Coalition for a Fair Judiciary

JUSTICE OWEN'S EVENHANDED APPROACH TO THE LAW

Table of Contents

I. Introduction

In the eight years she has served as a Justice of the Texas Supreme Court, Priscilla Owen has proven herself to be a common-sense, evenhanded jurist who strives to practice judicial restraint, and who succeeds in doing so. Justice Owen follows the law wherever it leads her, steadfastly enforcing the decisions of the United States Supreme Court, and unwaveringly implementing the expressed intent of the people's representatives in the legislature.

Contrary to the eleventh-hour accusations of People for the American Way—which has cornered the market in the industry of maligning universally esteemed and highly qualified judicial nominees—Justice Owen has authored and joined a number of rulings that have preserved the rights of working Texans, given effect to the legislature's policy choices, afforded maximum flexibility to duly elected government officials, and protected consumers and other citizens. Needless to say, Justice Owen did not set out to reach pro-plaintiff outcomes in these cases. She did what she does in every case: faithfully apply the law equally to all who come before her, regardless of what may be publicly popular or politically expedient. Justice Owen's mission, as she sees it, is to implement the law as defined by the Texas Legislature and the U.S. Supreme Court, not to give effect to a PFAW-approved judicial ideology. To paraphrase another great practitioner of judicial restraint: the Texas Constitution does not enact Mr. Ralph Neas's policy preferences.

Coalition for a Fair Judiciary
Contact: Kay Daly, (703) 578-1633

II. Defending the Rights of Employees

As Texans know, Justice Owen's eight years on the Texas Supreme Court have seen her actively defend the rights of employees and working people. For instance, in *Kroger Co. v. Keng*, 23 S.W.3d 347 (Tex. 2000), she ruled that employers that opt out of the workers' compensation insurance system cannot raise "comparative negligence" defenses. A contrary decision would have prevented employees from recovering damages resulting from on-the-job injuries. In *Pustejovsky v. Rapid-American Corp.*, 35 S.W.3d 643 (Tex. 2000), Justice Owen agreed that a worker who was suffering from asbestos-related cancer could sue certain asbestos suppliers, despite the fact that he had already settled with a different asbestos supplier. And in *Lee Lewis Construction, Inc. v. Harrison*, 70 S.W.3d 778 (Tex. 2001), a case where a construction worker died after the general contractor refused to prohibit the use of a dangerous device, Justice Owen upheld a $12.9 million jury verdict—including $5 million in punitive damages.

The cases cited by PFAW indicate nothing to the contrary. In fact, they reveal Justice Owen's demonstrated commitment to resolving legal disputes according to the prevailing law, regardless of whatever result the law ordains. Justice Owen consistently defers to the expressed intentions of the legislature, and she also looks to the federal courts—including the U.S. Supreme Court—for interpretive guidance.

QUANTUM CHEM. CORP. V. TOENNIES
Age Discrimination

Allegation: Justice Owen dissented in an age discrimination suit brought under the Texas civil rights statute.

Facts: ***Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473 (Tex 2001)**

- A 55 year-old terminated employee won a lawsuit by showing circumstantial evidence that age discrimination motivated his termination. The issue was whether a plaintiff needs to show that the age discrimination was (1) "a motivating factor" or (2) "the determinative factor" for his job loss.

- The employee sued under a state law that is patterned after the federal law.

- Justice Owen joined a dissenting opinion that interpreted the state law consistently with a virtually identical federal law, as would ordinarily be done, on the grounds that the federal courts are closely divided on the issue.

- Justice Owen agreed with the position that the Texas Supreme Court should follow the opinions of *two* federal circuits and indications in two United States Supreme Court opinions interpreting similar language in federal statutes. The Court majority, however, followed the opinion of *one* federal circuit and the ambiguous opinion of another.

MONTGOMERY INDEPENDENT SCHOOL DISTRICT V. DAVIS
Findings of Fact in Education Employment Law Cases

Allegation: Justice Owen wrote a dissent arguing that a school board may supplement findings of fact in education employment contract cases, to the detriment of teachers and in defiance of clear statutory language.

Facts: ***Montgomery Independent School District v. Davis*, 34 S.W.3d 559 (Tex. 2000)**

- In this case, a teacher was notified of the School Board's tentative decision not to renew her teaching contract, and opted to challenge the Board's decision. A state hearing examiner heard the challenge, but failed to make specific findings of fact on several key issues in the case. The hearing examiner recommended that the contract be renewed, but after holding its own hearing, the Board supplemented the examiner's factual findings and opted not to renew the contract. The teacher appealed to district court, which reversed, and the court of appeals affirmed the district court's decision.

- The majority held that the Board acted improperly in supplementing the deficient findings of fact, as it was not permitted to "sit in effect as a second factfinder." Statutory language that entitled the amendment of the findings of fact under certain circumstances was, in the majority's opinion, inapplicable because the hearing examiner's factual findings were supported by substantial evidence, which barred the Board from supplementing the factual findings.

- In dissent, Justice Owen argued that the examiner had refused to make specific findings of fact on several key issues in the case (*i.e.*, requests from students to transfer out of the teacher's class, student complaints about the teacher, and the teacher's use of obscene language in the classroom). The dissent further noted that "[t]he upshot of the Court's decision is this: a hearing examiner will now be able to make findings of fact about matters that support his or her ultimate recommendation and can ignore parts of the record that do not support those recommendations."

- Justice Owen noted that the practical effect of the decision would be to wrest power away from local school boards. She stated, "Control of schools should remain where the Legislature has placed it, with local school boards."

COLLINS V. ISON-NEWSOME
Jurisdiction to Hear Interlocutory Appeals

Allegation: Justice Owen joined a dissent declaring that the Texas Supreme Court should take an interlocutory appeal filed by a defendant school district in an employment discrimination case, despite a prohibition by the Legislature on the exercise of such jurisdiction.

Facts: ***Collins v. Ison-Newsome*, 73 S.W.3d 178 (Tex. 2001)**

- The dissent joined by Justice Owen did not concern the validity of the plaintiff's underlying employment discrimination claim. It simply addressed the issue of jurisdiction to hear defendant's appeal. The trial court denied the defendant's summary judgment motion, and the Texas Court of Appeals affirmed the denial.

- Under a Texas statute, the Supreme Court has jurisdiction to hear an interlocutory appeal in circumstances where "one of the courts of appeals holds differently from a prior decision of another court of appeals . . . ."

  - ✓ The majority opinion concluded that the Court lacked jurisdiction to hear the case, because one of the opinions cited by defendant as being in conflict with another Court of Appeals decision was not, in fact, a "prior decision." Another of the opinions could not be addressed because it was an example of a conflict between two panels of the same Court of Appeals, not "another" Court of Appeals. The majority noted that other opinions cited by defendant as being in conflict could not be addressed, as they were unpublished.

- The dissent joined by Justice Owen argued that another jurisdictional statute, which provides for jurisdiction over "a case in which the justices of a court of appeals disagree on a question of law material to the decision," provided for jurisdiction in this case. The conflicting opinions, even if they were not published prior decisions from a different appeals court, would permit the exercise of jurisdiction under this other statute, the dissent argued.

- Additionally, the dissenters saw no basis in law for the conclusion that conflicts in unpublished opinions could not be used as a basis for jurisdiction. The dissent notes, "The Court cannot use a rule of procedure . . . to reduce categorically its statutory jurisdiction." The dissenters also noted that the Court adopted its own rule limiting the precedential value of unpublished opinions in 1982, and "[n]o argument can be made that before 1982 unpublished opinions could not give rise to 'conflicts jurisdiction' . . . ."

  - ✓ Two justices, in a concurring opinion, agreed with the general view that conflicts in unpublished opinions were a basis for jurisdiction.

CONTINENTAL CASUALTY COMPANY V. DOWNS
Lack of Timeliness as a Bar to Challenge of a Worker's Compensation Claim

Allegation: Justice Owen joined a dissent stating that a workman's compensation carrier may challenge a worker's compensation claim despite the fact that the carrier failed to notify the worker of the refusal of the claim in the time limit proscribed by law.

Facts: ***Continental Casualty Company v. Downs*, 2001 WL 1876345 (Tex. 2001)**

- The claim at issue in the case was rejected by the carrier, but the carrier did not send its notice of refusal to the worker within seven days of its receipt of notice of the injury, as required by state law. The trial court granted summary judgment for the carrier, holding that the failure to send notice in a timely fashion did not necessarily mandate that the claim be granted. The Texas Court of Appeals reversed, holding that the carrier had forfeited its right to contest the claim, and rendered judgment for the worker.

- Neither the majority opinion nor the dissent joined by Justice Owen addressed the factual predicate supporting the claim.

- The majority held that the failure to notify the worker of the refusal of the claim in the time limit proscribed by law barred the carrier from contesting the claim, despite the fact that the statute imposing the deadline did not mandate the forfeiture of a carrier's right to contest a claim.

    - ✓ The majority opined that creating this penalty was an "interpret[ation] of the legislative scheme" and "str[uck] a balance between the injured employee's interest in obtaining prompt payment of benefits or notice of refusal and the carrier's interest in investigating valid grounds for refusal."

- The dissent joined by Justice Owen noted that **the Legislature had already proscribed a penalty for the failure to notify the worker of the refusal of the claim in the time limit proscribed by law – an administrative violation to be determined by the Texas Workers' Compensation Commission.** The dissent noted, "No other consequence is mentioned in the statute." The dissent concluded, "The Court unjustifiably dispenses with the statute's plain language and enacts a forfeiture provision that the Legislature never promulgated. In doing so, it alters a fundamental aspect of the Workers' Compensation System that has been applied consistently for over a decade."

- The dissent also chastised the majority for "consider[ing] whether the penalties are sufficient," for "[p]olitical questions such as those should not infect our analysis of the statute's meaning." Quoting another Texas Supreme Court case, the dissenters stated, "'The wisdom or expediency of the law is the Legislature's prerogative, not ours.'"

- The Texas Workers' Compensation Commission, a state agency, filed an *amicus curiae* brief that essentially agreed with the dissenters' position.

TEXAS MUN. LEAGUE RISK POOL V. TEXAS WORKERS' COMP. COMM'N

Constitutionality of the Texas Subsequent Injury Fund and Its Rules As Applied to a Municipal Risk Pool

Allegation: Justice Owen dissented from the Court's holding that the Texas Subsequent Injury Fund and its rules requiring municipal risk pools to pay unclaimed death benefits to the Fund were constitutional.

Facts: ***Texas Mun. League Risk Pool v. Texas Workers' Comp. Comm'n*, 74 S.W.3d 377 (Tex. 2002)**

- This case turned on the complex state constitutional question of whether the Texas legislature could require municipal risk pools to contribute unclaimed death benefits to the State Subsequent Injury Fund, or whether such requirement violated provisions of the Texas Constitution prohibiting state laws authorizing a political subdivision to "lend its credit or grant public money or thing or value…. to any individual, association or corporation whatsoever."

- Justice Owen's dissent relied on the plain meaning of the Texas Constitution, which prohibits any payments by municipalities unless the governmental unit has an independent obligation to make them.

- In this case, political subdivisions were required to transfer funds from their risk pools (unclaimed death benefits) to be used to pay for injuries for which the political subdivisions may have had no liability—i.e. workers compensation benefits paid to injured employees outside of the municipality.

- Following the principle of *stare decisis,* Justice Owen believed that the case was governed by long-standing precedent handed down in *City of Tyler v. Texas Employers' Insurance Association*, 288 S.W.2d 409 (Tex. Comm'n App. 1926, judgment adopted).

  - ✓ In *City of Tyler*, the court concluded that political subdivisions have no common law or contractual obligation to provide benefits to workers other than their own employees, and that the Texas Legislature was prohibited from requiring a political subdivision to divert public funds for those purposes.

- Recognizing the fact that the Texas Subsequent Injury Fund serves a "laudable purpose" in that it encourages employers to hire disabled employees without fear that later injuries will expose them to greater liability, Justice Owen nonetheless sought to remain faithful to the plain meaning of the Texas Constitution as she saw it, and as she interpreted existing Texas case law.

III. Parental Notification

Justice Owen's unswerving dedication to enforcing the intent of the legislature, and abiding commitment to the precedents of the U.S. Supreme Court, are perhaps most evident in the Texas Supreme Court's parental notification cases. Texas is one of more than 40 states whose legislatures have chosen to require that, as a general rule, minor girls must notify a parent before they have an abortion. (Some of these states additionally require minors to obtain parental consent, but Texas is not one of them.)

None of the notification cases required the Texas Supreme Court to decide whether the Constitution protects the right to abortion—a question that has been clearly settled by the U.S. Supreme Court. Instead, the Court had to interpret a new parental notification statute governing the exercise of that right. Texas state Senator Florence Shapiro, a chief author of the Parental Notification Act who rallied lawmakers on both sides of the abortion debate, recently explained as much in a letter to the Senate Judiciary Committee. According to Senator Shapiro:

> The Parental Notification Act is emphatically not about whether a minor is able to have an abortion, but whether her parent should be notified. The Act nowhere presents the question of whether the Constitution guarantees the right to abortion or the scope of such a right; in fact, it recognizes that a girl may have an abortion.

In addition, it is important to bear in mind that a finding that a minor has not met the legislature's standard for a judicial bypass does not prevent her from having an abortion. It only requires her to tell one parent before she does so.

In determining the meaning of the Parental Notification Act, Justice Owen consistently looked to the stated intentions of the Texas Legislature, and also applied decisions handed down by the U.S. Supreme Court. The definitive rebuttal to PFAW's misrepresentations appears in a report entitled "Priscilla Owen: A Restrained, Principled Jurist," authored by former White House Counsel C. Boyden Gray. (The Department of Justice has posted a copy of Mr. Gray's report on the web at: http://www.usdoj.gov/olp/boydengrayreport.pdf.) As Senator Shapiro—whom no one would mistake for a pro-life activist—has affirmed, Justice Owen's "opinions interpreting the Texas Parental Notification Act serve as prime examples of her judicial restraint."

IV. Maintaining the Integrity of Governmental Decisionmaking

As a state judge, Justice Owen has endeavored to preserve the integrity of the processes by which governmental bodies reach and implement political decisions. In doing so, she has rejected the use of the "nondelegation doctrine"—an arcane theory of constitutional law that would prevent legislatures from developing creative, innovative solutions to new and unanticipated social problems. (Coincidentally, the U.S. Supreme Court came to the same result in the recent case of *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457 (2001).) And Justice Owen has applied U.S. Supreme Court precedents affirming the confidentiality of certain privileged governmental documents.

FM Properties Operating Co. v. City of Austin
Deferring to Legislative Policy Choices

Allegation: "In a test of the constitutionality of a state law tailored to exempt a specific land developer from the City of Austin's water quality rules, Owen wrote a forceful dissent that decried the majority for finding this special-interest statute unconstitutional (*FM Properties Operating Co. v. City of Austin*). The dissenting Owen, who received $2,500 in campaign contributions from the same developer and $45,000 from the developer's attorneys, criticized the majority for curtailing the developer's private property rights."

Facts: ***FM Properties Operating Co. v. City of Austin*, 22 S.W.3d 868 (Tex. 2000)**

- Justice Owen dissented from the majority's decision that a Texas law, which allowed landowners to designate their property as "water quality protection zones," was an unconstitutional delegation of legislative power.
  - ✓ The Justices in the majority themselves conceded that "[d]efining what legislative power is or when it has been delegated is no easy task."
- Justice Owen argued that legislatures should be allowed the flexibility to develop creative, innovative solutions to pressing social problems, and that courts should not interfere with such experimentation: "How the Legislature chooses to regulate is left to the Legislature, not this Court." The majority's decision to invalidate the law "usurps authority that is reserved to another branch of government—the Legislature."
- Justice Owen rejected the majority's "nondelegation doctrine"—a theory that, if adopted by the federal courts, would imperil Congress's ability to delegate lawmaking authority to all manner of administrative agencies.
- Texas Attorney General Dan Morales, a Democrat, had intervened in the proceedings to defend the law's constitutionality.

City of Garland v. Dallas Morning News
Texas Public Information Act

Allegation: Justice Owen's dissent would have severely restricted the public's access to information in a case involving the Texas Public Information Act. Specifically, the issue was whether a memorandum concerning the termination of the employment of a city finance director was public information within the meaning of the Texas Public Information Act, and, if so, whether it was exempt from disclosure under the "deliberative process privilege."

Facts: ***City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000)**

- The plurality opinion acknowledges that the questions of whether the deliberative process privilege existed in Texas and, if so, the scope of such privilege, were issues of first impression. The entire court agreed that the Texas Public Information Act ("TPIA") incorporated the deliberative process privilege, however, it could not agree on whether documents used in making personnel decisions were included within the privilege.
  - ✓ The memo at issue was a draft written to the city's director of finance from the city manager stating that the director of finance was being removed from his position and the reasons for the removal. The memo was prepared for the purposes of discussion with city council members to determine whether to pursue a course of action consistent with the memo. Ultimately, the city decided to pursue a different course of action and never went forward with the memorandum.
- The TPIA was modeled on the federal Freedom of Information Act, and therefore, the plurality agreed with Justice Owen that it was proper to look to federal caselaw for guidance.
- The key exception to this case, which would exempt agency communications falling under the deliberative process privilege, was interpreted by the Supreme Court to promote "frank discussion of legal and policy matters." *EPA v. Mink*, 410 U.S. 73 (1973).
  - ✓ The plurality asserted that despite the federal caselaw holding to the contrary, it would not consider personnel issues as policy matters.
  - ✓ The plurality indicated that the federal courts had too broadly interpreted the exception, so that it would not follow their precedent, stating: "the increasing scope of the deliberative process privilege in federal courts is in itself a reason to not follow post-1973 federal court cases."
  - ✓ The concurring opinion of three justices expressed its concerns with the plurality's broad analysis, stating: "I join in the result of the plurality's analysis of whether the exceptions apply, but not in all of its writing."

- Justice Owen cited numerous examples of federal cases in which the courts held that documents used to make personnel decisions were included within the deliberative process privilege. Justice Owen would have had the courts follow the rationale of the federal circuit court opinions.

  - ✓ In *May v. Department of Air Force*, 777 F.2d 1012 (5th Cir. 1985), the court held that the deliberative process exemption applied to evaluations and recommendations that the Air Force kept on file and used in deciding to promote officers. In *American Federation of Government Employees, Local 2782 v. U.S. Department of Commerce*, 907 F.2d 203 (D.C. Cir. 1990), the court held that forms on which recommendations of particular employees for specific promotions were recorded were exempt under the deliberative process privilege. Similarly, in *Kalmin v. Department of Navy*, 605 F. Supp. 1492 (D.D.C. 1985), the court found that documents used by the Navy in making personnel decisions were part of the deliberative process and therefore exempt.

  - ✓ The D.C. Circuit's AFGE decision further explained: "The exemption . . . covers recommendations, drafts, documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. Documents which are protected by the privilege are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as an agency position that which is as yet only a person position." *AFGE* at 208.

- Justice Owen also argued that the Open Records Act or TPIA should be read together with the Open Meetings Act. The Texas Open Meetings Act specifically allows employment matters to be discussed in closed meetings. Justice Owen made the point that it would have been inconsistent for the Legislature to exempt from public disclosure an oral presentation, but not the identical presentation in writing.

  - ✓ Justice Owen specifically agreed with the plurality opinion that a document that would otherwise be public information could not be brought within the deliberative process exemption by discussing it at a closed session.

- In this case of first impression, Justice Owen would have had the court follow federal precedent and adopt the interpretation of deliberative process privilege to include documents relating to personnel matters. Justice Owen's dissent did not comment on other possible exceptions to the deliberative process privilege and she narrowly tailored her language to personnel matters only.

V. Protecting Texas Consumers

Justice Owen strives to ensure that all parties in Texas, including consumers, get a fair shake before their state's courts. To name just a few examples, in *Hernandez v. Tokai Corp.*, 2 S.W.3d 251 (Tex. 1999), she held that a manufacturer of cigarette lighters has a duty to make sure that its products are child resistant, even though they were intended for use only by adults. In *Chilkewitz v. Hyson*, 22 S.W.3d 825 (Tex. 1999), she ruled that a medical malpractice victim could bring a suit against the doctor, even though the plaintiff sued the doctor personally and not the physician's association. And in *Mid-Century Insurance Co. v. Lindsey*, 997 S.W.2d 153 (Tex. 1999), she required an insurance company to pay $50,000 in uninsured motorist coverage, because she concluded that the policy's coverage of "accidents" included a boy's inadvertent act.

Again, it must be stressed that Justice Owen did not set out in these cases to issue decisions that were consumer-friendly, or that would benefit a litigant whom she wanted to see prevail. Instead, Justice Owen reasoned her way to these conclusions the same way she does in every case: by dispassionately applying the law, as defined by the legislature and the U.S. Supreme Court, to the facts of an individual case.

TEXAS DOT V. ABLE
State Waiver of Sovereign Immunity under the Texas Tort Claims Act

Allegation: Owen dissented from an opinion finding that a state agency that entered into a joint enterprise with another governmental entity could be found vicariously liable for the negligent acts of that entity because the state waived sovereign immunity for such agreements under the Texas Tort Claims Act.

Facts: ***Texas DOT v. Able*, 35 S.W.3d 608 (Tex. 2000)**

- In *Able,* a 6-3 majority of the Court held that under the Texas Tort Claims Act, State agencies could be held vicariously liable for the acts of state political subdivisions, if the State had entered into a joint enterprise with the subdivision.
  - ✓ In this case, several victims injured in a car accident sued the Texas DOT (TxDOT), and several other government entities, including the Houston Metropolitan Transit Authority (Metro), alleging negligence and gross negligence and that the governmental entities participated in a joint enterprise in constructing and maintaining the Houston highway system.
  - ✓ **A jury found that TxDOT was not negligent**, but that it engaged in a joint enterprise with Metro, and was thus vicariously liable for Metro's negligence.
- Justice Owen, joined in her dissent by two other Justices, argued that the relationship between TxDOT and Metro was not a joint enterprise because it failed to meet two of the necessary elements of such a relationship- namely that members have an equal right of control over and a pecuniary interest in the enterprise.

- ✓ **Her dissent did not argue that such a relationship could never exist between a state and a political subdivision—only that it did not exist in this case.**

- **Equal control.** In this case, Justice Owen found that the operational agreement between the state and Metro recognized expressly that the state had ultimate control over the highway on which the plaintiffs were injured. She also noted that the traditional relationship between the state and its political subdivisions was one where the State had a superior right of control. Without such an equal right, no joint enterprise can exist.

- **Pecuniary interest.** Justice Owen, relied on existing case law holding that a joint enterprise can only arise in commercial situations. Since providing, operating and maintaining public highways is not truly a commercial enterprise—it is a core governmental function—it was arguable whether a joint enterprise existed in this case.

HELENA CHEMICAL CO. V. WILKINS
Texas Seed Arbitration Act

Allegation: Justice Owen joined a dissent that would have held that the Texas Seed Arbitration Act barred a farmer's claims because the farmer delayed the submission of his claim to the arbitration board. The dissent would have accepted the manufacturer's argument that the Board's refusal to arbitrate was a jurisdictional bar to litigation.

Facts: ***Helena Chemical Co. v. Wilkins*, 47 S.W.3d 486 (Tex. 2001)**

- This was a case of first impression involving the Texas Seed Arbitration Act ("Seed Act") where the 6-3 majority held that the timeliness requirement for submitting claims to arbitration did not jurisdictionally bar their court claim.
  - ✓ In this case, a farmer sued a seed company when the seeds did not perform as the company had suggested they would. The Seed Act was controlling on all such claims.
  - ✓ The farmer knew about the alleged problem with the seed sold to him by defendant, and knew that the Seed Act required complaints to be submitted to arbitration. Nevertheless, the farmer delayed submitting his complaint to arbitration until years after he discovered the problem – making it impossible for the arbitration Board to inspect his crops.
  - ✓ Unable to do an inspection because the crops were no longer in "field condition," the arbitration Board declined to arbitrate – allowing the farmer to go directly to court.
- The statute set forth arbitration requirements on individuals bringing defective seed complaints. The seed purchaser **"must submit the claim to arbitration as provided by this chapter as a prerequisite to the exercise of the purchaser's rights to maintain legal action against the labeler."** "Except in the case of seed that has not been planted, **the complaint must be filed within the time necessary to permit effective inspection of the field conditions**."
- The dissent joined by Justice Owen argued that the statute should be given its plain meaning and that the use of the word must in the relevant portions of the statute indicated that the legislature intended that two things would happen: (1) claim would be submitted; AND (2) the claim would be submitted within the time necessary to permit an effective inspection.
  - ✓ The dissent made the point that the purpose of the Seed Act is to "provide[] for an unbiased third party investigation by the State Seed and Plant Board of the Texas Department of Agriculture of complaints concerning seed performance." If the

seed purchaser fails to timely submit the claim, the Board cannot arbitrate and "the sole purpose of the Act is thwarted."

- ✓ The dissent argues that the majority's interpretation of the Seed Act would allow an individual to get around the requirement of arbitration simply by filing the claim too late to allow for an inspection.

- ✓ The dissent asserted that following Texas precedent, "when two constructions are possible, we should choose the one most consistent with the Act's purpose over the construction completely at odds with it."

UNIROYAL GOODRICH TIRE CO. V. MARTINEZ
Products Liability: Defective Design

Allegation: Justice Owen joined a dissent declaring that the Texas Supreme Court improperly applied the law of product defects when it upheld a multi-million dollar judgment in favor of the plaintiff, who had suffered injuries when a tire manufactured by the defendant exploded. Justice Owen would have denied the plaintiff recovery merely due to warnings on the tire and despite the existence of a safer design for the tire.

Facts: ***Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328 (Tex. 1998)**

- The dissent joined by Justice Owen relied on warnings that clearly appeared on the tire and of which the plaintiff admittedly was aware. Those warnings stated: "NEVER MOUNT A 16" DIAMETER TIRE ON A 16.5" RIM;" NEVER inflate a tire which is lying on the floor or other flat surface. Always use a tire mounting machine with a hold-down device or safety cage or bolt to vehicle axle;" "NEVER inflate to seat beads without using an extension hose with gauge and clip-on chuck;" "NEVER stand, lean or reach over assembly during inflation;" and that "Failure to comply with these safety precautions can cause the bead to break and the assembly to burst with sufficient force to cause serious injury or death."
  - ✓ The Plaintiff, as recognized even by the majority, ignored every one of these warnings.
  - ✓ In addition, the Plaintiff had admittedly changed about a thousand tires and admitted he knew better than to lean over a tire while inflating it, which is what he was doing in this case when the tire burst.
- The dissent relied on Restatement (Second) of Torts, an authority relied upon by a majority of courts in the United States.
  - ✓ Restatement (Second) of Torts § 402, comment j, addressed the very issue facing the court in this case. It states that "Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous."
  - ✓ Thus, the dissent opined that the tire at issue, given the extensive warnings which warned of the exact event encountered by the plaintiff, was not defectively designed and that when adequate warnings are provided and seen by a plaintiff, the product manufacturer should not face liability based on the existence of an alternative, but possibly equally dangerous, design.
- The tire rim at issue was not manufactured by the defendant, but rather by parties who settled with the plaintiff and had been dismissed from the suit. Contrary to the extensive

warnings on the defendant's product, the tire rim on which the plaintiff was attempting to mount the tire failed to contain any label as to its size, which would have further alerted the plaintiff to the danger of mounting a 16" tire on a 16.5" rim. Although the other dissenters concluded these other parties were liable as a matter of law and should have been determined by the jury to be responsible, that issue was not directly before the court as the court was faced only with whether sufficient evidence of liability on the part of the defendant existed.

- ✓ Justice Owen did not join in that portion of the dissent, restraining herself only to the question at hand.

H.E. Butt Grocery Co. v. Bilotto
Jury Charges

Allegation: "In *HEB Grocery Co. v. Vinnie Bilotto*, an appeals court and a Supreme Court majority both affirmed a trial court judgment that granted $91,000 in actual damages to a customer who was injured in a grocery store fall. Owen joined two dissents in the case that argued that damages questions to the jury should not have been predicated on the degree of negligence attributed to the defendant."

Facts: ***H.E. Butt Grocery Co. v. Bilotto*, 985 S.W.2d 22 (Tex. 1998)**

- Justice Owen joined dissents that faithfully applied a Texas procedural rule forbidding trial judges from informing juries about the legal effect of their factual findings.
  - ✓ Texas Rule of Civil Procedure 277 prohibits a judge from "advis[ing] the jury of the effect of their answers."
  - ✓ When charging the jury in a lawsuit involving a man who slipped at a grocery store, the trial judge's instructions implied that the plaintiff could not recover damages unless the jury found him 50% or less responsible for the injuries he suffered.
  - ✓ Under long-settled Texas law, telling jurors that a certain amount of negligence on the plaintiff's part will bar his recovery, impermissibly advises them about the legal effect of their answers. *See Grasso v. Cannon Ball Motor Freight Lines*, 81 S.W.2d 482 (Tex. 1935).
- In effect, the dissent sought to preserve the unique role of the jury as the finder of fact, without assigning it the power of a judge to resolve questions of law.

WEINER V. WASSON
Medical Malpractice Statute of Limitations

Allegation: Justice Owen wrote the dissent from a 6-3 opinion striking down as unconstitutional the state's statute of limitations for medical malpractice claims applied to minors. Justice Owen's dissent would have limited the ability of minors to enforce their legal rights.

Facts: ***Weiner v. Wasson*, 900 S.W.2d 316 (1995)**

- Justice Owen's opinion recognized that parents and guardians are responsible for enforcing their minor children's rights in almost all circumstances. She found that the manner in which the statute was written, allowed for a minor's rights to be pursued by the parent or guardian. Justice Owen specifically found that if a plaintiff could show that he did not have a competent parent or guardian, or one that could not act in his best interest, that statute would be unconstitutional as to that plaintiff.

- The majority found that under the open courts provision of the Texas Constitution, the statute of limitations of the Medical Liability and Insurance Improvement Act was unconstitutional as applied to minors. The majority decided that an earlier case holding that a predecessor statute also was unconstitutional as to the statute of limitations for minors was controlling in *Wasson*. *Sax v. Votteler*, 648 S.W.2d 661 (Tex. 1983)

  - ✓ The statute indicated that there was a 2-year statute of limitation on health care liability claims, "provided that minors under the age of 12 years shall have until their 14th birthday in which to file, or have filed on their behalf, the claim."

- In this case, the plaintiff was operated on by a doctor in May 1988, when he was a 15 year-old minor. In August, 1998 the plaintiff and his parents went to another doctor who told them that the original surgery had left surgical pins protruding into his hip. The minor turned 18 in December 1990, and a few months later underwent hip replacement surgery. **The plaintiff did not file suit against the original doctor until August 1992, four years after he was put on notice of the malpractice.**

- Justice Owen expressed concern that the majority's view of the open courts provision was so expansive that no statute of limitations aimed at limiting the claims of minors would be constitutional.

  - ✓ Justice Owen cautioned that the court should not presume that new statute of limitations for minors was unconstitutional just because the result in *Sax* was to find the old statute unconstitutional. She found that when the Legislature enacted the changes to the Medical Liability Act, it was aware of the Texas Supreme Court's holding in *Sax*, and therefore articulated strong policy considerations to explain the changes it had made.

- ✓ Justice Owen considered that Medical Liability Act's statute of limitations on minors in light of the two prong test set forth by the Texas Supreme Court and followed in *Sax*: (1) if a common-law cause of action has been restricted or withdrawn by the legislature, does section 10.1 substitute a reasonable remedy, and (2) if no reasonable remedy was substituted, is section 10.1 nevertheless a reasonable exercise of police power by the Legislature.

- ➢ Justice Owen found that requiring suit to be brought on behalf of a minor was a reasonable substitute for removing the right of a minor to bring suit for himself upon reaching the age of 18, *provided that* the minor had a legally competent parent or guardian to act in the minor's best interest.

  - ✓ Justice Owen looked to the Texas Family Code and found that it empowers parents to protect the legal interests of their children. She acknowledged that she disagreed with the assumption in *Sax* that competent parents could not be trusted to act in the best interest of their child.

- ➢ Justice Owen also would have held that the exercise of legislative power met the 2nd prong test of an important state interest and was constitutional because the Legislature found that there was a "medical malpractice crisis in the state which had a material and adverse effect on the cost and availability of health care."

- ➢ Justice Owen specifically stated that she would not hold that the statute of limitations for minors could *never* be unconstitutional in its application. She added that if a plaintiff demonstrated that he did not have a parent or legal guardian who was not competent to bring suit, of who had a conflict that prevented him from acting in the minor's best interest a different result would apply.

Sonnier v. Chisholm-Ryder
Statute of Repose in a Products Liability Case

Allegation: Owen joined an "activist dissent" in arguing that all manufacturers who construct or repair improvements to real property should be subject to a ten-year statute of repose.

Facts: ***Sonnier v. Chisholm-Ryder*, 909 S.W.2d 475 (Tex. 1995)**

➢ In *Sonnier*, an employee injured by a tomato chopper installed by the Texas Department of Corrections sued the chopper's manufacturer some 25 years after the manufacturer constructed the machine.

➢ This case turned on the interpretation of section 16.009 of the Texas Civil Practice and Remedies Code, which stated that "a claimant must bring suit for damages.... against a person who constructs or repairs an improvement to real property not later than 10 years after the substantial completion of the improvement...."

➢ **Justice Owen and her three fellow dissenters (which included Democrat Justice Gonzalez) attempted to follow what they believed was well-settled Texas law.**

- ✓ According to the dissent, the activist majority opinion ignored a prior decision of the Texas Supreme Court and no fewer than seven Texas courts of appeals.

- ✓ In *Conkle v. Builders Concrete Products*, 749 S.W.2d 489 (Tex. 1988), the Court held that off-site manufacturers were protected by Section 16.009's repose, but only if the manufacturer constructed the entire improvement and not a component part of it.

- ✓ Seven Texas courts of appeal had issued similar holdings. *See Karisch v. Allied-Signal, Inc*., 837 S.W.2d 679 (Tex.App.-- Corpus Christi 1992); *Big West Oil Co. v. Willborn Bros. Co.*, 836 S.W.2d 800 (Tex.App.--Amarillo 1992); *Ablin v. Morton Southwest Co.*, 802 S.W.2d 788 (Tex.App.--San Antonio 1990); *Dubin v. Carrier Corp.*, 798 S.W.2d 1 (Tex.App.--Houston [14th Dist.] 1989); *Rodarte v. Carrier Corp*., 786 S.W.2d 94 (Tex.App.--El Paso 1990); *Dubin v. Carrier Corp*., 731 S.W.2d 651 (Tex.App.-- Houston [1st Dist.] 1987); *Ellerbe v. Otis Elevator Co.*, 618 S.W.2d 870 (Tex.App.--Houston [1st Dist.] 1981).

Read v. Scott Fetzer Co.

Manufacturer Liability for Sexual Assaults by Independent Contractor Salesmen

Allegation: Justice Owen joined an "extreme dissent" in a case involving business liability for the acts of a door-to-door vacuum cleaner salesman who raped a customer. The dissent argued that a distributor had no legal duty to perform background checks on door-to-door salesmen, and that failure to perform these checks could not result in foreseeable assaults.

Facts: ***Read v. Scott Fetzer Co.*, 990 S.W. 2d 732 (Tex. 1998)**

- Ms. Read was raped at her home by a vacuum cleaner salesman, Mr. Carter. She sued the vacuum manufacturer, Kirby, and Kirby's distributor who hired Mr. Carter as an independent contractor/salesman.

- The issue was whether a company that requires in-home sales but markets through an independent contractor, who in turn, retains other independent contractors to make the sales exercises sufficient control to subject it to liability.

- **Justice Owen attempted to follow what she believed was settled Texas law in this case.** She believed that this case was governed by and indistinguishable from two prior decisions of the Texas Supreme Court, *Golden Spread Council, Inc. v. Akins*, 926 S.W.2d 287 (Tex. 1996) and *Greater Houston Transportation Co. v. Phillips*, 801 S.W.2d 523 (Tex. 1990).

  - ✓ In *Akins*, the Court held that the Boys Scouts of America had no duty to monitor its independent local volunteer councils' selection of troop leaders to prevent sexual assaults by these leaders, even though the Boy Scouts created an organization in which the risk of misconduct by troop leaders was inherently possible.

  - ✓ In *Phillips*, the Court rejected the argument that the Yellow Cab Company of Houston should have known that it was likely that one of its drivers would carry a gun, get into an altercation while on the job, and shoot someone. Despite the fact that the Yellow Cab Company had operated in Houston for nearly twenty years, and was involved in nearly 1,000 traffic accidents per year, the Court held that the company had no duty to warn its cab drivers not to carry guns.

- Justice Owen specifically agreed in the case that a contractor, like Kirby, has a duty to exercise reasonably the control it retains over the independent contractor's work.

- In addition, she noted that the plaintiff had suffered "a terrible injury" and that it was beyond doubt that the victim was due compensation from her rapist AND the local distributor for failing to exercise reasonable care in hiring him.

- ✓ Kirby, however, did not control the hiring of Mr. Carter. Ms. Read sued for injuries related to the selection of Mr. Carter as a salesman without a background check.

- ✓ The contract between Kirby and its distributors says that Kirby "shall exercise no control over the selection of ... Dealers," and that distributors have the "full ... responsibility for recruiting, hiring, firing, terminating ... independent contractors. *Id*. at 745.

State Farm Lloyds v. Nicolau
Bad Faith by Insurers

Allegation: In a case finding that an insurer breached its contract and acted in bad faith in denying most of the plaintiff's claims for foundation damage to their home, Justice Owen joined a dissent that reweighed the trial court evidence and found that no tort was committed at all. The dissent itself was striking in its disdain for plaintiffs in general.

Facts: ***State Farm Lloyds v. Nicolau*, 951 S.W.2d 444 (Tex. 1997)**

➢ The dissent, joined by Justice Owen and 3 other justices including Democrat Raul Gonzalez, focused on the Texas Supreme Court's failure to define the limits of bad faith liability.

- ✓ The opinion stated: "Individuals and entities, even insurance companies, are entitled to know before they act what the law expects of them, what behavior is culpable and what is not. A legal cause of action must be adequately defined by principles and standards."

- ✓ A court of appeals also noted the problem, stating that the Texas Supreme Court "has ultimately done little to provide lower courts with any guidance for conducting a legal sufficiency review in bad faith cases."

➢ The dissent specifically stated that as a reviewing court, it was not reweighing the evidence, "as that is the province of the jury." The dissent, following well-settled principles, viewed the evidence in the light most favorable to the plaintiffs, and determined that the evidence did not support the jury's finding of bad faith – a finding also arrived at by the trial court.

➢ Rather than criticizing the jury finding, the dissent sympathized with jurors who had to grapple with a decision on bad faith liability without being told what the clear legal standard was to apply.

➢ The dissent found that, even using the bad faith standard set forth in the majority opinion that an insurer breaches its duty when it "fails to settle a claim if [it] knew or should have known that it was reasonably clear that a claim was covered," the insurance company should not have been liable.

- ✓ The dissent argued that the evidence showed that there was a legitimate dispute among the experts hired by each side.

- ✓ The dissent, far from attacking plaintiffs, criticizes a system that encourages attorneys to add an allegation of bad faith to the complaint, because the odds of recovery – regardless of the facts – are good.

Universe Life Insurance Co. v. Giles
Bad Faith in Insurance Cases

Allegation: "In this bad-faith insurance case, the majority overturned the jury's punitive damages award citing a lack of evidence. Owen joined a more extreme dissent that would have directed judges to replace juries in making bad-faith determinations. The majority criticized this dissent, saying it 'would take the resolution of bad-faith disputes away from the juries that have been deciding bad faith cases for more than a decade.'"

Facts: ***Universe Life Insurance Co. v. Giles*, 950 S.W.2d 48 (Tex. 1997)**

- Justice Owen agreed with the unanimous Court that an insurance company had denied a policyholder's claim "in bad faith."

- She also joined a concurring opinion—along with other colleagues from both political parties—which argued that the question of what constitutes "bad faith" should be decided by judges, to ensure that such determinations can be reviewed on appeal.

  - ✓ Allowing juries to decide whether an insurance company has acted in "bad faith" prevents appellate courts from meaningfully reviewing their decisions.

  - ✓ Texas law forbids appellate courts, when examining a jury's findings, from weighing the evidence before the trial court. They can only consider "undisputed evidence and evidence to support the finding." *Id*. at 43 (concurring opinion).

  - ✓ To ensure that higher courts have the opportunity to consider whether "bad faith" exists in a given case, it is necessary to allow judges—whose decisions are fully reviewable on appeal—to determine "bad faith."

  - ✓ The concurrence reflects the view that juries should not be able to wield an unchecked, unreviewable power to make legal determinations.

- Even the majority acknowledged that Texas law effectively prevented appellate review of a jury's "bad faith" determinations, and tried to resolve the problem by adopting a narrower definition of "bad faith."

  - ✓ According to the majority, "[a]lthough we attempted to resolve this dilemma in [past cases], it is clear that our efforts have not been entirely successful." *Id*. at 52.

  - ✓ The majority and concurrence agreed that an unchecked jury was a significant problem; they simply differed on the best way to solve it.

- Justice Owen joined, but did not author, the concurrence.

State Farm Fire & Cas. Co. v. Simmons
Bad Faith by Insurers

Allegation: In a case where an insurer refused to pay the claim of a family whose home had burned to the ground, Justice Owen joined an extreme dissent that questioned the damages awarded by the jury for the bad faith of the insurer. The case shows that Justice Owen is activist, anti-consumer, and anti-jury.

Facts: ***State Farm Fire & Cas. Co. v. Simmons*, 963 S.W.2d 42 (Tex. 1998)**

➢ The **trial court** in this case found that there **was not legally sufficient evidence to support a jury's finding** that the insurer breached its duty of good faith and the jury's award of $2 million in punitive damages.

- ✓ The majority opinion, written by Democrat Justice Rose Spector, reversed the jury's punitive damages award, but left the bad faith finding under a revised legal standard.

➢ Justice Owen joined a dissent that argued that the majority opinion did not consider the bad faith claim under the standards the Texas Supreme Court itself had established.

- ✓ The court in earlier opinions held that there are two elements to proving bad faith: (1) the insurer had no reasonable basis for denying the claim and that it knew or should have known that fact; (2) an insurer denied a claim after liability was reasonably clear.

➢ The dissent criticized the majority opinion for being driven not by legal principles, but rather, by the belief that the insurer had not been entirely fair and therefore should pay some money to the plaintiffs.

- ✓ The dissent joined by Justice Owen applied the law as it was established in precedent. It was the majority opinion which ignored the legal standards and created an exception unique to the case.

- ✓ Although Justice Owen had dissented from the opinion setting forth the original standard, once it became precedent, she faithfully applied the standard.

➢ Both the majority opinion, written by Democrat Justice Rose Spector, and the dissent found that there was insufficient evidence to support the jury's verdict, a decision made by appellate courts every day.

Balandran v. Safeco Ins. Co. of Am.

Scope of Insurance Coverage

Allegation: "[T]he federal court asked the Texas court whether a particular Texas Standard Homeowner's policy covered damage to the insured's dwelling from foundation movement caused by an underground plumbing leak. In a 7-2 ruling, the Supreme Court held that it did. . . . Justice Owen wrote a dissent in which she would have held that the policy was not ambiguous and denied coverage to the insured individuals."

Facts: ***Balandran v. Safeco Ins. Co. of Am*., 972 S.W.2d 738 (Tex. 1998)**

- Justice Owen dissented from the majority's conclusion that the insurance policy covered water damage to the plaintiffs' home for two reasons: (1) the plain language of the policy excluded such coverage; and (2) a prior decision of the Fifth Circuit foreclosed any such recovery.

  - ✓ Coverage A of the plaintiffs' insurance policy, which dealt with dwellings, specifically stated that it did not cover any damage to structures caused by water. According to the policy, it does not apply to losses "caused by settling, cracking, bulging, shrinkage, or expansion of foundations, walls, floors, ceilings . . . ."

  - ✓ These are precisely the types of losses the plaintiffs in *Balandran* claimed, and Justice Owen therefore concluded that the insurance policy did not cover them.

  - ✓ The majority looked to Coverage B of the insurance policy, which dealt with personal property, to support its conclusion that the Coverage A extended to water damage to dwellings. But the Fifth Circuit had already rejected using Coverage B to interpret the scope of coverage under Coverage A.

  - ✓ According to the Fifth Circuit: "It therefore would appear to be nonsensical, and a rejection of the obvious structure of the policy, to reach into text that applies solely to Coverage B (Personal Property) to determine the extent of coverage provided under Coverage A (Dwelling)." *Sharp v. State Farm Fire & Cas. Ins. Co.*, 115 F.3d 1258, 1262 (5th Cir.1997).

- Because the insurance policy was unambiguous, Justice Owen concluded that it was inappropriate to invoke the rule that ambiguous policies should be construed in favor of the insured.

✓ This rule of construction comes into play only where the meaning of a policy cannot be readily ascertained. But the Balandran's policy could not have been more clear: damages of the sort caused by water leaks are not within the scope of coverage.

Texas Farmers Ins. Co. v. Murphy
Liability of Insurers Under Circumstances of Fraud

Allegation: Justice Owen joined a dissent that would have held that, notwithstanding the language of the insurance policy, an innocent spouse is not entitled to any of the insurance proceeds with respect to community property destroyed by a guilty spouse.

Facts: **Texas Farmers Ins. Co. v. Murphy, 996 S.W.2d 873 (1999)**

- In this case, the husband had intentionally burned down the family home, under which both the husband and wife were covered as insureds. The wife had no prior knowledge of the arson. After the insurance company had denied coverage based on the arson, the wife filed her own claim for the policy benefits.

- The dissent joined by Justice Owen relied on both federal and state precedent that public policy barred the recovery of an innocent spouse when the destroyed property is community property.

  - ✓ The Fifth Circuit specifically held that because the guilty spouse would benefit from the innocent spouse's recovery, public policy barred the innocent spouse's recovery in the case where the property is community property. *Norman v. State Farm Fire & Casualty Co.*, 804 F.2d 1365 (5th Cir. 1986).

  - ✓ The Fifth Circuit extended its *Norman* ruling, finding that an innocent spouse could not recover because "at all points of time pertinent to State Farm's decision to deny recovery – the date the policy was issued, the date of the fire, the date the Websters filed their claim, and the date the claim was refused – the property was community. *Webster v. State Farm Fire & Cas. Co.*, 953 F.2d 222 (5th Cir. 1992).

- The dissent also relied upon several Texas state cases that followed the 5th Circuit rulings.

  - ✓ A Texas Court of Appeals held that "if benefits would inure to the community and thus to the arsonist, the innocent spouse cannot recover." *Chubb Lloyds Ins. Co. v. Kizer*, 943 S.W.2d 946 (Tex. App. Fort Worth 1997, writ denied).

  - ✓ The Texas Supreme Court had agreed with the conclusion of *Kizer* at the time because they had denied the application for writ of error. The dissent pointed out that the writ was denied because there "has never been any conflict or confusion about the principle that an arsonist cannot benefit from his crime."

FITZGERALD V. ADVANCED SPINE FIXATION SYSTEMS, INC.
Indemnification Statute

Allegation: Justice Owen dissent in this case would have held that a seller not in the chain of sale to the plaintiff's was not entitled to indemnification from the manufacturer. This interpretation would have judicially amended the statute in question.

Facts: ***Fitzgerald v. Advanced Spine Fixation Systems, Inc.*, 996 S.W.2d 864 (Tex. 1999)**

- The Fifth Circuit certified the question to the Texas Supreme Court whether the Texas Products Liability Act of 1993 required a manufacturer of an injuring product to indemnify a retailer that was forced to defend itself in products liability litigation even though the retailer, who sold products of the same or similar type involved in the suit, did not sell the particular product claimed to have harmed the underlying plaintiff.
  - ✓ The statute read: "A manufacturer shall indemnify and hold harmless a seller against loss arising out of a products liability action, except for any loss caused by the seller's negligence, intentional misconduct, or other act or omission, such as negligently modifying or altering the product, for which the seller is independently liable." Tex. Civ. Prac. & Rem. Code sec. 82.002(a).
- In this split 5-4 decision, the majority found that the statute was unambiguous and therefore they held that the manufacturer was liable.
- The dissent written by Justice Owen cited Texas Supreme Court precedent stating that a court should not construe a statute in a manner that creates new liability in derogation of the common law unless the legislature clearly expresses its intent to do so. *Smith v. Sewell*, 858 S.W.2d 350 (Tex. 1993).
  - ✓ Finding that the terms "manufacturer" and "seller" were open-ended, the dissent considered the law prior to enactment of the statute to determine whether the new sections would create a new liability for indemnity if they were construed in the manner decided by the majority.
  - ✓ Justice Owen found that Texas common law had not recognized indemnity for an innocent seller who was not in the chain of distribution and, therefore was not liable to a third party. *Duncan v. Cessna Aircraft Co.* 665 S.W.2d 414 (Tex 1984).
- Justice Owen's dissent found that, as interpreted by the court, the statute was a significant departure from the common law. As such, she looked to whether the statue plainly and fairly expressed that it intended for such a departure. Following *Smith v. Sewell*, Justice Owen found that the legislature did not intend to depart from the common law, which required that the seller be in the chain of commerce.

- ✓ Justice Owen would have held that the Legislature's imprecise definition of the word "seller" did not constitute a sufficient statement by which it could be shown that the Legislature intended to remove the common law chain-of-distribution requirement.

- ✓ Because the statute did not clearly state that a seller did not have to be in the chain of distribution, i.e., he actually sold the offending product, Justice Owen would have held that he had no right to be indemnified by the manufacturer.

- ✓ Justice Owen recognized that in the same statute, the Texas Legislature clearly expressed certain new rights that it had created that did not exist in the common law. Those included (1) the right to indemnity from a manufacturer without showing that the manufacturer would have been liable to the underlying plaintiff, and (2) the right to recover attorney's fees and other costs of litigation.

VI. Conclusion

A well-funded, well-orchestrated alliance of left-leaning interest groups has been sharpening its knives for Priscilla Owen since President Bush nominated her to the Fifth Circuit on May 9, 2001—over fourteen months ago. The Senate Judiciary Committee has paid far too much attention to their dishonest, misleading smear campaign, and may even be aiding and abetting it. As the *Wall Street Journal* recently pointed out, "[w]hen the Chairman rescheduled her hearing last week, that news was up on Planned Parenthood's Web site before it was even communicated to the Republicans on the committee or the Justice Department. Talk about teamwork."

Rather than kowtow to the special interests, the Senate would do well to pay heed to those who know Justice Owen best: her colleagues on the bench and those who have practiced before her. These individuals have firsthand knowledge of Justice Owen's longstanding dedication to following the rule of law, and practicing judicial restraint. And they have testified about Justice Owen's unwavering fealty to the legislature's intent and the U.S. Supreme Court's precedents. As White House Counsel Al Gonzales, who served on the Texas Supreme Court with Justice Owen, has explained, she "possesses exceptional integrity, character and intellect." "She is an outstanding jurist and will perform superbly as a federal appeals court judge." And according to John L. Hill, a Democrat and former Chief Justice of the Texas Supreme Court:

> After years of closely observing Justice Owen's work, I can assert with confidence that her approach to judicial decision-making is restrained, that her opinions are fair and well reasoned, and that her integrity is beyond reproach. I echo the American Bar Association's *unanimous* conclusion that she is "well qualified" for the federal bench—the highest rating possible. United States Senators from both sides of the aisle have called the ABA's rating the "gold standard" of a nominee's fitness for the federal bench, and I agree with them. I know personally just how impeccable Justice Owen's credentials are.