



Court Watch

a project of the Texas Watch Foundation

SHINING A LIGHT

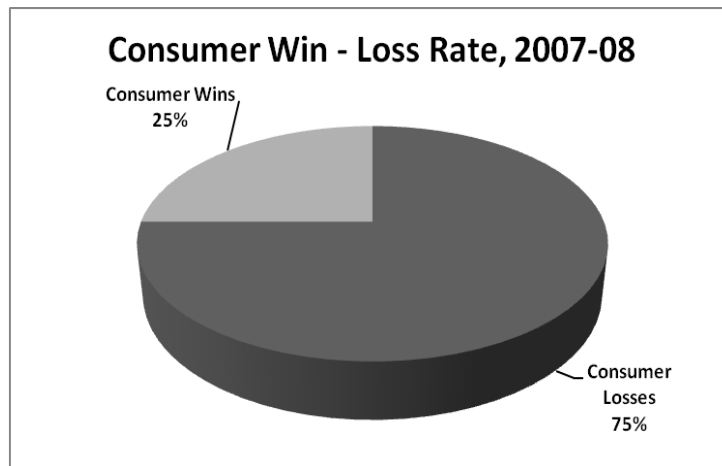
The Texas Supreme Court Annual Report, 2007-2008

I. INTRODUCTION

This past Supreme Court session marked the twelfth year Court Watch has monitored the actions of the Texas Supreme Court and the impact of its decisions on Texas consumers. Each year, our analysis has revealed a distinct bias of the Court favoring the interests of powerful groups such as insurance companies, the manufacturing industry, the medical industry, and government at the expense of Texas families.

This year's report reveals a continuing trend of decision-making that favors powerful interests over the interests of average Texans. Given the relative obscurity under which the Texas Supreme Court operates, we offer the Court Watch project as a way to shine a light on the Court's decision making. For a dozen years, we have revealed a decided pro-defendant bias and illuminated the impact the Court's actions have on Texas families. In recent years, we have

expanded our efforts to look into the ethics of the justices themselves. This has led to numerous ethics investigations, which have resulted in findings of wrongdoing by three of the Court's nine current members, including one of the largest ethics fines in Texas history.



Before delving into this year's findings, readers should note that our method of analysis has changed slightly for the 2007-2008 report.

Following our 2006-2007 annual report, the Supreme Court publicly announced that the Court's calendar runs from September 1 – August 31. Previously, Court Watch used the Texas Supreme Court's traditional calendar: July 1 – June 30. In order to synchronize the Court Watch Report with the newly announced Supreme Court calendar, Court Watch extended its 2007-2008 analysis through August 2008. In order to uphold our duty to Texas consumers, however, we also had to



include decisions made during June and July of 2007 in our 2007-2008 analysis. This Court Watch report therefore covers a period of fourteen months.¹

So as to not mislead our readers, all percentages reported will be a mean calculation of the 170 cases decided between July 1, 2007 and August 31, 2008. When we refer to a raw number, however, we will include only the 151 cases decided between September 2007 and August 31, 2008, unless noted otherwise. Using raw numbers only from the twelve-month period will prevent the numbers from appearing inflated in comparison to our previous reports, which are based on a twelve-month calendar.

During the 2007-2008 term, the Court delivered 82 decisions that we classified as consumer cases. Three-quarters of these decisions were consumer losses. While this disturbing loss rate may be shocking to first time readers, it is, sadly, the most consumer friendly result of the Court since the 2001-2002 session. This improvement may be in large part due to the heightened scrutiny brought on by Texas Watch's efforts to shine a light on the bench as well as the 2008 election season.

As usual, the report examines the statistical and substantive trends of the Texas Supreme Court and the significance of these trends for Texas consumers. And, of course, we couldn't call it a Court Watch Report without our annual Terrible Ten list, which highlights the most dangerous anti-consumer decisions issued by the Court during the previous session.

The Texas Supreme Court is the highest civil court in our state. Its decisions are far-reaching and touch the lives of each and every Texan. Few Texans outside the legal community, however, understand the drastic impact that these decisions can have on their everyday lives. As elected officials and arbiters of justice, it is important that the Supreme Court Justices issue decisions by the rule of law and not by the rule of big government and big business. We hope this report encourages Texans to become more involved in a system that has a dramatic effect on their lives.

¹ Future Court Watch reports will return to a twelve-month analysis and will correspond with the Court's updated calendar.



II. BY THE NUMBERS

Once again we reviewed every decision issued by the Supreme Court during the previous session, giving particular attention to the cases that pitted

individuals against insurance, medical, corporate, and government defendants. Eighty-two of the 151 cases were classified as consumer cases. Of these 82

cases, only 21 of them were consumer wins. Over the fourteen-month period surveyed, only 25% of the cases were consumer wins.²

While it is unacceptable to rule in favor of consumers only a quarter of the time, the consumer result was a marked improvement from the 2005-2006 term, which saw a record setting low for the consumer win rate at 14%.

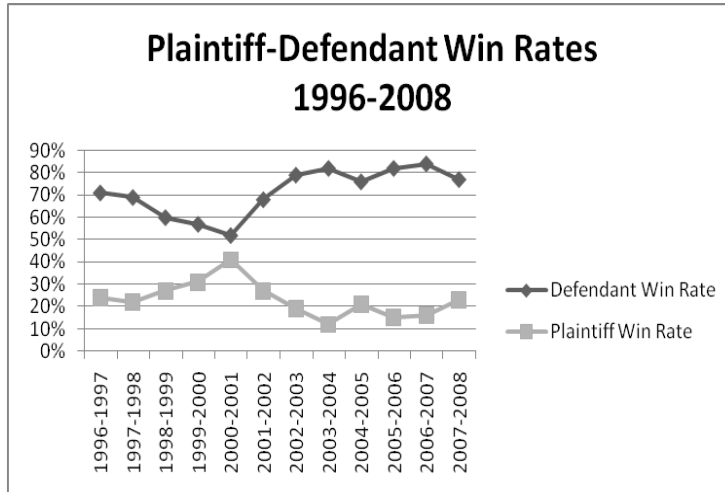
A Continued Pro-Defendant Bias

Generally in civil cases involving consumers the plaintiff is the consumer and the defendant is the corporate or government entity that has committed the alleged violation against the consumer. Because of this fact, Court Watch has

been monitoring the plaintiff-defendant win rate in consumer cases at the Court since 1996. The 2007-2008 session saw marked improvement in the plaintiff win

rate from the past two years. Unfortunately, this is because the bar was set very low, with plaintiffs winning only 14% of the time during the 2006-2007 session. This past session, plaintiffs were

victorious only 23% of the time. Even though this year marked an improvement for plaintiff victories, they still did not win even a quarter of the time.



Consumer Scorecard

Despite the increase in the consumer win rate this year, every justice on the Court received an “F” on our Consumer Scorecard.³ Chief Justice Jefferson replaced Justice O’Neill as the most consumer-friendly justice, voting in favor of consumers 38% of the time. This year Justice O’Neill voted for consumers only 33% of the time. Bringing up the rear was Justice Hecht, who earned the title of Consumer Curmudgeon with a paltry 12% rate of ruling in favor of consumers.

Consumer Scorecard	
Justice	Score
Jefferson	38%
O’Neill	33%
Medina	29%
Johnson	26%
Green	23%
Willett	21%
Brister	21%
Wainwright	19%
Hecht	12%

² When including cases from June and July of 2007, there were 96 consumer cases and 24 consumer wins, resulting in a 25% consumer win rate.

³ Scores were calculated based on each justice’s voting record in the 51 authored consumer cases with signed opinions rendered during the Court’s 2007-2008 term (including the 14 consumer cases issued in June and July 2007).



Agreement with Majority

This year, the Court once again showed a great amount of cohesion. The average rate of agreement with the Court's majority was 89%.⁴ This number has not shifted dramatically from last year, where the average rate of agreement with the majority was 90%. This continuing trend is disturbing given the fact that the Supreme Court is the highest court in the state of Texas. Most cases that come

before it have been litigated in both a district court and an appellate court. The fact that the Supreme Court grants certiorari to a case is usually an indication that there is a serious question of law that must be decided. One

would expect that there would be ample room for dissent amongst the justices, but the statistics show otherwise. As the chart below shows, the rate of agreement with the majority ranged between 86% and 93%. The average rate of agreement was 89%.

Justice	Agree	Disagree	Score
Jefferson	75.5	9.5	89%
Brister	73	10	88%
Green	73	10	88%
Hecht	72.5	9.5	88%
Johnson	72.5	11.5	86%
Medina	79	6	93%
O'Neill	72.5	9.5	88%
Wainwright	76.5	7.5	91%
Willett	72	9	89%

on a court reduce the possibility for any meaningful debate. In years past, the highest rates of cohesion were found between the most anti-consumer justices. This year, there were not as many voting bloc alliances as we have seen in the past. Instead there was generally a high rate of agreement between justices across the board. Whereas last year we experienced a relatively high rate of disagreement between certain justices

(Hecht and Willett agreed with O'Neill 70% of the time), this year that relative separation has dissolved.

Two blocs did present themselves, however. The first involves the Court's anti-consumer hardline, the second involves the Court's


















more moderate voices. On the more pro-defendant end of the spectrum, Justices Hecht and Brister agreed 93% of the time, while Justices O'Neill and Medina were similarly in agreement 93% of the time, representing the Court's decidedly conservative, though relatively moderate bloc.

Voting Bloc Analysis

Using a voting bloc analysis designed to measure voting alliances on appellate courts, the diagram below further elucidates the alignment between justices in rendering decisions. The average rate of agreement between individual justices was a shocking 85%. Strong alignments

⁴ This analysis includes majority and unanimous opinions. It does not include per curiam opinions as it is not possible to accurately discern the positions of individual justices on anonymous opinions. The Total Cases category lists the number of cases in which each justice participated.



	 Jefferson									
 Hecht	79%	 Hecht								
 O'Neill	88%	84%	 O'Neill							
 Wainwright	86%	88%	87%	 Wainwright						
 Brister	80%	93%	83%	83%	 Brister					
 Medina	89%	84%	93%	87%	84%	 Medina				
 Green	88%	82%	82%	90%	81%	81%	 Green			
 Johnson	88%	79%	83%	87%	74%	85%	92%	 Johnson		
 Willett	78%	84%	85%	88%	85%	84%	84%	85%	 Willett	

Bloc Voting Analysis

Bloc voting analysis is a political science technique for measuring the strength of voting alliances on collegial courts. It analyzes agreement to create a spectrum of voting behavior, but does not define an ideological spectrum. Blocs are defined by measuring a threshold that is halfway between the average agreement of the court and the perfect agreement score of 100 percent. At least twenty opinions with a split result are required to make the study accurate. Result analysis measures agreement on result, counting concurrence as agreement with the majority. A concurring and dissenting opinion is scored so that justices on such opinions are counted as being half in agreement with each justice in the majority and half in agreement with each dissenting justice.

Bloc Voting Calculation

Cohesion: 85%
 100 (perfect agreement) $- 85 = 15$;
 $15/2 = 7.5$; $85 + 7.5 = 92.5$
Bloc is 93% or greater

III. Continuing Trends, Emerging Nuances

Each year we examine emerging trends in the Court that may indicate the direction the Court may take in the future. This year, Court Watch readers will notice a number of continuing trends from years past, such as an anti-consumer arbitration policy, a bias towards insurance companies, and favoritism for employers in employment disputes. The following are some of the more troubling trends we observed over the past session.

Employer Favoritism in Employment Disputes

Every Texan deserves to work in a place where she is treated fairly, respected, and feels safe in her environment. Unfortunately, not everybody has the good fortune to work in such a place. In order to address this problem, the state legislature has taken a number of steps to improve workplace conditions for Texans. The legislature has established the Texas Workforce Commission (TWC) in order to provide workers with an additional venue to bring employment grievances. The legislature has also passed a Whistleblower Act that protects government employees who report wrongdoings of their employers. This past session, the Texas Supreme Court took it upon itself to degrade these and other employee protections.

In *Igal v. Brighstar Information Technology Group*,⁵ the Supreme Court ruled that an employee who attempts to bring an administrative action to enforce a payday law in front of the TWC, but misses the statutory filing deadline, is precluded from seeking redress in a court of law. The payday law was designed to provide an alternate venue for resolving disputes

between employers and employees, not to create a blockade. Nevertheless, the Supreme Court somehow ruled that an employee who doesn't even get the opportunity to argue his case before the TWC is precluded from bringing a claim in a court of law. This case shocked even the pro-business Texas legislature, which was spurred to quickly pass legislation overturning the Court's interpretation of the law.⁶

In *Montgomery County v. Park*,⁷ the Court ruled that an employer reassigning an employee to a less desirable position with economic consequences was not a violation of the Whistleblower Act. In this case, a sheriff's department lieutenant reported sexually demeaning comments made by a county commissioner. The county reassigned the lieutenant to a less desirable position. The Court gave a very narrow (and faulty) reading to the Whistleblower Act and determined that this action did not constitute a violation. By creating such a distorted reading, the Court essentially removed all the teeth from the Whistleblower Act.

In *Entergy Gulf States v. Summers*,⁸ the Court issued a decision allowing companies to avoid legal responsibility and financial liability for accidents that occur on their property, even if it was the company's actions that led to the injuries or deaths. Instead of looking out for the Texas workers, the Court decided to carve out an enormous loophole to ensure that big businesses would not be troubled by employee injuries. This case has garnered much media attention as well as the

⁵ Docket No. 04-0931; *See infra* Terrible Ten 2007-2008.

⁶ S.B. 741, effective Sep. 1, 2009.

⁷ Docket No. 05-1023; *See infra* Terrible Ten 2007-2008.

⁸ Docket No. 05-0272; *See infra* Terrible Ten 2007-2008.



attention of lawmakers. The public upset caused by this decision caused the Court to rehear the case but, unsurprisingly, the Court simply confirmed its previous decision.

The *Energy* decision became a cornerstone issue for lawmakers during the 2009 legislative session. Business and insurance interests, along with their lobbyists, fought tooth and nail to keep the legal scheme crafted by the Court in place so that they could avoid legal responsibility for injuries caused by a premises owner's inability to maintain a safe work site.

Not only are the results of each of these cases reprehensible, but each of these decisions establishes a precedent that will undermine the rights of employees for years to come.

A Double-Standard Arbitration Policy

For the past several years, Court Watch has closely monitored the Texas Supreme Court decisions interpreting arbitration clauses in contracts. Arbitration clauses usually favor businesses and insurance companies because they arbitration proceedings are closed without any public record, include hefty expenses borne by consumers, and offer no opportunity for appeal. In almost every case involving a dispute regarding the applicability of an arbitration clause, the Court has held that the arbitration clause is valid to the detriment of the consumer. Once again, the arbitration-related decisions issued by the Court this past session exhibited a distinct favoritism towards the businesses that placed the arbitration clauses in the contracts. In addition, the Court reversed its typically pro-arbitration stance only when a consumer stood to benefit from the provision.

In *In re Poly-America*,⁹ the Supreme Court overturned a trial court's decision not to enforce an arbitration agreement because it was unconscionable. As a result, a man who was fired for missing work due to a work-related injury was not able to seek redress in court.

In *City of Rockwall v. Hughes*,¹⁰ a landowner challenged a municipality's condemnation of his land. The landowner tried to compel arbitration pursuant to the condemnation statute. The Court, however, gave a very narrow reading to a vaguely worded statute and determined that arbitration can only be compelled if a municipality fails to respond at all to a landowner's petition. Arbitration could not be compelled if a municipality rejected a landowner's petition. Apparently, the Court only favors arbitration when a business entity stands to benefit. It is a different story when the consumer is the party requesting arbitration.

Similarly, in *Perry Homes v. Cull*,¹¹ the Supreme Court overturned an award given to a homeowner through arbitration on the basis that the homeowners had initially opposed the arbitration clause and had first initiated pre-trial procedures before arbitrating the dispute. Such a decision is difficult to reconcile with the Court's history of passing arbitration-friendly decisions. It is notable that Bob Perry, owner of Perry Homes, is a mega-contributor who has donated more to the campaigns of the current Texas Supreme Court than any other individual.

Broadening of Mandamus Power

A writ of mandamus is an order by a superior court to compel a lower court or

⁹ Docket No. 04-1049.

¹⁰ Docket No. 05-0126.

¹¹ Docket No. 05-0882; See *infra* Terrible Ten 2007-2008.



a government officer to perform ministerial duties correctly. Occasionally, courts will grant an interlocutory appeal to determine whether a writ of mandamus should be issued. Issuing a writ under such circumstances requires a clear abuse of the lower court's discretion and there must not be an adequate method for appeal available to the party. In two decisions this past session, the Supreme Court broadly expanded its mandamus powers, thereby limiting lower courts' ability to do their jobs.

In *In re McAllen Medical Center*,¹² the Supreme Court determined that mandamus relief was appropriate to grant review of expert reports introduced by a class of 224 plaintiffs suing a hospital for allowing a non-board-certified surgeon to operate on them. The Court looked to the extensive amount of time that the parties had spent in court and the extensive amount of money spent on litigation and determined that these factors warranted mandamus relief. The Court ignored the fact that any error resulting from the admission of the expert reports could be cured on appeal. The Court, however, decided to broadly expand its mandamus powers in order to issue a writ that would favor the hospital and punish the class members injured by its negligence.

In *In re Team Rocket*,¹³ the Court used its rationale from *McAllen* to grant mandamus relief to an airplane manufacturer sued for wrongful death. The Court decided that mandamus was appropriate to order the lower courts to grant the defendant an alternative venue.

Premises Liability

It would not be a typical Supreme Court session without a few decisions that strip property owners of any responsibility towards persons injured on their property and this past session was no exception. Indeed, the Court issued a number of sweeping decisions to protect premises owners from responsibility.

In *General Electric v. Moritz*,¹⁴ the Court examined a personal injury claim brought by Arthur Moritz, an independent contractor who delivered GE parts. Moritz was injured when he fell from a loading dock on GE property that was not secured by a guardrail. He sued GE, arguing that they had failed to warn him of the dangerous condition on their premises. Texas has a long-standing tradition of holding property owners responsible for defects on their premises. The dissent noted that the majority abandoned this long-standing principle and instead articulated a no-duty rule for the premises liability claims of independent contractors' employees. This decision was in keeping with *Jack in the Box v. Skiles*,¹⁵ a similar premises liability case that made our Terrible Ten list during the 2006-2007 session.

In *20801 v. Parker*,¹⁶ the Supreme Court held that a bar should not be responsible for brain damage suffered by a patron who was served 10 to 15 alcoholic beverages. Two of the alcoholic beverages were provided complimentary of the bar's manager. The Court determined that the bar had complied with the Dram Shop act by requiring its employees to attend a seller training program. The Court seemed unconcerned that the bar did not appear to be enforcing the policies taught

¹² Docket No. 05-0892; See *infra* Terrible Ten 2007-2008.

¹³ Docket No. 06-0414.

¹⁴ Docket No. 04-0871.

¹⁵ Docket No. 05-0911.

¹⁶ Docket No. 06-0574.



during the training session on the night in question.

As discussed previously, the Court issued a devastating opinion in *Entergy Gulf States v. Summers*. *Entergy* allows large business property owners to escape liability for injuries or even deaths that occur on their properties. Taken together, these decisions show a distinct disrespect for the welfare of innocent workers and consumers.

Stringent Requirements for Expert Reports

In Texas, plaintiffs who bring a lawsuit for medical malpractice are required by statute to file an expert report that details the credentials of their testifying experts as well as the expert's opinions regarding the standard of care, the manner in which the care rendered by the defendant failed to meet the standard, and the causal relationship between the defendant's failures and the patient's injury or damages. The justification for requiring expert reports is that they may quell frivolous lawsuits by preventing parties from bringing lawsuits without having an expert opinion to back up their legal theory. In practice, however, expert reports often act as an additional hoop through which injured consumers must jump. Oftentimes, legitimate claims are thrown out on technicalities related to the filing of expert reports. This past session the Court issued several decisions related to expert reports that make it even harder for injured parties to bring medical malpractice suits.

In *Lewis v. Funderburk*,¹⁷ the Supreme Court determined that appellate courts have jurisdiction to hear interlocutory appeals for allegedly insufficient expert reports. This decision will allow

¹⁷ Docket No. 06-0518; See *infra* Terrible Ten 2007-2008.

defendants in medical malpractice cases to delay litigation and appeal lower court actions before consumers are even given a decision on the merits of a case. In essence, this decision makes it more difficult for injured parties to bring legitimate claims and it further delays their ability to obtain justice. Following *Funderburk*, the Supreme Court issued eight other decisions which cited *Funderburk* as grounds for granting interlocutory review of expert reports.¹⁸ Similarly, in *In re McAllen Medical Center*, the Court determined that mandamus review of expert reports was appropriate when an appeal would be costly and time-consuming for defendants in a medical malpractice case. The Court did not seem bothered by the fact that interlocutory review will be costly and time consuming for the plaintiffs in medical malpractice lawsuits.

There was a silver lining to the Court's expert report decisions this session. In two cases involving expert reports, the Court sided with the consumer. The victories were small, but they at least give us a glimmer of hope that injured parties may still be able to acquire justice through the judicial process. In *Leland v. Brandal*,¹⁹ the Court determined that if a trial court or an appellate court finds an expert report to be insufficient, the plaintiff has thirty days to refile an adequate report. Additionally, the justices managed to pull a silver lining out of the otherwise

¹⁸ The eight consumer losses based on *Funderburk* grounds were: Diaz-Rohena v. Melton (Docket No. 08-0009), Center for Neurological Disorders v. George (Docket No. 07-0174), Collini v. Pustejovsky (Docket No. 07-0227), Graham Oaks Care Center v. Farabee (Docket No. 07-0228), Hill Regional Hospital v. Runnels (Docket No. 07-0368), Metwest v. Rodriguez (Docket No. 07-0422), Moore v. Gattica (Docket No. 07-0094), and Bismar v. Moreland (Docket No. 08-0009).

¹⁹ Docket No. 06-1028.



damaging decision of *Funderburk*. In *Danos v. Ritter*,²⁰ the Court cited dicta from *Funderburk*, which held that a plaintiff could cure a deficient expert report by filing an expert report from a separate expert. This decision is good because it gives consumers more options, but it still does not make up for the fact that consumers must continue to jump through hoops and face numerous procedural delays before they are able to seek redress. Such delays are especially problematic in medical malpractice suits because consumers often have large medical bills to pay.

²⁰ Docket No. 07-0312.

THE TERRIBLE TEN 2007-2008

Entergy Gulf States v. Summers (Willett 9-0)

Impact: Shields premises owners from accountability if they purchase a blanket insurance policy, thereby eliminating true accountability and placing workers and the public at large at risk.

Perry Homes v. Cull (Brister 5-4)

Impact: Reverses the Court's pro-arbitration bias when the consumer stands to benefit from the arbitration.

BIC Pen Corporation v. Carter (Medina 8-0)

Impact: Prevents the Texas legislature from passing consumer protections more stringent than national laws.

Igal v. Brightstar Information Technology Group (Wainwright 5-4)

Impact: Transforms a payday law designed to give workers more options into a trap causing workers to forfeit all their rights.

Lewis v. Funderburk (Brister 9-0)

Impact: Expands appellate review of expert reports, making it more difficult for consumers to bring legitimate claims against wrongdoers.

Montgomery County v. Park (Jefferson 9-0)

Impact: Removes the teeth from the Whistleblower Act by discouraging government employees from reporting wrongdoing.

In re McAllen Medical Center (Brister 6-3)

Impact: Drastically expands mandamus relief, sacrificing Court precedent in order to further quell access to the courts.

National Union Fire Insurance Co. v. Crocker (Willett 9-0)

Impact: Eliminates responsibilities of insurers when an additional insurer fails to give notice of a lawsuit, even when the insurer is aware of the lawsuit.

Nationwide Insurance Co. v. Elchehimi (Wainwright 7-2)

Impact: Prevents faultless drivers from obtaining underinsured motorist coverage when their automobile is damaged by a part of another vehicle.

Providence Health Center v. Dowell (Hecht 5-4)

Impact: Effectively removes any responsibilities of hospitals to evaluate or treat the mental health of attempted suicide patients.



TERRIBLE TEN

2007-2008

***Entergy Gulf States v. Summers*²¹** **(Willett 9-0)**

Impact: Shields premises owners from accountability if they purchase a blanket insurance policy, thereby eliminating true accountability and placing workers and the public at large at risk.

John Summers worked for International Maintenance Corporation (IMC). IMC had contracted with Entergy Gulf States to perform construction and maintenance on Entergy's premises. Summers sustained injuries while working at Entergy's Sabine Station plant and subsequently sued Entergy. Entergy argued that it was a general contractor, and therefore a deemed employer shielded from Summers's tort suit under the Texas Workers' Compensation Act. Summers argued that Entergy was the premises owner and that IMC was his direct employer.

The Supreme Court agreed with Entergy, holding that Entergy was a general contractor and because it had purchased workers compensation coverage, it was exempt from Summers's tort claims, even though Entergy was the owner of the premises where he was injured. Essentially, the Court carved out an enormous loophole for large business owners to escape the consequences of their actions on their property, creating a roadmap to immunity for premises owners to follow.

Workers expect to be provided with a safe working environment and this decision makes a mockery of this reasonable expectation. The *Entergy* decision places

Texas workers and those communities surrounding them at greater risk. Until this decision is overruled by either the legislature or by the Court, Texas workers will not receive the protection they expect and deserve.

***Perry Homes v. Cull*²²** **(Brister 5-4)**

Impact: Reverses the Court's pro-arbitration bias when the consumer stands to benefit from the arbitration.

The Cull family purchased a home from Perry Homes. Over the first few years of ownership, the home began suffering from numerous structural and drainage problems. As a result, the Culls sued Perry Homes for breach of warranty. The warranty contained a broad arbitration clause that the Culls vehemently opposed. They were successful in avoiding arbitration and managed to perform discovery and set a date for trial. As the trial approached, the Culls opted to exercise their right to compel arbitration.

Finding that there was no prejudice from the pretrial litigation, the trial court granted the request for arbitration. The arbiter awarded the Culls \$800,000. The decision was upheld by the appellate court. The Supreme Court, however, held that the Culls had waived their right to arbitration. The Court held that because the Culls had waited so long in the process to compel arbitration and because they initially objected to it, they had manipulated the system in a way that constituted prejudice. The Court therefore

²¹ Docket No. 05-0272.

²² Docket No. 05-0882.



reversed the decision, remanding the case to the trial court for a trial.

The Court has uniformly favored arbitration, a process that typically benefits businesses over consumers. Normally, when a consumer objects to an arbitration clause, the Supreme Court will compel arbitration even if there are extenuating circumstances justifying litigation.²³ Here, however, the consumers stood to benefit from the arbitration process and the Court consequently determined that arbitration should not be allowed, even though it was a component of the Culls's home warranty.

The Court's double standard for arbitration is unjust and simply bad jurisprudence. How could a court that has worked for years to advocate arbitration blatantly deny a right to arbitrate once a consumer actually stands to benefit from the process?

***BIC Pen Corporation v. Carter*²⁴ (Medina 8-0)**

Impact: Prevents the Texas legislature from passing consumer protections more stringent than national laws.

Five-year-old Jonas Carter accidentally set his six-year-old sister on fire with a BIC lighter, causing serious burn injuries. The

Carter family sued BIC, alleging manufacturing and design defects. The jury found for the Carter family, awarding \$3 million in damages. BIC appealed the decision, arguing that the state common law claims were preempted because they might frustrate the federal objective of the Consumer Product Safety Commission. This is a tough fish to fry because the objective of the Commission is to "protect the public from unreasonable risks of serious injury or death."²⁵

In a fact-intensive decision, the Court examined the methods of determining whether a lighter was childproof and determined that the Commission had properly balanced the safety of children with the interests of the adult users. The Commission tested the lighters by giving 200 children flame-free lighters. As long as no more than 29 of those children were able to activate the lighter, it passed the safety inspection. The Court reasoned that if BIC had made the lighters too difficult to use, people would have foregone purchasing childproof lighters.

In most states, it is legal for the state to provide its own consumer protections in state laws, provided that the protections are as stringent or more stringent than the federal counterparts. After all, who knows better what the needs are of a state's citizens than the state legislature? The Supreme Court, however, refused to honor the Legislature's attempt to protect its constituents and ruled that the state law was preempted by the federal regulations governing lighter safety. The Court argued that to impose our own laws would undermine the careful balancing test used to create the federal regulation. As a result, many efforts by the Texas

²³ Recent examples include *In re RLS Legal Solutions* (docket number 05-0290), *In re McKinney and Edward D. Jones & Co., L.P.* (docket number 04-0651), *In re Weekley Homes, L.P.* (docket number 04-0119), *In re Dillard Department Stores, Inc. and Reeder* (docket number 05-0250), *In re Dillard Department Stores, Inc.* (docket number 04-1132), *In re Vesta Insurance Group, Inc.* (docket number 04-0141), *In re Palm Harbor Homes* (docket number 04-0490), *In re Dallas Peterbilt, Ltd., L.L.P.* (docket number 05-0706), *In re Palacios* (docket number 05-0038), and *In re D. Wilson Construction Co.* (docket number 05-0326).

²⁴ Docket No. 05-0835.

²⁵ Consumer Products Safety Commission, <http://www.cpsc.gov/about/about.html>.



legislature to protect consumers will be rendered useless.

Igal v. Brightstar Information Technology Group²⁶
(Wainwright 5-4)

Impact: Transforms a payday law designed to give workers more options into a trap causing workers to forfeit all their rights.

Saleh Igal brought a Texas Workforce Commission claim against his employer, Brightstar Information Technology Group, alleging that Brightstar terminated his employment without cause. The Texas Workforce Commission (TWC) issued a decision in favor of Brightstar, concluding that Igal's claim failed on the merits and that TWC lacked jurisdiction because Igal filed his claim more than 180 days after his wages became due for payment. In lieu of filing a motion for rehearing with TWC or seeking judicial review of the TWC decision, Igal sued Brightstar in Texas district court for breach of contract.

The Supreme Court interpreted the relevant statute to have created a 180-day filing limitation period as a mandatory condition of pursuing the administrative cause of action. It further held that once a claimant who has alternate proceedings at his disposal to obtain relief available under the payday law pursues an administrative claim to a final decision, he foregoes his common law claims. In essence, the Court held that Igal had to choose one or the other – either pursue any redress through an administrative hearing or sue the employer in district court. The fact that Igal never actually received the opportunity to pursue justice through the administrative process seemed to have no bearing on the Court's decision.

²⁶ Docket No. 04-0931.

The four dissenting justices noted the impropriety of the majority decision, stating, “By holding Payday claims dismissed for tardiness cannot be refiled in court, the Court converts a law giving extra options to workers into a trap where they may forfeit all their rights.”

Lewis v. Funderburk²⁷
(Brister 9-0)

Impact: Expands appellate review of expert reports, making it more difficult for consumers to bring legitimate claims against wrongdoers.

Dewayne Funderburk sued Dr. Lewis, alleging that he was negligent in treating his daughter's broken wrist. Dr. Lewis moved to dismiss for failure to file an adequate expert report, a document that must be filed by any Texas plaintiff suing for medical malpractice.²⁸ When Dr. Lewis's challenge was denied by the trial court, he filed an interlocutory appeal to challenge the validity of the report. The appellate court claimed that it did not have jurisdiction to hear the interlocutory appeal. The Supreme Court granted certiorari to determine whether a 2003 law passed by the Texas legislature allowed interlocutory review of expert reports.

Funderburk argued that the 2003 law only allowed interlocutory review when no expert report was issued. The Court disagreed. In a very brief opinion, the Court held that Section 74.351 of the Civil Practices and Remedies Code provides for an interlocutory appeal when an inadequate expert report has been served. This means that the defendant can slow down the process of the litigation by challenging the legitimacy of an expert report, thereby making it even harder for victims of medical malpractice to obtain

²⁷ Docket No. 06-0518.

²⁸ See *supra* discussion of Expert Reports



justice through litigation. The impact of this holding will be widespread, as it is a common trend for medical defendants to attack medical malpractice suits based on the expert reports. In fact, in the months following the Court's decision in *Funderburk*, the Court handed down eight other decisions granting interlocutory review of expert reports based on *Funderburk's* holding.²⁹

The decision highlights a seriously flawed statute. The expert report statute, which is aimed at quelling frivolous lawsuits, actually acts as a hindrance to injured parties bringing legitimate claims. This decision will further prevent injured parties from receiving redress.

***Montgomery County v. Park*³⁰ (Jefferson 9-0)**

Impact: Removes the teeth from the Whistleblower Act by discouraging government employees from reporting wrongdoing.

David Park was a Montgomery County Sheriff's Department lieutenant. As part of his duties he was the security coordinator for Montgomery County Convention Center. A benefit of this position was that he made connections that allowed him to get part-time jobs as a private security officer. During a meeting with County Commissioner Rinehart, the Commissioner made degrading comments of a sexual nature about Park's administrative assistant. Park told his

assistant and she relayed many other stories of sexual harassment. Park did what any responsible employee should do and reported these incidents to the sheriff.

In response to Park's report, Rinehart ordered the sheriff to relieve Park of his security coordination duties. This negatively impacted Lieutenant Park by preventing him from obtaining work as a private security officer. Park sued Montgomery County, alleging that the Whistleblower Act had been violated. The Supreme Court found that the Whistleblower Act had not been violated because changes to Park's security coordinator responsibilities did not constitute an adverse personnel decision within the meaning of the Whistleblower Act. A personnel action must affect an employee's compensation, promotion, demotion, transfer, work assignment, or performance evaluation. The Court ignored the fact that by changing Park's security coordinator responsibilities, they were changing his work assignment and thereby affecting his compensation. The Whistleblower Act was passed with the intent of encouraging employees to report wrongdoing by their employers without fear of retaliation. By allowing employers to retaliate against employees, the Supreme Court is essentially removing any bite that the Whistleblower Act may have had.

***In re McAllen Medical Center*³¹ (Brister 6-3)**

Impact: Drastically expands mandamus relief, sacrificing Court precedent in order to further quell access to the courts.

A number of patients brought a class action suit against McAllen Medical Center for allowing a non-board-certified

²⁹ The eight consumer losses based on *Funderburk* grounds were: *Diaz-Rohena v. Melton* (Docket No. 08-0009), *Center for Neurological Disorders v. George* (Docket No. 07-0174), *Collini v. Pustejovsky* (Docket No. 07-0227), *Graham Oaks Care Center v. Farabee* (Docket No. 07-0228), *Hill Regional Hospital v. Runnels* (Docket No. 07-0368), *Metwest v. Rodriguez* (Docket No. 07-0422), *Moore v. Gattica* (Docket No. 07-0094), and *Bismar v. Moreland* (Docket No. 08-0009).

³⁰ Docket No. 05-1023.

³¹ Docket No. 05-0892



doctor to operate on them. The hospital moved to dismiss the suit on the basis that Dr. Brown, the expert who commented on the expert report, was not qualified to comment on the case. The trial court denied the motion to dismiss and the appellate court denied mandamus relief. A writ of mandamus is essentially an order by a higher court to an inferior court to take a certain course of action. Mandamus is generally reserved for extenuating circumstances where there are no other legal remedies for a party. At issue is whether mandamus review is available when expert reports are allegedly inadequate.

The Supreme Court found that based upon the record submitted to the Court the plaintiffs did not adequately establish Dr. Brown as an expert. The Court looked to the length of time that had been spent litigating the case and the length of time and future legal costs that would undoubtedly ensue from the litigation. Based on these factors, the Court determined that there was no adequate remedy available on appeal. Because the trial court abused its discretion in failing to grant the hospital's motion to dismiss, the Court granted mandamus relief so that the case could be dismissed.

The problem with this decision is that under the Court's analysis, any party involved in litigation may be entitled to mandamus relief. Litigation is expensive and time-consuming by its very nature. Quoting the theme song from *Aladdin*, the dissent argued that this decision created a "whole new world" of mandamus practice.³² The dissent stated, "Mandamus is an extraordinary writ that should issue 'only in situations involving manifest and

urgent necessity and not for grievances that may be addressed by other remedies."³³ This decision broadens this narrow doctrine to unprecedented levels.

***National Union Fire Insurance Co. v. Crocker*³⁴ (Willett 9-0)**

Impact: Eliminates responsibilities of insurers when an additional insurer fails to give notice of a lawsuit, even when the insurer is aware of the lawsuit.

Beatrice Crocker, a resident of a nursing home, was injured when a nursing home employee opened a door that struck her. She sued both the nursing home employee who injured her as well as the nursing home. The two claims were severed and a take nothing judgment was issued in favor of the insurance company. A default judgment was rendered in favor of Crocker against the nursing home employee. In order to collect the judgment, Crocker sued the nursing home's insurance company to collect the judgment under the theory that the employee was a third party beneficiary of the insurance coverage and it should indemnify him.

The insurance company had not acted on the employee's behalf even though he was a third party covered by the nursing home's policy. The insurance company rationalized its inaction by arguing that the employee had never properly notified it of the lawsuit. This argument smacks of deceit as the insurance company was already busily defending the nursing home in the lawsuit and was well aware of the employee's involvement.

³² *Id.*, Wainwright, J. dissenting, quoting Brad Kane, "A Whole New World," *Aladdin* (Disney 1992).

³³ *Id.*, quoting Walker v. Packer, 827 S.W.2d 833, 840 (Tex. 1992).

³⁴ Docket No. 06-0868.



Nevertheless, a unanimous Supreme Court held that even when an additional insured does not know about the coverage and the insurance company knows of the suit, there is no duty for the insurance company to inform the additional insured of the coverage. The practical result of this decision is that Ms. Crocker and other similarly situated citizens will not be able to receive legal redress if the injuring party does not contact his/her employer's insurance company directly.

Nationwide Insurance Co. v. Elchehimi³⁵
(Wainwright 7-2)

Impact: Prevents faultless drivers from obtaining underinsured motorist coverage when their automobile is damaged by a part of another vehicle.

Mohamad Elchehimi purchased from Nationwide a standard Texas personal automobile insurance policy which included the statutorily required unidentified motorist coverage. While driving his car, Elchehimi was hit by an axle-wheel assembly that released from an unidentified semi-trailer truck. Elchehimi filed a claim for uninsured motorist benefits which was denied by Nationwide because the impact between Elchehimi's vehicle and the axle-wheel assembly was not "actual physical contact" with an unknown "motor vehicle" as required by the terms of the policy and the Texas Insurance Code. Had the axle-wheel assembly been attached to an automobile at the time of the accident, Elchehimi would have been entitled to coverage. Since the assembly released from the unidentified truck prior to the impact, however, the insurance company argued that it could not be considered a motor vehicle.

The Supreme Court agreed with this illogic. The Court stated that in order to obtain underinsured motorist coverage, it must be shown that "actual physical contact must have occurred between the motor vehicle owned or operated by the unknown person and the person or property of the insured." Noting that a drive axle with two tandem wheels attached on one side lacks an engine or other means of propulsion, it in itself was not a vehicle. The Court found that whether the item that did make contact with the insured's vehicle was initially a piece of the unidentified vehicle or was cargo that had fallen off is irrelevant—in either case the item is not a vehicle. This decision is indicative of the extent the Court is willing to stretch common sense and meanings in order to tilt the playing field further in favor of the insurance industry at the expense of the consumer.

Providence Health Center v. Dowell³⁶
(Hecht 5-4)

Impact: Effectively removes any responsibilities of hospitals to evaluate or treat the mental health of attempted suicide patients.

Lance Dowell, a 21-year-old with a history of suicide attempts and a family history of depression, was taken to the emergency room after ingesting pills and slicing open one of his wrists. He was released after little interaction with the hospital staff and without a psychological evaluation. Approximately thirty hours after Lance's release from the hospital, he hanged himself.

Lance's family sued the hospital for wrongful death. During the trial, the Dowell's expert testified that most patients will consent to treatment when sternly presented with the dangers of

³⁵ Docket No. 06-0106.

³⁶ Docket No. 05-0386.



refusal. A jury found that the hospital and its staff had been negligent and issued a judgment in the family's favor. The Supreme Court reversed the decision on the basis that causation of the suicide could not be shown.

Despite the Dowell's expert testimony concerning how a reasonable person would respond to offers of medical treatment, the Supreme Court found evidence that Lance himself would not have consented to treatment even if the medical center had offered it to him. This information was sufficient to refute the Dowell's expert testimony of what most patients would do in similar situations. The Court also noted that the Dowell's expert never actually testified that hospitalization would likely have prevented the suicide. Finally, the Court found that the discharge from the emergency room was simply too remote from Lance's death in terms of time and circumstances.

The dissent noted that requiring evidence that Lance would have consented to hospitalization is a new and insurmountable legal hurdle. It would be impossible to determine with any level of certainty what a deceased suicidal person would have done if he or she had been offered medical assistance. The dissent also noted that Lance was never told to stay in the hospital, so it would be impossible to determine what would have happened had the hospital given him this offer. This decision shows a clear disregard for serious mental health issues.

