



Texas Court Watch
a project of the Texas Watch Foundation

A LOSING PROPOSITION: Consumers Continue to Face Long Odds at High Court

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Texas Supreme Court Annual Report, 2008-09

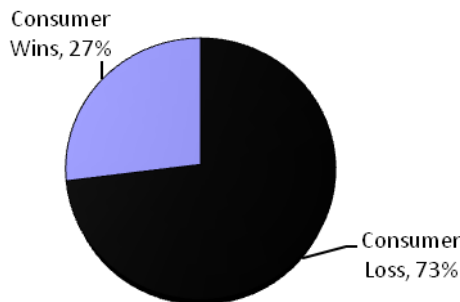
## **Introduction**

The Texas Supreme Court’s 2008-09 term marks the 13th year of the Court Watch project – thirteen years spent analyzing the opinions of the Court and how everyday Texans are impacted by its actions. This period has seen the Court grow increasingly protective of business interests at the expense of consumers, and the 08-09 term delivers much of the same bad news.

Some key statistics:

- Consumers prevailed in just 27% of cases involving an individual pitted against a corporate or governmental entity.
- In cases where a jury reached a verdict, the Texas Supreme Court reversed the jury’s decision 72% of the time.
- The average score on our Consumer Scorecard for the justices was just 32%.
- The average rate of agreement with the majority was 87%, indicating a lack of judicial debate or disagreement.

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A number of new trends emerged this term. Most notable was the Court’s penchant for shielding governmental entities from accountability. The Court has a long history of protecting corporate wrongdoers, and that is unchanged as is evidenced by the Court’s reaffirmation of its wrongheaded and decidedly activist decision in *Entergy v. Summers*. This term is marked by an increase in governmental immunity protections for state and local governments that put the lives and livelihoods of citizens at risk. From whistleblowers to unsafe road conditions to abiding by a signed contract, the Court allowed local and

state governments to hide behind a cloak of “sovereign immunity” rather than take responsibility for the harm caused to individual citizens.

There were, however, a few bright spots in this otherwise anti-consumer term. For the first time since the 2001-02 term, the Court made some significant rulings in favor of consumers. On a related note, three of the justices improved their consumer voting records, each topping 40% in favor of consumers with Justice Medina voting for consumers 49% of the time. Finally, the Court has nearly halved the percentage of unsigned opinions it releases, opening itself to more accountability and transparency. We applaud the Court for these positive developments and hope to see a new trend develop.

This term also marks the end of the Court's four year stable composition of justices. These nine justices have spent the past four terms together on the Court and, as might be expected, voting alliances have developed. We hope that the replacement of Justice Brister with Justice Guzman will lead to a more balanced term in 2009-2010.

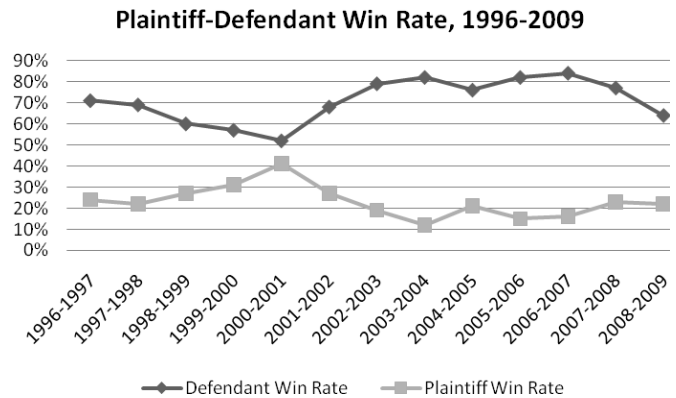
## By The Numbers

Over the course of the 2008-09 term (which ran from September 1, 2008 through August 31, 2009) the Court issued 118 opinions, including two dissents from denial of review. Of those, 34% were per curiam opinions – about half the amount compared to the previous term. While this is still a much higher percentage of unsigned opinions than the U.S. Supreme Court issues each term, it is nonetheless a marked and welcome change from the Texas Supreme Court’s recent trend of overreliance on these unsigned opinions.

Of the 118 opinions issued by the Court, 64 affect consumers. Of those 64, consumers won only 17, equating to a consumer win rate of a dismal 27%. This continues the Court’s decade-long trend of ruling against consumers at a much higher rate than against corporate, insurance, and governmental interests.

### Anti-jury, Pro-defendant Bias

A close correlation to the consumer win rate is the plaintiff win rate. Plaintiffs won 22% of the cases the Court heard, while defendants were nearly three times as successful with a win rate of 64%.<sup>1</sup> This low ratio of plaintiff wins to defendant wins is illustrated in the Court’s affirm/reverse rate. The Court has continued its tendency to overrule trial court decisions with an overturn rate of 82%, meaning that the Court affirmed only 18% of the cases it heard. When the overturn rate is broken down further into trial court verdicts issued by a judge versus those issued by a jury, the Court’s continued anti-jury bias is revealed with a jury reversal rate of 72%.



### Consumer Scorecard

While it would be unrealistic to expect consumers to win all cases that come before the Court, the Court has historically not come near parity when it comes to consumer victories. This term is no different with an average consumer score of just 32%.

However, the Court saw three of its justices moderate their decisions such that they voted in favor of consumers over 40% of the time. This is a marked improvement over the past several years when no justice topped 39% of votes in favor of consumers. Justice Medina led the pack with 49% of his decisions coming in favor of opinions. Justice O’Neill and Chief Justice Jefferson scores 45% and 44%, respectively.

| <b>Texas Supreme Court<br/>Consumer Scorecard, 2008-09</b> |                       |
|------------------------------------------------------------|-----------------------|
| <b>Justice</b>                                             | <b>Consumer Score</b> |
| David Medina                                               | 49%                   |
| Harriet O’Neill                                            | 45%                   |
| Wallace Jefferson                                          | 44%                   |
| Phil Johnson                                               | 35%                   |
| Paul Green                                                 | 30%                   |
| Scott Brister                                              | 28%                   |
| Don Willett                                                | 24%                   |
| Dale Wainwright                                            | 19%                   |
| Nathan Hecht                                               | 17%                   |
| <b>Average</b>                                             | <b>32%</b>            |

<sup>1</sup> The analysis of the plaintiff/defendant win rate includes 102 of the Court’s 118 decisions. Sixteen cases could not clearly be categorized plaintiff or defendant wins. These cases include reviews of disciplinary proceedings, attorney fee disputes, family law cases, tax disputes, and cases where the allegedly wronged party was not the party which filed the case.

The remaining six justices, however, continue to disproportionately vote against consumers. For the fourth consecutive term, Justices Hecht, Wainwright, and Willett have the dubious distinction of bringing up the rear with voting records lower than 25% in favor of consumers.

### Agreement with Majority

Of the 118 opinions issued by the Court this term, 78 were authored opinions. Of those, 35 were unanimous (45%), meaning that in only 55% of the opinions did at least one justice dissent. The Court’s high rate of cohesion is even clearer in the records of the individual justices and their frequency of joining the majority. The average rate of agreement with the majority was 87%, which is slightly lower than the average of the previous five years, but still represents a lack of serious judicial deliberation amongst the Justices.

| Texas Supreme Court<br>Agreement with Majority, 2008-09 |       |          |            |
|---------------------------------------------------------|-------|----------|------------|
| Justice                                                 | Agree | Disagree | Score      |
| Dale Wainwright                                         | 71    | 6        | 92%        |
| Phil Johnson                                            | 70    | 6        | 92%        |
| Don Willett                                             | 68    | 7        | 91%        |
| Paul Green                                              | 65.5  | 7.5      | 90%        |
| Scott Brister                                           | 69    | 9        | 88%        |
| Nathan Hecht                                            | 67.5  | 9.5      | 88%        |
| Wallace Jefferson                                       | 64    | 11       | 85%        |
| Harriet O’Neill                                         | 56    | 14       | 80%        |
| David Medina                                            | 59    | 16       | 79%        |
| <b>Average</b>                                          |       |          | <b>87%</b> |

### Voting Blocs

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. Forty-one majority opinions, 35 unanimous opinions, and 2 dissents from denial of review were considered in tallying these statistics. Result analysis measures agreement on result, counting concurrence as agreement with the majority.

The average rate of cohesion for the 2008-09 term was 83%. To put this figure into perspective, the U.S. Supreme Court’s average rate of cohesion for the same term was only 70%.<sup>2</sup>


















After conducting the Voting Block Analysis (VBA), a bloc occurs between two justices when they agree more than 91.5% of the time. Using this analysis, two of the Court’s long-standing blocs come into clear focus: a “moderate” bloc and a hard-line bloc. As can be seen by our Consumer Scorecard, Chief Justice Jefferson and Justice O’Neill have for many years represented the Court’s more moderate voices. Justice Medina also often sides with Justice O’Neill, falling just outside the VBA threshold with 91% agreement. Given the decidedly pro-corporate bent of the Texas Supreme Court, however, labeling this group as “moderate” must be taken with a grain of salt. The second bloc that emerges using the VBA represents a hard line coalition between Justices Wainwright and Willett. It also noteworthy that Wainwright and Willett have voted with Justice Hecht - who has long been the hard-line ideological leader of the Court - 90% of the time. Again, this falls just outside the VBA threshold.

One might expect a court comprised of nine elected individuals to disagree with each other more frequently, but that simply has not been the experience at the Texas Supreme Court in many years. The fact that all of the sitting justices are not only of the same political party, but also share similar degrees

<sup>2</sup> <http://www.scotusblog.com/wp-content/uploads/2009/06/full-stat-pack.pdf>

of ideology and legal backgrounds clearly presents serious questions as to whether justice can be served by a court that, in effect, acts as a single unit.

**Texas Supreme Court  
Voting Bloc Analysis, 2008-09**

|                                                                                                  |                                                                                                |                                                                                            |                                                                                              |                                                                                                  |                                                                                                |                                                                                                |                                                                                                |                                                                                                  |                                                                                                  |
|--------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------|
|                                                                                                  | <br>Jefferson |                                                                                            |                                                                                              |                                                                                                  |                                                                                                |                                                                                                |                                                                                                |                                                                                                  |                                                                                                  |
| <br>Hecht       | 78%                                                                                            | <br>Hecht |                                                                                              |                                                                                                  |                                                                                                |                                                                                                |                                                                                                |                                                                                                  |                                                                                                  |
| <br>O'Neill     | <u>93%</u>                                                                                     | 76%                                                                                        | <br>O'Neill |                                                                                                  |                                                                                                |                                                                                                |                                                                                                |                                                                                                  |                                                                                                  |
| <br>Wainwright | 79%                                                                                            | 90%                                                                                        | 76%                                                                                          | <br>Wainwright |                                                                                                |                                                                                                |                                                                                                |                                                                                                  |                                                                                                  |
| <br>Brister   | 79%                                                                                            | 84%                                                                                        | 81%                                                                                          | 90%                                                                                              | <br>Brister |                                                                                                |                                                                                                |                                                                                                  |                                                                                                  |
| <br>Medina    | 84%                                                                                            | 74%                                                                                        | 91%                                                                                          | 77%                                                                                              | 83%                                                                                            | <br>Medina |                                                                                                |                                                                                                  |                                                                                                  |
| <br>Green     | <u>94%</u>                                                                                     | 85%                                                                                        | 87%                                                                                          | 86%                                                                                              | 82%                                                                                            | 81%                                                                                            | <br>Green |                                                                                                  |                                                                                                  |
| <br>Johnson   | 83%                                                                                            | 90%                                                                                        | 76%                                                                                          | 91%                                                                                              | 83%                                                                                            | 75%                                                                                            | 88%                                                                                            | <br>Johnson |                                                                                                  |
| <br>Willett   | 78%                                                                                            | 90%                                                                                        | 74%                                                                                          | <u>92%</u>                                                                                       | 87%                                                                                            | 77%                                                                                            | 83%                                                                                            | 88%                                                                                              | <br>Willett |

**VBA methodology:**  
Average rate of agreement (cohesion): 83%

$100$  (perfect agreement) –  $83$  (cohesion) =  $17$ ;  $17/2 = 8.5$ ;  $83$  (cohesion) +  $8.5 = 91.5$

Bloc is 92% or greater

## **Trends**

The 2008-09 term saw the Court revisit some of its familiar themes (government immunity and civil procedure) as well exploring legal areas that are less frequently considered (workers compensation insurance, whistleblower protection, and the safety of drivers). Each of these subject areas are explored below.

### **Workers Compensation Insurance**

For a number of years, the Texas Supreme Court has steadily been whittling away worker protections. One of the means of accomplishing that task this term was through opinions affecting workers compensation insurance.

The basic premise of workers comp is that there's a fair trade between employer and employee whereby the employer purchases coverage for the employee in exchange for the employee waiving his right to go to court if he's injured on the job. The Court's interpretation of workers comp this term, however, was more that the system exists to prevent workers from obtaining fair compensation.

In *Entergy Gulf States, Inc. v. Summers*,<sup>3</sup> the Court made a sweeping change to the workers compensation system by allowing premises owners to purchase a form of workers compensation insurance – thereby purchasing legal immunity – that covers workers they do not directly employ. In essence, the Court laid out a road map for premises owners to avoid responsibility for dangerous work sites. This has been rejected for years by the Texas Legislature, and for good reason: the premises owner deducts the cost of the coverage from the amount it pays for the contract, essentially allowing the premises owner to obtain for nothing the legal protection offered by workers compensation. This situation may lead to more unsafe working conditions as premises owners (particularly very large ones like refineries) have less incentive to ensure a safe work environment, thus placing workers and surrounding communities at risk.

In *HCBeck, Ltd. v. Rice*,<sup>4</sup> the Court allowed an employer to use workers comp as a shield against liability even though that employer had not itself paid the workers comp premium. As the dissent noted, allowing an employer who has not paid for the benefits to nevertheless claim immunity when one of its employees is injured on the job violates the quid pro quo nature of the workers comp system. When an employer has sacrificed nothing in the workers comp trade-off, the employer should not be allowed to benefit from the system.

The Court did not only allow employers to game the workers comp system this term either. In *State Office of Risk Management v. Lawton*,<sup>5</sup> the Court also tipped the balance of the workers comp system in favor of insurers. With that case, the Court has made it much easier for a workers comp insurer to refuse to cover a medical bill months, possibly even years, after the injury occurred

### **Whistleblower Claims**

In attempting to expose the wrongdoing of their employers, whistleblowers must take serious risks. Persecution of whistleblowers is widespread and comes in many forms, from harassment by fellow employees to termination to being blacklisted by an entire industry. Because of these risks, it is

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<sup>3</sup> *Entergy Gulf States, Inc. v. Summers*, docket number 05-0272 (Green 6-3) (2009).

<sup>4</sup> *HCBeck, Ltd. v. Rice*, docket number 06-0418 (Green 6-2) (2009).

<sup>5</sup> *State Office of Risk Management v. Lawton*, docket number 08-0363 (Jefferson 9-0) (2009).

essential that whistleblowers receive strong legal protections. In several cases this term, however, the Texas Supreme Court further weakened their protections.

One of the necessary steps to gaining whistleblower protections is for the employee to report the illegal activity to law enforcement. In a trio of cases this term, the Court has made this process much more difficult for employees. In *State of Texas v. Lueck*,<sup>6</sup> the Court held that reporting a legal violation to one's supervisor is not comparable to reporting a violation to law enforcement, and therefore the employee will not receive whistleblower protections if fired. This holding creates the perverse incentive for the employer to fire the employee when it learns of the report to the supervisor, such that the employee does not gain whistleblower protection. This allows the employer to get around the purpose of the whistleblower law precisely by violating its purpose. Later in the term, the Court used *Lueck* to dismiss two other whistleblower cases involving an employee's report to his supervisor rather than law enforcement: *Texas Dept. of Health and Human Services v. Okoli*<sup>7</sup> and *TXDOT v. Garcia*.<sup>8</sup>

### **Driver Safety**

On four separate occasions this term the Court issued opinions that are likely to make the roads more dangerous for Texas drivers. Three of those rulings raise the bar for holding the government accountable for dangerous road conditions and the fourth increases the likelihood of accidents involving drivers who have fallen asleep.

In *Denton County v. Beynon*,<sup>9</sup> the Court held that the government is not liable for dangerous road conditions unless those conditions occur or exist on the surface of the road. In so ruling, the Court rejected the idea that the government should be held accountable to drivers for creating a dangerous condition mere feet off the shoulder.

In *Texas Department of Transportation v. Gutierrez*<sup>10</sup> and *Texas Department of Transportation v. York*,<sup>11</sup> the Court very narrowly defined the type of road obstruction for which the government would be liable by requiring that it "physically impair a car's ability to drive on the road." Both of these cases involved gravel on the road that caused drivers to lose control of their cars. As a result of these two opinions, the government cannot be held accountable for leaving excessive amounts of gravel on the road. By relieving the government of liability in this instance, the Court removes an important incentive the state has to maintain road safety.

In *Nabors Drilling, USA v. Escoto*,<sup>12</sup> the Court refused to recognize the difference between the dangers created by driving while fatigued and the dangers created by drivers who work alternating night shifts. Because of this, the Court refused to acknowledge a duty of employers whose employees work night shifts to warn those employees of the unexpected fatigue that might suddenly arise while driving home from work. While most people are aware that driving while tired is quite risky, people are not as aware that working night shifts can disrupt a person's circadian rhythm, creating a situation where the person feels alert one minute and highly fatigued the next. The Court's failure to penalize an employer for

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<sup>6</sup> *State of Texas v. Lueck*, docket number 06-1034 (Green 9-0) (2009).

<sup>7</sup> *Texas Dept. of Health and Human Services v. Okoli*, docket number 07-0642 (per curiam) (2009).

<sup>8</sup> *Texas Dept. of Transp. v. Garcia*, docket number 07-1030 (per curiam) (2009).

<sup>9</sup> *Denton County v. Beynon*, docket number 08-0016 (Willett 6-3) (2009).

<sup>10</sup> *Texas Dept. of Transp. v. Gutierrez*, docket number 07-1013 (per curiam) (2009).

<sup>11</sup> *Texas Dept. of Transp. v. York*, docket number 07-0743 (per curiam) (2009).

<sup>12</sup> *Nabors Drilling, USA v. Escoto*, docket number 06-0890 (Green 9-0) (2009).

failing to warn its employees of this danger makes it more likely that employees working night shifts will be on the road unaware that fatigue may suddenly overtake them.

### **Government Immunity**

In the 2008-09 term, the Court revisited one of its common subject areas: decreasing government accountability for wrongdoing.

In *Dallas County v. Posey*,<sup>13</sup> the Court concluded that the government cannot be liable when a defective object causes someone harm if the harm is not directly related to the defect. This creates the nonsensical situation where the government escapes accountability merely because a defective object injured someone in an unexpected way.

In *Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338*,<sup>14</sup> the city reached an agreement with its transit union employees then later refused to adhere to that agreement. The Court held that in these types of labor disputes, union employees have no direct recourse against a government entity that reneges on its contract.

### **Civil Procedure**

There are numerous ways that rules involving how a case must be handled can be manipulated to make it much more difficult for injured parties to hold their wrongdoer accountable. This term the Court did so by manipulating rules involving expert witnesses and by making a dramatic change in the law that affects how trial judges must grant a new trial.

Several types of cases require expert witnesses and expert reports, and there are many rules and guidelines related to these witnesses and reports. The general thrust of these rules is to promote fairness by preventing parties from gaming the system or double dipping. Two of the Court's cases this term did just the opposite, however.

In *San Antonio v. Pollock*,<sup>15</sup> the Court allowed defendants to game the system by choosing not to object to an expert witness before trial (when it is typically required to do so) and object on appeal instead. The purpose of requiring certain objections before trial is to give the judge ample time to perform his gatekeeping function and to give the opposing party an opportunity to correct any errors. The Court's ruling ignores both of these principles.

In *Hernandez v. Ebrom*, the Court allowed a defendant to object to an expert report on appeal when it failed to do so at trial. This effectively allows defendants to game the system on appeal by holding this objection as a trump card in the event that the plaintiff wins.

In *In re Columbia Medical Center*,<sup>16</sup> followed closely by *In re Baylor Medical Center*,<sup>17</sup> the Court made a dramatic change in longstanding trial practice. Trial courts in Texas have never been required to give specific reasons when granting an order for a new trial. Without so much as a public notice, the Texas Supreme Court took it upon itself to change that rule and ordered trial judges to issue detailed reasons

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<sup>13</sup> *Dallas County v. Posey*, docket number 08-0094 (per curiam) (2009).

<sup>14</sup> *Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338*, docket number 06-0034 (Hecht 9-0) (2008).

<sup>15</sup> *City of San Antonio v. Pollock*, docket number 04-1118 (Hecht 6-2) (2009).

<sup>16</sup> *In re Columbia Medical Center*, docket number 06-0416 (Johnson 5-4) (2009).

<sup>17</sup> *In re Baylor Medical Center*, docket number 06-0491 (Johnson 5-4) (2009).

for granting a new trial. Whether this change will help or hurt consumers remains to be seen, but the behind-closed-doors mentality of the Court in passing this sweeping change is cause for concern.

## ***Silver Lining***

Every year since its inception our Annual Review of the Texas Supreme Court has included a section highlighting the most anti-consumer cases of the Court's term. In the past, our report has also included a section highlighting major consumer victories at the Court. The last term we included a Silver Lining section to our annual review was the 2001-02 term. Seven terms later, we are pleased to present four important consumer victories.

### ***Marks v. St. Luke's Episcopal Hospital***<sup>18</sup> (Medina 5-4)

*Impact:* Categorizes patient injuries in hospitals by equipment not related to their care as premises liability claims, thus excusing the injured patient from the strict liability limits and stringent medical expert testimony required in medical malpractice claims.

While Irving Marks was lying in his hospital bed attempting to get up following back surgery, the footboard of the bed broke, causing Mr. Marks to fall. After this incident, Mr. Marks filed suit against the hospital for negligence. Before the trial began, the hospital asserted that the claim should be categorized as a medical malpractice claim rather than a premises liability claim. The trial court agreed. Because Mr. Marks had not met the strict rules of the medical malpractice statute that require the timely filing of a medical expert report, the court dismissed the case and the appellate court affirmed.

On appeal, the Texas Supreme Court noted that the medical malpractice statute was passed by the Legislature in response to a perceived crisis in the cost of malpractice insurance. Because malpractice insurance does not cover premises liability claims, the Court reasoned that the Legislature had not intended to include premises liability claims under the malpractice claim umbrella.

This opinion came as welcome news, confirming that a previous opinion from 2005 that classified safety failures in medical facilities as malpractice claims (*Diversicare General Partner, Inc. v. Rubio*<sup>19</sup>) was not as broad as many feared. As a result of this case, people who are injured in medical facilities by equipment not relating to their treatment will not be required to satisfy the much more difficult requirements of malpractice claims.

However, the Court has accepted the hospital's petition for a rehearing, so this consumer victory is not assured.

### ***Adams v. YMCA of San Antonio*** (Per Curiam)

*Impact:* A person need not experience past mental anguish in order to receive future mental anguish damages as long as the evidence supports the future mental anguish.

A nine year old child was sexually abused by a camp counselor while at a YMCA summer camp. He did not tell his parents about the incident and repressed the memory of it ever happening. The counselor later admitted to having molested several children at the camp, including the plaintiff, leading the child's parents to question him about the incident. The child became explosively emotional, and his parents subsequently sued the YMCA. The jury awarded future mental anguish damages, but not past mental anguish damages. The YMCA appealed, claiming that the jury's failure to award past mental anguish damages demonstrated that there was insufficient evidence to support the award of future damages.

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<sup>18</sup> *Marks v. St. Luke's Episcopal Hospital*, docket number 07-0783 (Medina 5-4) (2009).

<sup>19</sup> *Diversicare General Partner, Inc. v. Rubio*, docket number 02-0849 (Wainwright 6-3) (2005).

The Texas Supreme Court had previously recognized that child victims of sexual abuse often repress the memories in childhood but experience severe trauma as an adult. In this case, the plaintiff's expert testified that this would likely be the case for the plaintiff. The Court held that there was sufficient evidence in this case to support the award of future mental anguish damages despite the absence of past damages.

The result of this opinion is that victims who suppress memories of victimization need not establish that they have already begun suffering emotionally as a result of the abuse in order to receive compensation for anticipated future mental damages.

***Tanner v. Nationwide Mutual Fire Ins. Co.***<sup>20</sup> (Willett 8-1)

*Impact:* An auto insurer may not escape liability if its insured deliberately drove recklessly.

Richard Gibbons fled police, causing a high speed chase through heavily populated areas. As his car was about to accidentally hit the Tanner's car, Mr. Gibbons slammed his brakes in a failed attempt to prevent the accident. The Tanners were all injured in the accident and filed a claim against Mr. Gibbons' auto insurance, Nationwide. Nationwide declined to pay the claim, noting that the auto policy did not cover injury resulting from an intentional action, and the police chase was clearly an intentional action.

The Supreme Court disagreed. The Court held that a driver must intend to cause a specific resulting injury in order for his insurer to escape liability for any damages the driver causes. Thus, an intentionally reckless driver maintains insurance coverage for any damage he didn't specifically intend.

This opinion ensures that innocent bystanders who are injured by reckless driving will be able to file their claims against the reckless driver's auto insurance.

***In re Morgan Stanley & Co. Inc.***<sup>21</sup> (Medina 7-1)

*Impact:* It's the duty of a judge, not an arbitrator, to decide if a person had sufficient mental capacity to enter into a contract.

Helen Taylor entered into a contract with Morgan Stanley, transferring several of her securities accounts to them. The contract contained a mandatory arbitration clause. That same year, Ms. Taylor was diagnosed with dementia. After Morgan Stanley had lost much of Ms. Taylor's money through mismanagement, Ms. Taylor's guardian ad litem sued Morgan Stanley. Morgan Stanley claimed that because of the arbitration clause in the contract, the case must go through arbitration.

One of the issues in question was whether Ms. Taylor was mentally competent when she signed the contract with Morgan Stanley. The Texas Supreme Court held that the question of mental capacity is one for a judge, not an arbitrator, to decide.

This case ensures that the question of whether a person was mentally competent when he signed a contract will be made by a publicly accountable judge, subject to appeal.

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<sup>20</sup> *Tanner v. Nationwide Mutual Fire Ins. Co.*, docket number 07-0760 (Willett 8-1) (2009).

<sup>21</sup> *In re Morgan Stanley & Co. Inc.*, docket number 07-0665 (Medina 7-1) (2009).

## ***Terrible Ten***

Since our inaugural report in 1997, Court Watch has included a list of the ten (sometimes twelve) cases decided by the Texas Supreme Court in the previous term that have the most negative impact on Texas families and consumers. Without further ado, we present our twelfth annual list.

### ***City of San Antonio v. Pollock***<sup>22</sup> (Hecht 6-2)

*Impact:* Allows a party to game the system by choosing not to object before trial to expert testimony but retain its ability to appeal the admission of that testimony.

The Pollocks lived in a San Antonio home abutting a city landfill. While living there, Mrs. Pollock became pregnant and gave birth to a girl. When the child was four years old, she was diagnosed with acute lymphoblastic leukemia. The Pollocks sued the city, claiming that benzene from the landfill caused their daughter to develop cancer.

At trial the Pollocks presented two expert witnesses, a doctor and an engineer, with no objection from the city. On appeal, however, the city did object to the expert testimony, and the Supreme Court sided with the city, despite the fact that the city had not preserved its appeal by objecting to the trial judge. As the dissent correctly observed, this ruling allows defendants to game the system by withholding their objection until the verdict has been delivered.

### ***Entergy Gulf States, Inc. v. Summers***<sup>23</sup> (Green 6-3)

*Impact:* Disincentivizes safety at large worksites by allowing the owner of the worksite to use workers compensation insurance as a shield against responsibility for any dangerous condition it creates.

John Summers was employed by International Maintenance Corporation (IMC), which had contracted with Entergy to perform construction and maintenance. Mr. Summers was seriously injured while on Entergy's premises, and he brought suit against Entergy.

Entergy, however, had procured a form of workers compensation insurance on all of IMC's employees, and asserted that this coverage protected it from liability. Mr. Summers argued that Entergy was only the premises owner, not his employer, and thus had no right to shield itself from accountability.

The Texas Supreme Court ruled in Entergy's favor despite the fact that the Legislature had repeatedly refused to amend the workers comp statute to allow premises owners to qualify as contractors. As a result, refinery and chemical plant owners across Texas can now escape accountability when a contractor is injured on its premises simply by purchasing workers comp.

This is the second time this case has appeared on our list of the most anti-consumer decisions. In the 2007-08 term, the Court reached a similar decision. This case was subsequently reheard by the Court following an outcry by legal scholars, lawmakers, and work safety advocates, including Texas Watch. Unfortunately, the Court refused to correct this wrongheaded decision.

### ***Nabors Drilling, USA v. Escoto***<sup>24</sup> (Green 9-0)

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<sup>22</sup> *City of San Antonio v. Pollock*, docket number 04-1118 (Hecht 6-2) (2009).

<sup>23</sup> *Entergy Gulf States, Inc. v. Summers*, docket number 05-0272 (Green 6-3) (2009).

<sup>24</sup> *Nabors Drilling, USA v. Escoto*, docket number 06-0890 (Green 9-0) (2009).

*Impact:* Allows employers to offer no training on the unpredictable and sometimes sudden impact on a night shift employee's sleeping patterns, making the roads more dangerous for night time drivers.

Robert Ambriz was an oil field worker for Nabors Drilling. Nabors required its employees to work 12 hour day shifts for one week, take a week off, then work 12 hour night shifts. One night after a particularly rough shift, Mr. Ambriz did not appear tired and said he was not tired, and left the worksite to head home. On his way, however, Mr. Ambriz fell asleep and caused a fatal car accident.

The surviving family members sued Nabors Drilling, claiming it had a duty to protect the public from fatigued employees once they left work. The jury ruled for the family members, but the trial judge reversed, claiming that the employer had no duty. The appellate court reversed, reinstating the jury award. The Supreme Court reversed again, agreeing with the trial judge that an employer owes no duty to protect the public by warning its employees of obvious dangerous.

The Court refused to acknowledge the difference between the dangers of general fatigue versus the dangers created by working an alternating graveyard shift. It is not common knowledge that working erratic hours changes one's circadian rhythm and that one should attempt to modify one's sleep schedule to accommodate that. Acknowledging a duty by an employer that structures schedules the way that Nabors did to train its employees about that would not only have been reasonable, but it also could have prevented fatalities on the road.

***In re Labatt Food Service, L.P.***<sup>25</sup> (Johnson 9-0)

*Impact:* Forces surviving family members of employees and others subject to arbitration to bring their wrongful death claims in arbitration rather than in open court.

Carlos Dancy, Jr. worked for Labatt and had signed an agreement to participate in their workers comp plan. The agreement contained an arbitration clause.

Mr. Dancy later died on the job from an asthma attack. His surviving family filed suit against Labatt, but Labatt claimed that the family was required to bring their claim in arbitration. The family claimed that the arbitration agreement did not apply to them because they had not signed the agreement.

The Supreme Court held that if the deceased was subject to arbitration, then any survivors who bring a wrongful death action are similarly bound. The effect of this holding is that surviving family members of a person (usually this will be an employee) bound by arbitration will be forced to bring their wrongful death in arbitration, with its accompanying high fees and pro-business bias.

***Texas Department of Transportation v. York***<sup>26</sup> (Per Curiam) & ***Texas Department of Transportation v. Gutierrez***<sup>27</sup> (Per Curiam)

*Impact:* Protects the state from liability when drivers are injured or killed by many dangerous road conditions, including gravel.

Both of these cases involve auto accidents that were caused by a large amount of gravel that had been left in the road by TXDOT road crews. In *Gutierrez*, the driver was injured, and in *York*, the driver was

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<sup>25</sup> *In re Labatt Food Service, L.P.*, docket number 07-0419 (Johnson 9-0) (2009).

<sup>26</sup> *Texas Dept. of Transp. v. York*, docket number 07-0743 (per curiam) (2009).

<sup>27</sup> *Texas Dept. of Transp. v. Gutierrez*, docket number 07-1013 (per curiam) (2009).

killed. In both cases, plaintiffs alleged that TXDOT should have known of the presence of this dangerous condition and thus TXDOT was liable under the theory of special defect.

The Texas Supreme Court rejected plaintiffs' claims, taking a very narrow reading of the statute in question to determine that a special defect must be similar to an obstruction or excavation. The Court irrationally concluded that gravel does not physically impair a car's ability to drive and thus it cannot be an obstruction.

The practical effect of this case is that drivers who are injured because gravel or some similar type of material was left on the road will be forced to file premises liability (rather than special defects) claims. Such a claim would require the plaintiff to prove not just that TXDOT *should have known* of the dangerous condition of the road, but that it *actually did know*. This is a nearly impossible standard, and thus it basically excuses TXDOT from accountability when it fails to keep the roads free of debris that it caused to be put there.

***Dallas County v. Posey***<sup>28</sup> (Per Curiam)

*Impact:* Shields the state from liability when a person is injured or killed by a faulty or defective state-owned object if the defect did not directly cause the injury.

Bryan Posey was arrested after assaulting his mother. He was put into a cell with a disconnected telephone that had exposed wires, and he used the telephone cord to hang himself. Bryan's family subsequently sued the county.

The Supreme Court rejected the Poseys' claims on numerous grounds. While the county was aware of the dangers of telephone cords and had ordered them to be removed from all jail cells, the Court found that its failure to do so was only a non-use or misuse of state property, rather than a required use. Additionally, the Court held that for a defective condition to be sufficient to waive government immunity, the defect must pose dangers in its "intended and ordinary" use (ex. risk of electric shock caused by the exposed wires). Because the actual defect (the exposed wires) did not cause Bryan's suicide, but only made it possible, the county's immunity from suit was not waived.

As a result of this case, the government can escape responsibility for death caused by a defective government-owned object if the death was not caused directly by the defect.

***In re Next Financial Group, Inc.***<sup>29</sup> (Per Curiam)

*Impact:* Forces an employee who is terminated for reporting an illegal act of his employer to bring his whistleblower suit in arbitration, rather than in open court, if the employee was bound to a pre-dispute arbitration clause in his employment contract.

Michael Clements was an employee of Next Financial Group. He alleged that he was fired because he refused to commit an illegal act, and he brought a whistleblower suit against his employer. Next Financial Group claimed that Mr. Clements' suit was subject to the arbitration clause in his contract, but Mr. Clements asserted that because his claim was a whistleblower action, he was not bound by the arbitration clause.

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<sup>28</sup> *Dallas County v. Posey*, docket number 08-0094 (per curiam) (2009).

<sup>29</sup> *In re Next Financial Group, Inc.*, docket number 08-0192 (per curiam) (2008).

The Supreme Court agreed with the employer that an arbitration provision in an employment contract stands even if the employee was fired for refusal to commit an illegal act and brings a whistleblower claim.

As a result of this decision, employers can now force terminated employees with whistleblower suits into closed-door arbitration proceedings, making it much less likely that the public will learn of the company's illegal acts.

***Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338***<sup>30</sup> (Hecht 9-0)

*Impact:* Allows local governments to renege on its union contracts with public transit employees without consequence.

The Federal Transit Act (FTA) conditions a transportation authority's receipt of federal funds on several factors, including reaching fair compensation agreements with its employees and unions. The Dallas Area Rapid Transit (DART) reached an agreement with the local union, but then later refused to honor the agreement. The union exhausted its administrative procedures and sued DART in court. DART claimed sovereign immunity. The trial court and the appellate court disagreed, so DART appealed to the Texas Supreme Court.

The Court held that the FTA only requires that the transit authority reach a fair agreement, and the union does not dispute that the agreement was fair. The FTA, asserted the Court, does not require the transit authority to follow through with the agreement, therefore DART retained its immunity.

The Court's interpretation of the FTA invalidates its stated purpose of ensuring that employees of transit authorities are treated fairly and it gives a free pass to any transit authority that reneges on its union contracts.

***Southwestern Bell Telephone Co., L.P. v. Mitchell***<sup>31</sup> (Hecht 5-3)

*Impact:* Gives the Legislature the unconstitutional authority to redefine the meaning of statutes passed by previous Legislatures.

The Texas Supreme Court held in 2002 in *Continental Casualty Co. v. Downs*<sup>32</sup> that if a workers compensation subscriber fails within 7 days after the notice of injury is received to begin paying benefits or to notify its employee that it won't pay the benefits, then the subscriber may not later contest compensability. This was not the position the Workers Comp Commission had used. Instead, it had long interpreted the statute to mean that there might be an administrative penalty for failing to take the specified actions within 7 days, but the subscriber had up to 60 days to contest compensability. Nine months after the Court's opinion, the Legislature amended the statute so that it clearly supported the Commission's interpretation.

The question in this case was whether stare decisis dictated that *Downs* apply to cases that arose in the nine months before the Legislature amended the statute. The Court concluded it did not. It went on to explain that stare decisis is most important in cases involving statutory interpretation because the Legislature always has the ability to quickly amend a statute to clarify its meaning. The purpose of stare

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<sup>30</sup> *Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338*, docket number 06-0034 (Hecht 9-0) (2008).

<sup>31</sup> *Southwestern Bell Telephone Co., L.P. v. Mitchell*, docket number 05-0171 (Hecht 5-3) (2008).

<sup>32</sup> *Continental Casualty Co. v. Downs*, docket number 00-1309 (Hankinson 5-4) (2002).

decisis is to serve the interests of efficiency, fairness, and legitimacy. In a statutory interpretation case in which the Legislature quickly amended the statute in a way that does not agree with Court's interpretation (as was the case here), enforcing stare decisis no longer furthers those interests, and must be set aside.

The dissent noted that one session of a legislature cannot change the intent of a previous legislature. Thus when the 78th Legislature amended the statute in question, it was not changing the intent of the 70th Legislature that had created it. The dissent correctly notes that the Legislature does not have the authority to interpret the law – only the judiciary may do that.

By giving such strong weight to the Legislature's actions in this case, the Court ignores the entire purpose of stare decisis (that the law be predictable) and gives the Legislature unconstitutional authority.

***Denton County v. Beynon***<sup>33</sup> (Willett 6-3)

*Impact:* Allows the state to maintain its immunity for any dangerous roadside condition if that condition is even slightly off of the pavement, thereby creating dangerous situations for drivers who need to pull off of the shoulder.

Rhiannon Beynon, a minor, was riding in the backseat of a car driving down a narrow, unlit, rural road. The driver of the car attempted to pull to the side of the road when he saw an approaching car. The driver lost control of the car and it slid a few feet off of the pavement and into a 17 foot floodgate arm owned and maintained by the county. Rhiannon's leg was seriously injured and subsequently had to be amputated below the knee. Rhiannon's parents sued the county.

The Texas Supreme Court held that the county could not be held liable for a dangerous condition located off of the pavement. As the dissent correctly notes, the majority's opinion is nonsensical in asserting that an ordinary driver would not stray from the pavement at all, and thus would not expect safe conditions off of the pavement. Drivers exit the pavement for various reasons (ex. to avoid a collision as in this case, because of road debris, etc.). The Court's ruling allows the government to escape accountability for a danger it created if that danger is even slightly off of the paved surface of the road.

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<sup>33</sup> *Denton County v. Beynon*, docket number 08-0016 (Willett 6-3) (2009).

## **Appendix 1: Alphabetical List of Cases Cited**

*City of San Antonio v. Pollock*, docket number 04-1118 (Hecht 6-2) (2009).

*Continental Casualty Co. v. Downs*, docket number 00-1309 (Hankinson 5-4) (2002).

*Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338*, docket number 06-0034 (Hecht 9-0) (2008).

*Dallas County v. Posey*, docket number 08-0094 (per curiam) (2009).

*Denton County v. Beynon*, docket number 08-0016 (Willett 6-3) (2009).

*Diversicare General Partner, Inc. v. Rubio*, docket number 02-0849 (Wainwright 6-3) (2005).

*Energy Gulf States, Inc. v. Summers*, docket number 05-0272 (Green 6-3) (2009).

*HCBeck, Ltd. v. Rice*, docket number 06-0418 (Green 6-2) (2009).

*In re Baylor Medical Center*, docket number 06-0491 (Johnson 5-4) (2009).

*In re Columbia Medical Center*, docket number 06-0416 (Johnson 5-4) (2009).

*In re Labatt Food Service, L.P.*, docket number 07-0419 (Johnson 9-0) (2009).

*In re Morgan Stanley & Co. Inc.*, docket number 07-0665 (Medina 7-1) (2009).

*In re Next Financial Group, Inc.*, docket number 08-0192 (per curiam) (2008).

*Marks v. St. Luke's Episcopal Hospital*, docket number 07-0783 (Medina 5-4) (2009).

*Nabors Drilling, USA v. Escoto*, docket number 06-0890 (Green 9-0) (2009).

*Southwestern Bell Telephone Co., L.P. v. Mitchell*, docket number 05-0171 (Hecht 5-3) (2008).

*State Office of Risk Management v. Lawton*, docket number 08-0363 (Jefferson 9-0) (2009).

*State of Texas v. Lueck*, docket number 06-1034 (Green 9-0) (2009).

*Tanner v. Nationwide Mutual Fire Ins. Co.*, docket number 07-0760 (Willett 8-1) (2009).

*Texas Dept. of Health and Human Services v. Okoli*, docket number 07-0642 (per curiam) (2009).

*Texas Dept. of Transp. v. Garcia*, docket number 07-1030 (per curiam) (2009).

*Texas Dept. of Transp. v. Gutierrez*, docket number 07-1013 (per curiam) (2009).

*Texas Dept. of Transp. v. York*, docket number 07-0743 (per curiam) (2009).