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## Civil Evidence

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# CIVIL EVIDENCE

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**T**HIS Article is intended to provide an updated summary of the relevant Texas law regarding civil evidentiary issues and to highlight the most significant developments in this area of law during the Survey period.<sup>1</sup> Since the last survey, the Texas Supreme Court has articulated when the “snap-back” rule can be used to retrieve documents inadvertently provided to a party’s testifying expert. Also, several appellate courts issued important decisions regarding expert disqualification, the admissibility of settlement negotiations, and the introduction of a former client’s affidavit as parol evidence challenging the terms of a law firm engagement letter.

## I. PRIVILEGE

In *In re Christus Spohn Hospital Kleberg*,<sup>2</sup> the Texas Supreme Court addressed the applicability of the snap-back rule when attorney work product has been inadvertently provided to a party’s testifying expert.<sup>3</sup> In this medical malpractice action, the hospital inadvertently provided privileged work product documents to its testifying expert and attempted to retrieve the documents through the snap-back provision of Rule 193.3(d) of the Texas Rules of Civil Procedure.<sup>4</sup> The supreme court held

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1. The Survey period runs from October 1, 2006 to September 30, 2007. This article is not intended to analyze all Texas cases dealing with civil evidence issues.

2. 222 S.W.3d 434 (Tex. 2007).

3. *Id.* at 439.

4. *Id.* at 436. Rule 193.3(d) provides:

A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if—within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made—the producing party amends the response, identifying the material or information

that the inadvertent nature of the production could only preserve the privilege if the hospital's expert did not testify at trial.<sup>5</sup>

In balancing the tension between the snap-back provision that protects privileged documents and the requirements regarding expert disclosure, the supreme court reasoned that, so long as the hospital stood on its testifying expert designation, Rule 192.3's plain language and certain policy considerations that surrounded its amendment, compelled the conclusion that the documents could not be snapped back.<sup>6</sup> The supreme court noted that, under the former rule, privileged work product lost its protected status if the expert relied upon it as the basis for his or her testimony.<sup>7</sup> To avoid discovery disputes that frequently arose over what material an expert may or may not have relied on, Rule 192.3 was amended in 1999 to mandate the discovery of documents "that have been provided to, [or] reviewed by" a testifying expert.<sup>8</sup> Further, the supreme court noted that under Rule 192.5,<sup>9</sup> which governs testifying expert disclosure, documents provided to a testifying expert lose their work-product designation irrespective of the intent that accompanied their production because a jury is entitled to know what influenced the testimony and opposing counsel must be provided with that information to conduct an adequate cross-examination.<sup>10</sup>

After reviewing the federal expert-disclosure rule and other states' similar rules, the supreme court found that given the importance expert testimony can assume in a trial, and the corresponding concern that documents reviewed by a testifying expert should be produced, the disclosure requirements of "Rules 192.3(e)(6) and 192.5(c)(1) prevail over Rule 193.3(d)'s snap-back provision *so long as the expert intends to testify at trial.*"<sup>11</sup> The supreme court articulated an exception to this rule, how-

produced and stating the privilege asserted. If the producing party thus amends the response to assert a privilege, the requesting party must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege.

TEX. R. CIV. P. 193.3(d).

5. *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d at 435. Rule 192.3(e) provides, in pertinent part:

A party may discover the following information regarding a testifying expert or consulting expert whose mental impressions or opinions have been reviewed by a testifying expert . . . : (6) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of a testifying expert's testimony.

TEX. R. CIV. P. 192.3(e).

6. *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d at 436.

7. *Id.* at 438.

8. *Id.* (citing TEX. R. CIV. P. 192.3(e)(6)).

9. Rule 192.5 provides, in pertinent part:

Even if made or prepared in anticipation of litigation or for trial, the following is not work product protected from discovery: (1) information discoverable under Rule 192.3 concerning experts, trial witnesses, witness statements, and contentions.

TEX. R. CIV. P. 192.5(c).

10. *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d at 439-40, 443.

11. *Id.* at 440 (emphasis added).

ever: if the inadvertently-producing party can show that the privileged documents could not by their “nature” have influenced the expert’s opinion, then the expert-disclosure rule would not be implicated, and the party could snap-back the documents under Rule 192.3(d) without sacrificing their testifying expert.<sup>12</sup>

The hospital argued that the expert had not sufficiently reviewed the privileged documents so that they had not influenced the expert’s opinion.<sup>13</sup> However, the Texas Supreme Court ultimately held that the trial court correctly denied the request of the hospital to retrieve the documents because the testifying expert admitted that she “glanced” at the documents to determine that they were not something she needed or wanted to read, and it was unclear from the record to what extent she reviewed them.<sup>14</sup>

## II. RELEVANCE

### A. SETTLEMENT NEGOTIATIONS ADMISSIBLE TO DETERMINE REASONABLENESS OF ATTORNEY’S FEE AWARD

In *Vernon v. CAC Distributors, Inc.*,<sup>15</sup> a case in which the Plaintiff sought damages under the Fair Labor Standards Act (“FLSA”),<sup>16</sup> the First District Houston Court of Appeals addressed the admissibility of parties’ settlement negotiations with respect to determining the reasonableness of an attorneys’ fee award.<sup>17</sup> At the trial court, the plaintiff was successful in her FLSA claim, garnering the entire \$1,897.50 she pled in overtime wages plus an identical amount in liquidated damages; thus, she was entitled, as a matter of law, to her reasonable and necessary attorneys’ fees and court costs.<sup>18</sup> The trial court, therefore, awarded the plaintiff \$5,550 in fees and costs.<sup>19</sup>

On appeal, the employer did not challenge the award, but maintained that the trial court correctly reduced the award of attorneys’ fees to the value of thirty hours, not ninety hours, because to award the value of the full ninety hours was not “reasonable and necessary” as required under the statute.<sup>20</sup> In order to establish that ninety hours was unreasonable at trial, the employer sought to admit evidence relating to the settlement offers that it made to the plaintiff.<sup>21</sup> Although an offer to settle or compromise a claim is normally not admissible,<sup>22</sup> the court of appeals held

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12. *Id.* at 441.

13. *Id.* at 443.

14. *Id.* at 444-45.

15. No. 01-06-00009-CV, 2007 WL 2264455 (Tex. App.—Houston [1st Dist.] Aug. 9, 2007, no pet.).

16. 29 U.S.C. §§ 201-219 (2000).

17. *Vernon*, 2007 WL 2264455, at \*1.

18. *Id.* at \*2 (citing 29 U.S.C. § 216(b)).

19. *Id.* This number represented one-third of \$16,650 sought by Vernon’s attorney, calculated as ninety hours multiplied by his rate of \$185 per hour. *Id.*

20. *Id.* at \*4.

21. *Id.* at \*5.

22. TEX. R. EVID. § 408.

that the employer's evidence relating to the settlement offers was both relevant and admissible in relation to the reasonableness of the attorneys' fee award.<sup>23</sup>

The plaintiff first objected to the introduction of the settlement offers on the basis of relevance.<sup>24</sup> In a bench trial, the trial court overruled this objection, holding that the settlement offers were relevant because they tended to make more probable the fact that the plaintiff's attorney had spent more time than was reasonable and necessary to present the case through to trial.<sup>25</sup> The court of appeals agreed that the settlement proposals were relevant, holding that because the three settlements were greater than the cap on damages under the FLSA, they tended to prove that more than thirty hours on the matter was unreasonable.<sup>26</sup> The plaintiff also objected to the admissibility of the settlement proposals under Rule 408 of the Texas Rules of Evidence, which provides, "to prove liability for or invalidity of the claim or its amount[,] [e]vidence of conduct or statements made in compromise negotiations is likewise not admissible."<sup>27</sup> The court of appeals, however, held that because Rule 408 "does not require exclusion when the evidence is offered for another purpose," and because the settlement evidence was offered solely to "aid[] the court in determining the reasonableness of Vernon's attorney fees," that the settlement negotiations were admissible.<sup>28</sup> Accordingly, because it found that the settlement proposals were relevant and not barred by Rule 408 of the Texas Rules of Evidence, the court of appeals found that it was not an abuse of discretion to admit the settlement proposals into evidence.<sup>29</sup>

## B. RELEVANCE OF VALUE OF ASSIGNED LOAN

In *In re Pilgrim's Pride Corp.*,<sup>30</sup> Pilgrim's Pride sought mandamus to prevent discovery regarding documents concerning the amount it paid for debt instruments of the plaintiff, PPR&M, on the grounds that the amount paid was irrelevant.<sup>31</sup> During the underlying lawsuit, a suit on a sworn account seeking damages from Pilgrim's Pride, plaintiff defaulted on loans due to its former financing bank, Hibernia, who then intervened in the lawsuit.<sup>32</sup> Subsequent to the intervention, Hibernia assigned the loans to Pilgrim's Pride, and Pilgrim's Pride counterclaimed against PPR&M to collect the amounts due under the assigned loans as an offset against any amount it might owe on the underlying suit.<sup>33</sup> Pilgrim's Pride

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23. *Vernon*, 2007 WL 2264455, at \*5.

24. *Id.*

25. *Id.*

26. *Id.*

27. TEX. R. EVID. § 408.

28. *Vernon*, 2007 WL 2264455, at \*5.

29. *Id.*

30. 204 S.W.3d 831 (Tex. App.—Texarkana 2006, no pet.).

31. *Id.* at 832-33.

32. *Id.* at 833.

33. *Id.*

argued that because “a holder of a promissory note is entitled to recover the full amount due on the note regardless of what was paid for the assignment,” “the amount paid for the assignment is irrelevant.”<sup>34</sup> The Texarkana Court of Appeals held that they could not determine that the amount paid was not “patently irrelevant,” as required for a court to issue mandamus, even though it might prove inadmissible at trial.<sup>35</sup> The court held that, “[b]y pleading a counterclaim based on the assigned loans, Pilgrim’s Pride has placed the assigned loans in dispute.”<sup>36</sup> Further, because the transaction by which Pilgrim’s Pride acquired the loans from Hibernia “is the area of inquiry sought by PPR&M,” there was a possibility that the amount paid for the loans might be relevant, either to discern whether any value was paid or to discern whether equitable relief might be appropriate.<sup>37</sup> Thus, the court ruled that it was not an abuse of discretion for the trial court to have compelled production.<sup>38</sup>

### C. INTRODUCTION OF SUPERSEDED PLEADINGS AS EVIDENCE OF DISMISSAL OF OTHER DEFENDANTS

In *Bay Area Healthcare Group, Ltd. v. McShane*,<sup>39</sup> the parents of a child injured during childbirth sued a hospital for negligence-related claims, and the Texas Supreme Court addressed the admissibility of the plaintiff’s superseded pleadings.<sup>40</sup> At the trial court, the parents first sued the hospital and two doctors who came to help provide emergency assistance for the child; the parents, however, amended the petition by nonsuiting the two doctors before the trial.<sup>41</sup> Subsequently, the parents “filed a motion in limine to prevent Bay Area from introducing into evidence the superseded pleadings that listed Rothschild and Eubank [the two doctors] as defendants.”<sup>42</sup> Although neither side attempted to introduce the superseded pleadings into evidence, each party discussed the doctors’ status during voir dire, and the two doctors testified at trial as to their prior involvement in the case.<sup>43</sup> The supreme court was careful to note that the “McShanes’ counsel was the first to mention the doctors’ party status during voir dire.”<sup>44</sup>

The threshold question in any evidentiary dispute is whether the evidence is relevant, as only relevant evidence can be introduced at trial.<sup>45</sup> The supreme court noted that statements from pleadings can be excluded

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34. *Id.* at 834 (citing *Carter v. DeJarnatt*, 523 S.W.2d 88, 90-91 (Tex. Civ. App.—Texarkana 1975, writ ref’d n.r.e.)).

35. *Id.*

36. *Id.* at 835.

37. *Id.* at 835-36.

38. *Id.* at 836.

39. 239 S.W.3d 231 (Tex. 2007) (per curiam).

40. *Id.* at 233.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 233 n.1.

45. TEX. R. EVID. 402.

if they are either irrelevant or unfairly prejudicial.<sup>46</sup> However, the supreme court held that because plaintiffs' attorney was the first to mention the doctors' status as a prior party, they could not then complain that the doctors' testimony was irrelevant.<sup>47</sup> Because the McShanes opened the door to what may have otherwise been irrelevant information, the supreme court held that rebuttal evidence on the issue was admissible.<sup>48</sup>

The Texas Supreme Court also addressed the McShanes' objection that the superseded pleadings were inadmissible hearsay.<sup>49</sup> The supreme court recognized that a superseded pleading is an out-of court statement that would normally be classified as inadmissible hearsay.<sup>50</sup> Looking to the history of the Texas Rules of Evidence, the supreme court noted that before the current version of the Rules of Evidence came into effect in 1983, relevant information in the pleadings was inadmissible unless inconsistent,<sup>51</sup> as "cases required an inconsistency between the superseded pleading and the party's position at trial" in order to be admissible.<sup>52</sup> The supreme court further noted that, when a pleading is superseded, it no longer constitutes a pleading and therefore no longer acted as a judicial admission, which allows the pleading to be used at trial.<sup>53</sup> However, since the 1983 version of the Rules of Evidence came into effect, the Texas Supreme Court has held that there is no longer any requirement that the statement in the pleading be inconsistent with the party's position at trial.<sup>54</sup> The supreme court held that under Rule 801(e)(2) of the Texas Rules of Evidence, "subject to any other Rules of Evidence that may limit admissibility, *any* statement by a party-opponent is admissible against that party."<sup>55</sup> Therefore, the Texas Supreme Court held that the court of appeals erred in finding the superseded pleadings inadmissible, reversed the judgment of the court of appeals, and rendered judgment that the McShanes take nothing.<sup>56</sup>

### III. HEARSAY

In *Withrow v. Armstrong*,<sup>57</sup> the Waco Court of Appeals addressed the admissibility of a third party's assessment of the intrinsic value of a tree.<sup>58</sup> Withrow was accused of killing Armstrong's tree during an act of trespass, but the only evidence as to the value of the tree was Armstrong's

46. *Bay Area*, 239 S.W.3d at 234.

47. *Id.*

48. *Id.*

49. *Id.* at 235.

50. *Id.*

51. *See id.*

52. *Id.*

53. *Id.*, superseding *Drake Ins. Co. v. King*, 606 S.W.2d 812, 817 (Tex. 1980).

54. *Id.* at 235 (citing TEX. R. EVID. 801(e)(2)).

55. *Id.*

56. *Id.* at 235-36.

57. No. 10-05-00320-CV, 2006 WL 3317714 (Tex. App.—Waco Nov. 15, 2006, pet. denied).

58. *Id.* at \*2.

testimony that the he had received quotes for the replacement costs of the tree of \$14,884.38 and \$16,161.72.<sup>59</sup> After upholding the verdict finding Withrow liable for trespass, the court of appeals addressed his contention that no evidence existed to support the jury's award of \$5,000, because the only evidence of the tree's value was inadmissible hearsay.<sup>60</sup>

The court of appeals began its analysis by noting that where the cutting down of a tree does not reduce the market value, a court can award damages based on the tree's intrinsic value.<sup>61</sup> Further, it held that an "owner may testify regarding the intrinsic value of trees"<sup>62</sup> and that a "party may testify, based on his personal knowledge if he has performed his own research, as to the cost or value of his property."<sup>63</sup> The court held that the testimony regarding value was not offered to prove the truth of the matter asserted, but was instead offered to show the research that was the basis of the owner's personal knowledge.<sup>64</sup> Because Armstrong did not offer the testimony regarding the quotes to prove the truth of the matter asserted, the court held that the out-of-court statement was not hearsay, and; therefore, the lower court did not abuse its discretion by overruling the hearsay objections.<sup>65</sup>

#### IV. ADMISSIBILITY OF EXPERT TESTIMONY

##### A. TEXAS ROBINSON CASES

In *Guevara v. Ferrer*,<sup>66</sup> the Texas Supreme Court explored the limits of when mere non-expert evidence is sufficient to prove a causal connection between an occurrence and a resulting physical injury.<sup>67</sup> At trial, the jury awarded over \$1 million to the estate of the motorist injured in a car accident.<sup>68</sup> No expert testimony was given to establish causation; rather, the jury awarded damages based on non-expert testimony that created a logical connection between the accident and the victim's injuries.<sup>69</sup> The court of appeals affirmed the jury's finding, stating that the evidence was legally sufficient to support a finding of causation.<sup>70</sup> It focused on testimony stating that the victim did not suffer from any of his post-accident injuries before the accident, and relied on the standard that when testimony "establishe[s] a sequence of events which provide[s] a strong, logi-

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59. *Id.* at \*3.

60. *Id.* at \*2.

61. *Id.* (citing *Porras v. Craig*, 675 S.W.2d 503, 506 (Tex. 1984)). According to this court, "intrinsic value" is defined as the "inherent value not established by market forces; it is a personal or sentimental value." *Id.* (citing *Star Houston, Inc. v. Kundak*, 843 S.W.2d 294, 298 (Tex. App.—Houston [14th Dist.] 1992, no writ)).

62. *Id.* (citing *Porras*, 675 S.W.2d at 506).

63. *Id.* at \*3.

64. *Id.* at \*4.

65. *Id.*

66. No. 05-1100, 2007 WL 2457760 (Tex. Aug. 31, 2007).

67. *Id.* at \*4-5.

68. *Id.* at \*2.

69. *Id.* at \*2.

70. *Id.*



cally traceable connection between the event and the condition,” non-expert testimony is sufficient.<sup>71</sup>

However, the Texas Supreme Court disagreed with the El Paso Court of Appeals and espoused a slightly different standard.<sup>72</sup> The supreme court restricted when non-expert testimony is sufficient to support a finding of causation by itself. Specifically, the supreme court stated, “[n]on-expert evidence alone is sufficient to support a finding of causation in *limited* circumstances where both the occurrence and conditions complained of are such that the general experience and common sense of laypersons are sufficient to evaluate the conditions and whether they were probably caused by the occurrence.”<sup>73</sup>

Applying this rule to the facts of the case, the supreme court found that the victim’s “medical course clearly was not smooth or simple.”<sup>74</sup> As a result, the supreme court held that the evidence of the circumstances surrounding the car accident allowed “a layperson of common knowledge and experience” only to find the victim’s immediate post-accident condition, and transportation to and examination in “the emergency room [to be] causally related to the accident.”<sup>75</sup> Additionally, the supreme court determined that this evidence was legally insufficient to establish that the accident caused all of the victim’s injuries and related medical expenses.<sup>76</sup> Therefore, the Texas Supreme Court determined the proper action was to remand the case for consideration of remittitur with respect to expenses that required proof via expert evidence.<sup>77</sup>

#### B. FEDERAL DAUBERT<sup>78</sup> CASES

In *Mugworld, Inc. v. G.G. Marck & Associates, Inc.*,<sup>79</sup> the Eastern District of Texas excluded the testimony of two of the qualified experts for similar reasons.<sup>80</sup> The court found that their analysis was not sufficiently reliable because both experts failed to analyze a “statistically significant” sample of products in a products defect suit.<sup>81</sup> In a dispute related to the sale of allegedly defective goods, Mugworld, the plaintiff, returned approximately 150,000 mugs to the manufacturer.<sup>82</sup> The manufacturer’s expert on sublimation and coating examined 400 to 600 of the returned

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71. *Id.* (recognizing the appellate court’s reliance on *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729 (Tex. 1984)).

72. *Id.* at \*5.

73. *Id.* (emphasis added).

74. *Id.* at \*6. Indeed, after the accident, the eighty-six year old victim remained in the hospital for four months. *Id.* at \*1. After that, he went in and out of medical centers, complaining of various ailments. *Id.* There was also some evidence that the victim had significant past medical history, including hypertension and renal failure. *Id.*

75. *Id.* at \*6.

76. *Id.*

77. *Id.*

78. *See generally* *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

79. No. 4:05cv441, 2007 WL 2446533 (E.D. Tex. Aug. 23, 2007).

80. *Id.* at \*1, 2-4.

81. *Id.* at \*3-4.

82. *Id.*

mugs and found that 1-2% “contained defects that would make them commercially unacceptable.”<sup>83</sup> The court determined that the analysis of at most four-tenths of a percent of the amount returned was not sufficient to render the expert’s conclusions reliable under *Daubert*.<sup>84</sup> In addition, the court determined the manufacturer’s second expert’s testimony was not sufficiently reliable under *Daubert* for the same reason.<sup>85</sup> Although the court did not definitively say what percentage of the sample would have been sufficient to make the expert’s methodology reliable, it is clear that both experts failed to meet the undisclosed standard.<sup>86</sup>

In *Burton v. Wyeth-Ayerst Laboratories Division of American Home Products Corp.*,<sup>87</sup> the Northern District of Texas determined that two facets of an expert’s testimony were unreliable to support a \$1 billion award of punitive damages.<sup>88</sup> At trial, the plaintiff’s expert presented a schedule to the jury that suggested it should award punitive damages in the amount of \$100 million to \$2.5 billion.<sup>89</sup> The court determined that it was improper for an expert to present evidence of possible punitive damages to the jury.<sup>90</sup> The court relied on precedent from the United States District Court for the District of New Jersey in finding that the challenged testimony carried too great a risk of misleading the jury, especially since it was based on nothing more than the expert’s unsupported opinion.<sup>91</sup> Second, the court found that “economic impact testimony” was similarly unreliable.<sup>92</sup> In so doing, the court commented that the portion of the expert’s report that stated a \$1 billion award would have no punitive impact on the defendant was unreliable under *Daubert* because such conclusions “ha[ve] not been tested or subjected to peer review, ha[ve] no known error rate and ha[ve] not been accepted in the community of economists.”<sup>93</sup>

Notably, the court would not go as far as holding that the testimony giving evidence of the defendant’s net worth was improper.<sup>94</sup> Further, the court refused to find unconstitutional the provision of the Texas statutes permitting consideration of net worth when determining punitive damages.<sup>95</sup> The court recognized that the United States Supreme Court has held that presentation of such evidence “creates the *potential* that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences,” but refused to restrict evi-

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83. *Id.*

84. *Id.*

85. *Id.* at \*4.

86. *See generally id.*

87. 513 F. Supp. 2d 708 (N.D. Tex. 2007).

88. *Id.* at 717.

89. *Id.*

90. *Id.*

91. *Id.* (citing *Voilas v. Gen. Motors Corp.*, 73 F. Supp. 2d 452, 463-65 (D.N.J. 1999)).

92. *Id.*

93. *Id.* (quoting *Hayes v. Wal-Mart Stores, Inc.*, 294 F. Supp. 2d 1249, 1251-52 (E.D. Okla. 2003)).

94. *Id.* at 717-18.

95. *Id.* at 718 (citing TEX. CIV. PRAC. & REM. CODE § 41.011(a)(6)).

dence of the defendant's net worth.<sup>96</sup>

### C. EXPERT DISQUALIFICATION

In *Formosa Plastics Corp., USA v. Kajima International, Inc.*,<sup>97</sup> the Corpus Christi Court of Appeals addressed two issues of first impression in a rehearing en banc of a prior opinion. First, the court examined "whether an expert should be disqualified where he was retained by one side but was somehow related to an expert previously retained by the opposing party."<sup>98</sup> And second, "whether the entire firm of experts to which both of these experts belong should be disqualified."<sup>99</sup> To effectuate the resolution of these issues, the majority adopted the same basic test outlined in *Koch Refining Co. v Jennifer L. Boudreau MV*<sup>100</sup> and included additional factors utilized by other courts in its analysis.<sup>101</sup> The court confirmed that in order to disqualify an expert based on a prior relationship, the moving party bears the burden of establishing that (1) the expert had an "objectively reasonable basis to believe that a confidential relationship existed between that party and the expert witness and (2) confidential or privileged information was in fact provided to the expert by the moving party."<sup>102</sup> In addition, the court held that it would apply other factors, such as "fundamental fairness" and "prejudice," in its analysis.<sup>103</sup>

Applying this analysis, the court found it was not error for an expert to testify when (1) he worked for the same consulting firm as an expert retained by the opposing party to perform work related to the litigation for the movant, and (2) was copied on certain communications between the opposing party's attorneys and expert.<sup>104</sup> The court held that the movant did not meet either prong of the *Koch* test because it could not establish that it was objectively reasonable to conclude that the movant had a confidential relationship with an expert at the same firm as the one the movant employed.<sup>105</sup> And, the movant did not establish that any communication the other expert was copied on was in fact privileged.<sup>106</sup> Through this reasoning, the court additionally held that employment of an expert does not allow for the disqualification of the expert's firm.<sup>107</sup> The court noted its analysis was guided by the belief that "allowing experts to pursue their trade, allowing parties to select their own experts, and preventing gamesmanship . . . outweigh the policy of preventing con-

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96. *Id.* (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003)).

97. 216 S.W.3d 436 (Tex. App.—Corpus Christi 2006, pet. denied).

98. *Id.* at 447.

99. *Id.*

100. 85 F.3d 1178, 1181 (5th Cir. 1996).

101. *Formosa Plastics Corp.*, 216 S.W.3d at 447.

102. *Id.* at 448 (citing *Koch Ref. Co.*, 85 F.3d at 1181).

103. *Id.*

104. *Id.* at 446, 451.

105. *Id.* at 451.

106. *Id.* at 451.

107. *Id.*

flicts under the particular circumstances present in the instant case.”<sup>108</sup>

D. EXPERT REPORT REQUIREMENT OF THE TEXAS CIVIL PRACTICE AND REMEDIES CODE SECTION 74.351

Texas courts continued to broadly interpret the definition of a “health care liability claim” under Texas Civil Practice and Remedies Code section 74.351, and thus, when an expert report was necessary to support a claim. In one such case, the Dallas Court of Appeals held that a claim based on a doctor’s alleged breach of confidentiality qualified as a “health care liability claim” under section 74.351.<sup>109</sup> As such, the court determined that because the plaintiff failed to file an expert report, his claim should be dismissed.<sup>110</sup> The court’s determination ultimately rested on its resolution of “whether a physician’s duty of confidentiality is an inseparable part of the rendition of health care services or based on a standard of care applicable to health care providers.”<sup>111</sup> While the court recognized that expert testimony was not necessary to support a verdict on a breach of confidentiality claim, it commented that the claim was still a health care liability claim because patient-physician confidentiality is “inextricably intertwined with the physician-patient relationship and the health-care services to which the communication pertains.”<sup>112</sup> Ultimately, the court concluded that even though an expert report was not necessary for recovery, it was required to continue the suit under section 74.351, and therefore reversed the portion of the trial court’s order denying the defendant’s motions to dismiss, and rendered judgment in the defendant’s favor, dismissing the plaintiff’s claims with prejudice.<sup>113</sup>

Similarly, in *Clark v. Tirr Rehabilitation Center*,<sup>114</sup> the First District Houston Court of Appeals held that a negligent supervision claim against a physical therapist was a “health care liability claim,” requiring an expert report to continue the suit.<sup>115</sup> The court addressed a claim by the representative of a patient’s estate against a rehabilitation center as a result of negligent supervision by a licensed physical therapist.<sup>116</sup> The physical therapist allegedly failed to watch the elderly patient who fell from a “balance board,” causing her to fracture her pelvis and later die, possibly as a result of the injuries.<sup>117</sup> The court relied on a prior Texas Supreme Court case, which required expert testimony in a negligent supervision case, to extend the reach of section 74.351 to include claims of negligent supervision by a physical therapist.<sup>118</sup> The court reasoned that because

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108. *Id.* at 452.

109. *Sloan v. Farmer*, 217 S.W.3d 763, 769 (Tex. App.—Dallas 2007, pet. denied).

110. *Id.*

111. *Id.* at 768.

112. *Id.*

113. *Id.* at 769.

114. 227 S.W.3d 256 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

115. *Id.* at 263-64.

116. *Id.* at 258.

117. *Id.*

118. *Id.* at 261-62.

supervision is an inseparable part of the service rendered by the rehabilitation center, and is also inseparable from the accepted standards of safety applicable to the rehabilitation center, the claim is properly classified as a health care liability claim.<sup>119</sup>

## V. SANCTIONS

### A. DEATH PENALTY SANCTIONS

In *Van Es v. Frazier*,<sup>120</sup> the Waco Court of Appeals affirmed a trial court's imposition of "death penalty" sanctions *without an evidentiary hearing* due to the defendant's repeated failure to produce documents or appear for deposition, overruling *Minns v. Piotrowski*.<sup>121</sup> Plaintiffs had sued defendant Van Es, a dairy farm operator, and a water supply company, after the plaintiffs' water supply line ruptured. The water was allegedly contaminated with bovine manure and urine from the neighboring Van Es' dairy.<sup>122</sup> In both May and August 2005, the trial court granted motions for sanctions against Van Es, and ordered him to produce documents, appear with his wife for deposition, and pay \$3,000 in attorneys' fees as monetary sanctions.<sup>123</sup> In the order, the trial court warned Van Es that his pleadings would be struck and he would not be permitted to conduct discovery or proffer evidence at trial or any hearing unless he complied.<sup>124</sup>

Eight months after the initial sanctions order, and after Van Es failed to comply, the trial court signed its final sanctions order, which struck Van Es' pleadings and prohibited him from proffering evidence at trial or any hearing.<sup>125</sup> A month later, the court issued an order granting plaintiffs' motion for partial summary judgment, striking Van Es' summary judgment response, and awarding actual damages of \$581,793 and attorneys' fees of \$121,171.<sup>126</sup> A month after that order, the court held a "final hearing"—at which Van Es did not appear—and found Van Es liable for exemplary damages of \$250,000.<sup>127</sup>

Among other things, Van Es argued on appeal that the sanctions were an abuse of discretion because the trial court failed to hold an evidentiary hearing and the plaintiffs failed to present any evidence (at any of the hearings that were held) to justify the imposition of sanctions.<sup>128</sup> In rejecting Van Es' argument that an identifiable evidentiary hearing was required before death penalty sanctions could be imposed, the court of

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119. *Id.* at 263.

120. 230 S.W.3d 770 (Tex. App.—Waco 2007, pet. denied).

121. *Van Es*, 230 S.W.3d at 776 (citing *Minns v. Piotrowski*, 904 S.W.2d 161 (Tex. App.—Waco 1995), writ denied, 917 S.W.2d 796 (Tex. 1996)).

122. *Id.* at 773.

123. *Id.* at 774.

124. *Id.*

125. *Id.*

126. *Id.* The order also declared Van Es' dairy permit void. *Id.*

127. *Id.* at 774-75.

128. *Id.* at 776, 778.

appeals looked to *Cire v. Cummings*,<sup>129</sup> in which the Texas Supreme Court upheld a trial court's sanction of \$250 without holding an "oral hearing" beforehand.<sup>130</sup> The court of appeals also cited *Tidrow v. Roth*<sup>131</sup>—a case in which the Dallas Court of Appeals found it was an abuse of discretion to issue death penalty sanctions without notice and hearing—in support of the proposition that death penalty sanctions can be imposed without an evidentiary hearing.<sup>132</sup>

The court of appeals also rejected Van Es' argument that the plaintiffs provided no evidence at any of the hearings to justify the imposition of sanctions, reasoning that "a trial court may consider factors other than 'evidence,' in determining whether to impose a discovery sanction. Thus, the court did not abuse its discretion by imposing sanctions even though the [plaintiffs] did not formally present 'evidence' in the sanctions hearings."<sup>133</sup> Although the court of appeals did not say so explicitly, when making a determination on death penalty sanctions without evidence, a trial court may presumably rely on the same factors that the court of appeals must when reviewing the trial court's decision to impose a sanction—namely, "the entire record . . . , arguments of counsel, the written discovery on file, and the circumstances surrounding the party's alleged discovery abuse."<sup>134</sup>

In contrast to the situation in *Van Es*, in *In re Rozelle*,<sup>135</sup> the San Antonio Court of Appeals found that the trial court abused its discretion in ordering "death penalty" sanctions against a plaintiff who untimely responded to requests for admissions. The plaintiff had failed to timely respond to the requests during a two-month period in which he was *pro se* while searching for new counsel to represent him.<sup>136</sup> Such requests were phrased almost exclusively as issue-preclusive legal conclusions, and after the plaintiff missed the deadline, they were deemed admitted pursuant to Rule 198.2(c) of the Texas Rules of Civil Procedure.<sup>137</sup> Although the plaintiff realized his responses were due before the deadline, he explained that he was "not sure what to do" without the advice of an attorney, and was preoccupied dealing with several personal family issues.<sup>138</sup> After obtaining representation, the plaintiff filed a motion to withdraw the deemed admissions, which the trial court denied, finding no evidence that his failure to timely respond was due to "accident or mistake."<sup>139</sup> Predictably, the deemed admissions became the centerpiece for the de-

129. 134 S.W.3d 835, 843-44 (Tex. 2004).

130. *Van Es*, 230 S.W.3d at 776.

131. 189 S.W.3d 408 (Tex. App.—Dallas 2006, no pet.).

132. *Van Es*, 230 S.W.3d at 776.

133. *Id.* at 778 (internal citation omitted).

134. *Id.* at 777-78.

135. 229 S.W.3d 757 (Tex. App.—San Antonio 2007, orig. proceeding).

136. *Id.* at 759.

137. *Id.* Rule 198.2(c) provides, in pertinent part, that "[i]f a response is not timely served, the request is considered admitted without the necessity of a court order." TEX. R. CRV. P. 198.2(c).

138. *In re Rozelle*, 229 S.W.3d at 760.

139. *Id.*

fendant's summary judgment motion, which remained pending while the plaintiff sought mandamus relief.<sup>140</sup>

Based on the Texas Supreme Court's holding in *Wheeler v. Green*,<sup>141</sup> the court of appeals found that when a party attempts to use deemed admissions to preclude presentation of the merits of a case, due process concerns arise, and thus the trial court used the wrong standard: it should have determined whether the plaintiff failed to respond to the requests in "flagrant bad faith or callous disregard for the rules," instead of whether he failed to respond due to "accident or mistake."<sup>142</sup> The court of appeals found that the trial court abused its discretion in denying the motion to withdraw because, even though the plaintiff knew about the deadline, he was unsure of how to proceed without the advice of counsel and such conduct does not rise to the level of flagrant bad faith or callous disregard for the discovery rules.<sup>143</sup>

#### B. AWARD OF ATTORNEYS' FEES AS SANCTIONS

In *Broesche v. Jacobson*,<sup>144</sup> the Fourteenth District Houston Court of Appeals affirmed the trial court's order to pay \$179,500 in sanction, based on unnecessary attorneys' fees expended in response to sanctionable conduct.<sup>145</sup> The suit concerned a divorce decree providing that the ex-wife was to receive certain oil and gas interests of her ex-husband (a geologist) and her ex-husband's employer (an oil and gas exploration company).<sup>146</sup> During the course of the litigation, the ex-wife avoided her initial deposition, claiming that she was sick.<sup>147</sup> At her rescheduled deposition, she was not prepared to answer questions regarding her damages calculation. After a hearing the same day, the court gave the ex-wife a day to prepare and ordered the deposition to resume.<sup>148</sup> When the deposition resumed, she was still unable to fully answer the damages questions.<sup>149</sup> Further, four hours after the start of the deposition, she disclosed that she and her attorney had found another box of relevant documents the night before that had not been produced before the discovery deadline.<sup>150</sup> Despite her protests to the contrary, the trial court found that the ex-wife's failure to produce the documents was not inadvertent.<sup>151</sup>

In addition to the discovery shenanigans, the trial court found that a series of incidents surrounding the Christmas holidays also constituted

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140. *Id.*

141. 157 S.W.3d 439 (Tex. 2005) (per curium).

142. *In re Rozelle*, 229 S.W.3d at 764.

143. *Id.*

144. 218 S.W.3d 267 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

145. *Id.* at 274-75.

146. *Id.* at 270.

147. *Id.* at 275-76.

148. *Id.* at 276

149. *Id.*

150. *Id.*

151. *Id.*

sanctionable conduct.<sup>152</sup> Specifically, the ex-wife hired co-counsel on December 23, 2002, and immediately prepared a motion for continuance, even though trial was scheduled for January 6, 2003, with a December 27, 2002 deadline for exchanging draft jury charges and motions in limine.<sup>153</sup> Instead of informing opposing counsel about the motion for continuance or serving the motion by facsimile (as had been practice throughout the litigation), the ex-wife's counsel served the motion by mail by driving to the airport post office late that evening.<sup>154</sup> Counsel for the ex-husband and his employer learned of the motion on December 26, after working Christmas Eve and Christmas Day to meet the deadlines.<sup>155</sup> After all this, the new co-counsel never drafted any pleadings and only made one court appearance.<sup>156</sup> Despite the ex-wife's counsel's argument that sanctions were inappropriate because she violated no rule of civil procedure in serving by mail, the trial court found that the motion for continuance was for the purpose of delay, and therefore frivolous and in bad faith, in violation of Rule 13 of the Texas Rules of Civil Procedure.<sup>157</sup> Based on the above facts, the court of appeals found that the trial court did not abuse its discretion in determining that the attorney for the ex-wife should be sanctioned for his conduct, even if he did not violate a specific rule or statute.<sup>158</sup>

### C. SANCTIONS IN SUITS INVOLVING INTERESTS OF CHILDREN

This year, two courts of appeals separately addressed sanctions in suits affecting the interests of children, and in doing so, illustrated that, in such actions, reviewing courts may look to how the proposed sanctions relate to the standard concerning the best interests of the child. In *In re C.H.*,<sup>159</sup> the children's grandparents and mother were each vying to be managing conservator of the children. The grandparents had named twenty potential witnesses<sup>160</sup> nine days before trial and eighty-one days after the trial court's deadline and, accordingly, filed a motion to modify the discovery cut off.<sup>161</sup> Despite the plain language of Rule 193.6(a) of the Texas Rules of Civil Procedure, which prohibits a party from offering testimony of a non-party witness who was not timely identified unless the court finds there was good cause for the failure or it will not unfairly surprise or prejudice the other party, the Amarillo Court of Appeals affirmed the trial court's grant of the grandparents' motion to modify the discovery

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152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 276-77.

159. No. 07-04-0428, 2006 WL 3813751 (Tex. App.—Amarillo Dec. 28, 2006, no pet.).

160. *Id.* at \*1. These witnesses included six of the children's teachers, eight character witnesses for the grandparents, the mother's mother, the mother's boyfriend, and the mother's previous landlord.

161. *Id.*



deadline because the trial court permissibly evaluated the benefits to the children of a fully-informed decision by the jury.<sup>162</sup>

In contrast, in *Glash v. Glash*,<sup>163</sup> the Fourteenth District Houston Court of Appeals found that the trial court abused its discretion in awarding additional child support—in excess of the statutory guidelines—where the trial court appeared to award the additional child support as a discovery sanction.<sup>164</sup> Aside from noting that the record lacked any order compelling discovery, and that the father was afforded no notice or opportunity to respond to the allegations that he had violated discovery orders prior to the entry of the judgment, the court of appeals reasoned that the trial court's primary responsibility in a modification of child support proceeding is to consider the best interests of the children, not to punish an offending party.<sup>165</sup> Accordingly, the court of appeals modified the trial court's judgment to delete the portion of the child support not based on the statutory guidelines.<sup>166</sup>

## VI. SPOILIATION

In *Gilmore v. SCI Texas Funeral Services, Inc.*,<sup>167</sup> the Waco Court of Appeals held that a spoliation instruction could be given in cases that involve the loss or destruction of evidence even when there is no allegation of discovery abuse.<sup>168</sup> The plaintiffs appealed from a take nothing judgment arising from an incident at a graveside service when a lowering device failed and the casket tipped and fell to the bottom of the vault.<sup>169</sup> On appeal, the appellants raised several issues, including that the court erred by failing to submit a spoliation instruction to the jury because the lowering device was discarded when the company determined it could not be repaired.<sup>170</sup> The defendant primarily argued that no spoliation instruction could be given because “such an instruction is available only as a sanction for discovery abuse.”<sup>171</sup> The court relied on prior Texas Supreme Court language that “Texas courts ‘have generally limited the use

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162. *Id.* at \*2.

163. No. 14-05-00846, 2006 WL 2862217 (Tex. App.—Houston [14th Dist.] Oct. 10, 2006, no pet.).

164. *Id.* at \*3.

165. *Id.* The court of appeals apparently did not consider that a greater amount of child support might be in the best interests of the children.

166. *Id.* at \*4.

167. 234 S.W.3d 251 (Tex. App.—Waco 2007, pet. denied).

168. *Id.* at 262-63.

169. *Id.* at 253-54. According to witnesses, as the casket was being lowered, the lowering device emitted a ratcheting sound, there was a “big boom,” and after the casket fell it “was partially opened by the impact, [the decedent’s] arm was exposed[,] and several mementos fell out.” *Id.* at 254.

170. *Id.* at 262-63.

171. *Id.* at 262. It should also be noted that the defendant argued that the jury found him negligent even without such an instruction, so any error would be harmless. The court recognized that it would agree with this argument if it were affirming the judgment, but since it was reversing and remanding the cause, and because the record was not fully developed with respect to this issue the court decided to not address it. In addition, the court noted that spoliation was discussed to guide the trial court on remand. *Id.* at 262 n.11.

of the spoliation instruction to two circumstances: [1] the deliberate destruction of relevant evidence and [2] the failure of a party to produce relevant evidence or to explain its non-production.”<sup>172</sup> The court reasoned that while the second instance typically involved discovery abuse, the first did not, and therefore, could be the basis for a spoliation instruction outside the context of discovery abuse.<sup>173</sup>

In *Adobe Land Corp. v. Griffin, L.L.C.*,<sup>174</sup> varying aspects of spoliation were addressed by the Fort Worth Court of Appeals. The suit, brought by a group of farmers against a manufacturer of herbicide, sounded in products liability, breach of warranty, and negligence.<sup>175</sup> After applying the defendant’s herbicide to their fields in 2000, the plaintiffs’ crops failed to produce sustainable amounts of alfalfa, and eventually, all of their plants died. In 2002, the plaintiffs filed suit; but at that time, when the plaintiffs requested samples of the batch of herbicide they were given, the defendants claimed they were unable to produce the sample without an identifying lot number.<sup>176</sup> After further discovery, the proper lot number was uncovered, but by that point defendant had already destroyed the sample pursuant to its normal internal policy requiring the destruction of lot samples after three years. Shortly thereafter, the trial court granted defendant’s no-evidence summary judgment motion, disregarding the plaintiffs’ spoliation allegation.<sup>177</sup>

On appeal, the plaintiffs argued that it was improper for the trial court to grant no-evidence summary judgment as to all of their claims, when the defendant failed to specifically seek no-evidence summary judgment on plaintiffs’ spoliation claims.<sup>178</sup> The court disagreed with this contention, because “allegations of spoliation do not give rise to an independent cause of action under Texas law, and accordingly do not constitute *claims* subject to attack by way of a no-evidence motion for summary judgment.”<sup>179</sup> The court further noted that, while Rule 166(a)(i) requires a no-evidence motion to be specific, it does not require the defendant to attack evidentiary components that may ultimately be used to prove the challenged element.<sup>180</sup>

Although the court of appeals overruled the plaintiffs’ argument, it ultimately reversed the trial court’s ruling, holding that the plaintiffs were entitled to a presumption of spoliation.<sup>181</sup> The court rejected the defendant’s contentions that the company did not believe the sample was relevant to the claims asserted in the petition and that it could not have

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172. *Id.* at 262 (quoting *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 721 (Tex. 2003)).

173. *Id.*

174. 236 S.W.3d 351 (Tex. App.—Fort Worth 2007, no pet.).

175. *Id.* at 354.

176. *Id.* at 355.

177. *Id.*

178. *Id.* at 356.

179. *Id.* (internal citations omitted).

180. *Id.*

181. *Id.* at 361.

preserved the sample because the batch was discarded before the batch number was identified.<sup>182</sup> The court found that the filing of the original petition in the case put the defendant on notice that at least one of its retained samples contained material evidence relevant to the plaintiff's claims, and the plaintiffs' inability to identify the specific sample did not relieve the defendant of "its duty to preserve all *potentially* relevant" samples.<sup>183</sup> Because the plaintiffs were clearly prejudiced by the destruction of the sample, they were entitled to a spoliation presumption, and, consequently, the trial court erred by granting defendant's no-evidence summary judgment motion.<sup>184</sup>

In *Baker v. Federal Express Corp.*,<sup>185</sup> the First District Houston Court of Appeals addressed the effect of a settlement on sanctions for spoliation. The plaintiff brought a negligence action against a mail carrier for a car accident involving one of its mail delivery trucks.<sup>186</sup> At a pre-trial hearing, the trial court indicated that it did not intend to give a spoliation instruction related to the mail carrier's inability to locate the relevant pre- and post-trip inspection reports for the truck at issue; however, on the first day of trial, the court communicated its willingness to reconsider the instruction.<sup>187</sup> Upon arriving at the court the next day, the parties informed the court that they had reached a settlement, and, subsequently, the plaintiff moved for a nonsuit recognizing the controversy had been settled.<sup>188</sup> However, the plaintiff still sought sanctions against the mail carrier for spoliation.<sup>189</sup> According to the trial court, sanctions for spoliation could not be fully evaluated because the case did not go to trial, and, as a result, the court sanctioned the mail carrier in the amount of \$1,000.<sup>190</sup>

The plaintiff appealed the ruling, arguing that by indicating that it did not intend to give a spoliation instruction, the court impaired the presentation of his case.<sup>191</sup> The court of appeals gave this argument no credence and concluded that the plaintiff waived his right to complain about the ruling by settling his case.<sup>192</sup> The court further held that the settlement, although it did not specifically address spoliation sanctions, constituted a full and final settlement of all complaints, which, according to the court, included the request for sanctions based on spoliation.<sup>193</sup> Despite this holding, the court did not reverse the award of sanctions completely be-

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182. *Id.* at 358-59.

183. *Id.* at 359 (emphasis in original).

184. *Id.* at 361.

185. 224 S.W.3d 390 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

186. *Id.* at 391.

187. *Id.* at 392-93.

188. *Id.* at 393.

189. *Id.*

190. *Id.* (because of the limited amount of the monetary sanctions and the fact that the court would have not awarded sanctions if they had been challenged by the sanctioned party, the court noted the award of sanctions "should make you all unhappy").

191. *Id.*

192. *Id.* at 394.

193. *Id.*

cause only the plaintiff, and not the mail carrier, challenged the sanction award.<sup>194</sup> In sum, following this analysis, the court seemed to suggest that settlement of a case should result in the dismissal of any request for sanctions stemming from spoliation.<sup>195</sup>

## VII. ALTERNATIVE DISPUTE RESOLUTION

### A. WAIVER

Most of the cases dealing with the evidentiary issues in alternative dispute resolution proceedings during the Survey Period addressed what constituted a waiver of the right to arbitrate. Some recent cases illustrate what behavior does and does not constitute a waiver of one's right to arbitrate. Although the law of waiver is mostly settled, it is painted in broad strokes, and some recent cases illustrate what behavior does and does not constitute a waiver of one's right to arbitrate.

Texas courts have long held that "there is a strong presumption against waiver" of the right to arbitrate.<sup>196</sup> In order to find waiver, the party attempting to negate arbitration must show that the party seeking arbitration has substantially invoked litigation to its opponent's detriment and that the party attempting to negate arbitration has suffered prejudice as a result.<sup>197</sup>

In *LJA Engineering & Surveying, Inc. v. Richfield Investment Corp.*,<sup>198</sup> the Beaumont Court of Appeals addressed a mandamus petition claiming that the plaintiff had not sufficiently rebutted the strong presumption against waiver. In the underlying action, the plaintiff brought suit on a number of causes of action, including breach of a contract that included an arbitration clause.<sup>199</sup> Specifically, the plaintiff claimed that the defendant waived arbitration by substantially invoking the judicial process to their prejudice in three ways: defendant filed a motion to dismiss because of an insufficient expert affidavit, the defendant failed to timely pursue arbitration, and that the defendant engaged in extensive discovery.<sup>200</sup> The court held that there was insufficient evidence to rebut the strong presumption against waiver because the motion to dismiss might not have been dispositive, because the burden is on the plaintiff to initiate the arbitration, and because the information gained from "extensive discovery" was simply information that could have been discovered in the arbitration.<sup>201</sup> The court summarized its holding by stating that, "[i]t would seem incredible that any party could 'substantially invoke the judicial process to its opponent's detriment' during a little over six months into

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194. *Id.* at 395.

195. *See generally id.*

196. *In re Bank One, N.A.*, 216 S.W.3d 825, 827 (Tex. 2007) (orig. proceeding); *In re Bruce Terminix Co.*, 988 S.W.2d 702, 704 (Tex. 1998) (orig. proceeding).

197. *In re Bruce Terminix Co.*, 988 S.W.2d at 704.

198. 211 S.W.3d 443 (Tex. App.—Beaumont 2006, orig. proceeding).

199. *Id.* at 445.

200. *Id.*

201. *Id.* at 446-47.

litigation” where the claims are complex and there will be significant document and expert witness discovery.<sup>202</sup>

There is, however, a fine line between the actions in *LJA Engineering & Surveying* that did not constitute waiver and the behavior of the party that was found to have waived arbitration in *Interconex, Inc. v. Ugarov*.<sup>203</sup> In *Interconex*, the defendant challenged the ruling of the trial court denying its motion to compel arbitration.<sup>204</sup> The defendant was hired to move the plaintiff from Moscow to Houston, and out of this relationship the plaintiff sued for breach of a contract that included an arbitration clause.<sup>205</sup> In this case, the court concluded that the defendant substantially invoked the judicial process by failing to timely answer the lawsuit, requesting the case be reset from an initial trial date to a date two months later, and for failing to file a motion to compel arbitration until ten days before the jury trial.<sup>206</sup> Here, there was no evidence that the defendant sought final resolution of the dispute, acquired access to information that would not have been discoverable in arbitration, or other specific behaviors that had been previously held to be sufficient evidence to show waiver; instead, the defendant was simply subject to a default judgment and delayed in asking for arbitration.<sup>207</sup> As delay and the taking of solely defensive measures are not normally sufficient evidence to prove waiver,<sup>208</sup> the First District Houston Court of Appeals found that the prejudice of waiting until ten days before the trial on damages to seek arbitration coupled with the fact that the plaintiff procured a flight from Ukraine to attend the trial constituted enough prejudice to the plaintiff to outweigh the strong presumption in favor of arbitration.<sup>209</sup>

## B. ADR COMMUNICATIONS

In *Rabe v. Dillard's Inc.*,<sup>210</sup> the Dallas Court of Appeals addressed the competency of communications made during a mediation session as summary judgment evidence. In *Rabe*, the plaintiff brought a negligence action against defendant Dillard's. The parties subsequently conducted a mediation, at which the plaintiff's attorney was authorized to execute a settlement agreement on her behalf.<sup>211</sup> The plaintiff's attorney signed the settlement agreement, but the plaintiff then refused to sign the settlement documents and the dismissal.<sup>212</sup> The defendant moved for summary judgment on a breach of contract counterclaim based on the settlement

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202. *Id.* at 447.

203. 224 S.W.3d 523 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

204. *Id.* at 527.

205. *Id.* at 528.

206. *Id.* at 535.

207. *Id.*

208. *In re Vesta Ins. Group, Inc.*, 192 S.W.3d 759, 763 (Tex. 2006) (orig. proceeding); *In re Serv. Corp. Int'l*, 85 S.W.3d 171, 174 (Tex. 2002).

209. *Interconex*, 224 S.W.3d at 535-36.

210. 214 S.W.3d 767 (Tex. App.—Dallas 2007, no pet.).

211. *Id.* at 768-69.

212. *Id.* at 769.

agreement, which was granted by the trial court.<sup>213</sup> The Dallas Court of Appeals affirmed, holding that the plaintiff's only evidence that contradicted the enforceability of the contract was an alleged threat made by a Dillard's attorney during the mediation.<sup>214</sup> The court of appeals upheld the summary judgment, reasoning that because "[c]ommunications made during an alternative dispute resolution procedure are confidential, [they] may not be used as evidence."<sup>215</sup>

### VIII. PAROL EVIDENCE

In *Haden v. David J. Sacks, P.C.*,<sup>216</sup> a law firm sued its former client to collect unpaid invoices. The client retained the law firm for representation in an appeal to the Fifth Circuit.<sup>217</sup> To memorialize this representation, the firm sent a written engagement letter reciting the attorneys' and paralegals' hourly rates and that the client would owe a \$10,000 retainer to be applied to the fees and expenses incurred during the representation. The client returned the letter with his signature, altering the original retainer amount to \$5,000, and subsequently submitted a check in that amount. The appeal continued, and the firm sent an invoice reflecting an outstanding debt of approximately \$35,000. The company paid \$5,000 at the end of the year, but no more payments were made.<sup>218</sup> The law firm then sent multiple invoices, requests for payment, and finally a demand letter before it filed suit for breach of contract. The client immediately counterclaimed, contending that the firm had promised to render legal services for a maximum flat fee of \$10,000. The trial court rendered take-nothing summary judgment on the client's counterclaims and granted summary judgment to the firm on its breach-of-contract claims.<sup>219</sup>

On appeal, the client challenged the trial court's grant of summary judgment on the law firm's claim that the client breached its contract. In the court below, the client submitted affidavit testimony regarding the promise of the \$10,000 flat fee. In response, the law firm contended that this affidavit contravened the parol evidence rule and was therefore inadmissible.<sup>220</sup> Answering this contention, the client opined that this affidavit was admissible as an exception to the parol evidence rule; specifically, the testimony involved evidence of a collateral, contemporaneous agreement consistent with the engagement letter, and was therefore admissible.<sup>221</sup> Analyzing the substance of the engagement letter, the court found that the terms of the letter show that "(1) the law firm would represent

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213. *Id.*

214. *Id.*

215. *Id.*

216. 222 S.W.3d 580 (Tex. App.—Houston [1st Dist.] 2007, pet. granted), *rev'd in part* by 2008 WL 2702184 (Tex. 2008), *rev'd in part and remanded in part* by 2008 WL 2718262 (Tex. 2008).

217. *Id.* at 584.

218. *Id.* at 584-85.

219. *Id.* at 588.

220. *Id.* at 590.

221. *Id.* at 592-93.

[the client] and the company in the appeal to the Fifth Circuit, (2) [the client], individually and for the company, acknowledged the law firm's hourly rates, as well as responsibility for all disbursed expenses, and (3) a \$5,000 retainer fee, instead of the \$10,000 retainer proposed, would be paid."<sup>222</sup> However, the court determined that the contract shed no light on the terms in dispute, specifically, whether they had agreed to an open account or a flat maximum fee.<sup>223</sup> Because the engagement letter contract did not clarify whether the agreement was to "pay billing *as accrued* at the hourly rates acknowledged in the engagement-letter contract," a majority of the court determined that the parol evidence rule allowed the client to assert that, in addition to the engagement letter, an additional agreement with the law firm for a flat maximum fee existed.<sup>224</sup>

Dissenting with respect to the breach of contract finding, Justice Alcala stated that he would have held that the parol evidence was inadmissible and that the written documents establish a clear meeting of the minds.<sup>225</sup> Justice Alcala explained:

The undisputed evidence show[ed] that [the firm] and [the client] entered into a written agreement that provided that the law firm would "assist with the writing of the Appellant's Brief and any reply" and that [the client] would pay for the service, at a rate of \$200 per hour for [the attorney's] work, \$150 to \$200 per hour for work done by other lawyers in the firm, and \$50 to \$100 per hour for work done by paralegals, plus all costs and expenses.<sup>226</sup>

Because the dissent found that "[t]he agreement here is sufficiently definite that any court could enforce the terms . . . ," it determined that the parties came to a meeting of the minds and that only inadmissible parol evidence supports the client's breach of contract claim.<sup>227</sup>

## IX. CONCLUSION

This article is intended to update litigants on recent developments in the field of civil evidence and to provide litigants with tools helpful in navigating evidentiary issues in Texas. During this Survey Period, the Texas Courts of Appeals continued to broadly construe the definition of health care liability claim in regard to section 74.351 of the Texas Civil Practice and Remedies Code, although the Texas Supreme Court has yet to affirm their broad interpretations. Also, important decisions were issued regarding the snap-back rule, the disqualification of experts, and admissibility of parol evidence.

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222. *Id.*

223. *Id.* at 593.

224. *Id.* at 591, 593 (emphasis in original).

225. *Id.* at 598.

226. *Id.*

227. *Id.* at 599-600.