



2019 Employers' Conference

Positive Alternatives to Workers' Compensation

October 2 – 4, 2019



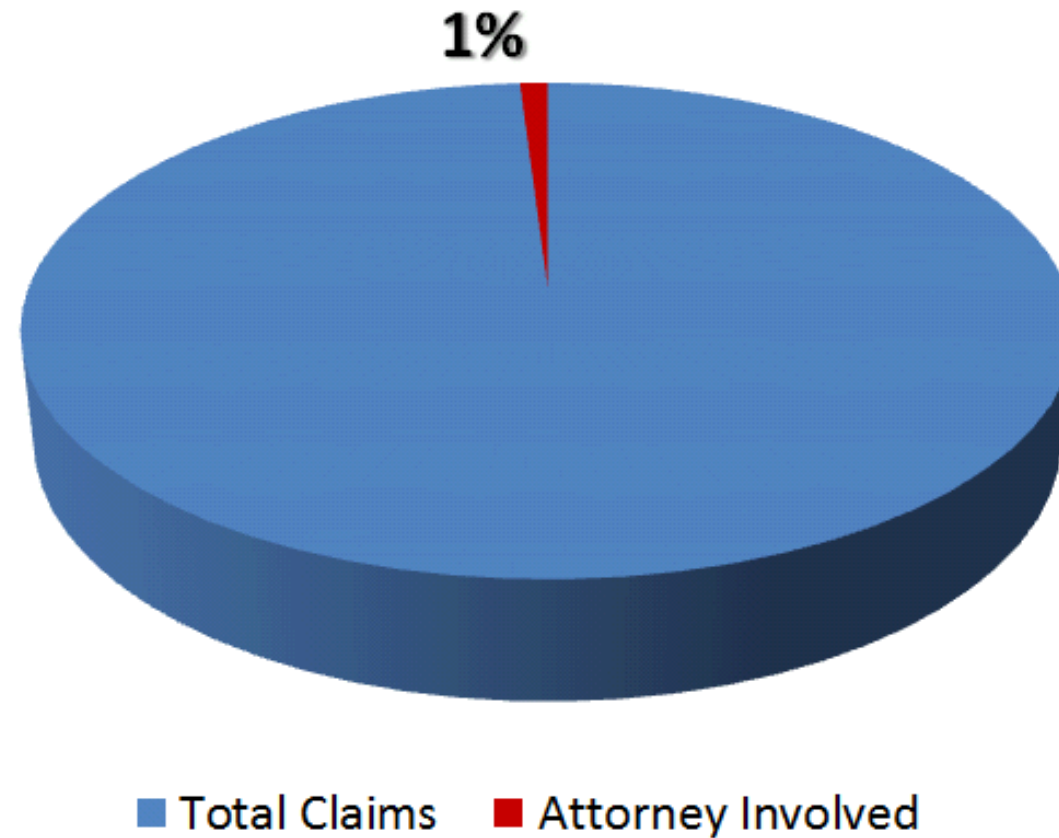
ADVANCING INNOVATION & CARE

Litigation Outcomes

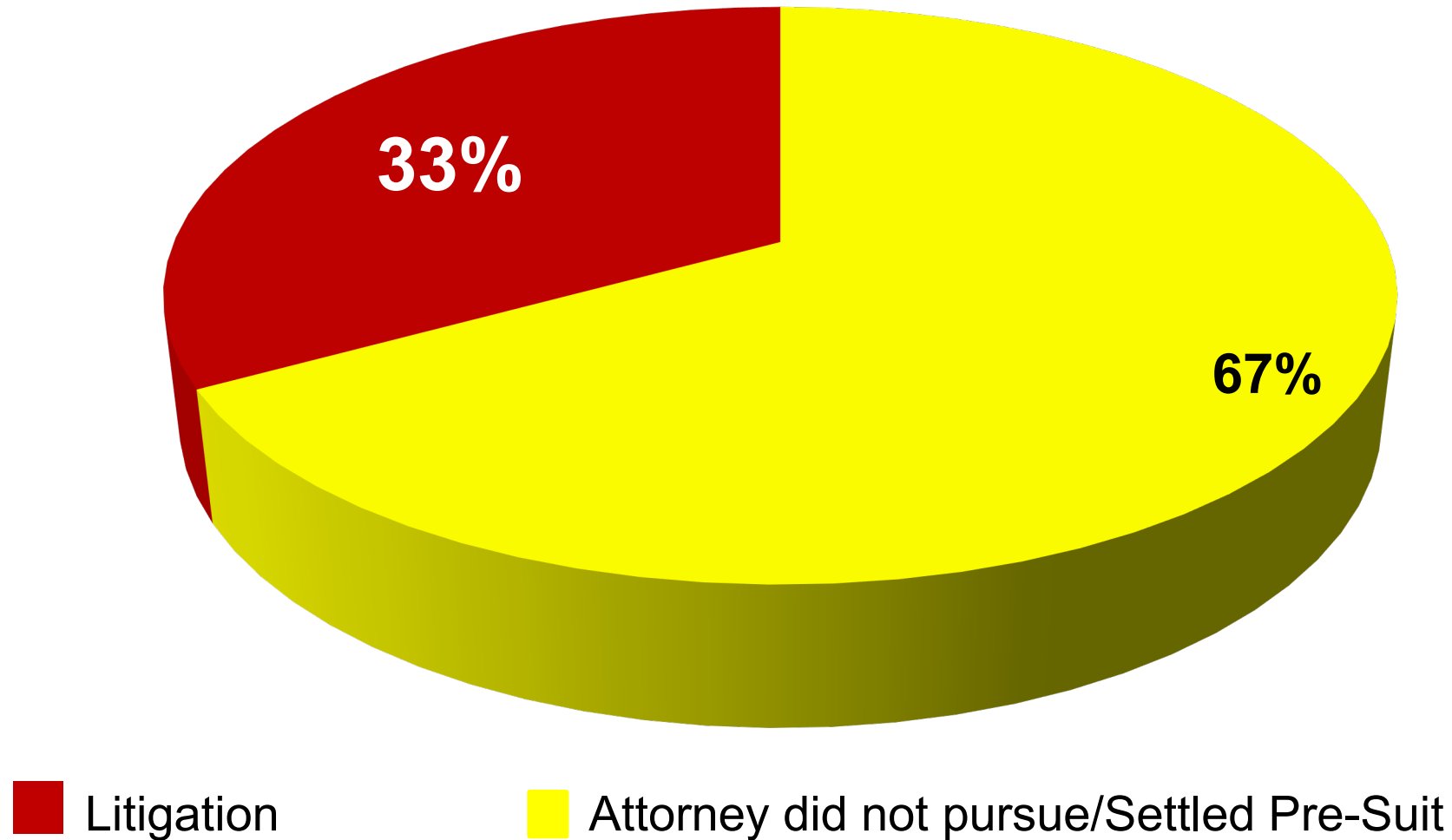


“We only see what we are prepared to see.”
Ralph Waldo Emerson

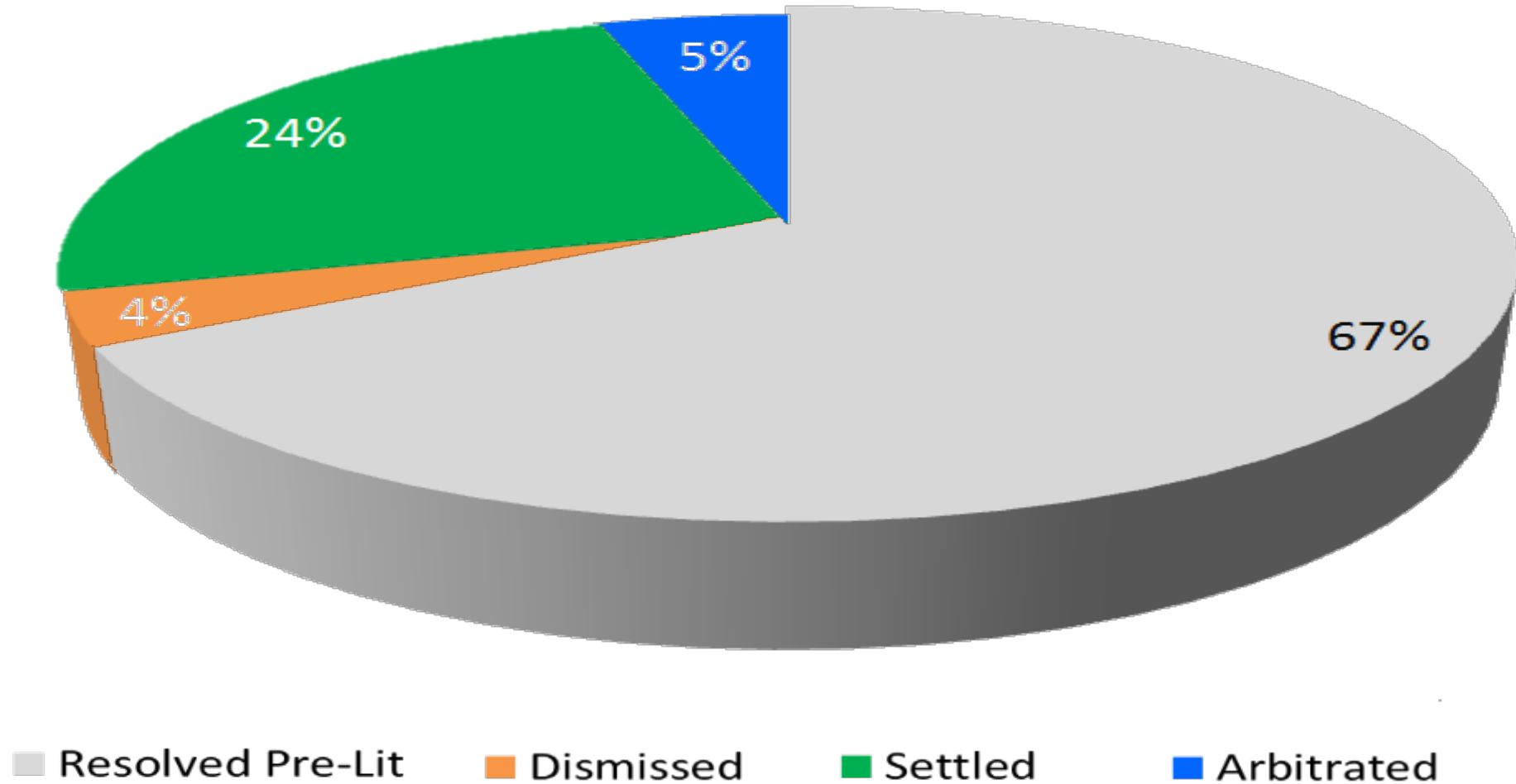
The Litigation Numbers



The Litigation Numbers



The Litigation Numbers



Outcome Influencers



The Parties

The Witnesses



The Fact Finder (Judge, Jury, Arbitrator)

The Judge/Arbitrator

The Law

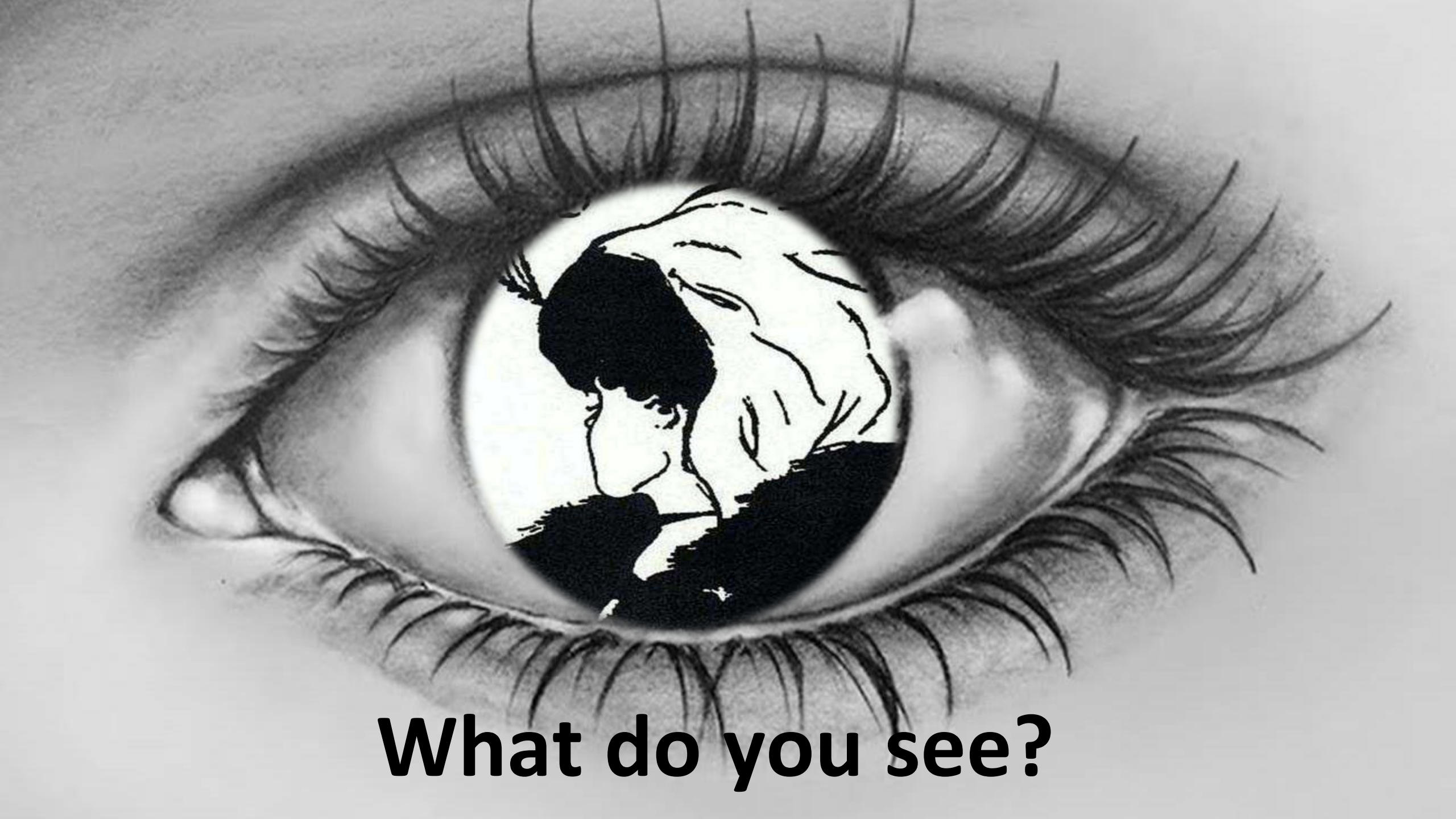


Physical/Documentary Evidence



The Attorneys

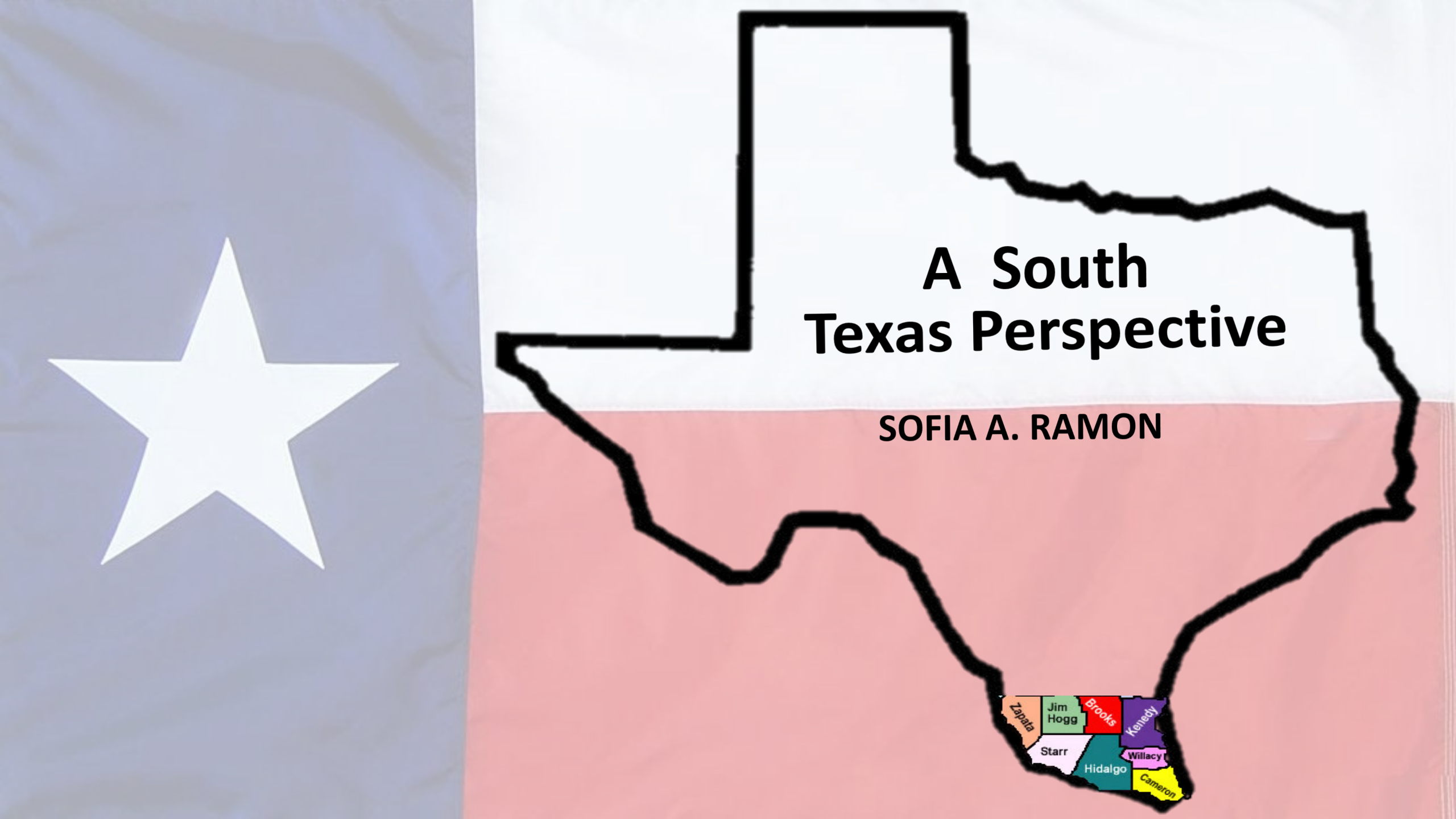




What do you see?



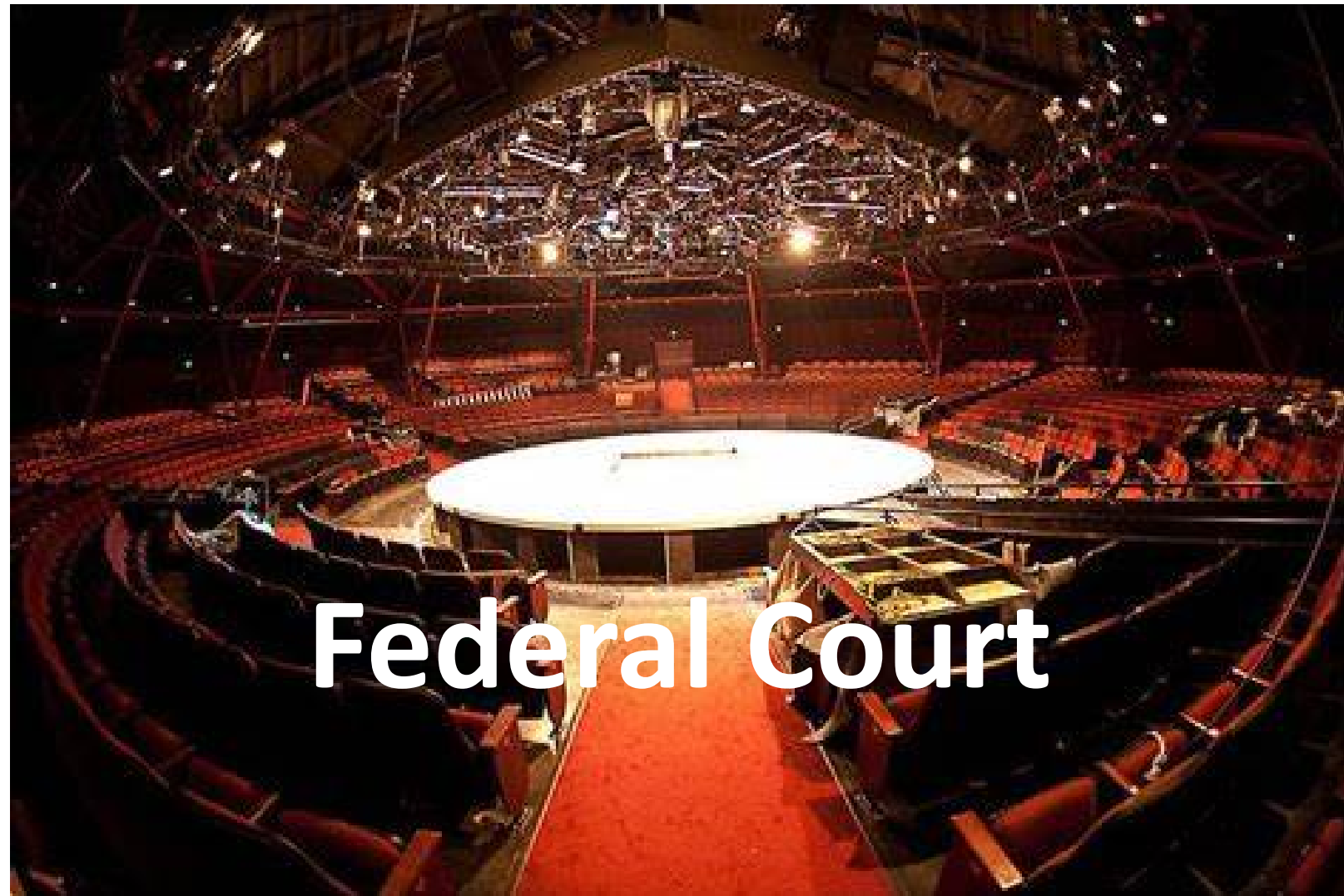
What do you see?

The background of the slide features the Texas state flag, which consists of a blue vertical stripe on the left containing a white five-pointed star, and two horizontal stripes of white and red on the right. Overlaid on the right side of the flag is a thick black outline of the state of Texas. In the bottom right corner of the Texas outline, there is a small map of the Rio Grande Valley area, with several counties highlighted in different colors and labeled: Zapata (orange), Jim Hogg (green), Brooks (red), Kenedy (purple), Starr (white), Willacy (pink), Hidalgo (teal), and Cameron (yellow).

A South Texas Perspective

SOFIA A. RAMON

The “Stage”



Federal Court





The Audience

The Director



Casting “Local” Experts



The Liability Plot

Lauro Lazono, Jr., a Truck Driver for JNM Express, a Nonsubscriber



- May 3, 2015, at approximately 3 p.m. Lozano arrives in McAllen from San Antonio after having been on duty 60 hours in a 7 day period.
- FMCSR requires Mr. Lozano be off duty 34 or more consecutive hours before coming back on duty.
- Owner of JNM calls Lozano the evening of March 3, 2015 and says he needs to drive a load to Maryland the following morning.
- Owner of JNM instructs Lozano to alter log book to reflect he took the requisite 34 hours off.
- Lozano departs to Maryland at 5:00 a.m. on May 4, 2015.
- In early morning hours of May 6, 2015, while driving through Alabama, Lozano fell asleep and crashed into the back of another 18 wheeler.
- Lozano suffered a traumatic brain injury, abdominal trauma, a crushed pelvis, a crushed left foot and fractured ribs

The Liability Plot

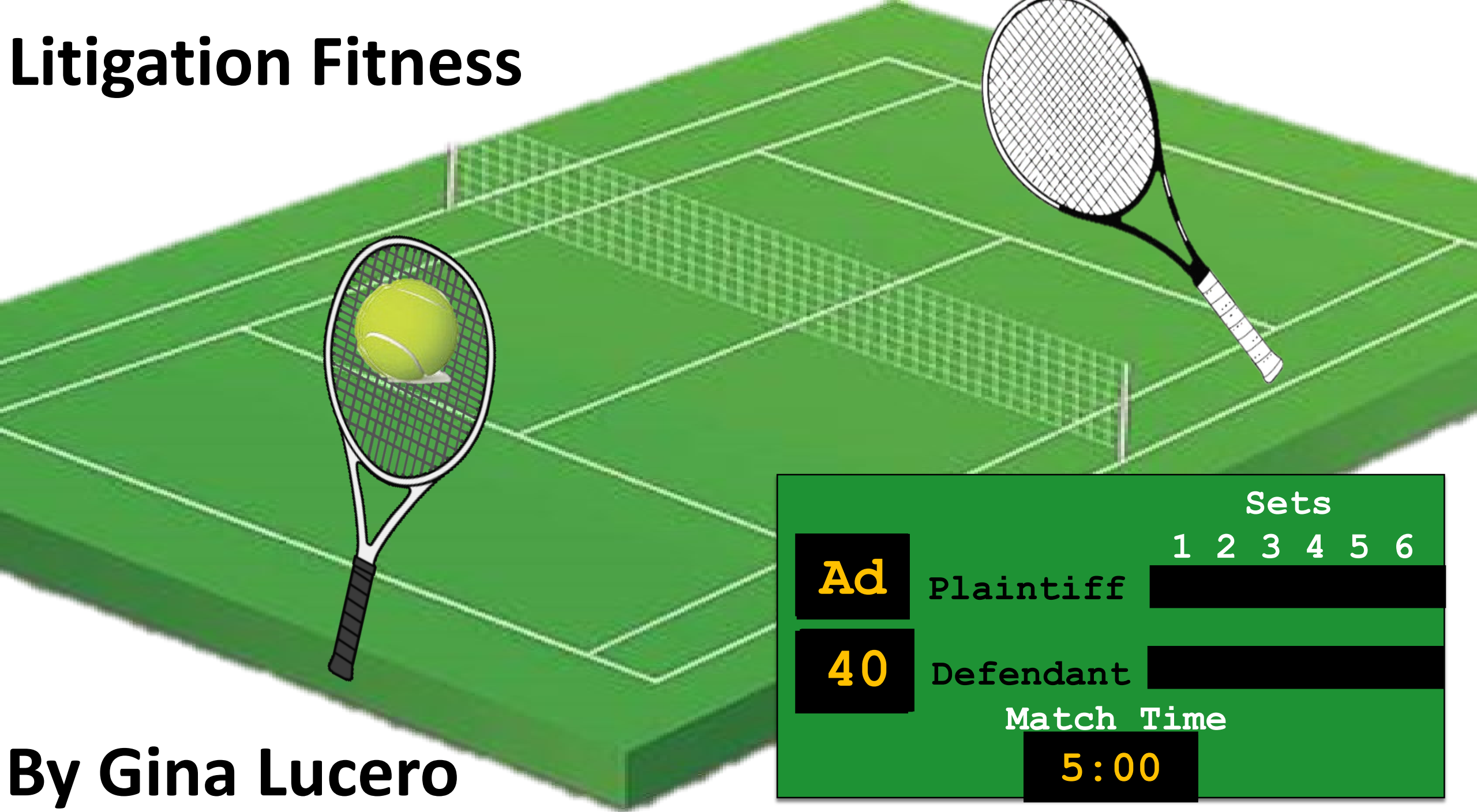


\$300,000.00 for past physical pain and mental anguish
\$700,000.00 for future physical pain and mental anguish
\$46,000.00 for past loss of earning capacity
\$550,000.00 for future loss of earning capacity
\$500,000.00 for past physical disfigurement
\$600,000.00 for future physical disfigurement
\$250,000.00 for past physical impairment
\$750,000.00 for future physical impairment
\$184,006.34 for past medical expenses
\$100,000.00 to wife for past loss household services
\$200,000.00 to wife for future loss of household services
\$275,000.00 to wife for past loss of consortium
\$550,000.00 to wife for future loss of consortium
\$25,000,000.00 for exemplary damages against JNM Express L.L.C.
\$25,000,000.00 for exemplary damages Co-Employer
\$25,000,000.00 for exemplary damages against Load Broker

Burden of Proof



Litigation Fitness



By Gina Lucero

		Sets					
		1	2	3	4	5	6
Ad	Plaintiff						
40	Defendant						
		Match Time					
		5:00					

Case Study Robbery

Robbery – Factual Background

42-year old male associate is working at Employer's retail store.

At approximately 8:40 p.m., an unidentified individual armed with a handgun enters the store.

The assailant forces a customer and another employee face down on the ground. He pushes the gun into the Associate's neck and instructed Associate to open the safe.

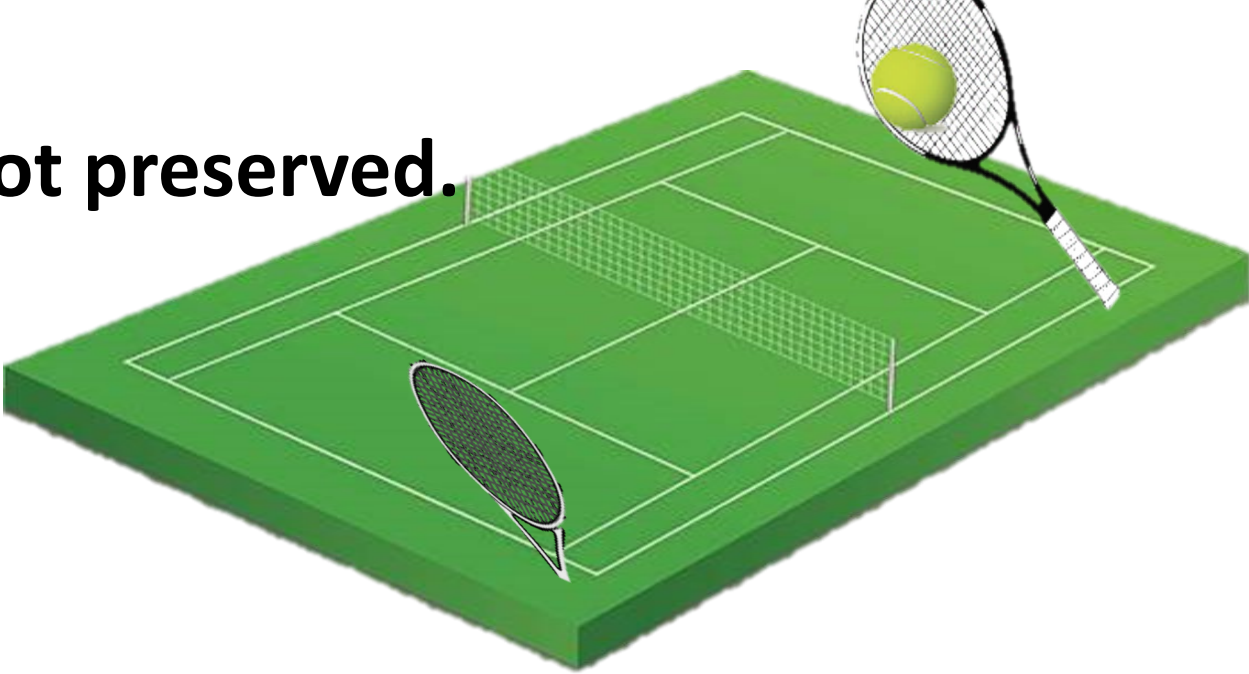
After the robbery, the assailant fled. The Associate locked the doors behind the assailant and called 911.

Incident captured on camera, but not preserved.

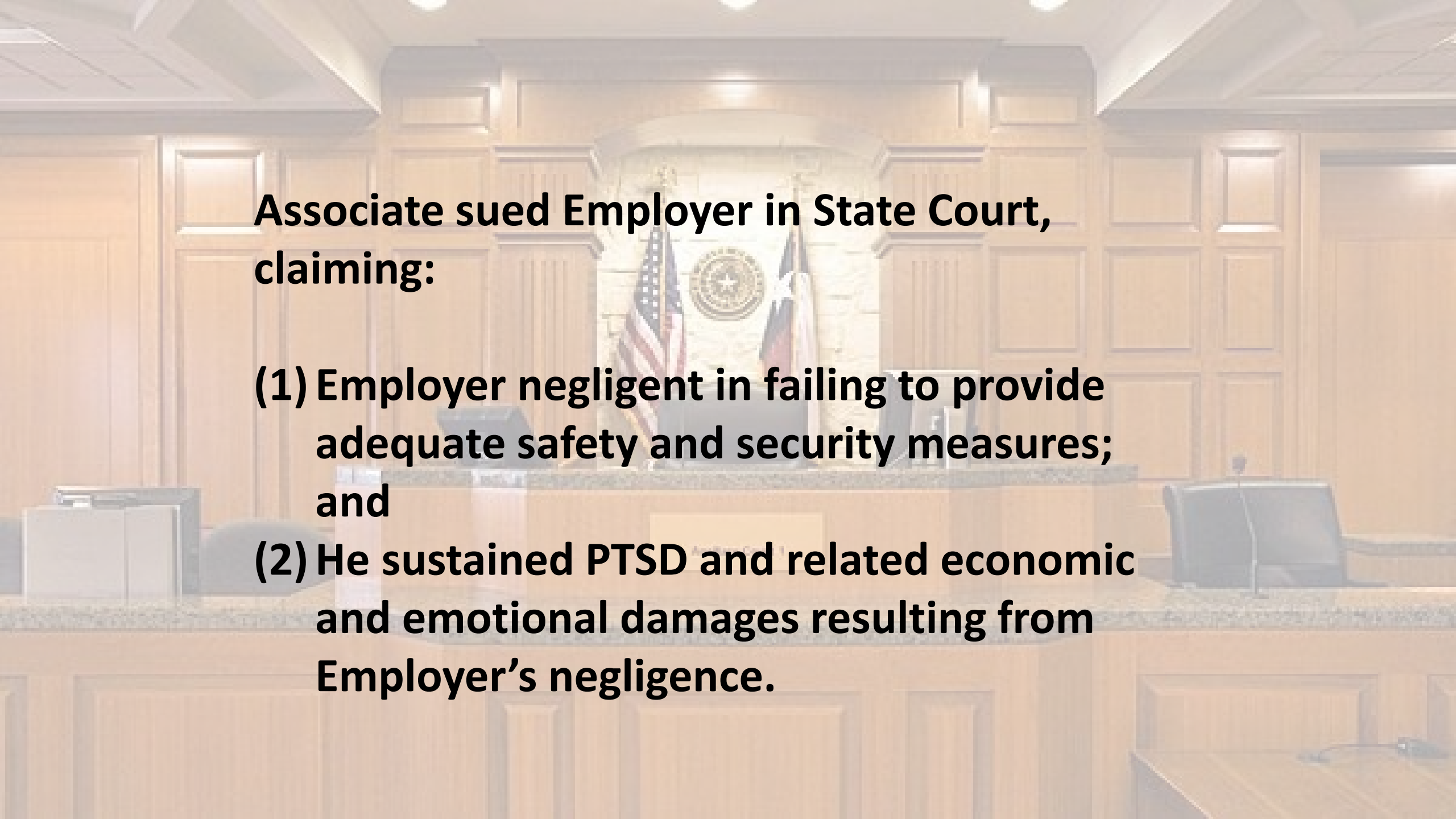
Associate completes Incident Report detailing the facts of the robbery.

Police Report corroborated Incident Report and identified the witnesses to the incident: Team Member, customer, and second employee.

Same store was robbed 5 months earlier.



		Sets					
		1	2	3	4	5	6
30	Plaintiff						
0	Defendant						
		Match Time					
		0:30					



**Associate sued Employer in State Court,
claiming:**

- (1) Employer negligent in failing to provide
adequate safety and security measures;
and**
- (2) He sustained PTSD and related economic
and emotional damages resulting from
Employer's negligence.**

Austin v. Kroger, 465 S.W.3d 193 (Tex. 2015)

An employer owes an employee a duty to provide a reasonably safe workplace.

An exception to this rule is when the premise defect entails criminal activity by third parties. Apply *Timberwalk*.

BUT, employers owe no duty to warn employees of hazards that are open and obvious, or of which the employee is already aware.



Timberwalk v. Cain, 972 S.W.2d 749 (Tex. 1998)

Employer owes an employee a duty to protect from the criminal acts of third party if:

1

Criminal act was “foreseeable;” AND

2

Risk of harm is unreasonable.

Is Crime Foreseeable

The following five factors are applied to prior crimes to determine foreseeability.

1

Recency

2

Frequency

3

Proximity

4

Similarity

5

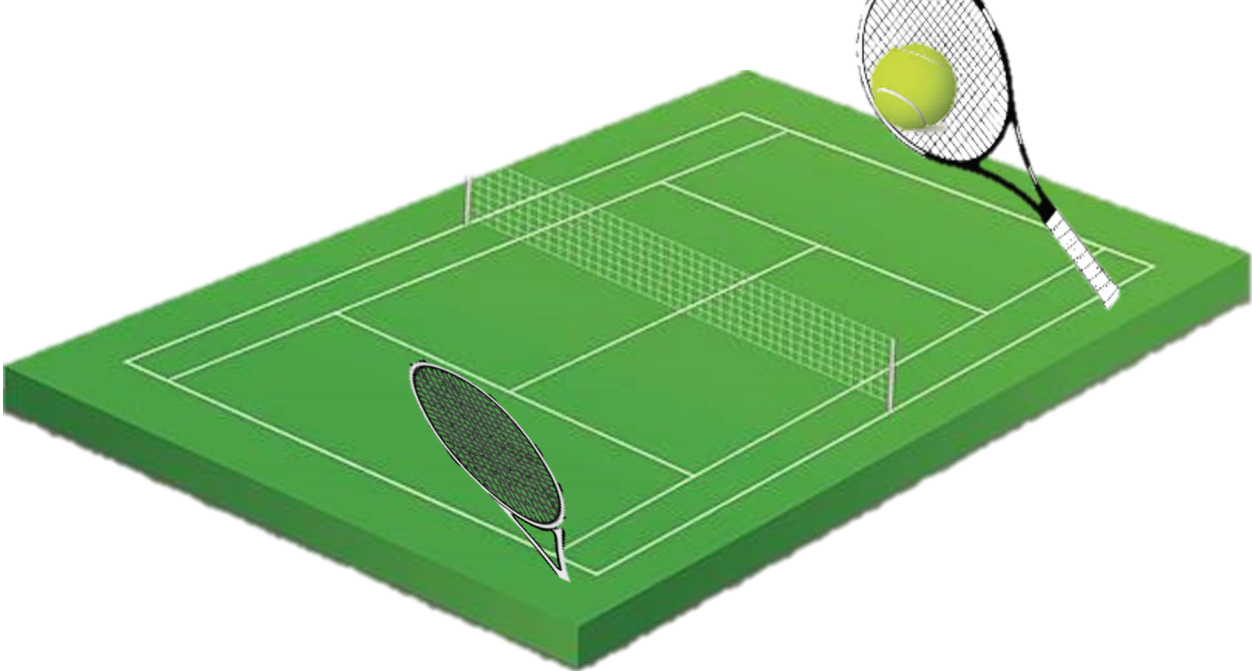
Publicity

In the 13 months prior to the incident, there were 52 crimes in the area: Burglary, Robbery (9) and Aggravated Assault.

PROXIMAL, RECENT, FREQUENT

Prior robbery 5 months earlier at this store

PROXIMAL, RECENT, SIMILAR



		Sets					
		1	2	3	4	5	6
40	Plaintiff	5	4	3			
0	Defendant	1	2	2			
		Match Time					
		2:00					

Employer trained employees how to decrease vulnerability to robbery.

Examples:

Make sure lighting on in parking lot after dark;

Close store with 2 associates;

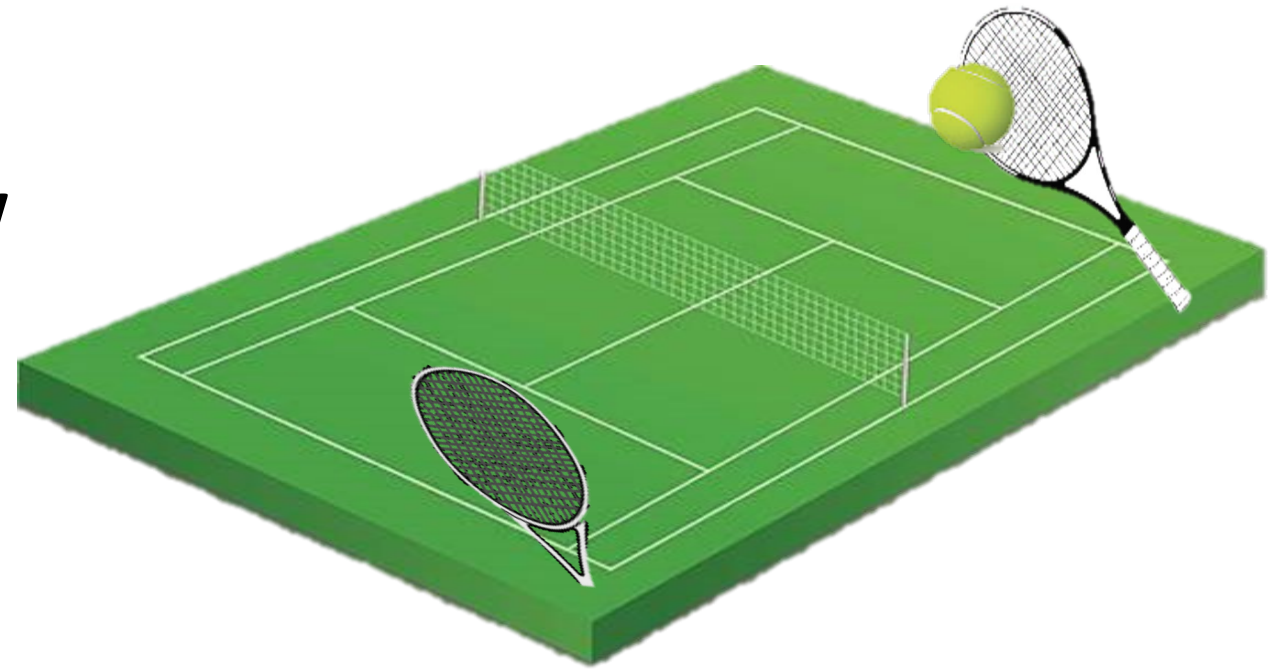
Avoid going outside after dark;

All personnel should be on floor

early morning and after dark;

Park cars in front of store at dusk;

Timing of making bank deposits.



		Sets					
		1	2	3	4	5	6
0	Plaintiff	5	4	3	1		
\$\$\$	Defendant	1	2	3	4		
		Match Time					
		3:00					

Employer trained employees what to do in event of robbery:

Examples:

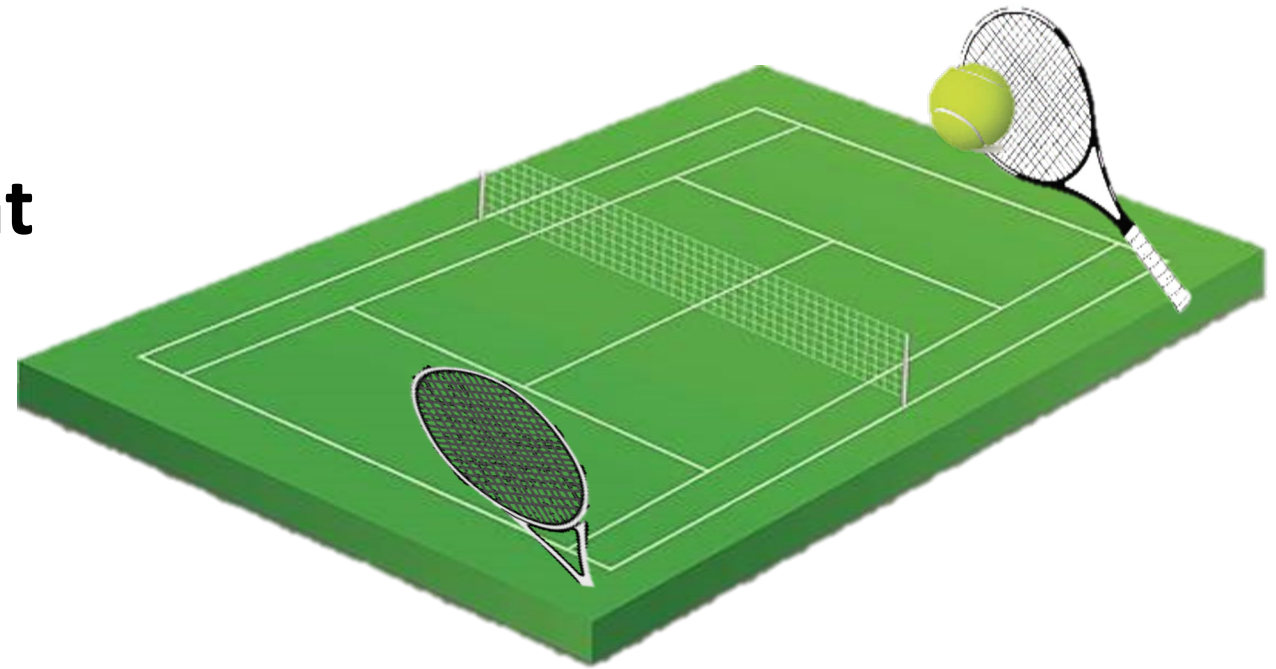
Comply with robbers requests;

Make sure all associates know how to open register w/o key;

**If asked to open the time delay, inform robber there will be delay;
Never pursue shoplifter or robber.**

Associate followed this training

No one was physically injured.



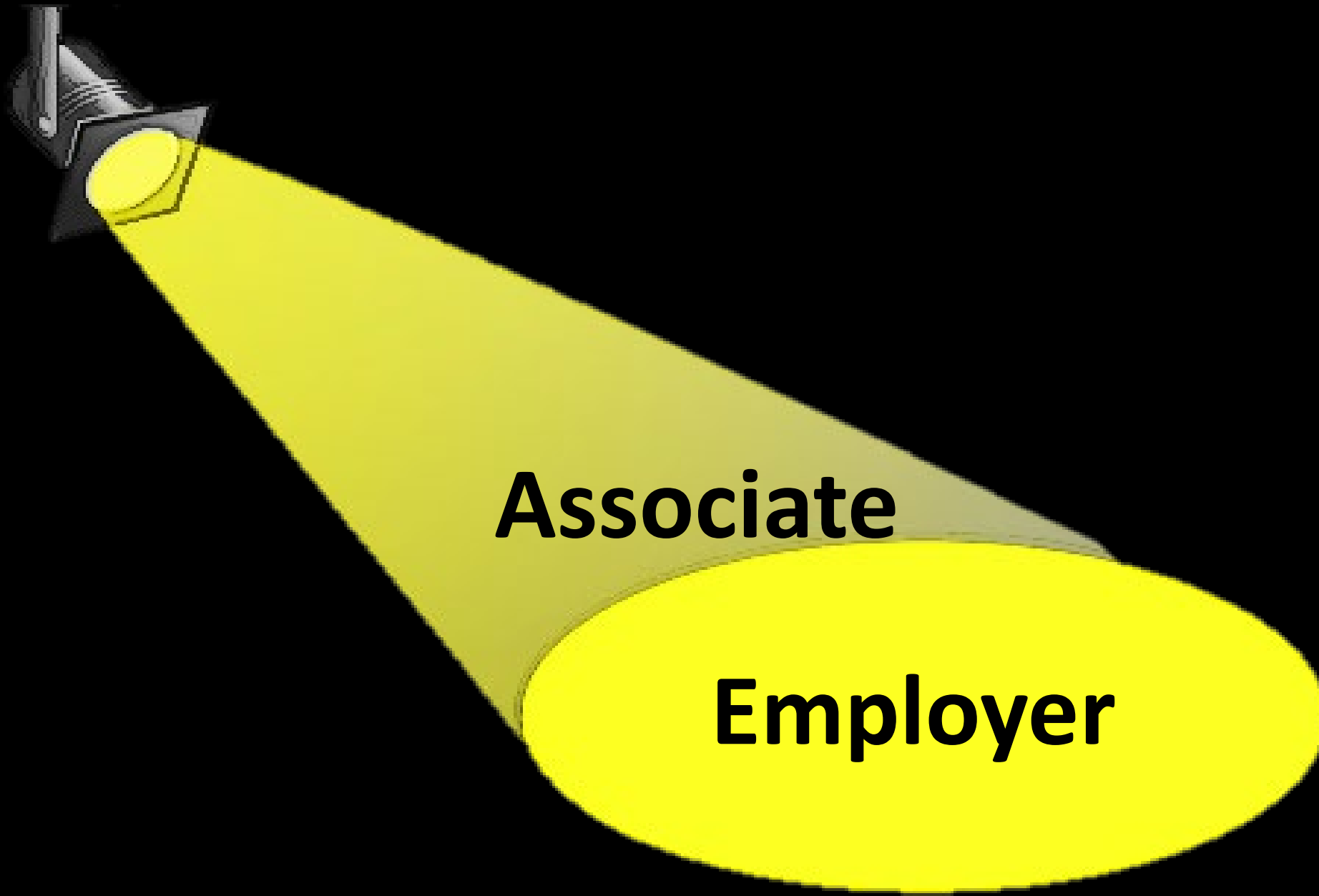
		Sets					
		1	2	3	4	5	6
0	Plaintiff	5	4	3	1		
0	Defendant	1	2	3	4	1	
		Match Time					
		43:30					

Moved to Compel Arbitration

Associate sued Employer in State Court, claiming:

- (1) Employer negligent in failing to provide adequate safety and security measures; and**
- (2) He sustained PTSD and related economic and emotional damages resulting from Employer's negligence.**

He claims to have sustained PTSD and related economic and emotional damages resulting from Employer's negligence.

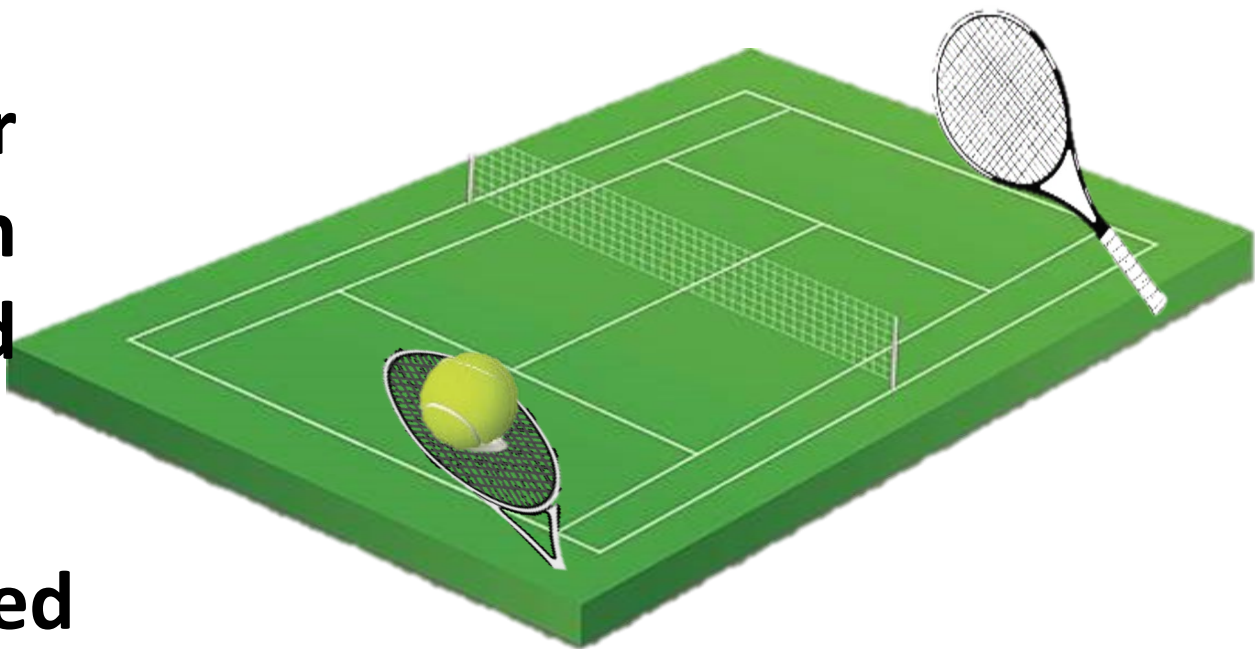


Associate

Employer

Associate sought counseling for trauma he claims he suffered from the Incident. Total paid/incurred medical expenses: \$7,795.35.

Prior mental health records revealed Associate had extensive history of pre-existing dysfunction, including family problems, relationship problems, and being involved in two prior robberies at a prior job. This also included one suicide attempt prior to the Incident.

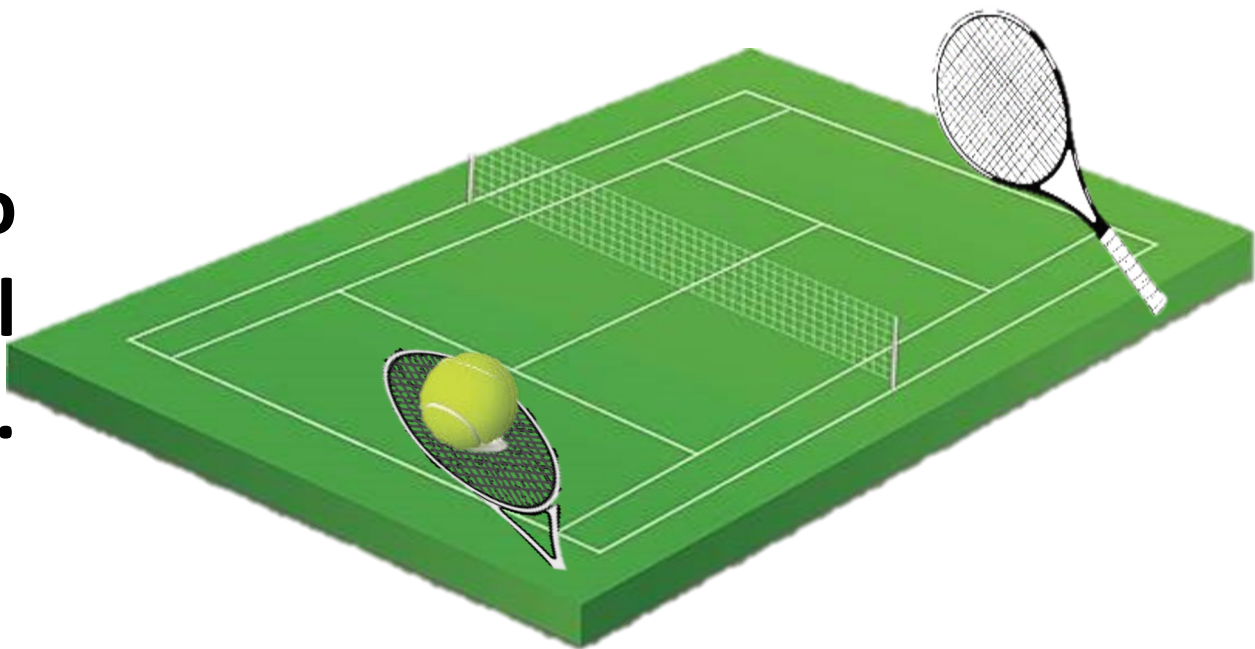


		Sets					
		1	2	3	4	5	6
35	Plaintiff	5	4	3	1	2	
35	Defendant	1	2	3	5	4	
		Match Time					
		4:30					

Associate alleged he could no longer work due to his emotional injuries sustained in the Incident.
Total lost wage claim: \$50,000.00.

Associate had an outstanding child support lien totaling \$104,932.62.

Demand: \$325,000



		Sets					
		1	2	3	4	5	6
30	Plaintiff	5	4	3	1	2	1
Ad	Defendant	1	2	3	5	4	1
		Match Time					
		54:30					

OUTCOME

Deuce

Plaintiff

1	2	3	4	5	6
5	4	3	1	2	3

Deuce

Defendant

1	2	3	5	4	3
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Settled: \$50,000

Duration File Open

5 mos.

Attorney's Fees

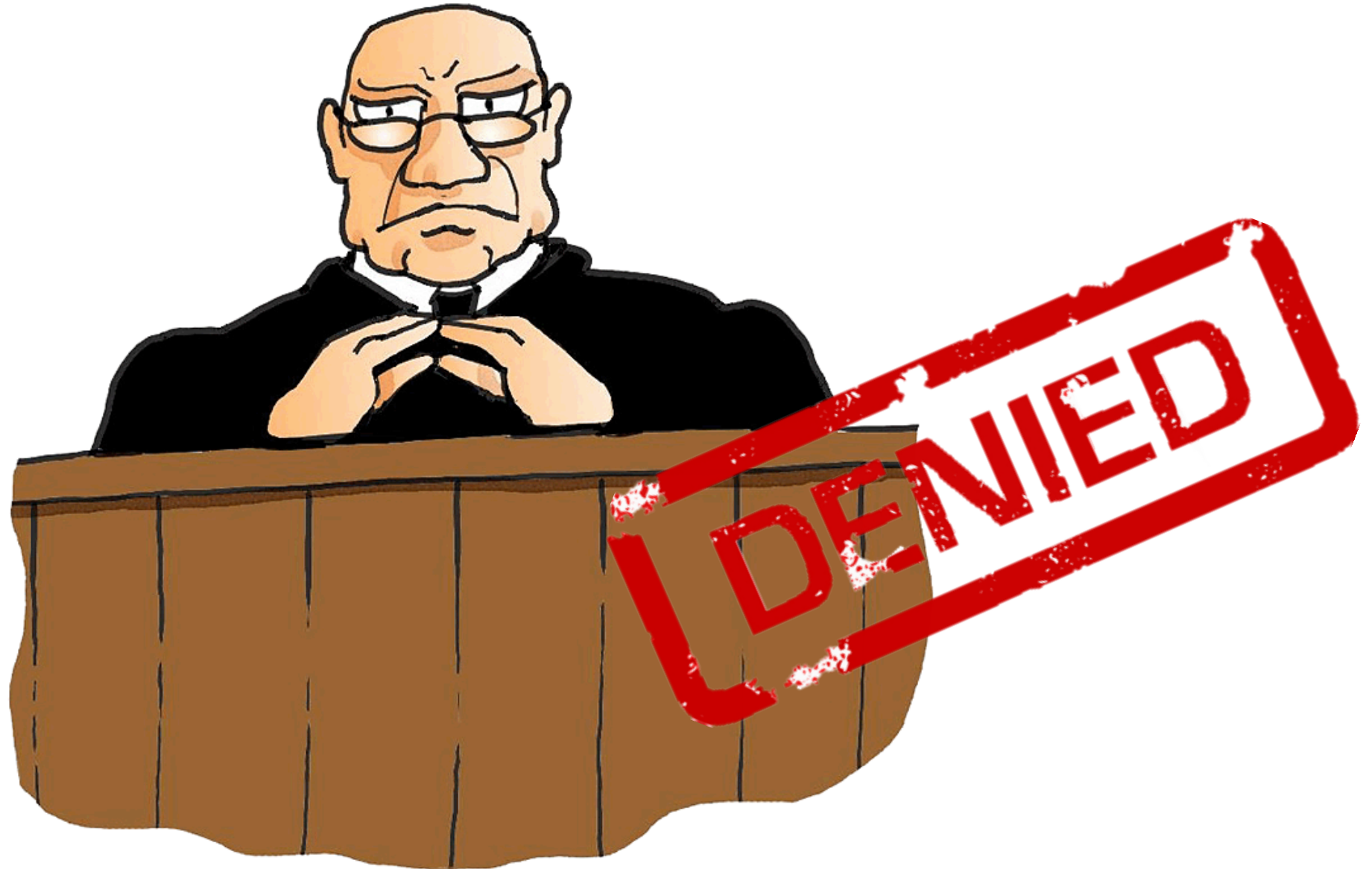
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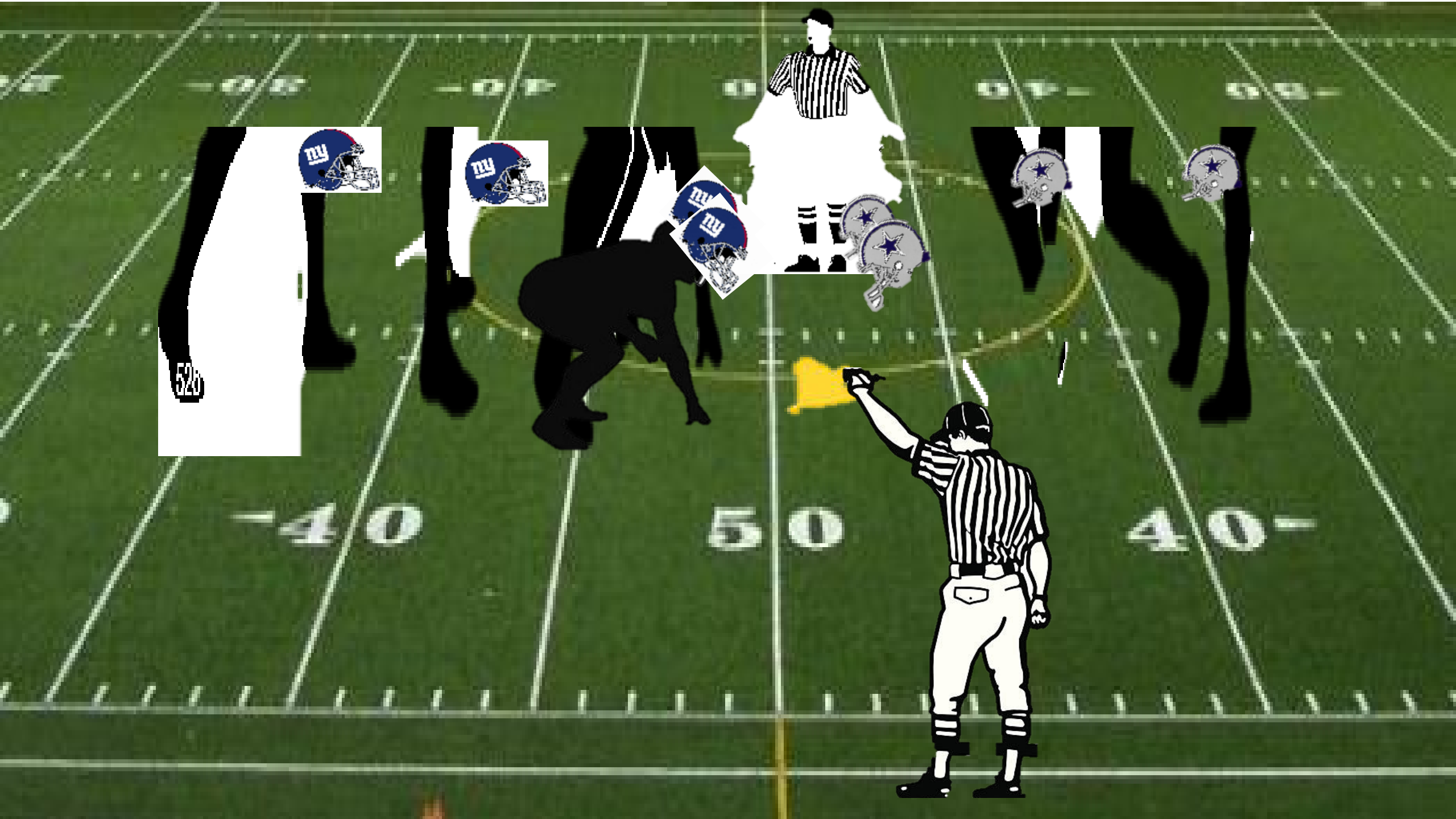
A whole yellow lemon and a sliced lemon with a green leaf. The whole lemon is on the left, and the sliced lemon is on the right. A green leaf is placed between them, leaning against the sliced lemon. The background is white.

**When
Litigation
Gives
You**

***By
Travis
Brewer***

MOTION TO COMPEL ARBITRATION





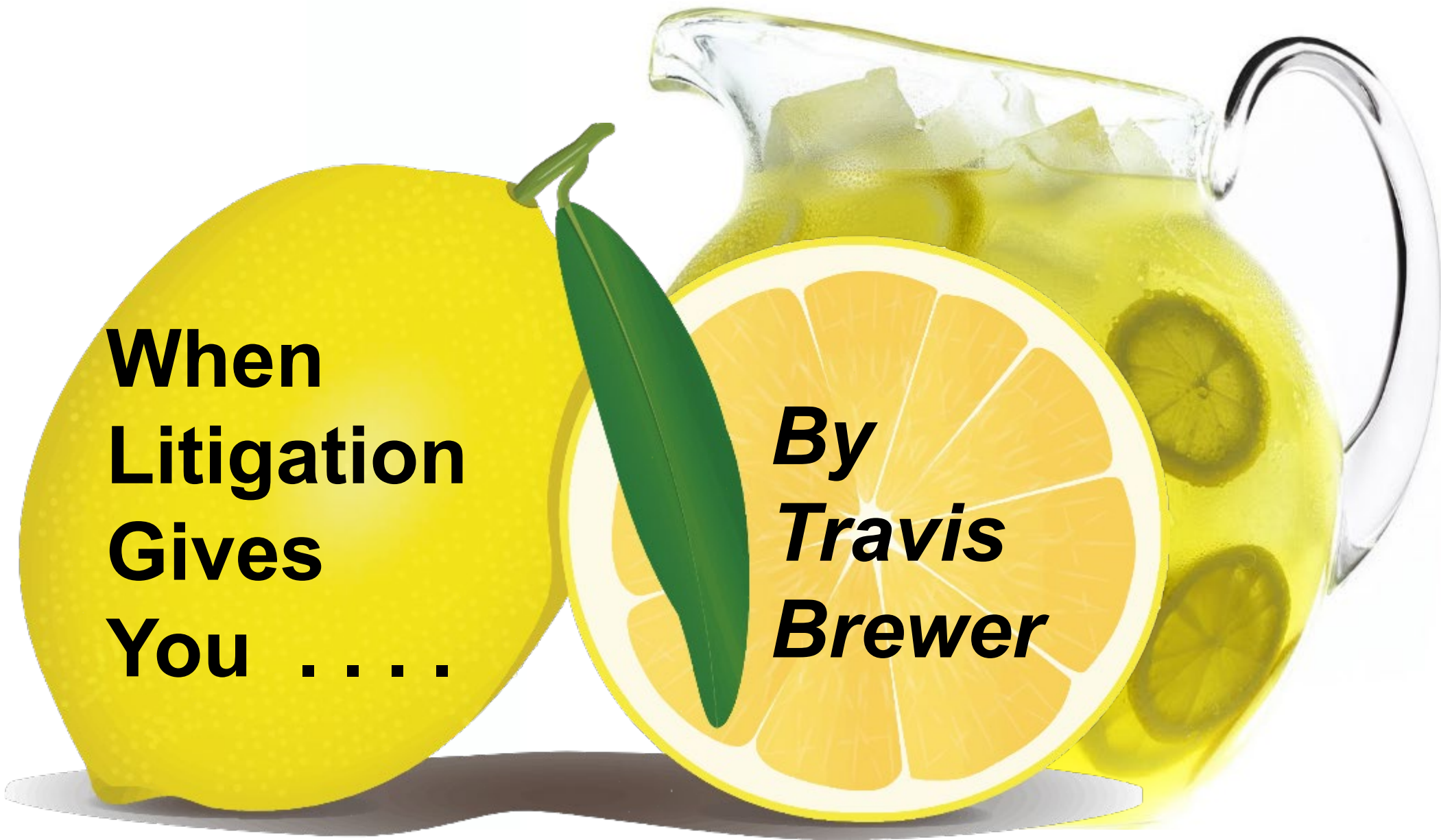






**Polite,
Non-threatening,
honest**





**When
Litigation
Gives
You**

***By
Travis
Brewer***



TEXAS NON-SUBSCRIBER CASE LAW UPDATE

Barry Moscovitz

Thompson Coe

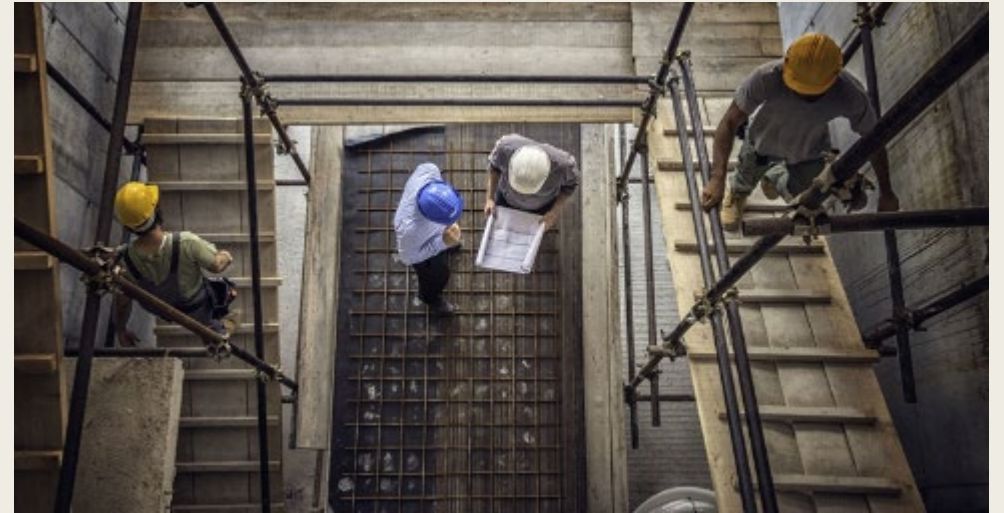
214-871-8275

bmoscovitz@thompsoncoe.com

What We Will Cover

- Texas Non-Subscriber Case Law Update
- Texas Non-Subscriber Settlements and Judgments
- Texas Non-Subscriber State and Federal Arbitration Cases
- New Trend: Use of Medical Marijuana May be a Reasonable Accommodation

No Duty to Warn or Make Safe



- Austin v. Kroger Texas, L.P
- Kroger Co. v. Elwood, 197 S.W.3d 793
- Jack in the Box, Inc. v. Skiles, 221 S.W.3d 566
- Brookshire Grocery Co. v. Goss, 262 S.W.3d 793



- McMillian v. Hearne, No. 06-18-00040-CV, 2019 WL 3269327
- Advance Tire & Wheels, LLC v. Enshikar, 527 S.W.3d 476
- Velasquez v. Fiesta Mart, Inc., No. 05-16-00813-CV, 2017 WL 3587099

Sufficient Evidence of Non-Subscriber's Breach of Duty of Care to Employee



Additional Texas Non-Subscriber Cases

- Gonzales v. Williams, No. 11-17-00130, 2019 WL 2710046
- Zamora v. Champion Cooler Corp., No. 05-16-00577-CV, 2018 WL 507362

Summary of Case Law

- Very clear case law set forth by the Texas Supreme Court.
- Inconsistently applied by trial courts throughout the State of Texas.
- Inconsistently applied by arbitrators throughout the State of Texas.
- Arbitration is trending in favor of employee awards.



The element of
CONFUSION

State Non-Subscriber Arbitration Cases

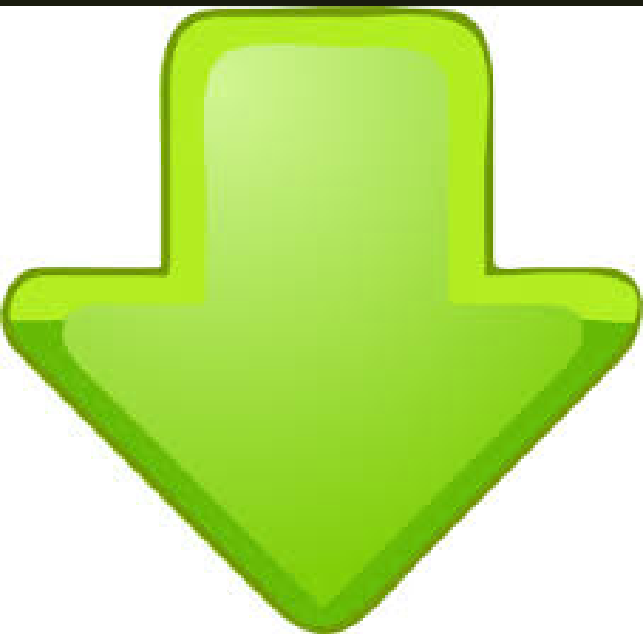
- Dorskocil Manufacturing Co., Inc. v. Sang Nguyen
- Virtually any case in El Paso!



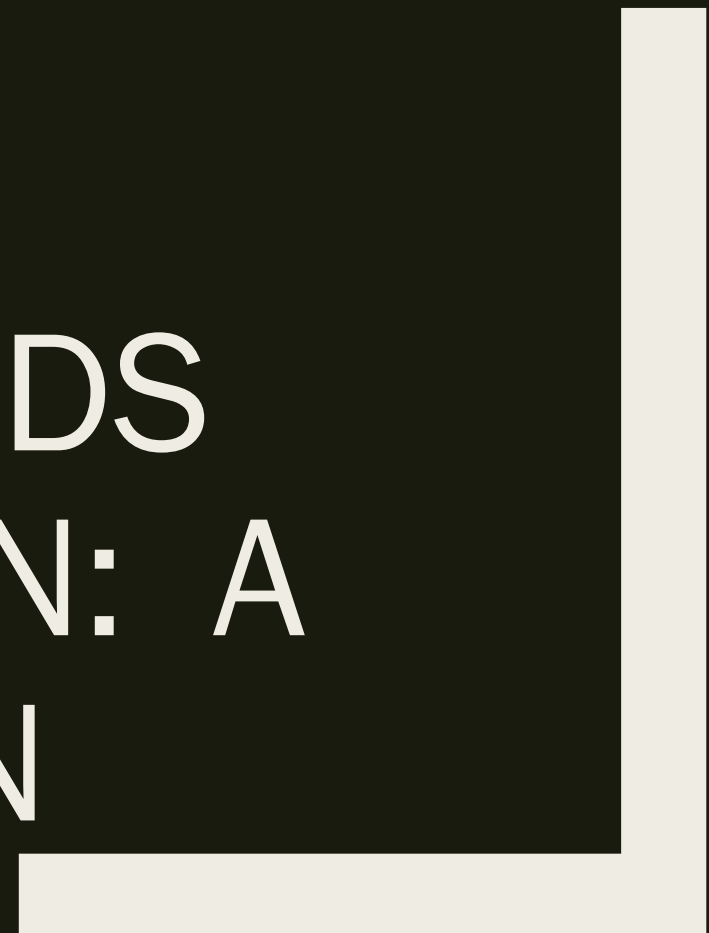
Summary of Arbitration Case Law

- Texas Courts on Both State and Federal Level Will Compel Arbitration Upon a Showing of a Valid Arbitration Agreement
- Defenses to Arbitration Commonly Raised By Employees Are Usually Unsuccessful





RECENT TRENDS IN ARBITRATION: A DISCUSSION



Three Cases

- A case that Employer should have lost but won.
- A case that Employer should have won but lost.
- A completely ridiculous result that arbitrator thought would allow both sides to claim victory/not feel too bad.

The Case We Should Have Lost

- Employee's heel caught in hole in concrete. Employer knew about the hole for quite some time before accident
- Employee claimed she injured both knees and required a double-knee replacement
- Arbitrator found no negligence and poured her out

The Case We Should Have Won

- Important Note: Same Arbitrator/Same Employer/Same Plaintiff's attorney
- Employee LITERALLY tripped over her own feet while unloading boxes. Claimed extensive, diffuse injuries to her entire body
- Impeached about 50 different ways during her cross-examination
- Found negligence and awarded a relatively low six-figure award which was far lower than demands

The Ridiculous One

- Employee knowingly lifted a box that was too heavy for her
- We argued relevant case law that says she cannot establish liability
- Demand at arbitration was \$5M. Awarded \$80k.

Takeaways for Non-Subscribers Re: Arbitration



- Arbitrators are over-compensating for perceived bias
- “Nobody will be too mad” awards are becoming a bit more common
- Makes selection of which cases to arbitrate even more important.