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Donald Colleluori

Gary D. Eisenstat

Bill E. Davidoff

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Civil Procedure: Pre-Trial and Trial

*Donald Colleluori**
*Gary D. Eisenstat***
*Bill E. Davidoff****

THE major developments in the field of civil procedure during the Survey period occurred through judicial decisions.

I. SUBJECT-MATTER JURISDICTION

In *City of El Paso v. Heinrich*, the Texas Supreme Court held that "while governmental immunity generally bars suits for retrospective monetary relief, it does not preclude prospective injunctive remedies in official-capacity suits against government actors who violate statutory or constitutional provisions."[1] Recognizing the well-settled rule that sovereign immunity cannot be avoided simply by relabeling a suit for damages as a declaratory judgment claim, the supreme court nevertheless recognized that the courts may compel a state official to comply with constitutional or statutory mandates, even if doing so would in effect compel the payment of money.[2] Such a suit would lie only against state officials acting in their official capacities, not the governmental entity itself.[3]

In *Graber v. Fuqua*, a divided Texas Supreme Court held that the federal bankruptcy code does not preempt a state law claim for malicious prosecution arising out of an adversary proceeding in a bankruptcy case.[4] The supreme court noted that it is well established that Federal Rule 11 of Civil Procedure[5] does not preempt malicious prosecution claims arising out of federal civil actions, and that there was no indication that Congress's adoption of that rule's bankruptcy counterpart, Federal Rule of Bankruptcy Procedure 9011,[6] was intended to do so.[7] Nor is preemption

* B.A., Dickinson College; J.D., New York University School of Law. Partner, Figari & Davenport, L.L.P., Dallas, Texas.
** B.S., University of Colorado; J.D., Boston University School of Law. Partner, Figari & Davenport, L.L.P., Dallas, Texas.
*** B.B.A., University of Texas; J.D., Southern Methodist University Dedman School of Law. Partner, Figari & Davenport, L.L.P., Dallas, Texas.

1. 284 S.W.3d 366, 368-69 (Tex. 2009).
2. *Id.* at 371-72.
3. *Id.* at 372-73.
4. 279 S.W.3d 608, 609-10 (Tex. 2009).
5. FED. R. CIV. P. 11.
6. FED. R. BANKR. P. 9011.
7. *Graber*, 279 S.W.3d at 613-14.

"warranted by the risk of disrupting uniformity" in bankruptcy law.[8] Thus, the state court action was not subject to dismissal for lack of jurisdiction.[9]

Combs v. Kaufman County addressed the transfer of a guardianship proceeding to a district court judge after the constitutional county court judge recused herself.[10] The County argued that the Probate Code required a transfer to a visiting probate judge.[11] The Dallas Court of Appeals, however, held that section 16 of article V of the Texas constitution[12] authorizes the parties to agree to a replacement judge.[13] Since no one objected to the district judge's appointment to the case for several years, the court of appeals held there was subject-matter jurisdiction.[14]

The Beaumont Court of Appeals concluded that a district court's subject-matter jurisdiction requires a minimum amount in controversy of $200 in *Acreman v. Sharp*.[15] The court of appeals made note of several Texas Supreme Court cases that questioned, but did not resolve, whether district courts still have any minimum jurisdictional amount.[16] The court of appeals held, however, that since the Texas constitution vests the justice of the peace courts with exclusive jurisdiction over claims of $200 or less, and neither the constitution nor statute establishes any minimum dollar threshold for district courts, the district court had jurisdiction over this case involving a $400 dispute.[17]

II. SERVICE OF PROCESS

"For 150 years, the rule [in Texas] has been that a default judgment cannot be based on an amended petition seeking more onerous relief unless the amendment was served with [a new] citation."[18] A divided Texas Supreme Court reversed this long-standing rule in *In re E.A.*[19] The majority based its decision on the 1990 amendment to Texas Rule of Civil Procedure 21a,[20] which provides for several methods of delivery, including certified or registered mail, for every type of notice, pleading, or motion "other than the citation to be served upon the filing of a cause of

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8. *Id.* at 617-18.
9. *Id.* at 610; *cf.* Brashear v. Victoria Gardens of McKinney, L.L.C., 302 S.W.3d 542, 544 (Tex. App.—Dallas 2009, no pet.) (where one defendant was in bankruptcy at the time the suit was commenced, "the entire lawsuit was subject to the automatic stay," and the trial court never acquired subject-matter jurisdiction).
10. 274 S.W.3d 922, 923 (Tex. App.—Dallas 2008, pet. denied).
11. *Id.* at 926.
12. TEX. CONST. art. V, § 16.
13. *Combs*, 274 S.W.3d at 926.
14. *Id.*
15. 282 S.W.3d 251, 255-56 (Tex. App.—Beaumont 2009, no pet.).
16. *Id.* at 254-55; *see, e.g.*, Dubai Petroleum Co. v. Kazi, 12 S.W.3d 71, 75 n.4 (Tex. 2000).
17. *Acreman*, 282 S.W.3d at 255-56.
18. *In re* E.A., 287 S.W.3d 1, 6 (Tex. 2009) (Brister, J., concurring).
19. *Id.* at 4-5.
20. *Id.*

action."[21] Thus, the majority concluded that service under Rule 21a satisfies the requirement that "a nonanswering defendant must be served with a more onerous amended petition" before a default judgment can be entered.[22] While the majority noted the benefit its new interpretation would provide in eliminating any confusion over "what constitutes a 'more onerous judgment,'"[23] the dissent argued that the "1990 amendment [to Rule 21a] merely consolidated three separate service rules," and there was no indication in the Advisory Committee notes or otherwise that it was intended to abrogate the well-established rule regarding the need for a new citation.[24]

The Texas Supreme Court considered the sufficiency of "the clerk's endorsement of the return of citation" in *Insurance Co. of the State of Pennsylvania v. Lejeune*.[25] In *Lejeune*, the defaulting party argued that the clerk's endorsement was defective because it failed to include the hour of receipt of citation as required by Rule 16.[26] The supreme court agreed, holding that even though the defendant was served by certified mail, the return must still show the hour of receipt, and in its absence, the default judgment could not stand.[27]

Most trial practitioners are aware of the rule that the filing of a suit just within the limitations period will not be timely unless the plaintiff exercises diligence in issuing and serving citation.[28] *Mauricio v. Castro* teaches that even a relatively brief period of delay in effecting service must be explained in order for a plaintiff to avail himself of this rule.[29] In this case, the plaintiff filed suit fourteen days before the statute of limitations expired. Citation was issued that same day but was not served until thirty-one days after limitations had run. Because the record contained no evidence or explanation for this "relatively short delay," the Dallas Court of Appeals held the defendant was entitled to a directed verdict on limitations.[30]

III. SPECIAL APPEARANCE

In *Lamar v. Poncon*, the Houston First Court of Appeals upheld the trial court's decision that the plaintiffs failed to establish specific jurisdiction over out-of-state defendants.[31] Although the plaintiffs also failed to prove general jurisdiction, the court of appeals reversed the order grant-

21. TEX. R. CIV. P. 21a.
22. *In re E.A.*, 287 S.W.3d at 4.
23. *Id.*
24. *Id.* at 7-8. The dissent also noted that commentators, such as the authors, failed to notice any such change at the time. *Id.* at 8 n.15 (citing Ernest E. Figari, Jr., A. Erin Dwyer & Donald Colleluori, *Civil Procedure*, 45 Sw. L.J. 73, 83 (1991)).
25. 297 S.W.3d 254 (Tex. 2009) (per curiam).
26. TEX. R. CIV. P. 16.
27. *Lejeune*, 297 S.W.3d at 256.
28. *See, e.g.*, Murray v. San Jacinto Agency, Inc., 800 S.W.2d 826, 830 (Tex. 1990).
29. 287 S.W.3d 476 (Tex. App.—Dallas 2009, no pet.).
30. *Id.* at 480.
31. 305 S.W.3d 130, 138 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).

ing the special appearance because the trial court refused to allow the plaintiffs to take any jurisdictional discovery.[32] The court of appeals concluded that the plaintiffs' affidavits, while not directly contradicting the defendants' special appearance evidence, were at least sufficient to allow plaintiffs to explore whether the defendants had contacts with Texas that were not easily investigated without procuring information directly from them.[33]

Boyd v. Kobierowski lays out the proper procedure for an out-of-state defendant who has successfully set aside a default judgment to preserve his right to contest personal jurisdiction.[34] Under Rule 123,[35] "[b]y appealing [a default] judgment, a defendant submits to the trial court's jurisdiction," and no new service of process is necessary.[36] However, the defendant can avoid Rule 123's presumption that he has entered a general appearance if, upon remand, he promptly files a special appearance.[37] Because the defendant in *Boyd* failed to do so for over six months, the San Antonio Court of Appeals held that his filing of a special appearance after he was defaulted a second time was properly denied by the trial court.[38]

IV. VENUE

During the Survey period, the Texas Supreme Court made significant holdings regarding forum-selection clauses and the doctrine of forum non conveniens.

In *In re International Profit Associates, Inc.*, the Texas Supreme Court held that "the trial court abused its discretion by refusing to enforce [several] forum-selection clauses," all of which provided: "It is agreed that exclusive jurisdiction and venue shall vest in the Nineteenth Judicial District of Lake County, Illinois, Illinois law applying."[39] The plaintiff argued that the forum-selection clauses were not enforceable, because "(1) [they] . . . are ambiguous . . . (2) [the defendant] procured the clauses through overreaching or fraud; (3) the interest of [plaintiff's] witnesses and the public favor litigating this case in Texas; and (4) enforcement of the clauses would effectively deprive [the plaintiff] of its day in court."[40]

The supreme court began its analysis by confirming that

> the party opposing enforcement [of a forum selection clause must] clearly show[ ] that (1) the clause is invalid for reasons of fraud or overreaching, (2) enforcement would be unreasonable or unjust, (3) enforcement would contravene a strong public policy of the forum

32. *Id.* at 139-40.
33. *Id.* at 140.
34. 283 S.W.3d 19, 24 (Tex. App.—San Antonio 2009, no pet.).
35. TEX. R. CIV. P. 123.
36. *Boyd*, 283 S.W.3d at 23.
37. *Id.* at 24.
38. *Id.* at 24-25.
39. 274 S.W.3d 672, 674 (Tex. 2009) (per curiam).
40. *Id.* at 675.

> where the suit was brought, or (4) the selected forum would be seriously inconvenient for trial.[41]

With that in mind, the supreme court then analyzed each of plaintiff's arguments.

First, the plaintiff argued that the clauses were ambiguous, because they "do not mention 'litigation'" and "do not mention what, if anything, is to be brought in the Nineteenth Judicial District Court of Lake County, Illinois."[42] The supreme court rejected this argument and held that the clauses were not ambiguous, because they were "not susceptible to more than one reasonable interpretation"—that is, "fix[ing] jurisdiction and venue for judicial actions between the parties in a specific location and court in Illinois."[43]

Second, the plaintiff argued that the clauses were procured by overreaching or fraud because the defendant's "representative initially contacted [the plaintiff] in her Texas office, accepted payment in her Texas office, and disclosed that the representative resided in Texas."[44] Accordingly, the plaintiff argued that under these circumstances, the defendant had a duty to expressly point out to the plaintiff that the contract had a forum-selection clause.[45] The supreme court stated that to prove the forum-selection clause had been procured by overreaching or fraud, the party must demonstrate that the clause resulted in unfair surprise or oppression.[46] Here, the supreme court noted that the plaintiff had not argued "that it was surprised by the presence of the forum-selection clauses in the contracts," but rather "that the clauses were not affirmatively disclosed."[47] This conduct did not amount to either overreaching or fraud.[48]

Third, the plaintiff claimed that the interest of its witnesses and the public favor litigating the case in Texas because all of its witnesses live in Texas and the underlying events giving rise to the suit all occurred in Texas. The supreme court rejected these arguments. With respect to the location of the witnesses, the supreme court held that the plaintiff "could have foreseen [the possibility of] litigation in Illinois for claims arising out of [the] contracts . . . and Illinois is not a remote alien forum for purposes of forum-selection agreements."[49] With respect to the public-interest factors, the supreme court held that "policy considerations weigh in favor of enforcing valid forum-selection clauses absent a statute that requires suit to be brought . . . in Texas," which was not the case in this matter.[50]

41. *Id.*
42. *Id.* at 677.
43. *Id.*
44. *Id.* at 678.
45. *Id.*
46. *Id.*
47. *Id.* at 679.
48. *Id.*
49. *Id.*
50. *Id.* at 680.

Finally, the plaintiff argued that it would be deprived of its day in court because of "the expense of pursuing litigation in Illinois and the fact that it would be forced to try two separate lawsuits" because one of the individual defendants was not subject to jurisdiction in Illinois.[51] The supreme court held, however, that to demonstrate it would be deprived of its day in court, the plaintiff must prove that "special and unusual circumstances developed after the contracts were executed and that litigation in Illinois would now be so gravely difficult and inconvenient that [the plaintiff] would for all practical purposes be deprived of its day in court."[52] The supreme court concluded that the plaintiff had not met this burden.[53]

In a second case styled *In re International Profit Associates, Inc.*, the Texas Supreme Court held that the trial court had abused its discretion by requiring a party seeking to enforce a forum-selection clause to prove that the specific clause was shown to the opposing party at the time the parties entered into the agreement.[54] In this case, the plaintiff argued that the defendant's failure "to show it the forum-selection clause [amounted to] fraud or overreaching."[55] The supreme court rejected the plaintiff's argument, because "[a] party who signs a document is presumed to know its contents."[56]

In *In re General Electric Co.*, the Texas Supreme Court analyzed whether a trial court had abused its discretion by denying the defendants' motion to dismiss on the basis of forum non conveniens.[57] Texas Civil Practice and Remedies Code section 71.051(b), the applicable forum non conveniens statute, provides:

> If a court of this state, on written motion of a party, finds that in the interest of justice and for the convenience of the parties a claim or action to which this section applies would be more properly heard in a forum outside this state, the court shall decline to exercise jurisdiction under the doctrine of forum non conveniens and shall stay or dismiss the claim or action. In determining whether to grant a motion to stay or dismiss an action under the doctrine of forum non conveniens, the court shall consider whether:
>
> (1) an alternate forum exists in which the claim or action may be tried;
> (2) the alternate forum provides an adequate remedy;
> (3) maintenance of the claim or action in the courts of this state would work a substantial injustice to the moving party;
> (4) the alternate forum, as a result of the submission of the parties or otherwise, can exercise jurisdiction over all the defendants properly joined to the plaintiff's claim;

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51. *Id.*
52. *Id.*
53. *Id.*
54. 286 S.W.3d 921, 922 (Tex. 2009) (per curiam).
55. *Id.* at 923.
56. *Id.* (alteration in original) (quoting *In re* Lyon Fin. Servs., Inc., 257 S.W.3d 228, 232 (Tex. 2008)).
57. 271 S.W.3d 681, 684 (Tex. 2008).

(5) the balance of the private interests of the parties and the public interest of the state predominate in favor of the claim or action being brought in an alternate forum, which shall include consideration of the extent to which an injury or death resulted from acts or omissions that occurred in this state; and
(6) the stay or dismissal would not result in unreasonable duplication or proliferation of litigation.[58]

Here, the plaintiff had "never lived or worked in Texas" but "sued numerous defendants in Dallas County as a result of alleged exposure to asbestos at his jobsite in Maine."[59] First, the plaintiff argued that although Maine state courts were an alternative forum that provided an adequate remedy, "his case would be vulnerable to removal to federal court on diversity jurisdiction grounds."[60] If the case were removed to federal court, it would become part of a multi-district litigation, and the plaintiff would likely die before the case were tried. The supreme court held that a comparative analysis of procedural processes and the time it takes to get to trial were disfavored when evaluating motions for forum non conveniens, and the possible delay did not deprive the plaintiff of an adequate remedy.[61]

Second, the defendants argued it would be a substantial injustice to them to try the case in Texas, because most witnesses and evidence were out of state. The supreme court agreed, specifically noting that the evidence and many fact witnesses were beyond the reach of compulsory process, making it difficult to defend the case.[62]

Third, the plaintiff argued that not all of the defendants had proven they were subject to jurisdiction in Maine. The supreme court held, however, that the defendants had previously agreed to jurisdiction in Maine, and in any event, it appeared the defendants were subject to the Maine long-arm statute.[63]

Fourth, the supreme court found that the public- and private-interest factors weighed in favor of a Maine forum because Maine law would apply, and the evidence and witnesses were located in Maine.[64]

Finally, the plaintiff claimed that dismissal would "result in unreasonable duplication of litigation" because there would be two lawsuits, one in Texas against the non-moving defendants and one in Maine against the moving defendants.[65] The supreme court disagreed, holding that the trial court had the discretion to dismiss or stay the entire case and that the extent to which litigation might be fragmented or duplicative depended on the decisions made by the plaintiff.[66] Accordingly, the supreme court

58. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(b) (Vernon 2008).
59. *In re Gen. Elec. Co.*, 271 S.W.3d at 684.
60. *Id.* at 687.
61. *Id.* at 688.
62. *Id.* at 689.
63. *Id.* at 690-92.
64. *Id.* at 691-92.
65. *Id.* at 692.
66. *Id.* at 694.

found that the trial court had abused its discretion by denying the motion to dismiss.[67]

V. PARTIES

In *In re Greater Houston Orthopaedic Specialists, Inc.*, the Texas Supreme Court clarified the differences between "misidentification" and "misnomer."[68] In this case, Greater Houston Orthopaedic Specialists, Inc. (GHOS) filed suit against Jody Griswold and Peter Zavaletta, "alleging that they failed to pay GHOS approximately $35,000 for medical services."[69] GHOS then non-suited Griswold and Zavaletta's action." Although the non-suit contained the correct cause number and style, it identified GHOS as "Orthopaedic Specialists, L.L.P." and omitted the "Greater Houston" predicate. Thereafter, Griswold and Zavaletta filed a counterclaim. GHOS moved to dismiss the case on the basis that the suit had been dismissed, but the trial court denied Ghos's motion. On appeal, Griswold and Zavaletta argued that "GHOS's nonsuit was ineffective because it was filed not by the plaintiff, GHOS, but by 'Orthopaedic Specialists, L.L.P.,' a nonexistent entity."[70] The supreme court held that this was a case of "misnomer," which "occurs when a party misnames itself or another party, but the correct parties are involved."[71] This situation differs from the case of "misidentification," which "arises when two separate legal entities exist and a plaintiff mistakenly sues an entity with a name similar to that of the correct entity."[72] Accordingly, the supreme court held that the trial court should have applied the "flexible" approach used in misnomer cases, and had abused its discretion in refusing to dismiss the case.[73]

VI. PLEADING

In *In re Shelby*, the Dallas Court of Appeals considered whether the trial court had abused its discretion by ordering the defendants to amend their verified denial, which denied that any partnership existed between them.[74] During their depositions, one of the defendants testified that although they were not "legal" partners with the other defendants, they were "partners in a nonlegal sense because they collaborated on the project" at issue.[75] The trial court ordered that the defendants amend their verified denial "to reflect the fact that they have made such statements that a form of partnership existed."[76] The court of appeals, however,

67. *Id.* at 693.
68. 295 S.W.3d 323, 325 (Tex. 2009) (per curiam).
69. *Id.* at 324.
70. *Id.* at 325.
71. *Id.*
72. *Id.*
73. *Id.* at 326.
74. 297 S.W.3d 494 (Tex. App.—Dallas 2009, no pet.).
75. *Id.* at 496.
76. *Id.* at 495.

found that the trial court had abused its discretion, because Texas Rule of Civil Procedure 93 "does not require a defendant to make affirmative representations in response to the plaintiff's allegations."[77]

In *In re Metropolitan Lloyds Insurance Co. of Texas*, the Dallas Court of Appeals held that the trial court abused its discretion by continuing to exercise jurisdiction over the case once the plaintiff had filed a non-suit.[78] Here, the plaintiff filed suit "seeking a declaration of its rights and obligations under an insurance policy issued to [the defendant]."[79] The defendant filed an answer which was titled "Defendant's Original Answer and Original Counterclaim."[80] However, the only reference to a counterclaim was in his prayer for relief, which stated,

> Defendant respectfully prays that upon a final hearing or trial of this case that a take [sic] judgment be entered for Defendant on Plaintiff's claims, that a judgment be entered against Plaintiff on Defendant's Insurance counterclaim, including Defendant's actual damages, attorney's fees, interest and costs of court and that Defendant receive such other relief to which it is justly entitled.[81]

The plaintiff subsequently filed a non-suit without prejudice, which the trial judge signed with an order that each party pay its own court costs. Thereafter, the defendant filed a "supplemental counterclaim," which included new statutory and tort claims.[82] The plaintiff sought dismissal of the counterclaim, arguing that the trial court had no jurisdiction after the non-suit. The trial court denied the motion, and the plaintiff appealed. The court of appeals found that the plaintiff's non-suit disposed of all the parties' claims and that no valid counterclaim survived the non-suit.[83] In particular, although the defendant's original answer contained the term "counterclaim," nothing in the pleading put the plaintiff on notice of any element of a cause of action or damages. Thus, even under a liberal construction of the pleadings, defendant's original pleading did not constitute a counterclaim.[84]

VII. DISCOVERY

An insurance company's two different capacities in the same lawsuit gave rise to an unusual application of the rules governing requests for admissions in *United States Fidelity & Guaranty Co. v. Goudeau*.[85] The plaintiff's employer had both a worker's compensation policy and an auto policy with underinsured-motorist coverage through United States Fidel-

77. *Id.* at 496-97.
78. No. 05-08-01712-CV, 2009 Tex. App. LEXIS 1764, at *1 (Tex. App.—Dallas Mar. 13, 2009, no pet.).
79. *Id.*
80. *Id.* at *1-2.
81. *Id.* at *2, 7.
82. *Id.* at *3.
83. *Id.* at *10.
84. *Id.* at *7.
85. 272 S.W.3d 603 (Tex. 2008).

ity & Guaranty Co. (USF&G). When the plaintiff was injured in the course of his employment, USF&G paid worker's compensation benefits, but denied benefits under the underinsured-motorist coverage. After the plaintiff sued USF&G for breach of the latter policy, USF&G intervened using a different law firm to assert a subrogation claim for the compensation benefits it had paid to the plaintiff. Thus, USF&G appeared as both an intervenor-plaintiff and a defendant in the case. As such, the Texas Supreme Court held that where requests for admissions were served on USF&G as an intervenor, its admission that the plaintiff was covered under the underinsured-motorist policy was not binding on USF&G as a defendant.[86] Although the supreme court noted that there was no case law on the issue and that USF&G might have avoided the confusion by intervening in the plaintiff's name, the fact remained that "a party appearing in one capacity cannot be bound by an admission sent to it in another."[87]

Whether to allow any discovery at all was at issue in two Texas Supreme Court decisions during the Survey period. In *In re Houston Pipe Line Co.*, the supreme court held that it was error for a trial court to order discovery on the merits of a dispute before ruling on a motion to compel arbitration.[88] Conversely, in *Ford Motor Co. v. Castillo*, the supreme court held that it was error to prohibit discovery into potential juror misconduct.[89]

The Texas Supreme Court confirmed the conclusion reached by most Texas courts of appeals that the sanction of excluding evidence not timely disclosed in discovery applies to summary judgment proceedings as well in *Fort Brown Villas III Condominium Ass'n v. Gillenwater*.[90] The supreme court noted that before no-evidence summary judgment motions became a part of Texas procedure, courts generally did not apply the exclusionary sanction.[91] With the new no-evidence procedure, and in light of the change in the discovery rules establishing pretrial deadlines that no longer necessarily change with a change in trial date, the evidence presented at the summary judgment and trial stages should be the same, and the exclusionary rule applies equally to both.[92]

Rule 193.3(d) allows a "party who produces material or information without intending to waive a claim of privilege" to belatedly assert the

86. *Id.* at 610.

87. *Id.* In his dissent, Justice Green argued that USF&G was but one legal person with one interest itself and that any competition between the two corporate factions was not a matter for the Texas courts. *Id.* at 613 (Green, J., dissenting).

88. No. 08-0800, 2009 Tex. LEXIS 468, at *5 (Tex. July 3, 2009). The supreme court noted that by statute, a trial court may permit some discovery when necessary to obtain information on the arbitrability question itself. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.023(b), 171.086(a)(4), (6) (Vernon 2005)).

89. 279 S.W.3d 656, 662 (Tex. 2009).

90. 285 S.W.3d 879, 881-82 (Tex. 2009) (per curiam).

91. *Id.* at 881.

92. *Id.* at 882.

privilege and "snap back" inadvertently produced material.[93] In *In re Certain Underwriters at Lloyd's London*, the Beaumont Court of Appeals held that the rule's reference to a "party" is not intended to limit its protection only to the actual parties to the lawsuit.[94] The court of appeals reached its conclusion based on the broad reach and interplay of the various discovery rules governing parties and non-parties, as well as the remedial purpose of the rule.[95]

Net-worth discovery was at issue in *In re Jacobs*.[96] Although the Houston Fourteenth Court of Appeals held that the plaintiffs were entitled to net-worth discovery based on their gross-negligence allegations, it expressed concern over the intrusion into a party's personal finances and the opportunity for harassment that such discovery entails.[97] Accordingly, the court of appeals concluded that limitations on the scope of deposition discovery into that topic are appropriate, and that each defendant need only state "(1) his or her current net worth, i.e., . . . total assets less current total liabilities . . . in accordance with generally accepted accounting principles . . . and (2) the facts and methods used to calculate [same]."[98] No further inquiry should be allowed without a showing that the information provided is inaccurate or incomplete.[99]

Finally, the Dallas Court of Appeals took on the propriety of a deposition of a former U.S. president in *In re Bush*.[100] The underlying suit arose out of Southern Methodist University's purchase of a condominium complex, in which the plaintiff owned units, that ultimately was included as part of the property on which the George W. Bush Presidential Library will be located. After extensive discovery, including depositions of the university's president and the former White House counsel, the plaintiff sought to take the deposition of former President George W. Bush himself. The court of appeals noted that the deposition of a former or sitting president is an extremely rare event.[101] Accordingly, the court of appeals held that such a deposition "should only be compelled when 'his testimony would be material as tested by a meticulous standard, as well as being necessary in the sense of being a more logical and more persuasive source of evidence than alternatives that might be suggested.'"[102] The plaintiff did not meet this standard, and the court of appeals therefore held that the deposition should not proceed.[103]

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93. TEX. R. CIV. P. 193.3(d).
94. 294 S.W.3d 891, 905 (Tex. App.—Beaumont 2009, orig. proceeding [mand. denied]).
95. *Id.*
96. 300 S.W.3d 35 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding).
97. *Id.* at 41-42, 46.
98. *Id.* at 46.
99. *Id.*
100. 287 S.W.3d 899 (Tex. App.—Dallas 2009, orig. proceeding).
101. *Id.* at 902.
102. *Id.* at 903 (quoting United States v. Poindexter, 732 F. Supp. 142, 147 (D.D.C. 1990)).
103. *Id.* at 905.

VIII. DISMISSAL

In *Ginn v. Forrester*, the Texas Supreme Court dismissed a restricted appeal that challenged the dismissal of a case for want of prosecution, holding that while the trial court is required to give notice of a hearing on its intent to dismiss for want of prosecution, the rules do not require that the trial court clerk actually make a record of the mailing of those notices.[104] Here, the trial court apparently did not give the requisite notice of its intent to dismiss the case for want of prosecution.[105] Upon review, the court of appeals suggested that for purposes of a restricted appeal, the appellant could supplement the record with some evidence from the trial court clerk showing the absence of any notice given of the dismissal hearing.[106] The appellant complied and supplemented the record accordingly with a notation from the trial court clerk indicating that the record was devoid of any evidence of such notice. The supreme court dismissed the appeal, holding that there is no difference for purposes of a restricted appeal between "a record that is silent and a record that contains a written notation that the record is silent."[107] In either case, any alleged error was not apparent from the face of the record, and a restricted appeal was not proper.[108]

In *Crites v. Collins*, the Texas Supreme Court held that a pending motion for sanctions under the Medical Liability Insurance Improvement Act[109] filed before the entry of an order of voluntary non-suit did not deprive the trial court of jurisdiction to consider the sanctions motion.[110] Similarly, in *Unifund CCR Partners v. Villa*, the supreme court held that the trial court's sanction order entered nine months after the plaintiff had voluntarily non-suited the case was not void for lack of jurisdiction, because the defendant filed the sanctions motion before the order of non-suit was entered, and the order of non-suit did not specifically address the request for sanctions.[111]

The Dallas and Fort Worth Courts of Appeals reached opposite conclusions during the Survey period regarding the propriety of trial courts' dismissals of civil suits brought by incarcerated plaintiffs for their failure to appear at mandatory hearings. In *Ringer v. Kimball*, a case heard by the Fort Worth Court of Appeals, the trial court issued an order requiring the parties to appear at a pre-trial conference.[112] Shortly before the hearing, the incarcerated plaintiff moved for the trial court to issue a bench warrant, or alternatively, to allow the plaintiff to appear at the hearing by a video conference call. The motion did not make any further explanation

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104. 282 S.W.3d 430, 431 (Tex. 2009) (per curiam).
105. *Id.*
106. *Id.* at 432.
107. *Id.* at 433.
108. *Id.*
109. Tex. Civ. Prac. & Rem. Code Ann. § 74.351 (Vernon 2005 & Supp. 2009).
110. 284 S.W.3d 839, 843 (Tex. 2009) (per curiam).
111. 299 S.W.3d 92, 93, 96-97 (Tex. 2009) (per curiam).
112. 274 S.W.3d 865, 866 (Tex. App.—Fort Worth 2008, no pet.).

regarding the need to attend the hearing. The trial court did not expressly rule on this motion, which was deemed overruled, and the inmate did not appear at the pretrial conference. The trial court then dismissed the case for want of prosecution. The court of appeals affirmed the dismissal, holding that the trial court did not abuse its discretion in refusing to enter a bench warrant or allow the inmate to appear by video conference, because prisoners have no absolute right to appear in person for every court proceeding.[113] Moreover, the inmate's motion failed to show on its face the need for the issuance of the bench warrant or the video conference, as the supreme court required in *In re Z.L.T.*[114]

However, in *Johnson v. Handley*, the Dallas Court of Appeals reached the opposite conclusion and reversed and remanded a dismissal for want of prosecution of an incarcerated plaintiff where the trial court denied the plaintiff's motion to issue a bench warrant or allow him to appear in court by alternate means.[115] In reversing the dismissal, the court of appeals held that, although the motion seeking the issuance of the bench warrant was insufficient under the *Z.L.T.* standard because it failed to specify the facts that required his personal appearance at the hearing, the denial of the request to appear in court by alternative means was error.[116] The court of appeals held that an appearance before the trial court by telephone would have been an effective way to allow the plaintiff to appear at the hearing, and trial court's denial of the motion "rendered it impossible for appellant to comply with the requirements of the court's own notice."[117]

Finally, the Austin Court of Appeals in *In re General Motors Corp.* held that a trial court's 2007 order purporting to vacate an order of dismissal that had been inadvertently issued in 2003 was void, because the 2007 order was issued after the trial court's plenary power had expired.[118] In this car dealer dispute, the dealer filed suit in 1998 seeking damages, which the trial court abated by an order entered in 2001 to allow the dispute to proceed administratively before the Texas Motor Vehicle Board. In 2003, while the suit was abated, the trial court inadvertently sent notices of its intent to dismiss for want of prosecution, absent the filing of a motion to retain. While counsel for the defendants received the dismissal notice, counsel for the dealer did not, due to the clerk's failure to note a change of address for the dealer's counsel. The following month, the trial court dismissed the suit for want of prosecution. In 2007, the dealer moved to lift the 2001 abatement order and subsequently discovered that the suit had been dismissed in 2003. The dealer then sought to declare the dismissal order void, because, among other reasons, it was

113. *Id.* at 867-68, 870.

114. *Id.* at 868-70; 124 S.W.3d 163, 165-66 (Tex. 2003) (setting forth the factors trial courts should weigh in deciding whether to issue a bench warrant).

115. 299 S.W.3d 925, 927-28 (Tex. App.—Dallas 2009, no pet.).

116. *Id.* at 929; *see Z.L.T.*, 124 S.W.3d at 165-66.

117. *Johnson*, 299 S.W.3d at 929.

118. 296 S.W.3d 813, 830 (Tex. App.—Austin 2009, orig. proceeding).

issued during the abatement period. The trial court agreed and found that its 2003 dismissal order was "null and void" as having been inadvertently entered.[119] The defendants then sought a writ of mandamus to vacate the 2007 order, which had declared void the 2003 dismissal order. The court of appeals held that the trial court lacked jurisdiction to enter its 2007 order vacating the 2003 dismissal order.[120] While expressing its displeasure that the defendants had sat silent for four years and allowed the case to proceed administratively without ever advising the plaintiff or the judicial system that the case had been dismissed, the court of appeals nonetheless concluded that the 2003 dismissal order could not be declared void by the 2007 order.[121] The court of appeals concluded that by 2007, the trial court's plenary power had long since expired, and the existence of the 2001 abatement order when the 2003 dismissal order was entered did not change that result.[122]

IX. JURY PRACTICE

In *In re Bank of America*, the Texas Supreme Court decided whether its holding in *In re Prudential Insurance Co. of America*—which held that in some circumstances a contractual waiver of jury trial was enforceable[123]—creates a presumption against waiver.[124] In this case, the court of appeals had held that the party seeking to enforce the waiver of the jury trial provision had the burden of producing prima facie evidence that the other party knowingly and voluntarily waived its constitutional right to a jury trial. As an initial matter, the supreme court noted that the court of appeals had misinterpreted the supreme court's decision in *Prudential* as imposing a presumption against contractual jury waivers.[125] Rather, *Prudential* had held that contractual jury waivers do not violate public policy and are enforceable.[126] The supreme court stated that such a presumption "would not only be contrary to the longstanding Texas contract principle that parties are free to enter into contracts without fear of retroactive nullification," but would also be erroneous for two other reasons.[127] First, "a presumption against contractual jury waivers wholly ignores the burden-shifting rule articulated in *General Electric*, where [the supreme court] held that 'a conspicuous provision is prima facie evidence of a knowing and voluntary waiver and shifts the burden to the opposing party to rebut it.'"[128] The supreme court noted that Texas case law has always presumed that "a party who signs a contract knows its con-

119. *Id.* at 820.
120. *Id.* at 830.
121. *Id.* at 821 n.6, 830.
122. *Id.* at 813, 821.
123. 148 S.W.3d 124, 130-33 (Tex. 2004).
124. 278 S.W.3d 342, 343 (Tex. 2009) (per curiam).
125. *Id.* at 343.
126. *Prudential*, 148 S.W.3d at 131.
127. *Bank of Am.*, 278 S.W.3d at 344.
128. *Id.* (quoting *In re* Gen. Elec. Capital Corp., 203 S.W.3d 314, 316 (Tex. 2006) (per curiam)).

tents."[129] Therefore, "[a]s long as there is a conspicuous waiver provision, [the party] is presumed to know what it is signing."[130] Second, the supreme court in *Bank of America* held that "a presumption against waiver would create an unnecessary distinction between arbitration and jury waiver clauses, even though [the supreme court has previously] expressed that . . . jurisprudence 'should be the same for all similar dispute resolution agreements.'"[131] Accordingly, the supreme court expressly held that "*Prudential* does not impose a presumption against jury waivers that places the burden on [the party seeking to enforce that provision] to prove that the waiver was executed knowingly and voluntarily."[132]

In *Moeller v. Blanc*, the Dallas Court of Appeals addressed an attorney's burden of proof when presenting a race-neutral explanation in response to a *Batson* challenge.[133] In this case, the attorney had used a peremptory strike to exclude an African-American venire member from the jury. The court of appeals first noted that the moving party had demonstrated a prima facie case of racial discrimination and moved to the second stage of the burden-shifting analysis, which required the responding attorney to provide "a race-neutral explanation for his use of peremptory strikes."[134] Here, when asked to give his reasons for the peremptory strike, the attorney stated as follows:

> On my notes, I don't know which ones are African-Americans and which ones aren't, so I'm going to give the Court my reasons for striking all eight that I struck, plus my alternate. . . . Juror No. 28, I have no notes on that juror in response to anybody's question. I have no response to any question [opposing counsel] asked. I have no response to any questions I asked, and no response to any questions [other opposing counsel] asked, so I know nothing about that person. And based on that, [I] was not comfortable putting that person on the jury.[135]

In other words, the attorney argued that he simply did not want to select a juror that he knew absolutely nothing about. The court of appeals held that "this assertion is not legally distinguishable from the cases holding that a 'bad feeling' about a panelist is not an adequate race-neutral reason."[136] Rather, it was "too vague for a court to be able to judge its legitimacy because it [was] not based on any observable facts."[137] Accordingly, the court of appeals found that this proffered reason did not constitute a race-neutral explanation, and it sustained the *Batson* challenge on appeal.[138]

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129. *Id.*
130. *Id.*
131. *Id.* at 343-44 (quoting *Prudential*, 148 S.W.3d at 134).
132. *Id.* at 346.
133. 276 S.W.3d 656, 660 (Tex. App.—Dallas 2008, pet. denied).
134. *Id.*
135. *Id.* at 663.
136. *Id.* at 665.
137. *Id.*
138. *Id.* at 666.

X. JUDGMENTS

In *In re Minter Electric Co.*, the Dallas Court of Appeals addressed the question of when a judgment becomes final in a multi-party case where a summary judgment has been entered in favor of one defendant but another defendant has not been served.[139] In this personal injury dispute, the plaintiffs sued a company and its employee. After the case had been on file for ten months, the trial court granted a no-evidence summary judgment motion in favor of the company, which was the only defendant that had been served. Although the summary judgment order presented to the trial court was entitled "Final Judgment," the court struck the word "Final" from the order before signing it. Approximately one year later, the trial court signed an order setting aside its summary judgment order and scheduling the case for trial on the merits. The corporate defendant sought a writ of mandamus, claiming that the initial judgment was final, and therefore, the trial court lacked jurisdiction to modify its original summary judgment order. The court of appeals denied the writ, holding that mandamus was not proper, because the record did not conclusively show that the plaintiff never intended to serve the individual defendant.[140] Thus, because the summary judgment order did not conclusively dispose of all issues and all parties, it was not a final judgment. Rather, the plaintiffs named the individual defendant in all of their pleadings, provided an address where service could be obtained, and paid for service to be issued on the individual defendant. Additionally, because the trial court struck through the word "Final" before "Judgment" in its summary judgment ruling, the court of appeals reasoned that this notation was a further indication that the trial court did not intend for the summary judgment ruling to be a final judgment.[141] Last, the court of appeals observed that the no-evidence summary judgment motion had been granted after the case had been on file for only ten months.[142] The court stated that the length of time the case had been on file, while not determinative, was also a factor to be considered in the decision to deny the request for mandamus based upon lack of jurisdiction.[143]

In *Lavender v. Lavender*, the Texarkana Court of Appeals faced the situation where the trial court in a divorce proceeding entered three separate judgments, all on the same day, and all file stamped with the same time.[144] Two of the judgments purported to be final (i.e., containing language stating they were disposing of all parties and all issues) on their face, while the third judgment did not state it was a final judgment. Noting that there can be only one final judgment in a case, the court of appeals held that it was impossible to determine from the record which of

139. 277 S.W.3d 540, 543 (Tex. App.—Dallas 2009) (orig. proceeding).
140. *Id.* at 544.
141. *Id.*
142. *Id.*
143. *Id.*
144. 291 S.W.3d 19, 22-23 (Tex. App.—Texarkana, no pet.).

the three simultaneously filed judgments was, in fact, the single "final" judgment.[145] Further, it was not possible in this case to read all three judgments collectively as one. Therefore, the court of appeals reversed and remanded the case to the trial court for further disposition.[146]

XI. MOTIONS FOR NEW TRIAL

The Texas Supreme Court issued several significant opinions on the subject of motions for new trial during the Survey period. In *Dolgencorp of Texas, Inc. v. Lerma*, the supreme court held that the trial court had erred in failing to grant a motion for new trial after entering a post-answer default judgment against the defendant when its lead counsel failed to appear for trial because he was in trial in another county.[147] In this property damage suit, the defendant, although having previously announced ready for trial, sent an associate to the docket call in Cameron County to advise the trial court that its lead counsel was preferentially set for trial the next week in Harris County. Nonetheless, the trial court required the associate to select a jury and then instructed the jury to be ready to return to start trial two days later. The next week, the defendant's lead counsel was, in fact, called to trial in Harris County. Although the Harris County judge and the associate placed numerous calls to the Cameron County trial court advising them that the defendant's lead counsel would still be in trial when the case was set to start, and although the Harris County court actually wrote the Cameron County trial court advising that it was having trouble reaching that court, the trial judge in Cameron County called the case to trial. Neither the defendant's lead counsel nor his associate was present. The trial court advised the jury that it had received calls from both the associate and the Harris County court, but not the defendant's lead counsel; therefore, the trial court was going to discharge the jury and proceed with a bench trial. The trial court then entered a post-answer default judgment against the defendant. The trial court subsequently denied the defendant's motion for new trial, which the court of appeals affirmed. The supreme court reversed, holding that neither the defendant's participation in the selection of the jury, nor its failure to file a verified motion for continuance, waived the defendant's right to seek a motion for new trial.[148] Moreover, because the defendant's counsel and the Harris County court had gone to considerable effort to try to advise the Cameron County trial court of the status of the defendant's lead counsel in another trial, it had satisfied the elements for a motion for new trial as set forth in *Craddock v. Sunshine Bus Lines, Inc.*[149] The supreme court remanded the case for a new trial, but declined to render judgment for the defendant based upon the insuffi-

145. *Id.*
146. *Id.* at 23.
147. 288 S.W.3d 922, 924 (Tex. 2009) (per curiam).
148. *Id.* at 925, 927, 929.
149. *Id.* at 926, 929; *see* Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 133 S.W.2d 124 (1939).

ciency of the evidence presented during the post-answer default judgment prove-up.[150] The supreme court reasoned that rendering judgment for the defendant would have given the defendant more relief than it would have received had its motion for new trial been granted.[151] The supreme court concluded its opinion by noting that trial courts should, and in most instances do, extend professional courtesies to each other and the attorneys in instances like this, where counsel for a party is unable to appear for trial because that attorney is in trial in another court.[152]

In two cases involving the granting of motions for new trial, *In re Columbia Medical Center of Las Colinas*,[153] and *In re E.I. du Pont de Nemours and Co.*,[154] the Texas Supreme Court held that trial courts must give more of an explanation than "in the interest of justice" as a basis for granting motions for new trial that set aside jury verdicts.[155] In reaching this conclusion, the supreme court noted that the majority of states require trial courts to articulate the bases for their decisions to set aside jury verdicts, and held that Texas trial courts should likewise explain their reasons for such decisions.[156]

In *In re Lovito-Nelson*, the Texas Supreme Court conditionally granted a writ of mandamus, holding that a docket entry showing the granting of a motion for new trial coupled with the entry of a new agreed scheduling order by all parties did not meet the requirements of Rule 329b(c),[157] which requires a signed, written order to effectuate the granting of a motion for new trial.[158] To the extent that *Thorpe v. Volkert*[159] is inconsistent with this ruling, the supreme court disapproved of that opinion.[160]

In *In re Baylor Medical Center at Garland*,[161] the Texas Supreme Court overruled its prior holding in *Porter v. Vick*,[162] which precluded a motion for new trial from being "ungranted" more than seventy-five days after it was signed. The supreme court held that a trial court should be allowed to set aside a new trial order at any time before a final judgment has been entered.[163] In this mandamus proceeding arising from a medical malpractice case, the jury found for the defendant, and the presiding trial court originally entered judgment in its favor. That judge then granted the plaintiffs' motion for new trial. In the meantime, the original trial judge was succeeded by another trial judge, who first vacated the new-trial order and reinstated the original judgment on the jury verdict, but

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150. *Lerma*, 288 S.W.3d at 930-31.
151. *Id.* at 930.
152. *Id.*
153. 290 S.W.3d 204 (Tex. 2009).
154. 289 S.W.3d 861 (Tex. 2009).
155. *Columbia Med. Ctr.*, 290 S.W.3d at 206; *DuPont*, 289 S.W.3d at 861.
156. *Columbia Med. Ctr.*, 290 S.W.3d at 212-13.
157. TEX. R. CIV. P. 329b(c).
158. 278 S.W.3d 773, 775-76 (Tex. 2009) (per curiam).
159. 882 S.W.2d 592 (Tex. App.—Houston [1st Dist.] 1994, no writ).
160. *Lorito-Nelson*, 278 S.W.3d at 776.
161. 280 S.W.3d 227, 228, 232 (Tex. 2008).
162. 888 S.W.2d 789, 789-90 (Tex. 1994) (per curiam).
163. *Id.* at 231-32.

then reconsidered that decision and reinstated the prior new trial order. While the petition for mandamus was pending before the supreme court, yet another trial judge succeeded the second trial judge. Accordingly, the supreme court abated the mandamus proceeding to allow the current presiding judge to review the pending motion for new trial because a mandamus may not issue against a new judge for a former judge's rulings.[164]

XII. DISQUALIFICATION OF JUDGES

In re Wilhite presented the issue of whether a trial judge should be disqualified from presiding over a case because his previous law firm represented one of the litigants in similar lawsuits a decade before.[165] While the judge was a partner at the law firm, the firm twice represented Alcoa, Inc., in asbestos suits, although the judge was not personally involved in the representation. The underlying case against Alcoa in this mandamus proceeding concerned allegations of asbestos exposure at the same plant during the same period of time. The trial judge nevertheless declined to remove himself from the case, and a divided en banc Houston First Court of Appeals held that he was not constitutionally disqualified from hearing the case.[166] The court of appeals reasoned that the case did not present the same matter in controversy, in that the plaintiffs were different, and certain other defendants named in the suit were different, suggesting that the liability theories and defenses would be different as well.[167] Importantly, the court of appeals noted that the only issue before it was disqualification, not whether the judge should be recused based on whether his impartiality might reasonably be questioned, an issue on which the court of appeals expressed no opinion.[168]

XIII. MISCELLANEOUS

During the Survey period, the Texas Supreme Court ruled on three different issues regarding arbitration clauses.

First, in *In re Morgan Stanley & Co.*, the Texas Supreme Court held that the trial court, and not the arbitrator, should decide whether a party had the mental capacity to enter into a contract that contained an arbitration agreement.[169] Although the supreme court recognized that the Fifth Circuit had held in *Primerica Life Insurance Co. v. Brown* that the defense of mental incapacity was an issue for the arbitrator and not the court,[170] it declined to follow that case.[171] Rather, the supreme court held that the *Primerica* case had been widely criticized and that formation

164. TEX. R. APP. P. 7.2(b).
165. 298 S.W.3d 754, 756 (Tex. App.—Houston [1st Dist.] 2009, orig. proceeding [mand. denied]).
166. *Id.* at 761.
167. *Id.* at 759-60.
168. *Id.* at 761.
169. 293 S.W.3d 182, 183 (Tex. 2009).
170. 304 F.3d 469, 472 (5th Cir. 2002).
171. *Morgan Stanley*, 293 S.W.3d at 189-90.

defenses, such as mental capacity, are matters that go to the very existence of whether an agreement to arbitrate existed and, as such, were matters for the court to decide and not the arbitrator.[172]

Second, in *In re Houston Pipe Line Co.*, the Texas Supreme Court addressed what amount of discovery was appropriate prior to compelling a matter to arbitration.[173] In this case, the trial court permitted discovery on certain damage allegations and the existence of other potential defendants before deciding on a motion to compel arbitration. Although the Texas Arbitration Act authorizes pre-arbitration discovery when, without it, "a trial court cannot fairly and properly make its decision on the motion to compel" arbitration, the supreme court held that this authorization does not allow discovery on the merits of the underlying controversy.[174]

Finally, in *In re Gulf Exploration LLC*, the Texas Supreme Court had the opportunity to discuss those rare instances where mandamus relief would be available when a trial court compels arbitration.[175] In particular, in *In re Palacios*, the supreme court held that mandamus relief was generally unavailable for orders compelling arbitration, but stopped short of saying it was never available.[176] Rather, the supreme court in *Palacios* had noted that mandamus review might be available if an applicant could show "clearly and indisputably that the district court did not have the discretion to stay the proceedings pending arbitration."[177] In *Gulf Exploration*, the supreme court confirmed that "[i]f appeal is an adequate remedy for an order compelling arbitration, mandamus must be denied."[178] The supreme court stated that whether an appeal was "adequate" "depend[ed] on a careful balance of the case-specific benefits and detriments of delaying or interrupting a particular proceeding."[179] However, since "both the federal and state arbitration acts pointedly exclude immediate review of orders compelling arbitration," the supreme court noted that "any balancing [test] must tilt strongly against mandamus review."[180] Accordingly, the delay and expense of an erroneous order compelling arbitration would not, standing alone, render a final appeal inadequate.[181] Rather, the supreme court stated, "The 'adequacy' of an appeal may be a closer question when the legislature has weighed in on both sides of the balance."[182] By way of example, the supreme court stated that mandamus review in another recent case was appropriate, because the arbitra-

172. *Id.* at 185, 190.
173. No. 08-0800, 2009 Tex. LEXIS 468, at *1 (Tex. July 3, 2009) (per curiam).
174. *Id.* at *5.
175. 289 S.W.3d 836, 841-43 (Tex. 2009).
176. 221 S.W.3d 564, 565 (Tex. 2006) (per curiam).
177. *Id.* (quoting Apache Bohai Corp., LDC v. Texaco China, B.V., 330 F.3d 307, 310-11 (5th Cir. 2003)).
178. *Gulf Exploration*, 289 S.W.3d at 842.
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*

tion "threatened to undermine the legislative workers compensation system as a whole."[183] Accordingly, "In those rare cases when legislative mandates conflict, mandamus [review of an order compelling arbitration may be] 'essential to preserve important substantive and procedural rights.'"[184]

183. *Id.* at 843 (discussing *In re* Poly-America, L.P.,, 262 S.W.3d 337, 352 (Tex. 2008).
184. *Id.* (quoting *In re* Prudential Ins. Co., 148 S.W.3d 124, 136 (Tex. 2004)).