



1997

Appellate Practice and Procedure

Alan Wright

LaDawn H. Conway

Debra J. McComas

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Alan Wright, et al., *Appellate Practice and Procedure*, 50 SMU L. Rev. 899 (1997)
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Articles

APPELLATE PRACTICE AND PROCEDURE

*Alan Wright**
*LaDawn H. Conway***
*Debra J. McComas****

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* B.A., with high honors, University of Texas at Austin; M.P.A., University of Texas at Austin; J.D., with honors, University of Texas at Austin; Partner, Haynes and Boone, L.L.P., Dallas, Texas.

** B.G.S., University of Texas at Arlington; J.D. *cum laude*, Southern Methodist University; Associate, Haynes and Boone, L.L.P., Dallas, Texas.

*** B.A., Austin College; J.D. *cum laude*, Tulane University; Associate, Haynes and Boone, L.L.P., Dallas, Texas.

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I. INTRODUCTION

A review of Texas Supreme Court mandamus decisions during the Survey period reflects that mandamus relief is arguably becoming a less than extraordinary remedy. Finding “no adequate remedy by appeal” upon a showing of “exceptional circumstances,” the supreme court reviewed a number of orders—including the *denial* of a motion for summary judgment—typically not reviewable until after final judgment.¹ Despite the court’s contention that it did not expand the “no adequate remedy by appeal” standard of *Walker v. Packer*,² a concurring opinion by Justice Gonzalez suggested overruling *Walker v. Packer* altogether, while the dissenting Justice Baker charged the court with using the new “exceptional circumstances” standard to justify the granting of mandamus relief whenever it “disagrees with the trial court’s decision.”³

Also during the Survey period, the Texas Supreme Court examined finality in the summary judgment context, and clarified the requirements for an appeal by writ of error.⁴ The court further articulated the procedure for and circumstances under which a party can transfer an appeal in geographically overlapping appellate districts.⁵

In keeping with its trend over the past few years, the court continues to construe the rules of procedure to provide—not deny—relief, and to decide cases on their merits, not procedural technicalities.⁶ The court further reinforced well-established standards for reviewing punitive damages and DTPA additional damages awards and factual insufficiency points,

1. *See, e.g., CSR Ltd. v. Link*, 925 S.W.2d 591, 596 (Tex. 1996) (orig. proceeding); *Tilton v. Marshall*, 925 S.W.2d 672, 681-82 (Tex. 1996) (orig. proceeding).

2. 827 S.W.2d 833 (Tex. 1992) (orig. proceeding).

3. *CSR*, 925 S.W.2d at 598 (Gonzalez, J., concurring), 599 (Baker, J., dissenting).

4. *Withem v. Underwood*, 922 S.W.2d 956, 957 (Tex. 1996) (per curiam); *Texaco, Inc. v. Central Power & Light Co.*, 925 S.W.2d 586, 589-91 (Tex. 1996); *Continental Airlines, Inc. v. Kiefer*, 920 S.W.2d 274, 276-77 (Tex. 1996); *Park Place Hosp. v. Estate of Milo*, 909 S.W.2d 508, 510 (Tex. 1995).

5. *Miles v. Ford Motor Co.*, 914 S.W.2d 135, 137-38, 140 (Tex. 1995) (per curiam).

6. *Scott & White Memorial Hosp. v. Schexnider*, 940 S.W.2d 594 (1996) (per curiam); *Simmons v. Texas State Bd. of Dental Examiners*, 925 S.W.2d 652, 653-54 (Tex. 1996) (per curiam); *Isern v. Ninth Court of Appeals*, 925 S.W.2d 604, 605-06 (Tex.) (orig. proceeding) (per curiam), *cert. denied*, 117 S. Ct. 612 (1996); *Stokes v. Aberdeen Ins. Co.*, 917 S.W.2d 267, 268 (Tex. 1996) (per curiam); *Fetchin v. Meno*, 916 S.W.2d 961, 962 (Tex. 1996) (per curiam); *Nueces Canyon Consol. Indep. Sch. Dist. v. Central Educ. Agency*, 917 S.W.2d 773, 776 (Tex. 1996) (per curiam).

while expanding the scope of appellate review of summary judgments.⁷

II. APPELLATE REVIEW BEFORE FINAL JUDGMENT

A. MANDAMUS

1. Orders: "Exceptional Circumstances" Establishing No Adequate Remedy by Appeal

a. Order Denying Special Appearance

Acknowledging that mandamus does not ordinarily lie from the denial of a special appearance, the Texas Supreme Court held in *CSR Ltd. v. Link*⁸ that "extraordinary circumstances" may sometimes warrant mandamus relief.⁹ In *CSR*, the Australian corporation CSR made a sale in Australia of 363 tons of raw asbestos to the Johns-Manville Corporation.¹⁰ CSR had no contacts whatsoever with Texas, but was sued in Texas relating to alleged injuries resulting from exposure to CSR asbestos used to manufacture pipe in the United States.¹¹ CSR filed a special appearance, asserting that the trial court lacked personal jurisdiction over the company.¹² The trial court overruled the motion and the court of appeals denied CSR leave to file its petition for writ of mandamus.¹³

The Texas Supreme Court conditionally granted CSR's petition for writ of mandamus, holding that the trial court abused its discretion in overruling the special appearance and that CSR had no adequate remedy by ordinary appeal.¹⁴ In its no adequate remedy by appeal analysis, the court recognized that mere increased cost and delay do not make an ordinary appeal inadequate and, in the typical special appearance denial, "no circumstances apart from the increased cost and delay of trial and appeal are present."¹⁵ However, the court explained, extraordinary situations may exist in which the denial of a special appearance cannot be adequately remedied on appeal.¹⁶ The court held that such extraordinary circumstances existed in *CSR*.

According to the court, the extraordinary circumstances present in *CSR* "stem[med] from the problems inherent in many, if not all, mass tort cases."¹⁷ The mass tort defendant's potential exposure to a large number of lawsuits places great strain on its resources, creating "considerable

7. *Ellis County State Bank v. Keever*, 915 S.W.2d 478, 479 (Tex. 1995) (per curiam); *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 625 (Tex. 1996); *Leonard & Harral Packing Co. v. Ward*, 937 S.W.2d 425, 425 (1996) (per curiam); *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996) (per curiam).

8. 925 S.W.2d 591 (Tex. 1996) (orig. proceeding).

9. *Id.* at 596.

10. *Id.* at 593-94.

11. *Id.* at 594-95.

12. *Id.* at 594.

13. *Id.*

14. *Id.* at 596.

15. *Id.*

16. *Id.* (citing *Canadian Helicopters Ltd. v. Wittig*, 876 S.W.2d 304, 309-10 (Tex. 1994)).

17. *Id.*

pressure to settle the case, regardless of the underlying merits.”¹⁸ Additionally, because mass tort litigation is usually complicated and lengthy, involving a multitude of parties, a trial on the merits that is subject to reversal on appeal for lack of personal jurisdiction would “overtax” the state’s judicial resources.¹⁹

The court noted that permitting mandamus relief when personal jurisdiction is clearly and completely lacking and exceptional circumstances exist “is in accord with the approach of other jurisdictions.”²⁰ The court, however, emphasized that it is not relaxing or retreating from “the requirement that relator must show an inadequate remedy by appeal.”²¹

In a concurring opinion, Justice Gonzalez considered the impact of CSR on the court’s previous decisions in *Canadian Helicopters Ltd. v. Wittig*²² and *National Industrial Sand Association v. Gibson*.²³ Justice Gonzalez noted that in *Canadian Helicopters*, “the Court denied mandamus relief to correct the special-appearance ruling,” but held that mandamus might be available when the “trial court, in denying a special appearance, . . . act[s] with such disregard for guiding principles of law that the harm to the defendant becomes irreparable, exceeding mere increased cost and delay.”²⁴ In contrast, the court in *National Industrial Sand* granted mandamus “to correct a denial of a special appearance when the trial court clearly had no personal jurisdiction over the defendant.”²⁵ Concluding that the holdings of *Canadian Helicopters* and *National Industrial Sand* are irreconcilable, Justice Gonzalez suggested overruling *Walker v. Packer*,²⁶ and its progeny, including *Canadian Helicopters*, “to the extent they hold that a foreign defendant with no ties to Texas must make a separate showing of harm before mandamus will issue to correct an order denying a special appearance.”²⁷

In a dissenting opinion, Justice Baker argued that CSR had not met its “heavy burden of showing irreparable harm.”²⁸ He maintained that CSR

18. *Id.*

19. *Id.* at 597. Specifically, the court stated that “[b]ecause of the size and complexity of the asbestos litigation, the most prudent use of judicial resources in this case is to permit a preliminary resolution of the fundamental issue of personal jurisdiction by writ of mandamus.” *Id.*

20. *Id.* (citing *United States v. Superior Court*, 697 P.2d 658, 662 (Ariz. 1985), *Lupo v. Lineberger*, 855 S.W.2d 293, 294 (Ark. 1993), *Conn v. IIT Aetna Fin. Co.*, 252 A.2d 184, 188 (R.I. 1969), *State ex rel. Fogle v. Steiner*, 656 N.E.2d 1288, 1292 (Ohio 1995)).

21. CSR, 925 S.W.2d at 597 (“While the question of personal jurisdiction is remediable by appeal in most cases, . . . under the circumstances of this case, the concerns of judicial efficiency in mass tort litigation combined with the magnitude of the potential risk for mass tort actions against the defendant makes ordinary appeal inadequate.”).

22. 876 S.W.2d 304 (Tex. 1994) (orig. proceeding); CSR, 925 S.W.2d at 598 (Gonzalez, J., concurring).

23. 897 S.W.2d 769 (Tex. 1995) (orig. proceeding); CSR, 925 S.W.2d at 598 (Gonzalez, J., concurring).

24. CSR, 925 S.W.2d at 598 (quoting *Canadian Helicopters*, 876 S.W.2d at 308-09).

25. *Id.* (citing *National Indus. Sand*, 897 S.W.2d at 776).

26. 827 S.W.2d 833 (Tex. 1992) (orig. proceeding).

27. CSR, 925 S.W.2d at 598-99.

28. *Id.* at 600 (Baker, J., dissenting).

failed to show that the denial of its special appearance would “compromise its ability to defend the underlying suit on the merits,” thus resulting in irreparable harm.²⁹ He further asserted that permitting mandamus review of the denial of a special appearance constitutes an improper judicial revision of Rule 120a(4) of the Texas Rules of Civil Procedure because Rule 120a(4) implicitly provides that ordinary appeal is the sole remedy for the denial of a special appearance.³⁰ Any change to Rule 120a to allow interlocutory appeal of an order on defendant’s special appearance, he argued, “should be accomplished through the State Bar Rules Committee and in conjunction with the Court’s rule-making authority” or legislative enactment, “not by case law mandate.”³¹

b. Order Denying Motion for Summary Judgment Requesting Dismissal of Claims Implicating First Amendment Rights

Until the supreme court’s decision in *Tilton v. Marshall*,³² mandamus relief was never available to correct the denial of summary judgment.³³ In *Tilton*, the plaintiffs consisted of a group of people who had made monetary contributions to Robert Tilton’s ministries. The plaintiffs sued Tilton for intentional infliction of emotional distress based on his alleged breach of promises to “read, touch, and pray” over prayer requests sent to him by the plaintiffs, and for his allegedly insincere religious representations that the plaintiffs’ prayers would be answered.³⁴ After Tilton unsuccessfully sought dismissal by summary judgment of the plaintiffs’ claims, he filed a petition for writ of mandamus in the supreme court, challenging the denial of summary judgment.³⁵

Without specifically mentioning the procedural posture of the case,³⁶ the supreme court held that the trial court abused its discretion in refusing to dismiss the claims against Tilton. The court held that the First Amendment prohibits courts from determining the veracity of religious tenets.³⁷ An adjudication of the plaintiffs’ claims of intentional infliction of emotional distress, the court concluded, “would necessarily require an inquiry into the truth or falsity of [Tilton’s] religious beliefs that is forbid-

29. *Id.*

30. *Id.* at 601. Rule 120a(4) provides:

If the court sustains the objection to jurisdiction, an appropriate order shall be entered. If the objection to jurisdiction is overruled, the objecting party may thereafter appear generally for any purpose. Any such special appearance or such general appearance shall not be deemed a waiver of the objection to jurisdiction when the objecting party or subject matter is not amenable to process issued by the courts of this State.

TEX. R. CIV. P. 120a(4).

31. CSR, 925 S.W.2d at 601.

32. 925 S.W.2d 672 (Tex. 1996) (orig. proceeding).

33. *Id.* at 695 (Enoch, J., dissenting).

34. *Id.* at 681.

35. *Id.* at 676.

36. Only the dissent overtly acknowledged that the mandamus in *Tilton* was issued to correct the *denial* of summary judgment, and that the supreme court had never before issued a mandamus in this context. *Id.* at 695 (Enoch, J., dissenting).

37. *Id.* at 679.

den by the Constitution.”³⁸

Notably, the court maintained that it did not grant mandamus relief to Tilton merely because the plaintiffs could not prevail on certain claims.³⁹ Mandamus relief, the court reiterated, is an “‘extraordinary’ remedy, reserved for ‘manifest and urgent necessity,’ . . . and will not issue unless relator satisfies a heavy burden of establishing ‘compelling circumstances.’”⁴⁰ The court found that Tilton met this “high burden of proof” because his petition raised important issues related to constitutional protections afforded by the First Amendment “which an appeal cannot adequately protect.”⁴¹ In addition to the imposition of an adverse judgment, the court held that the trial itself “would violate relator’s constitutional rights.”⁴²

While acknowledging that the trial court should have granted summary judgment, the dissent heartily disagreed with the supreme court’s decision to correct the error by mandamus, and speculated that the court’s decision to do so “must certainly leave the parties and trial court slack-jawed.”⁴³ The dissent argued that the majority opinion lays a “minefield” for the trial court, requiring it to “try only certain limited claims of fraud and not others, to admit evidence only pertinent to those limited claims, and even then for limited purposes only, and to ensure that Tilton’s free exercise rights” would never be implicated.⁴⁴ The dissent further pointed out that the court’s decision—without explanation—overrules *Bell Helicopter Textron, Inc. v. Walker*,⁴⁵ in which the court held that the denial of a plea to the jurisdiction is not reviewable by mandamus.⁴⁶ According to the dissent, however, the most significant problem with the majority’s opinion is its justification for granting mandamus relief—the implication “that the First Amendment right to free exercise of religion is more important than other constitutional rights.”⁴⁷

c. Order Compelling Production of Irrelevant, Highly Sensitive and Personal Documents

In *Tilton*, Tilton also sought mandamus relief from the trial court order directing him to produce his tithing records.⁴⁸ Finding the documents irrelevant, the supreme court conditionally granted the writ of manda-

38. *Id.* at 682.

39. *Tilton*, 925 S.W.2d at 681.

40. *Id.* at 681-82 (citing TEX. R. APP. P. 121(a)(2)(D); *Holloway v. Fifth Court of Appeals*, 767 S.W.2d 680, 684 (Tex. 1989); *Canadian Helicopters, Ltd. v. Wittig*, 876 S.W.2d 304, 306 (Tex. 1994); *Walker v. Packer*, 827 S.W.2d 833, 842 n.9 (Tex. 1992)).

41. *Tilton*, 925 S.W.2d at 682.

42. *Id.*

43. *Id.* at 695 (Enoch, J., concurring in part and dissenting in part, joined by Baker, J. and Cornyn, J.).

44. *Id.*

45. 787 S.W.2d 954, 955 (Tex. 1990).

46. *Tilton*, 925 S.W.2d at 695.

47. *Id.*

48. *Id.* at 682.

mus.⁴⁹ In doing so, however, the court acknowledged that a discovery order mandating the disclosure of irrelevant (as opposed to privileged) documents “does not normally satisfy this standard for mandamus relief.”⁵⁰ The court concluded, however, that mandamus was appropriate because the discovery order imposed on Tilton a burden “far out of proportion to any benefit that may obtain to the requesting party,” and invaded Tilton’s privacy.⁵¹

d. Order Granting Temporary Injunction in Case Involving Constitutional Rights

In *Republican Party of Texas v. Dietz*,⁵² the supreme court showed its willingness to review by mandamus a trial court’s grant of a temporary injunction order, despite the right to an immediate accelerated interlocutory appeal.⁵³ In *Dietz*, just six days prior to the beginning of the 1996 Republican Party of Texas Convention, the trial court issued a temporary injunction prohibiting the Party from refusing to provide a booth at the Convention to the Log Cabin Republicans, a group supporting equal civil rights for gays and lesbians.⁵⁴ Two days prior to the beginning of the Convention, the Republican Party filed in the supreme court a motion for leave to file a petition for writ of mandamus, a petition for writ of mandamus, and an emergency motion to stay the trial court’s temporary injunc-

49. *Id.* at 682-83.

50. *Id.*

51. *Id.* at 683 (quoting *Walker*, 827 S.W.2d at 843). In deciding that the request invaded Tilton’s privacy, the court analogized the request to a request for tax returns, which the court previously held to be discoverable only if the need for production outweighs protection of the litigant’s privacy. *Id.* (citing *Crane v. Tunks*, 328 S.W.2d 434 (Tex. 1959); *Maresca v. Marks*, 362 S.W.2d 299, 300 (Tex. 1962); *Hall v. Lawlis*, 907 S.W.2d 493 (Tex. 1995)).

52. 924 S.W.2d 932 (Tex. 1996) (orig. proceeding) (per curiam).

53. *Id.* at 932. Section 51.014 of the Texas Civil Practice and Remedies Code permits an interlocutory appeal from an order granting a temporary injunction, and the Texas Rules of Appellate Procedure mandate acceleration of such an interlocutory appeal. TEX. R. APP. P. 42; TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(4) (Vernon Supp. 1997). Section 51.014 provides, in relevant part: “A person may appeal from an interlocutory order of a district court, county court at law, or county court that . . . (4) grants or refuses a temporary injunction or grants or overrules a motion to dissolve a temporary injunction as provided by Chapter 65.” TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(4) (Vernon Supp. 1997). Rule 42 provides, in relevant part:

(a) Mandatory Acceleration.

(1) Appeals from interlocutory orders (when allowed by law) shall be accelerated. . . .

. . . .

(3) In all accelerated appeals from interlocutory orders and in quo warranto proceedings, the bond, or the notice or affidavit in lieu thereof, shall be filed, or the deposit in lieu of bond shall be made, within twenty days after the judgment or order is signed.

TEX. R. APP. P. 42.

54. *Republican Party*, 924 S.W.2d at 932.

tion order.⁵⁵ In addition to expediting consideration of the case,⁵⁶ staying the trial court's temporary injunction order, and granting the Republican Party's motion for leave within two days of the filing of the motion, the supreme court also tentatively determined that mandamus relief was appropriate.⁵⁷ The court justified the tentative grant of mandamus relief because of the "statewide importance of the constitutional issues" in the case and the "unique and compelling circumstances."⁵⁸

e. Order Requiring One Party to Advance the Litigation Costs and Attorneys' Fees of the Opposition

As seen in the supreme court's conditional grant of mandamus in *Travelers Indemnity Co. v. Mayfield*,⁵⁹ unusual circumstances may impact the adequacy of remedy by appeal analysis. In the workers' compensation suit underlying the mandamus proceeding in *Travelers*, the trial court appointed an attorney for the plaintiff and ordered the defendant, the workers' compensation carrier for the plaintiffs' employer, to pay the fees of the plaintiffs' appointed attorney on a monthly basis throughout the litigation.⁶⁰ Conditionally granting mandamus, the supreme court held that the trial court's actions constituted an abuse of discretion.⁶¹ The court further held that the carrier had no adequate remedy by appeal.⁶²

In determining that the carrier had no adequate remedy by appeal, the supreme court acknowledged that a party normally has an adequate remedy by appeal when the trial court improperly orders it to pay the opposing party's attorneys' fees as a sanction.⁶³ But this case, the court held, "is different . . . the trial court did not merely require [the defendant] to pay an isolated attorney's fee as a sanction."⁶⁴ Rather, the court required the defendant to fund, on a monthly basis, all of the plaintiffs' attorneys' fees throughout the litigation.⁶⁵ According to the supreme court, this would so "radically skew[]" the procedural dynamics of the case that any subsequent remedy by appeal would be inadequate.⁶⁶ Specifically, the party receiving the "free ride" under such circumstances "has little incentive to resolve the dispute economically and efficiently," while the party

55. *Id.*

56. *Id.* The Log Cabin Republicans filed a response the day after the Republican party filed its motion for leave; the supreme court heard oral argument the following day.

57. *Id.*

58. *Id.* at 932, 933.

59. 923 S.W.2d 590 (Tex. 1996) (orig. proceeding).

60. *Id.* at 592.

61. *Id.* at 593-94.

62. *Id.* at 594-95.

63. *Id.* (citing *Street v. Second Court of Appeals*, 715 S.W.2d 638, 639-40 (Tex. 1986)). The fact that the party ordered to pay such fees may be unable to collect them in the event of reversal of the trial court's order on regular appeal does not render the appellate remedy inadequate. *Street*, 715 S.W.2d at 639-40.

64. *Travelers*, 923 S.W.2d at 595.

65. *Id.*

66. *Id.*

bearing the expenses “will be unfairly hindered, knowing that at each step, whether it be trial, a hearing, a deposition, or the issuance of written discovery, it must bear the expenses of both sides.”⁶⁷ In so concluding, the court relied on its prior decisions holding that a party’s remedy by appeal is inadequate where the trial court’s error “vitiates or severely compromises a party’s ability to present a viable claim or defense.”⁶⁸ Calling the circumstances of the fee order in *Travelers* “unusual,” the court held regular appeal inadequate.⁶⁹

Justice Baker (joined by Justices Cornyn and Spector) dissented, stating that “[o]nce again, the Court ignores previously well-established mandamus standards and awards extraordinary relief because it simply disagrees with the trial court’s ruling.”⁷⁰ Pointing out that neither the defendant nor the majority disputed that the defendant could challenge the trial court’s order on regular appeal, the dissent asserted that mandamus was issued in this case because the majority “simply thinks the trial court acted outside its discretion and that a quick fix is deserved.”⁷¹ “This,” the dissent urged, “is not enough for mandamus.”⁷²

f. Appellate Court Order Refusing to Abate Appeal Pending Resolution of Suit to Enforce Settlement Agreement

According to the supreme court, a court of appeals’ refusal to abate an appeal pending resolution of a lawsuit filed to enforce a settlement agreement is sufficiently “unusual” to warrant mandamus relief.⁷³ The Dallas Court of Appeals ordered the parties, Mantas and Barnett, to mediation, which was successful.⁷⁴ However, after mediation but before any settlement documents were filed with the court of appeals, Barnett withdrew his consent to the settlement.⁷⁵ To enforce the settlement agreement, Mantas filed a separate lawsuit in district court and asked the court of appeals to abate the appeal until the enforcement suit was resolved.⁷⁶ The court of appeals refused.⁷⁷

Finding the circumstances of the case “unusual,” the supreme court held that Mantas lacked an adequate remedy by appeal regarding the abatement issue.⁷⁸ The supreme court reasoned that if the district court ultimately upheld the settlement agreement, Mantas would have lost much of the settlement’s benefit if required to expend time and resources

67. *Id.*

68. *Id.* (citing *Walker v. Packer*, 827 S.W.2d 833, 843 (Tex. 1992) (orig. proceeding)).

69. *Travelers*, 923 S.W.2d at 595 (citing *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 919 (Tex. 1991) (orig. proceeding)).

70. *Id.* (Baker, J., dissenting).

71. *Id.*

72. *Id.*

73. *Mantas v. Fifth Court of Appeals*, 925 S.W.2d 656, 659 (Tex. 1996) (orig. proceeding) (per curiam).

74. *Id.* at 657-58.

75. *Id.* at 658.

76. *Id.*

77. *Id.*

78. *Id.* at 659.

in prosecuting the appeal.⁷⁹ The court also found that “the court of appeals did abuse its discretion by refusing to abate the appeal pending resolution of the enforcement suit.”⁸⁰ The court reasoned that it “makes no sense for the court of appeals to expend its resources, and require the parties to expend theirs, on an appeal which may be moot.”⁸¹ The court also noted that “needless uncertainty” and confusion would result from a ruling on the merits of the appeal before the rendering of judgment in the enforcement suit.⁸²

g. Appellate Court Order Setting Aside Trial Court Order
Permitting Reduced Supersedeas Bond

Isern, the real party in interest in the original proceeding in *Isern v. Ninth Court of Appeals*,⁸³ was financially unable to post the \$3.1 million needed to supersede execution of the judgment against him in the underlying personal injury case.⁸⁴ On Isern’s request, the trial court issued an order permitting him to post alternate security in an amount less than the full amount of the judgment.⁸⁵ The court of appeals granted the plaintiffs’ request for mandamus relief and set aside the trial court’s order.⁸⁶ But the supreme court found that the court of appeals abused its discretion by disturbing the trial court’s order.⁸⁷ The court reasoned that “no adequate remedy by appeal exists because, absent immediate relief, defendant Isern [could not] supersede execution of the judgment.”⁸⁸ Granting mandamus relief, the supreme court concluded that “[t]he threat of execution on the judgment is a situation of manifest and urgent necessity which renders any remedy by appeal inadequate.”⁸⁹

79. *Id.*

80. *Id.* The supreme court held that the court of appeals, however, did not abuse its discretion in denying Manta’s initial request to enforce the settlement agreement. *Id.* The court relied on its opinion in *Padilla v. LaFrance*, 907 S.W.2d 454 (Tex. 1995), which held that although a written settlement agreement may be enforced even if one party withdraws consent before judgment is rendered on the agreement, “[w]here consent is lacking, . . . a court may not render an agreed judgment on the settlement agreement, but rather may enforce it only as a written contract.” *Mantas*, 925 S.W.2d at 658 (citing *Padilla*, 907 S.W.2d at 462). *Mantas*, therefore, was required to pursue a separate breach of contract claim in a separate lawsuit to enforce the settlement agreement. *Id.* at 658-59.

81. *Id.* at 659.

82. *Id.*

83. 925 S.W.2d 604 (Tex.) (orig. proceeding) (per curiam), *cert. denied*, 117 S. Ct. 612 (1996).

84. *Id.* at 605.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 606.

89. *Id.* (citing *Walker v. Packer*, 827 S.W.2d 833, 840-43 (Tex. 1992)).

2. Orders: Other Circumstances Establishing No Adequate Remedy by Appeal

a. Disqualification Orders

By its own admission, the Texas Supreme Court has granted mandamus in a number of disqualification cases without explaining how or why relators in such cases have no adequate remedy by appeal.⁹⁰ For example, in *Mendoza v. Eighth Court of Appeals*,⁹¹ the parents of a deceased employee brought a wrongful death action against the deceased's employer. The employer defendant subsequently moved for the imposition of sanctions and the disqualification of the plaintiffs' lawyer, both of which the trial court denied. The employer then petitioned for a writ of mandamus, which was conditionally granted by the court of appeals. Plaintiffs' counsel then petitioned the supreme court for a writ of mandamus.⁹² On review, the supreme court stated, without explanation, that "[a] party usually does not have an adequate remedy by appeal if its counsel is disqualified."⁹³

In an effort to clarify its reasoning on this issue, the supreme court held, in *National Medical Enterprises v. Godbey*⁹⁴ (*NME*) that the lack of an adequate remedy by appeal in disqualification cases is "obvious[]."⁹⁵ According to the court, the "injury to the legal profession from representation by lawyers who are disqualified cannot be cured by appeal."⁹⁶ Moreover, the fact that the order denying the motion to disqualify could be severed from the pending case and made final for appeal does not preclude review by mandamus.⁹⁷ According to the court, although an appeal from a severed, and therefore final, order would not be inappropriate, "that relief can also be obtained by mandamus."⁹⁸ In cases like *NME*, the court concluded, a party seeking disqualification based on the potential disclosure of confidential information in a pending lawsuit "is not required to simply hope that the pending case is concluded without

90. *National Medical Enters. v. Godbey*, 924 S.W.2d 123, 133 (Tex. 1996) (orig. proceeding) ("In the several cases in which we have granted mandamus relief to disqualify counsel we have not addressed the prerequisite that relief by appeal be inadequate.") (citing *Texaco, Inc. v. Garcia*, 891 S.W.2d 255, 257 (Tex. 1995) (orig. proceeding); *Henderson v. Floyd*, 891 S.W.2d 252, 255 (Tex. 1995) (orig. proceeding) (per curiam); *Grant v. Thirtieth Court of Appeals*, 888 S.W.2d 466, 468 (Tex. 1994) (orig. proceeding) (per curiam); *Mauze v. Curry*, 861 S.W.2d 869, 870 (Tex. 1993) (orig. proceeding) (per curiam)).

91. 917 S.W.2d 787 (Tex. 1996) (orig. proceeding) (per curiam).

92. *Id.* at 789.

93. *Id.* at 789-90. The supreme court in *Mendoza* held that the court of appeals abused its discretion in issuing a writ of mandamus ordering the disqualification of plaintiffs' counsel because the evidence relating to disqualification was conflicting and the trial court resolved the conflict in favor of counsel for the plaintiff. *Id.* The supreme court held that the trial court's factual determinations "may not be disturbed by mandamus review." *Id.*

94. 924 S.W.2d 123 (Tex. 1996) (orig. proceeding).

95. *Id.* at 133.

96. *Id.* Moreover, the possibility of a criminal investigation of the party seeking disqualification as a result of disclosed confidences in the pending matter plainly could not be cured on appeal. *Id.*

97. *Id.*

98. *Id.*

disclosure of its confidences"⁹⁹

b. Order Denying Arbitration

A party who is erroneously denied the right to arbitration "has no adequate remedy at law because the fundamental purpose of arbitration—to provide a rapid, less expensive alternative to traditional litigation—would be defeated."¹⁰⁰ In *Prudential Securities, Inc. v. Marshall*, defendants, Prudential Securities and individual employees of Prudential Securities, sought arbitration of libel and slander claims asserted against them by two former stockbroker employees.¹⁰¹ The arbitration clause reflected an agreement to arbitrate "[a]ny controversy between [the parties] arising out of the employment or termination of employment of [the stock broker employee]"¹⁰² The former employees alleged that Prudential Securities and the individual defendants "conspired to blackball them

99. *Id.* In *NME*, the supreme court granted mandamus to require the trial court to disqualify the law firm of Baker & Botts, which was counsel for the plaintiffs—a group of former patients at psychiatric hospitals operated by defendant NME. *Id.* at 125. In addition to NME's motion to disqualify Baker & Botts, NME's former hospital administrator, Cronen, who was not a party to the lawsuit, intervened and filed his own motion to disqualify the firm. *Id.* at 126. The motions to disqualify rested on Baker & Botts' prior representation of Cronen in a criminal investigation of NME and its employees. *Id.* at 125-26. The allegations underlying the criminal investigation were substantially similar to the patients' allegations in the lawsuit against NME. *Id.* In the prior criminal investigation in which Baker & Botts' represented Cronen, the attorney at Baker & Botts received confidential information not only from Cronen but also from NME during conferences and meetings at which a joint defense was discussed. *Id.* at 125. The evidence reflected, however, that the Baker & Botts attorney representing Cronen did not gain substantial confidential knowledge and did not share it with the other lawyers at Baker & Botts. *Id.*

In analyzing the motions under Rule 1.09 of the Texas Disciplinary Rules of Professional Conduct, the trial court considered the meaning of "direct adversity" and concluded that, under the facts of the case, no direct adversity existed because "Baker & Botts' independent judgment on behalf of plaintiffs and Baker & Botts' ability or willingness to consider, recommend or carry out a course of action will *not* be and is *not* reasonably likely to be adversely affected by Baker & Botts' prior representation of, or responsibilities to, Mr. Cronen" *NME*, 924 S.W.2d at 128 (emphasis added). The trial court concluded that there was "no reasonable probability that Baker & Botts would knowingly or unknowingly disclose confidential information in the course of its representation of the plaintiffs in the pending case." *Id.* at 131.

Conditionally granting mandamus, the supreme court held that, irrespective of the evidence, because the Baker & Botts attorney that represented Cronen in the criminal investigation had obtained confidential information from NME's counsel in the joint defense—and the evidence was undisputed that he had—he could not represent the plaintiffs in the pending lawsuit as a matter of law. *Id.* at 129. Because he could not represent the plaintiffs as a matter of law, neither could Baker & Botts. *Id.* at 131.

The dissent disagreed with the majority's application of the law relating to disqualification, and further accused the court of reaching its decision in the case by reweighing the evidence "contrary to the established standard of review in a mandamus case." *Id.* at 134-38 (Baker, J., dissenting). In response, the majority denied that it reweighed the evidence, pointing out that "one can disagree about the legal conclusions to be drawn from certain facts without disagreeing about the facts themselves." *Id.* at 133. "Our conclusions," the court held, "are based on the evidence and findings, not despite them." *Id.*

100. *Prudential Sec. Inc. v. Marshall*, 909 S.W.2d 896, 900 (Tex. 1995) (orig. proceeding) (per curiam).

101. *Id.* at 897.

102. *Id.*

from the brokerage industry,” and that the individual defendants had made several libelous or slanderous statements while acting in the course and scope of their employment for Prudential.¹⁰³

Prudential and the individual defendants sought to compel arbitration of the plaintiffs’ claim, arguing that the Federal Arbitration Act¹⁰⁴ and the Texas General Arbitration Act¹⁰⁵ required the trial court to enforce the arbitration agreement.¹⁰⁶ Noting that under the Federal Arbitration Act, “any doubts as to whether [plaintiffs’] claims fall within the scope of the agreement must be resolved in favor of arbitration,”¹⁰⁷ the supreme court held that the trial court abused its discretion by refusing to compel arbitration because the plaintiffs’ factual allegations established that the claims fell within the scope of the arbitration agreement.¹⁰⁸

Later in the Survey period, the supreme court again reaffirmed that a party who is erroneously denied the right to arbitrate under the Federal Arbitration Act “has no adequate remedy at law and mandamus relief is appropriate.”¹⁰⁹

c. Probate Court Order Refusing to Release Probate Assets

In *D’Unger v. De Pena*,¹¹⁰ the supreme court granted mandamus relief to correct a probate court’s abuse of discretion in refusing to release probate assets to an independent executor who replaced the court-appointed dependent administrator.¹¹¹ The court concluded that the independent executor in the case had no adequate remedy by appeal because “the Probate Code affords no mechanism for appellate relief.”¹¹²

103. *Id.*

104. 9 U.S.C. §§ 1-16 (1970).

105. TEX. CIV. PRAC. & REM. CODE ANN. ch. 171 (Vernon Supp. 1997).

106. *Prudential*, 909 S.W.2d at 897.

107. *Id.* at 899 (citing *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

108. *Id.* Notably, the supreme court focused only on the relator’s argument that, under the Federal Arbitration Act, the claims fell within the scope of the arbitration agreement. This is consistent with the supreme court’s prior decisions refusing to review by mandamus arbitrability complaints asserted under the Texas General Arbitration Act. *See, e.g.*, *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992) (orig. proceeding). The court’s refusal to review such complaints by mandamus is based on the rationale that litigants complaining of the trial court’s refusal to order arbitration have an adequate remedy by appeal as a result of their statutory right to an immediate, accelerated interlocutory appeal under the Texas Act. TEX. REV. CIV. STAT. ANN. art. 238-2(A) (Vernon Supp. 1995); *see Jack B. Anglin Co.*, 842 S.W.2d at 271 n.10.

109. *Cantella & Co., Inc. v. Goodwin*, 924 S.W.2d 943, 945 (Tex. 1996) (orig. proceeding) (per curiam).

110. 931 S.W.2d 533 (Tex. 1996) (orig. proceeding) (per curiam).

111. *Id.* at 535. The supreme court specifically held that under the Texas Probate Code, a probate court has no statutory authority to maintain control over estate funds in its registry or to refuse to release such funds to an independent executor. *Id.* at 534 (quoting TEX. PROB. CODE § 145(h) (Vernon Supp. 1995) (providing that, once an independent administration has been created, “further action of any nature shall not be had in the county court except where this Code specifically and explicitly provides for some action in the county court.”)).

112. *D’Unger*, 931 S.W.2d at 535.

d. Void Orders

Cases decided during the Survey period reflect that a party need not demonstrate no adequate remedy by appeal to be entitled to mandamus relief from a trial court's void order. The trial court in *Sanchez v. Hester*¹¹³ dismissed the plaintiff's lawsuit for want of prosecution against a defendant that declared bankruptcy during the pendency of the lawsuit.¹¹⁴ The plaintiff sought mandamus relief from the Corpus Christi Court of Appeals on the basis that the trial court's order dismissing his case was void because it violated the automatic bankruptcy stay.¹¹⁵ The court of appeals agreed that the order was void and granted mandamus relief, stating that "[a]ppel is . . . 'wholly unnecessary' to establish the invalidity of [the void] order."¹¹⁶ Thus, the court concluded that the plaintiff, "did not have a clear and adequate appellate remedy at law."¹¹⁷

The San Antonio Court of Appeals similarly held in *National Unity Insurance Co. v. Johnson*,¹¹⁸ that a nunc pro tunc judgment that improperly corrects a judicial, rather than a clerical, error is void and may be corrected by mandamus.¹¹⁹ In *National Unity*, the court of appeals held that mandamus was necessary when the trial court, after it lost plenary power, altered the original judgment dismissing both defendants to a judgment dismissing only one defendant.¹²⁰ The court of appeals held that the trial court had no jurisdiction to enter the nunc pro tunc judgment and that the judgment was, therefore, void.¹²¹ Acknowledging that under *Walker v. Packer*¹²² an appeal is not an inadequate remedy simply because it involves more expense or delay than obtaining an extraordinary writ, the court nonetheless determined that mandamus relief was appropriate because "more is at stake when the trial court has acted without jurisdiction."¹²³ The court reasoned that if mandamus relief is not available, the defendant will be "forced to defend a lawsuit over which the trial court has no jurisdiction."¹²⁴ Further, if the defendant loses, it will be unable to pursue an appeal because "the appellate court will also be without jurisdiction."¹²⁵ Requiring a party to pursue legal action in courts without jurisdiction, the court concluded, is not the type of "adequate remedy at law contemplated by *Walker*."¹²⁶

113. 911 S.W.2d 173 (Tex. App.—Corpus Christi 1995, orig. proceeding).

114. *Id.* at 175.

115. *Id.* (citing 11 U.S.C. § 362(a)(1) (1994)).

116. *Sanchez*, 911 S.W.2d at 177 (quoting *State v. Owens*, 907 S.W.2d 484, 486 (Tex. 1995) (per curiam)).

117. *Sanchez*, 911 S.W.2d at 177.

118. 926 S.W.2d 818 (Tex. App.—San Antonio 1996, orig. proceeding) (per curiam).

119. *Id.* at 822.

120. *Id.* at 820, 822.

121. *Id.* at 822.

122. 827 S.W.2d 833 (Tex. 1992) (orig. proceeding).

123. *National Unity*, 926 S.W.2d at 822.

124. *Id.*

125. *Id.*

126. *Id.*

Likewise, in *Gem Vending, Inc. v. Walker*¹²⁷ the Fort Worth Court of Appeals held that a party is entitled to mandamus relief without having to demonstrate that no adequate remedy by appeal exists if the trial court enters a void order.¹²⁸

e. Refusal to Rule on Motion for Summary Judgment

For the express purpose of preventing an interlocutory appeal, the trial court in *Grant v. Wood*¹²⁹ refused to rule on the defendants' motion for summary judgment.¹³⁰ In that case, the defendants, members of the media, moved for summary judgment based in part on Chapter 73 of the Civil Practice and Remedies Code¹³¹ and the federal and state constitutions.¹³² Aware that section 51.014(6) of the Civil Practice and Remedies Code grants a statutory right to an interlocutory appeal from a trial court order denying a motion for summary judgment based on Chapter 73 or the federal or state constitutional free speech or free press clauses,¹³³ the trial court refused to rule on the defendants' motion for summary judgment. The trial court admitted that it did not want the trial of the case to be postponed another "two years" due to the interlocutory appeal.¹³⁴

The First Court of Appeals granted mandamus relief, holding that, although a trial court has some discretion in the manner in which it rules on motions for summary judgment, "[i]t is a clear abuse of discretion for a trial court to refuse to rule on a timely submitted motion for summary judgment when the trial court's express purpose in refusing to rule is to preclude the movant from perfecting a statutory interlocutory appeal."¹³⁵ The court of appeals further held that relators had no adequate remedy by appeal because (1) they would forfeit the benefit of the statutory interlocutory appeal if forced to proceed to trial, and (2) any post-trial appellate challenge to the trial court's failure to rule on the motion for summary judgment would be pointless.¹³⁶

127. 918 S.W.2d 656 (Tex. App.—Fort Worth 1996, orig. proceeding).

128. *Id.* at 658 (holding that trial court order granting new trial was void where order was entered after trial court's plenary jurisdiction expired).

129. 916 S.W.2d 42 (Tex. App.—Houston [1st Dist.] 1995, orig. proceeding).

130. *Id.* at 45.

131. Chapter 73 of the Civil Practice and Remedies Code addresses liability for libel. TEX. CIV. PRAC. & REM. CODE ANN. §§ 73.001-.006 (Vernon 1986).

132. *Grant*, 916 S.W.2d at 43.

133. Section 51.014 provides, in pertinent part:

A person may appeal from an interlocutory order of a district court, county court at law, or county court that:

.....
 (6) denies a motion for summary judgment that is based in whole or in part upon a claim against or defense by a member of the electronic or print media, acting in such capacity, or a person whose communication appears in or is published by the electronic or print media, arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article 1, Section 8, of the Texas Constitution, or Chapter 73.

TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(6) (Vernon Supp. 1997).

134. *Grant*, 916 S.W.2d at 43-45.

135. *Id.* at 45.

136. *Id.* at 46.

f. Order Requiring the Production of Privileged Documents

During the Survey period, the supreme court affirmed that it is “well settled that an erroneous order requiring the production of privileged documents leaves the party claiming privilege without an adequate remedy by appeal.”¹³⁷

3. Orders: Circumstances Not Warranting Mandamus Relief

a. Order Severing Claims

During the Survey period, the Texas Supreme Court reaffirmed that mandamus will not issue “if for any reason it would be useless or unavailing.”¹³⁸ In the underlying litigation in *Dow Chemical*, women who received silicone breast implants filed a lawsuit against Dow Chemical Corporation, Corning Incorporated and Dow Corning Corporation (owned by Dow Chemical and Corning Inc.), alleging tortious conduct in the manufacturing of the breast implants.¹³⁹ Dow Corning filed bankruptcy and removed all breast implant cases pending against it and Dow Chemical to federal court.¹⁴⁰ The federal district court, however, determined that it did not have jurisdiction over the claims against Dow Chemical and remanded those claims to state court.¹⁴¹ The state court severed the claims against Dow Corning and the other defendants, and continued to proceed with the plaintiffs’ claims against Dow Chemical.¹⁴²

Seeking mandamus relief, Dow Chemical complained to the supreme court that the trial court abused its discretion in severing the claims against it from the claims against Dow Corning because the plaintiffs’ claims against the two parties presented the same issues of fact and law.¹⁴³ Without addressing the merits of the severance, the supreme court dismissed the mandamus proceeding, holding that the claims against Dow Corning could not be resolved anywhere other than in the federal system and, therefore, could not be rejoined in state court with the claims against Dow Chemical.¹⁴⁴ The supreme court concluded that directing the trial court to vacate the severance order would “have no practical effect” and refused to issue a mandamus that would be “useless

137. *Memorial Hosp.-The Woodlands v. McCown*, 927 S.W.2d 1, 12 (Tex. 1996) (orig. proceeding) (holding that mandamus is appropriate to correct trial court discovery order where documents are protected from discovery under the medical peer review committee privilege). See *Irving Healthcare Sys. v. Brooks*, 927 S.W.2d 12, 21 (Tex. 1996) (orig. proceeding) (mandamus appropriate where documents are protected by the medical peer review committee privilege); *Gulf Health Care, Inc. v. Lerner*, 932 S.W.2d 488, 488-89 (Tex. 1996) (orig. proceeding) (per curiam) (directing trial court to reconsider discovery order in light of supreme court’s opinions in *Memorial Hosp.-The Woodlands* and *Irving Healthcare Sys.*).

138. *Dow Chem. Co. v. Garcia*, 909 S.W.2d 503, 505 (Tex. 1995) (orig. proceeding) (quoting *Holcombe v. Fowler*, 9 S.W.2d 1028, 1028 (1928)).

139. *Id.* at 504.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 505.

or unavailing.”¹⁴⁵

b. Order Refusing to Sever Claims

In *Liberty National Fire Insurance Co. v. Akin*,¹⁴⁶ an insured brought breach of contract and bad faith claims against her homeowner’s insurance carrier after the carrier denied coverage for damage to her house caused by a shifting foundation.¹⁴⁷ At trial, the carrier asked the trial court to sever the insured’s breach of contract claims from her bad faith claim, arguing that certain evidence admissible on the bad faith claim would be inadmissible on the contract claim.¹⁴⁸ The trial court denied the carrier’s motion for severance and the court of appeals denied mandamus relief.¹⁴⁹

Considering the carrier’s request for mandamus relief, the Texas Supreme Court reiterated that a writ of mandamus will not issue “absent a clear abuse of discretion that leaves the aggrieved party no adequate remedy at law.”¹⁵⁰ To satisfy the clear abuse of discretion standard, the court held, the relator must show “that the trial court could reasonably have reached only one decision.”¹⁵¹

Applying this standard to the facts of the case, the supreme court held that the trial court did not abuse its discretion in refusing to sever the plaintiff’s breach of contract claim from her bad faith claim.¹⁵² The court found that her claims were so interwoven that “most of the evidence introduced [would] be admissible on both claims, and any prejudicial effect [could] be reasonably ameliorated by appropriate limiting instructions to the jury.”¹⁵³ Although the court held that, under some circumstances, severance might be necessary in the bad faith context,¹⁵⁴ such circumstances were not present in *Liberty National*.¹⁵⁵

c. Challenge to Constitutionality of Attorney Occupation Tax

Although the Texas Supreme Court has exclusive administrative authority to regulate the practice of law in Texas, this does not mean that it has exclusive original jurisdiction over any action affecting attorneys in Texas.¹⁵⁶ The relators in *Chenault* sought, by way of mandamus, a decla-

145. *Id.* (quoting *Holcombe*, 9 S.W.2d at 1028 (1928)).

146. 927 S.W.2d 627 (Tex. 1996) (orig. proceeding).

147. *Id.* at 628.

148. *Id.*

149. *Id.*

150. *Id.* at 629 (citing *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992)).

151. *Id.* at 630 (quoting *Walker*, 827 S.W.2d at 839).

152. *Id.*

153. *Id.*

154. *Id.* The court stated that a “trial court will undoubtedly confront instances in which evidence admissible only on the bad faith claim would prejudice the insurer to such an extent that a fair trial on the contract claim would become unlikely.” *Id.*

155. *Id.*

156. *Chenault v. Phillips*, 914 S.W.2d 140, 142 (Tex. 1996) (orig. proceeding) (per curiam).

ration that the Attorney Occupation Tax in Texas is unconstitutional.¹⁵⁷ The relators, however, did not first challenge the tax in district court.¹⁵⁸ Noting the relators' right to challenge the tax in district court and then to appeal any adverse ruling through the ordinary appellate process, the supreme court held that under *Walker v. Packer*,¹⁵⁹ the relators failed to meet their burden of showing that pursuing their claims first in the trial court would cause them to suffer immediate harm entitling them to mandamus relief.¹⁶⁰ The court further held that its inherent powers to regulate the bar are administrative powers, not jurisdictional powers.¹⁶¹ Thus, while the court has original jurisdiction to regulate the Texas bar, it has no original jurisdiction over a claim merely challenging a statute that affects lawyers.¹⁶²

d. Order Setting Abbreviated Schedule for Discovery in Venue Determination Context

Although the supreme court has held that an inadequate remedy by appeal may exist where the trial court denies discovery and thereby prevents a party from presenting a viable claim or defense at trial,¹⁶³ mandamus will not issue to correct a trial court's order limiting discovery and setting an abbreviated discovery schedule where the party seeking mandamus fails to show "harm."¹⁶⁴ The plaintiffs in *Montalvo* were not entitled to mandamus relief because their only objection to the trial court's ruling limiting discovery and setting an abbreviated schedule for hearing on the defendants' motion to transfer venue was that the ruling was, in effect, a discovery sanction.¹⁶⁵ The plaintiffs made no effort to present evidence that "the limitation on discovery or the abbreviated schedule deprived them of any ability to develop evidence pertinent to the venue issue."¹⁶⁶ Without such a showing of harm, the court held, "the record is wholly insufficient to establish that the plaintiffs lacked an adequate remedy by appeal."¹⁶⁷

In keeping with its decision in *Montalvo*, the supreme court, in *Bridgestone/Firestone, Inc. v. Thirteenth Court of Appeals*,¹⁶⁸ reaffirmed its position that "venue determinations generally are incidental trial rulings that are correctable on appeal."¹⁶⁹ In *Bridgestone/Firestone*, the defendants

157. *Id.* at 141. See TEX. TAX CODE ANN. §§ 191.141-145 (Vernon Supp. 1996).

158. *Id.*

159. 827 S.W.2d 833 (Tex. 1992) (orig. proceeding).

160. *Chenault*, 914 S.W.2d at 141.

161. *Id.*

162. *Id.*

163. *Able Supply Co. v. Moye*, 898 S.W.2d 766, 772 (Tex. 1995) (orig. proceeding).

164. *Montalvo v. Fourth Court of Appeals*, 917 S.W.2d 1 (Tex. 1995) (orig. proceeding) (per curiam).

165. *Id.* at 2.

166. *Id.*

167. *Id.*

168. 929 S.W.2d 440 (Tex. 1996) (orig. proceeding) (per curiam).

169. *Id.* at 441.

sought to transfer venue from Hidalgo County to Dallas County.¹⁷⁰ The venue hearing was set five months after the lawsuit was filed, but the plaintiffs had failed to conduct any discovery until the date that their response to the venue motion was due.¹⁷¹ At the hearing, the plaintiffs sought and obtained a continuance.¹⁷² On the day of the second hearing, the plaintiffs sought another continuance.¹⁷³ The trial court denied the second continuance and transferred the cause to Dallas County.¹⁷⁴ The court of appeals concluded that the plaintiffs were entitled to mandamus relief because the trial court had deprived them of their "opportunity for reasonable discovery on venue."¹⁷⁵

Comparing the facts of the case to the "extraordinary circumstances" of *Union Carbide Corp. v. Moye*,¹⁷⁶ the supreme court disagreed.¹⁷⁷ According to the court, no "extraordinary circumstances" existed in *Bridgestone/Firestone* and the trial court could reasonably have concluded that the plaintiffs had an opportunity to obtain, but did not diligently pursue, discovery on venue.¹⁷⁸

e. Order Denying Continuance to Allow Jury Request to Become Timely

In *General Motors Corp. v. Gayle*,¹⁷⁹ defendant General Motors relied upon a co-defendant's representation that a jury request had been made and the fee had been paid.¹⁸⁰ General Motors learned too late that no fee had been paid.¹⁸¹ When the case was called to trial, General Motors filed a formal jury request, paid the fee, and sought a continuance to allow the request to become timely.¹⁸² The trial court denied the jury request, since it was filed less than thirty days before trial, and refused to grant the continuance.¹⁸³ Seeking mandamus relief, General Motors argued to the court of appeals that communications from the trial court had led General Motors to believe that the case was set for a jury trial and, in

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. 798 S.W.2d 792 (Tex. 1990).

177. *Bridgestone/Firestone*, 929 S.W.2d at 441-42. The supreme court noted that, unlike in the case before it, the trial court in *Union Carbide* had misled the party seeking the venue transfer about the form of proof that would be acceptable at the venue hearing, effectively depriving that party of its fundamental due process right to notice and a hearing. *Id.* (citing *Union Carbide*, 798 S.W.2d at 793).

178. *Id.* In contrast to and perhaps derogation of the supreme court's position on this issue, the Waco Court of Appeals in *Lanier v. Stem*, 931 S.W.2d 1 (Tex. App.—Waco 1996, orig. proceeding), corrected by mandamus a trial court's improper venue determination without commenting on the propriety of reviewing the determination by mandamus.

179. 924 S.W.2d 222 (Tex. App.—Houston [14th Dist.] 1996, orig. proceeding).

180. *Id.* at 225. The court noted that "[a] jury request and jury fee payment by one party inures to the benefit of all other parties to the suit." *Id.* at 225 n.1.

181. *Id.* at 225.

182. *Id.*

183. *Id.*

fact, the trial court admitted at the continuance hearing that it thought the case was set for trial to a jury.¹⁸⁴

Refusing to grant mandamus relief, the court of appeals held that an error in denying a jury trial can be remedied on appeal.¹⁸⁵ Therefore, even if the trial court abused its discretion in denying the continuance, General Motors failed to demonstrate that its remedy by appeal would be inadequate.¹⁸⁶

4. *Mandamus Practice*

Although, under most circumstances, a petition for writ of mandamus must be presented to the court of appeals before filing a petition in the Texas Supreme Court, the supreme court in *Mendoza v. Eighth Court of Appeals*¹⁸⁷ clarified that, unlike the prerequisites to filing an application for writ of error, "the Texas Rules of Appellate Procedure do not require or provide for a motion for rehearing of a petition for writ of mandamus in the court of appeals" before pursuing mandamus in the supreme court.¹⁸⁸ A party, therefore, does not waive his right to seek mandamus review in the supreme court by failing to file a motion for rehearing of a petition for writ of mandamus in the court of appeals.¹⁸⁹

Moreover, under certain "compelling" circumstances, a party need not seek mandamus relief in the court of appeals before filing a petition in the Texas Supreme Court.¹⁹⁰ For example, the supreme court permitted a party to bypass the court of appeals in *Davis v. Taylor*.¹⁹¹ Through no fault of his own, the relator in *Davis*—the Republican Party's nominee for the office of Chief Justice of the Tenth Court of Appeals—failed to be timely certified with the Secretary of State as the Party's nominee for the 1996 general elections.¹⁹² Just days before the voting ballots were to be issued, Davis learned that the Secretary of State was rejecting his certification.¹⁹³ In light of the impending ballot issuance, the supreme court held that "compelling circumstances justify bypassing the court of appeals in this instance."¹⁹⁴

184. *Id.*

185. *Id.* at 226-27.

186. *Id.* at 227.

187. 917 S.W.2d 787 (Tex. 1996) (orig. proceeding) (per curiam).

188. *Id.* at 789 (comparing TEX. R. APP. P. 121(a)(1) with TEX. R. APP. P. 100).

189. *Id.*

190. Rule 121(a)(1) of the Texas Rules of Appellate Procedure provides:

When the court of appeals is authorized to exercise concurrent jurisdiction over an original proceeding, the motion should first be presented to the court of appeals. The motion for leave to file in the Supreme Court shall state the date of presentation of the petition to the court of appeals and that court's action on the motion or petition *or the compelling reason that a motion was not first presented to the court of appeals.*

TEX. R. APP. P. 121(a)(1) (emphasis added).

191. 930 S.W.2d 581 (Tex. 1996) (orig. proceeding).

192. *Id.* at 582.

193. *Id.*

194. *Id.* Under circumstances comparable to those of *Davis*, the supreme court in *Bird v. Rothstein*, 930 S.W.2d 586 (Tex. 1996) (orig. proceeding), similarly held that "the immi-

The Texas Supreme Court has held that mandamus relief may not be available to help those who do not diligently pursue their rights.¹⁹⁵ Nonetheless, the court of appeals in *Sanchez v. Hester*,¹⁹⁶ held that a seven month delay between the entry of the trial court's order dismissing the relator's case for want of prosecution and the filing of the relator's petition for writ of mandamus did not preclude the relator from seeking mandamus relief where the real parties in interest are not harmed as a result of the relator's delay in seeking his remedy.¹⁹⁷

B. INTERLOCUTORY APPEALS

1. Class Certification Orders

A party may appeal from an interlocutory order of a district court that "certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure."¹⁹⁸ Although an order that merely modifies a certification order (for example, changing the size of a class) is not immediately appealable under this statute because it is not an order that "certifies or refuses to certify a class,"¹⁹⁹ the Texas Supreme Court recently held that an order that "alters the fundamental nature of the class" (for example, changing a class from opt-out to mandatory) is immediately appealable under the statute.²⁰⁰

nence of the election places this case within the narrow class of cases in which resort to the court of appeals is excused." *Id.* at 587.

195. *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366 (Tex. 1993) (orig. proceeding) (refusing to grant mandamus relief when defendant sat on his right to quash a jury demand for four months).

196. 911 S.W.2d 173 (Tex. App.—Corpus Christi 1995, orig. proceeding [leave denied]).

197. *Id.* at 177.

198. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (Vernon Supp. 1997); TEX. R. CIV. P. 42. Section 51.014 of the Texas Civil Practice and Remedies Code provides, in relevant part:

A person may appeal from an interlocutory order of a district court, county court at law, or county court that:

(3) certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure

TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (Vernon Supp. 1996). Texas Rule of Civil Procedure 42 provides, in pertinent part:

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

TEX. R. CIV. P. 42(a).

199. See *Pierce Mortuary Colleges, Inc. v. Bjerke*, 841 S.W.2d 878, 880-81 (Tex. App.—Dallas 1992, writ denied).

200. *De Los Santos v. Occidental Chem. Corp.*, 933 S.W.2d 493, 495 (Tex. 1996) (per curiam). According to the supreme court in *De Los Santos*, changing the class from opt-out to mandatory altered the fundamental nature of the class because it did more than simply enlarge the class membership. *Id.* To the extent any ambiguity exists regarding the character of a given modification to a class certification order, the conservative appellate practitioner should assume the order is immediately appealable and attempt an interlocu-

2. Stay Pending Interlocutory Appeal

As a general rule, an appeal from an interlocutory order does not suspend enforcement of the interlocutory order or trial pending the appeal.²⁰¹ The rules of appellate procedure, however, give appellate courts authority to issue temporary orders pending determination of an interlocutory appeal if the appellate court finds such orders "necessary to preserve the rights of the parties until disposition of the appeal."²⁰² In *Teran v. Valdez*,²⁰³ the Corpus Christi Court of Appeals considered a temporary order staying proceedings in the trial court pending interlocutory appeal of an order denying the appellant's motion for summary judgment based on an assertion of immunity.²⁰⁴ The court held that the temporary order was necessary to preserve the rights of the appellant, who would be substantially deprived of his right to immunity if forced to trial before appellate review of the interlocutory order.²⁰⁵

III. PRESERVATION OF ERROR

A. FUNDAMENTAL ERROR

The only type of complaint that may be raised on appeal without having first been brought to the attention of the trial court is one involving fundamental error.²⁰⁶ Fundamental error occurs only in extremely limited circumstances when the record shows on its face that the court lacked jurisdiction or that a public interest is directly and adversely affected.²⁰⁷ Texas courts of appeals have routinely held that trial court er-

tory appeal since, if the order is immediately appealable under section 51.014, the court of appeals may refuse to review the order after a final judgment is entered in the case. *Id.*

201. TEX. R. APP. P. 43(a). Rule 43(a) provides, in relevant part:

No order denying interlocutory relief shall be suspended or superseded by an appeal therefrom. The pendency of an appeal from an order authorizing a cause to proceed as a class action suspends such order and also suspends trial on the merits in such cases. Otherwise, the pendency of an appeal from an order granting interlocutory relief does not suspend the order appealed from

.....

Id.

202. Rule 43(c) provides:

On perfection of an appeal from an interlocutory order, the appellate court may issue such temporary orders as it finds necessary to preserve the rights of the parties until disposition of the appeal and may require such security as it deems appropriate, but it shall not suspend the trial court's order if the appellant's rights would be adequately protected by supersedeas or other orders pursuant to Rules 47 or 49.

TEX. R. APP. P. 43(c).

203. 929 S.W.2d 37 (Tex. App.—Corpus Christi 1996, no writ).

204. Texas law provides a statutory right to an interlocutory appeal from a trial court order denying 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." TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(5) (Vernon Supp. 1997).

205. *Teran*, 929 S.W.2d at 39.

206. *Texas Indus. Traffic League v. Railroad Comm'n*, 633 S.W.2d 821, 822-23 (Tex. 1982), *overruled on other grounds*, *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440 (Tex. 1993).

207. *Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982) (per curiam).

rors involving the rights of minors are fundamental because "the interest of the state in their welfare and protection weighs on the side of finding a sufficient public interest."²⁰⁸ The supreme court may disagree. In a per curiam writ denial, the supreme court in *In re J.G.*²⁰⁹ expressly stated that it neither approved nor disapproved of the court of appeals' holding that constitutional claims made by a juvenile are claims of fundamental error that may be raised for the first time on appeal.²¹⁰

B. ORAL RULING ON MOTION FOR DIRECTED VERDICT

Is a ruling denying an oral motion for directed verdict appearing in the statement of facts sufficient to preserve error? The El Paso Court of Appeals recently addressed this issue in *Pride Petroleum Services, Inc. v. Criswell*²¹¹ and, citing Rules 52(a)²¹² and 52(c)(10)²¹³ of the Texas Rules of Appellate Procedure, answered the question "yes."²¹⁴ The court held that these rules "plainly mean" that an oral motion made in open court that is recorded and included in the statement of facts is sufficient to preserve error.²¹⁵ The court expressly declined to follow the courts holding otherwise.²¹⁶

C. OBJECTING TO THE CHARGE

Although, in the wake of the supreme court's opinion in *State Depart-*

208. *In re J.G.*, 905 S.W.2d 676, 680 n.1 (Tex. App.—Texarkana), writ denied per curiam, 916 S.W.2d 949 (Tex. 1995). See *In re G.A.O. v. State*, 854 S.W.2d 710, 715 (Tex. App.—San Antonio 1993, no writ).

209. 916 S.W.2d 949 (Tex. 1995) (per curiam).

210. *Id.* at 949.

211. 924 S.W.2d 720 (Tex. App.—El Paso 1996, writ denied).

212. *Id.* at 721. Rule 52(a) provides, in relevant part:

In order to preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling he desired the court to make. . . . It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. . . . It is not necessary to formally except to rulings or orders of the trial court.

TEX. R. APP. P. 52(a).

213. *Pride Petroleum*, 924 S.W.2d at 721. Rule 52(c)(10) provides, in relevant part: "Anything occurring in open court or in chambers that is reported and so certified by the court reporter may be included in the statement of facts rather than in a formal bill of exception . . ." TEX. R. APP. P. 52(c)(10).

214. *Pride Petroleum*, 924 S.W.2d at 721.

215. *Id.*

216. *Id.* In support of its argument that an order overruling a motion for directed verdict must appear in the judgment or be recited in a separate formal written order to properly preserve error, the appellee in *Pride Petroleum* referred the court to *Wal-Mart Stores, Inc. v. Berry*, 833 S.W.2d 587 (Tex. App.—Texarkana 1992, writ denied), *Western Co. of N. Am. v. Southern Pac. Transp. Co.*, 819 S.W.2d 952 (Tex. App.—Austin 1991, no writ), *Soto v. Southern Life & Health Ins. Co.*, 776 S.W.2d 752 (Tex. App.—Corpus Christi 1989, no writ), *Superior Trucks, Inc. v. Allen*, 664 S.W.2d 136 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.), and *Southwestern Materials Co. v. George Consol. Inc.*, 476 S.W.2d 454 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.). *Pride Petroleum*, 924 S.W.2d at 721. Rejecting the appellee's argument and cited authority, the court stated that it could "not see why an oral ruling on a motion for directed verdict that is fully recorded in the statement of facts will not preserve error." *Id.*

ment of Highways & Public Transportation v. Payne,²¹⁷ courts of appeals are less likely to find waiver of charge error resulting from noncompliance with the technicalities of Texas Rule of Civil Procedure 276, appellants must still “bring the matter to the [trial] court’s attention” and “obtain a ruling.”²¹⁸ Thus, the appellant’s failure to secure the notation “Refused” on her requested instruction in *Munoz* did not, by itself, constitute waiver of her complaint on appeal regarding the trial court’s omission of the instruction.²¹⁹ But, the appellant’s failure, at the formal charge conference, to specifically object to the omission of the instruction when she tendered the proposed instruction to the court as part of her entire proposed charge, did constitute waiver.²²⁰ The record did not indicate that the appellant specifically brought the omitted instruction to the court’s attention.²²¹ The trial judge, the court of appeals concluded, “may, or may not, have been aware that this requested instruction was tucked away in the requested charge.”²²²

IV. FINALITY OF JUDGMENTS

A. SUMMARY JUDGMENTS

During the Survey period, the Texas Supreme Court in *Park Place Hospital v. Estate of Milo*²²³ and *Continental Airlines, Inc. v. Kiefer*²²⁴ reaffirmed its previous holding in *Mafrige v. Ross*.²²⁵ Specifically, “[a]ll parties and all issues before the trial court must be disposed of before a summary judgment becomes final and appealable.”²²⁶ As reflected in *Park Place* and *Kiefer*, however, the “finality” requirement may be more

217. 838 S.W.2d 235 (Tex. 1992).

218. *Munoz v. Berne Group, Inc.*, 919 S.W.2d 470, 472 (Tex. App.—San Antonio 1996, no writ).

219. *Id.*

220. *Id.* Rule 276 of the Texas Rules of Civil Procedure provides, in relevant part:

When an instruction, question, or definition is requested and the provisions of the law have been complied with and the trial judge refuses the same, the judge shall endorse thereon “Refused,” and sign the same officially. . . . Such refused or modified instruction, question, or definition, when so endorsed shall constitute a bill of exceptions, and it shall be conclusively presumed that the party asking the same presented it at the proper time, excepted to its refusal or modification, and that all the requirements of law have been observed, and such procedure shall entitle the party requesting the same to have the action of the trial judge thereon reviewed without preparing a formal bill of exceptions.

TEX. R. CIV. P. 276. The trial judge’s notation of “Refused” on the requested instruction “results in a legal presumption that the issue has been preserved for review.” *Munoz*, 919 S.W.2d at 472. The rule, the court held, “does not make this the exclusive method by which the refusal to give a jury instruction can be preserved for appellate review.” *Id.*

221. *Id.*

222. *Id.*

223. 909 S.W.2d 508 (Tex. 1995).

224. 920 S.W.2d 274 (Tex. 1996).

225. 866 S.W.2d 590 (Tex. 1993).

226. *Park Place Hosp.*, 909 S.W.2d at 510; *Kiefer*, 920 S.W.2d at 276-77; *Mafrige*, 866 S.W.2d at 591.

stringent when the summary judgment fails to expressly dispose of all parties as opposed to all issues.

1. *The Judgment Must Dispose of All Issues*

In *Kiefer*, the plaintiff asserted a state law negligence claim against Continental Airlines for injuries she sustained when she was struck in the back of the head by a briefcase that fell from an overhead storage bin while she was riding on a Continental Airlines plane.²²⁷ Continental Airlines moved for summary judgment “on all claims brought by” the plaintiff on the basis that the plaintiff’s action was preempted by the Airline Deregulation Act of 1978 (ADA).²²⁸ After Continental Airlines moved for summary judgment, but prior to the trial court’s ruling on the motion, the plaintiff amended her petition to assert two new causes of action: an implied cause of action under the ADA and a federal common-law negligence action.²²⁹

The trial court granted Continental Airlines’ motion for summary judgment expressly on the basis that the plaintiff’s action was preempted by the ADA.²³⁰ Although the trial court’s summary judgment order stated that “the *cause* of action”—as opposed to *causes* of action—“is dismissed as being preempted,” the judgment was entitled, “FINAL SUMMARY JUDGMENT.”²³¹ Additionally, the plaintiff specifically drew to the trial court’s attention her federal causes of action in her response to the motion for summary judgment and in a motion for new trial.²³² Neither the parties nor the court of appeals suggested that the judgment was not final.²³³

Analyzing the finality and appealability of the trial court’s summary judgment, the supreme court stated that “[f]inality must be resolved by a determination of the intention of the court as gathered from the language of the decree and the record as a whole, aided on occasion by the conduct of the parties.”²³⁴ Focusing on the trial court’s characterization of the judgment as a “FINAL SUMMARY JUDGMENT” and the fact that the federal causes of action were drawn to the trial court’s attention, the supreme court concluded that, under the circumstances, “the district court intended to render a final, appealable judgment.”²³⁵

227. 920 S.W.2d at 275.

228. *Id.* at 275-76.

229. *Id.* at 276.

230. *Id.*

231. *Id.* at 277.

232. *Id.*

233. *Id.*

234. *Id.* (citation omitted).

235. *Kiefer*, 920 S.W.2d at 277. The court of appeals’ opinion in *Kiefer* stated that the court was reversing the trial court’s summary judgment only on the plaintiff’s state common-law negligence claim. *Id.* The court of appeals’ judgment, however, ordered “that the judgment of the court below be *in all things* reversed and the cause remanded for proceedings consistent with the opinion of this Court.” *Id.* at 277 (emphasis added). The judgment of the court of appeals, therefore, conflicted with its opinion. Noting that the mandate of the court of appeals “must issue in accordance with the judgment” under Rule

2. *The Judgment Must Dispose of All Parties*

In *Park Place*, the supreme court held that, under circumstances in which a plaintiff nonsuits one of several defendants but obtains no order dismissing the nonsuited defendant, a summary judgment rendered in favor of the remaining defendants that contains no Mother Hubbard clause²³⁶ is not final until the trial court signs an order either dismissing the nonsuited defendant or severing the plaintiff's claims against the nonsuited defendant from its claims against the remaining defendants that succeeded on summary judgment.²³⁷ In *Park Place*, a medical malpractice action, the plaintiffs filed suit against five defendants, including Dr. Badlissi and Dr. Walkes.²³⁸ The plaintiffs never obtained service on Dr. Badlissi and nonsuited Dr. Walkes, although no court order was entered dismissing him.²³⁹ After Dr. Walkes was nonsuited (but not dismissed), the remaining defendants moved and obtained summary judgment.²⁴⁰ Ten days after granting summary judgment, the trial court severed all of the plaintiffs' claims against Dr. Badlissi and Dr. Walkes from the claims against the remaining defendants who had obtained summary judgment.²⁴¹ The plaintiffs filed a motion for new trial and perfected their appeal ninety days after the trial court rendered its order of severance.²⁴²

On appeal, the defendants argued that the appellate timetable ran from the issuance of the summary judgment rather than from the signing of the severance order, rendering the plaintiff's appeal late.²⁴³ The supreme court disagreed, holding that the summary judgment was not a final, appealable order because it did not dispose of the claims against Dr. Walkes and Dr. Badlissi, and it contained no Mother Hubbard clause.²⁴⁴ The supreme court specifically held that, although the plaintiffs had filed notice to nonsuit Dr. Walkes, "the appellate timetable could not be triggered until a signed, written order of the court dismissed him."²⁴⁵

In *Atchison v. Weingarten Realty Management Co.*,²⁴⁶ a case decided after *Park Place*, the First Court of Appeals similarly held that a summary judgment that does not explicitly dispose of all claims and parties and contains no Mother Hubbard clause is not final until nonsuited defendants that are not named in the summary judgment are dismissed by an

86(a) of the Texas Rules of Appellate Procedure, the supreme court held that "the language of the judgment controls over the conflicting language of the opinion." *Id.* As a result, the court of appeals' reversal of the summary judgment was as to all of the plaintiff's claims. *Kiefer*, 920 S.W.2d at 277.

236. Generally, "Mother Hubbard" clauses recite that "all relief not expressly granted is denied." *Mafrige*, 866 S.W.2d at 590 n.1.

237. *Park Place*, 909 S.W.2d at 510.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. 916 S.W.2d 74 (Tex. App.—Houston [1st Dist.] 1996, no writ).

order granting the nonsuit.²⁴⁷

Appellate practitioners should be aware, however, that despite the apparent clarity of the supreme court's holding in *Park Place*—that a summary judgment is not a final appealable judgment if it (a) is against fewer than all defendants, (b) contains no Mother Hubbard clause, and (c) is rendered while a motion for nonsuit is pending—the First Court of Appeals characterized the supreme court's holding as a mere “suggestion.”²⁴⁸ In fact, the First Court of Appeals in *Atchison* submitted that the summary judgment in *Park Place* was a final appealable judgment, but that the severance order, which was signed within the trial court's thirty-day plenary power over the summary judgment, operated to delay the commencement of the appellate timetable until the date it was signed.²⁴⁹ This analysis appears to be at odds with the supreme court's clear holding in *Park Place* that a summary judgment is not final until the trial court signs an order either dismissing nonsuited defendants or severing a plaintiff's claims against nonsuited defendants from its claims against remaining defendants disposed of by summary judgment.²⁵⁰

3. *The Effect of a Mother Hubbard Clause*

What is the effect of a Mother Hubbard clause in a summary judgment that does not expressly dispose of all parties and issues? In *Gilchrist v. Bandera Electric Cooperative, Inc.*,²⁵¹ decided one month prior to the supreme court's decision in *Kiefer*, the San Antonio Court of Appeals held that a summary judgment that did not expressly dispose of the defendant's counterclaims against the plaintiff was interlocutory despite the fact that the judgment contained a Mother Hubbard clause.²⁵² In *Gil-*

247. *Id.* at 76. In *Atchison*, the summary judgment expressly disposed of the plaintiff's primary cause of action against the defendant, but did not address the defendant's cross-claims for contribution and indemnity against third-party defendants. *Atchison*, 916 S.W.2d at 75-76. The summary judgment did not contain a Mother Hubbard clause. *Id.* at 75 n.2. Nonetheless, the *Atchison* court of appeals examined the possibility that, even absent a Mother Hubbard clause, the summary judgment also disposed of the defendant's cross-claims for contribution and indemnity, since those claims were not independent causes of action but existed only as derivative claims of the plaintiff's primary cause of action, which was disposed of by summary judgment. *Id.* at 76. However, the court concluded that, while the summary judgment implicitly disposed of the defendant's cross-claims by disposing of the plaintiff's primary cause of action (which necessarily rendered the cross-claims no longer viable), a summary judgment that implicitly disposes of all issues and parties is still not final. *Id.* Under *Mafrige*, “a summary judgment which does not contain a ‘Mother Hubbard’ clause must *explicitly* dispose of all issues and parties before the judgment becomes final.” *Atchison*, 916 S.W.2d at 76 (emphasis in original) (citing *Mafrige*, 866 S.W.2d at 591-92).

248. *Atchison*, 916 S.W.2d at 76 n.3.

249. *Atchison*, 916 S.W.2d at 75 n.3.

250. 909 S.W.2d at 510.

251. 924 S.W.2d 388 (Tex. App.—San Antonio 1996), *rev'd per curiam*, 40 Tex. Sup. Ct. J. 441 (Mar. 21, 1997) (not released for publication).

252. *Id.* at 390 (citation omitted). In an opinion issued after the Survey period, the supreme court reversed the court of appeals' finding that the judgment was not final and held that a summary judgment is final for appeal purposes even if it grants more relief than requested if it contains a Mother Hubbard clause. On appeal, the proper disposition by

christ, the plaintiff moved for summary judgment on its "entire claim" against the defendant, but made no mention of the defendant's counterclaims against the plaintiff.²⁵³ The trial court's summary judgment in favor of the plaintiff included a Mother Hubbard clause, purporting to dispose of all parties and issues.²⁵⁴ The summary judgment, therefore, granted the plaintiff *more* relief than requested.²⁵⁵

Citing *Mafrige*²⁵⁶ and *Teer v. Duddleston*,²⁵⁷ the court of appeals held that

where a summary judgment order is appealed which appears to be final on its face, but which should have been partial and interlocutory, in the absence of an order of severance, the appellate courts should reverse the judgment and remand to the trial court for disposal of all remaining parties and issues in a final appealable order.²⁵⁸

Since the motion for summary judgment in *Gilchrist* failed to address the defendant's counterclaims and the counterclaims were not severed, the proper remedy, the court of appeals held, was to reverse and remand, without consideration of the merits of the summary judgment, for disposition or severance of the counterclaims that were not addressed in the motion for summary judgment.²⁵⁹ The court expressly rejected the notion that the inclusion of a Mother Hubbard clause in a summary judgment "amounts to an all-encompassing procedural safeguard, operating to make any summary judgment final and appealable as to all parties and causes of action, notwithstanding the fact that such relief was not requested."²⁶⁰

An apparent distinction between the facts of *Gilchrist* and those of *Kiefer*—in which the supreme court found a summary judgment to be final although the summary judgment contained no Mother Hubbard clause and the nonmoving party asserted additional claims after the motion for summary judgment was filed—is the fact that the moving party in *Kiefer* moved for summary judgment "on all claims brought by" the non-

the court of appeals is to consider the summary judgment on the merits and remand any portion that grants more relief than requested. *See* 40 Tex. Sup. Ct. J. 441.

253. *Id.* at 389.

254. *Id.*

255. *Id.*

256. 866 S.W.2d 590 (Tex. 1993).

257. 664 S.W.2d 702 (Tex. 1984).

258. *Gilchrist*, 924 S.W.2d at 390.

259. *Id.* at 390-91. In the event the counterclaims are not severable, the court held, the summary judgment "remains interlocutory until the counterclaims are adjudicated." *Id.* at 391.

260. *Id.* at 393. The dissent in *Gilchrist* argued that the court of appeals should have affirmed that part of the judgment dealing with the plaintiff's claims and reversed and remanded that part of the judgment improperly disposing of the defendant's counterclaims. *Id.* at 394 (Duncan, J., dissenting). In the dissent's opinion, the court of appeals had jurisdiction over the appeal because the Mother Hubbard clause rendered the trial court's judgment final and appealable, although the judgment "simply contain[ed] reversible error as to [the defendant's] counterclaims." *Id.* at 398. The majority characterized the dissent as proposing that the court of appeals *sua sponte* sever the counterclaims in order to consider the merits of "what is, in fact, an interlocutory partial summary judgment." *Id.* at 399.

moving party, "thus including the two [additional] claims even though they were first raised after the motion was filed."²⁶¹ In *Gilchrist*, the plaintiff expressly moved for summary judgment *only* on its claims against the defendant and did not even mention or purport to move for summary judgment on the defendant's counterclaims.²⁶² The summary judgment in that case, however, contained a Mother Hubbard clause that disposed of all claims, which should have resulted in a final, appealable judgment.²⁶³

4. Finality of a Summary Judgment on Improperly Severed Claims

According to the Corpus Christi Court of Appeals, if a trial court errs in severing certain claims in a case and rendering summary judgment on those claims, the severed summary judgment, although erroneous, is final for purposes of appeal.²⁶⁴ The proper remedy on appeal is to reverse the judgment and remand the case for trial.²⁶⁵ As the *Nicor* court acknowledged, however, this holding is directly contrary to the El Paso Court of Appeals' decision in *Cass v. Stephens*,²⁶⁶ in which the El Paso court held that if a severance is improper, summary judgment on the severed claims is not final, resulting in the court of appeals having no jurisdiction over the case.²⁶⁷ In disagreeing with *Cass*, the *Nicor* court argued that the supreme court in *Mafrige*²⁶⁸ directed courts of appeals to treat a judgment that on its face purports to be final as such for purposes of appeal.²⁶⁹ The judgment in the severed portion of the action, the Corpus Christi court held, "is final for the purpose of determining appellate jurisdiction without respect to whether the severance was proper."²⁷⁰

B. DEFAULT JUDGMENTS

In contrast to a judgment entered following a trial on the merits, "a default judgment carries no presumption of finality."²⁷¹ As in the summary judgment context, to determine the issue of finality of a default judgment, the court must "divine the intention of the trial court "from the

261. *Kiefer*, 920 S.W.2d at 276.

262. 924 S.W.2d at 389.

263. *English v. Union State Bank*, 40 Tex. Sup. Ct. J. 234 (Jan. 10, 1997) (although the opinion has not yet been released for publication in the permanent law, the court held that a summary judgment containing a Mother Hubbard clause is final and appealable, even if it grants more relief than requested).

264. *Nicor Exploration Co. v. Florida Gas Transmission Co.*, 911 S.W.2d 479, 482 (Tex. App.—Corpus Christi 1995, writ denied). The court in *Nicor* held that the severance in that case was improper because the severed claim was so interwoven with the remaining action that it involved the same facts and issues. *Id.*

265. *Id.*

266. 823 S.W.2d 731, 734 (Tex. App.—El Paso 1992, no writ).

267. *Nicor*, 911 S.W.2d at 482 (citing *Cass*, 823 S.W.2d at 733).

268. *Mafrige*, 866 S.W.2d at 592 (Tex. 1993).

269. *Nicor*, 911 S.W.2d at 482.

270. *Id.*

271. *Zamarripa v. Sifuentes*, 929 S.W.2d 655, 657 (Tex. App.—San Antonio 1996, no writ).

language of the decree and the record as a whole, aided on occasion by the conduct of the parties."²⁷² Applying these rules, the court of appeals in *Zamarripa* concluded that a default judgment that contains no Mother Hubbard clause and that does not expressly dispose of, or is otherwise completely silent on, the claim of prejudgment interest pled in the plaintiff's petition, is not a final, appealable default judgment.²⁷³

In *Zamarripa*, the defendants filed an answer on the same day but after a default judgment was taken.²⁷⁴ Plaintiff's counsel did not inform defendants' counsel of the default judgment, and the parties engaged in discovery and settlement talks after the judgment was entered.²⁷⁵ Some eight months later, defendants learned of the default judgment.²⁷⁶ Defendants challenged the default judgment by motion to reconsider, but the trial court held that its plenary power had expired and that it had no jurisdiction to consider the motion.²⁷⁷

On appeal, the San Antonio Court of Appeals analyzed the finality of the eight month old default judgment.²⁷⁸ If the default judgment was final, the appeal was untimely and would have to be dismissed for want of jurisdiction; if interlocutory, the appeal would have to be dismissed for failure to bring a final appealable judgment.²⁷⁹ Asserting that the judgment was final, the plaintiff argued that the omission of prejudgment interest from the default judgment did not render the judgment interlocutory, because the awarding of prejudgment interest is mandatory in personal injury cases under article 5069-1.05, section 6(a) of the Texas Revised Civil Statutes.²⁸⁰ Rejecting the plaintiff's argument, the court of appeals found that, under the circumstances of the case, the calculation of prejudgment interest would not be purely ministerial.²⁸¹ The pending dates and amounts of settlement offers among the parties, which were not clear in the record, would have to be considered in calculating prejudgment interest.²⁸² Since the calculation of prejudgment interest would involve factual issues unresolved by the default judgment, the judgment was interlocutory.²⁸³ Moreover, the court concluded, the plaintiff's postjudgment engagement in discovery on the substantive liability issues in the case reflected that even the plaintiff did not believe the default judgment was final.²⁸⁴

272. *Id.* (citing *Kiefer*, 920 S.W.2d at 277).

273. *Id.* at 658.

274. *Id.* at 656.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* at 657.

281. *Id.*

282. *Id.*

283. *Id.* at 657-58.

284. *Id.*

C. TURNOVER ORDERS

A turnover order is a final, appealable judgment, and a court of appeals errs in dismissing an appeal from a turnover order for lack of jurisdiction when the appellant perfects his appeal within thirty days of the order.²⁸⁵ In *Burns*, the Dallas Court of Appeals dismissed an appeal from a turnover order, holding that it lacked appellate jurisdiction over the case because a turnover order is an interlocutory order and the appellant had filed his cost bond more than twenty days after the signing of the judgment.²⁸⁶ The supreme court reversed the judgment of the court of appeals, holding that a turnover order is not an interlocutory order and that the appellant had complied with the thirty day deadline for perfection permitted by Rule 41 of the rules of appellate procedure.²⁸⁷

V. EXTENDING THE APPELLATE TIMETABLE

A. TRIAL COURT JURISDICTION OVER POST-VERDICT MOTIONS

1. *Motions to Modify the Judgment*

In *L.M. Healthcare, Inc. v. Childs*,²⁸⁸ the supreme court held that a motion to modify judgment filed after denial of a motion for new trial, but within thirty days of judgment, was timely, extending the trial court's plenary jurisdiction to sign a modified judgment within seventy-five days of judgment.²⁸⁹ The supreme court rejected the concern of the court of appeals in that case that, by filing subsequent postjudgment motions, a party could delay the running of the court's plenary power indefinitely.²⁹⁰ The court pointed out that the extension of the trial court's plenary power applies only to motions filed within thirty days from the date the trial court signed the judgment. As a result, the "trial court's plenary jurisdiction cannot extend beyond 105 days after the trial court signs the

285. *Burns v. Miller, Hiersche, Martens & Hayward, P.C.*, 909 S.W.2d 505, 506 (Tex. 1995) (per curiam).

286. *Id.*; TEX. R. APP. P. 42. Rule 42 requires appeals from interlocutory orders (when allowed by law) to be perfected within twenty days after the judgment is signed. TEX. R. APP. P. 42(a)(3). Rule 42(a)(3) specifically provides, in pertinent part:

In all accelerated appeals from interlocutory orders and in quo warranto proceedings, the bond, or the notice or affidavit in lieu thereof, shall be filed, or the deposit in lieu of bond shall be made, within twenty days after the judgment or order is signed.

Id.

287. *Burns*, 909 S.W.2d at 506. Rule 41(a)(1) provides, in relevant part:

When security for costs on appeal is required, the bond or affidavit in lieu thereof shall be filed with the clerk within thirty days after the judgment is signed, or, within ninety days after the judgment is signed if a timely motion for new trial has been filed by any party or if any party has timely filed a request for findings of fact and conclusions of law in a case tried without a jury. If a deposit of cash is made in lieu of bond, the same shall be made within the same period.

TEX. R. APP. P. 41(a)(1).

288. 929 S.W.2d 442 (Tex. 1996) (per curiam).

289. *Id.* at 444.

290. *Id.*

judgment.”²⁹¹

2. Late-Filed Post-Verdict Motion

a. Rule 306a(4): Defendant Must Learn of Judgment Within Ninety Days²⁹²

A trial court does not have jurisdiction to consider a motion for new trial filed 111 days after the entry of judgment where the defendant did not receive notice of the judgment until 103 days after the judgment was entered.²⁹³ The plain language of Texas Rule of Civil Procedure 306a(4)²⁹⁴ as construed by the supreme court in *Levit v. Adams*,²⁹⁵ limits the extension of the trial court's plenary power to instances where the defendant learns of the judgment within ninety days.²⁹⁶ As a result, a trial court has no jurisdiction to grant a motion for new trial where the defendant learns of a judgment more than ninety days after it is signed.²⁹⁷

b. Rule 306a(4): Defendant Must Establish *Prima Facie* Case of Jurisdiction²⁹⁸

A defendant who does not receive notice of judgment within twenty days after it was signed must do more than just file a motion challenging the judgment within thirty days of learning of the judgment. In his motion challenging the judgment, the defendant must establish a *prima facie* case of jurisdiction to extend the trial court's plenary power over the matter.²⁹⁹ A late-filed post-verdict motion that is unsworn and/or does not

291. *Id.* (citing TEX. R. CIV. P. 329b(c) (seventy-five days) and TEX. R. CIV. P. 329b(e) (30 days)).

292. TEX. R. CIV. P. 306(a)(4).

293. *Graham v. Fashing*, 928 S.W.2d 567, 568 (Tex. App.—El Paso 1996, orig. proceeding).

294. Rule 306a(4) provides:

If within twenty days after the judgment or other appealable order is signed, a party adversely affected by its or his attorney has neither received the notice required by paragraph (3) of this rule nor acquired actual knowledge of the order, then with respect to that party all the periods mentioned in paragraph (1) shall begin on the date that such party or his attorney received such notice or acquired actual knowledge of the signing, whichever occurred first, but in no event shall such periods begin more than ninety days after the original judgment or other appealable order was signed.

TEX. R. CIV. P. 306a(4).

295. 850 S.W.2d 469 (Tex. 1993) (per curiam).

296. *Graham*, 928 S.W.2d at 569. See *Levit*, 850 S.W.2d at 470.

297. *Graham*, 928 S.W.2d at 569. Further, under Rule 306a(4), notice of judgment received by the defendant's attorney constitutes notice to the defendant, commencing the time for filing a motion for new trial. *Gem Vending, Inc. v. Walker*, 918 S.W.2d 656, 657-58 (Tex. App.—Fort Worth 1996, orig. proceeding) (appellate time periods not tolled although defendant did not receive notice of judgment with 20 days of signing of judgment where defendant's attorney of record received notice of judgment within 20 days of the date judgment was signed).

298. TEX. R. CIV. P. 306(a)(4).

299. *Gonzalez v. Sanchez*, 927 S.W.2d 218, 221 (Tex. App.—El Paso 1996, no writ) (defendant failed to establish *prima facie* case of jurisdiction in motion to set aside default judgment); *In re Simpson*, 932 S.W.2d 674, 677-78 (Tex. App.—Amarillo 1996, no writ) (defendant failed to establish *prima facie* case of jurisdiction in motion for new trial).

establish the first date that either the defendant or his attorney received notice of the judgment fails to establish a *prima facie* case of jurisdiction and does not extend the trial court's plenary power.³⁰⁰

3. *Motions for New Trial*

a. Must Be Filed By a Party of Record

A motion for new trial extends the trial court's plenary power only when the motion is filed by a party of record.³⁰¹ A motion for new trial filed by a party seeking intervention, therefore, does not extend the court's plenary power.³⁰²

b. Can Be Considered Without Filing Fee

A trial court may, at its discretion, consider a motion for new trial before the filing fee is paid.³⁰³

c. Justice Court

The filing of a motion for new trial in justice court is governed by Texas Rule of Civil Procedure 567, rather than Rule 329b(e).³⁰⁴ Thus, a party who files a motion for new trial in justice court has a maximum of twenty days to file an appeal bond, rather than thirty days.³⁰⁵

4. *Motions to Reinstate*

Disagreeing with the Fort Worth Court of Appeals' decision in *Brim Laundry Machinery Co. v. Washex Machinery Corp.*,³⁰⁶ the Austin Court of Appeals in *Perez v. Texas Employers' Insurance Ass'n*³⁰⁷ held that a prematurely filed verified motion to reinstate operates to extend the appellate timetable.³⁰⁸

300. *Gonzalez*, 927 S.W.2d at 222; *Simpson*, 932 S.W.2d at 677-78.

301. *State & County Mut. Fire Ins. Co. v. Kelly*, 915 S.W.2d 224, 227 (Tex. App.—Austin 1996, orig. proceeding).

302. *Id.*

303. *Kvanvig v. Garcia*, 928 S.W.2d 777, 779 (Tex. App.—Corpus Christi 1996, orig. proceeding).

304. *Searcy v. Sagullo*, 915 S.W.2d 595, 596 (Tex. App.—Houston [14th Dist.] 1996, no writ).

305. *Id.* at 597.

306. 854 S.W.2d 297, 301 (Tex. App.—Fort Worth 1993, writ denied).

307. 926 S.W.2d 425 (Tex. App.—Austin 1996, no writ) (per curiam).

308. *Id.* at 426-27. In reaching this conclusion, the court of appeals relied on precedent applying Rule 58(a) of the Texas Rules of Appellate Procedure to motions for new trial. *Id.* Rule 58(a) states:

Proceedings relating to an appeal need not be considered ineffective because of prematurity if a subsequent appealable order has been signed to which the premature proceeding may properly be applied.

TEX. R. APP. P. 58(a). Analogizing motions to reinstate to motions for new trial, the court determined that a motion to reinstate should be considered "a proceeding relating to an appeal" for purposes of Rule 58. *Perez*, 926 S.W.2d at 426-27.

B. REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

In *Linwood v. NCNB Texas*,³⁰⁹ the supreme court held that a request for findings of fact and conclusions of law does not extend the appellate timetable in a summary judgment proceeding because a summary judgment proceeding is not an evidentiary hearing and, therefore, not "tried" under Texas Rule of Civil Procedure 296.³¹⁰ Relying on the supreme court's reasoning in *Linwood*, the Fort Worth Court of Appeals in *O'Donnell v. McDaniel*³¹¹ held that a request for findings of fact and conclusions of law did not extend the appellate timetable in an appeal from a judgment dismissing a case on the pleadings with prejudice for failure "to state an actionable cause."³¹² Similarly, the Austin Court of Appeals in *Lusk v. Service Lloyds Insurance Co.*³¹³ held that a request for findings of fact and conclusions of law is ineffective to extend the appellate timetable in an appeal from a case dismissed for want of jurisdiction on the pleadings where there was no evidentiary hearing.³¹⁴

However, under the Austin courts decision in *Hernandez v. Texas Department of Insurance*,³¹⁵ if a trial court conducts an evidentiary hearing on a plea to the jurisdiction and the cause is dismissed based upon evidence presented and facts determined at the hearing, the supreme court's holding in *Linwood* is not applicable and a request for findings of fact and conclusions of law operates to extend the appellate timetable.³¹⁶

C. FILING A MOTION FOR NEW TRIAL BY MAIL

In *Stokes v. Aberdeen Insurance Co.*,³¹⁷ the Texas Supreme Court held that mailing a motion to a district judge at his or her proper court address instead of directly to the court clerk is "conditionally effective as mailing it to the proper court clerk's address" so as to satisfy Texas Rule of Civil Procedure 5, provided that the clerk actually receives a copy of the document within ten days to perfect the filing.³¹⁸ Thus, a motion for new trial that was mailed to the trial judge at the proper court address, but forwarded to the clerk by Federal Express, was deemed timely filed.³¹⁹

309. 885 S.W.2d 102 (Tex. 1994).

310. *Id.* at 103.

311. 914 S.W.2d 209 (Tex. App.—Fort Worth 1995, writ denied).

312. *Id.* at 210.

313. 922 S.W.2d 647 (Tex. App.—Austin 1996, writ denied) (per curiam).

314. *Id.* at 649.

315. 923 S.W.2d 192 (Tex. App.—Austin 1996, no writ).

316. *Id.* at 194. *Accord* WISD Taxpayers Ass'n v. Waco Indep. Sch. Dist., 912 S.W.2d 392, 394 (Tex. App.—Waco 1995, no writ) (per curiam) (holding that request for findings of fact and conclusions of law did not operate to extend appellate timetable where case was dismissed for want of jurisdiction without evidentiary hearing).

317. 917 S.W.2d 267 (Tex. 1996) (per curiam).

318. *Id.* at 268.

319. *Id.*

D. COMMENCEMENT OF THE APPELLATE TIMETABLE

The Houston Court of Appeals affirmed that the appellate timetable begins to run from a signed, written order, even when the signing of that order is only ministerial.³²⁰ As a result, the appellate timetable runs from when the trial court signs an order granting nonsuit, rather than when the plaintiff files the notice of nonsuit.³²¹

VI. SUPERSEDING THE JUDGMENT

A. ALTERNATE SECURITY IN PERSONAL INJURY CASES

In *Isern v. Ninth Court of Appeals*,³²² the trial court issued an order permitting Isern, a judgment debtor, to supersede execution of a \$3.1 million personal injury judgment by posting "alternate security" in an amount less than the full amount of the judgment.³²³ The court of appeals set aside the trial court's order, holding that, under sections 52.002³²⁴ and 52.005 of the Texas Civil Practice and Remedies Code, a full supersedeas bond equal to the amount of the judgment, plus interest, plus costs, must be posted in appeals from judgments rendered in personal injury actions.³²⁵ The supreme court disagrees.

Acknowledging section 52.002's inapplicability to personal injury cases, the supreme court held that Rule 47(b)(1) of the Texas Rules of Appellate Procedure³²⁶ supplements section 52.002, affording the trial court "the discretion to reduce the amount of security in personal injury actions

320. *Glass v. Sponsel*, 916 S.W.2d 25, 27 (Tex. App.—Houston [1st Dist.] 1995, no writ) (per curiam).

321. *Id.*

322. 925 S.W.2d 604 (Tex. 1996) (orig. proceeding) (per curiam).

323. *Id.* at 605.

324. TEX. CIV. PRAC. & REM. CODE ANN. § 52.002 (Vernon 1986). Section 52.002 provides, in relevant part:

A trial court rendering a judgment that awards recovery of a sum of money, other than a judgment rendered in a . . . personal injury or wrongful death action, . . . may set the security in an amount less than the amount of the judgment, interest, and costs if the trial court, after notice to all parties and a hearing, finds that:

- (1) setting the security at an amount equal to the amount of the judgment, interest, and costs would cause irreparable harm to the judgment debtor; and
- (2) setting the security at the lesser amount would not substantially decrease the degree to which a judgment creditor's recovery under the judgment would be secured after the exhaustion of all appellate remedies.

Id.

325. 925 S.W.2d at 650.

326. Rule 47 provides, in relevant part:

(b) Money Judgment. When the judgment awards recovery of a sum of money, the amount of the bond or deposit shall be at least the amount of the judgment, interest, and costs. The trial court may make an order to provide for security in an amount or type deviating from this general rule if after notice to all parties and a hearing the trial court finds:

- (1) as to civil judgments rendered in . . . a personal injury or wrongful death action, . . . that posting the amount of the bond or deposit will cause irreparable harm to the judgment debtor, and not posting such bond or deposit will cause no substantial harm to the judgment creditor.

TEX. R. APP. P. 47(b)(1).

if the trial court finds that (1) posting the amount of the bond will cause irreparable harm to the judgment debtor, and (2) not posting the full bond will cause no substantial harm to the judgment creditor."³²⁷ The supreme court concluded that since, on its face, section 52.002 does not prohibit alternate security in appeals from personal injury judgments, it "does not apply to appeals from personal injury judgments."³²⁸ Section 52.002, therefore, "simply addresses alternate security for appeals in cases other than those involving personal injury."³²⁹ As a result, a trial court has discretion under Rule 47(b)(1) to set the supersedeas bond at a lesser amount than the full amount of the judgment in appeals from judgments rendered in personal injury actions.³³⁰

B. THE BOND MUST PROVIDE SECURITY IN ADDITION TO THE JUDGMENT DEBTOR'S ASSETS

The surety on the supersedeas bond "must provide security in addition to the assets owned by the judgment debtor at the date judgment was rendered against it."³³¹ A judgment debtor may not, therefore, simply transfer assets equal in value to the bond to a third party and arrange for that third party to act as surety on the judgment debtor's supersedeas bond.³³² Stretching the patience of the San Antonio Court of Appeals thin by their supersedeas bond "antics," the judgment debtors in *Trans-American* incorporated a new company post-judgment and transferred assets owned by them in excess of the amount of the judgment to the new company and then made the new company the surety on their supersedeas bond.³³³ Declining the appellants' "invitation to make a mockery of this court,"³³⁴ the San Antonio Court of Appeals reviewed the sufficiency of the bond.³³⁵ The court held that, implicit in the requirement that the

327. *Isern*, 925 S.W.2d at 606.

328. *Id.*

329. *Id.*

330. *Id.* In reaching this conclusion, the supreme court expressly overruled *Laird v. King*, 866 S.W.2d 110 (Tex. App.—Beaumont 1993, orig. proceeding).

331. *TransAmerican Natural Gas Corp. v. Finkelstein*, 911 S.W.2d 153, 155 (Tex. App.—San Antonio 1995, no writ).

332. *Id.*

333. *Id.* at 154-56. The judgment debtors did this after the court of appeals had already rejected their first supersedeas bond, which was insufficient because the sureties on the bond consisted of the judgment debtors' subsidiaries. *Id.* at 154.

334. *Id.* at 155.

335. The court held that the sufficiency of a supersedeas bond may be determined in the first instance by the court of appeals, in the absence of material factual disputes. *Id.* at 155. The court noted that nothing in Rules 47(k) and 49(a) of the Texas Rules of Appellate Procedure "requires prior trial court review of a motion challenging the sufficiency of a supersedeas bond." *Id.* TEX. R. APP. P. 47(k), 49(a). Rule 47(k) provides, in relevant part:

The trial court shall have continuing jurisdiction during the pendency of an appeal from a judgment, even after the expiration of its plenary power, to order the amount and the type of security and the sufficiency of sureties and, upon any changed circumstances, to modify the amount or the type of security required to continue the suspension of the execution of the judgment.

TEX. R. APP. P. 47(k). Rule 49(a) provides:

surety on a supersedeas bond provide security “*in addition to the personal liability of the appellant*, for the payment of the judgment[,] . . . is that the surety must provide security in addition to the assets owned by the judgment debtor at the date judgment was rendered against it.”³³⁶ If a judgment debtor is permitted to simply transfer assets owned by the debtor to a third party and arrange for the third party to act as surety on the judgment debtor’s supersedeas bond, “the judgment creditor would acquire no security in addition to that provided by the judgment debtor at the date of the judgment.”³³⁷ This, the court held, does not comport with Texas law.³³⁸

Rule 60(a) of the Texas Rules of Appellate Procedure authorizes courts of appeals to dismiss appeals as a penalty or sanction for an appellant’s failure to comply with any order of the court.³³⁹ Under the authority of this rule, the Texarkana Court of Appeals dismissed the appellants’ appeal in *Hayes v. Hayes*³⁴⁰ for failure to post a supersedeas bond or comply with post-judgment discovery orders.³⁴¹

VII. PLENARY POWER OF THE TRIAL COURT

A. JUDGMENTS NUNC PRO TUNC

After the trial court loses plenary jurisdiction over a case, it can correct only clerical errors—it cannot correct judicial errors.³⁴² That is, after the

The sufficiency of a cost or supersedeas bond or deposit or the sureties thereon or of any other bond or deposit under Rule 47 shall be reviewable by the appellate court for insufficiency of the amount or of the sureties or of the securities deposited, whether arising from initial insufficiency or from any subsequent condition which may arise affecting the sufficiency of the bond or deposit. The court in which the appeal is pending shall, upon motion showing such insufficiency, require an additional bond or deposit to be filed with and approved by the clerk of the trial court, and a certified copy to be filed in the appellate court.

TEX. R. APP. P. 49(a).

336. *TransAmerican*, 911 S.W.2d at 155 (emphasis in original).

337. *Id.*

338. *Id.*

339. TEX. R. APP. P. 60(a). Rule 60(a) provides, in relevant part:

(1) If an appeal or writ of error is subject to dismissal for want of jurisdiction or for failure of appellant to comply with any requirements of these rules or any order of the court, the appellee may file a motion for dismissal or for affirmance and judgment for costs on the appeal bond or for the cash deposit. . . .

(2) If it appears to the appellate court that an appeal or writ of error is subject to dismissal for want of jurisdiction or for failure to comply with any requirements of these rules or any order of the court, the court may, on its own motion, give notice to all parties that the case will be dismissed unless the appellant or any party desiring to continue the appeal or writ of error, files with the court within ten days a response showing grounds for continuing the appeal or writ of error.

Id.

340. 920 S.W.2d 344 (Tex. App.—Texarkana 1996, writ denied) (per curiam).

341. *Id.* at 345.

342. TEX. R. CIV. P. 316, 329b(f); *National Unity Ins. Co. v. Johnson*, 926 S.W.2d 818, 820 (Tex. App.—San Antonio 1996, orig. proceeding) (per curiam).

trial court loses plenary power, it can only correct the entry of a final written judgment that incorrectly states the judgment actually rendered.³⁴³ As a result, "even if the court renders incorrectly, it cannot alter a written judgment which precisely reflects the incorrect rendition."³⁴⁴ Although the judicial or clerical nature of an error is a question of law, factual questions concerning whether the court previously pronounced judgment and the terms of the pronouncement must be answered before this legal determination can be made.³⁴⁵ Where there is no evidence, however, that the trial court rendered a judgment other than that contained in the written judgment, any error in the rendition is judicial as a matter of law and cannot be corrected by a judgment nunc pro tunc.³⁴⁶

In keeping with the San Antonio Court of Appeals' decision in *National Unity*, the Austin Court of Appeals affirmed a trial court's judgment nunc pro tunc in *Newsom v. Petrilli*,³⁴⁷ where "satisfactory evidence" existed to prove that the use of a word in the original judgment was a clerical and not judicial error.³⁴⁸

B. SANCTIONS UNDER TEXAS RULE OF CIVIL PROCEDURE 13

In *Scott & White Memorial Hospital v. Schexnider*,³⁴⁹ the Texas Supreme Court considered whether a trial court has the power during its plenary jurisdiction to grant a motion for sanctions under Rule 13 of the

343. *National Unity*, 926 S.W.2d at 820.

344. *Id.*

345. *Id.*

346. *Id.* at 820-21. After the parties settled in *National Unity*, Judge Gebhardt, the trial judge, entered a take nothing judgment in favor of both defendants. *Id.* at 819-20. After the trial court's plenary jurisdiction expired, Judge Johnson, sitting for Judge Gebhardt, entered a nunc pro tunc judgment (on the plaintiff's motion) altering Judge Gebhardt's judgment to reflect a take nothing judgment in favor of only one of the defendants. *Id.* at 820. At the hearing before Judge Johnson—on the plaintiff's motion to correct, reform or modify the judgment—the plaintiff presented no evidence to prove that the judgment actually rendered by Judge Gebhardt was a take-nothing judgment in favor of only one of the defendants and not both. Therefore, the court of appeals held that the Judge Johnson abused his discretion in entering the judgment nunc pro tunc. *Id.* at 820-21. Since there was no evidence to support any finding that the judgment rendered by Judge Gebhardt was any different than the judgment contained in the written judgment signed by Judge Gebhardt, even if his rendition was in error, the error was judicial and could not be corrected by a judgment nunc pro tunc. *Id.* at 821.

347. 919 S.W.2d 481 (Tex. App.—Austin 1996, no writ).

348. *Id.* at 483. The Fourteenth Court of Appeals similarly affirmed a trial court's judgment nunc pro tunc in *Delaup v. Delaup*, 917 S.W.2d 411 (Tex. App.—Houston [14th Dist.] 1996, no writ), where the record reflected that the trial judge orally adopted the parties' agreed settlement and read the terms of the settlement into the record as the court's judgment. *Id.* at 413. The final written judgment, however, omitted several key aspects of the agreed settlement, thereby incorrectly stating the terms of the judgment rendered. *Id.* "This," the court of appeals held, "is exactly the situation where a judgment nunc pro tunc should be entered." *Id.*

349. 940 S.W.2d 594 (1996) (per curiam). The supreme court issued its opinion in *Scott & White* on December 13, 1996, which is actually outside the Survey period. Nevertheless, the authors have included this opinion because, in all respects material to this discussion, the Dec. 13, 1996 opinion is identical to the court's original, but withdrawn, opinion issued Aug. 16, 1996, which was within in the Survey period.

Texas Rules of Civil Procedure even if the motion is not pending when a nonsuit is filed.³⁵⁰ The court of appeals concluded that the trial court does not. The supreme court disagrees.

In *Scott & White*, the plaintiffs nonsuited a number of defendants.³⁵¹ The nonsuited defendants thereafter filed a motion for sanctions against the plaintiffs pursuant to Rule 13 of the Texas Rules of Civil Procedure.³⁵² The trial court granted the motion for sanctions during its plenary jurisdiction.³⁵³

Under Rule 162 of the Texas Rules of Civil Procedure, a plaintiff may take a non-suit at any time before introducing all of his evidence (other than rebuttal evidence).³⁵⁴ The rule further provides that a dismissal pursuant to a motion for nonsuit "shall have no effect on any motion for sanctions, . . . pending at the time of dismissal . . ." ³⁵⁵ The court of appeals in *Scott & White* interpreted this rule to mean that a trial court does not have jurisdiction over a motion for sanctions filed after a party has been nonsuited.³⁵⁶ The court reasoned that, since Rule 162 speaks only to the effects of a nonsuit on a motion for sanctions pending at the time of dismissal, the trial court does not have jurisdiction over a later-filed sanctions motion, even if ruled on while it maintains plenary power.³⁵⁷ Reversing the court of appeals, the supreme court held that a trial court's plenary power to act in a case does not expire until thirty days after the judgment has been signed.³⁵⁸ As a result, "the time during which the trial court has authority to impose sanctions on such a motion

350. *Scott & White*, 940 S.W.2d at 595.

351. *Id.*

352. Rule 13 provides, in relevant part:

The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment. Attorneys or parties who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading which they know to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanction available under Rule 215-2b, upon the person who signed it, a represented party, or both.

TEX. R. CIV. P. 13.

353. *Scott & White*, 940 S.W.2d at 595.

354. TEX. R. CIV. P. 162.

355. Rule 162 provides, in relevant part:

At any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, the plaintiff may dismiss a case, or take a non-suit, which shall be entered in the minutes. . . .

. . . A dismissal under this rule shall have no effect on any motion for sanctions, attorney's fees or other costs, pending at the time of dismissal, as determined by the court.

Id.

356. *Scott & White*, 940 S.W.2d at 595.

357. *Id.*

358. *Id.*

is limited to when it retains plenary jurisdiction and is not limited by Rule 162."³⁵⁹ Rule 162, the court concluded, merely acknowledges that the trial court's authority to act on a pending motion for sanctions is not affected by a nonsuit—"it does not purport to limit the trial court's power to act on motions filed after a nonsuit."³⁶⁰

VIII. PERFECTION OF APPEAL

A. BONA FIDE ATTEMPT TO INVOKE APPELLATE COURT'S JURISDICTION

The supreme court's holding in *Linwood v. NCNB Texas*³⁶¹—that an appellant who attempts to perfect his appeal by incorrectly filing a notice of appeal, instead of filing a cost bond, nonetheless timely perfects his appeal because he filed an instrument in "a bona fide attempt to invoke the appellate court's jurisdiction"³⁶²—has recently been extended. The Austin Court of Appeals in *Aguirre v. Texas Department of Protective & Regulatory Services*³⁶³ held that the filing of a defective affidavit of inability to pay costs of appeal is sufficient to invoke an appellate court's jurisdiction.³⁶⁴ The appellant's affidavit of inability to pay costs of appeal was defective in *Aguirre* because she failed to give notice of the filing of the affidavit to the court reporter and appellee within two days after filing the affidavit, as required under the Texas Rules of Appellate Procedure.³⁶⁵ Although the court of appeals agreed with the appellee that the appellant could not proceed by affidavit due to her failure to give notice of the filing of the affidavit within two days, the court disagreed that she was required to file security or costs by the ninety-day deadline to perfect her appeal.³⁶⁶ The court of appeals concluded:

we see no reason why an appellant who files an affidavit, which is an appropriate instrument by which to perfect its appeal, but who fails to give the two-day notice, should be worse off than an appellant who mistakenly files a notice of appeal, which is a wholly inappropriate means of perfecting its appeal.³⁶⁷

359. *Id.*

360. *Id.*

361. 885 S.W.2d 103 (Tex. 1994).

362. *Id.* at 103 (appellant who mistakenly files notice of appeal instead of cost bond and files cost bond 53 days after judgment signed invokes appellate jurisdiction even though appellant may have no legitimate reason to believe it could perfect by notice of appeal).

363. 917 S.W.2d 462 (Tex. App.—Austin 1996, no writ) (per curiam).

364. *Id.* at 463-64.

365. The rules provide:

The appellant or his attorney shall give notice of the filing of the affidavit to the opposing party or his attorney and to the court reporter of the court where the case was tried within two days after the filing; otherwise, he shall not be entitled to prosecute the appeal without paying the costs or giving security therefor.

TEX. R. APP. P. 40(a)(3)(B).

366. *Aguirre*, 917 S.W.2d at 463. The appellant filed a motion for new trial, extending the deadline to perfect the appeal to ninety days after judgment. *Id.*; TEX. R. APP. P. 41(a)(2).

367. *Id.* at 464.

The court held that the appellant needed only to amend the defective affidavit by posting bond or depositing cash.³⁶⁸

Although a bona fide attempt to perfect an appeal properly invokes the appellate court's jurisdiction, the failure to correct a defect in the perfecting document can result in a dismissal of the appeal. For example, the court of appeals accepted jurisdiction over the appeal in *Griffin v. Office of the Attorney General*³⁶⁹ when the appellant improperly attempted to perfect his appeal by filing a notice of appeal instead of a cost bond, cash deposit, or affidavit of indigency. The court then dismissed the appeal after the appellant ignored the court's order directing him to file a proper perfecting instrument.³⁷⁰

B. PREMATURELY FILED DOCUMENTS

Under the Texas Rules of Appellate Procedure, an appellant may avoid paying the costs of an appeal by filing an affidavit disclosing his lack of financial resources.³⁷¹ The affidavit must be filed with the court clerk within thirty days after the judgment is signed or within ninety days from the execution of judgment if a motion for new trial is filed or a timely request for findings of fact and conclusions of law.³⁷² The rules also require the party appealing *in forma pauperis* to notify the court reporter of the filing of the affidavit "within two days after" the affidavit is filed, or lose his opportunity to proceed as such.³⁷³ Any affidavit of indigency that is prematurely filed "shall be deemed to have been filed on the date of but subsequent to the time of signing of the judgment or the time of the overruling of motion for new trial, if such a motion is filed."³⁷⁴

368. *Id.*

369. 919 S.W.2d 170 (Tex. App.—San Antonio 1996, no writ).

370. *Griffin v. Office of the Attorney Gen.*, 926 S.W.2d 648, 649 (Tex. App.—San Antonio 1996, no writ) (per curiam).

371. TEX. R. APP. P. 40(a)(3)(A). Rule 40(a)(3)(A) provides:

When the appellant is unable to pay the cost of appeal or give security therefor, he shall be entitled to prosecute an appeal or writ of error by filing with the clerk, within the period prescribed by Rule 41, his affidavit stating that he is unable to pay the costs of appeal or any part thereof, or to give security therefor.

Id.

372. TEX. R. APP. P. 41(a)(1). Rule 41(a)(1) provides:

When security for costs on appeal is required, the bond or affidavit in lieu thereof shall be filed with the clerk within thirty days after the judgment is signed, or, within ninety days after the judgment is signed if a timely motion for new trial has been filed by any party or if any party has timely filed a request for findings of fact and conclusions of law in a case tried without a jury. If deposit of cash is made in lieu of bond, the same shall be made within the same period.

Id.

373. TEX. R. APP. P. 40(a)(3)(B).

374. TEX. R. APP. P. 41(c). Rule 41(c) states, in pertinent part:

No appeal or bond or affidavit in lieu thereof, . . . shall be held ineffective because prematurely filed. In civil cases, every such instrument shall be deemed to have been filed on the date of but subsequent to the time of signing of the judgment or the time of the overruling of motion for new trial, if such a motion is filed.

In *Trevino v. Pemberton*,³⁷⁵ the trial court signed the judgment on September 29, 1995.³⁷⁶ Eighteen days later, on October 17, 1995, the appellants filed an affidavit of inability to pay appeal costs.³⁷⁷ On October 25, 1995, the appellants filed a motion for new trial, which was overruled by operation of law on December 13, 1995.³⁷⁸ On December 14, 1995, the appellants notified the court reporter, for the first time, of their affidavit of inability that was filed on October 17, 1995.³⁷⁹ The court reporter refused to prepare the statement of facts free of charge, asserting that the appellants had failed to timely notify her of their October 17, 1995 affidavit.³⁸⁰ The trial court agreed with the court reporter, and refused to order her to prepare the statement of facts free of charged.³⁸¹

On mandamus, the Amarillo Court of Appeals disagreed with the trial court and court reporter, holding that the appellants notice was timely. In reaching this conclusion, the court held that the two-day time frame within which the appellant must give notice to the court reporter of the filing of a pauper's affidavit does not run from the date on which the affidavit is actually filed.³⁸² Rather, if it is prematurely filed by the appellant, the two-day period runs from the date on which the affidavit is deemed filed under Rule 41(c).³⁸³ As a result, since the appellants in *Trevino* filed their pauper's affidavit before their motion for new trial was overruled, the affidavit was deemed filed under Rule 41(c) the moment after the motion for new trial was overruled, or December 13, 1995.³⁸⁴ Since they gave the court reporter notice of the filing of the affidavit on December 14, 1995, their notice was not late—it was made within the two day time frame required by Rule 40(a)(3)(B).³⁸⁵ Under the court's reasoning in *Trevino*, therefore, if filed prematurely, an appellant's notice of filing an affidavit of inability to pay costs of appeal is timely even if given some *fifty-eight days* after the date on which the affidavit was actually filed.

In another case addressing the effect of a prematurely filed document, the First Court of Appeals in *Chunn v. Chunn*³⁸⁶ held that an appeal bond filed in violation of a bankruptcy automatic stay of judicial proceedings against the debtor should not be treated as void or voidable, but rather, as a prematurely filed document.³⁸⁷ As a result, an appeal bond

Id.

375. 918 S.W.2d 102 (Tex. App.—Amarillo 1996, orig. proceeding [leave denied]).

376. *Id.* at 103.

377. *Id.* at 103-04.

378. *Id.* at 104.

379. *Id.*

380. *Id.*

381. *Id.*

382. *Id.* at 105.

383. *Id.*

384. *Id.*

385. *Id.*

386. 929 S.W.2d 490 (Tex. App.—Houston [1st Dist.] 1996, habeas corpus writ requested).

387. *Id.* at 493.

filed during the automatic stay is without legal effect during the pendency of the stay, but is treated as immediately filed upon the lifting of the stay.³⁸⁸ The court reasoned that “requir[ing] a party to file more, if not identical, papers with the clerk when the automatic stay is lifted seems pointless.”³⁸⁹

C. MOTION FOR EXTENSION OF TIME TO FILE COST BOND

1. “Reasonable Explanation”

Although Rule 41(a)(2) of the Texas Rules of Appellate Procedure provides that a court of appeals may grant an extension of time for the late filing of a cost bond if such bond is filed not later than fifteen days after the last day allowed, the court may do so only if, “within the same period, a motion is filed in the appellate court reasonably explaining the need for such extension.”³⁹⁰ As the court of appeals in *Velasquez v. Harrison*³⁹¹ held, a “reasonable explanation” for such extension of time does not include the appellant’s inability to anticipate that the trial court would find that he did not file his affidavit of inability to pay costs on appeal in good faith.³⁹² Such a claim, the court reasoned, “could potentially apply in every such case, and the rule would therefore be effectively neutralized.”³⁹³

2. Failure to Request Extension

In the past, some courts of appeals have held that the late filing of a cost bond or notice of appeal within the fifteen-day grace period without a motion for extension of time is a procedural irregularity that could be corrected under Rule 83, and that a motion for extension of time can be implied.³⁹⁴ The San Antonio Court of Appeals disagrees and, in a re-

388. *Id.* at 493-94. The court’s holding in this regard is directly contrary to the Corpus Christi Court of Appeals’ holding in *Nautical Landings Marina, Inc. v. First Nat’l Bank*, 791 S.W.2d 293, 296 (Tex. App.—Corpus Christi 1990, writ denied) (holding that appeal bond filed during automatic stay is void).

389. *Chunn*, 929 S.W.2d at 493-94.

390. TEX. R. APP. P. 41(a)(2). Rule 41(a)(2) provides, in pertinent part:

An extension of time may be granted by the appellate court for late filing of a cost bond or notice of appeal . . . if such bond or notice of appeal is filed, . . . not later than fifteen days after the last day allowed and, within the same period, a motion is filed in the appellate court reasonably explaining the need for such extension.

Id.

391. 934 S.W.2d 767 (Tex. App.—Houston [1st Dist.] 1996, n.w.h.) (per curiam).

392. *Id.* at 770. A “reasonable explanation,” the court held, is “any plausible statement of circumstances that indicates that the failure to timely file was not deliberate or intentional, but was the result of inadvertence, mistake, or mischance.” *Id.* The court went on to state that “[a]ny conduct short of deliberate or intentional noncompliance qualifies as inadvertence, mistake, or mischance, even if that conduct constitutes professional negligence.” *Id.*

393. *Id.*

394. See *Sanchez v. State*, 885 S.W.2d 444, 445-46 (Tex. App.—Corpus Christi 1994, no pet.). Rule 83 provides, in pertinent part:

A judgment shall not be affirmed or reversed or an appeal dismissed for defects or irregularities, in appellate procedure, either of form or substance,

markably harsh move under the circumstances, dismissed the appeal in *Verburgt v. Dorner*³⁹⁵ for lack of a motion for extension of time.

In *Verburgt*, the appellant's incorrect method of calculating his cost bond deadline caused him to file his cost bond four days late.³⁹⁶ Because he believed that his cost bond was timely, the appellant did not file a motion for extension of time.³⁹⁷ As accurately cast by the court of appeals, the issue on appeal was "whether the appellate rules condone a result that allows a litigant who knows he is late with his bond to save his appeal, but rejects the appeal of the litigant who erroneously, but in good faith, believes he has timely filed his bond and, thus satisfied, also believes he has no need to file for an extension of time."³⁹⁸ Recognizing the "patent unfairness of such a result," the court nevertheless concluded that the failure to file a timely motion for extension of time "is a jurisdictional defect that cannot be cured."³⁹⁹ "[S]ometimes," the court commented, "the effect of strict application of the appellate deadlines is unavoidably harsh."⁴⁰⁰

The dissent argued that the appellant's failure to file a motion to extend the time for perfecting his appeal is "plainly a defect or irregularity in appellate procedure," requiring the court under Rule 83 to provide the appellant with an opportunity to correct within a specified, reasonable period of time.⁴⁰¹ The dissent further asserted that the majority's holding not only conflicts with Rule 83 but also with Rule 2(a), which provides that the rules of procedure "shall not be construed to . . . limit the jurisdiction of the courts of appeals . . ."⁴⁰²

without allowing a reasonable time to correct or amend such defects or irregularities

TEX. R. APP. P. 83. See also *Boulos v. State*, 775 S.W.2d 8 (Tex. App.—Houston [1st Dist.] 1989, pet. ref'd); *Jiles v. State*, 751 S.W.2d 620, 621 (Tex. App.—Houston [1st Dist.] 1988, pet. ref'd).

395. 928 S.W.2d 654 (Tex. App.—San Antonio 1996, writ granted) (en banc).

396. *Id.* at 655. Actually, the appellant was just one day off in his calculation but, since the day after the correct deadline was a Friday holiday preceding a weekend, the appellant did not file his cost bond until the following Monday, making the bond four days late. *Id.*

397. *Id.*

398. *Id.*

399. *Id.* at 656. In reaching this conclusion, the court recognized that some courts of appeals had previously accepted jurisdiction in such cases under the "procedural irregularity" exception to Rule 83. *Verburgt*, 928 S.W.2d at 656. The court determined, however, that the Court of Criminal Appeals' recent decision in *Olivo v. State*, 918 S.W.2d 519 (Tex. Crim. App. 1996) overrides the previous courts of appeals' decisions. The court in *Olivo* held that "[w]hen a notice of appeal is filed within the fifteen-day period but no timely motion for extension of time is filed, the appellate court lacks jurisdiction." *Id.* at 522.

400. *Verburgt*, 928 S.W.2d at 656.

401. *Id.* at 657 (Duncan, J., dissenting).

402. *Id.* Rule 2(a) states: "These rules shall not be construed to extend or limit the jurisdiction of the courts of appeals, the Court of Criminal Appeals or the Supreme Court as established by law." TEX. R. APP. P. 2(a). In accord with its decision in *Verburgt*, the San Antonio court similarly refused a late-filed cost bond in *Kleck Mechanical, Inc. v. Pack Bros. Constr. Co., Inc.*, 930 S.W.2d 190 (Tex. App.—San Antonio 1996, no writ). In that case, the district clerk's written notice of judgment erroneously stated that the judgment was signed three days later than the date it was actually signed. *Id.* at 191. Nonetheless, the appellants filed a timely motion for new trial. *Id.* The appellants failed, however, to file their cost bond on time and they did not request an extension of time for filing their

D. FOREIGN JUDGMENTS

When a judgment creditor proceeds under the Uniform Enforcement of Judgments Act (UEJA),⁴⁰³ the filing of the foreign judgment constitutes both the judgment creditor's original petition and a final judgment.⁴⁰⁴ If the judgment creditor's original petition complies with the UEJA in all respects, it becomes a final, appealable Texas judgment on the date it is filed, and the appellate timetable begins to run on the filing date.⁴⁰⁵

IX. TRANSFERRING THE APPEAL

Texas is the only state in the union that has geographically overlapping appellate districts.⁴⁰⁶ In addition to other problems, these overlapping districts occasionally create jurisdictional conflicts, as seen in *Miles v. Ford Motor Co.*⁴⁰⁷ The product liability case in *Miles* was tried in Rusk County.⁴⁰⁸ Judgments rendered by courts in Rusk County may be appealed to either the Texarkana or Tyler Courts of Appeals.⁴⁰⁹ Prior to trial, the Rusk County trial court rendered a partial summary judgment against the plaintiffs on some of their claims, which the plaintiffs immediately—albeit prematurely—appealed to the Texarkana Court of Appeals.⁴¹⁰ The defendants did not move to dismiss the premature appeal and the Texarkana appellate court took no action relating to the appeal prior to the plaintiffs' filing of a timely appeal bond from the subsequent

cost bond. *Id.* They claimed on appeal that their failure to timely perfect was due entirely to the district clerk's erroneous representation of the date the judgment was signed. *Id.* The San Antonio court was not sympathetic and refused the late-filed bond. It commented that appellants had probably seen a copy of the judgment reflecting the date it was signed, since their motion for new trial attacked the merits of the judgment. *Id.* at 192.

403. TEX. CIV. PRAC. & REM. CODE ANN. §§ 35.001-.008 (Vernon 1986).

404. *Walnut Equip. Leasing Co., Inc. v. Wu*, 920 S.W.2d 285, 286 (Tex. 1996) (per curiam).

405. *Id.*

406. See *Miles v. Ford Motor Co.*, 914 S.W.2d 135, 139 (Tex. 1995) (per curiam).

407. *Id.* For example, the bench and bar in counties served by overlapping appellate districts are "subjected to uncertainty from conflicting legal authority." *Id.* at 139. Overlapping districts additionally create the potential for unfair forum shopping and permit voters of some counties to elect a disproportionate number of justices. *Id.*

408. *Id.* at 136.

409. The Texas Government Code provides, in relevant part:

(a) The state is divided into 14 courts of appeals districts with a court of appeals in each district.

(g) The Sixth Court of Appeals District [in Texarkana] is composed of the counties of Bowie, Campe, Cass, Delta, Fannin, Franklin, Gregg, Harrison, Hopkins, Hunt, Lamar, Marion, Morris, Panola, Red River, *Rusk*, Titus, Upshur, and Wood.

(m) The Twelfth Court of Appeals District [in Tyler] is composed of the counties of Anderson, Cherokee, Gregg, Henderson, Hopkins, Houston, Kaufman, Nacogdoches, Panola, Rains, *Rusk*, Sabine, San Augustine, Shelby, Smith, Upshur, Van Zandt, and Wood.

See TEX. GOV'T CODE ANN. § 22.201(a), (g), (m) (Vernon 1988) (emphasis added).

410. *Miles*, 914 S.W.2d at 136.

final judgment.⁴¹¹

At trial on the plaintiffs' remaining claims, the jury found in favor of the plaintiffs on all but one claim, and the trial court rendered judgment against defendants in excess of \$37 million.⁴¹² On the date the judgment was signed, the plaintiffs perfected an appeal to the Texarkana Court of Appeals, complaining of the trial court's summary judgment and the jury's verdict against the plaintiff on one claim.⁴¹³ Ten days later, the defendants perfected an appeal to the Tyler Court of Appeals, which the plaintiffs moved to dismiss on the basis that the Texarkana Court of Appeals had already acquired dominant jurisdiction over the entire appeal.⁴¹⁴ The defendants subsequently filed a motion in the Texarkana Court of Appeals requesting a transfer of the plaintiffs' appeal to the Tyler court.⁴¹⁵ The Texarkana court then forwarded the defendants' motion to transfer to the Texas Supreme Court.⁴¹⁶

Considering the motion to transfer appeal, the supreme court reviewed applicable law. All challenges to the trial court's judgment, the court confirmed, should be heard together in one appellate proceeding.⁴¹⁷ To ensure consolidated review of such judgments, the supreme court, and that court alone, has authority to transfer appellate cases when, in its opinion, there is "good cause" for the transfer.⁴¹⁸ However, the general rule of dominant jurisdiction, which applies routinely at the trial court level, applies equally to appeals in those instances where the legislature has not otherwise provided an allocation mechanism.⁴¹⁹ Once the first appeal is perfected, therefore, the "court [of appeals] acquire[s] dominant jurisdiction over the entire appeal."⁴²⁰

Applying these rules to the facts of *Miles*, the supreme court rejected the defendants' argument that "good cause" existed because their appeal was "primary" (it was the appeal from the \$37 million judgment while the plaintiffs' appeal related to claims worth, at most, a small percentage of that amount).⁴²¹ Rather, the court held, in determining whether "good cause" exists, "the rule of dominant jurisdiction should control."⁴²²

411. *Id.*

412. *Id.* at 137.

413. *Id.*

414. *Id.*

415. *Id.*

416. *Id.*

417. *Id.* at 138.

418. *Id.* at 137. The Texas Government Code provides that

The supreme court may order cases transferred from one court of appeals to another at any time that, in the opinion of the supreme court, there is good cause for the transfer.

TEX. GOV'T CODE ANN. § 73.001 (Vernon 1988).

419. *Miles*, 914 S.W.2d at 137 ("the court in which suit is first filed acquires dominant jurisdiction to the exclusion of other coordinate courts").

420. *Id.*

421. *Id.* at 138-39.

422. *Id.* As explained by the court in *Miles*, in determining whether to grant a motion to transfer an appeal, the supreme court needs to have before it (1) the motion to transfer, (2) any briefs in support of the transfer, and (3) any objections of the two courts of appeals

An appellant cannot circumvent the rule set forth in *Miles*—that jurisdiction lies in the appellate court where the appeal is first perfected—by changing his proper designation from one appellate court to another after perfecting the appeal in the first, under the guise of amending the cost bond.⁴²³ Although an appellant has the right to amend a *defective* appeal bond in order to properly perfect an appeal, an appellant in overlapping appellate districts does not have the right to amend his appeal bond to name a different court of appeals.⁴²⁴

X. THE RECORD ON APPEAL

A. INABILITY TO OBTAIN COMPLETE STATEMENT OF FACTS

Under the rules of appellate procedure, a party who is unable to obtain a complete statement of facts for appellate review is entitled to a new trial.⁴²⁵ To qualify for a new trial, however, the statement of facts must be unobtainable due to the fact that the court reporter's notes and records were "lost or destroyed."⁴²⁶ This presupposes that notes were actually made, then either lost or destroyed after coming into existence.⁴²⁷ As a result, an appellant who is unable to obtain a complete statement of facts due to the fact that the court reporter was excused from the courtroom by both parties when the testimony missing from the statement of facts was given is not entitled to a new trial.⁴²⁸ As held by the court in *Lascurain*, "[c]ounsel cannot keep silent when the court reporter openly leaves the courtroom and thereby guarantee his client a new trial."⁴²⁹

B. FAILURE TO REQUEST EXTENSION OF TIME FOR BOTH TRANSCRIPT AND STATEMENT OF FACTS

A motion to extend time operates as a basis for extending the time to file the entire record *only* where the motion includes a request for both

to the transfer. *Id.* at 137 n.2. The proper procedure for presenting a motion to transfer to the supreme court, therefore, is to file a copy of the motion to transfer as well as any briefs in support of the transfer in each of the two courts of appeals, and request that, when the motion and any briefs are forwarded to the supreme court, each court of appeals advise the supreme court in writing whether it has any objection to the proposed transfer. *Id.*

423. *Birmingham Fire Ins. Co. v. American Nat'l Fire Ins. Co.*, 928 S.W.2d 226, 228 (Tex. App.—Texarkana 1996, n.w.h.).

424. *Id.*

425. TEX. R. APP. P. 50(e). Under Rule 50(e):

When the record or any portion thereof is lost or destroyed it may be substituted in the trial court and when so substituted the record may be prepared and transmitted to the appellate court as in other cases. If the appellant has made a timely request for a statement of facts, but the court reporter's notes and records have been lost or destroyed without appellant's fault, the appellant is entitled to a new trial unless the parties agree on a statement of facts.

Id. See *Lascurain v. Crowley*, 917 S.W.2d 341, 344 (Tex. App.—El Paso 1996, no writ).

426. *Lascurain*, 917 S.W.2d at 344.

427. *Id.*

428. *Id.* at 345.

429. *Id.*

the transcript and statement of facts. As a result, a motion to extend the time to file the statement of facts alone does not extend the time for filing the record nor does it alter the due date for the transcript. In *Jarrell v. Serfass*,⁴³⁰ the record was originally due September 8, 1995. Because appellant had obtained an extension of time (until December 6, 1995) to file the statement of facts, she argued that the record was not due until the statement of facts was due. Therefore, she argued, her December 12, 1995 motion to extend the time for filing the transcript was timely, having been filed "not later than fifteen days after the last date for filing the record."⁴³¹ The Waco Court of Appeals rejected the appellant's argument, reasoning that because her original motion to extend time referred only to the statement of facts, the extension applied only to the statement of facts.⁴³²

C. REQUEST FOR EXTENSION OF TIME FILED IN WRONG APPELLATE COURT

In *Birmingham Fire Insurance Co. v. American National Fire Insurance Co.*,⁴³³ the appellants brought suit in the Texarkana Court of Appeals but filed their request for extension of time to file the record with the Tyler Court of Appeals.⁴³⁴ The Texarkana Court of Appeals noted that the general rule is that "[a]n instrument is deemed as filed with the proper clerk of an appellate court once it is received by the clerk's agent."⁴³⁵ The court then stated that it would be "appropriate to consider the clerk of the [Tyler Court of Appeals] as the agent of this court for purposes of receiving and filing these motions, and we therefore consider the motions to extend time to file the record that were filed in that court as having been filed here."⁴³⁶

430. 916 S.W.2d 719, 721 (Tex. App.—Waco 1996, no writ) (per curiam).

431. *Id.* at 720-21. See TEX. R. APP. P. 54(c), which provides, in pertinent part: An extension of time may be granted for late filing in a court of appeals of a transcript or statement of facts, if a motion reasonably explaining the need therefor is filed by appellant with the court of appeals not later than fifteen days after the last date for filing the record.

Id.

432. *Jarrell*, 916 S.W.2d at 721. The court dismissed the appeal on the grounds that it could not review the trial court's judgment with only the statement of facts. *Id.* The court reasoned that without the transcript, it could not determine if the appellant had properly preserved her factual sufficiency complaints, or even if she properly perfected the appeal so as to invoke the court's appellate jurisdiction. *Id.*

433. 928 S.W.2d 226 (Tex. App.—Texarkana 1996, no writ).

434. *Id.* at 227. The appeal could have been taken to either the Tyler or Texarkana Courts of Appeals, since the trial court in *Birmingham Fire* sits in geographically overlapping appellate districts. *Id.*

435. *Id.* at 229.

436. *Id.*

D. APPELLANT'S RIGHT TO HAVE STATEMENT OF FACTS PREPARED PRIOR TO PAYMENT

When the appellant has filed a cost bond and made a proper request for a statement of facts, a court reporter may not demand a deposit before beginning the preparation of the statement of facts.⁴³⁷ The rules of appellate procedure require only that an appellant pay or make arrangements to pay the court reporter when the court reporter completes and delivers the statement of facts.⁴³⁸ The court reporter may, however, move to increase the amount of the cost bond if she believes that the bond posted by the appellant is insufficient to cover the estimated costs of the statement of facts.⁴³⁹

E. TAMPERING WITH THE RECORD

An appellant who purposely alters an appellate record fails to meet his burden to present a sufficient record on appeal showing error requiring reversal.⁴⁴⁰ Accompanying an appellant's right to appellate review is "the duty to provide an accurate record sufficient for the appellate court to perform its function to determine the correctness of the lower court's judgment."⁴⁴¹ Thus, when an appellant purposely alters an appellate record, "he fails by his own actions to provide the appellate court with a sufficient record."⁴⁴²

XI. THE BRIEF ON APPEAL

During the Survey period, the supreme court reaffirmed that a so-called "Malooly" point of error—a point of error stating generally that the trial court erred by granting summary judgment—"is sufficient to preserve error and to allow argument as to all possible grounds upon which

437. *Easton v. Creeks*, 921 S.W.2d 449, 450 (Tex. App.—Houston [1st Dist.] 1996, orig. proceeding) (per curiam) (citing *Grossnickle v. Turner*, 903 S.W.2d 362, 364 n.2 (Tex. App.—Texarkana 1995, orig. proceeding) and *Jackson v. Crawford*, 715 S.W.2d 130, 131 (Tex. App.—Dallas 1986, no writ) (interlocutory order)).

438. *Id.* See TEX. R. APP. P. 46(e). Rule 46(e) provides: "Even if a bond is filed or deposit in lieu of bond is made, appellant shall either pay or make arrangements to pay the court reporter upon completion and delivery of the statement of facts." *Id.*

439. *Easton*, 921 S.W.2d at 450 (citing *Vickery v. Porche*, 848 S.W.2d 855, 857 (Tex. App.—Corpus Christi 1993, no writ) (interlocutory order)).

440. *Okere v. Apex Fin. Corp.*, 930 S.W.2d 146, 152 (Tex. App.—Dallas 1996, writ denied); TEX. R. APP. P. 50(d). Rule 50(d) provides: "The burden is on the appellant, or other party seeking review, to see that a sufficient record is presented to show error requiring reversal." *Id.*

441. *Okere*, 930 S.W.2d at 152.

442. *Id.* The *pro se* appellant in *Okere* (1) inserted loose documents into the transcript, (2) highlighted portions of the transcript, (3) inserted handwritten annotations and interlineations into the statement of facts, (4) inserted at least one exhibit into the original volume of exhibits prepared by the court reporter, (5) altered testimony as recorded in the statement of facts, and (6) altered transcript documents. *Id.* The Dallas Court of Appeals affirmed the trial court's judgment and referred the record in the matter to the office of the district attorney, noting that tampering with a governmental record under certificate or seal is a third-degree felony. *Id.*; TEX. PENAL CODE ANN. § 37.10(a)(3), (d) (Vernon 1994).

summary judgment should have been denied."⁴⁴³ If a general Malooly point of error is sufficient to attack all possible grounds supporting a trial court's summary judgment, does an appellant who advances a Malooly point of error have to specifically present argument in his brief attacking all grounds advanced in support of summary judgment or else be deemed to have waived error in any grounds not argued? No, according to the Texarkana Court of Appeals, which faced this issue in *Stevens v. State Farm Fire & Casualty Co.*⁴⁴⁴

In *Stevens*, the appellant asserted a general Malooly point of error complaining that the trial court erred in granting summary judgment. The court's order granting summary judgment did not specify the grounds on which it was granted, although several grounds had been asserted. On appeal, the appellant stated that the trial court had granted the summary judgment on limitations grounds and, in his brief, limited his argument to that defense.⁴⁴⁵ The appellee argued that the court of appeals was required to affirm the summary judgment because the trial court could have granted the judgment on a ground not argued by the appellant.⁴⁴⁶ Rejecting the appellee's argument, the court of appeals held that an appellant who raises a general Malooly point of error does not waive error in a trial court's summary judgment by failing to argue against all grounds which could possibly support the summary judgment.⁴⁴⁷ A general Malooly point of error, the court noted, "is a request for the appellate court to conduct a *de novo* review of the trial court's judgment."⁴⁴⁸ As a result, the court of appeals can, "as a practical matter, step into the trial court's shoes and . . . by reviewing the pleadings and evidence as raised in the motion and response, determine whether the trial court properly granted judgment."⁴⁴⁹

In reaching its decision, the court of appeals noted that summary judgment cases differ from non-summary judgment cases to which the briefing

443. *Plexchem Int'l, Inc. v. Harris County Appraisal Dist.*, 922 S.W.2d 930, 930-31 (Tex. 1996) (per curiam) (citing *Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970)).

444. 929 S.W.2d 665 (Tex. App.—Texarkana 1996, writ denied).

445. *Id.* at 669.

446. *Id.*

447. *Id.* at 669-70.

448. *Id.* at 670.

449. *Id.* The Texarkana court acknowledged that its holding in this regard is in conflict with a number of other courts of appeals. *Id.* (citing *Maranatha Temple, Inc. v. Enterprise Prods. Co.*, 893 S.W.2d 92, 106 (Tex. App.—Houston [1st Dist.] 1994, writ denied); *Bradt v. West*, 892 S.W.2d 56, 68-69 (Tex. App.—Houston [1st Dist.] 1994, writ denied); *Martin v. Cohen*, 804 S.W.2d 201 (Tex. App.—Houston [14th Dist.] 1991, no writ); *A.C. Collins Ford, Inc. v. Ford Motor Co.*, 807 S.W.2d 755, 760 (Tex. App.—El Paso 1990, writ denied) (opinion on rehearing)).

requirements of Rule 74(f)⁴⁵⁰ apply.⁴⁵¹ Further, the court noted that on appeal “the summary judgment movant has the burden of demonstrating it is entitled to judgment as a matter of law.”⁴⁵² Thus, the appellee is deemed to have waived a ground by not arguing it on appeal, the movant is relieved of its burden “even though Malooly seems to allow a single general point of error to bring all possible grounds into issue.”⁴⁵³ Taking such a rule to its logical extension, the court concluded, would require the court to affirm the summary judgment “even if the trial court erred on a ground not argued on appeal, and even though the general point of error is sufficient to attack all grounds.”⁴⁵⁴

Notably, although the Texarkana court in *Stevens* cited to the supreme court’s opinion in *Plexchem* for the general proposition that a Malooly point of error is sufficient to preserve error on all possible grounds, the Texarkana court failed to discuss two significant aspects of *Plexchem*. First, in *Plexchem* the supreme court held that Malooly language is “sufficient to preserve error *and to allow argument* as to all possible grounds upon which summary judgment should have been denied.”⁴⁵⁵ Second, the appellant in *Plexchem* did not waive any error because, in addition to using Malooly language in its point of error, it “presented three pages of argument and authorities on this issue in its brief.”⁴⁵⁶ In fact, the supreme court’s specific holding in *Plexchem* is that “[the appellant’s Malooly] point of error *and accompanying briefing* were adequate to preserve error on [the] issue.”⁴⁵⁷

XII. COMMUNICATIONS WITH COURT STAFF

Rule 6 of the Texas Rules of Appellate Procedure provides that: “correspondence or other communications relative to any matter before the court must be conducted with the clerk and shall not be addressed to or conducted with any of the justices or judges or other members of the court’s staff.”⁴⁵⁸ Further, the Texas Disciplinary Rules of Professional Conduct provide that “a lawyer shall not communicate *ex parte* with a court for the purpose of influencing the court or person concerning a pending matter other than orally upon adequate notice to opposing coun-

450. Rule 74(f) states, in relevant part:

A brief of the argument may present separately or grouped the points relied upon for reversal. The argument shall include: (1) a fair, condensed statement of the facts pertinent to such points, with reference to the pages in the record where the same may be found; and (2) such discussion of the facts and the authorities relied upon as may be requisite to maintain the point at issue.

TEX. R. APP. P. 74(f).

451. *Stevens*, 929 S.W.2d at 669.

452. *Id.*

453. *Id.* at 669-70.

454. *Id.* at 670.

455. *Plexchem*, 922 S.W.2d at 931 (emphasis added).

456. *Id.*

457. *Id.* (emphasis added).

458. TEX. R. APP. P. 6.

sel or to the adverse party if he is not represented by a lawyer."⁴⁵⁹ Applying these rules, the El Paso Court of Appeals recently held that "[p]rivate communications between a lawyer in a pending action and a staff member of an appellate court before whom a case is pending concerning the merits of the then pending appeal are 'ex parte communications' not authorized by law."⁴⁶⁰

In *J.B.K.*, an attorney, after presenting an appellate brief and oral argument in a case, telephoned an acquaintance who was a staff member of the appellate court before whom the appeal was pending "for the purpose of inquiring . . . as to what his 'chances' were in the [appeal] and whether he should 'settle' his case prior to the [court of appeals' decision]."⁴⁶¹ Holding that the attorneys' conduct violated the rules of appellate procedure as well as the disciplinary rules, the court found, as a matter of law, that "any attempt to solicit or receive information on the merits of a pending case from a staff member of an appellate court constitutes an impermissible ex parte communication with chambers."⁴⁶²

XIII. FRIVOLOUS APPEALS

Several cases this Survey period reflect a growing concern over the filing of frivolous appeals. In three cases, *Campos v. Investment Management Properties, Inc.*,⁴⁶³ *Jim Arnold Corp. v. Bishop*,⁴⁶⁴ and *Jackson v. Biotronics, Inc.*,⁴⁶⁵ the courts of appeals sanctioned the appellant under Rule 84 of the Texas Rules of Appellate Procedure.⁴⁶⁶ To determine whether an appeal has been taken for purposes of delay and without sufficient cause under Rule 84, the court of appeals must "review the record from the point of view of an advocate and ascertain whether appellant had reasonable grounds to believe that the case would be

459. TEX. DISCIPLINARY R. PROF. CONDUCT 3.05(b)(3) (1995), reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. (Vernon Supp. 1992).

460. *In re J.B.K.*, 931 S.W.2d 581, 584 (Tex. App.—El Paso 1996, no writ).

461. *Id.* at 583.

462. *Id.* at 584. The El Paso Court of Appeals forwarded a copy of their opinion to the Office of the General Counsel, State Bar of Texas, for "investigation and any action it deems warranted." *Id.* at 585.

463. 917 S.W.2d 351 (Tex. App.—San Antonio 1996, writ denied).

464. 928 S.W.2d 761 (Tex. App.—Beaumont 1996, no writ).

465. 937 S.W.2d 38 (Tex. App.—Houston [14th Dist.]) 1996, n.w.h.). The Fourteenth Court of Appeals issued its opinion in *Jackson* on December 5, 1996, which is actually outside the Survey period. Nevertheless, the authors have included this opinion because, in all respects material to this discussion, the December 5, 1996 opinion is identical to the court's original, but withdrawn, opinion issued August 29, 1996, which was within in the Survey period.

466. TEX. R. APP. P. 84; *Campos*, 917 S.W.2d at 353; *Jim Arnold*, 928 S.W.2d at 772; *Jackson*, 937 S.W.2d at 46. Rule 84 states, in pertinent part:

In civil cases where the court of appeals shall determine that an appellant has taken an appeal for delay and without sufficient cause, then the court may, as part of its judgment, award each prevailing appellee an amount not to exceed ten percent of the amount of damages awarded to such appellee as damages against such appellant.

TEX. R. APP. P. 84.

reversed."⁴⁶⁷

In *Campos*, the plaintiff appealed from a summary judgment rendered in favor of the defendant.⁴⁶⁸ The plaintiff, however, had filed his response to the defendant's motion for summary judgment late and never sought leave from the trial court to file the late response.⁴⁶⁹ As a result, the trial court did not consider the response in rendering summary judgment and, therefore, the only evidence before the court of appeals was the defendant's evidence in support of summary judgment.⁴⁷⁰ Nonetheless, the plaintiff urged on appeal that a fact issue existed precluding summary judgment.⁴⁷¹ Moreover, in his appellate brief, the plaintiff overtly embellished pertinent statutory language, which constituted a material misrepresentation to the court of appeals "clearly calculated to induce a reversal of [the] summary judgment appeal."⁴⁷² The court of appeals assessed Rule 84 sanctions against the appellant for filing what was a patently frivolous appeal.⁴⁷³

However, as seen in *Jim Arnold* and *Jackson*, courts of appeals are apparently prepared to sanction appellants under facts significantly less egregious than those seen in *Campos*. In *Jim Arnold*, Rule 84 sanctions were assessed because the appellant's "statement, arguments, and cited authorities are minimal, and authorities cited only tenuously relate to appellant's claimed points of error"⁴⁷⁴ Similarly, in *Jackson*, the appellant was sanctioned because his "points of error contain[ed] little or no authority, and in most instances, when he did cite authority, it was off point."⁴⁷⁵

XIV. SPECIAL APPEALS

A. THE LIMITED APPEAL

As the appellant in *Brown v. Brown*⁴⁷⁶ discovered, under certain circumstances, the limited appeal provision of the rules of appellate procedure create a trap for the unwary. As is typical in family law cases, the child custody issues in *Brown* were tried to a jury while the proceedings relating to child support and property division were tried to the judge.⁴⁷⁷

467. *Jim Arnold*, 928 S.W.2d at 772; *Campos*, 917 S.W.2d at 356; *Jackson*, 937 S.W.2d at 46.

468. *Campos*, 917 S.W.2d at 353.

469. *Id.*

470. *Id.* at 353-55.

471. *Id.* at 354-55.

472. *Id.* at 358 (Green, J., concurring).

473. *Id.* at 353.

474. *Jim Arnold*, 928 S.W.2d at 772. Justice Stover dissented, disagreeing with the majority's conclusion that the case was frivolous. *Id.* at 772-73 (Stover, J., dissenting).

475. *Jackson*, 937 S.W.2d at 46.

476. 917 S.W.2d 358 (Tex. App.—El Paso 1996, no writ).

477. *Brown*, 917 S.W.2d at 359-60. As the concurring justice noted in *Brown*, the reason for this bifurcation in family law cases is obvious: "the trial court may not enter a decree that contravenes the jury verdict concerning the appointment of a managing conservator" and "a jury finding in response to an inquiry concerning the division of property upon divorce is advisory only." *Id.* at 360-61 (McClure, J., concurring).

Mrs. Brown appealed only from the trial court's rulings on property division and child support; she did not appeal the jury's child custody findings.⁴⁷⁸ In her statement of facts on appeal, she included only the non-jury proceedings relating to the issues tried to the court. She did not, however, include the testimony and evidence presented in the child custody determination tried to the jury.⁴⁷⁹ As a result, she did not comply with the provisions of Rule 53(d) of the Texas Rules of Appellate Procedure, which, if she wished to pursue a limited appeal, required her to (1) include in her request for the statement of facts the points of error she intended to assert on appeal, (2) ask that the notice of limitation be included in the appellate transcript, and (3) notify the other parties of the limitation of the record.⁴⁸⁰

The El Paso Court of Appeals reluctantly held that, as a result of her failure to comply with Rule 53, the entire case was before the appellate court, requiring the court to presume that the omitted statement of facts from the separate jury trial on child custody "provide the evidence to support the trial court's implied findings and judgment on property division and child support."⁴⁸¹ As most succinctly stated by the concurrence, "[t]he result, while harsh, is inescapable."⁴⁸²

B. APPEAL BY WRIT OF ERROR

Appeal by writ of error is reserved for those who did not participate "in the actual trial of the case in the trial court."⁴⁸³ Whether a party "participated" in the actual trial has been the subject of much dispute—until this Survey period. In *Texaco, Inc. v. Central Power & Light Co.*⁴⁸⁴ and *Withem v. Underwood*,⁴⁸⁵ the supreme court granted writ to "clarify the requirements for an appeal by writ of error." The supreme court explained that "participation" means:

478. *Id.* at 359-60.

479. *Id.* at 360.

480. *Id.* Rule 53(d) provides:

If appellant requests or prepares a partial statement of facts, he shall include in his request or proposal a statement of the points to be relied on and shall thereafter be limited to such points. If such statement is filed, there shall be a presumption on appeal that nothing omitted from the record is relevant to any of the points specified or to the disposition of the appeal. Any other party may designate additional portions of the evidence to be included in the statement of facts.

TEX. R. APP. P. 53(d).

481. *Brown*, 917 S.W.2d at 360.

482. *Id.* at 365 (McClure, J., concurring).

483. TEX. R. APP. P. 45(b). Appeal by writ of error requires that the appellant "(1) file the petition for writ of error within six months of the signing of the final judgment, (2) be a party to the lawsuit, (3) *have not participated in the actual trial of the case*, and (4) show error on the face of the record." *Withem v. Underwood*, 922 S.W.2d 956, 957 (Tex. 1996) (per curiam) (emphasis added). Rule 45(b) provides: "No party who participates either in person or by his attorney in the actual trial of the case in the trial court shall be entitled to review by the court of appeals through means of writ of error." TEX. R. APP. P. 45(b).

484. 925 S.W.2d 586 (Tex. 1996).

485. 922 S.W.2d 956 (Tex. 1996) (per curiam).

taking part in a hearing in open court, leading up to the rendition of judgment on the questions of law, if the case is disposed of on the questions of law, or on the questions of fact, if the final judgment is rendered on the facts. The statute was intended to cut off the right of appeal by writ of error of those who participate in the hearing in open court in the trial that leads to final judgment.⁴⁸⁶

The issue in determining "participation" is "whether the appellant has participated in 'the decision-making event' that results in judgment adjudicating the appellant's rights."⁴⁸⁷ Moreover, whether an appellant is entitled to appeal by writ of error is determined not by whether the appellant's failure to "participate" in the decision-making event was due to the appellant's negligence or absent of diligence, but, rather, by whether the appellant *in fact* did not participate in the decision-making event that results in judgment adjudicating his rights.⁴⁸⁸

After announcing ready on the first day of trial, Texaco (one of the two defendants in the underlying case) settled with the plaintiffs.⁴⁸⁹ The trial court approved the settlement and, apparently under the impression that the settlement ended Texaco's involvement in the case, told Texaco's attorney to go home.⁴⁹⁰ Texaco's attorney did so and did not attend the remainder of the trial between the plaintiffs and the other defendant, Central Power & Light (CP&L).⁴⁹¹ CP&L, however, filed a motion on the last day of trial asking the court to take judicial notice of a tariff that allegedly established Texaco's duty to indemnify CP&L.⁴⁹² CP&L served the motion on Texaco's lawyers.⁴⁹³ After the jury returned a verdict finding CP&L partially negligent, the trial court entered a judgment reciting that CP&L had established entitlement to indemnification from Texaco by virtue of the tariff and ordered Texaco to completely indemnify CP&L for all amounts due to the plaintiffs under the judgment.⁴⁹⁴ Almost six months postjudgment, Texaco sought to appeal by writ of error to the San Antonio Court of Appeals, which held that Texaco's participation in the trial was sufficient to cause Texaco to be barred from appealing by writ of error.⁴⁹⁵

The supreme court disagreed, holding that the "decision-making event" that resulted in judgment adjudicating Texaco's rights was the plaintiffs' jury trial establishing liability against CP&L.⁴⁹⁶ Thus, despite the fact that Texaco may have appeared generally in the trial of the case by an-

486. *Withem*, 922 S.W.2d at 957; see *Texaco*, 925 S.W.2d at 589.

487. *Texaco*, 925 S.W.2d at 589; see *Withem*, 922 S.W.2d at 957.

488. *Texaco*, 925 S.W.2d at 590 ("[I]t is the *fact* of nonparticipation, not the reason for it, that determines the right to appeal by writ of error." (emphasis in original)).

489. *Id.* at 587.

490. *Id.*

491. *Id.*

492. *Id.*

493. *Id.* at 587-88.

494. *Id.* at 588.

495. *Id.* See *Texaco, Inc. v. Central Power & Light Co.*, 897 S.W.2d 854, 863-64 (Tex. App.—San Antonio 1995), *rev'd*, 925 S.W.2d 586 (Tex. 1996).

496. *Texaco*, 925 S.W.2d at 590.

nouncing ready for trial and by appearing before the court to announce the settlement with the plaintiffs, Texaco did not in fact attend or participate in the jury trial establishing liability against CP&L and was therefore entitled to appeal by writ of error.⁴⁹⁷

C. ADMINISTRATIVE APPEALS

1. *Perfecting the Administrative Appeal*

Under the Administrative Procedure Act (APA), a party aggrieved by an administrative agency's order must file a timely motion for rehearing to the administrative agency prior to filing an appeal to the district court.⁴⁹⁸ The administrative agency then has forty-five days to act on a motion for rehearing before it is overruled by operation of law.⁴⁹⁹ Once the motion for rehearing is overruled, whether by the agency or by operation of law, the appellant has thirty days to file a petition to initiate judicial review.⁵⁰⁰ Although the administrative agency has an obligation to notify an appellant upon issuing an order overruling a motion for rehearing,⁵⁰¹ the agency has no obligation to notify the appellant that his motion for rehearing was overruled by operation of law.⁵⁰² Further, the agency's failure to give such notice will not excuse an appellant's failure to timely appeal the agency's order within thirty days of the overruling of the motion for rehearing.⁵⁰³ The appellant has an obligation to note the passage of forty-five days and timely file his appeal.⁵⁰⁴

As the dentist/appellant in *Simmons v. State Board of Dental Examiners*⁵⁰⁵ discovered, under some circumstances, an administrative appeal might be late even if all time frames under the APA are carefully considered. Specifically, although the APA governs dentists' disciplinary actions and appeals, the Dental Practice Act (DPA) is also applicable. Under the DPA, a dentist has thirty days from the date of a license-revocation notice to seek judicial review in district court.⁵⁰⁶ Thus, under the DPA, a dentist appealing an order of the State Board of Dental Examiners (the Board) revoking his license must file his appeal within thirty days

497. *Id.* In *Withem*, counsel for one of two co-defendants filed an answer on behalf of his client as well as the other defendant, Withem, whose whereabouts were unknown. *Withem*, 922 S.W.2d at 957. The trial court rendered judgment against Withem. *Id.* The attorney who had filed the answer on behalf of Withem next filed a petition for writ of error in the Dallas Court of Appeals on Withem's behalf. *Id.* The Dallas Court of Appeals dismissed the petition, finding that Withem "participated" at trial. *Id.* The supreme court reversed the court of appeals, holding that Withem had not participated at trial. *Id.*

498. TEX. GOV'T CODE ANN. § 2001.145(a) (Vernon 1993). See also *Texas State Bd. of Dental Exam'rs v. Sizemore*, 759 S.W.2d 114, 116 (Tex. 1988).

499. TEX. GOV'T CODE ANN. §§ 2001.144 & .146(c) (Vernon 1993).

500. *Id.* § 2001.176(a) (Vernon 1993).

501. See *id.* § 2001.142(b) (Vernon 1993).

502. *Hernandez v. Texas Dept. of Ins.*, 923 S.W.2d 192, 195 (Tex. App.—Austin 1996, no writ).

503. *Id.*

504. *Id.*

505. 925 S.W.2d 652 (Tex. 1996) (per curiam).

506. TEX. REV. CIV. STAT. ANN. art. 4548h, § 3(a) (Vernon 1981).

of the order, while, under the APA, he cannot appeal the revocation order until his motion for rehearing is overruled, which, as discussed above, can be as late as forty-five days after the date of the order.

In *Simmons*, the dentist/appellant tried to comply with both the DPA and APA by filing a motion for rehearing with the Board and, while his motion was pending, seeking judicial review in district court.⁵⁰⁷ He requested the district court to stay his judicial proceeding until either the Board had ruled on his motion for rehearing, or the motion was overruled by operation of law.⁵⁰⁸ Although the trial court stayed the proceeding, the court refused to reinstate Simmons' action for judicial review after the motion for rehearing was overruled by operation of law.⁵⁰⁹ The court of appeals affirmed the trial court's judgment.⁵¹⁰

The supreme court reversed, holding that a conflict existed between the DPA and the APA and that, despite the conflict, Simmons had "made every attempt to comply with both."⁵¹¹ As a result, the court concluded, Simmons' motion to reinstate substantially satisfied the judicial-review requirements of the APA and invoked the trial court's appellate jurisdiction.⁵¹²

2. Filing the Administrative Record

Under the Administrative Procedure Act, the party seeking judicial review of an administrative order "shall offer, and the reviewing court shall admit, the state agency record into evidence as an exhibit."⁵¹³ Until the Texas Supreme Court's recent decision in *Nueces Canyon Consolidated Independent School District v. Central Education Agency*,⁵¹⁴ the Austin Court of Appeals consistently interpreted this language to dictate that the *exclusive* procedure for bringing the agency record before reviewing courts, including courts of appeals, is by timely filing it as part of the statement of facts.⁵¹⁵ The supreme court disagrees, holding in *Nueces*

507. 925 S.W.2d at 652.

508. *Id.* at 652-53.

509. *Id.* at 653.

510. *Id.*

511. *Id.* at 654.

512. Notably, not all administrative acts or codes conflict with the ADA in this regard. For example, as noted by the supreme court in *Simmons*, under the Alcoholic Beverage Code, an aggrieved party must appeal within thirty days after an agency order *becomes final*. 925 S.W.2d at 653; TEX. ALCO. BEV. CODE ANN. §§ 11.67(b)(1), 61.34(a) (Vernon 1977 & 1987). In contrast, the DPA requires the aggrieved dentist to file his appeal within thirty days from the *service of notice* of the Board of Dental Examiners. TEX. REV. CIV. STAT. ANN. art. 4548h, § 3(a) (Vernon 1981). Thus, an aggrieved party seeking review of an agency order under the Alcoholic Beverage Code who files an appeal before his motion for rehearing is overruled never invokes the district court's jurisdiction because the agency order is not appealable until the motion for rehearing is overruled. See *Lindsay v. Sterling*, 690 S.W.2d 560 (Tex. 1985).

513. TEX. GOV'T CODE ANN. § 2001.175(d) (Vernon 1993).

514. 917 S.W.2d 773 (Tex. 1996) (per curiam).

515. See, e.g., *Everett v. Texas Educ. Agency*, 860 S.W.2d 700, 702 (Tex. App.—Austin 1993, no writ); *Snead v. Texas State Bd. of Medical Exam'rs*, 753 S.W.2d 809, 810 (Tex. App.—Austin 1988, no writ). Other courts of appeals have disagreed with the Austin

Canyon that, although an administrative record must be offered into evidence at the trial court for an appeal to be brought under the Administrative Procedure Act, "an appellant may bring an administrative record in an appeal governed by the Administrative Procedure Act to an appellate court as part of a statement of facts *or* transcript so long as a court reporter's certificate or other evidence demonstrates that the trial court admitted the record."⁵¹⁶

Notably, however, the supreme court expressly stated in *Nueces Canyon* that, although the method of transmitting the administrative record to the courts of appeals may be by its inclusion in the statement of facts *or* the transcript, the administrative record must be offered into evidence at the trial court in an appeal for judicial review brought under the APA.⁵¹⁷ Therefore, an administrative record that is transmitted as part of the transcript by virtue of having been simply filed with the district court cannot be considered by the court of appeals.⁵¹⁸ As a result, although the *method* of transmitting the record via the transcript is now permitted, the administrative record will only be considered by the court of appeals if it was admitted into evidence by the trial court.⁵¹⁹

XV. STANDARDS OF REVIEW

A. REVIEW OF SUMMARY JUDGMENT GROUNDS NOT GRANTED BY TRIAL COURT

In *Cincinnati Life Insurance Co. v. Cates*,⁵²⁰ the Texas Supreme Court expanded the scope of appellate review of summary judgments. Prior to *Cincinnati Life*, the supreme court and the courts of appeals limited their consideration of summary judgments granted on specific grounds to the grounds upon which the trial court granted summary judgment.⁵²¹ In

Court of Appeals position on this issue. See *Texas Dep't of Pub. Safety v. Raffaelli*, 905 S.W.2d 773, 776 (Tex. App.—Texarkana 1995, no writ).

516. 917 S.W.2d at 776 (emphasis added). In *Fetchin v. Meno*, 916 S.W.2d 961 (Tex. 1996) (per curiam), the supreme court similarly reversed the Austin Court of Appeals' refusal to review two other administrative appeals on the basis that the administrative record was filed as part of the transcript instead of the statement of facts. *Id.* at 962.

517. 917 S.W.2d at 776.

518. *Texas Health Enters., Inc. v. Texas Dept. of Health*, 925 S.W.2d 750, 755 (Tex. App.—Austin 1996, writ requested).

519. *Id.*

520. 927 S.W.2d 623 (Tex. 1996).

521. *Id.* at 625 (citing *State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 380 (Tex. 1993) (plurality opinion); *Delaney v. University of Houston*, 835 S.W.2d 56, 58 (Tex. 1992); *Maley v. 7111 Southwest Freeway, Inc.*, 843 S.W.2d 229, 234 (Tex. App.—Houston [14th Dist.] 1992, writ denied); *In re Estate of Canales*, 837 S.W.2d 662, 668 (Tex. App.—San Antonio 1992, no writ)). However, the supreme court carefully noted that its opinion does not conflict with any of its prior opinions. *Cincinnati Life*, 927 S.W.2d at 626. The court pointed out that *State Farm* was a plurality opinion with no binding precedential value on the court and the additional summary judgment grounds in *Delaney* were not addressed by the court because the record was not well developed on those issues, not because the court of appeals had no authority to consider grounds not ruled on by the trial court. *Cincinnati Life*, 927 S.W.2d at 626. The court further distinguished *Travis v. City of Mesquite*, 830 S.W.2d 94 (Tex. 1992), and *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671 (Tex. 1979), noting that "neither case dealt with whether the trial court must actually rule

Cincinnati Life, the supreme court expanded appellate review of summary judgments granted on specific grounds to include the review of summary judgment grounds asserted but not made the basis of the summary judgment.⁵²²

In support of its holding, the supreme court stated the general rule that, in an appeal from a summary judgment, "issues an appellate court may review are those the movant actually presented to the trial court."⁵²³ Additionally, nothing in the rules of civil or appellate procedure limits the scope of appellate review. Rule 166a of the Texas Rules of Civil Procedure does not prohibit an appellate court from affirming a summary judgment on other grounds properly raised before the trial court when the trial court grants summary judgment on fewer than all grounds asserted.⁵²⁴ Moreover, the rules of appellate procedure expressly "give appellate courts the authority, when reviewing judgments of lower courts, to render the judgment or decree that the court below should have rendered."⁵²⁵ As a result, the court held, courts of appeals (1) "should consider all summary judgment grounds the trial court rules on and the movant preserves for appellate review that are necessary for final disposi-

on each summary judgment ground for the appellate court to have authority to consider the ground on appeal." *Cincinnati Life*, 927 S.W.2d at 626.

522. 927 S.W.2d at 624-25.

523. *Id.* at 625.

524. *Id.* Rule 166a(c) states, in part: "Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal." TEX. R. CIV. P. 166a(c).

525. *Cincinnati Life*, 927 S.W.2d at 625 (citing TEX. R. APP. P. 80(b), 81(c), 180, 182(a)). Rule 80(b) states:

The court of appeals may: (1) affirm the judgment of the court below, (2) modify the judgment of the court below by correcting or reforming it, (3) reverse the judgment of the court below and dismiss the case or render the judgment or decree that the court below should have rendered, or (4) reverse the judgment of the court below and remand the case for further proceedings.

TEX. R. APP. P. 80(b). Rule 81(c) states:

When the judgment or decree of the court below shall be reversed, the court shall proceed to render such judgment or decree as the court below should have rendered, except when it is necessary to remand to the court below for further proceedings.

TEX. R. APP. P. 81(c). Rule 180 states:

In each cause, the Supreme Court shall either affirm the judgment of the court of appeals, or reverse and render such judgment as the court of appeals should have rendered, or remand the cause to the court of appeals, or reverse the judgment and remand the cause to the trial court, if it shall appear that the justice of the cause demands another trial.

TEX. R. APP. P. 180. Rule 182(a) states:

Whenever the Supreme Court shall affirm the judgment or decree of the trial court or the court of appeals, or proceeds to modify the judgment and to render such judgment or decree against the appellant in the court of appeals as should have been rendered by the trial court or the court of appeals, it shall render judgment against the appellant and the sureties upon his supersedeas bond, if any, for the performance of said judgment or decree, and shall make such disposition of the costs as the court shall deem proper, rendering judgment against the appellant or petitioner and the sureties on his appeal or supersedeas bond, if any, for such costs as are taxed against him.

TEX. R. APP. P. 182(a).

tion of the appeal when reviewing a summary judgment," and (2) "may consider other grounds that the movant preserved for review and [the] trial court did not rule on in the interest of judicial economy."⁵²⁶

B. REVIEW OF EVIDENCE OF PUNITIVE AND DTPA ADDITIONAL DAMAGES

During the Survey period, the supreme court emphasized its holding in *Transportation Insurance Co. v. Moriel*.⁵²⁷ Specifically, when affirming a punitive damages award over a challenge that it is based on insufficient evidence or is against the great weight and preponderance of the evidence, the court of appeals is required to detail *all* the relevant evidence and explain why that evidence "supports or does not support the punitive damages award" in light of the *Alamo National Bank v. Kraus*⁵²⁸ factors.⁵²⁹ The supreme court also affirmed its holding in *Haynes & Boone v. Bowser Bouldin, Ltd.*⁵³⁰ that the *Kraus* review must be applied to an award of additional damages under the Deceptive Trade Practices-Consumer Protection Act.⁵³¹

C. REVIEW OF FACTUAL SUFFICIENCY POINTS

The supreme court reaffirmed that, in reviewing a factual sufficiency point, the court of appeals "must weigh *all* of the evidence in the record."⁵³² This is so, regardless of whether the point attacks a trial court fact finding or a jury verdict—the two are reviewed on appeal under the same legal standards.⁵³³ In overturning a finding of fact, the court of appeals must "clearly state why the . . . finding is factually insufficient or is so against the great weight and preponderance as to be manifestly unjust."⁵³⁴ A "perfunctory" review of the evidence will not suffice.⁵³⁵

D. REVIEW OF JURY MISCONDUCT

In *Pharo v. Chambers County, Texas*,⁵³⁶ the supreme court clarified that the determination of whether jury misconduct occurred is a question of fact for the trial court and, if there is conflicting evidence on the issue,

526. *Cincinnati Life*, 927 S.W.2d at 626 (citing TEX. R. APP. P. 90(a)). Rule 90(a) states: "The court of appeals shall hand down a written opinion which shall be as brief as practicable but which shall address every issue raised and necessary to final disposition of the appeal. Where the issues are clearly settled, the court shall write a brief memorandum opinion." TEX. R. APP. P. 90(a).

527. 879 S.W.2d 10 (Tex. 1994).

528. 616 S.W.2d 908 (Tex. 1981).

529. *Ellis County State Bank v. Keever*, 915 S.W.2d 478, 479 (Tex. 1995) (per curiam).

530. 896 S.W.2d 179 (Tex. 1995).

531. *Leonard & Harral Packing Co. v. Ward*, 937 S.W.2d 425 (1996) (per curiam); see TEX. BUS. & COM. CODE ANN. § 17.50(b) (Tex. UCC) (Vernon 1987 & Supp. 1997).

532. *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996) (per curiam) (emphasis added).

533. *Id.*

534. *Id.* (quoting *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986)).

535. *Id.*

536. 922 S.W.2d 945 (Tex. 1996).

the trial court's finding must be upheld on appeal.⁵³⁷ Stated another way, "the trial court's determination as to whether jury misconduct occurred 'is ordinarily binding on the reviewing courts and will be reversed only where a clear abuse of discretion is shown.'"⁵³⁸

XVI. DISPOSITION ON APPEAL

A. REMAND FOR NEW TRIAL ON DAMAGES ONLY

A court of appeals that remands a case for a new trial solely on the issue of unliquidated damages where liability is contested exceeds its authority under the Texas Rules of Appellate Procedure and is subject to reversal by the supreme court.⁵³⁹ Under the Rules, if a trial court's error affects only a part of the case and that part is "clearly separable without unfairness to the parties," the court of appeals may reverse the judgment only as to that part affected by the error.⁵⁴⁰ The court may not, however, order a separate trial on unliquidated damages alone "if liability issues are contested."⁵⁴¹

B. TRIAL COURT REFUSAL TO ENTER FINDINGS OF FACT AND CONCLUSIONS OF LAW

If a trial court commits harmful error by failing to make findings of fact and conclusions of law after timely request and reminder,⁵⁴² should the court of appeals reverse the case and remand for a new trial, or stay the proceedings and order the trial judge to file findings and conclusions? The El Paso Court of Appeals faced this issue in *Brooks v. Housing Authority*.⁵⁴³ The court determined that, under the circumstances of that case, the error was properly remedied by abating the appeal and remand-

537. *Id.* at 948.

538. *Id.* (quoting *State v. Wair*, 351 S.W.2d 878, 878 (Tex. 1961)).

539. *Redman Homes, Inc. v. Ivy*, 920 S.W.2d 664, 669 (Tex. 1996); TEX. R. APP. P. 81(b)(1).

540. TEX. R. APP. P. 81(b)(1).

541. *Redman*, 920 S.W.2d at 669. Rule 81(b)(1) states, in full:

(1) *Civil Cases*. No judgment shall be reversed on appeal and a new trial ordered in any cause on the ground that the trial court has committed an error of law in the course of the trial, unless the appellate court shall be of the opinion that the error complained of amounted to such a denial of the rights of the appellant as was reasonably calculated to cause and probably did cause rendition of an improper judgment in the case, or was such as probably prevented the appellant from making a proper presentation of the case to the appellate court; and if it appears to the court that the error affects a part only of the matter in controversy and that such part is clearly separable without unfairness to the parties, the judgment shall only be reversed and a new trial ordered as to that part affected by such error, provided that a separate trial on unliquidated damages alone shall not be ordered if liability issues are contested.

TEX. R. APP. P. 81(b)(1).

542. "A trial court's failure to make findings is not harmful error if 'the record before the appellate court affirmatively shows that the complaining party suffered no injury.'" *Tenery v. Tenery*, 932 S.W.2d 29, 30 (Tex. 1996) (per curiam).

543. 926 S.W.2d 316 (Tex. App.—El Paso 1996, no writ).

ing for the trial court to file findings and conclusions.⁵⁴⁴

In reaching this conclusion, the El Paso court reviewed the position taken by the supreme court on this issue over the years, including the court's opinion in *Cherne Industries, Inc. v. Magallanes*.⁵⁴⁵ In *Cherne Industries*, the supreme court reversed the judgment of the court of appeals and remanded to that court with instructions for it to direct the trial court to correct its error pursuant to Rule 81(a) of the Texas Rules of Appellate Procedure.⁵⁴⁶ Having reviewed the supreme court's decision in *Cherne*, the appeals court in *Brooks* held that, "whenever possible, appellate courts should attempt to remedy the absence of findings and conclusions by abating the appeal and remanding to the trial judge for entry of findings and conclusions, so that the appeal can be handled in the normal manner."⁵⁴⁷

Significantly, four months after the El Paso court's opinion in *Brooks*, the supreme court in *Tenery v. Tenery*⁵⁴⁸ found that a trial court's failure to file findings and conclusions was harmful error, reversed the judgment of the court of appeals, and remanded the case to the court of appeals "with instructions for it to direct the trial court to correct its error under Texas Rule of Appellate Procedure 81(a)."⁵⁴⁹ Although the supreme court in *Tenery* did not expressly discuss the abatement/new trial issue, the court apparently agrees with the El Paso Court of Appeals that a trial court's failure to file findings and conclusions should be remedied by abating the appeal and remanding to the trial court for entry of findings and conclusions.⁵⁵⁰

C. REMITTITUR IN THE SUPREME COURT

The Texas Supreme Court's decisions are limited by a paramount rule: it can consider only questions of law.⁵⁵¹ As a result, even if the supreme court can accept remittitur in a case (which is currently an unresolved

544. *Id.* at 321.

545. 763 S.W.2d 768 (Tex. 1989).

546. *Cherne*, 763 S.W.2d at 773. Rule 81(a) of the Texas Rules of Appellate Procedure provides:

No Reversal if Error Remediable. If the erroneous action or failure or refusal of the trial judge to act shall prevent the proper presentation of a cause to the court of appeals, and be such as may be corrected by the judge of the trial court, then the judgment shall not be reversed for such error, but the appellate court shall direct the said judge to correct the error, and thereafter the court of appeals shall proceed as if such erroneous action or failure to act had not occurred.

TEX. R. APP. P. 81(a).

547. 926 S.W.2d at 321.

548. 932 S.W.2d 29 (Tex. 1996) (per curiam).

549. *Id.* at 30.

550. As explained by the court in *Brooks*, however, under some circumstances, abatement may not be an appropriate remedy. 926 S.W.2d at 321. For example, if the trial court cannot forward findings and conclusions to the court of appeals "due to loss of the record, problems with memory, passage of time, or other inescapable difficulties," reversal and remand for a new trial is a proper remedy. *Id.*

551. *Redman*, 920 S.W.2d at 669.

issue), remittitur is not an available remedy in the Texas Supreme Court unless the evidence establishes an amount of damages as a matter of law.⁵⁵²

XVII. REHEARING EN BANC

During the Survey period, the supreme court clarified that while the Texas Constitution, Government Code and rules of appellate procedure require that for an appellate court decision to be valid, a majority of the members of an en banc court of appeals must join in the court's opinion and judgment in a case submitted en banc, a majority is not required to deny a motion for rehearing.⁵⁵³ The Texas Constitution states that "[t]he concurrence of a majority of the judges sitting in a section is necessary to decide a case."⁵⁵⁴ The Government Code states that "[w]hen convened en banc, a majority of the membership of the court constitutes a quorum and the concurrence of a majority of the court sitting en banc is necessary for a decision."⁵⁵⁵ The rules of appellate procedure provide that "[w]here a case is submitted to an en banc court, whether on motion for rehearing or otherwise, a majority of the membership of the court shall constitute a quorum and the concurrence of a majority of the court sitting en banc shall be necessary to a decision."⁵⁵⁶ Holding that a motion for rehearing is not "a case" within the meaning of the constitutional provision or "a decision" within the meaning of the Government Code or Rule 79 because those provisions refer to a decision on "the merits of the case," the *Saenz* court concluded that if the vote on a motion for rehearing or motion for rehearing en banc is evenly divided, "there is no 'decision' . . . and the motion fails."⁵⁵⁷

552. *Id.* In *Redman*, the supreme court upheld the court of appeals' finding that the evidence was insufficient to support the jury's actual damages award. *Redman*, 920 S.W.2d at 669. The court of appeals, however, erred in remanding for a new trial only the issue of damages, when, under Rule 81(b)(1) of the Texas Rules of Appellate Procedure, it should have remanded the entire case. *Id.* The supreme court reversed the court of appeals on this basis. *Id.* In an attempt to escape the consequences of the court of appeals' error in this regard, the respondents attempted to tender a voluntary remittitur to the supreme court. *Id.* The supreme court rejected the remittitur since, although there was some evidence to support the lesser amount of damages, the evidence did not establish the lesser amount as a matter of law. *Id.*

553. *Saenz v. Fidelity & Guar. Ins. Underwriters*, 925 S.W.2d 607, 612 (Tex. 1996).

554. TEX. CONST. art. V, § 6 (1891, amended 1978).

555. TEX. GOV'T CODE ANN. § 22.223(b) (Vernon 1988).

556. TEX. R. APP. P. 79(d). In the event a majority of the justices of the court sitting en banc cannot concur in a decision because they are equally divided, Rule 79(d) further provides that

such fact shall be certified to the Chief Justice of the Supreme Court who may temporarily assign a justice of another court of appeals or a qualified retired justice to participate in the decision of the case pursuant to law. The reconstituted en banc court may order the case reargued, at its discretion.

Id.

557. *Saenz*, 925 S.W.2d at 612. The court also held that, with respect to the requirement that a majority of the court sitting en banc join in the court's opinion and judgment in a case submitted en banc, the later addition of a new justice of the court cannot disturb an earlier vote on a case unless the court agrees to rehear the case. *Saenz*, 925 S.W.2d at 612.

