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# APPELLATE PRACTICE AND PROCEDURE

*LaDawn H. Conway**
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## I. APPELLATE REVIEW BEFORE FINAL JUDGMENT

### A. MANDAMUS

#### 1. *Discovery Orders*

DURING the Survey period,[1] the Texas Supreme Court continued to recognize the availability of mandamus relief to correct erroneous discovery orders. For instance, in *In re Graco Children's Products, Inc.*, the plaintiff sought discovery of 20,000 pages of documents following the Consumer Products Safety Commission's settlement with the plaintiff for failure to report product defects.[2] In particular, the product or defect alleged in the plaintiff's suit had nothing to do with the products and defects at issue in the settlement. Because there was "no apparent connection between the alleged defect and the discovery ordered," the supreme court held the discovery requests "impermissibly overbroad" and conditionally granted mandamus.[3]

The supreme court also utilized the mandamus process to resolve an issue of first impression involving a discovery dispute. In *In re Christus Spohn Hospital Kleberg*, the relator inadvertently produced privileged material to its own testifying expert, rendering the material discoverable under Texas Rule of Civil Procedure 192.3(e)(6).[4] The supreme court was faced with whether Rule 193.3(d)'s "snap-back" provision could be invoked by the relator to protect the material from discovery. The supreme court concluded that the expert-disclosure rules prevail over the snap-back provision, "so long as the expert intends to testify at trial despite the inadvertent document production."[5] Because the relator continued to stand on its testifying expert designation, the documents could not be snapped back and the supreme court denied mandamus relief.[6]

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1. The Survey period is from October 1, 2006, to September 30, 2007.
2. *In re* Graco Children's Products, Inc., 210 S.W.3d 598 (Tex. 2006) (per curiam).
3. *Id.* at 600-01 (orig. proceeding) (per curiam); *see also In re* Allstate Co. Mut. Ins. Co., 227 S.W.3d 667, 668 (Tex. 2007) (orig. proceeding) (per curiam).
4. *In re* Christus Spohn Hosp. Kleberg, 222 S.W.3d 434 (Tex. 2007) (orig. proceeding).
5. *Id.* at 436-40.
6. *Id.* at 443, 445.

Appeal remains an inadequate remedy when a trial court erroneously orders disclosure of privileged information. In *In re Bexar County Criminal District Attorney's Office*, the District Attorney's Office claimed the work-product privilege to protect its prosecutors from testifying in a malicious prosecution suit arising from the plaintiff's neighbor allegedly filing a complaint that resulted in the criminal charges against the plaintiff.[7] The Texas Supreme Court conditionally granted the writ, concluding that the district attorney's office did not waive its work-product privilege against testifying even though it had produced its prosecution file to the malicious prosecution plaintiff for use in the civil case.[8]

### 2. *Arbitration and Forum Selection Orders*

Mandamus is still the proper avenue for enforcing arbitration provisions governed by the Federal Arbitration Act ("FAA"). In *In re Bank One, N.A.*, the Texas Supreme Court ordered mandamus relief, finding that the parties' arbitration agreements incorporated by reference on account signature cards were valid, and that Bank One did not waive its right to arbitration by moving to set aside a default judgment and requesting a new trial.[9] The supreme court in *In re RLS Legal Solutions, LLC* similarly granted mandamus to compel arbitration in a contract governed by the FAA where a relator's duress defense was unsuccessful to defeat arbitration because the alleged duress pertained to the entire agreement and not just to the arbitration provision.[10]

What about orders *compelling* arbitration under the FAA? Can a party obtain mandamus relief from such an order? In a case decided before the Survey period, *In re Palacios*, the Texas Supreme Court noted that while "an order denying arbitration under the FAA is reviewable by mandamus," federal courts do not allow the review of an order compelling arbitration until the entry of final judgment.[11] Accordingly, if the underlying case is merely stayed instead of dismissed, mandamus relief is unavailable.[12] The supreme court "recognize[d] [that] there is some one-sidedness in reviewing only orders that deny arbitration, but not orders that compel it."[13] However, "both the Federal and Texas acts leave little uncertainty that this is precisely what the respective legislatures in-

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7. *In re* Bexar County Crim. Dist. Attorney's Office, 224 S.W.3d 182 (Tex. 2007) (orig. proceeding).

8. *Id.* at 184-85, 190.

9. *In re* Bank One, N.A., 216 S.W.3d 825, 826-27 (Tex. 2007) (orig. proceeding) (per curiam).

10. *In re* RLS Legal Solutions, LLC, 221 S.W.3d 629, 630 (Tex. 2007) (orig. proceeding) (per curiam); *see also In re* Merrill Lynch Trust Co. FSB, 235 S.W.3d 185, 188 (Tex. 2007) (orig. proceeding); *In re* Merrill Lynch Trust Co. FSB, 235 S.W.3d 217, 218 (Tex. 2007) (orig. proceeding) (per curiam); *In re* Sonic-Carrollton V, L.P., 230 S.W.3d 811, 814-15 (Tex. App.—Dallas 2007, orig. proceeding).

11. *In re* Palacios, 221 S.W.3d 564, 565 (Tex. 2006) (orig. proceeding) (quoting Apache Bohai Corp. v. Texaco China, B.V., 330 F.3d 307, 310-11 (5th Cir. 2003)).

12. *Id.*

13. *Id.* at 566.

tended."[14] Significantly, the supreme court stopped short of holding that "mandamus review of an order staying a case for arbitration is entirely precluded."[15] The supreme court noted that relief from such an order may be granted if the relator meets a "'particularly heavy' mandamus burden to show 'clearly and indisputably' that the [trial] court did not have discretion to stay the proceedings pending arbitration."[16] Following *Palacios*, the courts of appeals have analyzed mandamus jurisdiction over orders compelling arbitration by considering whether the relator has met its "heavy burden to show an indisputable abuse of discretion."[17]

"[L]ike arbitration agreements," forum-selection clauses can also be enforced through mandamus.[18] In *In re AutoNation, Inc.*, the relator/employer filed suit in Florida against its former employee to enforce an employment contract containing a covenant not to compete and agreement to litigate in Florida. The employee later sued the employer in Texas state court, which refused to enforce the forum-selection clause. Finding mandamus available to enforce forum-selection clauses, the Texas Supreme Court reasoned:

> '[S]ubjecting a party to trial in a forum other than that agreed upon and requiring an appeal to vindicate the rights granted in a forum-selection clause is clear harassment'—harassment that injures not just the non-breaching party but the broader judicial system, injecting inefficiency by enabling forum-shopping, wasting judicial resources, delaying adjudication on the merits, and skewing settlement dynamics contrary to the parties' contracted-for expectations.[19]

### 3. *Incidental Trial Court Rulings*

While noting its "general proscription against using mandamus to correct incidental trial court rulings,"[20] the Texas Supreme Court stepped in numerous times during the Survey period to correct trial court rulings that would "disrupt the orderly processes of government,"[21] or that would amount to such a denial of rights "as to go to the heart of the case."[22] For example, the supreme court granted mandamus relief to correct a trial court's denial of a plea to the jurisdiction based on an agency's

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14. *Id.*
15. *Id.* at 565.
16. *Id.* at 565-66.
17. *In re* Premont Indep. Sch. Dist., 225 S.W.3d 329, 332 (Tex. App.—San Antonio, orig. proceeding) (citing *In re* Ivins, No. 09-06-00249-CV, 2006 WL 2075192, at *1 (Tex. App.—Beaumont July 27, 2006, orig. proceeding) (mem. op.); *see also In re* Great W. Drilling, Ltd., 211 S.W.3d 828, 835 (Tex. App.—Eastland 2006, orig. proceeding); *In re* Jim Walter Homes, Inc. 207 S.W.3d 888, 895 n.4 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding)).
18. *In re* AutoNation, Inc. 228 S.W.3d 663, 668 (Tex. 2007) (orig. proceeding).
19. *Id.* at 667-68.
20. *In re* Sw. Bell Tel. Co., L.P., 235 S.W.3d 619, 624 (Tex. 2007) (orig. proceeding) (quoting State v. Sewell, 487 S.W.2d 716, 719 (Tex. 1972)).
21. *Id.*
22. *In re* Allied Chem. Corp., 227 S.W.3d 652, 657 (Tex. 2007) (orig. proceeding) (quoting Able Supply Co. v. Moye, 898 S.W.2d 766, 772 (Tex. 1995)).

exclusive jurisdiction. Acknowledging the incidental nature of the ruling, the supreme court nevertheless ordered the relief because "[a]llowing the trial court to proceed if the [Public Utilities Commission] has exclusive jurisdiction would disrupt the orderly processes of government."[23] "That, coupled with the hardship occasioned by postponed appellate review, makes mandamus an appropriate remedy."[24]

Under some circumstances, a trial court order that merely sets a case for trial may warrant mandamus relief. Such circumstances may exist, for example, where there is "too little time between adequate [discovery] responses and trial for the defendants to have a fair chance to mount a defense."[25] A trial court's refusal to move the trial setting back may constitute an abuse of discretion, correctable by mandamus.[26]

#### 4. *Void Orders*

As in the past, mandamus relief continues to be available to correct a trial court's enforcement of an order that is void. Thus, in *In re Discount Rental, Inc.*, the Texas Supreme Court conditionally granted mandamus to correct a trial court's order forcing the sale of property in execution of a void judgment.[27]

#### 5. *Venue Rulings*

In *In re Texas Department of Transportation*, the Texas Supreme Court considered an original proceeding for mandamus under the authority of section 15.0642 of the Civil Practice and Remedies Code, which permits a party to apply for mandamus with an appellate court to enforce the

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23. *Sw. Bell*, 235 S.W.3d at 624.

24. *Id.*; *see also In re* Sw. Bell Tel. Co., L.P., 226 S.W.3d 400, 405 (Tex. 2007) (orig. proceeding); *but see In re* Thompson, Coe, Cousins, & Irons, LLP, 212 S.W.3d 918, 919, 921 (Tex. App.—Tyler 2007, orig. proceeding) (denying mandamus relief and discussing exceptions to the "long standing principle that there exists an adequate remedy by appeal when a trial court denies a plea to the jurisdiction").

25. *Allied Chem.*, 227 S.W.3d at 658.

26. *Id.* at 656-57. In *In re Allied Chemical Corp.*, a mass tort action had been pending for five years and the plaintiffs had not yet designated a medical expert on causation when the trial court set a trial date merely six months away. Granting mandamus relief from the trial setting, the Texas Supreme Court noted that "no one can prepare for trial" without evidence of causation. *Id.* The supreme court reasoned that such relief is appropriate "in mass toxic tort cases when plaintiffs have refused to produce basic information like this." *Id.* The supreme court cautioned that its grant of mandamus was no indication that it intended to intervene in more trial settings. *Id.* at 658. However, "trial settings . . . cannot be used to hold the parties hostage." *Id.* at 659. The dissent disagreed that mandamus relief was appropriate, given the relators' failure to first avail themselves to pretrial methods to remedy incomplete discovery responses. *Id.* at 665. The concurrence, however, pointed out that the "relators' objection to going to trial before plaintiffs have produced evidence of causation is tantamount to a request for such evidence and the trial court's order setting trial is tantamount to a refusal to compel its production." *Id.* at 662 (Hecht, J., concurring). "When a 'request [for relief] would have been futile and the refusal little more than a formality', they are not prerequisites to mandamus review." *Id.*

27. *In re* Discount Rental, Inc., 216 S.W.3d 831, 832-33 (Tex. 2007) (orig. proceeding) (per curiam).

mandatory venue provisions of that chapter.[28] In doing so, the supreme court expressly recognized that, "[i]n seeking mandamus under section 15.0642, a party need not prove the lack of an adequate appellate remedy, but need only show that the trial court abused its discretion by failing to transfer the case."[29]

### 6. *Disqualification Orders*

"When a trial court improperly denies a motion to disqualify opposing counsel, there is no adequate relief by appeal."[30] The Texas Supreme Court thus conditionally granted mandamus relief in *In re Basco*, concluding that disqualification was "mandatory" where the circumstances of the case would require the disqualified attorney to question the work product of his former law partner.[31]

### 7. *Appellate Court Sanctions Order*

Without specifically discussing the standards warranting mandamus relief, the Texas Supreme Court conditionally granted mandamus in *In re Moore* to correct a court of appeals's order imposing sanctions.[32] In *In re Moore*, a child's mother and alleged paternal grandmother were engaged in a child custody battle in three lawsuits. In all three suits, the trial court awarded custody to the grandmother, but those decisions were later reversed by the court of appeals. Ultimately, the court of appeals awarded custody to the mother and ordered, as a sanction, the grandmother to pay the mother more than $47,000 for the mother's attorneys' fees and costs. Conditionally granting the grandmother's petition for writ of mandamus, the supreme court "[a]ssum[ed] without deciding that the court of appeals had the authority to issue the sanctions order," and concluded that the court of appeals "abused its discretion in doing so" by basing the sanctions on unfounded grounds.[33]

### 8. *Diligence in Seeking Mandamus Relief*

Twice during the Survey period, the Texas Supreme Court rejected arguments that a party had waived its right to pursue mandamus relief. In *In re Southwestern Bell Telephone Co., L.P.*, the supreme court rejected the real parties in interest's argument that Southwestern Bell Telephone Co., L.P. ("Southwestern Bell") had waived its right to mandamus relief because it sought mandamus relief too long after the trial court's refusal to abate the case.[34] Although the trial court heard oral argument and denied Southwestern Bell's motion on December 2, 2004, the court did

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28. 218 S.W.3d 74, 76 (Tex. 2007) (orig. proceeding) (per curiam). The petitioner first sought and was denied mandamus relief in the court of appeals.
29. *Id.* (interpreting Tex. Civ. Prac. & Rem. Code Ann. § 15.0642 (Vernon 2002)).
30. *In re* Basco, 221 S.W.3d 637, 639 (Tex. 2007) (orig. proceeding) (per curiam).
31. *Id.* at 638.
32. *In re* Moore, 235 S.W.3d 210, 211 (Tex. 2007) (orig. proceeding) (per curiam).
33. *Id.* at 213.
34. *In re* Sw. Bell Tel. Co., L.P., 226 S.W.3d 400, 405 (Tex. 2007).

not enter a written order until April 18, 2005, and Southwestern Bell did in fact seek mandamus relief less than one month later.[35] Likewise, in another mandamus by Southwestern Bell, the supreme court rejected the plaintiffs' (real parties in interest) argument that Southwestern Bell had waived its right to mandamus relief by waiting more than a year to file its supreme court mandamus petition after the court of appeals denied relief.[36] The supreme court found the delay justified because the plaintiffs had asserted a new claim after the court of appeals denied mandamus relief, which prompted Southwestern Bell to remove the case to federal court.[37] "From the time the case was removed to federal court until it was remanded to state court, the state court was prohibited from taking further action."[38] "[U]nder these circumstances," the supreme court concluded, "[Southwestern Bell] did not waive its right to mandamus relief."[39]

## B. INTERLOCUTORY APPEALS

### 1. *Interlocutory Appeals in the Courts of Appeals*

Generally, only final judgments are appealable.[40] In certain circumstances, however, parties may appeal interlocutory orders.[41] Statutes authorizing such appeals should be strictly construed.[42]

#### a. Orders Subject to Interlocutory Appeal

##### i. *Orders Relating to Immunity and Pleas to the Jurisdiction*

During the Survey period, the Texas Supreme Court considered whether appellate courts have jurisdiction to consider a government official's interlocutory appeal of the denial of a jurisdictional plea. In *Texas A & M University System v. Koseoglu*,[43] the plaintiff, a former employee of Texas A & M University, sued the university and his former supervisor, McLellan. When the trial court denied McLellan's plea to the jurisdiction based on sovereign immunity, he appealed. The appellate court held that it was without jurisdiction to decide McLellan's appeal because, as a state official, McLellan had no statutory right under section 51.014(a)(8) of the Civil Practice and Remedies Code to appeal the trial court's denial of a plea to the jurisdiction premised on sovereign immunity. Section 51.014(a)(8) provides that "[a] person may appeal from an interlocutory order . . . that . . . grants or denies a plea to the jurisdiction

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35. *Id.* at 404-05.
36. *In re* Sw. Bell Tel. Co., 235 S.W.3d 619, 624 (Tex. 2007).
37. *Id.*
38. *Id.*
39. *Id.*; *see also In re* Border Steel, Inc., 229 S.W.3d 825, 836 (Tex. App.—El Paso 2007, orig. proceeding).
40. Hudak v. Campbell, 232 S.W.3d 930, 931 (Tex. App.—Dallas 2007, no pet.).
41. *Id.*
42. *Id.*
43. 233 S.W.3d 835 (Tex. 2007).

by a governmental unit . . . ."[44]

On appeal, the supreme court first examined the language of the statute, concluding that "person" describes who may pursue an appeal, while "governmental unit" describes what may be appealed.[45] The supreme court also stated that subsection (a)(8) "cannot be read as applying solely to a governmental unit" because it allows "for interlocutory appeals of orders granting *or* denying pleas to the jurisdiction."[46] Since a governmental unit would have no reason to appeal the *grant* of a plea to the jurisdiction, the supreme court reasoned that the statute must apply to plaintiffs as well.[47]

Finally, the supreme court stated that construing subsection (a)(8) to exclude state officials "would draw an artificial distinction between pleas filed by governmental entities and pleas filed by state officials asserting the entities' sovereign immunity from suit."[48] In short, the purpose of subsection (a)(8)—to resolve the question of sovereign immunity prior to suit and reduce litigation expenses—applies equally "regardless of whether the plaintiff chooses to style his petition against a governmental entity or a state official."[49] The supreme court thus concluded that "a state official may seek interlocutory appellate review from the denial of a jurisdictional plea."[50]

*Hudak v. Campbell* dealt with section 51.014(a)(5) of the Civil Practice and Remedies Code, which allows interlocutory appeal from an order that denies a motion for summary judgment based on the assertion of immunity by certain individuals.[51] In that case, the defendant appealed an interlocutory order denying her motion to dismiss. The Dallas Court of Appeals dismissed the appeal because the defendant was not appealing the denial of a motion for summary judgment. In reaching its decision, the court looked to the "nature of the motion," rather than just the title. Because the trial court did not apply any of the "procedural safeguards or levels and burdens of proof associated with motions for summary judgment," the court refused to treat the motion to dismiss as a motion for summary judgment.[52]

During the Survey period, the Houston Courts of Appeals considered whether they had jurisdiction over the interlocutory appeals by nonsuited parties. In *Young v. Villegas*, the plaintiffs sued Young and Baylor Col-

44. *Id.* at 837, 841 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8) (Vernon 2007).

45. *Id.* at 842.

46. *Id.* at 843 (emphasis added).

47. *Id.* at 842-43.

48. *Id.* at 844.

49. *Id.* at 845.

50. *Id.* at 844-46; *see also* Tex. Parks & Wildlife Dep't v. E.E. Lowrey Realty, Ltd., 235 S.W.3d 692, 693-94 (Tex. 2007).

51. *See* Hudak v. Campbell, 232 S.W.3d 930, 930-31 (Tex. App.—Dallas 2007, no pet.).; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(5) (Vernon 2007).

52. *Hudak*, 232 S.W.3d at 930-31.

lege of Medicine for alleged medical negligence.[53] The defendants filed a joint traditional motion for summary judgment and a joint plea to the jurisdiction, both based on immunity. Baylor did not assert any claims for affirmative relief against any party. Before the trial court ruled on the defendants' motion and plea, the plaintiffs nonsuited all of their claims against Baylor. More than four months later, the trial court signed an order denying the summary judgment motion and the jurisdictional plea as to Young. The trial court refused to rule on the motion and plea as to Baylor despite the nonsuit, and both defendants filed interlocutory appeals.[54]

Baylor sought to establish appellate jurisdiction under Civil Practice and Remedies Code section 51.014(a)(5), which allows interlocutory appeal of an order that "denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state," and section 51.014(a)(8), which allows the interlocutory appeal of an order that "grants or denies a plea to the jurisdiction by a governmental unit."[55] The Houston Fourteenth Court of Appeals first noted that although subsection (a)(5) does not expressly require that the party requesting interlocutory appeal also be the party whose motion or plea was denied by the trial court's order, "principles of standing generally require this to be so."[56]

Applying this rule, the court quickly disposed of Baylor's argument for interlocutory appeal under subsection (a)(5) because Baylor did not assert immunity as an "individual officer or employee of the state" or "political subdivision of the state."[57] With regard to subsection (a)(8), Baylor argued that the trial court's refusal to rule on its jurisdictional plea was equivalent to a denial of the pled. The court rejected Baylor's argument for two reasons. First, subsection (a)(8) does not authorize an appeal from a trial court's *refusal* to rule on a plea to the jurisdiction.[58] Second, the trial court had a good reason for not ruling on Baylor's plea—Baylor was no longer a party to the case.[59] After the plaintiffs nonsuited their claims against Baylor, Baylor's motion and plea were moot, and the trial court could no longer rule on them. Thus, the court of appeals lacked jurisdiction to hear Baylor's appeal.[60]

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53. Young v. Villegas, 231 S.W.3d 1 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).
54. *Id.* at 3.
55. *Id.* at 4-5 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a) (Vernon Supp. 2006)).
56. *Id.* at 5 (citing Elgin Indep. Sch. Dist. v. R.N., 191 S.W.3d 263, 266 n.1 (Tex. App.—Austin 2006, no pet.)).
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 5-6.

In *Klein v. Hernandez*,[61] another case involving Baylor, the underlying facts were essentially the same as in *Young*, with one material difference. After Baylor was nonsuited, the trial court in *Klein* mistakenly entered orders denying Baylor's motion for summary judgment and plea to the jurisdiction instead of declining to rule on them.[62]

The Houston First Court of Appeals disagreed with the *Young* court's reasoning regarding subsection (a)(5) as it applied to Baylor.[63] Under subsection (a)(5), a "person" may appeal from an interlocutory order that is "based on an assertion of immunity by an individual . . . ."[64] The court reasoned that if the person appealing had to be the same person asserting immunity, the legislature would have used the same term for both parties within the section. Further, the court explained that the broader reading of "person" is in line with the general statutory definition of "person" in the Civil Practice and Remedies Code.[65] Under the court's analysis, Baylor was a "person" appealing from an interlocutory order denying a summary judgment motion that was "based on an assertion of immunity by an individual [Klein] who is an officer or employee of the state or a political subdivision of the state."[66] Accordingly, the court of appeals had jurisdiction under subsection (a)(5).

Because the trial court in *Klein* mistakenly entered orders denying Baylor's summary judgment motion and jurisdictional plea, the basis for the *Young* court's ruling on subsection (a)(8) did not apply. Thus, the *Klein* court reached the question of whether Baylor was a "governmental unit" within the meaning of subsection (a)(8). The court rejected Baylor's argument that it was a state agency for all purposes. The court found that sections 312.006 and 312.007 of the Health and Safety Code, upon which Baylor relied, failed to cloak Baylor with "the status of a governmental unit for purpose of [subsection (a)(8)]—either expressly, through its terms, or implicitly, through the conferring of governmental immunity from suit or liability on Baylor."[67] As a result, the court of appeals did not have jurisdiction under subsection (a)(8).

*ii. Orders Relating to Arbitration*

The Texas Arbitration Act makes an order denying a motion to compel arbitration an appealable order.[68] The grant of a motion to *stay* arbitration proceedings, however, is not an implicit denial of a motion to compel

61. No. 01-06-00569-CV, 2007 WL 2264539 (Tex. App.—Houston [1st Dist.] Aug. 3, 2007, no pet.).
62. *Id.* at *5.
63. *Id.* at *8.
64. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(5) (Vernon 2007).
65. *Klein*, 2007 WL 2264539, at *8.
66. *Id.*
67. *Klein*, 2007 WL 2264539, at *5, *7-8.
68. W. Dow Hamm III Corp. v. Millennium Income Fund, L.L.C., 237 S.W.3d 745, 751 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a)(1) (Vernon 2005)).

arbitration.[69] Thus, when a motion to compel arbitration has been filed but not ruled upon, no interlocutory appeal may be taken from a subsequent order staying arbitration proceedings.[70]

*iii. Orders Relating to the First Amendment*

Under section 51.014(a)(6) of the Civil Practice and Remedies Code, an appeal may be taken from an interlocutory order that "denies a motion for summary judgment that is based in whole or in part upon a claim . . . or defense . . . arising under the free speech . . . clause of the First Amendment . . . ."[71] The Fort Worth Court of Appeals held that the statute does not "permit an interlocutory appeal from summary judgment rulings on non-free speech claims and defenses simply because they happen to be included in the same motion,"[72] finding that permitting such an approach "would allow a party to circumvent [the statute's] restriction . . . ."[73]

b. Trial Court Proceedings Pending Interlocutory Appeal

During the Survey period, the Houston First Court of Appeals addressed, as an issue of first impression, whether the 2003 amendment to section 51.014(b) of the Civil Practice and Remedies Code bars a plaintiff from amending his petition and rendering an interlocutory appeal moot, thereby depriving the appellate court of jurisdiction. Although the court of appeals acknowledged that such amendments are generally permitted notwithstanding the statutory amendment,[74] the 2003 amendment to section 51.014(b) of the Civil Practice and Remedies Code specifically provides that "[a]n interlocutory appeal under [s]ubsection (a)(3), (5), or (8) . . . stays all other proceedings in the trial court pending resolution of that appeal."[75] Thus, the court in *City of Houston v. Swinerton Builders, Inc.* held that a plaintiff's attempt to amend his petition and render an interlocutory appeal moot is without force when the appeal is based on a governmental entity's jurisdictional plea under subsection (a)(8).[76]

*2. Interlocutory Appeals in the Texas Supreme Court*

When a court of appeals's decision conflicts with a prior decision of another court of appeals or the Texas Supreme Court, the supreme court

69. *Id.*
70. *Id.* at 751-52.
71. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(6) (Vernon 2007).
72. Astoria Indus. of Iowa, Inc. v. SNF, Inc., 223 S.W.3d 616, 626 (Tex. App.—Fort Worth 2007, pet. denied).
73. *Id.* at 627.
74. City of Houston v. Swinerton Builders, Inc., 233 S.W.3d 4, 8 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (citing City of Austin v. L.S. Ranch, Ltd., 970 S.W.2d 750, 755 (Tex. App.—Austin 1998, no pet.)).
75. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(b) (Vernon 2007).
76. *Swinerton Builders*, 233 S.W.3d at 9.

will hear the case based on conflicts jurisdiction.[77] The supreme court has held that "[t]wo decisions conflict for purposes of establishing [conflicts] jurisdiction when the two are so similar that the decision in one is necessarily conclusive of the decision in the other,"[78] or "when there is inconsistency in [two] decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants."[79]

The Texas Supreme Court exercised conflicts jurisdiction over a number of interlocutory appeals during the Survey period.[80] Those appeals raised a host of different issues, ranging from premises liability[81] to personal jurisdiction.[82]

## II. PRESERVATION OF ERROR

"To preserve error for appellate review, the complaining party must timely and specifically object to the evidence and obtain a ruling."[83] Failure to comply with these requirements will result in waiver on appeal.[84]

### A. Ineffective Attempts at Running Objections

A timely running objection can preserve error in the continuing admission of evidence on a particular topic.[85] A running objection is ineffective, however, if not sufficiently specific.[86] In *Low v. Henry*, the Texas Supreme Court held that the "trial court did not abuse its discretion in denying [the plaintiff's] request for a running objection" where the plaintiff failed to "plainly identif[y] the source of the objectionable testimony, the subject matter of the witness's testimony and the ways the testimony would be brought before the [court]."[87]

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77. Stephen F. Austin State Univ. v. Flynn, 228 S.W.3d 653, 656 (Tex. 2007) (citing Tex. Gov't Code Ann. §§ 22.001(a)(2), 22.225(c) (Vernon 2007)).

78. *Id.*

79. State v. Holland, 221 S.W.3d 639, 642 (Tex. 2007) (quoting Tex. Gov't Code Ann. § 22.001(e) (Vernon 2007)).

80. *See, e.g.*, Lamesa Indep. Sch. Dist. v. Booe, 235 S.W.3d 710, 711 (Tex. 2007); IRA Res., Inc. v. Griego, 221 S.W.3d 592, 595 n.2 (Tex. 2007); Citizens Ins. Co. of Am. v. Daccach, 217 S.W.3d 430, 437-38 (Tex. 2007); Moki Mac River Expeditions v. Drugg, 221 S.W.3d 569, 574 (Tex. 2007).

81. *See Flynn*, 228 S.W.3d at 656-57 (exercising conflicts jurisdiction to determine whether a governmental unit may control a premises for purposes of waiving immunity under the Tort Claims Act, but not sufficiently control the premises for purposes of the recreational use statute).

82. *See* PHC-Minden, L.P. v. Kimberly-Clark Corp., 235 S.W.3d 163, 169 (Tex. 2007) (exercising conflicts jurisdiction to determine the appropriate time period for assessing "contacts" in a general jurisdiction analysis).

83. Bay Area Healthcare Group, Ltd. v. McShane, 239 S.W.3d 231, 235 (Tex. 2007) (citing Tex. R. App. P. 33.1(a)).

84. *Id.*

85. *Id.*

86. Low v. Henry, 221 S.W.3d 609, 619 (Tex. 2007).

87. *Id.* (quoting Volkswagen of Am., Inc. v. Ramirez, 159 S.W.3d 897, 907 (Tex. 2004)).

### B. Failure to Preserve Error in Jury Charge

In *Barker v. Eckman*,[88] the plaintiff contended that his claim was not barred by limitations because of the discovery rule. Although the plaintiff pleaded and presented evidence on the discovery rule, he did not request a jury question on the issue or object to the omission of such a question from the charge. On appeal, the defendants argued that the plaintiff had waived any right to rely on the discovery rule by failing to obtain a jury finding on it. Importantly, the Texas Supreme Court noted that the parties were disputing exactly *when* the plaintiff should have known about the defendants' breaches. Because the evidence on this issue was not conclusive, the trial court was precluded from applying the discovery rule absent appropriate jury findings.[89]

In *Equistar Chemicals, L.P. v. Dresser-Rand Co.*,[90] the plaintiff sued to recover damages allegedly caused by a defective product. In the charge, the jury was asked to find only one damages amount rather than distinguish between damages caused by tortious conduct and damages caused by breach of implied warranty. On appeal, the defendant argued that the plaintiff was precluded from recovering tort damages under the economic loss rule, which bars a plaintiff from recovering in tort if the only damage caused by the defective product is damage to the product itself. Since the defendant never objected to the damages question or instruction, damages had to be measured by the actual question and instruction given.[91]

### C. The Acceptance of Benefits Rule

In *Williams v. Lifecare Hospitals of North Texas, L.P.*,[92] the Fort Worth Court of Appeals considered the effect of the "acceptance of benefits" rule on a party's right to appeal. In that case, the trial court rendered judgment on a verdict against the defendants, awarding compensatory damages, interest, and court costs. The full amount of the judgment was subsequently disbursed to the plaintiffs. The plaintiffs then filed a notice of appeal, stating that they were only appealing the trial court's refusal to submit jury questions on malice and exemplary damages. The defendants filed a motion to dismiss, arguing that the plaintiffs were barred from maintaining their appeal because they had accepted the full benefit of the judgment. The plaintiffs responded by arguing that the reversal of the judgment on the grounds appealed could not possibly affect their right to the benefits accepted under the judgment and is a recognized exception to the acceptance of benefits rule.[93]

The court of appeals first noted that the appeal was governed by Texas Rule of Appellate Procedure 44.1(b), which authorizes a partial reversal

88. 213 S.W.3d 306 (Tex. 2007).
89. *Id.* at 311-12.
90. 240 S.W.3d 864 (Tex. 2007).
91. *Id.* at 865-68.
92. 207 S.W.3d 828 (Tex. App—Fort Worth 2006, no pet.)
93. *Id.* at 829-30.

and remand if the issues are "separable without unfairness to the parties."[94] The court then explained that in the context of bifurcated trials, Texas law requires the same jury to decide liability in the first phase and exemplary damages in the second phase.[95] The court found that the jury must consider "the totality of evidence presented at both phases of the trial"[96] when determining exemplary damages. This ensures that exemplary damage awards are not "grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages."[97] Thus, the court concluded that the issues of malice and exemplary damages were intertwined with the issues of ordinary negligence and compensatory damages and could not be separated.[98] Because the issues were not separable, the court held that reversal in *Williams* would "require remand for new trial on the entire case, which could affect or even eliminate the liability and amount of compensatory damages awarded to and accepted by [plaintiffs]."[99] Thus, the case did not fall within the exception to the acceptance of benefits rule, and so the plaintiffs were precluded from appealing.[100]

## III. FINALITY OF THE JUDGMENT

Severance of an interlocutory judgment from unresolved claims renders the judgment in the severed action final unless the trial court indicates otherwise in its order. In *Doe 1 v. Pilgrim Rest Baptist Church*, the Texas Supreme Court recognized that a trial court may condition severance on a "future certain event," such as the completion of an administrative procedure required by the district clerk.[101] The supreme court cautioned that this practice should be avoided, however, "because of the potential for confusion."[102]

To be final, a trial court's order need not "itemize [ ] each and every element of damages pleaded."[103] In *Ford v. Exxon Mobil Chemical Co.*, Ford moved for summary judgment on its entire case, including all of its fee claims. The evidence established attorneys' fees of $36,167 and expert fees of $1,500. According to Exxon, the trial court's lump sum award of $36,167 meant that it had not adjudicated expert fees and that its order was interlocutory. The Texas Supreme Court disagreed, stating that it has "never held that an order disposing of all claims can be final only if it itemizes each and every element of damages pleaded."[104] The fact that the order may have been incorrect, the supreme court noted, does not

94. *Id.* at 831-32 (citing TEX. R. APP. P. § 44.1(b)).
95. *Id.* at 833-34.
96. *Id.* at 834 (quoting Transp. Ins. Co. v. Moriel, 879 S.W.3d 10, 30 (Tex. 1994)).
97. *Id.* (quoting Sw. Red. Co. v. Bernal, 22 S.W.3d 425, 432-33 (Tex. 2000).
98. *Id.*
99. *Id.* at 834-35.
100. *See id.* at 835.
101. Doe 1 v. Pilgrim Rest Baptist Church, 218 S.W.3d 81 (Tex. 2007).
102. *Id.* at 82.
103. *See* Ford v. Exxon Mobil Chem. Co., 235 S.W.3d 615, 617 (Tex. 2007).
104. *Id.*

render it interlocutory.[105]

In *Bozeman v. Kornblit*, the Houston First Court of Appeals considered finality in the context of probate proceedings.[106] The Probate Code states that "[a]ll *final* orders of any court exercising original probate jurisdiction shall be appealable to the courts of appeals."[107] The court of appeals in *Bozeman* noted that "[t]he Probate Code does not clarify [ ] what constitutes a 'final' and, therefore, 'appealable' . . . order."[108] In *Bozeman*, "[t]he trial court issued [an] order . . . pursuant to section 405 of the Probate Code, which governs approval of final settlement of decedent estates." Although section 405 does not expressly authorize an appellate challenge, it provides an extensive list of matters that must be addressed in the account for final settlement before an estate is closed.[109]

The appellant argued that the trial court's order was final and appealable. The court of appeals disagreed, noting that the order expressly contemplated additional actions to be completed before the estate could be closed. In addition, the trial court had never ruled on the appellee's proposed application to close the estate. The court also rejected the appellant's argument that the order should be appealable simply because the title of section 405 includes the word "final." Ultimately, the court held that the order was not final because it "merely set[ ] the stage" for the closing of the estate.[110]

## IV. PERFECTING THE APPEAL

"Under the 'mailbox rule,' [ ] a document is deemed timely filed if it is sent to the proper clerk by first-class mail in a properly addressed, stamped envelope on or before the last day for filing and is received not more than ten days beyond the filing deadline."[111] Courts have taken a more flexible approach to the mailbox rule in cases involving prison inmates.[112] In *Ramos v. Richardson*, the plaintiff-inmate placed his notices of appeal in the outgoing prison mailbox twelve days before the filing deadline. The notices were not file-stamped by the court of appeals, however, until one day after the filing deadline. "Because the [plaintiff] 'did everything necessary to comply with the rules,'" the Texas Supreme Court held that his notice of appeal was timely.[113]

The Texas Supreme Court has also held that "[a] court of appeals may not dismiss an action due to a formal defect or irregularity without first

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105. *Id.*
106. Bozeman v. Kornblit, 232 S.W.3d 261 (Tex. App.—Houston [1st Dist.] 2007, no pet.).
107. Tex. Prob. Code Ann. § 5(g) (Vernon 2003) (emphasis added).
108. *Bozeman*, 232 S.W.3d at 262.
109. *See id.* at 262-63.
110. *Id.* at 262-64.
111. Ramos v. Richardson, 228 S.W.3d 671, 673 (Tex. 2007) (citing Tex. R. Civ. P. 5; Tex. R. App. P. 9.2(b)(1)).
112. *Id.*
113. *Id.* at 672-74.

allowing the petitioner reasonable time to cure the error."[114] In *Hood v. Wal-Mart Stores, Inc.*, a pro se petitioner met his deadline for filing a notice of appeal but failed to timely pay the filing fee or file an affidavit of indigence. The court of appeals notified the petitioner that his fee was past due and granted an additional ten days to pay. The petitioner did not pay the fee but instead filed an affidavit of indigence within the ten-day window. The court of appeals responded that the affidavit was untimely and ultimately dismissed the appeal for want of prosecution. Citing Texas Rule of Appellate Procedure 44.3, the Texas Supreme Court held that the court of appeals had erred in dismissing the appeal due to a formal defect without first allowing the petitioner reasonable time to cure the error.[115] Because the petitioner's affidavit was sufficient to discharge the filing fee requirement, the supreme court reversed the court of appeals' judgment.[116]

In *Rainbow Group, Ltd. v. Wagoner*, the Austin Court of Appeals noted that Texas Rule of Appellate Procedure 25.1(f) allows an amended notice of appeal to "'correct[ ] a defect or omission in an earlier filed notice.'"[117] The rule "does not, however, allow an appellant to alter its notice of appeal" to include an entirely different order for which the deadline to appeal has passed.[118]

Finally, the Waco Court of Appeals made clear that notices of appeal filed prior to final judgment do not act as placeholders for appeals that may be pursued sometime in the future.[119] In *Ganesan v. Reeves*, the plaintiff filed a notice of appeal at the pre-trial stage. He wanted to have the notice on file in the event that he decided to complain about the court's judgment at some later date. The court reasoned that there were simply "too many uncertainties" to permit such a procedure and accordingly refused to docket the plaintiff's appeal or hold it open.[120]

## V. WAIVER ON APPEAL

An appellate court is under no duty to make an independent search of the record for evidence supporting a position taken in an appellate brief.[121] In *Flores v. Star Cab Cooperative Ass'n*, the appellant filed a "Motion to Reduce Bond and Set Amount for Supersedeas" with the court of appeals but did not cite to any page numbers of the clerk's record, which included more than 1100 pages and fourteen volumes. Likening the motion to an appellate brief, the Amarillo Court of Appeals

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114. Hood v. Wal-Mart Stores, Inc., 216 S.W.3d 829, 830 (Tex. 2007).
115. *Id.*
116. *Id.*
117. Rainbow Group, Ltd. v. Wagoner, 219 S.W.3d 485, 492 (Tex. App.—Austin 2007, no pet.).
118. *Id.*
119. Granesan v. Reeves, 236 S.W.3d 816, 817 (Tex. App.—Waco 2007, pet. denied).
120. *Id.*
121. Flores v. Star Cab Coop. Ass'n, No. 07-06-0306, 2007 WL 2296166, at *2 (Tex. App.—Amarillo Aug. 10, 2007, no pet.).

stated, "[the appellant] cannot expect us to search the appellate record for evidence to supporting his [argument]."[122]

## VI. STANDARDS OF REVIEW

In the landmark case of *City of Keller v. Wilson*, the Texas Supreme Court held that where there are conflicts in testimony, the court of appeals must presume that the "jurors decided all of [the conflicts] in favor of the verdict if reasonable human beings could do so."[123] During the Survey period, the supreme court revisited these standards in *Jackson v. Axelrad*,[124] a medical malpractice case against a physician by a patient who was also a physician. In *Jackson*, both parties claimed the other was negligent, and the jury assessed slightly more fault to the plaintiff (51%) than the defendant (49%). On appeal from the trial court's taking-nothing judgment, the court of appeals reversed and remanded for new trial, disregarding the finding of the plaintiff's negligence on the basis that, generally, laymen have no duty to volunteer medical information during medical treatment. Noting that the plaintiff in *Jackson* was not a layman, but a doctor with expertise, the supreme court reversed, finding some evidence that the plaintiff doctor failed to report a critical symptom (where his pain began).[125]

In analyzing the case under the *City of Keller* presumption (that the jurors decided all conflicts in the testimony in favor of the verdict), the supreme court noted that, in the case of a split verdict, one version of the evidence (that the plaintiff reported where his pain began) supported the verdict against the defendant while the other version (that he did not) supported the verdict against the plaintiff.[126] Because reasonable jurors could not have believed both, the supreme court was faced with the question: "Which one must we presume jurors believed?"[127] The supreme court concluded that the answer "turns on the purpose of the presumption."[128] The purpose of the presumption "serves to protect jury verdicts from second-guessing on appeal" and therefore "operates in favor of any jury finding a litigant asks an appellate court to set aside."[129] In *Jackson*, the court of appeals set aside only one jury finding— that the plaintiff was negligent. Thus, "[t]o ensure that the appellate court did not substitute its own judgment for that of the jury," the supreme court was required to presume that the jurors found that the plaintiff did not report where his pain began.[130]

122. *Id.*
123. City of Keller v. Wilson, 168 S.W.3d 802, 819 (Tex. 2005).
124. 221 S.W.3d 650 (Tex. 2007).
125. *Id.* at 651-52.
126. *Id.* at 653.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*

Critically, however, the supreme court in *Jackson* pointed out that courts "cannot presume findings in favor of one part of the verdict if doing so creates an irreconcilable conflict with another."[131] As a result, there are some cases in which the presumption will not apply. In *Jackson*, however, "each party asserted several reasons why the other was negligent, so jurors did not have to agree on any one reason so long as they agreed on the result."[132] Because there was evidence that the defendant was negligent even if the plaintiff failed to report all of his symptoms, the supreme court could properly presume, without creating an irreconcilable conflict, that the jurors found that the plaintiff did not report where his pain began.[133]

Also during the Survey period, the Texas Supreme Court analyzed the applicability of *City of Keller* in the summary judgment context. In *Goodyear Tire and Rubber Co. v. Mayes*,[134] the supreme court held that the court of appeals applied the wrong standard of review in a case alleging liability against an employer-defendant for injuries resulting from a car accident caused by the defendant's employee. The accident occurred while the employee was driving the employer's truck on a personal errand to buy cigarettes at 3:00 a.m. The trial court entered a take-nothing summary judgment in favor of the employer. Reversing the summary judgment and remanding the case, the Houston First Court of Appeals applied a standard of review that viewed only the evidence and inferences favorable to the non-movant plaintiff. Under this standard, the court of appeals found sufficient evidence to raise a genuine issue of material fact as to whether the employee was acting in the course of the scope of his employment at the time of the accident. The Texas Supreme Court reversed, finding that the court of appeals had failed to apply the proper standard of review.[135] Citing *City of Keller*, the supreme court held: "[A]n appellate court reviewing a summary judgment must consider whether reasonable and fair-minded jurors could differ in their conclusions in light of *all* of the evidence presented."[136] The court of appeals erred by considering only the evidence favorable to the plaintiff, improperly that "ignoring undisputed evidence in the record that cannot be disregarded."[137] Properly considering *all* of the evidence, the supreme court concluded that there was no conflicting evidence to raise a genuine issue of material fact on the issue of the course and scope of employment at the time of the accident.[138]

Again looking to *City of Keller*, the Texas Supreme Court in *Central Ready Mix Concrete Co. v. Islas* reaffirmed that "[t]he standard for re-

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131. *Id.*
132. *Id.*
133. *Id.*
134. 236 S.W.3d 754 (Tex. 2007) (per curiam).
135. *Id.* at 756.
136. *Id.* at 755-57 (emphasis added).
137. *Id.* at 757.
138. *Id.* at 755-57.

viewing a judgment notwithstanding the verdict, like all other motions rendering judgment as a matter of law, requires [the court of appeals] to credit evidence favoring the jury verdict if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not."[139] Accordingly, while the court of appeals may state a standard that "examine[s] the record for evidence supporting the jury finding and ignore[s] all evidence to the contrary," this standard is proper only "so long as a reviewing court keeps in mind that some contrary evidence cannot be ignored."[140]

## VII. APPELLATE REMEDIES

During the Survey period, the Texas Supreme Court concluded in *Barker v. Eckman* that, under certain circumstances, a party is entitled to have his case remanded for a new trial on attorney's fees when compensatory damages are reduced.[141] Specifically, when a party challenges the factual sufficiency of the evidence to support a jury's finding as to attorney's fees, "[t]hey are entitled to a meaningful evidentiary review of the jury's determination."[142] In its factual sufficiency review, "an appellate court is to review the evidence according to the jury charge given and the jury findings in response to that charge."[143] Accordingly, when the jury's actual damages award is reduced on appeal, "[a] review of the original jury finding as to attorney's fees [cannot] afford the [party challenging the award] the factual sufficiency review to which they [are] entitled—a factual sufficiency review of a jury finding made in consideration of the correct damages amount."[144] Under such circumstances, "the error is reversible unless the appellate court is reasonably certain that the jury was not significantly influenced by the erroneous amount of damages it considered."[145]

Finding such circumstances in *Barker*, the supreme court remanded for a new trial on attorneys' fees. In doing so, the supreme court expressly rejected the suggestion that it remand the case to the court of appeals with instructions that the court perform a factual sufficiency review based on the correct damages amount.[146] "Such a process," the supreme court held, "would effectively require the court of appeals to substitute its judg-

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139. Cent. Ready Mix Concrete Co. v. Islas, 228 S.W.3d 649, 651 (Tex. 2007).
140. *Id.* (citing *City of Keller*, 168 S.W.3d at 811).
141. Barker v. Eckman, 213 S.W.3d 306, 313 (Tex. 2006).
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* The jury charge in *Barker* included a "results obtained" instruction in the question on attorneys' fees. The supreme court cautioned that "[n]ot every appellate adjustment to the damages which a jury considered as 'results obtained' when making attorney's fees findings will require reversal." *Id.* The supreme court in that case, however, was not reasonably certain that the jury was not significantly affected by the error in the damages award, "considering both the absolute value of the difference between the erroneous [$111,983] and correct [$16,180] amounts of damages, and the fact that the correct damages were one-seventh of the erroneous damages." *Id.*
146. *Id.* at 314.

ment for that of the jury," something an appellate court is *not* to do in conducting a factual sufficiency review.[147]

Twice during the Survey period, the Texas Supreme Court cautioned that, "absent fundamental error, an appellate court should refrain from deciding cases on legal errors not assigned by the parties."[148] First, in *Mack Trucks, Inc. v. Tamez*, the Corpus Christi Court of Appeals erred by considering expert testimony admitted in a bill of exceptions when the plaintiff did not assert error in the court of appeals regarding the trial court's exclusion of the evidence.[149] The Texas Supreme Court held, "[e]xcept for fundamental error, appellate courts are not authorized to consider issues not properly raised by the parties."[150] "[F]undamental error," the supreme court explained, includes:

> those instances in which error directly and adversely affects the interest of the public generally, as that interest is declared by the statutes or Constitution of our State, or instances in which the record affirmatively and conclusively shows that the court rendering the judgment was without jurisdiction of the subject matter.[151]

Then, in *Western Steel Co. v. Altenburg*, the Corpus Christi Court of Appeals "found" that the defendant had failed to prove the existence of its workers' compensation policy, although the existence of the policy was undisputed by the parties and no party complained on appeal that the defendant had failed in such proof.[152] The Texas Supreme Court held that "[c]reating issues of fact when the facts are not in dispute is akin to a court searching for errors that the parties have not raised"—something no court of appeals should do absent fundamental error.[153]

## VIII. MOOT APPEALS

"An appeal is moot when a court's action on the merits cannot affect the rights of the parties."[154] The Texas Supreme Court conducted a detailed analysis of the mootness doctrine in *In re Allied Chemical Corp.*[155] In that case, 1,900 plaintiffs sued 30 defendants, alleging exposure to toxic chemicals. Five years later, the trial court consolidated five of the claims and set the initial trial for just over six months away. The plaintiffs in the consolidated action varied in age, degree of exposure, type and severity of injury, and proximity to chemicals. Shortly after the trial court's order, the supreme court issued an opinion that reversed the same type of con-

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147. *Id.*

148. W. Steel Co. v. Altenburg, 206 S.W.3d 121, 124 (Tex. 2006) (per curiam); *see also* Mack Trucks, Inc. v. Tamez, 206 S.W.3d 572, 757 (Tex. 2006).

149. *Mack Trucks, Inc.*, 206 S.W.3d at 576-78. The plaintiff failed to preserve error by not objecting to the trial court's refusal to hear further evidence and subsequent refusal to reconsider its ruling. *Id.* at 577.

150. *Id.*

151. *Id.* at 575.

152. *W. Steel*, 206 S.W.3d at 122-24.

153. *Id.*

154. Zipp v. Wuemling, 218 S.W.3d 71, 73 (Tex. 2007).

155. 227 S.W.3d 652 (Tex. 2007).

solidation order in the same type of case in the same county. In light of this new case, the defendants asked for relief from the trial court and then from the appellate court, both to no avail. The defendants then petitioned the supreme court for mandamus relief, arguing that the trial court had erroneously consolidated the five claims and set the case for trial in the absence of adequate discovery responses from the plaintiffs. When the supreme court granted a stay and requested full briefing, the plaintiffs retreated, asking the trial court to withdraw its consolidation order and proceed to trial on just one plaintiff. The trial court granted these requests. The plaintiffs then supplemented their discovery responses to reflect their expert designations.[156]

The supreme court stated that the appeal was not moot for several reasons. First, the consolidation issue was capable of repetition yet evading review because the plaintiffs had given no assurance that they would not seek future consolidated trials inconsistent with supreme court precedent.[157] Accordingly, the consolidation issue was not moot.[158]

Second, even in the absence of consolidated claims, the defendants' argument regarding deficient discovery responses still remained as to the one plaintiff who was set for trial.[159] Further, the plaintiffs' last-minute attempt to supplement their discovery responses did not moot the discovery issue.[160] The issue before the court was not the adequacy of the discovery responses but their timeliness.[161] Thus, nothing changed when the plaintiffs finally disclosed which experts they would use at trial—"that they would not [disclose them] any earlier is precisely the defendants' complaint."[162]

Finally, the supreme court refused to endorse manipulation by the parties of pretrial discovery to evade appellate review: "[p]retrial [discovery] cannot be conducted one way when appellate courts are looking and another way when they are not."[163] Ultimately, the supreme court directed the trial court to vacate its order setting any of the plaintiffs' claims for trial until the defendants had a reasonable opportunity to prepare after learning the identity of the plaintiffs' experts.[164]

During the Survey period, the courts also addressed mootness in the context of injunctions and guardianship proceedings. In *Electrolux Home Care Products, Ltd. v. International Manufacturing Solutions Corp.*, the El Paso Court of Appeals refused to review an injunction that had expired by its own terms, explaining that "[w]hen an injunction becomes inoperative due to passage of time or because it has expired, issues re-

156. *Id.* at 654.
157. *Id.* at 655.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* at 659.

garding its validity become moot."[165] In *Zipp v. Wuelming*, the Texas Supreme Court held that guardianship issues are not necessarily mooted by the death of a ward, particularly where there is still a dispute about who should settle the estate and who should receive statutory fees and costs.[166]

## IX. RESTRICTED APPEALS

A restricted appeal from a default judgment must (1) be brought within six months after the trial court signs the judgment, (2) by a party to the suit, (3) who, either in person or through counsel, did not participate at trial, and (4) the error complained of must be apparent from the face of the record.[167] "No presumptions are made in favor of valid service."[168]

During the Survey period, the Texas Supreme Court addressed an issue of first impression: "whether the face of the record in a restricted appeal must show that service was forwarded to a statutorily required address."[169] In *Wachovia Bank of Delaware v. Gilliam*, the plaintiff sought substituted service on defendant Wachovia through the Secretary of State. The petition simply stated that Wachovia could be served at "920 King Street, Wilmington, Delaware 19801," without alleging any specific statute or rule. Nothing in the record indicated that the address provided was Wachovia's "home office" as required by the Texas Long-Arm Statute, or Wachovia's "principal office" as required by the Texas Business Corporations Act. The supreme court held that "for a default judgment to survive a restricted appeal, the face of the record must reflect that service was forwarded to the address required by statute."[170] Because nothing in the record showed that service was forwarded to the statutorily required address, the default judgment was vacated.[171]

## X. APPELLATE ATTORNEY'S FEES

A party requesting attorneys' fees for an appeal or other post-judgment proceeding must present evidence regarding a reasonable fee for those services at trial.[172] The Texas Supreme Court affirmed this rule in *Varner v. Cardenas*, declining to "change Texas procedure to allow post-judgment fees to be determined after appeal by remand to the trial court."[173]

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165. Electrolux Home Care Prods., Ltd. V. Int'l Mfg. Solutions Corp., 247 S.W.3d 239, 241 (Tex. App.—El Paso 2007, no pet.).
166. Zipp v. Wuelming, 218 S.W.3d 71, 74 (Tex. 2007).
167. *See* Harvestons Sec., Inc. v. Narnia Invs., Ltd., 218 S.W.3d 126, 129 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).
168. Wachovia Bank of Del. v. Gilliam, 215 S.W.3d 848, 850 (Tex. 2007).
169. *Id.*
170. *Id.* at 850.
171. *Id.* at 849-51.
172. Varner v. Cardenas, 218 S.W.3d 68, 69 (Tex. 2007).
173. *Id.* at 69-70.