



## HIGH COURT HIDES BEHIND SECRET RULINGS

A growing trend of secrecy by Texas' elected judges is alarmingly established in a new report by Texas Watch called "In the Shadows." The report reveals that the Texas Supreme Court relies to a startling degree on anonymous opinions; 57 percent of the opinions issued by the court during its last term were per curiam opinions (unsigned by any justice).

"It is ironic," the report noted, "that justices on the U.S. Supreme Court who are appointed for life terms rarely use per curiam opinions, while justices on the Texas Supreme Court who are elected make use of such opinions nearly half the time."

The report further documented that over the past decade the Texas high court has relied on per curiam opinions an average of 40 percent of the time, while the U.S. Supreme Court used unsigned opinions in only 4 percent of cases heard.

The Texas Supreme Court's overuse of per curiam opinions raises serious ethical questions regarding the Court's transparency. While per curiam opinions are typically used in non-controversial matters that do not have a significant legal impact, the Texas Court habitually uses them as a shield in controversial decisions, leaving justices unaccountable to the people who elected them.

In a per curiam opinion, all of the justices need not support the opinion, and dissenting justices are not required to write their own opinions. No judge accepts responsibility, and no judge can be held accountable for the opinion. In Texas, only six of the nine justices must support a per curiam opinion, and no one knows who the supporters or dissenters are.

The use of per curiam opinions in non-controversial areas offers expediency for courts that process a great number of opinions, but unsigned opinions in controversial cases violate the concept of public scrutiny, particularly in Texas where judges are elected.

The Texas Watch report observed "just how outside the mainstream the Texas high court is," quoting an annual survey by the National Center for State Courts which showed that only 33.6 percent of opinions

*(Continued on Page 2)*

## Todd Law Firm Wins \$1.5 Million Verdict In Admiralty Products Liability Case

On September 1, 2004, Mandy Norman was seriously injured in a boating accident on Taylor Lake, contiguous to Clear Lake in Harris County, Texas. After boating for part of the day, Mandy, who sat in the lap of her boyfriend in the forward fishing chair, and her companions were leaving to go home. Putting the motor in forward gear, the operator proceeded, and, while making a left turn at 12-15 mph, the seat of the fishing chair broke. Mandy's boyfriend lost his grip on her and she fell overboard. The blade of the motor's propeller passed over her, almost severing her arm, and causing serious facial injury. Bleeding profusely, she was quickly rescued from the water by her friends and life-flighted to the University of Texas Medical Branch in Galveston, where she would spend the next 45 days. Plastic surgery was required for her face. Although surgeons were successful in re-attaching her arm, its use is limited to guiding objects and for support.

A lawsuit was filed in Galveston Federal Court on behalf of Mandy Norman by The Law Firm of Alton C. Todd for product liability asserting admiralty jurisdiction.

The defendants, in addition to the seller of the boat, were the manufacturers, the pedestal on which the fishing chair was placed, and the fishing chair. The theory of liability on the seller and the boat and pedestal manufacturers was based on failure to warn of the danger of falling overboard from the forward fishing chair when moving over 5 mph. Although warnings were mounted on the base of the pedestal, they faced away from the occupants of the boat and were in small print. The boat was a 2001 Tracker 17' aluminum Crappie boat manufactured by Tracker Marine. The pedestal was manufactured by SWIVL-Eze which was acquired by the Brunswick Corporation. The seller of the boat was Bass Pro Outdoor World. The seat with the hinge that broke and failed was manufactured as a complete assembly by B&M Seating, a division of the Moore Company.

Prior to trial, a settlement for a confidential amount was reached with the seller, the manufacturer of the boat, and the manufacturer of the pedestal for the seat. The case proceeded to trial against the remaining defendant, B&M Seating. Interestingly, the defendant at trial adopted the plaintiff's theory of liability against the settling defendants that the warnings were not adequate.

The Court's verdict and judgment on April 23, 2008, found the fishing chair defective and unreasonably dangerous inasmuch as the use made by Mandy Norman was foreseeable use; i.e. that occupants would ride in the fishing chair when moving in excess of 5 mph and that cost and effort to strengthen the hinge that failed would have been minimal. These facts were admitted by a representative of B&M Seating in his testimony at trial.

The Court found 40 percent fault on Mandy Norman for sitting in the fishing chair while moving and 60 percent fault on the manufacturer of the seat. After reduction of comparative fault and the addition of pre-judgment interest, the verdict approximates \$1,500,000. Notice of appeal to the Fifth Circuit Court of Appeals was filed by the defendant.

### INSIDE THIS ISSUE



Trial by Jury Endangered	Page 2
Houston Cheerleaders 1st in World	Page 3
Alton C. Todd Honored	Page 4

# Trial By Jury Endangered Right

It is indirect and insidious, and it has many names. *Tort "Reform," Arbitration, Preemption, Special Interests and Litigation Management* are some of them.

"It" is the **erosion** of our strongest guarantor of judicial independence—the fundamental authority of our government, the American right of trial by jury.

Ronald Reagan, when governor of California, emphasized that "liberty is a fragile thing. It is never more than one generation away from extinction. It is not ours by inheritance. It must be fought for and defended constantly by each generation. For it comes only once to a people." With these prophetic words, the 40<sup>th</sup> president recognized the danger of limiting that liberty and the importance of protecting our Constitutional rights.

Today, we are not defending the jury system and the trial process but are sacrificing the resolution of jurors in ways both subtle and dangerous. Disdain by the Supreme Court for lower courts results in consumer protection cases being taken out of state courts and wrongful death cases *preempted*, jury trial denied. *Special interest groups* lobby legislatures, and business-friendly measures are enacted

"Regaining a right once surrendered is far more difficult than fighting for a right long possessed," Massachusetts U. S. District Judge William G. Young told the Florida Bar's Annual Convention last year. The problem, as the judge noted, is pervasive, and yet few voices are heard in support of a jury system already marginalized.

The most recently calculated bench time of a United States district judge was 437

## HIGH COURT HIDES

(Continued from Page 1)

issued by other state high courts were per curiam. The high percentage of per curiam opinions in Texas is particularly troubling in that justices raise a significant amount of money to run for re-election, and unsigned opinions conceal how a justice voted in a case involving a campaign donor. Texas Watch discovered that justices accepted \$967,081.81 in campaign contributions from parties with an interest in cases that resulted in anonymous opinions, the largest—\$256,740.44—being collected by Justice Don Willett.

"In the Shadows" concludes that the Texas high court, in its strong reliance on unsigned opinions, is not conducting itself as a body open to public scrutiny and contradicts all notions of accountability to Texas voters, scholars and members of the legal community.

hours, and, of that, only 225 hours were spent in trial, Judge Young related. In 1998, the average bench time was 790 hours. It is not that trial judges are working 50 percent less but that they are primarily busy with *litigation management*.

Thomas Jefferson wrote in 1792: "I consider trial by jury the greatest anchor ever yet devised by humankind for holding a government to the principles of its constitution."

Who would have thought that that great anchor of democracy, the extraordinary empowerment of ordinary people as guaranteed by Article III of the Constitution, would ever, for any reason, become so imperiled?

## ALLSTATE, STATE FARM SETTLE FOR BIG CHUNK OF CHANGE

The 2003 reform bill passed by the Texas legislature, which allowed insurers to raise rates without approval from the state, is still resulting in settlements that let the insurance companies off the hook, while pocketing millions in overcharges to customers.

State Farm recently won another round in its five-year battle to avoid the insurance commissioner's order to cut homeowners rates by 12 percent. The Austin-based 3<sup>rd</sup> Court of Appeals, on May 22, found a provision in the law to be unconstitutional because it failed to protect the company's due process rights and sent State Farm's case, involving an amount owed to consumers for overcharges and interest approaching a half-billion dollars, back to the Department of Insurance.

State Farm, like Allstate, who was allowed to keep nearly \$20 million in overcharges to customers, based on a settlement with Texas Department of Insurance officials, walked away with a sizeable amount, leaving some 700,000 policyholders still waiting for those touted refunds and credits of more than \$50 million.

The five-year battle between regulators and State Farm, the market leader in the homeowners' market, has dulled the impact of the law designed to lower insurance costs for homeowners. Rates overall have remained flat while the industry has enjoyed consistent profits.

Lawmakers, expected to review the 2003 law when they meet in January, need to give the insurance commissioner, who now has meager ability to oversee the insurance industry, the clear authority to approve rates before insurance companies put them into effect.

## Texas Insurers Record Profits

It was a very good year for Texas insurers. Financial reports released this spring by the Texas Department of Insurance indicated that most companies had another year of solid earnings, marking their fifth consecutive year of surpassing a standard benchmark for reasonable profits.

According to the TDI reports, insurers paid out only 36.5 percent of premiums to cover property losses in 2007, well below the 58 percent figure frequently cited by experts as a good measure of profitability.

The low loss ratio numbers are deemed "outrageous" by consumer groups, further proof that in a year of slowing economy, untouched insurers continued to overcharge Texans for home insurance.

### OTHER CASES, OTHER CAUSES

In *Sarah et al. v. Primarily Primates, Inc.*, which was heard in the 73<sup>rd</sup> Judicial District Court of Bexar County, Texas in January, the court ruled that the parties—nine chimps and monkeys did not have the right to sue their keeper.

Primarily Primates, Inc. (PP), a Texas entity, entered into an agreement with Ohio State University (OSU) to provide lifetime care for nine chimpanzees and three new world monkeys. In transferring ownership of the primates, OSU agreed to pay a substantial amount to pay for them and to provide an endowment for their care.

After the chimps and monkeys arrived in Texas, two died and a third escaped. Attorneys "representing" the surviving Sarah, Harper, Emma, Keeli, Ivy, Seba, Darrell, Rain and Ulysses filed suit against PP, alleging breach of contract.

The court ruled against the Ohio monkeys, affirming the trial court's dismissal of the action.

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## COMPANIES BENEFIT FROM COURT SUPPORT OF PUNITIVE LIMITS

For the second consecutive year, companies like Ford and Philip Morris have reaped the rewards of court limits on punitive damages. Ford victories in appeals of two decisions resulted in more than \$100 million reductions in punitive damage awards of more than \$392 million in the past five years.

The overturned awards included \$55 million for an Explorer rollover accident that left a woman paralyzed and \$52 million for the death of a child run over by a pickup truck that a jury determined had a faulty parking brake.

Philip Morris' appeal to the Supreme Court paid off in a February 5-4 decision in favor of the tobacco company. An Oregon jury had awarded \$79.5 million in punitives to the survivors of a lung cancer victim. A trial judge cut the award to \$32 million, and an appeals court restored it to the full amount. Phillip Morris appealed, saying that the family's lawyer urged the jury to think about how many others had developed lung cancer in the last 40 years in Oregon. The high court ruled that a jury may not use a punitive damages verdict to punish a defendant for harms to nonparties.

The Philip Morris decision threatens any punitive damage award that does not include a jury instruction against punishing people not included in the case being tried. The reduction or dismissal of punitive damages discourages trial lawyers from taking a case with large potential punitives, primarily affecting, ultimately, the injured victim.

### *Industry on a Roll*

## Federal Pre-Emption Trumps Plaintiffs' Claims

To the delight of manufacturers and corporate defense attorneys, a developing body of judicial opinion is beginning to further limit the lawsuit protection rights of American consumers. The growing practice of bureaucratic "silent tort reform" which favors pre-emption by federal agencies over state product liability laws, insulates companies from lawsuits, saving them millions of dollars.

**As long as a product, whether it be a prescription drug, a vehicle, a toy, medical device, food or almost anything that the American public uses, meets the standards of the federal agency regulating that product, companies are immune from civil suits for money damages, according to 51 rules adopted or proposed by agency bureaucrats since 2005.**



*My Four Sons: Seth Park, Mike, Matt and Jeff Todd support their favorite contender at the March 2008 NCAA Basketball South Regional Tournament in Houston.*

## Seth Park, SMU Junior Studies In Veracruz

Seth Park, son of Alton and Nari Todd, completed his sophomore year at Southern Methodist University, Dallas, having placed on the honor roll every semester since his freshman enrollment. To be listed on the SMU honor roll with high distinction, students must be in the top five percent of their school of record.

Seth, who is pursuing a degree in the Edwin L. Cox School of Business, is attending SMU-in-Xalapa from June 6-July 18. He is enrolled in a six-week summer language program which offers intensive exposure to the Spanish language and culture of Mexico. Participants live with local families and attend classes on the campus of Universidad Veracruzana where they earn six semester credit hours.

The ancient Indian city of Xalapa, the capital of Veracruz, is nestled high in the Sierra Madre Oriental mountain range some 4600 feet above sea level and 200 miles east of Mexico City.



*Coach, Cheerleader & Championship Trophy*

## HOUSTON CHEERLEADERS 1ST IN WORLD COMPETITION

Houston's University Cheer Junior Air Force One, the program in which 15-year-old Kamilah Todd has participated since she was eight, won first place in the 2008 Junior International Junior Coed Gold World Championship in Orlando, Florida, on April 27. Cheerleaders from 34 countries competed.

This is the first time that University Cheer Junior Air Force One, NCA (National Cheerleaders Association) national champions in 2005, 2006 and 2007, came home with the Gold in the international championship competition. University Cheer, which was the first to win an NCA title in this area, is also the first Houston area team to win a world title at any level. The U.S. All Star Federation (USASF) is the governing body for All Star cheerleading in the United States.

For Kamilah, pictured above with her team's winning coach, Edgar Ruiz, and the championship trophy, this remarkable cheerleading season leaves bittersweet memories; it is her last year as a member of Junior Air Force One. Next year, she moves up to the senior division.

**THE LAW FIRM OF ALTON C. TODD**

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**Alton C. Todd is Honored  
At Alumni Appreciation Day**

Alton C. Todd was honored by his alma mater, the University of North Texas, when he was invited, as a distinguished alumnus, to address the College of Arts and Science Department of Political Science on Alumni Appreciation Day on April 18. Todd graduated in 1968 from what was then North Texas State University with a Bachelor of Science degree in political science and a minor in secondary education with a first teaching field of Latin. (If he had not become an attorney, he might have been a high school teacher and, hopefully, a football coach.)

Todd spoke to a political science class studying the Texas judicial system, had a conference with the political science faculty, attended a reception for honorees from the College of Arts and Science and was introduced and recognized at a luncheon hosted by the president of the university, Gretchen M. Bataille. Heads of all departments of each college of the university and faculty members attended.

Located in Denton, the University of North Texas, a student-centered public research university, is one of Texas' largest universities.

**CLOSING STATEMENT**

*We value your trust and your referral.  
Thank you for the opportunity to represent  
your interest and for recommending*

*THE LAW FIRM OF ALTON C. TODD.*

**Federal Pre-emption Trumps Plaintiffs' Claims**

*(Continued from Page 3)*

by Bic. The mother sued, and a 130<sup>th</sup> District Court jury awarded \$3 million in actual damages and \$2 million in exemplary damages. The latter was reduced to \$750,000 to comply with Texas caps. Bic appealed to the 13<sup>th</sup> Court which affirmed the trial court's judgment. Then, Bic filed a petition for review with the Supreme Court, and there, the company won a unanimous victory. As noted in the high court's opinion, the Consumer Product Safety Commission's pre-emption clause provided

**ALTON C. TODD LAW FIRM  
HOSTS PICNIC IN THE PARK**

On Saturday, May 17, The Law Firm of Alton C. Todd hosted its first annual Picnic in the Park for railroad workers and their families at Walter Hall Park in League City, Texas. The event was held in appreciation of railroad workers' continued support of the firm and to give them and their families an opportunity to relax and visit with co-workers outside of work. Although it did not initially look promising, the weather was fantastic. Refreshments served included a delicious barbecue and wonderful homemade desserts. Disc jockey Mike Tidero provided entertainment, and the children enjoyed the spacious park playground and moonwalk.

The Law Firm of Alton C. Todd would like to thank Roy Quintanilla, Donnie Neuweiler and Jack Sweeny for their assistance in planning and organizing the picnic. We had a great time and excellent turnout and look forward to doing it again next year.

that no state has the authority to establish or to continue in effect any safety standard or regulation that sets requirements for a consumer product "unless such requirements are identical to the Federal standard."

**The Supreme Court will address the issue of federal pre-emption as it relates to lawsuits and prescription drug labeling later this year. The defendant drugmaker is trying to overturn a \$6.8 million award given a woman whose arm had to be amputated after anti-nausea medication was inadvertently injected into an artery. The FDA had approved the warning label on the drug; therefore, the drug manufacturer contends it should not have been sued.**

Meanwhile, NHTSA proposals for new SUV rollover rules, which could go into effect as early as July 1, contain pre-emption provisions that effectively displace state tort law. Ten of 15 federal traffic safety regulations have been finalized by NHTSA, a development that has received minimal media attention or public awareness.

The trend toward expansive interpretation of the powerful pre-emption defense, a merciless move to shield companies from lawsuits, leaves little room for consumers to sue in this era of "silent tort reform."

**ALT-RUISM**

***The court is most merciful when  
the accused is most rich.***