U.S. Supreme Court Year in Review/ Evidence in the Eighth Circuit

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I. U.S. Supreme Court Year in Review

A. Civil Jurisdiction and Procedure

1. Exxon Mobil Corp. v. Allapattah Services, Inc., ___ U.S. __, 125 S. Ct. 2611 (2005). In the presence of the other elements of jurisdiction, where at least one named plaintiff in a class action satisfies the amount-in-controversy requirements of 28 U.S.C. § 1332(a), the court may exercise supplemental jurisdiction over the claims of the other plaintiffs, even if for less than the jurisdictional amount. (Op. by Kennedy, J.; 5-4 split; Stevens and Breyer, JJ., dissenting op.; Ginsburg, Stevens, O'Connor and Breyer, JJ., dissenting op.)

2. Lincoln Property Co. v. Roche, ___ U.S. ___, 126 S. Ct. 606 (2005). Defendants who remove a case to federal court based on diversity jurisdiction do not have to show the non-existence of any potential co-defendant who might destroy complete diversity. (Op. by Ginsburg, J.; unanimous)

3. Martin v. Franklin Capital Corp., ___ U.S. ___, 126 S. Ct. 704 (2005). Unless there are unusual circumstances, attorney fees under the fee provision of the removal statute will only be awarded "where the removing party lack[s] an objectively reasonable basis for seeking removal." (Op. by Roberts, C.J.; unanimous)

4. Wachovia Bank, N.A. v. Schmidt, ___ U.S. ___, 126 S. Ct. 941 (2006). For purposes of diversity jurisdiction, a national bank is a citizen of the state in which its main office, as set forth in articles of association, is located, not in all states in which it maintains branch operations. (Op. by Ginsburg, J.; unanimous except Thomas, J., who took no part in consideration/decision)

5. Will v. Hallock, ___ U.S. ___, 126 S. Ct. 952 (2006). Plaintiff's first lawsuit against Custom Service agents brought under the Federal Tort Claims Act was dismissed on the grounds that the agents' conduct at issue (seizure and search of plaintiff's computer equipment, which resulted in damage to the equipment and loss of all the stored data) fell within an exception to that Act's waiver of sovereign immunity. She then brought a Bivens action, in response to which the agents by motion raised the judgment bar in § 2676 of the FTCA, which was denied by the district court, leading to an appeal. The Supreme Court found that this ruling was not subject to collateral appeal because the claim of the agents did not serve a "weighty public objective" like those involved with claims of qualified immunity. (Op. by Souter, J.; unanimous)

6. Unitherm Food Systems v. Swift-Eckrich, Inc., ___ U.S. __, 126 S. Ct. 980 (2006). A reminder concerning renewal of preverdict motions pursuant to Rule 50(b) -- a party cannot rest an appeal on denial of a Rule 50(a) motion; the failure to file or make the additional Rule 50(b) motion deprives the appellate court of the ability to correct any judgment or post-trial rulings by the district court. (Op. by Thomas, J.; 7-2 split; Stevens and Kennedy, JJ., dissenting op.)

7. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, _ U.S. ___, 126 S. Ct. 1503 (2006). State-law holder class actions claims are preempted by the Securities Litigation Uniform Standards Act of 1998. (Op. by Stevens, J.; unanimous except Alito, J. who took no part)

8. Marshall v. Marshall, ___ U.S. ___, ___ S. Ct. ___, 2006 WL 1131904 (5/1/2006). The federal district court could assert jurisdiction over Anna Nichole Smith's tortious interference counterclaim against the claim her deceased spouse's son filed in her bankruptcy proceedings as resolution of the claim did not involve the administration of the estate or probate of the will, subjects reserved to state court jurisdiction. (Op. by Ginsburg, J., joined by Roberts, C.J., and Scalia, Kennedy, Souter, Thomas, Breyer and Alito, JJ. Stevens, J., concurring in part and in judgment).

B. Criminal Law and Procedure

1. Rompilla v. Beard, ___ U.S. ___, 125 S. Ct. 2456 (2005). A lawyer is always bound to make "reasonable efforts" to review the government's evidence of aggravation, even when defendant or his family indicate there is no mitigating evidence. (Op. by Souter, J.; 5-4 split; O'Connor, J., concurring op.; Kennedy, Scalia, Thomas, JJ. and Rehnquist, C.J., dissenting op.)

2. Mayle v. Felix, ___ U.S. ___, 125 S. Ct. 2562 (2005). An amended habeas petition that asserts a new ground of relief based on facts which differ in time and type from those alleged in the original petition does not relate back under Fed. R. Civ. P. 15(c)(2); thus new claims which are brought after the one-year limitation period are barred. (Op. by Ginsburg, J.; 7-2 split; Souter and Stevens, JJ., dissenting op.)

3. Halbert v. Michigan, ____ U.S. ____, 125 S. Ct. 2582 (2005). In a two-tier appellate system, indigent defendants have a right to appointment of counsel for first-tier review. (Op. by Ginsburg, J.; 6.33-2.66 split; Thomas, Scalia JJ., dissenting op. joined by Rehnquist, C.J., except as to Part III-B-3)

4. Gonzalez v. Crosby, ___ U.S. ___, 125 S. Ct. 2641 (2005). A motion under Fed. R. Civ. P. 60(b) which challenges a previous ruling concerning AEDPA statute of limitations is not the equivalent of a successive petition and therefore the district court may rule on such a motion without precertification by the court of appeals. (Op. by Scalia, J.; 7-2 split; Breyer, J., concurring op.; Stevens and Souter, JJ., dissenting op.)

5. Bell v. Thompson, ___ U.S. ___, 125 S. Ct. 2825 (2005). In a death penalty case, after the Supreme Court denied certiorari and then rehearing on ineffective assistance issues, the Sixth Circuit did not issue a mandate. Defendant's execution date was set and accompanying proceedings commenced, during the pendency of which the Sixth Circuit reconsidered its decision and issued an amended opinion without giving notice to the parties it was reconsidering, which action was found to be an abuse of the circuit's discretion. (Op. by Kennedy, J.; 5-4 split; Breyer, Stevens, Souter and Ginsburg, JJ., dissenting op.)

6. Evans v. Chavis, ___ U.S. ___, 126 S. Ct. 846 (2006). That a state habeas petition was denied on a summary basis did not make an inmate's six-month delay in filing a notice of appeal from the decision timely under California's "reasonable time" standard. (Op. by Breyer, J.; unanimous; Stevens, J., op. concurring in judgment)

7. Brown v. Sanders, ___ U.S. ___, 126 S. Ct. 884 (2006). In death penalty cases, instead of considering whether a state is weighing or non-weighing in its sentencing scheme, the Court held that a sentence will be rendered unconstitutional when a sentencing factor is invalidated unless another sentencing factor allows the sentencer to give "aggravating weight to the same facts and circumstances." (Scalia, J.; 5-4 split; Stevens and Souter, JJ., dissenting op.; Breyer and Ginsburg, JJ., dissenting op.)

8. Rice v. Collins, ___ U.S. ___, 126 S. Ct. 969 (2006). Under AEDPA, habeas review court may not substitute its own evaluation of the state court record for that of the state trial court, which made credibility determinations concerning the prosecution's explanations for juror strikes. (Op. by Kennedy, J.; unanimous; Breyer and Souter, JJ., concurring op.)

9. Oregon v. Guzek, ___ U.S. ___, 126 S. Ct. 1226 (2006). In this death penalty case, after defendant's sentence was vacated for a third time, defendant sought to introduce new alibi testimony from his mother during the sentencing proceedings. The Court held the state could constitutionally limit innocence-related evidence at a sentencing proceeding to that introduced at the original trial, but left open the door to admission on remand as impeachment evidence. (Op. by Breyer, J.; Scalia and Thomas, JJ., op. concurring in judgment; Alito, J. did not participate)

10. Scheidler v. NOW, ___ U.S. ___, 126 S. Ct. 1264 (2006). The Court held the Hobbs Act did not apply to violent conduct by anti-abortion groups against abortion clinics as the violence involved was unrelated to robbery or extortion. (Op. by Breyer, J.; unanimous except Alito, J., who took no part in consideration/decision)

11. United States v. Grubbs, ___ U.S. ___, 126 S. Ct. 1494 (2006). The Fourth Amendment's particularity requirement does not require that conditions precedent to execution of an anticipatory warrant be set out in the warrant, only "the place to be searched" and "the persons or things to be seized." (Op. by Scalia, J.; unanimous; Souter, J., concurring op. in part and concurring in judgment joined by Stevens and Ginsburg, JJ.; Alito, J., took no part)

12. Georgia v. Randolph, ____ U.S. ____, 126 S. Ct. 1515 (2006). Officers may not conduct a warrantless search of a premises in the face of "disputed permission" from co-tenants. (Op. by Souter, J.; 5-3 split; Stevens and Breyer, JJ., concurring; Roberts, C.J., dissenting op. joined by Scalia, J.; Scalia, J., dissenting op.; Thomas, J., dissenting op.; Alito, J., took no part)

13. Day v. McDonough, ___ U.S. ___, ___ S. Ct. ___, 2006 WL 1071410 (4/25/2006). Because a statute of limitations defense is not jurisdictional, a court is not required to raise the issue *sua sponte*, however, it may in "appropriate circumstances" raise an AEDPA time bar itself: in doing so, the court must give the parties notice and opportunity to brief the issue and determine whether there is prejudice to the petitioner by "delayed focus on the limitation issue." (Op. by Ginsburg, J.; 5-4 split; Roberts, C.J. and Kennedy, Souter, and Alito, JJ. joining; Stevens, J., dissenting op. joined by Breyer, J.; Scalia, J., dissenting op. joined by Thomas and Breyer, JJ.)

14. Holmes v. South Carolina, ___ U.S. ___, ___ S. Ct. ___, 2006 WL 1131853 (5/1/2006). Exclusion of defendant's evidence of third-party guilt in the face of strong forensic evidence by the government violates federal constitutional rights because such a rule evaluates the strength of only one side's evidence. (Alito, J.; unanimous decision).

C. Civil Rights Law

1. American Trucking Ass'n v. Michigan Public Service Comm'n, ___ U.S. ___, 125 S. Ct. 2419 (2005). Annual flat fee of $100 on trucks engaged in intrastate commercial hauling did not violate the "dormant Commerce Clause" -- it applied only to intrastate transactions and did not facially discriminate against interstate or out-of-state activities. (Op. by Breyer, J.; unanimous; Scalia, J., op. concurring in judgment; Thomas, J., op. concurring in judgment)

2. Kelo v. City of New London, ___ U.S. ___, 125 S. Ct. 2655 (2005). The city's condemnation of housing in a targeted area to undertake an integrated development plan did not confer a private benefit on any particular private party and qualified as a "public use" under the Takings Clause of the Fifth Amendment. (Op. by Stevens, J.; 5-4 split; Kennedy, J., concurring op.; O'Connor, Scalia and Thomas, JJ. and Rehnquist, C.J., dissenting; Thomas, J., dissenting)

3. McCreary Co. v. ACLU, ____ U.S. ____, 125 S. Ct. 2722 (2005). This Establishment Clause case involved the display of the Ten Commandments in county courthouses. The Court reaffirmed the "secular legislative purpose" enquiry of Lemon v. Kurtz, finding that the counties had a nonsecular purpose in their displays. (Op. by Souter, J.; 5.33-3.66 split; O'Connor, J., concurring op.; Scalia and Thomas, JJ. and Rehnquist, C.J., dissenting op. with Kennedy, J. joining in Parts II and III)

4. Town of Castle Rock v. Gonzales, ___ U.S. ___, 125 S. Ct. 2796 (2005). There is no property interest in police enforcement of a domestic abuse restraining order under Fourteenth Amendment Due Process analysis. (Op. by Scalia, J.; 7-2 split; Souter and Breyer, JJ., concurring; Stevens and Ginsburg, JJ., dissenting)

5. Van Orden v. Perry, ___ U.S. ___, 125 S. Ct. 2854 (2005). An Establishment Clause case involving the display of a monument inscribed with the Ten Commandments on the grounds of the Texas state capitol, which monument had been donated by the Fraternal Order of the Eagles. In a five-four vote the Court found display of the monument in these circumstances had "dual significance" and did not violate the Establishment Clause. (Op. by Rehnquist, C.J.; 5-4 split; Scalia, J., concurring op.; Thomas, J., concurring op.; Breyer, J., op. concurring in judgment; Stevens and Ginsburg, JJ., dissenting op.; O'Connor, J., dissenting op.; Souter, Stevens and Ginsburg, JJ., dissenting op.)

6. Schaffer v. Weast, ___ U.S. ___, 126 S. Ct. 528 (2005). Under the Individuals with Disabilities Education Act (IDEA), the burden of persuasion in challenging an individualized education program is on the party seeking relief, whether it is the school district or the disabled child. (Op. by O'Connor, J.; 6-2 split; Stevens, J., concurring op.; Ginsburg, J., dissenting op.; Breyer, J., dissenting op.; Roberts, C.J., did not participate)

7. Wagnon v. Prairie Band Potawatomi Nation, ___ U.S. ___, 126 S. Ct. 676 (2005). A state motor fuel tax imposed on off-reservation distributors to an Indian reservation was nondiscriminatory and did not infringe in the sovereignty of the Indian nation. (Op. by Thomas, J.; 7-2 split; Ginsburg and Kennedy, JJ., dissenting op.)

8. United States v. Georgia, ___ U.S. ___, 126 S. Ct. 877 (2006). Title II of the Americans with Disability Act abrogates state sovereign immunity to the extent the Fourteenth Amendment is also violated. (Op. by Scalia, J.; unanimous; Stevens and Ginsburg, JJ., concurring op.)

9. Ayotte v. Planned Parenthood of Northern New England, ___ U.S. ___, 126 S. Ct. 961 (2006). The Court held that lower courts could direct narrow declaratory and/or injunctive relief from enforcement of a statute regulating access to abortion, which would be unconstitutional in the case of medical emergencies, without invalidating the entire statute. (Op. by O'Connor, J.; unanimous)

10. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, ___ U.S. ___, 126 S. Ct. 1211 (2006). At the preliminary injunction stage, the parties have the same burden of proof as they would at trial; therefore, church did not have the burden of disproving the government's asserted compelling interest in protecting the health and safety of church members and preventing distribution of a hallucinogenic tea beyond church members. Further, the government does not meet its burden under the strict scrutiny test of the Religious Freedom Restoration Act (RFRA) (which is not applicable to state and local governments following City of Boerne v. Flores, 521 U.S. 570, 516 (1997)) by reliance on the prohibitions of the Controlled Substances Act which does not by itself create an exception to proof requirements under RFRA. (Op. by Roberts, C.J.; unanimous except Alito, J., who did not participate)

11. Domino's Pizza v. McDonald, ___ U.S. ___, 126 S. Ct. 1246 (2006). This case did not involve a fast-food fight. McDonald, an African-American, was the sole shareholder of a company which had contracts with Domino's. Domino's terminated the contracts and McDonald brought suit on his own behalf under 42 U.S.C. § 1981 claiming the contracts were broken based on racial animus towards him. The Supreme Court affirmed the dismissal of his lawsuit because the contractual relationship was between corporations and not a corporation and an individual, confirming that a corporation is not a person for purposes of the statute. (Op. by Scalia, J.; unanimous except Alito, J., who did not participate)

12. Rumsfeld v. FAIR, ___ U.S. ___, 126 S. Ct. 1297 (2006). Solomon Amendment, which ties requirement of equal access to a university by military recruiters to receipt of federal funds by the university, does not violate the First Amendment as it regulates conduct, not speech. (Op. by Roberts, C.J.; unanimous except Alito, J., who did not participate)

13. Northern Ins. Co. of NY v. Chatham Co., Georgia, ___ U.S. ___, ___ S. Ct. ___, 2006 WL 1071413 (4/25/2006). Counties are not entitled to sovereign immunity under the Eleventh Amendment even if exercising state power as they are not an "arm of the state." The Supreme Court also rejected "a distinct sovereign immunity against *in personam* admiralty suits that bars cases arising from a county's exercise of core state functions with regard to navigable waters." (Op. by Thomas, J.; unanimous)

14. Jones v. Flowers, ___ U.S. ___, ___ S. Ct. ___, 2006 WL 1082955 (4/26/2006). Due process requires a state to "take additional reasonable steps" to provide notice to a property owner before the property is sold as a result of tax payment delinquencies. (Op. by Roberts, C.M.; 5-3 split (Alito, J., took no part); Thomas, J., dissenting op., joined by Scalia and Kennedy, JJ.)

15. Hartman v. Moore, ___ U.S. ___, ___ S. Ct. ___, 2006 WL 1082843 (4/26/2006). The absence of probable cause for bringing criminal charges must be pled and proved by plaintiff in an action for retaliatory prosecution. (Op. by Souter, J.; 5-2 split (Alito, J., and Roberts, C.J., took no part); Ginsburg, J., dissenting op., joined by Breyer, J.)

D. Employment Law

1. IBP, Inc. v. Alvarez, ____ U.S. ____, 126 S. Ct. 514 (2005). The time employees spent walking between an area where they changed into required protective gear and walking to the production areas is compensable under Fair Labors Standard Act (FLSA); however, the time the employees spent waiting to put on their gear is not included in a continuous workday under FLSA. (Op. by Stevens, J.; unanimous)

2. Ash v. Tyson Foods, Inc., 546 U.S. ___, 126 S. Ct. 1195 (2006). The key question in this race discrimination case was whether reference to the plaintiffs (African-Americans) as "boy" was evidence of discriminatory animus was resolved by the Court's determination that "modifiers or qualifications are [not] necessary in all instances to render the disputed term probative of bias;" that "[t]he speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage." (*Per curiam*)

3. Arbaugh v. Y & H Corp, ____ U.S. ____, 126 S. Ct. 1235 (2006). The 15-employee threshold under Title VII is held to be nonjurisdictional; it was untimely to raise it defensively after judgment has been entered. (Op. by Ginsburg, J.; unanimous except Alito, J., who did not participate)

E. Business Law

1. Volvo Trucks North America v. Reeder-Simco GMC, ___ U.S. ___, 126 S. Ct. 860 (2006). Unless it can be established that a manufacturer has discriminated between dealers who are completing to resell the product to the same customer, the Robinson-Patman Act does not reach secondary-line price discrimination. (Op. by Ginsburg, J.; 7-2 split; Stevens and Thomas, JJ., dissenting op.)

2. Central Va. Comm. College v. Katz, ___ U.S. ___, 126 S. Ct. 990 (2006). Sovereign immunity does not bar a bankruptcy proceeding to set aside preferential transfers to state agencies. (Op. by Stevens, J.; 6-3 split; Thomas and Scalia, JJ., and Roberts, C.J., dissenting op.)

3. Buckeye Check Cashing, Inc. v. Cardegna, ___ U.S. ___, 126 S. Ct. 1204 (2006). Where the validity of a contract, not the arbitration clause contained therein, is involved, an arbitrator must determine the issue and not a court. (Op. by Scalia, J.; 7-1 split; Thomas, J., dissenting op.; Alito, J., did not participate)

4. Texaco v. Dagher, ___ U.S. ___, 126 S. Ct. 1276 (2006). A price-fixing agreement between joint venturers is not *per se* unlawful, but rather, is subject to Sherman Act challenge under "rule of reason" analysis; joint venturers are viewed as single firm. (Op. by Thomas, J.; unanimous except Alito, J., did not participate)

5. Illinois Tool Works, Inc. v. Independent Ink, Inc., ___ U.S. ___, 126 S. Ct. 1281 (2006). Rejecting the assumption that ownership of a patent confers market power, the Supreme Court holds that in cases claiming an illegal tying arrangement under the Sherman Act, plaintiff must prove "defendant has market power in the tying product." (Op. by Stevens, J.; unanimous except Alito, J., did not participate)

F. Miscellaneous Federal Statutory Claims

1. Orff v. United States, ___ U.S. ___, 125 S. Ct. 2606 (2005). The Reclamation Reform Act of 1982 does not waive the United States' sovereign immunity from suit for breach of contract after petitioners' water supply was reduced. (Op. by Thomas, J.; unanimous)

2. National Cable & Telecommunications Ass'n v. Brand X Internet Services, ___ U.S. ___, 125 S. Ct. 2688 (2005). The FCC's exemption of broadband cable modem companies from common-carrier regulations held to be a lawful construction of the Communications Act. (Op. by Thomas, J.; 6-3 split; Stevens, J., concurring op.; Breyer, J., concurring op.; Scalia, Souter and Ginsburg, JJ., dissenting op.)

3. MGM Studios v. Grokster, ___ U.S. ___, 125 S. Ct. 2764 (2005). Grokster distributed free computer software which permitted users to share electronic files directly, which software Grokster knew could and was being used to share copyrighted movies and video files. The Supreme Court found Grokster liable for the infringing acts of its users, even though the software itself had lawful uses. (Op. by Souter, J.; unanimous; Ginsburg and Kennedy, JJ., and Rehnquist, C.J., concurring op.; Breyer, Stevens and O'Connor, JJ., concurring op.)

4. United States v. Olson, ___ U.S. ___, 126 S. Ct. 510 (2005). In a case claiming negligence of federal mine inspectors' cause a mine accident, the sovereign immunity of the United States is only waived where local law would make a "private person," not "state or municipal entity" liable in tort. (Op. by Breyer, J.; unanimous)

5. Gonzales v. Oregon, ___ U.S. ___, 126 S. Ct. 904 (2006). The Controlled Substances Act does not give the Attorney General authority to prohibit doctors from prescribing regulated drugs for use under the Oregon Death With Dignity Act. (Op. by Kennedy, J.; 6-3 split; Scalia and Thomas, JJ., and Roberts, C.J., dissenting op.; Thomas, J., dissenting op.)

6. Dolan v. USPS, ____ U.S. ____, 126 S. Ct. 1252 (2006). Postal exception under the Federal Tort Claims Act addressing loss arising from negligent transmission of mail could not be construed to bar suit following an injury which occurred after a customer tripped over mail left on her porch by a postal employee. The Court determined the statutory exception is meant to apply to damages arising from late- or non-arriving mail. (Op. by Kennedy, J.; 7-1 split; Thomas, J., dissenting op.; Alito, J., did not participate)

7. Ark. Dep't of Health and Human Servs. v. Ahlborn, ___ U.S. ____, ____ S. Ct. ____, 2006 WL 1131936 (5/1/2006). State statutory scheme, which required satisfaction of the portion of the state's Medicaid lien which exceeded the portion of a third-party settlement attributed to medical costs out of the remaining proceeds, was unauthorized by federal Medicaid law. (Op. by Stevens, J.; unanimous)

II. Evidence in the Eighth Circuit

A. General Provisions

1. United States v. Flenoid, 415 F.3d 974 (8th Cir. 2005), cert. denied, 126 S. Ct. 1179 (2006). Defendant was charged with being a felon in possession and escape after he killed his girlfriend's brother-in-law while on weekend pass -- filing a motion in limine was sufficient to stand as an objection to admission of evidence from the shooting, even though counsel made no further objection later; however, the evidence was not unfairly prejudicial as the trial court limited the evidence to what was necessary to prove defendant possessed the gun involved.

2. United States v. Frokjer, 415 F.3d 865 (8th Cir. 2005). Defendant was charged with providing a false statement to receive federal employees' compensation after she made statements about her physical limitations and medical condition to her employer and to health care providers. The government's primary evidence was surveillance videos of defendant engaged in day-to-day activities -- defendant filed a motion in limine regarding a composite tape containing surveillance footage and taped phone calls she made to her employer. The district court never ruled definitively on the motion and the tapes from which it was created were received without objection; therefore, plaintiff's failure to renew her objection to the composite tape later in the trial was forfeiture of error -- under plain error admission of the composite tape was not unfairly prejudicial as the differing dates of the audio and video recordings were shown on the tape and the jury could not believe the audio recordings were made contemporaneously with the video tapes.

B. Relevance

1. United States v. Katz, ___ F.3d ___, 2006 WL 1227940 (8th Cir. 5/9/2006). Physician was charged in a 192-count indictment with illegal distribution of controlled substances outside the scope of medical practice and not for legitimate medical purposes. Evidence of nearly 300 prescriptions which were not charged in the indictment but which were written for patients who testified at trial was admissible under Fed. R. Evid. 404(b) to show the doctor's intent.

2. Wilson v. City of Des Moines, 442 F.3d 637 (8th Cir. 2006). In a sexual harassment case, trial court was not required to hold a Rule 412 hearing concerning evidence of plaintiff's sexual behavior or public comments in the workplace -- evidence was properly admitted as an exception under Rule 412(b)(2) to demonstrate why plaintiff's co-workers did not socialize with her and was relevant to issue of whether the harassment was invited.

3. Garner v. Missouri Dep't of Mental Health, 439 F.3d 958 (8th Cir. 2006). Testimony from employer concerning an unsubstantiated allegation that plaintiff had received money from a patient's Social Security check in violation of the rules of the center was offered to explain why she had been suspended and an investigation commenced, not to prove the truth of the matter asserted, and thus was properly admitted as proof of the employer's state of mind.

4. United States v. (Willie) Johnson, 439 F.3d 947 (8th Cir. 2006). Evidence from a witness concerning his past drug dealings with defendant was admissible to show defendant's intent to enter into a conspiracy to distribute drugs; the prior bad acts were similar in kind and time to the crimes charged.

5. United States v. Johnson, 439 F.3d 884 (8th Cir. 2006). In case involving charges of possession of child pornography, evidence that defendant possessed stories about the rape of young girls should not have been admitted as Fed. R. Evid. 404(b) precludes propensity evidence; because the evidence against defendant was not otherwise "overwhelming," admission of the evidence could have influenced the jury and therefore it was not harmless error to admit the stories.

6. Smith v. Tenet Healthsystem SL. 436 F.3d 879 (8th Cir. 2006). Plaintiff's medical, psychiatric and Social Security records in medical malpractice case were relevant to defendant doctors' theory that plaintiff's above-knee amputation was caused by "the cumulative trauma" of decades of knee problems, as evidenced in the records and court properly conducted a Rule 403 weighing of the evidence.

7. United States v. Voegtlin, 437 F.3d 741 (8th Cir. 2006). Co-defendant's testimony concerning defendant's prior drug dealings was admissible to show defendant's "knowledge of the purpose of the conspiracy [to manufacture methamphetamine]." Coupled with limited instruction and the fact that the prior acts were similar in kind and close in time to those charged in the conspiracy, no abuse of the court's discretion occurred.

8. United States v. Jourdain, 433 F.3d 652 (8th Cir.), petition for cert. filed (4/6/2006)(No. 05-10242). In a case charging defendant with aiding and abetting assault resulting in serious bodily injury to one individual, evidence that defendant solicited a friend to shoot a different individual was relevant to defendant's intent in response to his argument he was merely present when the first individual was shot and killed a few hours later.

9. United States v. Scofield, 433 F.3d 580 (8th Cir. 2006). Informant's testimony that referenced defendant's possession of methamphetamine paraphernalia and his consumption of methamphetamine was admissible to prove defendant knew the substance he was distributing was methamphetamine.

10. United States v. Hollins, 432 F.3d 809 (8th Cir. 2005). Witness' reference to observation of a "mug shot" of defendant seen prior to identifying defendant in a photographic lineup (thus implying past criminal record) was only minor objectionable statement which did not create prejudicial error in the face of the vast evidence against defendant.

11. United States v. Anwar, 428 F.3d 1102 (8th Cir. 2005), cert. denied, ____ S. Ct. ____, 2006 WL 653781, 74 USLW 3532 (4/17/2006). Admission of evidence that defendant solicited six women to marry foreign nationals in order to evade immigration laws was within the trial court's discretion because the prior acts were relevant to defendant's intent to aid and abet others to enter into fraudulent marriages, were similar in kind to the crime, and were not remote in time from the charged conduct, given defendant was charged with engaging in marriage fraud conspiracy during the same time period. Additionally, a single 404(b) limiting instruction during final instructions instead of before each witness testified was sufficient.

12. United States v. Walker, 428 F.3d 1165 (8th Cir. 2005), cert. denied, 126 S. Ct. 1385 (2006). Defendant's 10-year old conviction of making felony terroristic threats to his ex-wife was offered by the government in connection with the current charges of felon in possession of a firearm and possession of an unregistered firearm. The specifics of the conviction, while inadmissible as to the felon in possession charge under Old Chief, was admissible as to the possession of an unregistered firearm charge because the old charge and the current one were both associated with his ex-wife, thus the conviction was relative to motive and intent.

13. United States v. Richardson, 427 F.3d 1128 (8th Cir. 2005), vacated in part on other grounds on rehr'g en banc, 439 F.3d 421 (8th Cir. 2006). In a case involving charges of being a drug user in possession of a firearm, evidence that while on pretrial release defendant failed to attend scheduled drug tests and fled from the police were relevant to the element of being a drug user as avoiding drug tests and flight showed fear his drug use would be discovered.

14. United States v. Conroy, 424 F.3d 833 (8th Cir. 2005). Government's failure to disclose defendant's statement to a victim, that he once received favorable treatment from the police during a traffic stop because his father is a tribal police officer, was not material evidence requiring disclosure under Brady because the issue was not whether the stop occurred as the victim testified but whether she believed defendant had received special treatment from the police -- the victim initially told police she did not report a rape right away because defendant's father was a police officer.

15. United States v. Koski, 424 F.3d 812 (8th Cir. 2005). Defendant was charged with knowing use of the mails to deliver a threatening communication -- admission of his prior conviction for mailing such communications under Rule 404(b) was evidence that he knew his prior correspondence of this nature had been found threatening, in response to his defense that the letters were "a cry for help" instead of threatening.

16. United States v. Looking Cloud, 419 F.3d 781 (8th Cir. 2005). Evidence of defendant's association with the American Indian Movement was "comparable to the admission of a defendant's association with a group or gang, who engage in violent activities," which evidence has been admitted to establish motive or opportunity to commit a crime -- here the murder of a person suspected to be a federal informant on the group could only be explained "within the context of the [group] and its activities."

17. United States v. Cockerham, 417 F.3d 919 (8th Cir. 2005). Evidence of defendant's two prior felon in possession convictions was relevant to the present charge (felon in possession) as it showed knowledge and intent by the defendant, which he put in issue.

18. United States v. Strong, 415 F.3d 902 (8th Cir. 2005), cert. denied,126 S. Ct. 1121 (2006). In a felon in possession case, the government offered evidence of defendant's 16-year-old convictions for robbery and being a felon in possession -- defendant had asserted "mere presence" in a truck where the current gun was found. Noting that 13 years had been the longest time frame admitted to date, the circuit declined to set a "definitive rule of limitation" on the age of prior convictions as the evidence related to defendant's knowledge of and intent to possess a firearm.

19. United States v. Holmes, 413 F.3d 770 (8th Cir. 2005). Trial court erred in excluding testimony of witnesses which would have provided background and context to assess the credibility of officers and defendant in a felon in possession case where defendant's story was that he was present in an apartment to help move things. When officers responded to a report of a fight (between two women there), defendant backed up to a counter where he saw a gun and panicked, because he was not supposed to be around guns.

20. United States v. Fleck, 413 F.3d 883 (8th Cir. 2005). During a trial involving felon in possession charges, testimony regarding defendants' alleged involvement in insurance fraud was wholly irrelevant and should have been barred even if it provided context for police presence in the home because the information otherwise had nothing to do with the charged crime. However, the error was harmless as the majority of evidence at trial focused on possession of guns.

21. United States v. Noe, 411 F.3d 878 (8th Cir.), cert. denied, 126 S. Ct. 184 (2005). Where defense counsel opened the door to the topic of defendant's affiliation with a white supremacist gang, otherwise inadmissible evidence on the topic which the government pursued on redirect examination was not improper, particularly when the court gave a limiting instruction to which no objection was raised.

22. United States v. Carter, 410 F.3d 1017 (8th Cir. 2005). In a case involving charges of sexual abuse, in addition to the testimony of the complaining witnesses, the trial court allowed three other female witnesses to testify concerning other offenses defendant allegedly committed because the witnesses were in the same age group as the complaining witnesses, the incidents involved sexual abuse by defendant and the methods were consistent with the offenses charged.

23. United States v. Hill, 410 F.3d 468 (8th Cir. 2005), cert. denied, ___ S. Ct. ___, 2006 WL 1059443 (2006). In a drug conspiracy case, testimony from a co-conspirator that defendant provided him a firearm and asked him to use it to kill or maim two people who were to testify before the grand jury, a person who stole drugs and property from the alleged conspiracy and another person who unfortunately drew the police to the location where methamphetamine was made, was admissible as "substantive evidence of the existence of the conspiracy" and was not barred as "other crimes, wrongs, or acts" evidence under Rule 404(b).

24. Regions Bank v. BMW North America, 406 F.3d 978 (8th Cir.), cert. denied, 126 S. Ct. 742 (2005). Even if admission of plaintiff's blood alcohol level was erroneous under the applicable state law (here Arkansas), it was speculative at best whether the jury verdict was prejudicially influenced by the evidence as the case was submitted on a general verdict form, presentation of the evidence took only an hour and fifteen minutes out of an eight-day trial, and defendant's evidence focused on lack of defect in the vehicle plaintiff was driving at the time of an accident during which she lost control of her car, not on plaintiff's use of alcohol.

C. Witnesses

1. United States v. Kelly, 436 F.3d 992 (8th Cir. 2006). In a felon in possession case, the trial court was not required to determine the competency of a seven-year-old witness who would not testify when questioned about his father's participation in a shooting incident; further, admission of the child's tape-recorded testimony as a prior inconsistent statement under Fed. R. Evid. 613(b) after he refused to testify further; the child had an opportunity to explain his refusal and defendant to cross-examine him.

2. United States v. Burns, 432 F.3d 856 (8th Cir. 2005). Although co-defendant's inculpatory statement concerning defendant's participation in methamphetamine transactions normally would have been inadmissible, by asking the investigating officer on cross-examination about the statement in a general way, defense counsel opened the door to admission of the whole of the statements on redirect examination.

3. United States v. Caballero, 420 F.3d 819 (8th Cir. 2005), petition for cert. filed (1/30/2006)(No. 05-8997). As a "tool of the trade", evidence of recovery of firearms from defendant's home and place of business was admissible as circumstantial proof of drug trafficking; also the evidentiary "door" to the issue was opened by defense counsel's questions to an agent on cross-examination whether any weapons were seized.

D. Opinions and Expert Testimony

1. United States v. Seifert, ___ F.3d ___, 2006 WL 1007901 (8th Cir. 4/19/2006). Proper foundation for admission of digitally enhanced video included expert testimony detailing each step of the enhancement process.

2. United States v. Wintermute, ___ F.3d ___, 2006 WL 925436 (8th Cir. 4/11/2006). Defendant's proposed expert testimony concerning the impact defendant's false statements would have made in the decision-making process on an Application for Change in Control submitted to the Office of the Comptroller of Currency misrepresented the government's burden in proving materiality: the government only needed to show the statements were capable of influencing the decision, not that they actually did. Therefore, exclusion of the testimony was not an abuse of discretion.

3. Miller v. Baker Implement, 439 F.3d 407 (8th Cir. 2006). Trial court was not required to hold a Daubert hearing where expert qualification issues and reports were fully briefed by the parties, satisfying the "opportunity to be heard" requirement. Further, its *sua sponte* Daubert analysis taken in considering plaintiff's motion to make late designation of third expert was permissible as there was an adequate record based on the previous Daubert motions with respect to plaintiff's first two experts.

4. Smith v. Tenet Healthsystem SL, 436 F.3d 879 (8th Cir. 2006). In a case reviewed supra, plaintiff also failed to present expert medical testimony to establish his claim that failure to comply with infection-control policies caused the amputation -- *res ipsa loquitur* does not apply because "amputations regularly occur without someone's negligence."

5. United States v. Cawthorn, 429 F.3d 793 (8th Cir. 2005). Hand swab evidence obtained from defendant during execution of a search warrant at a club (where a CI said s/he had purchased drugs from someone matching defendant's description) tested positive for cocaine residue. The government sought to prove the residue could not come from casual contact by means of an expert who tested a money counter and the hands of bank tellers during a Saturday morning and found that neither the counter nor the tellers' hands tested positive for cocaine, nor did the steering wheels of cars impounded for drug offenses. The former evidence was held to be scientific and supported by appropriate validation; the second was not, but error in its admission was harmless in view of the substantial amount of evidence from which guilt could be found.

6. Torbit v. Ryder System, Inc., 416 F.3d 898 (8th Cir. 2005). Admission of expert witness' two charts which summarized driver injuries arising from use of a ratchet system which secured vehicles being delivered to dealerships to a tractor trailer deck was not a "clear and prejudicial" abuse of discretion even though some of the injuries shown in the charts did not relate to how this accident occurred; expert testified as to the difference between types of injuries in the chart and the jury could distinguish between them.

7. United States v. Beltran-Arce, 415 F.3d 949 (8th Cir. 2005). Officer's lengthy experience as a police officer, a large share of which was in narcotics investigations, together with his training and publication record and service as an instructor in narcotics investigation qualified him to testify as an expert witness concerning general activities in drug trafficking.

8. Larson v. Kempker, 414 F.3d 936 (8th Cir. 2005). Although trial court abused its discretion in excluding the testimony of plaintiff prisoner's expert concerning second-hand smoke because his facts and conclusions were inaccurate, the error was harmless because plaintiff's evidence failed to demonstrate exposure to "unreasonably high" levels of ETS as required by Helling v. McKinney, 509 U.S. 25 (1993).

9. Nebraska Plastics, Inc. v. Holland Colors Americas, Inc., 408 F.3d 410 (8th Cir. 2005). Exclusion of expert's future damages testimony was not an abuse of discretion where the opinion did not consider the relevant facts of the case, i.e., the existence of "a plethora of specific facts" which negated the existence of future damages claims.

10. Ridpath v. Pederson, 407 F.3d 934 (8th Cir. 2005). Because aggravation of Crohn's disease is not an injury which a lay person might normally understand to result from battery, trespass or false imprisonment, expert testimony was required to support plaintiff's aggravation of pre-existing injury damages claim.

E. Hearsay

1. United States v. Lewis, 436 F.3d 939 (8th Cir. 2006). Prior statements by defendant and a witness were properly excluded as hearsay even though both testified at trial because the statements were offered for the truth of the matter asserted.

2. United States v. Peneaux, 432 F.3d 882 (8th Cir. 2005), petition for cert. filed (3/31/2006)(No. 05-10261). Where minor victim testified at trial and was subject to cross-examination, admission of her prior unsworn out of court statements through the testimony of other witnesses complied with materiality requirement of F.R.E. 807.

3. United States v. Naiden, 424 F.3d 718 (8th Cir. 2005). Testimony from defendant's girlfriend that the day after defendant's sexually explicit online "chat" with an individual who said she was a fourteen-year-old girl (actually a male officer) defendant said he did not believe the individual was actually fourteen was excluded as hearsay and did not fit Fed. R. Evid. 803(3) state of mind exception because of the length of time from the online conversation to defendant's statement the next day.

4. United States v. Brun, 416 F.3d 703 (8th Cir. 2005). Statements by a 12-year-old boy to a 911 dispatcher that his aunt and a male friend were fighting and requesting police assistance were excited utterances, nontestimonial, admissible as an exception to the hearsay rule and did not violate the defendant's Confrontation Clause rights when the government could not locate the boy to testify at trial.

5. United States v. Water, 413 F.3d 812 (8th Cir. 2005). After an evening of drinking, smoking marijuana and playing with defendant's brother's new .22 revolver, defendant shot his neighbor's daughter's boyfriend Chief while they continued to "play" with the gun after the party concluded -- immediately after the shooting, within five minutes, defendant's brother told the investigating officer defendant had put a live round in the revolver and shot Chief. The hearsay statement was admitted over objection without reference to the excited utterance exception, but the circuit agrees considering the circumstances in which the statement was made, the exception applied.

6. United States v. Smith, 410 F.3d 426 (8th Cir. 2005). Another "open door" problem: here defense counsel asked an agent on cross examination about his grand jury testimony in which he repeated statements a prior witness had made -- on redirect the government asked the agent about an inconsistent statement the prior witness made before the grand jury. Defendant's hearsay objection was overruled.

7. United States v. Wallace, 408 F.3d 1046 (8th Cir.), cert. denied, 126 U.S. 816 (2005)(No. 05-7416). Sentencing judge could consider hearsay evidence concerning defendant's possessing a firearm in connection with another felony offense (here felony assault) because it was accompanied by indicia of reliability (the statements had been made before a grand jury); furthermore, no Confrontation Clause violation occurred as it does not apply to sentencing proceedings.

F. Contents of Writings, Recordings and Photographs

1. United States v. Green, 428 F.3d 1131 (8th Cir. 2005). Admission of summary charts based on evidence introduced at trial, in a case involving social security fraud and use of computers to steal information to gain credit, was proper where the charts were of assistance in showing "how the scheme was perpetrated and the witness who prepared the charts was available for cross examination."