

## Texas Supreme Court advisory

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### **ORDERS AND OPINIONS ISSUED AUGUST 29, 2008 ... finally**

Thirty-five opinions in 20 cases. The record is 36 writings in 24 cases, set July 9, 1997.

LINKS TO FULL-TEXT OPINIONS FOLLOW SUMMARIES.

NOTE: *Summaries are prepared by the Court's staff attorney for public information and reflect his judgment alone on facts and legal issues. These summaries are not part of the Court's opinion in the case.* Links are to Adobe's PDF format (duplication of the document) and to HTML documents (rendition). [Click here to download a free Adobe Reader.](#)

[AUGUST 29 ORDERS](#) (in HTML)

[Decisions in cases \(motions, requests, etc.\) from August 21 through Wednesday](#) (PDF)

### **OPINIONS**

04-0575

Columbia Medical Center of Las Colinas Inc. v. Athena Hogue, et al.  
from Dallas County and the Fifth District Court of Appeals, Dallas

For petitioner: R. Brent Cooper, Dallas

For respondents: Eric D. Pearson, Dallas

Principal issues in this wrongful death case are (1) whether separate submission of a contributory negligence question, after the jury found negligence and gross negligence and awarded damages, was reversible error; (2) whether the court of appeals applied the proper review standard for legal sufficiency of gross negligence; and (3) whether the amended pre- and post-judgment interest statute, applicable to cases "subject to appeal" on September 1, 2003, applies to a case pending on appeal at the effective date. In this case Hogue sued for Columbia's alleged failure to ensure that emergency patients were given prompt and proper treatment after her husband's death. Her husband, had been

diagnosed with a heart murmur in 1996 but never pursued treatment and in 1998 didn't tell the hospital's emergency-room doctor of the heart problem when he was admitted for fluid on his lungs. He died of a heart-valve leak after spending more than 10 hours at the hospital waiting to see heart and lung specialists and for an emergency electrocardiogram the lung specialist ordered. The hospital did not have an on-call list for specialists and its contract electrocardiogram provider did not provide emergency service. At trial, the court submitted a jury instruction on contributory negligence after the jury returned verdict for actual and exemplary damages against the hospital. The jury answered no on the contributory negligence issue. The court of appeals affirmed, but reversed on actual damages to apply statutory "caps." Hogue did not appeal from the decision on actual damages.

The Supreme Court HOLDS that Hogue presented clear and convincing evidence by which a jury could reasonably conclude that the hospital was grossly negligent, that no evidence existed to prove loss of inheritance damages and that the 2003 amendments to the Texas Finance Code concerning interest on judgments do not govern this case.

[Opinion in HTML](#)

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[Briefs](#)

Justice Brister CONCURRING, joined by Justice Medina:

Bifurcation is proper in a few instances, but no one appears to have ever bifurcated the plaintiff's negligence from the defendant's negligence as the trial court did here. Trial on these two issues cannot be severed. A jury cannot decide whose negligence (if any) caused an occurrence without knowing what both did. Nor can a jury apportion fault between two parties until it finds both negligent. Whenever evidence shows both parties negligent, circumstances are hard to imagine in which a trial judge could properly bifurcate the trial of these issues and ask a jury about them separately.

[Brister concurrence in HTML](#)

[Brister concurrence in PDF](#)

Justice Green CONCURRING AND DISSENTING, joined by Justice Hecht:

Because of the punitive nature of exemplary damages, evidence of gross negligence must be clear and convincing. This elevated clear and convincing standard, to have any meaning, must necessarily affect legal sufficiency review. It is not enough to simply conclude, as the Court does, that some evidence supports the jury's gross negligence finding without determining whether that evidence is clear and convincing.

[Green concurrence/dissent in HTML](#)

[Green concurrence/dissent in PDF](#)

04-1049

In re Poly-America L.P., et al.

from Chambers County and the First District Court of Appeals, Houston

For relators: Adam B. Ross, Grand Prairie

For real party interest: G. Scott Fiddler, Houston

Justice Willett did not participate

MANDAMUS RELIEF CONDITIONALLY GRANTED, opinion by Justice O’Neill:

The principal issues are (1) whether an arbitration agreement that limited remedies and required the employee to share arbitration costs is unconscionable and (2) whether the court of appeals abused its discretion by not enforcing the agreement’s severance provision. In this case Luna sued Poly-America, claiming the company fired him for filing a worker’s compensation claim and seeking punitive damages and reinstatement. Poly-America moved to compel arbitration based on arbitration agreements. Among other provisions, the agreements required Luna to split arbitration costs up to his highest monthly pay in the previous year preceding an arbitration award, precluded him from recovering punitive damages and from reinstatement if he were terminated and limited both discovery and the limitations period. Two arbitration agreements Luna signed contained a severance clause, providing in part that any provision found unconscionable would leave the remaining terms effective. The trial court granted the company’s motion to compel arbitration. The court of appeals granted Luna’s mandamus relief, ordering the trial court to vacate the arbitration order.

The Supreme Court HOLDS that (1) the trial court did not abuse its discretion by allowing the arbitrator to assess whether the agreement’s fee-splitting and discovery-limitation provisions as applied in the arbitration are unconscionable and (2) the arbitration agreement’s provisions precluding remedies under the Workers’ Compensation Act are substantively unconscionable and void under Texas law. But those provisions are not integral to the parties’ overall intended purpose to arbitrate their disputes and, pursuant to the agreement’s severability clause, are severable from the remainder of the arbitration agreement. That agreement is otherwise enforceable.

[Opinion in HTML](#)

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[Briefs](#)

Justice Brister DISSENTING:

Only two years ago, this Court held in *In re Palacios* that mandamus review was

available for “orders that *deny* arbitration, *but not* orders that *compel* it,.” noting a reversal of previous practice necessitated by the U.S. Supreme Court’s 2000 opinion in *Green Tree Financial Corp. v. Randolph*, which said that orders compelling arbitration “would not be appealable” unless they included final dismissal of the case. But now this Court comes full circle, saying once again that mandamus review of orders compelling arbitration is “proper,” though courts should be “hesitant” about it. Apparently, so long as someone expresses qualms, *Palacios* is a dead letter.

[Brister dissent in HTML](#)

[Brister dissent in PDF](#)

05-0236

State of Texas v. J. Grady Brown Jr.

from Denton County and the Second District Court of Appeals, Fort Worth  
REVERSED AND JUDGMENT RENDERED, opinion by Justice Johnson:

In this condemnation case, the issue is whether the Property Code authorizes a landowner to recover fees and expenses from the state when the state amends its condemnation petition to seek property rights different from those it sought before special commissioners appointed to value the taking. The Supreme Court HOLDS that under the facts presented, the Property Code does not allow recovery of fees and expenses. The amended pleadings did not effect either an actual dismissal of its condemnation proceedings or the functional equivalent of a dismissal. The plain language of Property Code section 21.019 requires a condemnation proceeding to be dismissed before fees and expenses may be recovered from the condemning authority.

[Opinion in HTML](#)

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[Briefs](#)

Justice O’Neill CONCURRING AND DISSENTING:

The Court’s conclusion is correct that the Property Code does not authorize the award of all fees and expenses under these circumstances. But the case should be remanded, rather than rendering judgment, so the trial court may consider imposing any sanctions available under the Texas Rules of Civil Procedure.

[O’Neill concurrence/dissent in HTML](#)

[O’Neill concurrence/dissent in PDF](#)

05-0466

Coastal Oil & Gas Corp., et al. v. Garza Energy Trust, et al.

from Hidalgo County and the 13th District Court of Appeals, Corpus Christi/Edinburg  
For petitioners: Elizabeth N. Miller, Austin

For respondents: Michael D. Jones, Houston

Justices O’Neill and Wainwright did not participate

REVERSED, JUDGMENT RENDERED IN PART AND REMANDED,

opinion by Justice Hecht:

A principal issue is whether a tort for subsurface trespass by hydraulic fracturing exists in Texas law. In its suit Garza alleged Coastal drained gas from that part of a field in which the trust owned a royalty interest by injecting liquid across lease lines to break up gas deposits. Garza argues that Coastal’s well was at the edge of the lease line and that fracturing can be the basis of a subsurface trespass claim just as deviation, directional and slant-hole drilling can be. Coastal contends in part that the rule of capture protects “frac” drilling, but Garza counters that the rationale for the rule of capture – that adjacent owners can drill offset wells to protect their oil and gas interests – cannot work in this instance because Coastal owns the lease in which Garza has its royalty interest. Garza also argues against a “negative rule of capture” that would bar Coastal’s liability because the liquid does not migrate across lease lines but is forced. The trial court awarded trespass and other damages. The court of appeals affirmed.

The Supreme Court HOLDS:

- the rule of capture bars damages recovery for the alleged trespass;
- the mineral lessors with a reversionary interest have standing to bring an action for subsurface trespass causing actual injury;
- the measure of damages for breach of the implied covenant to protect against drainage is the value of the minerals lost because of the lessee’s failure to act with reasonable prudence, and no evidence exists of that value in this case;
- some evidence supported the jury’s finding of breach of the implied covenant to develop, and whether lessors’ repudiation of the lease was a defense was, on this record, a matter of law;
- some evidence supported the jury’s finding of bad faith pooling;
- admission at trial of a memorandum containing a racial slur was reversible error; and
- the trial court did not abuse its discretion in refusing to abate this case for two related cases.

[Opinion in HTML](#)

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[Briefs](#)

Justice Willett CONCURRING:

Texas common law should not give traction to an action rooted in abstraction in these times of fast-growing energy needs and Texas can ill afford its finite resources, or its law, to remain stuck in the ground. The Court averts an improvident decision that, in terms of its real-world impact, would have been a legal dry hole, juris-imprudence that turned booms into busts and torrents into trickles. Scarcity exists, but *above-ground* supply obstacles also exist and this Court shouldn't be one of them.

[Willett concurrence in HTML](#)

[Willett concurrence in PDF](#)

Justice Johnson CONCURRING AND DISSENTING,

joined by Chief Justice Jefferson and joined in part by Justice Medina:

The Court should not address whether the rule of capture precludes damages when oil and gas is produced through hydraulic fractures that extend across lease lines until determining whether hydraulically fracturing across lease lines is a trespass. The admission of the 1977 memorandum constituted error and was harmful, but the Court should hold that a harm analysis is not necessary because admission of the memorandum was incurable error.

[Johnson concurrence/dissent in HTML](#)

[Johnson concurrence/dissent in PDF](#)

05-0653

Gilbert Kerlin, et al. v. Concepcion Saucedo, et al.

from Cameron County and the 13th District Court of Appeals, Corpus Christi/Edinburg

For petitioners: Claudia Wilson Frost and Jeremy Gaston, Houston

For respondents: Jules L. Laird Jr., Houston

REVERSED AND JUDGMENT RENDERED, opinion by Justice O'Neill:

In this case, a lawsuit by descendants of an original land-grant owner of Padre Island claiming interest in thousands of acres of the island, principal issues include (1) whether the statute of limitations was tolled by Kerlin's absence from the state and (2) whether equity should bar the claim. Descendants of Juan Jose Balli — whose uncle was Padre Island's namesake — sued Kerlin, claiming breach of contract, fraud and breach of fiduciary duty arising originally from Kerlin's purchase from the Balli heirs of any Padre

Island interests by quitclaim deed in the 1930s. The Balli claimants also sued two of Kerlin's companies. Kerlin's purchase reserved to the Balli heirs a fraction of gas and oil royalties, if any such royalty interest existed. Kerlin bought the interests by quitclaim deed based on the prospect that the Balli heirs might still have legal title, based on a rescinded sale of the land in 1830. Kerlin and his companies argue that the statute of limitations in this case cannot be halted because, though he was out of state since the quitclaim deeds were bought, his companies were Texas-based. And even if limitations were tolled, they argue, the heirs should be barred by laches from bringing the lawsuit because they waited too long to sue, to the point when almost all witnesses to the half-century-old dealings were dead. A jury awarded damages to the Balli heirs. The court of appeals affirmed.

The Supreme Court HOLDS the Ballis' claims were not subject to statutory tolling and are barred. A defendant's fraudulent concealment of wrongdoing may toll limitations, but fraudulent concealment will not bar limitations when the plaintiff discovers the wrong or could have discovered it through the exercise of reasonable diligence. Because several sources of information are available to royalty owners about potential damage to their mineral resources, including their lessees, Railroad Commission records and visible operations on adjoining property, the Court has held that reasonable diligence would likely reveal any harm and the discovery rule does not apply. The Ballis were on notice that the warranty deeds their predecessors executed contained a royalty reservation, yet they never received any royalties. As a matter of law, the Ballis could have discovered through the exercise of reasonable diligence the existence of any claims before limitations expired. If a nonresident's contacts with the state are sufficient to afford personal jurisdiction under the general long-arm statute, as it is undisputed Kerlin's were, then no reason can be discerned why a nonresident's "presence" in this state would not be established for purposes of the tolling statute. Whether or not Kerlin was constructively present in Texas because he was subject to service of process via the secretary of state, he was present by doing business in this state as the tolling statute defines that term.

[Opinion in HTML](#)

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Justice Brister CONCURRING, joined by Justices Hecht, Medina and Willett:

The Court's reluctance to overrule a case may be understandable, but 40 years ago Justices Pope, Greenhill and Steakley were right that *Vaughn v. Deitz* was wrongly decided. The "absent from the state" statute arose in 1841, a long time before minimum-

contacts analysis did. As almost every other state has decided, a person whose minimum contacts make them amenable to suit in a state cannot fairly be said to be “absent from the state.” It is unclear why the Court is afraid to say so. No one has argued that we should distinguish rather than overrule *Vaughn* for a very good reason: It is impossible.

[Brister concurrence in HTML](#)

[Brister concurrence in PDF](#)

06-0178

Forest Oil Corp. and Daniel B. Worden v. James Argyle McAllen, et al.

from Hidalgo County and the 13th District Court of Appeals, Corpus Christi/Edinburg

For petitioners: Geoffrey L. Harrison, Houston

For respondents: Craig T. Enoch and David Morris, Austin

REVERSED AND REMANDED, opinion by Justice Willett:

The principal issues are (1) whether a disclaimer in a settlement contract – that no other representations were made – bars a claim that an arbitration clause in the settlement was fraudulently induced; (2) whether reliance on a representation contrary to the contracts was justified; and (3) whether reliance on a representation during settlement negotiations was justified. In this case McAllen sued for personal injuries and for death of an endangered rhinoceros that allegedly resulted from radioactive pipe that Forest Oil had used on McAllen’s property and that the company donated for McAllen’s use on a reserve for exotic animals. McAllen and Forest Oil’s settlement agreement ended a royalties dispute and included, among other provisions, an arbitration agreement for environmental claims not covered by the settlement. When Forest Oil moved to compel arbitration, McAllen countered that he was fraudulently induced to agree to arbitration on assurances that contamination or environmental problems did not exist on the land. The trial court denied arbitration and the court of appeals affirmed.

The Supreme Court HOLDS that the fraudulent-inducement claim is barred because the arbitration conclusively negates reliance on representations made by either side. This case is controlled by *Schlumberger Technology Corp. v. Swanson*, holding that a disclaimer of reliance on representations, “where the parties’ intent is clear and specific, should be effective to negate a fraudulent inducement claim.” The Court’s analysis in *Schlumberger* rested on the paramount principle that Texas courts should uphold contracts negotiated at arm’s length by “knowledgeable and sophisticated business players” represented by “highly competent and able legal counsel,” a principle that applies with equal force to contracts that reserve future claims as to contracts that settle all claims. Essentially, *Schlumberger* holds that when knowledgeable parties expressly discuss material issues during contract negotiations but nevertheless elect to include

waiver-of-reliance and release-of-claims provisions, the Court will generally uphold the contract. An all-embracing disclaimer of any and all representations, as here, shows the parties' clear intent.

[Opinion in HTML](#)

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Chief Justice Jefferson DISSENTING, joined by Justice Medina:

Under the Court's analysis, a party may intentionally misrepresent facts essential to the bargain to induce the other to sign, as long as the agreement says reliance is waived. This is not sound policy and *Schlumberger* does not support this result. The Court should hold that McAllen's fraudulent inducement claim survives the disclaimer of reliance at issue in this case.

[Jefferson dissent in HTML](#)

[Jefferson dissent in PDF](#)

06-0247

Ulico Casualty Co. v. Allied Pilots Association

from Tarrant County and the Second District Court of Appeals, Fort Worth

For petitioner: Donald Colleluori, Dallas

For respondent: B. Daniel Berryman, Fort Worth

REVERSED AND JUDGMENT RENDERED, opinion by Justice Johnson:

Principal issues are (1) whether an exception exists to the general rule that an insurer has no liability for defense costs for a claim after a policy's expiration when the insurer told the policyholder it would pay the costs and, if such an exception exists, (2) whether the court of appeals erred by characterizing the claim as one for contract breach for which attorneys fees can be awarded. In this case Ulico sued Allied for a declaration that it did not owe Allied defense costs in a suit Allied won. Allied had filed a claim when it was sued, in a separate suit, but filed it after its policy with Ulico expired. Despite that, Ulico told Allied that it would pay for Allied's defense in a letter that reserved its rights to contest coverage. In a subsequent letter the insurer restated that it would pay defense expenses "pursuant to" the earlier "reservation of rights" letter. The trial court awarded defense costs to Allied, based on waiver and estoppel – that Ulico had given up its right to deny defense costs by assuring Allied that its defense would be paid for. The court of appeals affirmed.

The Supreme Court HOLDS that if an insurer's actions prejudice its insured, the insurer may be estopped from denying benefits that would be payable under its policy as

if the risk had been covered, but the doctrines of waiver and estoppel cannot be used to re-write the contract of insurance and provide contractual coverage for risks not insured. Justification for the rule in *Farmers Texas County Mutual Insurance Co. v. Wilkinson* typically is noted as the “*apparent* conflict of interest that *might* arise when the insurer represents the insured in a lawsuit against the insured and simultaneously formulates its defense against the insured for noncoverage.” Under some circumstances, insurers who take control of their insured’s defense without a valid reservation of rights or non-waiver agreement can and should be prevented from denying benefits that would have been payable had the claim been covered because the insured is actually prejudiced by the insurer’s actions. But the possibility that an apparent conflict of interest might arise under the circumstances of this case is insufficient justification for judicially rewriting the parties’ agreement. If an insurer defends its insured when no coverage for the risk exists, the insurer’s policy is not expanded to cover the risk simply because the insurer assumes control of the lawsuit defense. But if the insurer’s actions prejudice the insured, the lack of coverage does not preclude the insured from asserting an estoppel theory to recover for any damages it sustains because of the insurer’s actions.

[Opinion in HTML](#)

[Opinion in PDF](#)

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Chief Justice Jefferson CONCURRING, joined by Justice O’Neill:

If the Court (1) resolves the tension between its holdings in *Craddock* and *Ferris* by making it clear that while estoppel cannot create coverage, the benefits that would have been paid had the insurer not denied coverage remain the appropriate measure of damages and (2) requires that the insured show prejudice in order to recover those damages, it is correct. If the insurer defends without reserving its rights, and the insured shows prejudice, the insured is entitled to recover the benefits that would have been due under the policy. To that extent, it matters little whether a court says coverage was created or that the benefits are those that would have been payable had there been coverage. A rose by any other name would smell as sweet.

[Jefferson concurrence in HTML](#)

[Jefferson concurrence in PDF](#)

06-1030

Zurich American Insurance Co., et al. v. Nokia Inc.

*consolidated with*

06-1040

Federal Insurance Co. v. Samsung Electronics America, et al.

*and*

07-0140

Trinity Universal Insurance Co. v. Cellular One Group

all from Dallas County and the Fifth District Court of Appeals, Dallas

For petitioners: Joseph R. Knight, Austin; Russell McMains, Corpus Christi; and Kirk C. Chamberlin, Los Angeles

For respondents: Eric Mayer, Houston, and Charles L. Perry, Dallas

JUDGMENT AFFIRMED AS MODIFIED, opinion by Chief Justice Jefferson:

The principal issue common to all three petitions is whether insurers have a duty to defend or indemnify cellular-telephone manufacturers from class lawsuits that allege human-cell injury from cell phone radio-frequency radiation but do not claim “individual issues of injury.” These three cases arise from six class actions that allege biological cell injury to cellular phone users who talk on their phones without headsets. By declaratory judgment or on summary-judgment motions, the insurers argued that they have no duty to defend in part because the underlying suits for the most part alleged no “bodily” injury as that term is normally used. In two of the cases the trial courts ruled in the insurers’ favor and in the third the trial court issued a judgment for the plaintiffs. The court of appeals held that insurers had a duty to defend against claims alleging cell injuries.

The Supreme Court HOLDS that most of the underlying suits seek damages for bodily injury. As with other courts that have considered similar claims, and the court of appeals in these cases, the Court concludes that the biological injuries alleged by the plaintiffs potentially state a claim for bodily injuries under the policies, much like the subclinical injuries alleged by plaintiffs who have been exposed to asbestos, triggering the duty to defend. The Court notes that it does not need to decide whether headsets qualify as damages, because each of the complaints seeks compensation based on their physical exposure to radiation.

[06-1030 in HTML](#)

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[07-0140 in HTML](#)

[07-0140 in PDF](#)

Justice Hecht DISSENTING, joined by Justice Brister:

When construing pleadings under the eight-corners rule to determine whether they state a claim an insurer must defend, the Court must be liberal. But liberal does not mean

naïve and does not mean blind. The pleadings in the five putative class actions at issue all allege that cell phone radiation causes bodily injury, although they never use that phrase. They call it “biological injury.” Since the human body is totally biological (as opposed to a human *being*), the two phrases would seem to mean the same thing. But American case law rarely refers to injuries to the human body as “biological injuries.”

[06-1030 Hecht dissent in HTML](#)

[06-1030 Hecht dissent in PDF](#)

[06-1040 Hecht dissent in HTML](#)

[06-1040 Hecht dissent in PDF](#)

[07-0140 Hecht dissent in HTML](#)

[07-0140 Hecht dissent in PDF](#)

[Briefs in 06-1030](#)

[Briefs in 06-1040](#)

[Briefs in 07-0140](#)

07-0085

Brookshire Grocery Co. v. Barbara Goss

from Wood County and the Sixth District Court of Appeals, Texarkana

REVERSED AND JUDGMENT RENDERED, per curiam opinion:

In this case a grocery store employee was injured when she attempted to maneuver around a loaded cart. Jurors found that her employer’s negligence proximately caused the incident. The court of appeals affirmed the trial court’s judgment. The Supreme Court HOLDS the employer had no duty to warn employees of the risk or provide specialized training to avoid a commonly known hazard.

[Opinion in HTML](#)

[Opinion in PDF](#)

[Briefs](#)

07-0091

Trammell Crow Central Texas Ltd. v. Maria Gutierrez, et al.

from Bexar County and the Fourth District Court of Appeals, San Antonio

For petitioner: W. Wendell Hall, San Antonio

For respondents: Joe Stephens, Katy

REVERSED AND JUDGMENT RENDERED, opinion by Justice Willett:

The issues are (1) whether past crimes were similar enough to make a crime foreseeable, triggering a duty to protect an invitee and (2) whether legally sufficient

evidence supported the conclusion that breach of the duty proximately caused the invitee's injuries. In this case Gutierrez's husband was killed in an attack in shopping center parking lot outside a theater he and his wife had left. Trammel Crow's trial evidence suggested Gutierrez may have been targeted for a "hit" because, after his arrest for burglary, Gutierrez turned information on other suspects and told police he feared a drive-by shooting as retaliation. But Gutierrez's wife presented evidence that he was not afraid of an attack; that his wallet was stolen in the attack and his gold bracelet was broken (indicating a robbery by strangers); and that 10 robberies occurred on the premises among 220 crimes reported there in the previous two years. Her evidence indicated five of those robberies involved deadly weapons. Jurors awarded her a multi-million dollar verdict. The court of appeals affirmed, finding jurors could have determined the attack was a robbery by strangers, not a targeted killing, and was foreseeable.

The Supreme Court HOLDS that the no-duty-to-protect rule applies to the facts of this case because Gutierrez's death was not foreseeable. Trammell Crow had knowledge of violent crimes that were committed at the shopping center within a reasonable time before his death. But these previous crimes were not sufficiently frequent and similar to give rise to a duty in this case. Even viewing the attack as a robbery, as the jury presumably did, the circumstances of this attack are extraordinary. The assailant opened fire from behind at long range without making any prior demand. After missing with the first shot, the attacker proceeded to shoot Gutierrez four times from behind before taking his wallet. Nothing about the previous robberies committed at the shopping center put Trammell Crow on notice that a patron would be murdered as part of a robbery on its premises.

[Opinion in HTML](#)

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Chief Justice Jefferson CONCURRING, joined by Justices Hecht, Brister and Johnson:

The Court correctly concludes that Trammell Crow had no duty, but it should have concluded I would conclude not that the risk of its occurrence was not unreasonable, not that the attack was unforeseeable, but, and the consequences of requiring premises owners to prevent this type of crime would require a measure of deterrence that is neither feasible nor desirable.

[Jefferson concurrence in HTML](#)

[Jefferson concurrence in PDF](#)

07-0147

In re Calla Davis, et al.

from Dallas County and the Fifth District Court of Appeals, Dallas

For relator: Craig T. Enoch, Austin

For real party in interest: Grant H. Brenna, Dallas

MANDAMUS RELIEF DENIED, opinion by Chief Justice Jefferson:

In this dispute over an order for a local-option election to approve beer and wine sales, the principal issues are (1) whether county commissioners abused their discretion by refusing to order the election after election petitions were certified and, if so, (2) whether the election should be called for the current justice-of-the-peace precinct (from which petitions were gathered) or separate elections for areas of two existing precincts that were in the precinct that voted “dry” in the 1870s. Commissioners acted because the Texas Alcoholic Beverage Code (section 251.80) requires a “wet” or “dry” area must remain unchanged until a vote in the same territory that comprised the precinct when its status was established. In this case the boundaries of the original JP precinct changed since it voted “dry” in 1877. The court of appeals denied mandamus relief that would have ordered commissioners to set the election.

The Supreme Court HOLDS that the election would be improper because the precinct’s territory differs from that of the justice precincts that once voted “dry.” The Commissioners Court was not presented with proper petitions for old Precincts 2 and 3, so it had no duty to order a local option election for those historical precincts. If the Commissioners Court refused, upon proper request, to fix the boundaries of historical precincts, relators could seek mandamus relief.

[Opinion in HTML](#)

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[Briefs](#)

07-0639

Don’s Building Supply Inc. v. OneBeacon Insurance Co.

certified question from the Fifth Circuit U.S. Court of Appeals

For appellant: Thomas B. Alleman, Dallas

For appellee: Gene F. Creely II, Austin

CERTIFIED QUESTIONS ANSWERED, opinion by Justice Willett:

The threshold question is when property damage “occurs” to trigger an insurer’s duty to defend in an occurrence-based general liability policy. In this case homeowners alleged synthetic exterior stucco allowed water to seep behind it, causing wood rotting and mold. The homeowners asserted the discovery rule, arguing that the damage was

hidden until discovered just before they filed suit. OneBeacon initially defended Don's Building Supply, then withdrew the defense, claiming it had no duty to defend because the homeowners discovered the property damage after its policy expired. The U.S. district court granted summary judgment for the insurance company, holding that the duty to defend becomes manifest or identifiable.

The Supreme Court HOLDS that the insurer's duty is triggered under Texas law when injury happens, not when someone happens upon it.

[Opinion in HTML](#)

[Opinion in PDF](#)

[Briefs](#)

07-0682

Unifund CCR Partners v. Kenneth F. Weaver

from McLennan County and the 10th District Court of Appeals, Waco

REVERSED AND JUDGMENT RENDERED, per curiam opinion:

[Opinion in HTML](#)

[Opinion in PDF](#)

[Briefs](#)

07-0698

In the Interest of M.N.

from Taylor County and the 11th District Court of Appeals, Eastland

REVERSED AND REMANDED, opinion by Justice Johnson:

In this parental-right termination case, the mother's statement of points for appeal required by section 263.405 of the Texas Family Code was filed late, but the trial court granted an extension of time and concluded that the statement of points was filed timely. The court of appeals held that section 263.405 did not allow extensions of time for filing statements of points, concluded the mother did not preserve error for review of her issues, and affirmed the trial court's judgment. The Supreme Court HOLDS that the trial court was authorized to grant the extension, the statement of points was timely filed, and the mother's issues were preserved for appeal.

[Opinion in HTML](#)

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[Briefs](#)

Justice Willett DISSENTING:

The Legislature wanted parental-rights cases to proceed with alacrity, reducing post-judgment delay by barring appellate consideration of tardy points. The Court should take lawmakers at their word: 15 days means 15 days.

[Willett dissent in HTML](#)

[Willett dissent in PDF](#)

07-0959

In re Simon Kiberu and Harris Methodist H-E-B Hospital  
from Tarrant County and the Second District Court of Appeals, Fort Worth  
MANDAMUS RELIEF CONDITIONALLY GRANTED, per curiam opinion:

The trial court authorized presuit depositions pursuant to Texas Rule of Civil Procedure 202. The court of appeals denied mandamus relief. The Supreme Court directs the court of appeals to withdraw its previous opinion and reconsider relators' petition in light of *In re Jorden*, decided March 28.

[Opinion in HTML](#)

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[Briefs](#)

08-0009

Mike Bismar, M.D. v. Dorothy A. Morehead, et al.  
from Tarrant County and the Second District Court of Appeals, Fort Worth  
REVERSED AND REMANDED, per curiam opinion:

Plaintiffs filed this suit and on behalf of Gloria Morehead, deceased, claiming Mike Bismar, M.D. failed to timely served a curriculum vitae and expert report supporting their claim within 120 days of filing, as required by statute. Bismar moved for dismissal and attorney's fees on the ground that the expert report was inadequate, but the trial court granted the Moreheads 30 days to cure deficiencies in the report and then denied the motion. The court of appeals dismissed Bismar's mandamus petition for want of jurisdiction. The Supreme Court HOLDS that Bismar's motion seeking dismissal and fees was reviewable by interlocutory appeal under [Lewis v. Funderburk](#), decided April 11.

[Opinion in HTML](#)

[Opinion in PDF](#)

[Briefs](#)

08-0380

In the Interest of G.B., P.B., N.B. and V.R.

from Washington County and the First District Court of Appeals, Houston

PETITION DENIED, per curiam opinion:

The Supreme Court notes in denying the petition that the Court neither approves nor disapproves the holding of the court of appeals regarding whether Texas Family Code section 263.405(i) prohibits an appellate court from considering an ineffective assistance of counsel claim that was raised for the first time on appeal.

[Opinion in HTML](#)

[Opinion in PDF](#)

[Briefs](#)

06-0491

In re Baylor Medical Center at Garland

from Dallas County and the Fifth District Court of Appeals, Dallas

For relator: R. Brent Cooper, Dallas

For real parties in interest: William M. Hayner Jr., Gil L. Daley II, Dallas

Argued September 27, 2007

CAUSE ABATED, opinion by Justice Brister:

Among the principal issues in this medical-malpractice case are (1) whether Baylor's mandamus request in this Court – on the same or similar issues dismissed as moot in an earlier proceeding before the Court – justifies bypassing the appeals court and (2) whether the trial court in one instance and its successor abused their discretion either by (a) vacating an order reinstating a judgment in Baylor's favor or (b) by ordering a new trial based on post-trial juror affidavits in the absence of other grounds supporting a new trial. In an earlier stage in the underlying proceedings, after a jury verdict for Baylor, Baylor challenged a new trial order in a mandamus petition that the court of appeals denied. Baylor filed for mandamus relief in the Supreme Court, but later moved to dismiss it as moot because a new judge vacated the new trial order and reinstated the verdict. That successor judge then vacated her order, allowing a second trial to proceed. Baylor filed for mandamus relief directly with the Supreme Court.

The Supreme Court HOLDS that Rule 7.2 requires abatement of this original proceeding to allow the successor judge to reconsider the order. As with any other order, a trial court should be able to reconsider a new trial order as long as a case is still pending. The Court agrees with the hospital's argument that it should reconsider the 75-day deadline in preventing set out in *Porter v. Vick*, 888 S.W.2d 789 (Tex. 1994), because *Porter* contradicts the general rules of plenary power and is unsupported by the

current rules of civil and appellate procedure.

[Opinion in HTML](#)

[Opinion in PDF](#)

[Briefs](#)

Justice Johnson DISSENTING:

Conceptual and practical difficulties exist with the holding of *Porter v. Vick*, but those are better addressed through the rule-making process than through the decision-making process. *Porter* should not be overruled.

[Johnson dissent in HTML](#)

[Johnson dissent in PDF](#)

06-0904

Guitar Holding Co., L.P. v.

Hudspeth County Underground Water Conservation District No. 1, et al.

from Hudspeth County and the Eighth District Court of Appeals, El Paso

For petitioner: Joseph L. Hood Jr., El Paso; Russell S. Johnson, Austin

For respondents: Renea Hicks and Lambeth Townsend, Austin

MOTION FOR REHEARING GRANTED, supplemental per curiam opinion:

[Opinion in HTML](#)

[Opinion in PDF](#)

[Briefs](#)

[Original opinion in HTML](#)

[Original opinion in PDF](#)

[Briefs](#)

## **CORRECTED OPINIONS**

05-0541

First American Title Insurance Co., et al. v. Comptroller of Public Accounts, et al.

from Travis County and the Third District Court of Appeals, Austin

Minor corrections: On page 21 of the original opinion, the first eight words of this sentence were deleted: The insurers do not challenge this point, and [W]e have no trouble concluding that the Comptroller rationally could have believed that reducing the premium tax burdens Texas imposes on title insurers operating here would encourage other states to impose lower financial obligations on Texas title insurers operating elsewhere.

[Opinion in PDF](#)

[Original opinion in PDF](#)

05-0892

In re McAllen Medical Center Inc., et al.

from Hidalgo County and the 13th District Court of Appeals, Corpus Christi/Edinburg

New title for subhead IV and wording changes to the first sentence following it on pages 15-16.

[Opinion in PDF](#)

[Original opinion in PDF](#)

### **ISSUES SUMMARIES ON PETITIONS GRANTED**

**ORAL ARGUMENT IN TODAY'S ORDERS WILL BE SENT LATER**

06-0975

Grant Thornton LLP v. Prospect High Income Fund, et al.

from Dallas County and the Fifth District Court of Appeals, Dallas

On rehearing

Oral argument set December 9

[Briefs](#)

[Court of appeals opinion](#)

07-0490

Mann Frankfort Stein & Lipp Advisors Inc, et al. v. Brendan J. Fielding

from Harris County and the First District Court of Appeals, Houston

Oral argument set November 13

[Briefs](#)

[Court of appeals opinion](#)

07-0806

Walter E. Harrell v. State of Texas

from Terry County and the Seventh District Court of Appeals, Amarillo

Oral argument set November 13

[Briefs](#)

[Court of appeals opinion](#)

07-0818

Akin, Gump, Strauss, Hauer & Feld, L.L.P.

v. National Development and Research Corp. and Robert E. Tang  
from Dallas County and the Fifth District Court of Appeals, Dallas

Oral argument set December 9

[Briefs](#)

[Court of appeals opinion](#)

07-0871

In re United Services Automobile Association

from Bexar County and the Fourth District Court of Appeals, San Antonio

Oral argument set December 9

[Briefs](#)

[Court of appeals opinion](#)

08-0093

In re Gayle E. Coppock

from Denton County and the Second District Court of Appeals, Fort Worth

Oral argument set December 10

[Briefs](#)

[Court of appeals opinion](#)

08-0379

In the Interest of J.O.A., T.J.A.M., T.J.M. and C.T.M.

from Collingsworth County and the Seventh District Court of Appeals, Amarillo

Oral argument set October 14

[Briefs](#)

[Court of appeals opinion](#) (abatement and remand)

[Court of appeals opinion](#)