

# **HOW TO REVERSE A CASE ON APPEAL**

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## HOW TO REVERSE A CASE ON APPEAL

by Sidney Powell<sup>1</sup>

The Fifth Circuit currently reverses or vacates, in whole or in part, only approximately 8% of the cases it hears.<sup>2</sup> This paper addresses some of the ways that counsel can increase the likelihood that her case will fall into the category of cases in which the Court will correct the result by finding legal error. It also includes brief summaries of some of the cases that were reversed by the Court in 2003.

A clear and expected trend emerges from a review of the cases the Fifth Circuit has reversed in the last year. It is much easier to obtain a reversal when the court can review the case for legal error under the *de novo* standard of review. Most of the reversals occurred from summary judgments or JMOL's where the court was free to

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<sup>2</sup> Judicial Workload Statistics, Clerk's Annual Report (June 2003). In the year ending June 30, 2003, the Fifth Circuit received 8,684 new appeals. It terminated 9114. En banc was granted in only 8 cases. The Supreme Court granted 10 writs. The Fifth Circuit decided 78.9% of its cases on the summary and conference calendars. 733 cases were placed on the oral argument calendar. Thus, only slightly more than 20% of the cases go to oral argument, and cases are rarely reversed without oral argument. See Statistical Snapshot, A-1, *infra*.

substitute its judgment for that of the district court. Cases reviewed under the abuse of discretion or clearly erroneous standards of review are rarely reversed. When they are, it is often because the circuit court found a legal error that constituted an abuse of discretion or created clear error. The following comments are for discussion of the considerations that factor into a successful appeal.

1. **“MAKE SURE YOU’RE RIGHT, THEN GO AHEAD.”** Davey Crockett. Be the side who should win the case when it is filed! Frivolous cases are not won on appeal. Careful review of the facts and the law should be made before filing any case in federal or state court, and before defenses are asserted.

2. **BUILD A GOOD RECORD AT TRIAL.** See the section in this seminar notebook on Building the Record for Appeal. It is extremely difficult to obtain a reversal on appeal if the errors made by the trial court were not preserved for appeal. Most issues, if not properly preserved by trial counsel, are effectively unreviewable on appeal.

3. **CASE SELECTION PRIOR TO APPEAL.** If you did not try the case, but have been contacted about representation in the appeal, it is very important to evaluate the case carefully. Bluntly stated, not every case that can be appealed, should be. The ability to reverse a case on appeal should be considered in making the decision to appeal. A case in which the errors were not preserved, that your client

should have lost on the facts, or that has no legitimate legal error, can not and will not be reversed on appeal. You are wasting your time, your clients money, and the court's time by appealing the decision. Look at the case as objectively as possible in the first interview with the client. If it does not strike you that something went awry in the result or the application of the law to the facts, then you need to look at the case very hard to see if it should be appealed. Trying to buy time for your client is not a good reason to appeal a case. You should never try to get the court to adopt a rule that it should not adopt, or change a result that was correct. It simply will not work, and it will also cost you credibility in the eyes of the court and your client.

4. **READ THE RECORD CAREFULLY.** There is no substitute for personally combing the record to look for critical facts that must be included in the statement of facts to make the court want to reverse the case and to look for errors of law that warrant reversal. For example, in the *Castillo v. First City Bancorporation of Texas*, 43 F.3d 953 (5<sup>th</sup> Cir. 1994), a careful and fresh read of the record revealed a critical contract provision that had not been the focus of the case previously, but which required reversal of the improvidently granted summary judgment. It was a purely legal issue and controlled the outcome of the case.

5. **REQUEST ORAL ARGUMENT.** It is almost pointless to argue that a case should be reversed, but tell the court in the request for oral argument that oral

argument is not needed.<sup>3</sup> Unless the legal error is so clear that the other side should confess error, the case is not likely to be reversed by the court on the summary calendar.<sup>4</sup> The Court does not often reverse cases, and it wants to give the case full scrutiny before it does. If you tell the court that the case does not warrant its careful review by not requesting oral argument, you might as well tell the Court to affirm the case on the summary calendar, unless reversal is clearly mandated by well-established precedent.

That said, your request for oral argument needs to be meaningful and pithy. Counsel should draft a request for argument that tells the court the size of the record and explains why argument really is justified. Are there multiple parties? Is this a case of first impression? Is there a split in the district courts or in the circuit? Is this an area of law that needs clarification? What is it about this case that warrants the level of attention that a case gets when three chambers independently prepare for oral argument?

**6. LOOK FOR ISSUES/ERRORS THAT THE COURT CAN REVIEW *DE NOVO*.** Appellate courts are bound by the standard of review, and the

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<sup>3</sup>See *Moore v. Radian Guaranty*, (No. 02-41464) affirmed on the summary calendar after Plaintiffs did not request oral argument.

<sup>4</sup>Our survey of cases in the last year disclosed only a few that were reversed on the summary calendar.

Fifth Circuit takes these standards very seriously. Questions and discussion of the standard of review are common in oral argument; the statement and citations to the standards are required in the briefs; and, the Court strictly applies them. If the standard of review is *de novo*, then the Court is not only empowered but required to review the issue freely and to substitute its judgment for that of the district court.

For example, recently, in *American Realty Trust v. Matisse Partners*, No. 02-11148 (5<sup>th</sup> Cir. December 17, 2003) (unpublished), the district court misapplied Georgia law and wrongly substituted his judgment for that of the jury in overturning the jury's verdict. Each of these issues was reviewable *de novo*, which made it much easier for the appellate court to say that the district court erred.

Issues that are reviewable *de novo* include, *inter alia*, the grant or denial of summary judgment and of judgments as a matter of law, 12(b)(6) dismissals, the district court's application of purely legal issues, statutory interpretations, contract interpretations, and its application of state law.<sup>5</sup>

**7. IF THE STANDARD IS ABUSE OF DISCRETION, YOU MUST ALSO HAVE THE FACTS ON YOUR SIDE.**

The abuse of discretion standard is much more difficult to meet, but it is not impossible. Generally, a strong, compelling and sympathetic factual record is

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<sup>5</sup> Reviewing the district court's application of state law *de novo*. *Swearingen v. Owens-Corning Fiberglas Corp.*, 968 F.2d 559, 561 (5<sup>th</sup> Cir. 1992).

required to obtain a reversal under this standard. This standard is also met when the district court just really gets way off track or completely misunderstands a legal issue. Importantly, it is an abuse of discretion to misapply the law<sup>6</sup>.

The abuse of discretion standard of review applies, *inter alia*, to evidentiary issues, to the dismissal of a declaratory judgment action, and to class certification. Note, however, especially in the class certification cases, the court usually proceeds to find an error of law, which it reviews *de novo*, and then holds that the district court abused its discretion when it misapplied the law. See *infra*, Section D.

#### **8. FEW CASES ARE REVERSED UNDER THE CLEARLY ERRONEOUS STANDARD OF REVIEW.**

Under the clear error standard of review, the court of appeals will reverse only if, on the entire record, the court is left with the “definite and firm conviction that a mistake has been made.” *In the Matter of: Needham v. Needham*, \_\_\_ F.3d \_\_\_, 2003 WL 22953383 (5<sup>th</sup> Cir. December 16, 2003)(reversing for the government in a bankruptcy context; issues included what constitutes navigable waters under the CWA and OPA). Factual findings, including an award of damages, are reversed only for clear error. *Cleere Drilling Company v. Dominion Exploration & Production, Inc.*, 351 F.2d 642, 645 (5<sup>th</sup> Cir. 2003).

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<sup>6</sup> *O’Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 737 (5<sup>th</sup> Cir. 2003) reversing class certification).

It is important to note, however, that misapplication of the law is clear error. Thus, counsel needs to look for a legal error that caused the wrong result and frame the appeal around it and cite this portion of the rule. Legal errors are reviewable *de novo*.

9. **ILLUSTRATIVE CASES FROM 2003.** The Court reversed only 8% of its cases last statistical year,<sup>7</sup> and a Westlaw search for the calendar year 2003 produced approximately 80 civil cases that were reversed last year and approximately 60 that were vacated.<sup>8</sup> A number of the reversals were rendered in unpublished decisions, and only those available on Westlaw or known to the author are listed herein. I did not include criminal cases in the search, and, I have not included bankruptcy cases or agency appeals in the discussion, although some of these cases are listed with annotations in the list of citations. Other cases may have been reversed by the Court in unpublished decisions that were not published by Westlaw, but I would expect that number to be small.

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<sup>7</sup> The Court's statistical year runs from July 1-June 30.

<sup>8</sup> This search was run using the following parameters: CTA5-DA(2003) & SY(REVERSED) % TO(110 197) CRIM!. It resulted in 84 cases, and a list of cites is reproduced with this paper *Infra-A-2*. A separate search was run for cases that "vacated" the decision of the district court. This produced approximately 60 cases that did not also include "reversed." These cases are listed and annotated separately, *infra, A-3* but the effect of the decisions is the same as if the Court used the term "reversed."

All counsel are cautioned to read each case independently and not to rely on the material in this paper alone. This is a catalogue of decisions that were vacated or reversed. It does not include all cases. The focus of this paper and our panel discussions are on techniques and strategies to obtain reversal. It is not an analysis of the opinions themselves, and only “short-hand” descriptions of the cases have been used. Any case must be thoroughly reviewed, cite-checked and analyzed before counsel cites it for any other purpose.

**A. Purely legal errors reviewed *de novo* :**

1. **Reversing the district court’s JMOL (judgment as a matter of law)** that had overturned a jury verdict in favor of American Realty Trust and instead awarded a judgment of \$6 million to Matisse. The Fifth Circuit agreed with the appellants that there was ample evidence to support the jury’s verdict and that the district court had misapplied the law. The standard of review was *de novo*. *American Realty Trust, Inc. v. Matisse Partners, LLC.*, No. 02-11148 (5<sup>th</sup> Cir. December 17, 2003)(unpublished). Issues included breach of contract, breach of fiduciary duty, and Georgia corporate law.

2. **Reversing JMOL for insurer on punitive damages under Mississippi law, and reversing award of attorneys fees for failure to address**

**Johnson factors.** *Pride Ford Lincoln Mercury, Inc. v. Motors Insurance Corporation*, 2003 WL 22508427 (5<sup>th</sup> Cir. Nov. 5 2003)(unpublished).

3. **Reversing denial of Defendant's motion for JMOL.**

*Lewis v. Bank of America*, 343 F.3d 540 (5<sup>th</sup> Cir. 2003), and denying borrower's petitions for rehearing. 347 F3d 587 (5<sup>th</sup> Cir. 2003), *cert. pending* (No. 03-966). Issues included ERISA, breach of oral contract and misrepresentation.

4. **Reversing grant of JMOL to plaintiffs in FLSA case, and**

rendering judgment for defendants. *Moore v. Hannon Food Service*, 317 F.3d 489 (5<sup>th</sup> Cir. 2003), *cert. denied*, 124 S.Ct. 76 (2003).

5. **Reversing JMOL for employer in Age Discrimination**

**and Title VII** case brought by former employee, holding that evidence established employer terminated him based on his age and upper management's comments were probative of intent. *Palasota v. Haggard Clothing Co.*, 342 F.3d 569 (5<sup>th</sup> Cir. 2003).

6. **Reversing injunction granted against Louisiana to**

**prohibit its enforcement of certain tax statutes**, holding that the district court was barred by the Tax Injunction Act from exercising jurisdiction. *American Civil Liberties Union v. Bridges*, 334 F.3d 416 (5<sup>th</sup> Cir. 2003).

7. **Reversing dismissal for lack of personal jurisdiction**, holding there were sufficient contacts with the state. *Central Freight Lines, Inc. v. APA Transport Corp.*, 322 F.3d 376 (5th Cir. 2003).

8. **Reversing dismissal of Title VII, race and gender discrimination case against the Army** and holding that employee did exhaust administrative remedies. *Martinez v. Department of the U.S. Army*, 317 F.3d 511 (5<sup>th</sup> Cir. 2003). This case is unusual in that it was reversed on the summary calendar.

9. **Reversing the dismissal of an underwriter's declaratory judgment action for lack of diversity jurisdiction**, holding that where the underwriter was seeking relief in its individual—not representative capacity—underwriter's citizenship as opposed to the citizenship of all of the underwriters on the policy, would be used to determine diversity—regardless of whether all underwriters would be bound by the outcome of the case; and, the underwriter was the substantial and real party to the controversy. *Corfield and Liberty Corporate Capital Ltd. V. Dallas Glen Hills LP*, \_\_\_ F.3d \_\_\_, 2003 WL 23028316 (5<sup>th</sup> Cir. Dec. 29, 2003). This was a case of first impression in the Fifth Circuit. It diverges from and adopts different reasoning on similar issues addressed by the Third, Sixth, and Seventh Circuits, and aligns with the Second Circuit.

10. **Reversing denial of reimbursement to insurer based on provisions of the Louisiana Code and the contracts at issue.** *American International Specialty Co. v. Canal Indemnity Company*, \_\_\_F.3d \_\_\_, 2003 WL 22830632 (5<sup>th</sup> Cir. Dec. 15, 2003)(affirming district court's summary judgment allocating liability).

11. **Reversing district court's interpretation of oil well drilling contract under Texas law following a bench trial.** *Cleere Drilling Company v. Dominion Exploration & Production, Inc.*, 351 F.2d 642 (5<sup>th</sup> Cir. 2003).

12. **District Court's interpretation of contract overly expanded scope of covenant not to compete.** *U-Save Auto Rental of America, Inc. v. Moses*, 2003 WL 22682126 (5<sup>th</sup> Cir. 2003).

13.. **Reversing interpretation of tax consulting contract and award of contractual damages;** affirming dismissal of one claim by plaintiff. *Management Insights, Inc. v. Baxter Healthcare Corporation*, 2003 WL 21961188 (5<sup>th</sup> Cir. Aug. 18, 2003)(unpublished).

14. **Reversing damage award to landowners under Texas law** for their failure to prove the value of their land before trespass, but remanding for new trial on damages alone. *Stevenson v. E.I. DuPont de Nemours and Company*, 327 F.3d 400, 409 (5<sup>th</sup> Cir. 2003). The court held that it had the discretion to order

a new trial instead of rendering judgment when the defect in proof could be remedied in a second trial.

15. **Reversing judgment for plaintiff in a medical malpractice**, Federal Tort Claims Act case, holding that the district court under Texas law in determining the applicable standard of care. *Quijano v. United States*, 325 F.3d 564 (5<sup>th</sup> Cir. 2003).

16. **Reversing judgment for Plaintiff against Wal-Mart**, holding that plaintiff failed to prove that Wal-Mart had **constructive knowledge of unreasonable risk** of harm from a plastic binder on the floor. *Dixon v. Wal-Mart Stores, Inc.*, 330 F.3d 311 (5<sup>th</sup> Cir. 2003). The court effectively grants Wal-Mart's JMOL, and it discusses for the first time a "reasonable maximum time limit" for constructive knowledge to be applied. (Dennis dissents). Arguably, this is one of those instances where the court substituted its judgment for that of the jury.

17. **Reversing interpretation of charter party agreement**, and holding in favor of insurer on declaratory judgment action regarding coverage of damages caused by charterer's handling of cargo. *Continental Insurance Company v. J. Ray McDermott, Inc.*, 2003 WL 22662996 (5<sup>th</sup> Cir. Nov. 11, 2003)(unpublished).

18. **Reversing district court's failure to instruct jury on damages element of fiduciary duty claim under Delaware law.** *Taita Chemical*

*Company v. Westlake Styrene, LP*, \_\_\_ F.3d \_\_\_, 2003 WL 22725273 (5<sup>th</sup> Cir. 2003).

Note: Objections to jury instructions must be specific. This is a good case on preservation of error on jury instructions. Its holding on reversal is limited to Delaware law.

**19. Reversing jury verdict and judgment for distributor on distributors claims for breach of contract, and negligent misrepresentation.**

Applying Texas law, this decision grants the Defendant Kohler's motion for JMOL. *Coburn Supply Company, Inc. v. Kohler Co.*, 342 F.3d 372 (5<sup>th</sup> Cir. 2003).

**20. Reversing an admiralty case to award the Plaintiff additional damages, and to determine issues of indemnification.** This was based on *de novo* review of the legal conclusions underlying an award of damages. *Texas A & M Research Foundation v. Magna Transportation, Inc.*, 338 F.3d 394 (5<sup>th</sup> Cir. 2003).

**21. Reversing dismissal for lack of subject matter jurisdiction**, holding taxpayer's action seeking judicial review of request for an interest abatement from IRS was not barred by sovereign immunity, and the district court did have jurisdiction. *Beall v. United States*, 336 F.3d 419 (5<sup>th</sup> Cir. 2003).

**22. Reversing in part from appeal of denial of a preliminary injunction** in a non-solicitation and trade secrets case, holding that Guy Carpenter

demonstrated a likelihood of success on the merits on its claims for breach of the non-solicitation covenant and of the non-disclosure covenant, but remanding for the district court to apply the other three factors governing preliminary injunctions. *Guy Carpenter & Company, Inc. V. Provenzale*, 334 F.3d 459 (5<sup>th</sup> Cir. 2003).

23. **Reversing district court’s order remanding a case to the arbitrator for clarification**, holding that the arbitration award was not ambiguous and noting the “highly deferential” standard of review applied to arbitration decisions. *International Chemical Workers Union v. Columbian Chemicals Co.*, 331 F.3d 491 (5<sup>th</sup> Cir. 2003). The court also affirmed the arbitration award.

24. **Reversing district court’s reduction of award of past lost wages to admiralty personal injury plaintiffs.** *Trico Marine Assets Inc. v. Diamond B. Marine Services, Inc.*, 332 F.3d 779, 793-94 (5<sup>th</sup> Cir. 2003). The court applied the “collateral source rule”, and it reviews decisions as to whether benefits are collateral under the *de novo* standard.

25. **Reversing interpretation of, and award of damages based on, contractor’s excess liability insurance policy.** *Roy Anderson Corp. V. Westport Insurance Group*, 2003 WL 22703208 (5<sup>th</sup> Cir. Nov. 17, 2003)(unpublished)(*per curiam*).

26. **Reversing admiralty case**, and holding that evidence did not establish that the stevedore intended to rely solely on credit of agent, and thus waived its maritime lien on the vessel. *Maritrend, Inc. v. Serac & Company (Shipping) Ltd.*, 348 F.3d 469 (5<sup>th</sup> Cir. 2003). The court remanded for entry of judgment for Maritrend on its *in rem* claim against the vessel.

27. **District court's interpretation of contract overly expanded scope of covenant not to compete.** *U-Save Auto Rental of America, Inc. v. Moses*, 2003 WL 22682126 (5<sup>th</sup> Cir. 2003) (unpublished)

**B. Interlocutory Appeals of issues reviewed *de novo*.**

1. **Reversing denial of summary judgment on claim of professor of adverse employment action and finding qualified immunity.** University professors brought 1981 and 1983 claims against the university and fellow professors, alleging discrimination and retaliation. The Fifth Circuit affirmed the district court's denial of summary judgment of one plaintiff's retaliation claim under §1981, and reversed in favor of the defendants and held that summary judgment should have also be granted against Dr. Hutto on her §1983 claims, because she could not overcome the defense of qualified immunity and show the requisite occurrence of an adverse employment action. Some claims remained alive in the district court

and were not at issue in this interlocutory appeal. *Foley v. University of Houston System*, 324 F.3d 310 (5<sup>th</sup> Cir. 2003).

2. **Reversing denial of summary judgment motions raising qualified immunity** defense to political patronage dismissal claims of former county employees. The court held that it lacked jurisdiction over the appeals by the county because it was not protected by qualified immunity. However, it also addressed First Amendment issues of political speech and held that the district court's denial of the Defendant's motion to dismiss Gentry and Cornelius's political dismissal claims based on qualified immunity must be reversed because they held positions that fell within the *Branti* exception to First Amendment protection of political association and speech. *Gentry v. Lowndes County, Mississippi*, 337 F.2d 481 (5<sup>th</sup> Cir. 2003).

3. **Reversing denial of motion to dismiss on state sovereign immunity** in suit brought by professor for failure to accommodate her disability. *Miller v. Texas Tech University Health Sciences Center*, 330 F.3d 691 (5<sup>th</sup> Cir. 2003), *en banc granted*, 342 F.3d 563 (5<sup>th</sup> Cir. 2003).

4. **Reversing summary judgment for the plaintiff**, applying the Fair Labor Standards Act, on grant of leave to appeal interlocutory order. *Thibodeaux v. Executive Jet International, Inc.*, 328 F.3d 742 (5<sup>th</sup> Cir. 2003).

5. **Reversing grant of preliminary injunction** for dealer in contract dispute, applying Louisiana law. *Lake Charles Diesel, Inc. v. General Motors Corp.*, 328 F.3d 192 (5<sup>th</sup> Cir. 2003).

6. **The Fifth Circuit had no jurisdiction over an interlocutory order compelling arbitration in this admiralty case , and reversed district court's denial of motion to compel arbitration against the shipper.** *Cargill Ferrous International v. SEA Phoenix, MV, et al.*, 325 F.3d 695 (5<sup>th</sup> Cir. 2003) (Garza dissents).

7. **Vacating preliminary injunction.** *St. Paul Mercury Ins. Co. v. Williamson*, 332 F.3d 304 (5<sup>th</sup> Cir. 2003).

**C. Summary Judgments Reversed applying *de novo* review.**

In the summary judgment context, the court of appeals views the case and record just as did the district court. The standard or test is essentially the same as in the JMOL context.

1. **Reversing summary judgment for employer in Title VII sexual harassment case** and finding that genuine issues of material fact precluded grant of summary judgment on that claim. *Taylor-Rogers v. Robb & Stucky, Ltd.*, 2003 WL 22955876 (5<sup>th</sup> Cir. Dec. 12, 2003)(unpublished). The plaintiffs evidence in this case was strong and egregious.

2. **Reversing grant of summary judgment for employer in a Title VII employment discrimination case as to the individual plaintiff** because district court wrongly applied objective job requirements without considering whether those were equally applicable to the employees actually hired, but affirming as to “grouped plaintiffs” who did not meet their burden of proving that they were qualified. *Johnson v. State of Louisiana*, 351 F.3d 616 (5<sup>th</sup> Cir. 2003).

3. **Reversing grant of summary judgment for employer on former city employee’s §1983 action for gender discrimination.** *Jerge v. City of Hemphill, Texas*, 2003 WL 22595224 (5<sup>th</sup> Cir. Nov. 10, 2003)(unpublished).

4. **Reversing 12(b)(6) dismissal of prisoner’s claims of abuse and holding that private prison management corporations and their employees perform a public function and may be sued under §1983.** *Roseborough v. Management & Training Coporation*, 350 F.3d 459 (5<sup>th</sup> Cir. 2003). This case was reversed on the summary calendar and in a published decision.

5. **Reversing summary judgment on qualified immunity** granted to school superintendent in §1983 action, holding that the teacher’s allegations stated a violation of a constitutionally protected right to educate her children in private schools and that right was clearly established at the time of the

alleged violation. *Barrow v. Greenville Independent School District*, 332 F.3d 844 (5<sup>th</sup> Cir. 2003), *cert. denied*, 124 S.Ct. 547 (2003).

6. **Reversing in part the grant of summary judgment to an employer**, involving issues of **copyright**, licensing, and estoppel, and holding that the employee's conversion claim was not preempted by federal copyright law. *Carson v. Dynege, Inc.*, 344 F.3d 446 (5<sup>th</sup> Cir. 2003).

7. **Reversing summary judgment granted against the plaintiff in a Title VII** retaliatory discharge case, holding that plaintiff's evidence did raise fact issues. *Fabela v. Socorro Independent School District*, 329 F.3d 409 (5<sup>th</sup> Cir. 2003).

8. **Reversing district court's sua sponte grant of summary judgment** to property owner in oil lease dispute, vacating its dismissal of a motion for preliminary injunction and denial of motion for attorneys fees. *HS Resources, Inc. v. Wingate*, 327 F.3d 432 (5<sup>th</sup> Cir. 2003).

9. **Reversing as premature the dismissal of inmate's claims under §1983 for denial of access to religious publications.** *Neal v. Lucan FNU*, 2003 WL 22207902 (5<sup>th</sup> Cir. Sept. 24, 2003).

10. **Reversing dismissal of fraud and misrepresentation claims, because they were not preempted by ERISA.** *Hobson v. Robinson*, 2003

WL 22183558 (5<sup>th</sup> Cir. Sept. 23, 2003)(unpublished). Breach of contract claim was preempted by ERISA in this action against a health insurance broker.

11. **Reversing grant of summary judgment to insurer and holding that policy coverage provision applied.** *Administaff, Inc. v. American International Specialty Lines Insurance Co.*, 2003 WL 22080760 (5<sup>th</sup> Cir. Sept. 9, 2003)(unpublished). This case also remands to the district court for reconsideration of an indemnity provision and an exclusion provision.

12. **Reversing grant of summary judgment to employer denying motion to compel arbitration**, and holding that questions of whether the grievance covered the employee's discharge and whether the union timely arbitrated the grievance were for the arbitrator. The district court wrongly substituted its judgment for that of the arbitrator. The Fifth Circuit remanded the case "for the sole purpose of entering an order compelling arbitration." *General Warehousemen and Helpers Union Local 767 v. Albertson's Distribution, Inc.*, 331 F.3d 485 (5<sup>th</sup> Cir. 2003).

13. **Reversing summary judgment for the bus company in negligence action**, holding amount in controversy was satisfied for diversity and fact issues existed on company's breach of heightened duty of care. *Felton v. Greyhound Lines, Inc.*, 324 F.3d 771 (5<sup>th</sup> Cir. 2003).

14. **Reversing summary judgment in ERISA case with issue of derivative standing to bring action for enforcement under ERISA.** *Tango Transport v. Healthcare Financial Services, L.L.C.*, 322 F.3d 888 (5<sup>th</sup> Cir. 2003).

15. **Reversing summary judgment for the SBA and remanding** because fact issues existed on breach of fiduciary duty claims against company's former officers and on causation. *United States Small Business Administration v. Beaulieu*, 2003 WL 22080773 (5<sup>th</sup> Cir. Sept. 9, 2003)(unpublished).

16. **Reversing grant of summary judgment for beneficiary of group health plan** on the merits after *en banc* court found claims were preempted by ERISA and the federal court had jurisdiction. 338 F.3d 433 (5<sup>th</sup> Cir. 2003)(*en banc*). *Arana v. Ochsner Health Plan*, \_\_\_ F.3d \_\_\_, 2003 WL 22883373 (5<sup>th</sup> Cir. Dec. 8, 2003)(panel decision on remand for consideration of the merits held in favor of the insurer, applying Louisiana law on subrogation and holding that Arana has no claim under Louisiana law), *cert. denied*, \_\_\_ S.Ct. \_\_\_, 2004 WL 46651 (Jan. 12, 2004)

17. **Reversing grant of summary judgment for owner and rendering judgment for tenant that it did not breach lease.** *Kilgore Enterprises v. Brookshire Grocery Company*, 2003 WL 22860260 (5<sup>th</sup> Cir. Dec. 3, 2003)(unpublished). This case turned on contract issues.

18. **Reversing failure to allow more time for depositions before granting summary judgment against the Plaintiff.** *Tonnas v. Stonebridge Life Insurance Co.*, 2003 WL 22430515 (5<sup>th</sup> Cir. Oct. 27, 2003)(unpublished). Because this turned on the 56(f) issue, it was reviewed under the abuse of discretion standard of review. The district court did not even address the 56(f) issue in its grant of summary judgment.

19. **Reversing summary judgment for defendant on issue of foreign corporation's residency and applicable statute of limitations** under Mississippi law. *St. Paul Fire & Marine Insurance Company v. Paw Paw's Camper City, Inc.*, 346 F.3d 153 (5<sup>th</sup> Cir. 2003).

20. **Reversing summary judgment for the employer** in a Title VII and §1981 racial discrimination case, and finding issues of fact as to discrimination, but affirming that “balanced workforce program” did not create a hostile work environment. *Frank v. XEROX Corp.*, 347 F.3d 130 (5<sup>th</sup> Cir. 2003).

21. **Reversing summary judgment on issues of interpretation of surety contract.** *Weeks Marine, Inc. v. Fireman's Fund Insurance Company*, 340 F.3d 233 (5<sup>th</sup> Cir. 2003).

22. **Partially reversing summary judgment for buyer in breach of contract action**, applying the United Nations Convention on Contracts for

the International Sale of Goods. *BP Oil International, Ltd. et al. v. Empresa Estatal Petroleos De Ecuador*, 332 F.3d 333 (5<sup>th</sup> Cir. 2003).

23. See *Lakomy*, section E. 3., *infra*.

24. **Reversing dismissal for failure to exhaust administrative remedies and remanding for trial.** A workers compensation claimant was not required to exhaust his administrative claims before pursuing extra-contractual claims in court against the insurer. *Gregson v. Zurich American Insurance Company*, 322 F.3d 883 (5<sup>th</sup> 2003).

25. **Vacating summary judgment for the railroad -** remanding case to state court. *Smallwood v. Illinois Central R. Co.*, 352 F.3d 220 (5<sup>th</sup> Cir. 2003), *rehearing en banc granted*, \_\_\_ F.3d \_\_\_, 2003 WL 22995174 (5<sup>th</sup> Cir. 2003).

26. **Unresolved discovery disputes** required judgment in ADEA disparate treatment case to be vacated in part and remanded. *Smith v. City of Jackson, Miss.*, 351 F.3d 183, (5<sup>th</sup> Cir. 2003).

27. **Reversing grant of summary judgment for reconsideration** of expert affidavit filed 3 weeks before motion granted. *Estate of Sturges ex rel. Anderson v. Moore*, 2003 WL 22100834 (5<sup>th</sup> Cir. 2003).

28. **Fact issues precluded summary judgment.** *Tamilia v. Gulf Coast Medical Center*, 2003 WL 21790180 (5<sup>th</sup> Cir. 2003).

29. **Partial reversal for fact issues that precluded summary judgment.** *Ackel v. National Communications, Inc.*, 339 F.3d 376 (5<sup>th</sup> Cir. 2003).

30. **Material fact issues.** *Jourdan v. Schenker Intern., Inc.*, 2003 WL 21754963 (5<sup>th</sup> Cir. 2003).

31. **Summary judgment for FSA, vacated in part and remanded.** *Davidson v. Veneman*, 317 F.3d 503 (5<sup>th</sup> Cir. 2003).

32. **Vacating summary judgment for business automobile insurer.** *Genesis Ins. Co. v. Wausau Ins. Companies*, 343 F.3d 733 (5<sup>th</sup> Cir. 2003).

33. **Fact issues precluded summary judgment.** *Tamilia v. Gulf Coast Medical Center*, 2003 WL 21790180 (5<sup>th</sup> Cir. 2003).

**D. Abuse of Discretion by the District Court.**

1. **Reversing the district court's award of ERISA disability plan benefits**, holding that the district court abused its discretion in substituting its judgment for that of the plan administrator. *Boswell v. Reliance Standard Life Insurance*, 2003 WL 22965564 (5<sup>th</sup> Cir. Dec. 17, 2003)(unpublished).

2. **Reversing a dismissal with prejudice for plaintiff's failure to prosecute** the case because the district court failed to make the required express

determination that it considered lesser sanctions and found them to be inadequate. The court also remanded the case to the district court for reconsideration. *Augustine v. Avoyelles Progress Action Committee, Inc.*, 2003 WL 22880726 (5<sup>th</sup> Cir. Dec. 5, 2003) (unpublished).

3. **Reversing an award of damages** and remanding for new trial on damages because the district court erred in allowing the **admission of lay opinion testimony on lost profits**. *DIJO, Inc. v. Hilton Hotels Corp.*, 351 F.3d 679 (5<sup>th</sup> Cir. 2003).

4. **Reversing the dismissal of declaratory judgment action** seeking resolution of liability for costs of lead paint abatement. The court held that federalism, fairness and efficiency concerns did not justify dismissal. *The Sherwin Williams Company v. Holmes County*, 343 F.3d 383 (5<sup>th</sup> Cir. 2003).

5. **Reversing dismissal for lack of an immediate, actual controversy** in a lease dispute. *Venator Group Specialty, Inc. v. Mathew/Muniot Family, L.L.C.*, 322 F.3d 835 (5<sup>th</sup> Cir. 2003). Although the court reviews the dismissal of a declaratory judgment action for abuse of discretion, it reviews *de novo* whether a controversy is ripe for decision.

6. **Reversing and remanding for reconsideration the denial of class certification to Plaintiffs seeking an injunction** in § § 1981 and 1982

actions against insurers. Plaintiffs sought an injunction against racial discrimination in the sale and administration of “industrial life” policies. The court held that class certification for injunctive relief was warranted. *In the Matter of Monumental Life Insurance Company*, 343 F.3d 331 (5<sup>th</sup> Cir. 2003). Judge Clement dissented from the panel of Smith and Dennis.

7. **Reversing the certification of a statewide 23(b)(2) class against a motor home dealer.** *McManus v. Fleetwood Enterprises, Inc.*, 320 F.3d 545 (5<sup>th</sup> Cir. 2003). The court affirmed certification of the plaintiff’s claim for breach of implied warranty of merchantability under Rule 23(b)(3).

8. **Evidence of cause of fibromyalgia not sufficiently reliable to be admitted.** *Vargas v. Lee*, 317 F.3d 498 (5<sup>th</sup> Cir. 2003).

**E. Cases Involving Clear Error.**

1. **Applying maximum recovery rule, ordering remittitur of damages for conscious pre-death pain and suffering** and finding damages excessive; affirming other damages. Actually, in this case, the court appears to have simply substituted its opinion for that of the jury, and **Judge Reavley dissented.** *Vogler v. Blackmore*, \_\_\_ F.3d \_\_\_, 2003 WL 22790811 (5<sup>th</sup> Cir. 2003).

2. **Reversing fraud penalty portion of tax deficiency assessment.** *Estate of Lisle v. Commissioner of Internal Revenue*, 341 F.3d 364 (5<sup>th</sup>

Cir. 2003), *cert. pending*, 72 US LW 3129 (Aug. 4, 2003). This decision notes that whether a finding is clearly erroneous must be viewed in light of the burden of proof. Evidence which may meet one level of burden may be insufficient to meet a higher burden. The court also found one year of assessment barred by the statute of limitations which is not tolled without the fraud finding.

**3. Reversing summary judgment in favor of flight attendants in Federal Tort Claims Act** suit against air traffic controllers for injuries the flight attendants sustained in a sudden, evasive maneuver. This was an appeal by the United States, and the Court reversed the fact finding of causation and held that the alleged negligence of the air traffic controllers was not the proximate cause of the injuries to the plaintiffs. *Lakomy v. United States*, 2003 WL 21653988 (5<sup>th</sup> Cir. July 11, 2003).

**4. Finding that client breached implied reasonable miles term was clearly erroneous.** *In re R.H. Transport, Inc.*, 2003 WL 22709012 (5<sup>th</sup> Cir. 2003).

**10. Miscellaneous cases.**

- i. *DP Solutions, Inc. v. Rollins, Inc.*, \_\_\_ F.3d \_\_\_, 2003 WL 22938477 (5<sup>th</sup> Cir. 2003 (reversed and to determine amount of attorneys fees)
- ii. *Will-Drill Resources, Inc. v. Samson Resources Co.*, 352 F.3d 211 (5<sup>th</sup> Cir. 2003) (Existence of arbitration agreement at issue - for arbitrator to decide)

- iii. *St. David's Health Care System v. U.S.*, 349 F.3d 232 (5th Cir. 2003) (partnership issues)
- iv. *Avondale Industries, Inc. v. Davis*, 348 F.3d 487 (5th Cir. 2003) (workers compensation issues; amount of fees awarded might be excessive; decision vacated and remanded)
- v. *International Transactions, Ltd. v. Embotelladora Agral Regiomontana, SA de CV*, 347 F.3d 589 (5th Cir. 2003) (bankruptcy ex parte order; Smith dissenting)
- vi. *Samuels v. Hammond*, 2003 WL 22348914 (5th Cir. 2003) (unpublished) (complaint alleged sufficient chronology of events to state non-frivolous civil rights claim for retaliation)
- vii. *Cressman v. Ellis*, 2003 WL 22326602 (5th Cir. 2003) (unpublished) (plaintiffs stated cause of action for violations of 4<sup>th</sup> Amendment privacy rights), *on rehearing*, 2003 WL 22849802 (5<sup>th</sup> Cir. 2003).
- viii. *Osigwe v. Ashcroft*, 2003 WL 22287540 (5th Cir. 2003) (unpublished) (immigration issues)
- ix. *XL Specialty Ins. Co. v. Bollinger Shipyards Lockport LLC*, 2003 WL 22097501 (5th Cir. 2003) (unpublished) (insurance dispute and award of costs)
- x. *Collins ex rel. Collins v. American Home Products Corp.*, 343 F.3d 765 (5th Cir. 2003) (district court impermissibly engaged in merits determination to be made in state court)
- xi. *Bridas S.A.P.I.C. v. Government of Turkmenistan*, 345 F.3d 347 (5th Cir. 2003) (arbitration issues)
- xii. *In re Coho Resources, Inc.*, 345 F.3d 338 (5th Cir. 2003) (obligation of indemnitor with respect to underlying state court judgment was for Miss. state courts to resolve; remanded for transfer)

- xiii. *Hunter v. Rodriguez*, 2003 WL 22070516 (5th Cir. 2003) (unpublished) (defendants were entitled to absolute immunity, and dismissal was required to be with prejudice)
- xiv. *DeRouen v. Shoneys, Inc.*, 2003 WL 22070524 (5th Cir. 2003) (unpublished) (remanded to the district court on wage discrimination claim)
- xv. *In re Perry*, 345 F.3d 303 (5th Cir. 2003) (Remand required to permit bankruptcy court to determine if debtor's use of property was inconsistent with claimed exemption)
- xvi. *Maritrans Operating Partners, LP v. Port of Pascagoula*, 2003 WL 22002597 (5th Cir. 2003) (unpublished) (admiralty issues)
- xvii. *U.S. ex rel. Bowman v. Computer Learning Centers*, 2003 WL 22002638 (5th Cir. 2003) (unpublished) (vacating dismissal and remanding in bankruptcy case)
- xviii. *Satellite Dealers Supply, Inc. v. Echostar Communications Corp.*, 2003 WL 22002572 (5th Cir. 2003) (unpublished) (vacated and remanded to provide explanation for denial of sanctions motion)
- xix. *Benchmark Electronics, Inc. v. J.M. Huber Corp.*, 343 F.3d 719 (5<sup>th</sup> Cir. 2003) (Breach of contract case; reassignment to another judge on remand not warranted), *opinion modified on denial of rehearing*, \_\_\_ F.3d. \_\_\_, 2003 WL 22977496 (5<sup>th</sup> Cir. 2003).
- xx. *Ferguson v. Petroleum Helicopters, Inc.*, 2003 WL 21961189 (5th Cir. 2003) (unpublished) (vacating summary judgment because fact issues remained as to whether platform operator reasonably ascertained the extent of the worker's injuries)
- xxi. *Pedcor Management Co., Inc. Welfare Benefit Plan v. Nations Personnel of Texas, Inc.*, 343 F.3d 355 (5<sup>th</sup> Cir. 2003)

(arbitrator, not court, was to decide whether class arbitration was available)

- xxii. *White ex rel. White v. Ascension Parish School Bd.*, 343 F.3d 373 (5th Cir. 2003) (school district did not violate Louisiana law)
- xxiii. *Smallwood v. Illinois Central R. Co.*, 342 F.3d 400 (5th Cir. 2003) (Fraudulent joinder and removal issues)
- xxiv. *Religious Technology Center v. Liebreich*, 339 F.3d 369 (5th Cir. 2003) (jurisdictional issues), *clarified*, \_\_\_ F.3d \_\_\_, 2003 WL 22342827 (5<sup>th</sup> Cir. 2003), *cert. denied*, \_\_\_ S.Ct. \_\_\_, 2004 WL 46758 (Jan. 12, 2004).
- xxv. *Cargill Ferrous Intern. v. HIGHGATE MV*, 2003 WL 21683528 (5th Cir. 2003) (unpublished) (maritime entities did not waive right to arbitration)
- xxvi. *Snow v. WRS Group, Inc.*, 2003 WL 21672844 (5th Cir. 2003) (unpublished) (partially vacates; Anti-Injunction Act issue)
- xxvii. *American States Ins. Co. v Synod of the Russian Orthodox Church Outside of Russia*, 335 F.3d 493 (5<sup>th</sup> Cir. 2003) (insurer did not have duty to indemnify insured based solely on its duty to defend)
- xxviii. *Edmond v. Eaves*, 2003 WL 21554573 (5th Cir. 2003) (unpublished) (prisoner adequately stated state failure to protect claim under the Eighth Amendment)
- xxix. *In re Horseshoe Entertainment*, 337 F.3d 429 (5th Cir. 2003) (transfer issues in employment discrimination case) (Benavides dissented), *cert. denied*, 124 S.Ct. 826 (2003).
- xxx. *Murphy v. Fort Worth Independent School Dist.*, 334 F.3d 470 (5th Cir. 2003) (determination of mootness did not preclude attorney fee award)

- xxxi. *Musmeci v. Schwegmann Giant Super Markets, Inc.*, 332 F.3d 339 (5th Cir. 2003) (retirees claims; partially vacated), *cert. denied*, \_\_\_ S.Ct. \_\_\_, 2004 WL 46755 (Jan. 12, 2004).
- xxxii. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir. 2003) (LHWCA case), *cert. denied*, 124 S.Ct. 825 (2003).
- xxxiii. *Leasehold Expense Recovery, Inc. v. Mothers Work, Inc.*, 331 F.3d 452 (5th Cir. 2003) (Issues of fraud misrepresentation)
- xxxiv. *Johnson v. Louisiana Dept. of Educ.*, 330 F.3d 362 (5th Cir. 2003) (§504 of Rehabilitation Act) (Weiner dissents or specially concurs), *en banc granted*, 343 F.3d 732 (5<sup>th</sup> Cir. 2003).
- xxxv. *Counts v. Guevara*, 328 F.3d 212 (5th Cir. 2003) (scope of employment; removal issues)
- xxxvi. *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665 (5th Cir. 2003) (anti Injunction Act and choice of laws issues)
- xxxvii. *Travis v. Irby*, 326 F.3d 644 (5th Cir. 2003) (Railroad failed to establish that engineer was fraudulently joined to defeat diversity; this opinion superseded a prior opinion on denial of rehearing)
- xxxviii. *Pace v. Bogalusa City School Bd.*, 325 F.3d 609 (5th Cir. 2003) (school board provided reasonable accommodations for student), *en banc granted*, 339 F.3d 348 (5<sup>th</sup> Cir. 2003)
- xxxix. *Sandy Creek Investors, Ltd. v. City of Jonestown, Tex.*, 325 F.3d 623 (5th Cir. 2003) (District court did not have jurisdiction; owner failed to exhaust administrative remedies)
- xl. *Bridgmon v. Array Systems Corp.*, 325 F.3d 572 (5th Cir. 2003) (licensing dispute; licensee entitled to attorneys fees on appeal)

- xli.            *Flock v. Scripto-Tokai Corp.*, 319 F.3d 231 (5th Cir. 2003)  
(affirmed in part)

## CONCLUSION

The standard of review is often outcome determinative of the success of an appeal. Informed counsel must research the issues and frame them in accordance with the applicable standard of review to obtain a reversal on appeal.