “Apparent authority exists ***only if*** a party . . .” or “Apparent authority ***means that*** a party ***either*** . . . ?” It also will be interesting to see whether *Regal* spurs any revisions to these types of instructions in the PJC.

### **2. If the evidence is sufficient to support any of the legally permissible methods of proving commercial reasonableness, the evidence may be sufficient even if the jury was never instructed on those legal standards.**

It also appears to me that the majority made the following determination: Where the jury is instructed on only one of several methods for determining commercial reasonableness, and the charge (without objection) does not instruct that the jury is limited to the stated method, the evidence is sufficient to support a finding of commercial reasonableness if there is evidence sufficient to support any of the legally permissible methods of proving commercial reasonableness, even if the legal standards for commercial reasonableness are beyond the common understanding of laypeople and the jury was never instructed on those legal standards.

After deciding the meaning of the “commercially reasonable” definition given to the jury, the majority turned to the question of whether the evidence was

sufficient to support the jury's finding. *Regal Fin.*, 53 Tex. Sup. Ct. J. at 1038. In determining that the evidence was sufficient to support the jury's finding of commercial reasonableness, the majority cited various legal factors that courts have relied upon to find commercial reasonableness, as well as the policies underlying Article 9. *Id.* at 1038-39. However, as the dissent pointed out, Texas law did not allow the jury to use any of that information in reaching its decision unless: (1) the charge instructed the jury that such law applied; or (2) the law was injected into the trial through evidence, such as expert testimony. *Id.* at 1044 (Johnson, J., dissenting).

The charge did not instruct the jury on any standard for commercial reasonableness other than compliance with industry practice, and there was no expert testimony or other evidence telling the jury about any other way (*i.e.*, other factors or policies) to establish commercial reasonableness. *See id.* at 1044-45. For example, Regal did not have a qualified expert witness testify as to what were reasonable commercial practices among dealers in the same type of property that Regal was liquidating, or that Regal's actions conformed to such practices. *Id.* at 1045. Thus, regardless of whether "if" means "only if," the dissent concluded that the charge functionally gave the jury – who had no common understanding of the legal standards applicable to "commercially reasonable" – only one way to find commercial reasonableness. *Id.*

Nevertheless, because the charge did not *limit* the jury to the stated method, the majority examined the other methods available at law when it analyzed whether the evidence was sufficient to support the "commercially reasonable" finding. *Id.* at 1038-39 (majority op.).

### **G. Fiduciary Duty Damages**

When a partner in a business breaches his fiduciary duty by fraudulently inducing another partner to buy out his interest, the consideration received by the breaching party for his interest in the business is subject to forfeiture as a remedy for the breach, in addition to other damages that result from the tortious conduct. *ERI Consulting Eng'rs, Inc. v. Swinnea*, --- S.W.3d ---, 53 Tex. Sup. Ct. J. 683 (May 07, 2010).

### **H. Punitive Damages**

Several important punitive damages decisions issued in 2010.

#### **1. Excessive awards in violation of due process**

In *Bennett v. Reynolds*, punitive damages were awarded against a corporation and its president (Bennett) for conversion, with malice. 315 S.W.3d 867, 871 (Tex. 2010). The judgment awarded compensatory damages of approximately \$5000.00, and awarded exemplary damages of \$250,000 against Bennett and \$1 million against the Corporation. *Id.*

The jury's additional finding that the corporation and president had committed felony theft triggered the felony exception to the exemplary damages cap. *Id.* at 872. The question remained as to whether the exemplary damages award violated due process.

Three factors assist a court in identifying "unconstitutionally excessive" punitive damages awards: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the plaintiff's actual or potential harm and the punitive damages amount; and (3) the difference between the punitive damages awarded and civil penalties authorized or imposed in comparable cases. 315 S.W.3d at 873 (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996)). Reprehensibility is the most important indicator of a punitive damages award's reasonableness. *Id.* at 874. Reprehensibility is itself broken down into five sub-factors, only one of which was present in this case. *Id.* at 874 (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003)), 877.

In examining reprehensibility, the Court addressed the threshold question of scope. Could Bennett's actions beyond the conversion itself factor into the reprehensibility analysis? 315 S.W.3d at 874. To the extent that Bennett's alleged extra-conversion misdeeds related back to the underlying theft and sought to extend and exacerbate harm to the plaintiff, the acts could count toward reprehensibility. *Id.* at 875. Although the inquiry "should center on the unsavoriness of the acts, not the actor," it can include, to some extent, surrounding circumstances beyond the underlying tort. *Id.* The Court referenced acts that were "sufficiently entwined with the theft," and then provided an analysis of which extra-conversion acts were properly considered in determining reprehensibility in the case at hand. *Id.* at 875-77.

The Court then examined the ratio between compensatory and exemplary damages. The ratios in this case were 47:1 as to Bennett and 188:1 as to the corporation. 315 S.W.3d at 869. The Court made clear that a 1:4 ratio would not be rigidly applied as an immovable ceiling, and identified two Fifth Circuit cases upholding triple-digit ratios post-*State Farm*. *Id.* at 879. However, the Court found the facts of the present case distinguishable from those opinions and not meaningfully distinguishable from *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299 (Tex. 2006), in which the Court found a ratio of 1:4.33 unconstitutional. *Bennett*, 315 S.W.3d at 878-79. Accordingly, the Court held that the exemplary damages awards were unconstitutionally excessive, and remanded to the court of appeals for consideration of the amount of a suggested remittitur. *Id.* at 880.

## 2. Reduction of punitive damages on remand

When an appellate court reduces an economic damages award, and the mandate orders the reduction of the economic damages award but does *not* expressly address a proportionate reduction in punitive damages, the lower court still is required to reduce the punitive damages award in compliance with the statutory cap. *In re Columbia Med. Ctr. of Las Colinas*, 306 S.W.3d 246, 247 (Tex. 2010) (per curiam). In the appeal of the underlying case, the Texas Supreme Court reduced the amount of economic damages awarded, but did not expressly address the amount of punitive damages. *Id.* Nevertheless, the statute capping punitive damages as measured against economic damages requires a reduction in punitive damages as a matter of law. *Id.* at 248. In a *per curiam* opinion, the Court held that, regardless of whether an appellate court judgment expressly commands it, trial courts “must give effect to statutory caps on damages when the parties raise the issue.” *Id.*

This last phrase, “when the parties raise the issue,” indicates that there may be room for waiver. In the case at hand, after the Supreme Court’s mandate issued, the defendant tendered payment to the plaintiffs, subtracting from the original judgment the amount of loss-of-inheritance damages (which had been reversed by the Supreme Court) and also reducing the punitive damages amount proportionately. 306 S.W.3d at 247. The plaintiffs refused to accept the payment. *Id.* At that point, the defendant moved the trial court to enter a modified final judgment that would effectuate the Supreme Court’s mandate by reducing the economic damages award appropriately *and* by reducing the punitive damages award to twice the amount of the economic damages award that had been affirmed, plus interest. *Id.* The trial court denied the motion after a hearing, and this order was the subject of the current mandamus. *Id.*

In the mandamus, the Court concluded that, to give full effect to the Court’s earlier judgment vacating a portion of economic damages, the trial court was required to reduce the punitive damages award in compliance with the statutory cap. 306 S.W.3d at 248. By failing to do so, the trial court abused its discretion. *Id.* Because the issue arose after an appeal of the final judgment in the case, the Court concluded that no adequate remedy by appeal existed, and conditionally granted a writ of mandamus. *Id.*

## V. CONCLUSION

I hope you’ve enjoyed this dance through recent appellate opinions affecting trial lawyers and business tort cases. When you’re out there on the dance floor without me, don’t forget to breathe, stand up straight, and at some point, have some fun!

