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## Appellate Practice and Procedure

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# Articles

## APPELLATE PRACTICE AND PROCEDURE

Alan Wright\*  
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## I. INTRODUCTION

In keeping with the trend seen in recent years, the Texas Supreme Court continues to expand the traditional standards for mandamus relief. For example, citing “judicial economy,” the Supreme Court reviewed an order denying a motion for continuance after expressly finding that it had no mandamus jurisdiction over the order.<sup>1</sup> The Supreme Court also dispensed with the traditional requirement in mandamus proceedings that the relator show it has no adequate remedy at law when a visiting judge refuses to disqualify himself after proper objection.<sup>2</sup> The Court further refused to foreclose the possibility of mandamus review of procedural irregularities committed by courts of appeals in interlocutory

1. *General Motors Corp. v. Gayle*, 951 S.W.2d 469, 477 (Tex. 1997) (orig. proceeding).

2. See *Mitchell Energy Corp. v. Ashworth*, 943 S.W.2d 436, 437 (Tex. 1997) (orig. proceeding); *Dunn v. Street*, 938 S.W.2d 33, 34-35 (Tex. 1997) (orig. proceeding) (per curiam); *Flores v. Banner*, 932 S.W.2d 500, 501 (Tex. 1996) (orig. proceeding) (per curiam).

appeals.<sup>3</sup> In addition, the Texas Supreme Court clarified the appealability of interlocutory class certification orders that "alter[ ] the fundamental nature of the class," and defined the scope of appellate jurisdiction over interlocutory orders denying summary judgment based on an assertion of immunity.<sup>4</sup> Reaffirming the vitality of its holding in *State Department of Highways and Public Transportation v. Payne*,<sup>5</sup> the Supreme Court refused to find waiver in a party's failure to strictly comply with the rules for objecting to the charge when the party's oral objection and written request "left no room for misunderstanding of its complaint."<sup>6</sup>

With respect to the appellate timetable, the Texas Supreme Court clarified that the period for perfecting appeal is extended by filing a timely request for findings of fact and conclusions of law when the judgment is based in whole or in part on an evidentiary hearing.<sup>7</sup> Extending its holding in *Jamar v. Patterson*,<sup>8</sup> the Court further held that a motion for new trial timely presented without the required filing fee extends the appellate timetable when the fee is paid after the motion is overruled by operation of law.<sup>9</sup> However, this must occur before the trial court loses plenary jurisdiction.<sup>10</sup>

The Court continues to require liberal construction of the rules of appellate procedure, condemning at least one court of appeals for affirming the trial court's judgment on the basis of items omitted from the record after having summarily denied a pre-submission request to supplement the record.<sup>11</sup> In fact, in one case, instead of requiring the appellant to carry its burden of presenting a sufficient record on appeal to show reversible error, the Supreme Court recognized its "residual authority to complete the record to assure that justice is done."<sup>12</sup> Consequently, the Court directed a trial court to transmit to the clerk of the Supreme Court a transcript that was never made a part of the appellate court record.<sup>13</sup>

Also during the Survey period, the Supreme Court reemphasized its holding in *Mafrige v. Ross*,<sup>14</sup> that a summary judgment appearing final on its face is final for purposes of appeal, even if it grants more relief than

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3. See *Deloitte & Touche, L.L.P. v. Fourteenth Court of Appeals*, 951 S.W.2d 394 (Tex. 1997) (orig. proceeding); *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86 (Tex. 1997) (orig. proceeding).

4. See *De Los Santos v. Occidental Chem. Corp.*, 933 S.W.2d 493, 495 (Tex. 1996) (per curiam); *Newman v. Obersteller*, 960 S.W.2d 621 (Tex. 1997).

5. 838 S.W.2d 235 (Tex. 1992).

6. *Galveston County Fair & Rodeo, Inc. v. Glover*, 940 S.W.2d 585, 586 (Tex. 1996) (per curiam).

7. See *IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440 (Tex. 1997). See also *Awde v. Dabeit*, 938 S.W.2d 31 (Tex. 1997) (per curiam); *Phillips v. Beavers*, 938 S.W.2d 446 (Tex. 1997) (per curiam).

8. 868 S.W.2d 318 (Tex. 1993) (per curiam).

9. See *Tate v. E.I. DuPont de Nemours & Co., Inc.*, 934 S.W.2d 83 (Tex. 1996) (per curiam).

10. See *id.*

11. See *Gallagher v. Fire Ins. Exchange*, 950 S.W.2d 370 (Tex. 1997) (per curiam).

12. *Feldman v. Marks*, 960 S.W.2d 613, 615 (Tex. 1996) (per curiam).

13. See *id.*

14. 866 S.W.2d 590 (Tex. 1993).

requested.<sup>15</sup> The Court further clarified that, on appeal, those portions of the judgment granting more relief than requested should be reversed.<sup>16</sup>

## II. APPELLATE REVIEW BEFORE FINAL JUDGMENT

### A. MANDAMUS

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

##### a. Preservation of Consulting-Expert Privilege

Extraordinary circumstances justifying the exercise of mandamus jurisdiction exist when a party can obtain meaningful appellate review of a trial court's order only by first disobeying the order.<sup>17</sup> In *General Motors Corp. v. Gayle*,<sup>18</sup> the district court entered an order requiring General Motors (GM) to notify the plaintiffs of any crash tests conducted for evidentiary, rather than consulting, purposes.<sup>19</sup> This crash test order effectively required GM to determine in advance whether each test was for evidentiary or consulting purposes.<sup>20</sup>

GM sought a writ of mandamus in the court of appeals, challenging the crash test order (among other things).<sup>21</sup> The court of appeals denied the requested relief, finding that GM had an adequate remedy by appeal.<sup>22</sup>

The Texas Supreme Court disagreed. The Court found that the district court's crash test order violated the consulting-expert privilege and held GM had no adequate remedy by appeal.<sup>23</sup> The Court reasoned, to obtain meaningful appellate review of the crash test order without violating its consulting-expert privilege, GM would have to fail to notify the plaintiffs of the tests and nonetheless attempt to use the results of these tests at trial, subjecting it to potential contempt proceedings.<sup>24</sup> Because a party should never have to disobey a court order to obtain meaningful review in the court of appeals, the Court conditionally granted mandamus relief on the crash test order and held that GM lacked an adequate remedy by appeal.<sup>25</sup>

##### b. Judicial Economy

As a general rule, the Supreme Court will not grant mandamus relief to

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15. See *English v. Union State Bank*, 945 S.W.2d 810 (Tex. 1997) (per curiam).

16. See *Bandera Elec. Coop., Inc. v. Gilchrist*, 946 S.W.2d 336 (Tex. 1997) (per curiam); *Page v. Geller*, 941 S.W.2d 101 (Tex. 1997) (per curiam).

17. See *General Motors Corp. v. Gayle*, 951 S.W.2d 469, 475 (Tex. 1997) (orig. proceeding).

18. *Id.*

19. See *id.* at 472.

20. See *id.* at 473.

21. See *id.*

22. See *id.*

23. See *id.* at 474, 476.

24. See *id.* at 476.

25. See *id.*

revise a trial court's erroneous scheduling order "however perverse."<sup>26</sup> The Court, however, will remedy such an error in the interest of judicial economy if it finds another aspect of the trial court's actions constitutes "special circumstances" justifying mandamus relief.<sup>27</sup> In *General Motors*, the Supreme Court conditionally granted GM's petition for writ of mandamus regarding a discovery order.<sup>28</sup> GM also sought mandamus review of the trial court's denial of a motion for continuance, but the Supreme Court found it did not give rise to extraordinary circumstances justifying the exercise of the Court's mandamus jurisdiction.<sup>29</sup> Nonetheless, in the interest of judicial economy, the Court reviewed the denial of the motion for continuance.<sup>30</sup>

The Court concluded that the denial of a motion for continuance, sought in part to provide GM with sufficient time to pay its jury fee, was an abuse of discretion when the trial court had no expectation of reaching the merits of the trial for weeks.<sup>31</sup> Accordingly, the Court directed the trial court to abort the nonjury trial and place the case on the jury docket.<sup>32</sup> As the Supreme Court had already noted its lack of jurisdiction over this issue, however, the authority for the Court's action is unclear.

### c. Discovery

Discovery abuses continue to merit mandamus relief by the Texas Supreme Court. Citing *Dillard Department Stores, Inc. v. Hall*<sup>33</sup> and *Texaco, Inc. v. Sanderson*,<sup>34</sup> the Supreme Court held that a party ordered to respond to an overly broad or vague discovery request has no adequate remedy at law and is, therefore, entitled to mandamus relief.<sup>35</sup>

In *K Mart Corp. v. Sanderson*,<sup>36</sup> the plaintiff sued K Mart (among others) for failing to take adequate safety precautions to prevent her abduction from a K Mart parking lot and her resulting rape.<sup>37</sup> The plaintiff served interrogatories on K Mart asking it to describe any criminal activity that had occurred on its property both locally and nationally for the past seven years.<sup>38</sup> Plaintiff also asked K Mart to list any other incidences of abduction or rape in any store nationwide.<sup>39</sup> The trial court ordered K Mart to respond.<sup>40</sup>

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26. *Id.* at 477.

27. *Id.*

28. *See id.*

29. *See id.*

30. *See id.*

31. *See id.*

32. *See id.*

33. 909 S.W.2d 491 (Tex. 1995) (orig. proceeding) (per curiam).

34. 898 S.W.2d 813 (Tex. 1995) (orig. proceeding) (per curiam).

35. *See K Mart Corp. v. Sanderson*, 937 S.W.2d 429, 432 (Tex. 1996) (orig. proceeding) (per curiam).

36. *See id.*

37. *See id.* at 430.

38. *See id.* at 431.

39. *See id.*

40. *See id.*

The Supreme Court found the interrogatories overly broad because they asked K Mart to describe all criminal conduct that had occurred on its premises, even though many criminal activities occurring on the premises, such as shoplifting, were irrelevant to the issue of whether K Mart's parking lots were safe.<sup>41</sup> Conditionally granting writ, the Court found the request for information regarding criminal activities at stores throughout the state and nation overly broad because conduct in other cities at other K Mart's, especially those in other states, is too remote to justify discovery.<sup>42</sup>

d. Extraordinary Discovery Sanctions

In *Ford Motor Co. v. Tyson*,<sup>43</sup> the Dallas Court of Appeals granted mandamus relief to Ford Motor Company from the trial court's order imposing a ten million dollar discovery sanction, which was to be paid in ten days to avoid contempt orders.<sup>44</sup> The court urged, however, that it was not the amount of the sanction that led the court to grant relief to the relator; rather, mandamus relief was appropriate to prohibit the imposition of an arbitrary fine that was not authorized by Texas Rule of Civil Procedure 215(3).<sup>45</sup> Because the trial court had no power to enter the sanction order, the court reasoned, mandamus would lie.<sup>46</sup>

e. Affidavit of Inability to Pay

In *Reed v. Onion*,<sup>47</sup> the San Antonio Court of Appeals exercised mandamus jurisdiction when a county court applied the wrong rule of civil procedure in denying an appellant's affidavit of inability to pay costs.<sup>48</sup> In *Reed*, a party filed an Affidavit of Inability to Give Appeal Bond in the county court, seeking to appeal a judgment in the justice court.<sup>49</sup> The county court denied appellant's affidavit because it failed to comply with the requirements of Texas Rule of Civil Procedure 145.<sup>50</sup> Noting that Rule 145 applies to original proceedings while Texas Rule of Civil Procedure 572<sup>51</sup> governs an appellant's failure to pay costs on appeal from a

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41. *See id.* The Supreme Court did find, however, that a request that K Mart produce all documents "which relate to, touch or concern the allegations of this lawsuit" was not unduly broad or burdensome because the request was limited to the specific lawsuit. *Id.* at 430-431.

42. *See id.* at 431.

43. 943 S.W.2d 527 (Tex. App.—Dallas 1997, orig. proceeding).

44. *See id.* at 529.

45. *See id.* at 532. Rule 215(3) permits a trial court to impose "appropriate" sanctions authorized under the Rules of Civil Procedure against a party that has abused the discovery process. TEX. R. CIV. P. 215(3).

46. *See Ford*, 943 S.W.2d at 532.

47. 937 S.W.2d 609 (Tex. App.—San Antonio 1996, orig. proceeding).

48. *See id.* at 610.

49. *See id.*

50. *See id.* Rule 145 provides in relevant part, "The affidavit shall contain the following statements: 'I am unable to pay the court costs. I verify that the statements made in the affidavit are true and correct.' The affidavit shall be sworn before a Notary Public." TEX. R. CIV. P. 145(2).

51. Rule 572 provides in relevant part:



justice court<sup>52</sup> the court of appeals conditionally granted mandamus to correct the trial court's abuse of discretion in applying the wrong rule.

f. Disqualification of Counsel

In *Schwartz v. Jefferson*,<sup>53</sup> the Fourteenth District Court of Appeals conditionally granted mandamus on an order disqualifying counsel.<sup>54</sup> The court noted that the relator, who was the defendant in the underlying lawsuit, could not remedy on appeal a court's order that required her to go to trial without her counsel of choice.<sup>55</sup> The court also found that the district court abused its discretion by dismissing the defendant's counsel because he did not intend to testify at trial and the plaintiff's counsel could not show any prejudice to the continued representation.<sup>56</sup>

g. Denial of Severance Motion

Despite evidence that all parties had agreed to a severance and the district court had agreed to reconsider its original motion denying the severance, the First District Court of Appeals in *Black v. Smith*<sup>57</sup> stayed proceedings in the trial court and found extraordinary circumstances sufficient to justify exercising its mandamus jurisdiction.<sup>58</sup> Finding that the trial court abused its discretion by denying the motion for severance, the court of appeals conditionally granted writ directing the district court to grant the motion and sever the cases.<sup>59</sup>

h. Denial of Motion to Compel Arbitration

In *EZ Pawn Corp. v. Mancias*,<sup>60</sup> the Supreme Court exercised its mandamus jurisdiction to enforce an arbitration agreement under the Federal Arbitration Act.<sup>61</sup> The Court held that "[w]hen a trial court erroneously denies a party the right to arbitration under the FAA, it has no adequate remedy at law."<sup>62</sup>

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Where appellant is unable to pay the costs of appeal, or give security therefor, he shall nevertheless be entitled to appeal by making strict proof of such inability . . . , which shall consist of his affidavit filed with the justice of the peace stating his inability to pay such costs, or any part thereof, or to give security.

TEX. R. CIV. P. 572.

52. See *Reed*, 937 S.W.2d at 610.

53. 930 S.W.2d 957 (Tex. App.—Houston [14th Dist.] 1996, orig. proceeding).

54. See *id.* at 962.

55. See *id.* at 959.

56. See *id.* at 961.

57. 956 S.W.2d 72 (Tex. App.—Houston [1st Dist.] 1997, orig. proceeding).

58. See *id.* at 73.

59. See *id.* at 75.

60. 934 S.W.2d 87 (Tex. 1996) (orig. proceeding) (per curiam).

61. See Federal Arbitration Act, 9 U.S.C. §§ 1-307 (1994).

62. *EZ Pawn*, 934 S.W.2d at 91.

## 2. Orders: No Evidence of Adequate Remedy by Appeal Required

In a series of cases where the trial court exceeded its jurisdictional authority, the Supreme Court granted mandamus relief without requiring the petitioner to first show that he had no adequate remedy by appeal.

### a. State Bar Proceedings

In *State Bar of Texas v. Jefferson*,<sup>63</sup> the Supreme Court conditionally granted writs of mandamus and prohibition to prohibit a trial court from enjoining the continuation of state bar disciplinary proceedings.<sup>64</sup> In *Jefferson*, the district court issued a temporary restraining order staying proceedings before a disciplinary committee investigatory panel after two lawyers complained of irregularities in the proceedings.<sup>65</sup> Notably, these same two lawyers filed for mandamus relief in the Supreme Court on the same claims raised in the injunction proceedings before the trial court.<sup>66</sup>

The Court found the trial court lacked jurisdiction to enjoin state bar disciplinary proceedings because the lawyers had other more direct means of complaining about the proceedings.<sup>67</sup> Holding that an original proceeding is the appropriate remedy when a trial court issues an order beyond its jurisdiction, the Court conditionally granted mandamus and prohibition. The Court directed the trial court to vacate the temporary restraining order and avoid any further interference with the state bar disciplinary proceedings.<sup>68</sup>

### b. Visiting Judges

Mandamus is also the appropriate remedy when a visiting judge refuses to disqualify himself after a proper objection is made under section 74.053 of the Texas Government Code.<sup>69</sup> Any order made by a judge after proper objection is void and the objecting party may seek mandamus relief without showing he has no adequate remedy at law.<sup>70</sup>

In *Flores v. Banner*,<sup>71</sup> Flores filed an objection on the day of the hear-

63. 942 S.W.2d 575 (Tex. 1997) (orig. proceeding) (per curiam).

64. *See id.* at 576.

65. *See id.* at 575.

66. *See id.*

67. *See id.* at 576.

68. *See id.*

69. Section 74.053 of the Texas Government Code provides in relevant part:

(b) If a party to a civil case files a timely objection to the assignment the judge shall not hear the case. Except as provided by subsection (d), each party to the case is only entitled to one objection under this section for that case.

(d) A former judge or justice who was not a retired judge may not sit in a case if either party objects to the judge or justice.

TEX. GOV'T CODE ANN. § 74.053(b) & (d) (Vernon Supp. 1998).

70. *See Mitchell Energy Corp. v. Ashworth*, 943 S.W.2d 436, 440 (Tex. 1997) (orig. proceeding); *Dunn v. Street*, 938 S.W.2d 33, 34-35 (Tex. 1997) (orig. proceeding) (per curiam); *Flores v. Banner*, 932 S.W.2d 500, 501 (Tex. 1996) (orig. proceeding) (per curiam).

71. 932 S.W.2d 500 (Tex. 1996) (orig. proceeding) (per curiam).

ing to the appointment of a former judge to hear her motion to recuse the presiding judge.<sup>72</sup> The former judge overruled the objection.<sup>73</sup> Citing section 74.053(b) and (d), the Supreme Court conditionally granted mandamus and directed the former judge to disqualify himself from any further proceedings in the matter, reasoning that disqualification under the Government Code is mandatory after proper objection is made.<sup>74</sup>

The Supreme Court reached the same conclusion on identical legal issues in *Dunn v. Street*.<sup>75</sup> After sustaining Dunn's objection to a visiting judge, the visiting judge nonetheless ordered Dunn to appear and show cause why he should not be in contempt for failing to appear at a hearing.<sup>76</sup> Citing *Flores*, the Supreme Court held that mandamus is appropriate where a visiting judge proceeds to enter a show cause order after sustaining an objection to his participation.<sup>77</sup>

In *Mitchell Energy Corp. v. Ashworth*,<sup>78</sup> the Texas Supreme Court was faced with the additional determination of whether the objecting party raised a proper objection to the visiting judge. In *Mitchell*, the plaintiff exercised its one objection under section 74.053 of the Texas Government Code and then objected to a retired judge subsequently assigned to the case.<sup>79</sup> Under the Government Code, a party is ordinarily permitted only one objection to a retired judge, but may make additional objections to visiting judges that are not retired judges.<sup>80</sup> Granting mandamus relief and enforcing the objection to the subsequently assigned retired judge, the Supreme Court held that section 74.053 of the Government Code only limits the number of objections a party can make to retired judges whose retired status vested at the time the judge left office.<sup>81</sup> Thus, a party can exercise an unlimited number of objections to a retired judge who gained retired status through serving as a visiting judge rather than through serving as an elected judge.<sup>82</sup>

### 3. Orders: Circumstances Not Warranting Mandamus Relief

#### a. Adequate Remedy by Appeal

As seen in *Jefferson*, a party has an adequate remedy by appeal from a trial court's order temporarily sealing all filed paperwork.<sup>83</sup> The party may still obtain the relief it seeks from the trial court and may appeal the issue.<sup>84</sup>

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72. *See id.* at 501.

73. *See id.* at 500.

74. *See id.* at 501-02.

75. 938 S.W.2d 33, 34-35 (Tex. 1997) (orig. proceeding) (per curiam).

76. *See id.* at 34.

77. *See id.* at 35.

78. 943 S.W.2d 436, 440 (Tex. 1997) (orig. proceeding).

79. *See id.* at 437.

80. *See id.*

81. *See id.* at 440-41.

82. *See id.*

83. *See Jefferson*, 942 S.W.2d at 576.

84. *See id.*

Although the court in *Ford Motor Co. v. Tyson*<sup>85</sup> granted mandamus relief on the issue of monetary sanctions, it held that excluding evidence as a discovery sanction is not a “death penalty sanction” requiring immediate mandamus review by the court of appeals.<sup>86</sup> Where the evidence remains in the possession of the party sanctioned and nothing in the sanction order precludes the party from making an adequate appeal record, the party has an adequate remedy by appeal and mandamus will not issue.<sup>87</sup>

Similarly, the Dallas Court of Appeals held that the imposition of the payment of attorneys’ fees as a sanction is not the type of extraordinary circumstances justifying mandamus relief.<sup>88</sup>

#### b. Premature Petition for Mandamus

Under some circumstances, the Texas Supreme Court will deny mandamus relief as premature to allow the trial court the opportunity to reconsider its decision. In *General Motors*,<sup>89</sup> GM paid a jury fee on the date of the trial setting and then moved for a continuance to conduct additional discovery and to allow the jury fee to become timely.<sup>90</sup> The trial court denied the motion for continuance and issued an order restricting GM’s use of crash tests.<sup>91</sup>

GM petitioned the court of appeals for mandamus relief on both issues.<sup>92</sup> The court of appeals denied the mandamus request, reasoning that GM had failed to demonstrate the lack of an adequate remedy by appeal.<sup>93</sup> Although denying mandamus relief, the court of appeals issued an opinion questioning the trial court’s rulings on the continuance motion and the use of crash tests.<sup>94</sup> The plaintiffs asked the trial court to reconsider its orders regarding the crash tests and the continuance.<sup>95</sup> GM filed a petition for mandamus relief in the Texas Supreme Court.<sup>96</sup> The Supreme Court dismissed GM’s petition as premature to allow the trial court the opportunity to reconsider its ruling on both issues in light of the court of appeals’ opinion.<sup>97</sup>

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85. 943 S.W.2d 527 (Tex. App.—Dallas 1997, orig. proceeding).

86. *Id.* at 532.

87. *See id.*

88. *See id.*

89. 940 S.W.2d 598 (Tex. 1997) (orig. proceeding) (per curiam).

90. *See id.* at 598.

91. *See id.* at 599.

92. *See id.*

93. *See id.*

94. *See id.*

95. *See id.*

96. *See id.*

97. *See id.* Notably, the trial court declined to reconsider its ruling despite the court of appeal’s disapproval. As a result, General Motors was forced to refile its petition for writ of mandamus with the Supreme Court. Mandamus relief was ultimately granted by the Supreme Court. *General Motors*, 951 S.W.2d at 469.

#### 4. *Mandamus Jurisdiction Despite Right to Immediate Appeal*

##### a. Class Certification

In *Deloitte & Touche, L.L.P. v. Fourteenth Court of Appeals*,<sup>98</sup> the Supreme Court denied mandamus relief to Deloitte & Touche for failure to show extraordinary circumstances that would make an interlocutory appeal inadequate.<sup>99</sup> Notably, the Court did not foreclose the possibility of reviewing procedural irregularities committed by a court of appeals in an interlocutory appeal.<sup>100</sup>

In dissent, Justice Spector argued that the Supreme Court never has jurisdiction, mandamus or otherwise, over interlocutory appeals because the Legislature has expressly provided the courts of appeals with conclusive authority over such intermediate appeals.<sup>101</sup>

##### b. Injunctions and Constitutional Issues

In *Republican Party of Texas v. Dietz*,<sup>102</sup> the Supreme Court considered its mandamus jurisdiction over a case in which the parties had the right to an interlocutory appeal. In *Dietz*, a group of Republicans who supported equal rights for gay and lesbian individuals sought an injunction in the trial court after they were denied access to the Republican Party of Texas Convention.<sup>103</sup> The group asserted both constitutional and breach of contract claims.<sup>104</sup> On Friday, June 14, 1996, the trial court issued an order temporarily enjoining the Republican Party from refusing to provide a booth and advertisement to the group.<sup>105</sup>

On Monday, June 17, 1996, the Republican Party filed a petition for writ of mandamus in the Texas Supreme Court and an emergency motion to stay the temporary injunction.<sup>106</sup> The Supreme Court requested an expedited response from the plaintiffs and set the case for oral argument on June 19, 1996, one day before the convention began.<sup>107</sup> The Court granted a stay in a per curiam opinion.<sup>108</sup> Some eight months later, the Court issued an opinion, providing a more detailed explanation as to why it granted the stay.<sup>109</sup>

After concluding that the group was not likely to succeed on its breach of contract and constitutional law claims, the Court reasoned that the constitutional issues, the statewide importance of the claims raised, and the short time frame in which the issues had to be decided provided

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98. 951 S.W.2d 394 (Tex. 1997) (orig. proceeding).

99. *See id.* at 397.

100. *See id.* at 398.

101. *See id.* at 398-400 (Spector, J., dissenting).

102. 940 S.W.2d 86 (Tex. 1997) (orig. proceeding).

103. *See id.* at 87-88.

104. *See id.* at 88.

105. *See id.*

106. *See id.*

107. *See id.*

108. *See id.*

109. *See id.*

“unique and compelling reasons” justifying the Court’s exercise of mandamus jurisdiction over the case.<sup>110</sup> The Court then dismissed the petition for writ of mandamus as moot, finding that the order staying the trial court’s temporary injunctive relief provided the Republican Party with all the relief to which it was entitled.<sup>111</sup>

Also looking to the immediate and compelling circumstances surrounding the election process, the Corpus Christi Court of Appeals (sitting *en banc*) conditionally granted mandamus when a trial court declared a mayoral election void and brought into question who had authority to govern the city.<sup>112</sup> Citing *Dietz*, the court reasoned that despite the would-be mayor’s right to an accelerated appeal, the issue of who is the appropriate mayor creates unique and compelling circumstances justifying mandamus relief.<sup>113</sup> Moreover, the court reasoned, mandamus is appropriate to remedy illegal efforts to oust an elected official.<sup>114</sup> In dissent, two justices disagreed, arguing that the relator had an adequate remedy by accelerated appeal, making mandamus inappropriate and unnecessary.<sup>115</sup>

### 5. *Exclusive Jurisdiction*

In some limited circumstances the Supreme Court has exclusive mandamus jurisdiction. For instance, the Government Code comports exclusive jurisdiction to the Court over an officer of an executive department of the Texas government.<sup>116</sup> Attempting to invoke this exclusive jurisdiction in *City of Arlington v. Nadig*,<sup>117</sup> the City of Arlington sought mandamus relief directly from the Supreme Court after the Texas Workers’ Compensation Commission (TWCC) refused to reimburse the City pursuant to a trial court’s order to do so.<sup>118</sup> Denying mandamus relief, the Supreme Court held that members of state boards are not “officers of [an] executive department” within the meaning of section 22.002(c) of the Government Code, and the Court does not have exclusive jurisdiction over cases involving them.<sup>119</sup>

### 6. *Compelling Circumstances Excusing Failure to First Seek Relief in Court of Appeals*

The Supreme Court granted mandamus relief in two companion cases involving the Secretary of State’s failure to certify a candidate for the Texas State House of Representatives. In *Bird v. Rothstein*,<sup>120</sup> the Demo-

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110. *Id.* at 94.

111. *See id.*

112. *See De Alejandro v. Hunter*, 951 S.W.2d 102, 105 (Tex. App.—Corpus Christi 1997, orig. proceeding).

113. *See id.* at 105.

114. *See id.* at 106.

115. *See id.* at 107 (Chavez, J., dissenting).

116. *See* TEX. GOV’T CODE ANN. § 22.002(c) (Vernon 1988).

117. 960 S.W.2d 641 (Tex. 1997) (orig. proceeding) (per curiam).

118. *See id.* at 642.

119. *Id.*

120. 930 S.W.2d 586 (Tex. 1996) (orig. proceeding).

cratic Party properly nominated candidate Bird for an open seat in the State House of Representatives, but failed to timely deliver the nomination form to the Secretary of State.<sup>121</sup> Because the Secretary of State received the nomination late, the Secretary refused to certify the Bird candidacy.<sup>122</sup> Bird filed a petition for writ of mandamus directly with the Supreme Court.<sup>123</sup>

The Court held that the circumstances in *Bird* were sufficiently compelling to excuse his failure to first seek relief in the court of appeals.<sup>124</sup> The Court conditionally granted mandamus, ordering the Secretary of State to certify Bird's candidacy.<sup>125</sup> The Court openly criticized the Secretary for failing to abide by the Court's recent decision in *Davis v. Taylor*.<sup>126</sup> In *Davis*, the Court held that a candidate is entitled to a writ of mandamus directing a party official to comply with the statutory deadline under the Election Code so that the party official may perform his duties.<sup>127</sup>

In dissent, Justice Owen (joined by Justice Cornyn) urged that while mandamus was appropriate in *Davis*, the Court's order should have been directed to the district committee director rather than the Secretary of State.<sup>128</sup>

## 7. Standards of Review

Petitions for writs of mandamus are reviewed under an abuse of discretion standard. In *Griffin Industries, Inc. v. Thirteenth Court of Appeals*,<sup>129</sup> the Supreme Court denied Griffin Industries' request for mandamus relief because it believed the court of appeals correctly applied this standard.<sup>130</sup> In *Griffin Industries*, Villegas, the appellant, filed an affidavit of inability to pay costs in lieu of a cost bond under former Texas Rule of Appellate Procedure 40.<sup>131</sup> Griffin Industries and the court reporter both challenged the affidavit.<sup>132</sup> The trial court sustained the contest.<sup>133</sup> Villegas sought mandamus review of the trial court's action in the court of appeals.<sup>134</sup>

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121. *See id.* at 587.

122. *See id.*

123. *See id.*

124. *See id.* at 588. *See also* *Davis v. Taylor*, 930 S.W.2d 581 (Tex. 1996) (orig. proceeding).

125. *See Bird*, 930 S.W.2d at 588.

126. 930 S.W.2d 581 (Tex. 1996) (orig. proceeding).

127. *See id.*

128. *See Bird*, 930 S.W.2d at 588 (Owen, J., dissenting).

129. 934 S.W.2d 349 (Tex. 1996) (orig. proceeding).

130. *See id.* at 350.

131. *See id.* at 350. Rule 40 provided in relevant part, "When the appellant is unable to pay the cost of appeal . . . he shall be entitled to prosecute an appeal . . . by filing with the clerk . . . his affidavit stating that he is unable to pay the costs of appeal." TEX. R. APP. P. 40(a)(3)(A) (now TEX. R. APP. P. 20.1).

132. *See Griffin Indus.*, 934 S.W.2d at 350.

133. *See id.*

134. *See id.*

The court of appeals granted mandamus relief, finding that “the trial court abused its discretion in sustaining the contest . . . because Villegas proved that she was indigent and unable to pay the costs of appeal.”<sup>135</sup>

Agreeing with the court of appeals, the Supreme Court denied Griffin Industries’ petition for writ of mandamus.<sup>136</sup> The Court reasoned that proof that an appellant’s reliance on public assistance is sufficient to establish inability to pay costs on appeal under former Rule 40.<sup>137</sup> The Court further explained that even if the attorney is obligated to pay costs through a contingency fee agreement but will not or cannot do so, the appellant will not be stripped of indigent status.<sup>138</sup>

In dissent, Justice Baker (joined by Justice Enoch) emphasized that the standard for mandamus review is abuse of discretion.<sup>139</sup> To conclude that Griffin Industries did not negate Villegas’ prima facie case of inability to pay, the dissent argued, the Court impermissibly reweighed the evidence and rejudged the witnesses’ credibility.<sup>140</sup>

## B. INTERLOCUTORY APPEALS

### 1. Orders Denying or Granting Class Certification

“A person may appeal from an interlocutory order . . . that certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure. . . .”<sup>141</sup> What exactly does this mean? For example, is an order changing a class from opt-out to mandatory a permitted interlocutory appeal under this statute? It is, according to the Texas Supreme Court’s decision in *De Los Santos v. Occidental Chemical Corp.*<sup>142</sup>

In *De Los Santos*, the defendant chemical companies were faced with more than 8,600 similar injury claims and approximately 500 other lawsuits in connection with an accidental chemical release from a butadiene plant.<sup>143</sup> The “defendants moved the trial court . . . to certify a mandatory plaintiffs’ class of all persons claiming injury from the incident.”<sup>144</sup> The district court first denied the motion and then granted the defendants’ motion over the plaintiffs’ protest.<sup>145</sup> Some plaintiffs appealed the trial court’s order.<sup>146</sup> While the interlocutory appeal was pending, the plaintiffs repeatedly urged the trial court to reconsider its ruling.<sup>147</sup> The case was then transferred to another trial court, “which

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135. *See id.* at 351.

136. *See id.* at 354.

137. *See id.* at 351.

138. *See id.* at 354.

139. *See id.* at 355 (Baker, J., dissenting).

140. *See id.* at 357-58 (Baker, J., dissenting).

141. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(3) (Vernon Supp. 1998).

142. 933 S.W.2d 493 (Tex. 1996) (per curiam).

143. *See id.* at 494.

144. *Id.*

145. *See id.*

146. *See id.*

147. *See id.*



promptly granted the motions to reconsider and certified the class not as a mandatory one but as an opt-out class.”<sup>148</sup> Certain plaintiffs opted out and the case went to trial.<sup>149</sup> Ultimately, the defendants offered to settle the case conditioned on certification of a mandatory class. The trial court certified a mandatory class and approved the settlement.<sup>150</sup>

The plaintiffs that opted out appealed the trial court’s interlocutory order certifying the class and the court of appeals dismissed the appeal for want of jurisdiction.<sup>151</sup> “The court of appeals reasoned that the order certifying a mandatory class only enlarged the size of the existing opt-out class and thus was not an order from which interlocutory appeal could be taken under Section 51.014.”<sup>152</sup> Disagreeing with the appellate court’s conclusion, the Texas Supreme Court held that “[c]hanging a class from opt-out to mandatory does not simply enlarge its membership; it alters the fundamental nature of the class.”<sup>153</sup>

## 2. *Orders Denying a Claim of Immunity*

One of the few pre-trial rulings that may be appealed before final judgment is an order denying summary judgment based on an assertion of immunity:

A person may appeal from an interlocutory order of a district court, county court at law, or county court that . . . denies a motion for summary judgment that is based on an *assertion of immunity* by an individual who is an officer or employee of the state or a political subdivision of the state. . . .<sup>154</sup>

Does the statute’s “assertion of immunity” requirement have to be a direct grant of immunity or can it be indirect? The Texas Supreme Court in *Newman v. Obersteller*<sup>155</sup> held that a statute granting *indirect* immunity is an “immunity statute” within the meaning of section 51.014(a)(5).<sup>156</sup>

In *Newman*, a high school student sued the head coach and athletic director of his high school, as well as the school district for alleged mistreatment resulting in emotional damage.<sup>157</sup> Both the school district and

148. *Id.*

149. *See id.*

150. *See id.*

151. *See id.*

152. *Id.* at 495. The court of appeals relied on *Pierce Mortuary Colleges, Inc. v. Bjerke*, 841 S.W.2d 878 (Tex. App.—Dallas 1992, writ denied) in reaching this conclusion. The *Pierce Mortuary* court held that “an order changing the size of a class only modifies a certification order and is not an order certifying or refusing to certify a class from which an interlocutory appeal will lie.” *De Los Santos*, 933 S.W.2d at 495 (citing *Pierce Mortuary*, 841 S.W.2d at 880-81)).

153. *Id.* “In *Pierce Mortuary*, new members were added to the class prior to trial, but the relationship of class members to each other and their attorneys was not affected by the expansion.” *Id.* *Pierce Mortuary*, the Court concluded, “cannot be stretched to cover this case.” *Id.*

154. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(5) (Vernon Supp. 1998) (emphasis added).

155. 960 S.W.2d 621 (Tex. 1997).

156. *Id.* at 621-22.

157. *See id.* at 622.

coach moved for summary judgment claiming governmental immunity.<sup>158</sup> The trial court initially granted summary judgment for both the coach and school district, but vacated the summary judgment for the coach on the plaintiff's motion for reconsideration.<sup>159</sup> The trial court then severed the case against the school district, rendering the summary judgment for the district a final judgment.<sup>160</sup> The plaintiff did not challenge or appeal the summary judgment for the school district.<sup>161</sup>

Thereafter, the coach filed a second motion for summary judgment, claiming an affirmative defense of immunity under section 101.106 of the Texas Civil Practice and Remedies Code.<sup>162</sup> Under section 101.106, a judgment in an action against a governmental unit precludes an action against an employee of that unit.<sup>163</sup> The coach, therefore, argued that, under section 101.106, the unchallenged summary judgment for the school district rendered the coach immune from any further action.<sup>164</sup> The trial court denied the coach's second motion and the coach appealed under section 51.014(a)(5).<sup>165</sup> The court of appeals refused to exercise jurisdiction over the coach's interlocutory appeal.<sup>166</sup>

The Texas Supreme Court reversed. The Court concluded that section 101.106 is an immunity statute for purposes of section 51.014(a)(5) because "[t]he language 'bars any action' is an unequivocal grant of immunity in this context."<sup>167</sup> The fact, the Court held, "that section 101.106 does not use the word 'immunity' is of no consequence," given "the structure and intent of the Tort Claims Act."<sup>168</sup> As a result, "the court of appeals erred by not exercising jurisdiction over [the coach's] interlocutory appeal under section 51.014(a)(5)."<sup>169</sup>

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158. *See id.* The parties claimed immunity under the Texas Tort Claims Act. *See id.*; TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001-109 (Vernon 1994 & Supp 1998).

159. *See Newman*, 960 S.W.2d at 622.

160. *See id.*

161. *See id.*

162. *See id.*; TEX. CIV. PRAC. & REM. CODE ANN. § 101.106 (Vernon 1997).

163. *Newman*, 960 S.W.2d at 622. Section 101.106 provides: "A judgment in an action or settlement of a claim under this chapter bars any action involving the same subject matter by the claimant against the employee of the governmental unit whose act or omission gave rise to the claim." TEX. CIV. PRAC. & REM. CODE ANN. § 101.106 (Vernon 1997).

164. *See Newman*, 960 S.W.2d at 622.

165. *See id.*

166. *See id.*

167. *Id.*

168. *Id.*

169. *Id.* The Supreme Court further rendered judgment for the coach, holding "that section 101.106 render[ed] [the coach] immune from further action in [the] matter." *Id.* The dissent argued that section 51.014(a)(5) contemplates only *direct* grants of immunity and section 101.106 is not a grant of immunity, direct or indirect. *See id.* at \*3 (Abbott, J., dissenting). As a result, the dissent concluded, the denial of summary judgment based on section 101.106 "does not fall within the ambit of section 51.014(a)(5)" and the court of appeals had no jurisdiction over the interlocutory order. *Id.* at \*4.

### 3. Orders Compelling Arbitration

The San Antonio Court of Appeals recently affirmed that an order compelling arbitration under the Texas or Federal Arbitration Acts is an unappealable interlocutory order.<sup>170</sup> A trial court's order compelling arbitration is an interlocutory order, and appeals of interlocutory orders are permitted only by statute.<sup>171</sup> "The general Texas statute permitting appeal of interlocutory orders does not include an order compelling arbitration as one [that] may be appealed."<sup>172</sup> Neither does the Texas Arbitration Act.<sup>173</sup> The Texas Arbitration Act provides only for an interlocutory appeal from an order "(1) denying an application to compel arbitration . . . ; (2) granting an application to stay arbitration . . . ; (3) confirming or denying confirmation of an award; (4) modifying or correcting an award; or (5) vacating an award without directing a rehearing."<sup>174</sup> As a result, an order compelling arbitration is an unappealable interlocutory order.<sup>175</sup>

Further, as the appellant in *Elm Creek* learned, a party cannot circumvent section 171.098 by arguing that they are really appealing the denial of an injunction requesting a stay of the arbitration proceedings.<sup>176</sup> While "[s]ection 51.014(a)(4) of the Texas Civil Practice and Remedies Code authorizes an interlocutory appeal from orders granting or denying a temporary injunction," an appellant cannot attempt to circumvent section 171.098 "by cloaking an otherwise unappealable order in injunction terms."<sup>177</sup>

170. See *Elm Creek Villas Homeowner Ass'n, Inc. v. Beldon Roofing & Remodeling Co.*, 940 S.W.2d 150, 153 (Tex. App.—San Antonio 1996, no writ).

171. See *id.*

172. *Id.* See TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (Vernon 1997 & Supp. 1998).

173. See *id.* § 171.098 (Vernon Supp. 1998).

174. *Id.* § 171.098(a)(1)-(a)(5).

175. See *Elm Creek*, 940 S.W.2d at 154. *Accord* *Gathe v. Cigna Healthplan of Tex., Inc.*, 879 S.W.2d 360, 362 (Tex. App.—Houston [14th Dist.] 1994, writ denied); *Bethke v. Polyco, Inc.*, 730 S.W.2d 431, 434 (Tex. App.—Dallas 1987, no writ); *Citizens Nat'l Bank v. Callaway*, 597 S.W.2d 465, 466 (Tex. Civ. App.—Beaumont 1980, writ ref'd). *But see* *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992) ("Both the Texas and Federal [Arbitration] Acts permit a party to appeal from an interlocutory order granting or denying a request to compel arbitration."). The *Elm Creek* court, as well as other courts of appeals, have concluded that the Supreme Court's statement in *Jack B. Anglin* is dicta and elect not to follow it. See *Elm Creek*, 940 S.W.2d at 154. In refusing to follow the Supreme Court's statement in *Jack B. Anglin*, these courts of appeals reason that (1) *Jack B. Anglin* was a mandamus proceeding, not an appeal, (2) the order at issue was an order denying (not granting) an application to compel arbitration, (3) the Court's statement is not supported in the language of the Texas Arbitration Act, and (4) the cases cited by the Supreme Court state that an order denying arbitration is appealable, but do not address orders compelling arbitration. See *Elm Creek*, 940 S.W.2d at 154.

176. See *Elm Creek*, 940 S.W.2d at 154-55.

177. *Id.* As the appellant in *Elm Creek* further learned, attempting to do so may result in an assessment of appellate sanctions. See *id.* at 155-56. Following its holding in *Elm Creek*, the San Antonio Court of Appeals dismissed the appeal of an order compelling arbitration in *Materials Evolution Dev. USA, Inc. v. Jablonowski*, 949 S.W.2d 31 (Tex. App.—San Antonio 1997, no writ). As in *Elm Creek*, the court held that the order compelling arbitration was not final and an interlocutory appeal of the order is not expressly

Conducting a nearly identical analysis, the Dallas Court of Appeals in *Lipshy Motorcars, Inc. v. Sovereign Associates, Inc.*<sup>178</sup> similarly concluded that it had no jurisdiction over an interlocutory appeal of an order granting a motion to compel arbitration and a stay of litigation.<sup>179</sup>

#### 4. Protective Orders Under the Texas Family Code

Under the Texas Family Code, a trial court may render a protective order if the court finds that family violence has occurred and is likely to occur in the future.<sup>180</sup> A protective order is effective for the period specified by the trial court, but cannot exceed one year.<sup>181</sup> "During [the] effective period, the trial court retains the power and jurisdiction to modify the protective order either by removing items included or including items not previously contained in the order."<sup>182</sup>

Is an interlocutory protective order entered under the Texas Family Code appealable? Facing this issue in *Normand v. Fox*, a majority of the Waco Court of Appeals held that the protective order at issue was interlocutory and not subject to appeal.<sup>183</sup> The court first noted that family protective orders entered under the Texas Family Code do not fall within the parameters for interlocutory review under the general Texas statute permitting appeal of interlocutory orders.<sup>184</sup> The court then noted that "Title 4 of the Family Code does not provide for interlocutory appeal" of protective orders.<sup>185</sup> The court thus concluded that the protective order was not an appealable interlocutory order and that it could only be reviewed if it qualified as a final judgment.<sup>186</sup>

To be a final and appealable, the court noted, a "judgment must settle all disputed material issues between the parties which require the exer-

authorized by either the general Texas statute permitting appeal of certain types of interlocutory orders or the Texas Arbitration Act. *See id.* at 33; TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (Vernon 1997 & Supp. 1998); TEX. CIV. PRAC. & REM. CODE ANN. § 171.098 (Vernon Supp. 1998). Unlike in *Elm Creek*, however, the court denied the appellee's motion for sanctions, finding that the appellant did not bring the appeal for the purpose of delay or without sufficient cause. *See Materials Evolution*, 949 S.W.2d at 33.

178. 944 S.W.2d 68 (Tex. App.—Dallas 1997, no writ).

179. *See id.* at 70. As did the court in *Elm Creek*, the Dallas court in *Lipshy* rejected as "dicta" the Supreme Court's comment on the appealability of an interlocutory order compelling arbitration in *Jack B. Anglin*, stating that it "contradicts the very authority [the Supreme Court] cites." *Lipshy*, 944 S.W.2d at 70. In contrast to the *Elm Creek* court, however, the Dallas court refused to entertain the appellee's motion for appellate sanctions, holding that "[o]nce a court determines it has no jurisdiction . . . , all it can do is declare its lack of jurisdiction and dismiss." *Id.* at 72. The court has no jurisdiction to consider a motion for sanctions. *See id.*

180. *See* TEX. FAM. CODE ANN. § 81.001 (Vernon Supp. 1998).

181. *See* TEX. FAM. CODE ANN. § 85.025 (Vernon Supp. 1998).

182. *Normand v. Fox*, 940 S.W.2d 401, 403 (Tex. App.—Waco 1997, no writ).

183. *See id.* at 403-04.

184. *See id.* at 403; TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (Vernon 1997 & Supp. 1998).

185. *Normand*, 940 S.W.2d at 403. *See generally* TEX. FAM. CODE tit. 4 (Vernon 1996 & Supp. 1998).

186. *See Normand*, 940 S.W.2d at 403.

cise of judicial discretion.”<sup>187</sup> The court ultimately determined that the trial court’s modification power under the Family Code clouded the protective order’s finality.<sup>188</sup> As a result, a protective order entered under the Family Code “is not a final, appealable order.”<sup>189</sup> The dissent disagreed, contending that the protective order disposed of all issues between the parties and was therefore final and appealable.<sup>190</sup>

Interestingly, both the majority and dissent advocated mandamus as an appropriate remedy to challenge a protective order entered under the Texas Family Code.<sup>191</sup> Moreover, both called upon the Texas Legislature to amend the Family Code or another appropriate statute to make a protective order entered under the Family Code a final order that can be reviewed on appeal on an accelerated basis.<sup>192</sup>

The El Paso Court of Appeals also dismissed for want of jurisdiction an appeal of a protective order entered under the Texas Family Code, but on different grounds. Specifically, in *Ruiz v. Ruiz*,<sup>193</sup> the El Paso court held that a protective order granted while a divorce action is pending between parties is not a final judgment when the protective order is consolidated with the divorce action and the divorce action includes unresolved issues like child custody, support, and property division.<sup>194</sup> Under these circumstances, the protective order is not final because it does not dispose of all issues in the case and no affirmative statutory authority exists authorizing interlocutory appellate review of the order.<sup>195</sup>

The *Ruiz* court noted the controversy over whether a protective order issued under the Family Code is, or should be, considered a final appealable order.<sup>196</sup> The court decided, however, that it did not need to reach the merits of the controversy since the order in *Ruiz* was not an independent action disposing of all issues between the parties.<sup>197</sup> In line with the majority and dissent in *Normand*, the *Ruiz* court concluded that absent action by the Legislature, “the method for seeking review of a protective order entered during pendency of a divorce is mandamus.”<sup>198</sup>

## 5. Charging Orders

In a case of first impression, the Texarkana Court of Appeals in *Dis-*

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187. *Id.*

188. *See id.*

189. *Id.*

190. *See id.* at 405 (Vance, J., dissenting). The dissent specifically rejected the majority’s conclusion that the court’s ability to modify the order “clouds it finality.” *Id.* “Once modified, the new order would also be final, assuming it disposed of all issues and parties.” *Id.*

191. *See id.* at 404.

192. *See id.*

193. 946 S.W.2d 123 (Tex. App.—El Paso 1997, no writ) (per curiam).

194. *See id.* at 124.

195. *See id.*

196. *See id.* (citing *Normand v. Fox*, 940 S.W.2d 401 (Tex. App.—Waco 1997, no writ)).

197. *See id.*

198. *Id.*

*pensa v. University State Bank*<sup>199</sup> considered the appealability of a charging order.<sup>200</sup> Seeking enforcement of its judgment, the judgment creditor in *Dispensa* sought a charging order against the judgment debtor's interest in a partnership, as well as a turnover order and the appointment of a receiver.<sup>201</sup> The trial court granted the judgment creditor's request and issued a charging order.<sup>202</sup> The judgment debtor appealed the order by writ of error, contending that the trial court erred in issuing the order because it lacked jurisdiction over him.<sup>203</sup>

Acknowledging that interlocutory orders may be appealed in limited circumstances,<sup>204</sup> the court of appeals concluded that none of the statutory exceptions applied to the charging order.<sup>205</sup> Further, the court held that the order was not final because it did not address the judgment creditor's request for a turnover order and appointment of a receiver.<sup>206</sup> Due to these defects in the charging order, the court dismissed the appeal for want of jurisdiction.

Notably, the court of appeals had no need and refused to decide the question of whether a charging order itself is a final, appealable judgment.<sup>207</sup> The court pointed out, however, that "as a general rule, the usual writs and orders used to aid enforcement and collection of a final money judgment are not appealable."<sup>208</sup>

### III. PRESERVATION OF ERROR

In *Galveston County Fair & Rodeo, Inc. v. Glover*,<sup>209</sup> the parents of a county fair contestant brought suit for breach of contract against a county fair company, complaining that the Fair had misapplied its rules and improperly disqualified their son's steer from competition on the grounds that the steer had been unethically "fitted" or "injected with air to make it appear larger and smoother."<sup>210</sup> The Fair orally objected to the submission of the proposed jury question on wrongful disqualification (which did not contain any instruction on the "fitting" issue) as speculative and tendered in writing three proposed questions tied to the specific provisions of the Fair's rules, one of which was accompanied by an instruction on "unethical fitting."<sup>211</sup>

The trial court rejected the Fair's objections and refused to submit the

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199. 951 S.W.2d 797 (Tex. App.—Texarkana 1997, pet. denied).

200. *See id.* at 798-99.

201. *See id.* at 799.

202. *See id.*

203. *See id.*

204. *See Dispensa*, 951 S.W.2d at 799. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (Vernon 1997 & Supp. 1998).

205. *See Dispensa*, 951 S.W.2d at 799.

206. *See id.* at 800.

207. *See id.* at 801 n.7.

208. *Id.*

209. 940 S.W.2d 585 (Tex. 1996).

210. *Id.* at 586.

211. *See id.* at 586.

Fair's questions and instruction.<sup>212</sup> Affirming the trial court's judgment against the Fair, the appellate court held that the trial court did not abuse its discretion in refusing the tendered submission and that the Fair failed to separately request in writing any definitions or instructions on "wrongful disqualification" as required by Texas Rule of Civil Procedure 273.<sup>213</sup>

Reaffirming the vitality of its holding in *State Department of Highways and Public Transportation v. Payne*,<sup>214</sup> the Supreme Court held that the trial court erred in its submission of the wrongful disqualification question and that the Fair's oral objection and written request "left no room for misunderstanding of its complaints" and complied with Rule 273.<sup>215</sup> The Supreme Court held that the error was not harmful, however, because the jury's affirmative answer to a separate breach of contract question, submitted without objection by the Fair, was sufficient to support the judgment.<sup>216</sup>

In *Yazdi v. Republic Insurance Co.*,<sup>217</sup> the San Antonio Court of Appeals applied the *Payne* test in a dispute between a homeowner and his insurer concerning the alleged theft of oriental rugs and other items from the insured's condominium.<sup>218</sup> The court of appeals held that, even under the Supreme Court's "simplified and loosened"<sup>219</sup> test in *Payne* for determining whether a party has preserved error in the jury charge, the insured's request that a definition of the word "false" be added to the fraud question did not preserve error because no written tender of the requested definition was made.<sup>220</sup> The court of appeals also held that the homeowner waived the specific objections to the charge complained of on appeal by failing to raise them before the trial court.<sup>221</sup>

#### IV. JUDGMENTS

##### A. CONSENT JUDGMENTS

Unless all parties consent to an agreement underlying the judgment at the time of rendition, a court cannot render a valid consent judgment.<sup>222</sup> Further, a trial court should not enter a consent judgment if it has information that would "reasonably prompt further inquiry, and such inquiry, if pursued, would disclose a lack of consent."<sup>223</sup> A party, of course, may revoke its consent, but must do so *before* the judgment is rendered.<sup>224</sup> If

212. *Id.*

213. *See id.* at 586-87. *See also* TEX. R. CIV. P. 273.

214. 838 S.W.2d 235 (Tex. 1992).

215. *See* 940 S.W.2d at 586-87; TEX. R. CIV. P. 273.

216. *See id.* at 587.

217. 935 S.W.2d 875 (Tex. App.—San Antonio 1996, writ denied).

218. *See id.* at 876-77.

219. *Id.* at 879.

220. *See id.*

221. *See id.*

222. *See* First Heights Bank, FSB v. Marom, 934 S.W.2d 843, 844 (Tex. App.—Houston [14th Dist.] 1996, no writ).

223. *Id.*

224. *See id.* at 844-45.

a party wishing to revoke consent does so *after* the judgment is rendered, the trial court commits no error in signing the agreed judgment.<sup>225</sup>

This is so, even if the agreed judgment signed by the court prior to the withdrawal of consent is interlocutory.<sup>226</sup> Once the trial court renders an agreed interlocutory judgment, a party may not withdraw its consent if, at the time of rendition, the trial court was not aware of any objection.<sup>227</sup> The interlocutory nature of the rendered agreed judgment does not impact this rule because the entry of final judgment “is a purely ministerial act by which [the previously rendered] judgment is made of record and preserved.”<sup>228</sup> In short, consent cannot be withdrawn once judgment is rendered, regardless of the date of entry of final judgment.

A trial court, however, has no power to render an agreed judgment unless and until “all the terms of a final judgment have been definitely agreed upon by all parties and those terms either reduced to writing or placed of record. . . .”<sup>229</sup> Where at least one essential element of agreement is left undecided by the parties’ agreement, the trial court is “without power to render a judgment by agreement.”<sup>230</sup>

Moreover, an agreed judgment must be rendered in “strict or literal compliance” with the parties’ agreement.<sup>231</sup> To the extent the trial court’s judgment goes beyond the terms of the parties’ agreement, it is void.<sup>232</sup> On appeal, the proper disposition of an improperly rendered agreed judgment is reversal and remand “without prejudice to the rights of the parties to seek to enforce, or to avoid enforcement of, the settlement agreement.”<sup>233</sup>

## B. RENDERING JUDGMENT

“Judgment is rendered when the trial court officially announces its de-

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225. *See id.* at 845.

226. *See id.*

227. *See id.* As explained by the Fourteenth District Court of Appeals in *First Heights*, there is a distinction between an agreement between the parties pertaining to the lawsuit and an agreed interlocutory judgment incorporating the terms of the parties’ agreement. *See id.* For the former, “consent may be withdrawn prior to the entry of a judgment incorporating the agreement of the parties;” in fact, “entry of a judgment in the absence of that continuing consent is prohibited.” *Id.* For the latter, however, “once the trial court renders an agreed judgment, a party may not withdraw its consent if at the time of rendition the trial court was not aware of any objection.” *Id.*

228. *Id.* at 845-46.

229. *Reppert v. Beasley*, 943 S.W.2d 172, 174 (Tex. App.—San Antonio 1997, no writ).

230. *Id.* The San Antonio Court of Appeals in *Reppert* held that the trial court erred in rendering an agreed judgment where it was evident that the parties had not agreed whether the judgment would be self-enforcing through the trial court’s contempt power or enforceable only through a breach of contract action. *See id.*

231. *Id.* at 175. *See also Keim v. Anderson*, 943 S.W.2d 938, 946 (Tex. App.—El Paso 1997, no writ).

232. *See Reppert*, 943 S.W.2d at 175.

233. *Id.* at 174. Where a trial court improperly modifies a stipulated division of the parties’ property in the divorce context, the trial court on remand may “reject the [parties’] agreement on the grounds that it does not constitute a just and right division of the parties’ estates.” *Keim*, 943 S.W.2d at 946.



cision in open court or by written memorandum filed with the clerk."<sup>234</sup> Rendition and entry of judgment are distinguishable; entry of judgment "is a purely ministerial act by which judgment is made of record and preserved."<sup>235</sup> To render judgment, the trial court must use words that "clearly indicate the intent to render judgment at the time the words are expressed."<sup>236</sup> "[A] judge's intention to render judgment in the *future* cannot be a present rendition of judgment."<sup>237</sup> Rather, "the rendition of judgment is a present act, either by spoken word or signed memorandum, which decides the issues upon which the ruling is made."<sup>238</sup>

### C. FINALITY OF JUDGMENTS

Relying in part on the First District Court of Appeals' decision in *Atchison v. Weingarten Realty Management Co.*,<sup>239</sup> the El Paso Court of Appeals held in *Villalba v. Fashing*<sup>240</sup> that an order that fails to expressly dispose of claims asserted by an intervening third party is not final even if the underlying action is a condition precedent to the third party's claims and the underlying action has been dismissed for want of prosecution.<sup>241</sup>

Specifically, in *Villalba*, a third party judgment creditor of Villalba filed an intervention for recovery of its judgment in a lawsuit brought by Villalba against his former employer for wrongful discharge.<sup>242</sup> Ultimately, Villalba's wrongful discharge case was dismissed for want of prosecution.<sup>243</sup> The trial court's order dismissing Villalba's claims did not specifically mention the intervening judgment creditor's plea.<sup>244</sup> More than thirty days after the order was signed, Villalba sought to reinstate the lawsuit based on his assertion that he never received notice of the dismissal of the underlying lawsuit.<sup>245</sup> The defendant (Villalba's former employer) argued that the trial court had no jurisdiction to reinstate the case because the order of dismissal was final, having disposed of the intervenor's claim by "necessary implication."<sup>246</sup> That is, "because the trial court dismissed the underlying action, which was a condition precedent to the [judgment creditor's] action, the order also dismissed the bank's action."<sup>247</sup>

The court of appeals disagreed. "To be final," the court of appeals

234. *Keim*, 943 S.W.2d at 942.

235. *Id.*

236. *Id.*

237. *Id.* (emphasis added).

238. *Id.* The court's statement, in part, that "I will grant the divorce as of this time" indicated an intent to render judgment at the time the words were spoken. *Id.* at 942-43.

239. 916 S.W.2d 74 (Tex. App.—Houston [1st Dist.] 1996, no writ).

240. 951 S.W.2d 485 (Tex. App.—El Paso 1997, orig. proceeding).

241. *See id.* at 488-89.

242. *See id.* at 487.

243. *See id.*

244. *See id.* at 488.

245. *See id.* at 487.

246. *Id.* at 488.

247. *Id.*

held, "a judgment must dispose of all issues and parties in a case."<sup>248</sup> In determining finality, "a reviewing court applies different presumptions . . . depending on whether the judgment follows a trial on the merits or a summary or default judgment."<sup>249</sup> After a trial on the merits, the judgment is presumed final.<sup>250</sup> After a summary or default disposition, no such presumption is applied.<sup>251</sup> That is, "[a] summary disposition that [only] implicitly, but not explicitly, dispose[s] of claims is *not* a final appealable judgment."<sup>252</sup> As a result, even if the trial court implicitly dismissed the judgment creditor's claim by dismissing the underlying action, the court's failure to expressly dispose of that claim rendered the order interlocutory and the trial court maintained jurisdiction to reinstate the suit.<sup>253</sup>

#### D. JUDGMENTS NUNC PRO TUNC

In *Traylor Brothers, Inc. v. Garcia*,<sup>254</sup> the San Antonio Court of Appeals recently affirmed that a judgment nunc pro tunc is proper to correct an error in the signing date of a judgment *and* that such correction can be made "at any time," including after the expiration of the trial court's plenary power.<sup>255</sup>

A judgment labeled "Judgment Nunc Pro Tunc," however, is not a judgment nunc pro tunc if it does "more than correct purely clerical errors."<sup>256</sup> For example, although the trial court in *Matz* labeled two post-judgment orders "Judgment Nunc Pro Tunc," the court of appeals determined that the post-judgment orders did not merely correct clerical er-

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248. *Id.*

249. *Id.*

250. *See id.*

251. *See id.*

252. *Id.* (emphasis added).

253. *See id.* at 489. The First District Court of Appeals came to the same conclusion during the Survey period in *Dardari v. Texas Commerce Bank Nat'l Assoc.*, 961 S.W.2d 466 (Tex. App.—Houston [1st Dist.] Sept. 11, 1997, no pet. h.). In *Dardari*, the court of appeals rejected the notion that a claim that is entirely derivative of the underlying claims is dismissed by necessary implication when the underlying claims are dismissed. *See id.* at 469. When a case is dismissed for want of prosecution, the court explained, "there is no presumption that the dismissal order also disposed of issues in an independent cross-action or counterclaim." *Id.*

254. 949 S.W.2d 368 (Tex. App.—San Antonio 1997, n.w.h.).

255. *Id.* at 369-70. The court noted that the rules governing whether an incorrect date may be corrected by a judgment nunc pro tunc after the expiration of the trial court's plenary power are Rules 316 and 329b(f) of the Texas Rules of Civil Procedure. *See id.* at 369. Texas Rule of Civil Procedure 316 provides that "Clerical mistakes in the record of any judgment may be corrected by the judge in open court according to the truth or justice of the case." Tex. R. Civ. P. 316. Rule 329b(f) provides that "the court may at any time correct a clerical error in the record of a judgment and render judgment nunc pro tunc under Rule 316." Tex. R. Civ. P. 329b(f). The court further cited to interpretative case law holding that dates contained in judgments are the "type of errors that are correctable by judgment nunc pro tunc." *Traylor*, 949 S.W.2d at 369 (citing *Polis v. Alford*, 267 S.W.2d 918, 919 (Tex. Civ. App.—San Antonio 1954, no writ) (per curiam); *Ortiz v. O.J. Beck & Sons, Inc.*, 611 S.W.2d 860, 863 (Tex. Civ. App.—Corpus Christi 1980, no writ)).

256. *Matz v. Bennion*, 961 S.W.2d 445, 450 (Tex. App.—Houston [1st Dist.] 1997, n.w.h.).

rors but, rather, were orders enforcing the trial court's original judgment.<sup>257</sup> "[A] title of a document," the court held, "does not necessarily control the nature of its content."<sup>258</sup>

## V. EXTENDING THE APPELLATE TIMETABLE

### A. MOTIONS FOR NEW TRIAL

In *Estate of Townes v. Wood*,<sup>259</sup> the First District Court of Appeals sitting *en banc* construed the "written order" requirement of Texas Rule of Civil Procedure 329b(c).<sup>260</sup> Noting that the trial court had orally granted the defendant's motion for new trial on the record, made and initialed a docket entry stating "MNT granted," and signed an order setting the case for trial,<sup>261</sup> the majority of the court held that neither the plain language of Rule 329b(c)<sup>262</sup> nor the Supreme Court's holding in *Faulkner v. Culver*<sup>263</sup> were satisfied by the signing of an order that set the case for trial but did not determine the merits of the motion for new trial.<sup>264</sup> Four dissenting justices argued that, while the actions of the trial court in orally granting the motion for new trial on the record and making the entry "MNT granted" on the docket sheet were not sufficient to satisfy the "written order" requirement, the additional and simultaneous step of signing an order setting the case for trial was, when considered in the overall context, sufficient to satisfy the rule.<sup>265</sup>

In *Nuchia v. Woodruff*,<sup>266</sup> the court of appeals held that a motion for new trial directed at an interlocutory judgment, filed and overruled nearly six months before the final judgment appealed from, operated to extend the appellate timetable under Texas Rule of Civil Procedure

257. *See id.*

258. *Id.* The court rejected the appellant's contention that the post-judgment orders "were void because the trial court had lost plenary jurisdiction to change its judgment." *Id.* *See also* TEX. R. CIV. P. 329b(d) (trial court has plenary power for thirty days after judgment is signed to grant new trial or vacate, modify, correct or reform judgment). The appellee argued that the documents were "orders to enforce the trial court's original judgment, which the trial court had continuing jurisdiction to enter." *Matz*, 961 S.W.2d at 450. *See also* TEX. R. CIV. P. 308 (trial court has authority "to enforce its orders and decrees beyond its plenary power"). *Matz*, 961 S.W.2d at 450. Agreeing with the appellee, the court found that no terms of the orders constituted "a material change in substantial adjudicated portions of the judgment." *Id.* at 451 (citing *Katz v. Bianchi*, 848 S.W.2d 372, 374 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding)).

259. 934 S.W.2d 806 (Tex. App.—Houston [1st Dist.] 1996, orig. proceeding) (*en banc*).

260. TEX. R. CIV. P. 329b(c). Rule 329b(c) states, in pertinent part, that "[i]n the event an original . . . motion for new trial . . . is not determined by written order signed within seventy-five days after the judgment was signed, it shall be considered overruled by operation of law on expiration of that period." *Id.*

261. *See Estate of Townes*, 934 S.W.2d at 806.

262. TEX. R. CIV. P. 329b(c).

263. 851 S.W.2d 187 (Tex. 1993) (orig. proceeding) (*per curiam*).

264. *See Estate of Townes*, 934 S.W.2d at 807.

265. *See id.* at 808-09.

266. 956 S.W.2d 612 (Tex. App.—Houston [14th Dist.] Oct. 2, 1997, no pet. h.).

306c<sup>267</sup> and Texas Rule of Appellate Procedure 58(a).<sup>268</sup> Relying on *Harris County Hospital District v. Estrada*,<sup>269</sup> the appellants in *Nuchia* argued that their April 10, 1995, motion for new trial, directed at an earlier interlocutory judgment in the case and overruled almost five months before the October 5, 1995, final judgment, extended the appellate timetable and made the filing of the transcript timely.<sup>270</sup> The appellee, relying on *A.G. Solar & Co. v. Nordyke*,<sup>271</sup> argued that the motion for new trial could not “assail” the final judgment because it was overruled before the final judgment was signed and, as a result, was not a live pleading.<sup>272</sup>

Acknowledging the conflict between *Estrada* and *Solar*, the court of appeals followed the reasoning of the Supreme Court’s decision in *Fredonia State Bank v. General American Life Insurance Co.* and held that the motion operated to extend the appellate deadlines.<sup>273</sup> In *Fredonia*, a preservation of error case, the Supreme Court declined to resolve the conflict between *Solar* and *Estrada* as to whether a motion for new trial overruled by operation of law is effective to extend the appellate timetable for appeal from a subsequent judgment.<sup>274</sup> Nonetheless, the Supreme Court held that, with respect to preservation of error, the reasoning of *Estrada* is better, and observed that a “live pleading” requirement would defeat the purpose of the rules enacted to assure that cases are not dismissed because the motion for new trial was filed too soon.<sup>275</sup>

Finally, in *Tate v. E.I. DuPont de Nemours & Co.*,<sup>276</sup> the Supreme Court held that “a motion for new trial timely presented to the district clerk without the required filing fee extends the appellate timetable,” where the fee is paid “after the motion is overruled by operation of law but before the trial court loses plenary jurisdiction.”<sup>277</sup> Extending its holding in *Jamar v. Patterson*,<sup>278</sup> in which the appellate timetable was held to be extended by the timely tender of a motion for new trial when the filing fee was paid by the movant before the motion was overruled, the Supreme Court held that, while “the failure to pay the fee before the motion is overruled . . . may forfeit . . . the movant’s opportunity to have

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267. See *id.* at 615. See also TEX. R. CIV. P. 306c. Rule 306c provides that “[n]o motion for new trial . . . shall be held ineffective because prematurely filed; but every such motion shall be deemed to have been filed on the date of but subsequent to the time of signing of the judgment the motion assails. . . .” *Id.*

268. See *Nuchia*, 956 S.W.2d at 615. See also TEX. R. APP. P. 58(a). Rule 58(a) provides that “[p]roceedings 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.” *Id.*

269. 831 S.W.2d 876 (Tex. App.—Houston [1st Dist.] 1992, writ denied).

270. See *Nuchia*, 956 S.W.2d at 612.

271. 744 S.W.2d 646 (Tex. App.—Dallas 1988, no writ).

272. See *Nuchia*, 956 S.W.2d at 614.

273. 881 S.W.2d 279 (Tex. 1994).

274. See *id.* at 282 n.2.

275. See *id.* at 282.

276. 934 S.W.2d 83 (Tex. 1996).

277. *Id.* at 83.

278. 868 S.W.2d 318 (Tex. 1993).

the trial court consider the motion," the failure to pay the fee before the motion is overruled does not "retroactively invalidate the conditional filing for purposes of the appellate timetable."<sup>279</sup>

The Supreme Court specifically declined to opine as to whether the appellate timetable is extended if the filing fee is not paid before the trial court loses plenary jurisdiction.<sup>280</sup> Also, the Court expressed no opinion on the related question of whether a motion for new trial preserves error, even though it may extend the appellate timetable, if the fee is paid after the motion is overruled by operation of law.<sup>281</sup>

Recognizing that the Supreme Court had left the issue unresolved in *Tate*, the Waco Court of Appeals held in *Polley v. Odom*<sup>282</sup> that a timely tendered motion for new trial extended the appellate timetable when the appellant paid the filing fee only after receiving the appellee's motion to dismiss the appeal for want of jurisdiction, more than six months after the fee was due and long after the trial court lost plenary jurisdiction.<sup>283</sup> This decision appears to be consistent with the majority of court of appeals decisions on the issue.<sup>284</sup>

#### B. REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

In *IKB Industries (Nigeria) Ltd. v. Pro-Line Corp.*,<sup>285</sup> the Texas Supreme Court clarified the circumstances in which the timely filing of a request for findings of fact and conclusions of law extends the time for perfecting appeal under Texas Rule of Appellate Procedure 41(a)(1)<sup>286</sup> and announced a rule of broad application. Following an evidentiary hearing (for which there was no statement of facts), the trial court dismissed IKB's suit with prejudice as a sanction for discovery abuse, making seven pages of findings in its judgment "from the evidence before it."<sup>287</sup>

279. *Tate*, 934 S.W.2d at 84.

280. *See id.* at 84 n.1.

281. *See id.*

282. 937 S.W.2d 623 (Tex. App.—Waco 1997, no writ).

283. *See id.* at 624-26.

284. *See Spellman v. Hoang*, 887 S.W.2d 480, 481 (Tex. App.—San Antonio 1994, no writ) (appellate timetable extended by tender of motion for new trial where filing fee paid after trial court loses plenary jurisdiction); *Ramirez v. Get "N" Go # 103*, 888 S.W.2d 29, 31 (Tex. App.—Corpus Christi 1994, writ denied) (same). *But see Arndt v. Arndt*, 709 S.W.2d 281, 282 (Tex. App.—Houston [14th Dist.] 1986, no writ) (motion for new trial does not extend appellate timetable if the filing fee is not paid before the motion is either heard or overruled).

285. 938 S.W.2d 440 (Tex. 1997).

286. *See* TEX. R. APP. P. 41(a)(1). Rule 41(a)(1) provides, in pertinent 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 . . . any party has timely filed a request for findings of fact and conclusions of law in a case tried without a jury.

*Id.*

287. *IKB*, 938 S.W.2d at 441.

Eight days after the dismissal order was signed, IKB timely requested findings of fact and conclusions of law, referring to Texas Rule of Civil Procedure 296.<sup>288</sup> The trial court did not respond to IKB's request.<sup>289</sup> Because IKB filed its cost bond forty-nine days after the dismissal order was signed, its appeal was properly perfected "only if its request for findings and conclusions extended the deadline" for filing the cost bond from thirty to ninety days after the judgment was signed.<sup>290</sup> The court of appeals dismissed IKB's appeal, holding that the request for findings and conclusions did not extend the appellate timetable.<sup>291</sup>

The Supreme Court reversed the court of appeals and announced the following rule:

[A] timely filed request for findings of fact and conclusions of law extends the time for perfecting appeal when findings and conclusions are required by Rule 296, or when they are not required by Rule 296 but are not without purpose—that is, they could properly be considered by the appellate court.<sup>292</sup>

The Court's decision discusses the differing purposes of Rule 296 ("to give a party a right to findings of fact and conclusions of law finally adjudicated after a conventional trial on the merits before the court")<sup>293</sup> and Rule 41 ("to prescribe the time for perfecting appeal").<sup>294</sup> Additionally, the opinion follows a "functional" approach to Rule 41(a)(1) consistent with the decision in *Linwood v. NCNB Texas*,<sup>295</sup> in which the Supreme Court held that "findings of fact and conclusions of law have no place in a summary judgment proceeding."<sup>296</sup> In a possible attempt to guide practitioners in determining when a request for findings and conclusions may be appropriate, the *IKB* opinion cites examples where findings and conclusions can have no purpose (summary judgment, judgment after directed verdict, judgment *non obstante veredicto*, default judgment awarding liquidated damages, dismissal for want of prosecution without an evidentiary hearing, dismissal for want of jurisdiction without an evidentiary hearing, dismissal based on the pleadings or special exceptions, and any judgment rendered without an evidentiary hearing),<sup>297</sup> as well as situations where findings and conclusions are not required by Rule 296 but are not without purpose (judgment after a conventional bench trial, default judgment on a claim for unliquidated damages, judgment rendered

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288. *See id.* *See also* TEX. R. CIV. P. 296. Rule 296 provides, in pertinent part, that "[i]n any case tried in the district court or county court without a jury, any party may request the court to state in writing its findings of fact and conclusions of law. Such request . . . shall be filed within twenty days after judgment is signed." *Id.*

289. *See IKB*, 938 S.W.2d at 441.

290. *Id.*

291. *See IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp.*, 901 S.W.2d 568, 569 (Tex. App.—Dallas 1995).

292. *IKB*, 938 S.W.2d at 443.

293. *Id.* at 442.

294. *Id.*

295. 885 S.W.2d 102 (Tex. 1994).

296. *IKB*, 938 S.W.2d at 440 (citing *Linwood*, 885 S.W.2d at 103).

297. *See IKB*, 938 S.W.2d at 443.

as sanctions, and any judgment based in any part on an evidentiary hearing).<sup>298</sup>

In dissent, Justice Baker urged the Court to adopt a rule providing that the applicable appellate standard of review would determine whether a request for findings and conclusions extends the time to appeal.<sup>299</sup> Under this rule, a timely request for findings and conclusions would extend the appellate timetable in cases where legal and factual sufficiency of the evidence is the standard of review, but would not do so in cases in which abuse of discretion is the applicable standard of review, including dismissal as a discovery sanction.<sup>300</sup>

In two opinions handed down the same day as *IKB*, the Supreme Court followed its decision in *IKB* and held that the appellate timetable was extended by a request for findings and conclusions in a case in which dismissal was ordered based on a want of jurisdiction and as a sanction,<sup>301</sup> and a case dismissed for want of prosecution.<sup>302</sup> In both cases, the Supreme Court held that the time for filing the record was extended because the dismissal was based in whole or in part on an evidentiary hearing.<sup>303</sup>

In a suit seeking judicial review of an administrative order granting an application to amend a solid waste permit, the Austin Court of Appeals held that a request for findings of fact did not extend the appellate timetable when it was clear from the record that the trial court's judgment was not based on evidence heard by the trial judge.<sup>304</sup> The court of appeals also observed that, under the substantial evidence standard of review applicable to the case, the trial court was forbidden to receive evidence and was required to "decide the questions of law at issue exclusively from the agency record."<sup>305</sup>

## VI. SUPERSEDING THE JUDGMENT

In *Amwest Surety Insurance Company v. Graham*,<sup>306</sup> the San Antonio Court of Appeals determined in a case of first impression whether a surety that secures a judgment conditioned on the judgment debtor pursuing his appeal "with effect" has agreed to be responsible for the judgment entered on remand.<sup>307</sup> The court concluded that the surety's continued liability is based not on whether the appeals court reviewed the case on the merits, but on whether the judgment secured by the surety is

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298. *See id.*

299. *See id.* at 444 (Baker, J., dissenting).

300. *See id.* at 444-46.

301. *See Awde v. Dabeit*, 938 S.W.2d 31 (Tex. 1997).

302. *Phillips v. Beavers*, 938 S.W.2d 446 (Tex. 1997).

303. *See Awde*, 938 S.W.2d at 33; *Phillips*, 938 S.W.2d at 447.

304. *See City of Lancaster v. Texas Natural Resource Conservation Comm'n*, 935 S.W.2d 226, 227 (Tex. App.—Austin 1996, writ denied) (issued before the Texas Supreme Court's decision in *IKB*).

305. *Id.* at 228.

306. 949 S.W.2d 724 (Tex. App.—San Antonio 1997, writ denied).

307. *See id.* at 729.

affirmed or reversed.<sup>308</sup> Because the judgment in *Amwest* was reversed, albeit on procedural grounds, the surety was discharged from its obligations under the supersedeas bond as a matter of law.<sup>309</sup>

Finding that Texas Rule of Civil Procedure 755, read in conjunction with section 24.007 of the Texas Property Code, does not exempt occupants as a private resident in a forcible entry and detainer suit from filing a supersedeas bond, the El Paso Court of Appeals denied the appellants' motion, per Texas Rule of Civil Procedure 49(b),<sup>310</sup> to review and declare a \$19,000 supersedeas bond as excessive.<sup>311</sup>

## VII. PLENARY POWER OF THE TRIAL COURT

In *Scott & White Memorial Hospital v. Schexnider*,<sup>312</sup> the Supreme Court held that a trial court retains the power during its plenary jurisdiction to grant a motion for sanctions under Texas Rule of Civil Procedure 13,<sup>313</sup> though the movants were nonsuited by the party against whom sanctions are sought before the sanctions motion was filed.<sup>314</sup>

The plaintiffs in *Scott & White* filed a medical malpractice action, initially against Scott & White Memorial Hospital, Scott & White Clinic, and eight Scott & White doctors.<sup>315</sup> The plaintiffs later named twenty-three other Scott & White doctors as defendants.<sup>316</sup> More than two years after suit was filed, all defendants moved for summary judgment, with the defendant doctors supporting their motions with affidavits swearing that the treatments they rendered met the applicable standard of care.<sup>317</sup>

While the summary judgment motions were pending, the plaintiffs nonsuited all of the defendant doctors except for Doctors Nickel and Heriot.<sup>318</sup> The trial court later granted a final summary judgment in favor of all remaining defendants. All of the defendants, including those who had been nonsuited, moved for Rule 13 sanctions, claiming that the suit was "groundless and brought in bad faith and for the purpose of harassment

308. *See id.*

309. *See id.*

310. Suspension of enforcement of judgment while on appeal is now governed by Texas Rule of Appellate Procedure 24.1. *See* TEX. R. APP. P. 24.1.

311. *See* *McCartney v. California Mortgage Serv.*, 951 S.W.2d 549 (Tex. App.—El Paso 1997, n.w.h.) (per curiam).

312. 940 S.W.2d 594 (Tex. 1996).

313. *See* TEX. R. CIV. P. 13. Rule 13 provides, in pertinent 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 . . . . 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 . . . .

*Id.*

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

315. *See id.*

316. *See id.*

317. *See id.*

318. *See id.*



as to all non-party movants.”<sup>319</sup> After an evidentiary hearing conducted before the expiration of its plenary jurisdiction, the trial court ordered plaintiffs’ counsel to pay \$25,000 in sanctions to the nonsuited defendants.<sup>320</sup>

The court of appeals reversed the summary judgment and the sanctions order, and held that, on the sanctions issue, Texas Rule of Civil Procedure 162<sup>321</sup> “deprived the trial court of jurisdiction to grant the motion for sanctions [filed] after the nonsuit.”<sup>322</sup> The Supreme Court reversed the court of appeals, holding that Rule 162 did not apply because its application is limited to sanctions motions filed before the nonsuit takes place.<sup>323</sup> The Supreme Court’s holding is instructive:

A trial court’s power to decide a motion for sanctions pertaining to matters occurring before judgment is no different than its power to decide any other motion during its plenary jurisdiction . . . . Rule 162 merely acknowledges that a nonsuit does not affect the trial court’s authority to act on a pending sanctions motion; it does not purport to limit the trial court’s power to act on motions filed after a nonsuit.<sup>324</sup>

In its decision, the Supreme Court disapproved of certain holdings in two court of appeals decisions in the subject area. The court disapproved the holding in *Hjalmarson v. Langley*<sup>325</sup> (that a trial court must reinstate a case before granting a Rule 13 motion filed after a nonsuit)<sup>326</sup> and the holding in *Wolma v. Gonzalez*<sup>327</sup> (that a trial court may sanction prejudgment conduct after the expiration of its plenary jurisdiction).<sup>328</sup>

### VIII. STANDING TO APPEAL

In *Preston v. American Eagle Insurance Company*,<sup>329</sup> the Dallas Court of Appeals dismissed an appeal for want of jurisdiction because the parties seeking to appeal were not parties to the lawsuit on the date final judgment was signed.<sup>330</sup> In *Preston*, the Prestons were nonsuited from the original suit on July 16, 1996.<sup>331</sup> The trial court entered an order granting a motion for partial summary judgment on November 1, 1996.<sup>332</sup> Although the Prestons attempted to intervene on November 14, 1996, the

319. *Id.*

320. *See id.*

321. *See* Tex. R. Civ. P. 162. Rule 162 states, in pertinent part, that “[a]t 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 . . . . A dismissal under this rule shall have no effect on any motion for sanctions . . . pending at the time of dismissal.” *Id.*

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

323. *See id.* at 596.

324. *Id.*

325. 840 S.W.2d 153 (Tex. App.—Waco 1992, orig. proceeding).

326. *See Scott & White*, 940 S.W.2d at 596.

327. 822 S.W.2d 302 (Tex. App.—San Antonio 1991, orig. proceeding).

328. *See Scott & White*, 940 S.W.2d at 596 n.2.

329. 948 S.W.2d 18 (Tex. App.—Dallas 1997, n.w.h.).

330. *See id.* at 21.

331. *See id.* at 20.

332. *See id.*

same date the trial court entered an order modifying its judgment, the plea was filed after the original judgment had been entered and was, therefore, untimely.<sup>333</sup> Thus, because the Prestons were not parties to the final judgment, they had no standing to appeal.<sup>334</sup>

Similarly, a party that has not intervened in a class action lawsuit prior to judgment has no standing to file postjudgment motions or to appeal.<sup>335</sup>

## IX. DISQUALIFICATION OF APPELLATE COURT JUDGES

In response to a "Motion to Recuse Judges of the Eighth Judicial District and any Judge Within a 200 Mile Radius" filed by a *pro se* appellant, the El Paso Court of Appeals denied the motion without explanation but with careful assurances that the court followed the procedures outlined in Texas Rules of Appellate Procedure 15 and 18.<sup>336</sup> Finding no authority for the recusal of all judges within a 200 mile radius, however, the court declined to even address this portion of the appellant's motion.<sup>337</sup>

In a case of apparent first impression, the San Antonio Court of Appeals was asked to decide whether a party may object to the assignment to the court of appeals of a former justice.<sup>338</sup> In *Weidner*, the Appellee, Arthur Marlin, filed an objection in the court of appeals to the assignment of a former justice to the panel hearing his case.<sup>339</sup> The objection was based on section 74.053 of the Texas Government Code, which provides for objections to assigned judges. The San Antonio court held that the provision permitting a party to object to an assigned judge under section 74.053 of the Texas Government Code does not apply to the assignment of visiting appellate justices under section 75.003 of the Government Code.<sup>340</sup>

## X. PERFECTION OF APPEAL

In *Kunstoplast of America, Inc. v. Formosa Plastics Corp., USA*,<sup>341</sup> the Supreme Court held that Texas Rules of Appellate Procedure 40(a)(1)<sup>342</sup> and 41(a)(1)<sup>343</sup> do not preclude a nonlawyer from performing the ministerial act of depositing cash with a clerk in lieu of a cost bond on behalf of

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333. See *id.* at 21.

334. See *id.*

335. See *San Juan 1990-A, L.P. v. Meridian Oil Inc.*, 951 S.W.2d 159, 164 (Tex. App.—Houston [14th Dist.] 1997, pet. filed).

336. See *Resendez v. Schwartz*, 940 S.W.2d 714, 714 (Tex. App.—El Paso 1996, no writ).

337. See *id.* at 714 n. 1.

338. See *Weidner v. Marlin*, 937 S.W.2d 601 (Tex. App.—San Antonio 1996, no writ).

339. See *id.* at 601.

340. See *id.* at 603.

341. 937 S.W.2d 455 (Tex. 1996) (per curiam).

342. See TEX. R. APP. P. 40(a)(1). Rule 40(a)(1) states, in pertinent part, that "[w]hen security for costs is required by law, the appeal is perfected when the bond, cash deposit or affidavit in lieu thereof has been filed or made." *Id.*

343. See TEX. R. APP. P. 41(a)(1). Rule 41(a)(1) states, in pertinent part, that "[w]hen security for costs on appeal is required, the bond . . . shall be filed with the clerk within thirty days after the judgment is signed . . . . If a deposit of cash is made in lieu of bond, the same shall be made within the same period." *Id.*

a corporation and an individual appellant.<sup>344</sup>

In order to perfect their appeal, appellants Kunstoplast and Ashok Chauhan arranged for Justin Seth, an officer of Kunstoplast and a non-lawyer, to file a cash deposit in lieu of cost bond for each of them.<sup>345</sup> "The court of appeals dismissed Kunstoplast's appeal, holding that only a licensed attorney can represent a corporation."<sup>346</sup> The court of appeals dismissed Chauhan's appeal "because he did not represent himself or appear by a licensed attorney as required by Texas Rule of Civil Procedure 7."<sup>347</sup>

The Supreme Court reversed the court of appeals with respect to both appellants, noting that Kunstoplast and Chauhan "made bona fide attempts to invoke the court of appeals' jurisdiction by having Seth file their cash deposits in lieu of cost bonds."<sup>348</sup> The Supreme Court agreed that, generally speaking, "a corporation may be represented only by a licensed attorney . . . and an individual must appear in person or by an attorney."<sup>349</sup> Nonetheless, relying on its "policy to construe rules reasonably but liberally . . . so that the right to appeal is not lost by creating a requirement not absolutely necessary from the literal words of the rule,"<sup>350</sup> the Supreme Court held that the "specific ministerial task" of depositing cash in lieu of a cost bond may be performed by a nonlawyer.<sup>351</sup>

## XI. THE RECORD ON APPEAL

In *Gallagher v. Fire Insurance Exchange*,<sup>352</sup> the Supreme Court followed its decision in *Crown Life Insurance Co. v. Estate of Gonzalez*<sup>353</sup> and held that the court of appeals erred in denying, without a stated reason, the appellant pre-submission leave to supplement the statement of facts.<sup>354</sup> Noting its holding in *Crown Life* that appellate courts must liberally construe Texas Rule of Appellate Procedure 55(b),<sup>355</sup> the Supreme

344. See *Kunstoplast*, 937 S.W.2d at 456.

345. See *id.*

346. *Id.*

347. *Id.*; see also TEX. R. CIV. P. 7. Rule 7 states that "[a]ny party to a suit may appear and prosecute or defend his rights therein, either in person or by an attorney of the court." *Id.*

348. *Kunstoplast*, 937 S.W.2d at 456.

349. *Id.*

350. *Id.* (quoting *Jamar v. Patterson*, 868 S.W.2d 318, 319 (Tex. 1993)).

351. *Kunstoplast*, 937 S.W.2d at 456.

352. 950 S.W.2d 370 (Tex. 1997) (per curiam).

353. 820 S.W.2d 121 (Tex. 1991) (per curiam).

354. See *Gallagher*, 950 S.W.2d at 371.

355. See TEX. R. APP. P. 55(b). Rule 55(b) states, in pertinent part:

If anything material to either party is omitted from the transcript or statement of facts, before submission[,] . . . the appellate court, on a proper suggestion or on its own initiative, may direct a supplemental record to be certified and transmitted by the clerk of the trial court or the official court reporter supplying such omitted matter. The appellate court shall permit it to be filed unless the supplementation will unreasonably delay disposition of the appeal.

Court held that the spirit of Rule 55(b) is offended when the court of appeals affirms the trial court's judgment on the basis of items omitted from the record after having denied pre-submission supplementation of those items "without having determined that such would unreasonably delay disposition of the appeal."<sup>356</sup>

In *State Farm Fire and Casualty Insurance Co. v. Vandiver*,<sup>357</sup> the court of appeals addressed a situation in which the court reporter in a jury trial omitted to take down verbatim and include in the statement of facts deposition testimony and exhibits read into the trial record.<sup>358</sup> After the appeal had been perfected and the record filed, the parties to the appeal discovered that there were several omissions of testimony from the statement of facts and numerous discrepancies between the recollections of counsel of trial testimony and what was contained in the statement of facts.<sup>359</sup> The court of appeals abated the appeal to the trial court so that the inaccuracies in the record could be corrected.<sup>360</sup> After the trial court held a hearing, determined that the record could be corrected and entered findings of fact and conclusions of law relating to the record, the appellant, State Farm, filed a motion in the court of appeals to strike the supplemental statement of facts and to reverse and remand the case.<sup>361</sup>

The court of appeals denied State Farm's motion, holding that the testimony and exhibits could be properly reconstructed from the court reporter's contemporaneous shorthand notes, the court reporter's audio tape recording and the relevant exhibits and deposition excerpts that had been read into the record but not transcribed.<sup>362</sup> In reaching its decision, the Waco Court of Appeals retreated from its earlier contrary decision in *Home Insurance Co. v. Hambric*,<sup>363</sup> which was itself inconsistent with the decisions of other courts of appeals on the question.<sup>364</sup>

In *Guerra v. Texas Department of Protective and Regulatory Services*,<sup>365</sup> the court of appeals refused to consider an untimely tendered statement of facts where the appellant had previously sought and obtained an extension of time for filing the statement of facts and then failed to make the filing in accordance with the extension granted, even though appellant's counsel stated that the failure to observe the court's deadlines was "due to his not having a permanent secretary" and to a "termite problem he was experiencing at home."<sup>366</sup> The court of appeals rejected appellant's

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*Id.*

356. *Gallagher*, 950 S.W.2d at 371.

357. 941 S.W.2d 343 (Tex. App.—Waco 1997, no writ).

358. *See id.* at 345.

359. *See id.*

360. *See id.*

361. *See id.*

362. *See id.* at 349.

363. 906 S.W.2d 956 (Tex. App.—Waco 1995, no writ).

364. *See State Farm*, 941 S.W.2d at 349. *Accord* *Rogers v. CIGNA Ins. Co. of Tex.*, 881 S.W.2d 177 (Tex. App.—Houston [1st Dist.] 1994, no writ); *Southern Pacific Transp. Co. v. Hernandez*, 804 S.W.2d 557, 560 (Tex. App.—San Antonio 1991, writ denied).

365. 940 S.W.2d 295 (Tex. App.—San Antonio 1997, no writ).

366. *Id.* at 297.

argument that her constitutional rights of due process and equal protection were infringed by the court's refusal to allow her to submit the statement of facts late.<sup>367</sup>

In *Sheerin v. Exxon Corp.*,<sup>368</sup> the court of appeals held that Texas Rule of Appellate Procedure 54(a)<sup>369</sup> prevented the court from considering a transcript tendered seventy-nine days late when the appellant did not file a motion for extension of time.<sup>370</sup> In disposing of the appellant's argument that the district clerk improperly refused to prepare the transcript because the clerk's computer erroneously showed that the judgment was interlocutory, the court stated that even such an alleged "improper refusal . . . does not relieve appellants' burden to tender a timely transcript or . . . motion for extension of time to file the transcript."<sup>371</sup>

In *McDonald v. State*,<sup>372</sup> the Waco Court of Appeals held that the "party appealing a directed verdict must . . . bring forth the entire record of the trial court proceedings to show error requiring reversal."<sup>373</sup> The court's analysis considered Supreme Court precedents holding that harmful error on legal sufficiency points cannot be shown without a complete record on appeal.<sup>374</sup> Specifically, the opinion focused on the correlation between appellate review of directed verdicts and appellate review of legal sufficiency challenges, noting that

because the possibility exists that evidence could be found anywhere in the appellate record that would entitle a party to judgment as a matter of law, we conclude that a party appealing a directed verdict must, as in legal sufficiency cases, bring forth the entire record of the trial court proceedings to show error requiring reversal.<sup>375</sup>

In *Bassett Furniture Industries, Inc. v. Texas State Bank*,<sup>376</sup> the Corpus Christi Court of Appeals held that, where original exhibits are lost and the parties cannot agree that tendered copies of the exhibits sworn by the court reporter to correspond to the original documents admitted into evidence are an adequate substitute, the appropriate remedy under Texas Rule of Appellate Procedure 50(e)<sup>377</sup> is to abate the appeal and remand the case to the trial court for a determination of whether copies may be

367. See *id.* at 298 (citing *Krasniqi v. Dallas County Child Protective Servs. Unit of Tex. Dep't of Human Servs.*, 809 S.W.2d 927 (Tex. App.—Dallas 1991, writ denied), *cert. denied*, 503 U.S. 1006 (1992)).

368. 939 S.W.2d 227 (Tex. App.—Houston [1st Dist.] 1997, no writ).

369. See TEX. R. APP. P. 54(a). Rule 54(a) states, in pertinent part, that "[t]he transcript . . . shall be filed in the appellate court within sixty days after the judgment is signed. . . . The court has authority to consider all timely filed transcripts . . . but shall have no authority to consider a late filed transcript . . . except as permitted by this rule." *Id.*

370. See *Sheerin*, 939 S.W.2d at 228-29.

371. *Id.* at 229 n.5.

372. 936 S.W.2d 734 (Tex. App.—Waco 1997, no writ).

373. *Id.* at 737.

374. See *id.* at 736-37. See also *Schafer v. Conner*, 813 S.W.2d 154 (Tex. 1991); *Englander Co. v. Kennedy*, 428 S.W.2d 806 (Tex. 1968).

375. *McDonald*, 936 S.W.2d at 737 (citing *Schafer*, 813 S.W.2d at 155; *Kennedy*, 428 S.W.2d at 807).

376. 951 S.W.2d 8 (Tex. App.—Corpus Christi 1997, n.w.h.) (per curiam).

377. See TEX. R. APP. P. 50(e). Rule 50(e) states that

substituted for the lost original exhibits.<sup>378</sup> The decision highlights a division among the courts of appeals on this issue, as it disagrees with holdings from certain other courts of appeals that the appellant is entitled to an automatic new trial without any resort to the trial court for determination of the substitution question.<sup>379</sup>

In *Soto v. El Paso Natural Gas Co.*,<sup>380</sup> an appeal from a summary judgment, the El Paso Court of Appeals followed the Supreme court's decision in *Silk v. Terrill*,<sup>381</sup> granting appellant's post-submission motion for leave to file a supplemental transcript to include the appellee's motion for partial summary judgment.<sup>382</sup> Despite the fact that the appellant had requested that the motion be included in the transcript, the appellee's transcript designation requested all items designated by the appellant, and the appellee's appendix to its brief contained the motion. The appellee objected for the first time in a letter filed on the day of submission that this defect in the record was fatal to the appeal.<sup>383</sup> The court of appeals disagreed and stated its view that appellee's "tardy" and "belated" objection did not serve the interests of judicial economy.<sup>384</sup>

In *Feldman v. Marks*,<sup>385</sup> the Supreme Court took the admittedly extraordinary step of directing the district court to transmit to the clerk of the Supreme Court for the Court's consideration a sealed transcript containing *ex parte* communications between the trial court and counsel for the Office of Independent Counsel of the U.S. Government (OIC), even though the transcript was never made part of the record in the court of appeals.<sup>386</sup>

The unusual facts of the case are useful in explaining the result. Marks, a taxpayer, after being informed by the OIC that he may have failed to file tax returns in certain years and that his tax returns in other years may have been incorrect, attempted to obtain documents relating to the tax returns from Feldman, his former accountant.<sup>387</sup> Feldman refused to co-

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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.*

378. See *Bassett Furniture*, 951 S.W.2d at 11.

379. See *Owens-Illinois, Inc. v. Chatham*, 899 S.W.2d 722 (Tex. App.—Houston [14th Dist.] 1995, writ dismissed); *Hidalgo, Chambers & Co. v. FDIC*, 790 S.W.2d 700 (Tex. App.—Waco 1990, writ denied). But see *First Heights Bank, FSB v. Gutierrez*, 852 S.W.2d 596 (Tex. App.—Corpus Christi 1993, writ denied); *Hackney v. First State Bank of Honey Grove*, 866 S.W.2d 59 (Tex. App.—Texarkana 1993, no writ); *Adams v. Transportation Ins. Co.*, 845 S.W.2d 323 (Tex. App.—Dallas 1992, no writ).

380. 942 S.W.2d 644 (Tex. App.—El Paso 1996, no writ).

381. 898 S.W.2d 764 (Tex. 1995).

382. See *Soto*, 942 S.W.2d at 645.

383. See *id.* at 644.

384. *Id.* at 645.

385. 960 S.W.2d 613 (Tex. 1996) (per curiam).

386. See *id.* at 616.

387. See *id.*

operate with Marks because of his own concerns about the OIC investigation.<sup>388</sup>

Worried that Feldman was in poor health, Marks successfully petitioned the district court for an order under Texas Rule of Civil Procedure 187<sup>389</sup> to obtain Feldman's deposition and documents.<sup>390</sup> Feldman moved for reconsideration and, at the hearing, OIC counsel appeared and argued for the order to be vacated on the grounds that the requested discovery would interfere with an ongoing federal grand jury investigation.<sup>391</sup> Over Marks' objection, the court heard OIC counsel in chambers for forty-five minutes, outside the presence of Marks and his counsel.<sup>392</sup> A transcript of the hearing was prepared, and Marks unsuccessfully sought a copy.<sup>393</sup>

Marks appealed the trial court's refusal to release the sealed transcript under Texas Rule of Civil Procedure 76a.<sup>394</sup> The OIC argued on appeal that the transcript was properly sealed, but the court of appeals disagreed, holding that the *ex parte* hearing violated "both the United States and Texas Constitutions, Texas rules and case law."<sup>395</sup> The United States then applied for a writ of error.<sup>396</sup>

The Supreme Court recognized that the sealed transcript was not in the appellate record, and that "Marks learned of [its] omission while the case was pending in the court of appeals but did not move to supplement the record" to include it.<sup>397</sup> The Supreme Court also recognized that it was Marks' burden under Texas Rule of Appellate Procedure 50(d)<sup>398</sup> to present a sufficient record on appeal to show reversible error and that, without the sealed transcript, the Supreme Court (as well as the court of appeals before it) "was obliged to presume" that the transcript contained

388. *See id.*

389. *See* TEX. R. CIV. P. 187. Rule 187 states, in pertinent part:

When any person may anticipate the institution of an action in which he may be a party, and may desire to perpetuate his own testimony or that of any other person to be used in such suit, he, his agent or attorney, may file a verified petition in the proper court of any county where venue of the anticipated action may lie . . . . If satisfied that the perpetuation of testimony may prevent a failure or delay of justice, the court or justice shall make an order authorizing the taking of such depositions . . . . Any interested party may . . . move to suppress said deposition . . . .

*Id.* at 187(1), (4).

390. *See Feldman*, 960 S.W.2d at 615.

391. *See id.*

392. *See id.*

393. *See id.*

394. *See* TEX. R. CIV. P. 76a. Rule 76a states, in pertinent part, that "[a]ny order . . . relating to sealing or unsealing court records shall be deemed to be severed from the case and a final judgment which may be appealed by any party or intervenor who participated in the hearing preceding issuance of such order." *Id.* at 76a(8).

395. *Feldman*, 960 S.W.2d at 616 (quoting *Marks v. Feldman*, 910 S.W.2d 73 (Tex. App.—Dallas 1995)).

396. *See id.*

397. *Id.*

398. *See* TEX. R. APP. P. 50(d). Rule 50(d) states, in pertinent part, that "[t]he burden is on the appellant . . . to see that a sufficient record is presented to show error requiring reversal." *Id.*

secret grand jury information as the United States contended.<sup>399</sup>

Nonetheless, relying on the language of Texas Rule of Appellate Procedure 51(d),<sup>400</sup> the Supreme Court held that:

As we have said, the burden is ordinarily on the appellant—in this case Marks—to present a complete record in an unrestricted appeal, and appellant's failure to discharge this burden ordinarily results in presumptions against appellant's position. We do not question the wisdom of this rule, but in extraordinary cases—as this one certainly is—the appellate court must have residual authority to complete the record to assure that justice is done.<sup>401</sup>

Justice Gonzalez, dissenting from the majority opinion, complained that the majority opinion established no guidelines for when the appellate court will order supplementation of the record on its own initiative.<sup>402</sup>

In *S.H. v. National Convenience Stores, Inc.*,<sup>403</sup> the court of appeals affirmed the judgment below because the appellant failed to provide a complete statement of facts.<sup>404</sup> The decision reiterated the established rule that a party seeking reversal based on the exclusion of testimony must present the entire statement of facts for the appellate court to review. A successful evidentiary challenge requires the appellant to show that “the judgment depends on the particular evidence excluded.”<sup>405</sup>

In *Baker v. Trand, Inc.*,<sup>406</sup> the Waco Court of Appeals allowed the appellants to supplement the statement of facts with testimony and exhibits, even though they had previously requested the court reporter to omit the evidence from the statement of facts. The appellants requested supplementation only after the appellees' brief argued that the failure to bring forward a complete statement of facts was fatal to each point of error.<sup>407</sup> The rationale for the decision is two-fold. First, the court held that “omitted” testimony under Texas Rule of Appellate Procedure 55(b)<sup>408</sup> means “‘missing’ without any consideration of the scienier involved.”<sup>409</sup> Second, the court held that the burden of showing unreasonable delay rests on the party resisting supplementation, and that the appellees did not meet their burden merely by showing that they would have to rewrite the appellees' brief in light of the record supplementation.<sup>410</sup>

In *French v. Kopecky*,<sup>411</sup> the court of appeals held that the pendency of

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399. *Feldman*, 960 S.W.2d at 617.

400. See TEX. R. APP. P. 51(d). Rule 51(d) states, in pertinent part, that “[t]he appellate court on its own initiative may direct the clerk of the court below to send to it any original paper or exhibit for its inspection.” *Id.*

401. *Feldman*, 960 S.W.2d at 617.

402. See *id.* at 618.

403. 936 S.W.2d 406 (Tex. App.—Houston [1st Dist.] 1996, no writ).

404. See *id.* at 408.

405. *Id.* at 408.

406. 931 S.W.2d 405 (Tex. App.—Waco 1996, no writ).

407. See *id.* at 406.

408. See TEX. R. APP. P. 55(b).

409. *Baker*, 931 S.W.2d at 407.

410. See *id.*

411. 931 S.W.2d 34 (Tex. App.—Houston [1st Dist.] 1996, writ denied).



a successful mandamus proceeding overruling a contest to the appellant's affidavit of inability to pay costs on appeal does not toll the time period for filing the transcript. Consequently, the appellant's failure to timely file or request an extension of time to file the transcript requires the dismissal of the appeal.<sup>412</sup>

## XII. THE BRIEF ON APPEAL

In *Federal Sign v. Texas Southern University*,<sup>413</sup> the Supreme Court considered an appellant's argument that the application of the sovereign immunity doctrine violates the Open Courts and Due Course of Law Clauses of the Texas Constitution<sup>414</sup> despite the appellant's failure to brief the Due Course of Law argument.<sup>415</sup> Acknowledging that Texas Rule of Appellate Procedure 74(f) states that a party generally waives the claimed error if he does not brief it,<sup>416</sup> the Court noted that "when fact issues are not germane to the issue on appeal, and the issue is a law question involving constitutional ramifications," the importance of the issue to the State's jurisprudence justifies the Court's review of the issue on the merits.<sup>417</sup>

## XIII. FRIVOLOUS APPEALS

In *In re Marriage of Long*,<sup>418</sup> the court of appeals awarded the appellee sanctions against the appellant in the amount of 4.5 times the court costs under Texas Rule of Appellate Procedure 84.<sup>419</sup> The court found that the appeal from an agreed judgment based on a settlement agreement signed and filed of record, in which the parties dismissed their respective claims against each other and waived the right to appeal from any existing order, was done for the purposes of delay, even though the appellant "subjectively expected to prevail in his appeal."<sup>420</sup>

## XIV. MOOT APPEALS

In *City of Alamo v. Montes*,<sup>421</sup> the Texas Supreme Court dismissed as

412. *See id.* at 35.

413. 951 S.W.2d 401 (Tex. 1997).

414. *See* TEX. CONST. art. I, § 19.

415. *Federal Sign*, 951 S.W.2d at 409-10.

416. *See* TEX. R. APP. P. 74(f) (1997, superseded by TEX. R. APP. P. 38 (1998)). *See also* *Leyva v. Leyva*, 960 S.W.2d 732 (Tex. App.—El Paso 1997, no writ) (applying Rule 74 to affirm trial court's judgment without review on the merits where appellant failed to assign any points of error or provide any authorities for his arguments).

417. *Federal Sign*, 951 S.W.2d at 410.

418. 946 S.W.2d 97 (Tex. App.—Texarkana 1997, no writ).

419. *See id.* at 100; *see also* TEX. R. APP. P. 84. 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 . . . times the total taxable costs as damages against such appellant.

*Id.*

420. *In re Marriage of Long*, 946 S.W.2d at 99.

421. 934 S.W.2d 85 (Tex. 1996).

moot an appeal from an injunction requiring the city to reinstate Ms. Montes as city secretary after she resigned her position.<sup>422</sup> In contrast, the San Antonio Court of Appeals denied a defendant's motion to dismiss as moot a suit by the Texas Department of Public Safety to suspend the defendant's license based on a DWI charge despite the fact that the DWI charge had been dismissed.<sup>423</sup> Because the dismissal of the DWI charge did not constitute an acquittal, the court refused to dismiss the case.<sup>424</sup>

## XV. SPECIAL APPEALS

### A. THE LIMITED APPEAL

In *Casey v. Casey*,<sup>425</sup> the Fourteenth District Court of Appeals dismissed a limited appeal at the appellant's request, despite the appellee's argument that she intended to raise cross-points. The court noted that in order to preserve issues for review by the appellate court in response to a limited appeal, appellee needed to file her own notice of appeal, rather than rely on cross-points.<sup>426</sup> Since appellee failed to file a notice of appeal, the court dismissed the limited appeal.<sup>427</sup>

### B. APPEAL BY WRIT OF ERROR

“[T]o be entitled to reversal by writ of error, a party who did not participate at trial has six months [from the date of the judgment] in which to show error on the face of the record.”<sup>428</sup> The appellate court considers “all papers on file in the appeal, including the statement of facts,” when making the determination.<sup>429</sup>

In *Bloom*, a writ of error appeal from a default judgment in a divorce case, the San Antonio Court of Appeals held that “the acceptance-of-benefits doctrine applies in equitable bill of review proceedings, as well as direct appeals,” even when the bill of review is grounded on defective service.<sup>430</sup> Finding that the appellant had accepted benefits under the challenged divorce decree, including her share of the community estate, relief from community debts, and court-ordered child support, the court

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422. *See id.* at 86.

423. *See Texas Dep't of Pub. Safety v. Stacy*, 954 S.W.2d 80 (Tex. App.—San Antonio 1997, n.w.h.).

424. *See id.* at 82.

425. No. 14-96-01043-CV, 1997 WL 441872 (Tex. App.—Houston [14th Dist.] Aug. 7, 1997, pet. filed).

426. *See id.* at \*2. *Cf. TEX. R. APP. P.* 25.1(c) (effective September 1, 1997).

427. *See Casey*, 1997 WL 441872, at \*2.

428. *Bloom v. Bloom*, 935 S.W.2d 942, 945 (Tex. App.—San Antonio 1996, no writ) (quoting *Primate Constr. Inc. v. Silver*, 884 S.W.2d 151, 152 (Tex. 1994)).

429. *Id.* (citing *DSC Fin. Corp. v. Moffitt*, 815 S.W.2d 551 (Tex. 1991)).

430. *Id.* at 945-946 (citing *Newman v. Link*, 889 S.W.2d 288, 289 (Tex. 1994)). *See also Carle v. Carle*, 234 S.W.2d 1002, 1004 (Tex. 1950) (“A litigant cannot treat a judgment as both right and wrong, and if he has voluntarily accepted the benefits of a judgment, he cannot afterward prosecute an appeal therefrom.”).

dismissed the appeal.<sup>431</sup> The court held that the appellant's acceptance of substantial benefits estopped her from pursuing the merits of her appeal from the divorce decree.<sup>432</sup>

In *Rosas v. Diaz*,<sup>433</sup> the San Antonio Court of Appeals held that the failure of the petition for writ of error to identify adversely interested parties as required by Texas Rule of Appellate Procedure 45(c)<sup>434</sup> was not a jurisdictional defect and would not justify dismissal.<sup>435</sup> Relying on its prior decisions in *Palacios v. Harris*<sup>436</sup> and *Molina v. Negley*,<sup>437</sup> as well as the Supreme Court's decision in *Grand Prairie Independent School District v. Southern Parts Imports, Inc.*,<sup>438</sup> the court held that Rosas timely filed his petition for writ of error "in a bona fide attempt to perfect his appeal" and, thereby, properly invoked the court's jurisdiction.<sup>439</sup>

In *Greenstreet v. Heiskell*,<sup>440</sup> the court of appeals dismissed the petition for writ of error from an adverse summary judgment clearing title to real property and lifting purported crop liens. The court held that *pro se* petitioner Greenstreet, an apparent adherent of the "Republic of Texas" movement, had "participated" in the trial of the case within the meaning of Texas Rule of Appellate Procedure 45(b)<sup>441</sup> by filing among other things, a response to the summary judgment motion.<sup>442</sup>

In *C & V Club v. Gonzalez*,<sup>443</sup> the Corpus Christi Court of Appeals denied a petition for writ of error based on the fact that defense counsel

431. See *Bloom* 935 S.W.2d at 949.

432. See *id.* at 947-49. The court of appeals, while correctly noting that the acceptance-of-benefits doctrine could not estop appellant from complaining that the trial court lacked subject matter jurisdiction to determine child visitation and custody, child support, and the division of marital property, nonetheless denied relief on the basis that appellant failed to show error on the face of the record. See *id.* at 949.

433. 940 S.W.2d 254 (Tex. App.—San Antonio 1997, no writ).

434. See TEX. R. APP. P. 45(c). Rule 45(c) states, in pertinent part, that "[t]he petition shall state the names and residences of the parties adversely interested." *Id.*

435. See *Rosas*, 940 S.W.2d at 255.

436. 715 S.W.2d 418 (Tex. App.—San Antonio 1986, no writ).

437. 425 S.W.2d 896 (Tex. Civ. App.—San Antonio 1968, no writ).

438. 813 S.W.2d 499 (Tex. 1991).

439. *Rosas*, 940 S.W.2d at 255.

440. 940 S.W.2d 831 (Tex. App.—Amarillo 1997, no writ).

441. See TEX. R. APP. P. 45(b). Rule 45(b) states that "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." *Id.*

442. See *Greenstreet*, 940 S.W.2d at 834. In response to the original petition, Greenstreet had filed a document titled "'CORRECTED' NOTICE OF NO VENUE OR JURISDICTION NOTICE OF REFUSAL TO ACCEPT FOR CAUSE WITHOUT DISHONOR PLAINTIFF'S ORIGINAL PETITION" and a document titled "DEMAND FOR QUALIFICATION AS DE JURE JUDICIAL AND EXECUTIVE OFFICERS OF THE DE JURE JUDICIAL AND EXECUTIVE BRANCH OF THE GOVERNMENT OF THE TEXAS STATE OF THE UNION, PURSUANT TO THE PREAMBLE AND THE TEXAS ENABLING ACT." *Id.* at 832. The court noted that these documents, which "purported to be issued by 'Republic of Texas, Our One Supreme Court, Common Law Venue; Original Jurisdiction Exclusive to the People, A Superior court Sitting with the Power of a Circuit and United States District Court, in and for Dallam county, Texas Republic, United States of America,'" requested affirmative relief and constituted a general appearance in the case. *Id.* at 832 n.1.

443. 953 S.W.2d 755 (Tex. App.—Corpus Christi 1997, n.w.h.).

appeared at the sanctions hearing at which a default judgment was entered without the defendant, Mercado. Then, at a later hearing on damages, counsel unsuccessfully requested a continuance to locate his client and cross-examined the witnesses on actual damages.<sup>444</sup> Participation by counsel in a dispositive hearing, even though not literally "participation at trial" under Texas Rule of Appellate Procedure 45(b),<sup>445</sup> "is sufficient to make appeal by writ of error unavailable."<sup>446</sup>

In *Martin v. Dosohs I, Ltd.*,<sup>447</sup> a petition for writ of error proceeding challenging a decree ordering the partition of real property, the San Antonio Court of Appeals observed that a partition case produces two appealable orders or judgments: the decree ordering partition and "the partition decree itself, in which the trial court actually partitions the property."<sup>448</sup> The petition for writ of error did not specifically identify the challenged decree, and it would have been untimely filed if directed to the decree ordering partition rather than the partition decree.<sup>449</sup> The court nonetheless held that representations of counsel in the appellant's brief that "[t]here is no dispute that the petition was filed within six months of the signing of the final judgment" were sufficient to establish that the petition challenged the later decree and was timely.<sup>450</sup> However, the error alleged in the petition was not reviewable precisely because it did not challenge the earlier decree ordering partition.<sup>451</sup>

### C. BILL OF REVIEW

An equitable bill of review proceeding is an independent action brought by a party to a former action, seeking to set aside a final judgment that is no longer subject to a motion for new trial, appeal, or writ of error. The movant must ordinarily show "that he had a meritorious claim or defense; . . . that he was prevented from asserting his claim or defense by the fraud, accident, or mistake of the opposing party;" and that he is free from "any fault or negligence of his own."<sup>452</sup> However, a party who did not receive actual notice of pending litigation need not show that he had a meritorious defense or that he was prevented from asserting it in order to seek a bill of review.<sup>453</sup>

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444. *See id.* at 757.

445. *See* TEX. R. APP. P. 45(B). *See also* footnote 420, *supra*.

446. *C & V Club*, 953 S.W.2d at 757 ("A party participates by taking some part, whether personally or through counsel, in the decision-making event producing final judgment adjudicating his rights." (emphasis added)).

447. 951 S.W.2d 821 (Tex. App.—San Antonio 1997, no writ).

448. *Id.* at 823-24.

449. *See id.* at 824.

450. *Id.*

451. *See id.*

452. *Caldwell v. Barnes*, 941 S.W.2d 182, 186 (Tex. App.—Corpus Christi 1996, writ granted) (citing *Ortega v. First Republic Bank*, Fort Worth, N.A., 792 S.W.2d 452, 453 (Tex. 1990); *Alexander v. Hagedorn*, 226 S.W.2d 996, 998 (1950)).

453. *See Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80 (1988); *Lopez v. Lopez*, 757 S.W.2d 721 (Tex. 1988).

In *Caldwell*, the Corpus Christi Court of Appeals addressed the novel question of "whether a party who did not receive actual notice of a suit before entry of the default still needs to be diligent in exhausting his legal remedies against the judgment" (in a jurisdiction other than Texas) before bringing a bill of review action in Texas.<sup>454</sup>

Barnes sued Caldwell, a Colorado resident, in 1989, alleging claims arising from business dealings in Texas.<sup>455</sup> Barnes unsuccessfully attempted service on Caldwell by certified mail and then arranged for personal service in Colorado by a private process server, who filed an affidavit (which he later contradicted) stating that he personally served Caldwell on July 30, 1989.<sup>456</sup> Caldwell never answered, and a fifteen million dollar default judgment was entered against him on December 6, 1989.<sup>457</sup>

Barnes domesticated the default judgment in Colorado on September 24, 1991, pursuant to the Colorado Uniform Enforcement of Foreign Judgments Act.<sup>458</sup> Caldwell alleged that the first time he learned of the Texas judgment was on or about September 24, 1991, when he received notice of the domestication of the judgment in Colorado.<sup>459</sup> Although Caldwell could have done so, he did not contest either the service in the underlying Texas case or the domestication at that time.<sup>460</sup> Caldwell's answer to Barnes' June 15, 1992, Colorado civil action to find and recover assets to enforce the domesticated judgment also did not contest service of process in the underlying Texas suit.<sup>461</sup> Caldwell argued, instead, that the property Barnes sought to acquire did not belong to him.<sup>462</sup>

In May of 1993, Caldwell located the Texas process server, "who admitted that he never. . . served [Caldwell] in the underlying case."<sup>463</sup> At that point, almost nineteen months after being put on notice of the default, Caldwell filed a motion in the Colorado enforcement suit attacking the domesticated judgment.<sup>464</sup> In response, Barnes filed an action in Hidalgo County, Texas, seeking a declaratory judgment validating the original default judgment.<sup>465</sup> "[Caldwell] answered this suit, and filed a petition for bill of review and injunction in the same court, . . . seeking to have the underlying default judgment set aside."<sup>466</sup> Caldwell and Barnes moved

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454. *Caldwell*, 941 S.W.2d at 187 ("The parties have not cited any authority, and we have found none, which addresses a situation in which a party who has had *other* legal remedies available to contest a default judgment besides the Texas remedies, fails to pursue them." (emphasis in original)).

455. *See id.* at 184.

456. *See id.*

457. *See id.*

458. *See id.*; COLO. REV. STAT. ANN. §§ 13-53-101 *et seq.* (West 1989).

459. *See Caldwell*, 941 S.W.2d at 185.

460. *See id.*

461. *See id.*

462. *See id.*

463. *Id.*

464. *See id.*

465. *See id.*

466. *Id.*

for summary judgment on the petition for bill of review, and Barnes prevailed.<sup>467</sup>

On appeal, Caldwell argued that the default was void as a matter of law for lack of service.<sup>468</sup> Barnes contended that Caldwell negligently failed to attack the default in Colorado when he first learned of it and that, as a result, was estopped to attack it by bill of review.<sup>469</sup>

The court of appeals affirmed the summary judgment against Caldwell, stating:

We do not construe his "legal remedies" as encompassing only Texas remedies. Rather, when the Texas judgment was domesticated in Colorado, appellant had legal remedies available which he declined to pursue. He chose not to contest the Texas court's jurisdiction at that point, either in Colorado or in Texas. Instead, he chose to treat the judgment as valid. Thus, appellant failed as a matter of law to meet his only requirement towards bringing a bill of review; he failed to show that he was not negligent in pursuing his legal remedies.<sup>470</sup>

In *Pursley v. Ussery*,<sup>471</sup> a bill of review proceeding to reopen a property division entered in a divorce action, the 57th District Court of Bexar County reformed the retirement benefits provisions in a divorce decree entered by the 224th District Court.<sup>472</sup> The San Antonio Court of Appeals reversed and rendered, holding that the 224th District Court lacked jurisdiction to consider the bill of review because it was not the court that had entered the original divorce decree.<sup>473</sup> In addition, although the court of appeals considered the bill of review to be a collateral attack on the decree instead of a direct attack, the court of appeals held that the relief granted by the 224th District Court was still erroneous because there was no pleading or trial court finding that the original decree was void.<sup>474</sup>

In *Subsequent Injury Fund, State of Texas v. Service Lloyds Insurance Co.*,<sup>475</sup> the court of appeals dismissed for want of jurisdiction an appeal by the Subsequent Injury Fund (the Fund) from a summary judgment dismissing the Fund's equitable bill of review on the basis that "the legal remedy of writ of error was available."<sup>476</sup> Acknowledging that appellee Lloyds contended for the first time on rehearing that the Fund lacked standing to bring a bill of review because it was not a party to the underlying suit, the court found that "the underlying judgment [was] void and unenforceable against [the Fund] because [the Fund] was never made a

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467. *See id.*

468. *See id.*

469. *See id.*

470. *Id.* at 189-90.

471. 937 S.W.2d 566 (Tex. App.—San Antonio 1996, no writ).

472. *See id.* at 567.

473. *See id.* at 568.

474. *See id.*

475. 961 S.W.2d 673 (Tex. App.—Houston [1st Dist.] 1998, no pet. h.).

476. *Id.* at 675.

party to the underlying suit."<sup>477</sup>

#### D. ADMINISTRATIVE APPEALS

A significant number of cases in the courts of appeal during the Survey period address procedural questions related to appeals from administrative agencies. Because each administrative agency is governed by its own enabling legislation, appellate timetables and procedures are often uncertain. Courts determine which law governs appellate deadlines based on the express language in the statutes enabling the agency to review complaints.

##### 1. *Administrative Procedure Act v. Agency Regulations*

###### a. Appeals from Agency Proceedings Governed by the Administrative Procedure Act

Faced with conflicting procedural rules regarding when to file a motion for rehearing in an administrative proceeding, the Austin Court of Appeals in *Mednick v. Texas State Board of Public Accountancy*,<sup>478</sup> favored the time lines established in the Administrative Procedure Act over the agency regulations.<sup>479</sup> In *Mednick*, Mednick filed his motion for rehearing before the Board of Public Accountancy twenty days after the Board mailed its order.<sup>480</sup> Under section 22(f) of the Texas Public Accountancy Act,<sup>481</sup> Mednick had only fifteen days to file his motion for rehearing, but he had twenty days pursuant to the Administrative Procedure Act (APA).<sup>482</sup> The district court dismissed Mednick's petition for judicial review on the grounds that his motion for rehearing was late.<sup>483</sup> The Austin Court of Appeals reversed the trial court's dismissal, holding that, because Accountancy Act specifically incorporated the APA, which "provides the minimum standards for judicial review of agency decisions," the twenty day time period under the APA governed the time for filing Mednick's motion for rehearing.<sup>484</sup>

###### b. Appeals from Agency Proceedings *Not* Governed by the Administrative Procedure Act

The Dallas Court of Appeals declined to apply the Administrative Procedure Act to determine which party had the burden of bringing forth the record from the administrative proceedings for review by the appellate

477. *Id.* at 680.

478. 933 S.W.2d 336, 338 (Tex. App.—Austin 1996, writ denied).

479. *See id.* at 338.

480. *See id.* at 337.

481. *See* TEX. REV. CIV. STAT. ANN. art. 41a, §§ 1-32 (Vernon Supp. 1998).

482. *See Mednick*, 933 S.W.2d at 337; TEX. GOV'T CODE ANN. § 2001.146(a) (Vernon Supp. 1998).

483. *See Mednick*, 933 S.W.2d at 337.

484. *Id.* at 338-39. *See also* Texas Dep't of Pub. Safety v. Lavender, 935 S.W.2d 925,929 (Tex. App.—Waco 1996, writ denied) (holding that APA applies to proceedings arising out of a driver's license suspension).

court.<sup>485</sup> Instead, the court found that administrative proceedings related to the Dallas Urban Review Board were governed by section 214.0012 of the Texas Local Government Code, which is the enabling statute for the relevant Dallas City Code provision.<sup>486</sup> The court reasoned that under section 214.0012 of the Texas Local Government Code, the party appealing from the agency's ruling must do so by requesting the issuance of a writ of certiorari, placing the duty upon the petitioner to obtain the administrative record.<sup>487</sup> By failing to meet this burden, petitioner was left without a record from the administrative proceedings.<sup>488</sup>

## 2. *The Record*

In *Texas Health Enterprises, Inc. v. Texas Department of Human Services*,<sup>489</sup> the Texas Supreme Court held that the record from an administrative proceeding is part of the appellate record, despite the failure of either party to admit the record as evidence before the trial court, where the administrative record was filed with the trial court, both parties used the record in arguing before the trial court and the trial court relied on the record in reaching its conclusions.<sup>490</sup> The Court based its decision on the longstanding rule that "evidence that is not objected to and that the trial court and the parties treat as admitted is, for all practical purposes, admitted."<sup>491</sup>

## 3. *Motions for Rehearing Before the Agency*

As a general rule, in administrative proceedings, a party must raise each ground of error in a motion for rehearing before the administrative agency to be able to raise the issue in the trial court. In *Central Power & Light Co. v. Sharp*,<sup>492</sup> the Supreme Court noted that this general rule does not apply where the agency lacks authority to decide the issue raised in the trial court. Thus, because the State Comptroller of Public Accounts lacks authority to decide the issue of whether the underlying statute relied upon by the agency is unconstitutional, a motion for rehearing before the agency is unnecessary on this issue in order to raise the argument in the trial court.<sup>493</sup>

## 4. *Timeliness of Petition for Review by Trial Court*

In reviewing a trial court's jurisdiction to hear a petition for judicial review from a final decision of the State Office of Administrative Hearings, the Austin Court of Appeals held that a petitioner's appeal was un-

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485. See *Nussbaum v. City of Dallas*, 948 S.W.2d 305 (Tex. App.—Dallas 1996, no writ).

486. See *id.* at 307.

487. See *id.* at 307-308.

488. See *id.* at 308.

489. 949 S.W.2d 313 (Tex. 1997) (per curiam).

490. See *id.* at 313-14.

491. *Id.* at 314.

492. 960 S.W.2d 617, 619 (Tex. 1997).

493. See *id.* at 620.



timely when its petition never reached the district clerk's office, though timely mailed.<sup>494</sup> The court noted that when petitions are mailed, "the cautious practitioner would benefit by making doubly sure that the clerk actually receives a copy. . . ."<sup>495</sup> Because the attorneys in *P.R.I.D.E.* failed to exercise any diligence to verify that the petition timely reached the court, the court would not apply any equitable remedies to extend the time for filing the petition.<sup>496</sup>

### 5. *Scope of Review*

Appeals from agency decisions are limited. In *Texas Department of Transportation v. T. Brown Constructors, Inc.*,<sup>497</sup> the Austin Court of Appeals held that a trial court erred by rendering judgment for a party in a different amount than the agency's decision. The court reasoned that although a trial court has the legislative authority to review an agency's decision, substituting its own discretion for that of the agency's "usurp[s] the agency's [statutory] authority and discretion" and "violate[s] the separation-of-powers provision of the Texas Constitution."<sup>498</sup>

## XVI. STANDARDS OF REVIEW

### A. REVIEW OF SUMMARY JUDGMENTS

A summary judgment that contains a Mother Hubbard clause<sup>499</sup> or other language purporting to dispose of all claims or parties is final and appealable even if the order grants more relief than requested.<sup>500</sup> The Supreme Court explained in *Mafrige*:

If a summary judgment order appears to be final, as evidenced by the inclusion of language purporting to dispose of all claims or parties, the judgment should be treated as final for purposes of appeal. If the judgment grants more relief than requested, it should be reversed and remanded, but not dismissed. We think this rule to be practical in application and effect; litigants should be able to recognize a judgment which on its face purports to be final, and courts should be able to treat such a judgment as final for purposes of appeal.<sup>501</sup>

494. See *P.R.I.D.E. v. Texas Workers' Compensation Comm'n*, 950 S.W.2d 175, 176-77 (Tex. App.—Austin 1997, n.w.h.) (petition arrived at district court fifty-six days after the deadline set forth in the APA and forty-five days after the grace period provided for in other cases).

495. *Id.* at 177.

496. See *id.*

497. 947 S.W.2d 655 (Tex. App.—Austin 1997, pet. denied).

498. *Id.* at 660.

499. "A Mother Hubbard clause generally recites that all relief not expressly granted is denied." *Mafrige v. Ross*, 866 S.W.2d 590, 590 n.1 (Tex. 1993); *Bandera Elec. Co-op., Inc. v. Gilchrist*, 946 S.W.2d 336, 336 n.1 (Tex. 1997) (per curiam). "Clauses stating that the summary judgment is granted as to all claims asserted by plaintiff, or that plaintiff takes nothing against the defendant are the functional equivalent of a Mother Hubbard clause." *Id.*

500. See *English v. Union State Bank*, 945 S.W.2d 810, 811 (Tex. 1997) (per curiam) (citing *Mafrige*, 866 S.W.2d at 590).

501. *Mafrige*, 866 S.W.2d at 592.

As reflected in *English*, this rule can have a harsh result. In that case, the plaintiff bank filed two motions for summary judgment on the defendant English's counterclaims against the bank.<sup>502</sup> The first motion for summary judgment addressed only three of English's six counterclaims.<sup>503</sup> The trial court granted the first motion, stating in its order that "[the bank] is entitled to summary judgment in this case' and that English should 'take nothing on account of his lawsuit against [the Bank]'. English did not appeal this order."<sup>504</sup> The second motion, which addressed English's remaining claims, was granted by the trial court almost five months later.<sup>505</sup> The court of appeals reviewed the second order granting summary judgment and affirmed.<sup>506</sup>

The Supreme Court reversed the judgment of the court of appeals.<sup>507</sup> Under the rule stated in *Mafrige*, the Court held, English was required to appeal the first grant of summary judgment because it appeared on its face to be final.<sup>508</sup> Contrary to the conclusion of the court of appeals, *Mafrige* did not merely institute "a presumption of finality when a summary judgment purporting to be final is presented for appellate review."<sup>509</sup> Rather, under *Mafrige*, if a summary judgment order appears to be final, *the judgment should be treated as final for purposes of appeal.*<sup>510</sup>

Under facts similar to those of *English*, the First District Court of Appeals in *Kaigler v. General Electric Mortgage Insurance Corp.*<sup>511</sup> acknowledged that, under the rule of *Mafrige* and *English*, "a party now runs the risk of waiving its appeal if it incorrectly believes that the summary judgment is interlocutory."<sup>512</sup> To avoid waiver, the nonmovant confronted with a summary judgment order granting more relief than requested must either (1) request the trial court to correct the erroneous summary judgment while the court retains plenary power over its judgment, or (2) perfect a timely appeal.<sup>513</sup> If the nonmovant does neither, the erroneous summary judgment becomes final and unappealable.<sup>514</sup> The court noted, however, that the "harshness of this . . . result is counterbalanced by a salutary effect: uniform enforcement of *Mafrige* and *English* will encourage attentiveness to correct judgments."<sup>515</sup>

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502. See *English*, 945 S.W.2d at 810.

503. See *id.* at 811.

504. *Id.*

505. See *id.*

506. See *id.*

507. See *id.*

508. See *id.*

509. *Id.*

510. See *id.*

511. 961 S.W.2d 273 (Tex. App.—Houston [1st Dist.] 1997, n.w.h.).

512. *Id.* at 279.

513. See *id.*; see also *English*, 945 S.W.2d at 811.

514. *Kaigler*, 1997 WL 297591, at \*4.

515. See *id.* The majority in *Kaigler* rejected the dissent's attempt to distinguish the case at bar, which involved a summary judgment order containing a Mother Hubbard clause purporting to dispose of *parties* not mentioned in the order, from the facts of *Mafrige*, which "[dealt] with the impact of Mother Hubbard language on unresolved *issues*

If, as *Mafrige* and *English* dictate, a summary judgment that grants more relief than requested is to be treated as final for purposes of appeal what is the proper appellate disposition of such a summary judgment? The Supreme Court considered this question in *Bandera Electric Cooperative, Inc. v. Gilchrist*<sup>516</sup> and *Page v. Geller*,<sup>517</sup> and concluded that the court of appeals must treat the judgment as any other final judgment. "It is to consider all matters raised on appeal and reverse only those portions of the judgment that were rendered in error."<sup>518</sup> Of course, "it is well established that it is reversible error to grant summary judgment on a cause of action not addressed in the motion [for summary judgment]."<sup>519</sup>

Along these same lines, the Supreme Court in *Science Spectrum, Inc. v. Martinez*<sup>520</sup> affirmed the rule of *McConnell v. Southside Independent School District*<sup>521</sup> that "[a] motion for summary judgment must itself expressly present the grounds upon which it is made, and must stand or fall on these grounds alone."<sup>522</sup> The Court stressed that, "in determining whether grounds are expressly presented, [a court] may not rely on briefs or summary judgment evidence."<sup>523</sup>

In *Science Spectrum*, the plaintiff alleged that his injuries were caused either by Science Spectrum's control of the premises on which he was injured or by Science Spectrum's creation of the dangerous condition that injured him.<sup>524</sup> Science Spectrum asserted: "the uncontradicted summary judgment evidence establishes as a matter of law that SCIENCE SPECTRUM, INC. did not control nor have a . . . duty to control the area where the accident occurred. . . ."<sup>525</sup> The majority of the Court held that this allegation failed to address the plaintiff's claim that Science Spectrum had created a dangerous condition.<sup>526</sup> Because it failed to raise this ground in its motion, the Court held that Science Spectrum was not entitled to summary judgment on the claim.<sup>527</sup>

The dissent "fail[ed] to see what more Science Spectrum could have argued to challenge [the plaintiff's] claim that it created a dangerous condition."<sup>528</sup> According to the dissent, the majority "reads Science Spec-

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between parties, rather than the disposition as to the parties themselves." *Id.* at 218 (emphasis added). The majority maintained that "[i]ssues and parties . . . are codependent: one could not exist without the other." *Id.* "If an order disposes of all issues in a case, then it necessarily disposes of all parties to a case, and vice versa." *Id.*

516. 946 S.W.2d 336 (Tex. 1997) (per curiam).

517. 941 S.W.2d 101 (Tex. 1997) (per curiam).

518. *Id.* at 102 (citing *Bandera*, 946 S.W.2d at 377).

519. *Granada Biosciences, Inc. v. Barrett*, 958 S.W.2d 215, 221 (Tex. App.—Amarillo 1997, pet. filed) (citing *Mafrige*, 866 S.W.2d at 591).

520. 941 S.W.2d 910, 912 (Tex. 1997).

521. 858 S.W.2d 337 (Tex. 1993).

522. *Science Spectrum*, 941 S.W.2d at 912 (citing *McConnell*, 858 S.W.2d at 341).

523. *Id.*

524. *See id.* at 910.

525. *Id.* at 913 (Enoch, J., dissenting).

526. *See id.* at 912.

527. *See id.*

528. *Id.* at 913 (Enoch, J., dissenting).

trum's motion with too narrow a vision."<sup>529</sup>

Also applying the rule of *McConnell*, the Texarkana Court of Appeals in *McKillip v. Employers Fire Insurance Co.*<sup>530</sup> similarly refused to affirm a summary judgment granted in favor of the defendant on the plaintiff's negligence and DTPA claims because these claims were not mentioned or addressed in the defendant's motion for summary judgment.<sup>531</sup> Rejecting the defendant's argument that, by failing to except to the defendant's motion for summary judgment, the plaintiff waived any error in the defendant's failure to raise the negligence and DTPA claims, the court of appeals quoted *McConnell*, stating, "When a motion for summary judgment asserts grounds A and B, it cannot be upheld on grounds C and D, which were not asserted, even if the summary judgment proof supports them and the responding party did not except to the motion."<sup>532</sup>

Similarly, a summary judgment cannot be upheld on grounds stated in an accompanying brief, even if the brief is wholly incorporated into the motion for summary judgment.<sup>533</sup> Thus, as the defendant in *Coastal Cement Sand Inc. v. First Interstate Credit Alliance, Inc.*<sup>534</sup> learned the hard way, affirmative defenses raised in a Memorandum of Authorities in Support of Motion for Summary Judgment cannot be addressed on appeal in determining whether the trial court erred in granting the motion for summary judgment.<sup>535</sup> Only the ground expressly stated in the motion can be considered on appeal.<sup>536</sup>

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529. *Id.*

530. 932 S.W.2d 268 (Tex. App.—Texarkana 1996, no writ).

531. *See id.* at 271.

532. *Id.* (citing *McConnell*, 858 S.W.2d at 342). *See also* *Garner v. Corpus Christi Nat'l Bank*, 944 S.W.2d 469, 477 (Tex. App.—Corpus Christi 1997, n.w.h.) (summary judgment in favor of defendant improper on plaintiff's negligent misrepresentation and fraud claims where defendant did not move for summary judgment on those claims); *Granada Biosciences, Inc. v. Barrett*, 958 S.W.2d 215 (Tex. App.—Amarillo 1997, pet. filed) (summary judgment on claim for business disparagement improper where defendant did not move for summary judgment on that claim).

533. *See* *Coastal Cement Sand Inc. v. First Interstate Credit Alliance, Inc.*, 956 S.W.2d 562, 566 (Tex. App.—Houston [14th Dist.] 1997, pet. filed).

534. 956 S.W.2d 562 (Tex. App.—Houston [14th Dist.] 1997, pet. filed).

535. *See id.* at 566.

536. *See id.* In refusing to consider grounds raised in a brief accompanying the motion for summary judgment, the Fourteenth District Court of Appeals refused to follow *Howell v. Murray Mortgage Co.*, 890 S.W.2d 78 (Tex. App.—Amarillo 1994, writ denied). *See id.* In *Howell*, the Amarillo court declared, "our reading of *McConnell* convinces us that grounds found in a brief that is incorporated into a summary judgment motion should be deemed as being presented in the motion." *Howell*, 890 S.W.2d at 85. The *Coastal Cement* court concluded that "[t]he result in *Howell* appears to contradict the mandate in *McConnell*." *Coastal Cement*, 956 S.W.2d at 566. As noted by the concurrence in *Coastal Cement*, *McConnell* made it "crystal clear" that "grounds not contained in a motion for summary judgment, but only incorporated by reference, [cannot] be considered in support of the motion." *Id.* at 572-73 (Fowler, J., concurring). The concurrence, however, disagreed with the majority's reading of *Howell*, noting that "[t]he issue in *Howell* was whether the court could consider grounds contained in the same document as the motion [for summary judgment] but placed under a different-numbered paragraph than the paragraph containing the motion." *Id.* at 573. The concurrence pointed out that, in contrast to *Howell*, "[t]he issue in *McConnell* was whether a court could consider grounds in support of a motion for summary judgment when those grounds were contained in a separate document or contained

## B. REVIEW OF AMBIGUOUS ORDERS

In *MacGregor v. Rich*,<sup>537</sup> the trial court entered an ambiguous order dismissing the plaintiff's lawsuit.<sup>538</sup> The order "reasonably could be understood either as a sanctions order under [a local rule of the court] or as a dismissal for want of prosecution."<sup>539</sup> The court of appeals interpreted the dismissal as a sanction rather than a dismissal for want of prosecution, and reversed the case for abuse of discretion.<sup>540</sup>

Disagreeing with the analysis of the court of appeals, the Texas Supreme Court held that, "[w]hen an ambiguous order is susceptible to two reasonable constructions, an appellate court should adopt the construction that correctly applies the law."<sup>541</sup> According to the Supreme Court, "when construed as a dismissal for want of prosecution based on lack of diligence," the trial court's order "[did] not amount to an abuse of discretion."<sup>542</sup> "The court of appeals," concluded the Supreme Court, "should have adopted that construction [of the order] and affirmed the dismissal [of the case]."<sup>543</sup>

## C. REVIEW OF *BATSON/EDMONSON* CHALLENGES

In *Goode v. Shoukfeh*,<sup>544</sup> the Texas Supreme Court analyzed appellate review of the trial court's rulings on *Batson/Edmonson*<sup>545</sup> challenges to peremptory strikes. In doing so, the Court set forth the three-step process used to resolve an objection that a peremptory challenge is based on race.<sup>546</sup> According to the Court, the opponent of the peremptory challenge must first establish a prima facie case of racial discrimination.<sup>547</sup> Second, the burden shifts and the party exercising the strike must come forward with a race-neutral explanation.<sup>548</sup> At this stage of the process, the appellate court is not to consider "whether the explanation offered is

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in evidence attached to the summary judgment motion." *Id.* In the concurrence's opinion, *Howell* had "no significance to the appeal before this Court because this appeal involve[d] a *McConnell* situation—grounds and defenses not contained in the motion and discussed only in a separate document from the motion." *Id.*

537. 941 S.W.2d 74 (Tex. 1997) (per curiam).

538. *See id.* at 75.

539. *Id.*

540. *See id.* at 75-76.

541. *Id.* at 75.

542. *Id.* at 76.

543. *Id.*

544. 943 S.W.2d 441 (Tex. 1997).

545. *See Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that a criminal defendant is denied equal protection under the U.S. Constitution if a prosecutor uses peremptory challenges to exclude members of the jury panel solely on the basis that their race is the same as the defendant's); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (extending *Batson* to civil trials). *See also Powers v. Palacios*, 813 S.W.2d 489, 490-91 (Tex. 1991) (holding that the use of a peremptory challenge to exclude a juror on the basis of race violates the equal protection rights of the excluded juror).

546. *See Goode*, 943 S.W.2d at 445.

547. *See id.*

548. *See id.*

persuasive or even plausible.”<sup>549</sup> Rather, “[i]n evaluating whether the explanation offered is race-neutral,” the court of appeals must assume “the reasons for the peremptory challenge are true” and “determine whether the . . . challenge violates the Equal Protection Clause as a matter of law.”<sup>550</sup> Only at the third step of the process does the persuasiveness of the justification for the strike become relevant.<sup>551</sup>

At the third step, “the trial court may believe or not believe the explanation offered by the party [exercising the peremptory strike].”<sup>552</sup> At this point, whether the explanation should be believed is a question of fact for the trial court.<sup>553</sup> The trial court’s decision in this regard is reviewed under an abuse of discretion standard, which “is similar . . . to the federal standard of ‘clearly erroneous.’”<sup>554</sup> A reviewing court, however, “will not be bound by a finding of no discrimination under either our abuse of discretion standard or the clearly erroneous standard if the justification offered for striking a potential juror is ‘simply too incredible to be accepted.’”<sup>555</sup>

#### D. NO EVIDENCE REVIEW OF EXPERT TESTIMONY

During the Survey period, the Texas Supreme Court discussed at length the concepts set forth in *E.I. du Pont de Nemours & Co. v. Robinson*<sup>556</sup> concerning no evidence review of expert testimony. Specifically, in *Merrell Dow Pharmaceuticals, Inc. v. Havner*,<sup>557</sup> the Supreme Court analyzed whether the plaintiffs’ evidence of causation presented by well-recognized experts “[was] scientifically reliable and thus some evidence to support the judgment in their favor.”<sup>558</sup> Recognizing the well-established rules for reviewing no evidence points, the Court stated that

[i]n determining whether there is no evidence of probative force to support a jury’s finding, all the record evidence must be considered in the light most favorable to the party in whose favor the verdict has been rendered, and every reasonable inference deducible from the evidence is to be indulged in that party’s favor.<sup>559</sup>

The Court held that a no evidence point will be sustained

when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d)

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549. *Id.*

550. *Id.*

551. *See id.*

552. *Id.* at 445-46.

553. *See id.* at 446.

554. *Id.*

555. *Id.* The concurrence objected to the majority’s “refusal to adopt the ‘clearly erroneous’ standard of reviewing a *Batson/Edmonson* challenge.” *Id.* at 453 (Gonzalez, J., concurring).

556. 923 S.W.2d 549 (Tex. 1995).

557. 953 S.W.2d 706 (Tex. 1997).

558. *Id.* at 711.

559. *Id.*

the evidence conclusively establishes the opposite of the vital fact.<sup>560</sup> An "expert's bare opinion" regarding the existence of a vital fact, however, does "not suffice" to establish "some evidence."<sup>561</sup> "The *substance* of the [expert's] testimony must be considered."<sup>562</sup>

In reaching this conclusion, the Supreme Court recognized that "[i]t [can] be argued that looking beyond the testimony [of the expert] to determine the reliability of scientific evidence is incompatible with our no evidence standard of review."<sup>563</sup> That is, "[i]f a reviewing court is to consider the evidence in the light most favorable to the verdict, . . . [the] court should not look beyond the expert's testimony to determine if it is reliable."<sup>564</sup> The Supreme Court rejected that argument on the basis that it was "too simplistic."<sup>565</sup> Under this argument, the no evidence standard of review is reduced "to a meaningless exercise of looking to see only what words appear in the transcript of the testimony, not whether there is in fact some evidence."<sup>566</sup> "[E]ven an expert with a degree," the Court explained, "should not be able to testify that the world is flat, that the moon is made of green cheese, or that the Earth is the center of the solar system."<sup>567</sup>

## XVII. DISPOSITION ON APPEAL

### A. REMAND FOR NEW TRIAL WHEN TRIAL COURT ERRS IN FOLLOWING TEXAS PATTERN JURY CHARGE

In *City of San Antonio v. Rodriguez*,<sup>568</sup> the Texas Supreme Court held that, when a trial court submits an instruction in accordance with provisions of the Texas Pattern Jury Charge, any error in the instruction should result in a remand of the case for a new trial, not in rendition of judgment.<sup>569</sup>

However, error in the jury charge does not necessarily warrant reversal. For instance, submission of an improper jury question is harmless where an independent finding by the jury comports the same liability upon the defendant.<sup>570</sup>

560. *Id.*

561. *Id.*

562. *Id.* (emphasis added).

563. *Id.* at 712.

564. *Id.*

565. *Id.*

566. *Id.*

567. *Id.* To determine reliability, the reviewing court must look at the numerous factors set forth in *Robinson* and *Daubert* and the guidelines of TEX. R. EVID. 702. *See id.* Rule 702 "offers substantive guidelines in determining if the expert testimony is some evidence of probative value." *Id.* In essence, the underlying data should be independently evaluated in determining if the opinion itself is reliable. *See id.* at 713.

568. 931 S.W.2d 535 (Tex. 1996) (per curiam).

569. *See id.* at 536.

570. *See Galveston County Fair & Rodeo, Inc. v. Glover*, 940 S.W.2d 585, 587 (Tex. 1996) (per curiam).

## B. NO REMAND TO COURT OF APPEALS IN THE INTEREST OF JUSTICE

The Texas Supreme Court has no jurisdiction to determine whether the jury's verdict is supported by factually as well as legally sufficient evidence.<sup>571</sup> The Supreme Court *can*, however, remand a cause to the court of appeals for a second factual sufficiency review. Of course, as the appellants in *Continental Coffee Products Co. v. Cazarez*<sup>572</sup> discovered too late, the Supreme Court *cannot* remand for a second factual sufficiency review unless requested to do so by the petitioner.<sup>573</sup>

## C. SUPREME COURT DISPOSITION OF MOTION FOR REHEARING: TIMELINESS

In a harsh criticism of the Supreme Court's dilatoriness in ruling on two motions for rehearing, Justice Cornyn called the three-year delay in granting the motion for rehearing in *State Farm Fire & Casualty Co. v. Simmons*<sup>574</sup> and the seven month delay in granting the motion for rehearing in *Maritime Overseas Corp. v. Ellis*<sup>575</sup> "unconscionable."<sup>576</sup> The delay, he said, "cannot be justified."<sup>577</sup>

On November 4, 1997, Texas voters approved a constitutional amendment providing, in essence, that any motion for rehearing not acted on by the Supreme Court before the 180th day after the date on which the motion was filed, is denied.<sup>578</sup> In Justice Cornyn's opinion, that such an amendment is "necessary at all does not reflect well on this Court."<sup>579</sup> The Court, he said, "should have the self-discipline to timely dispose of

571. See *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 634 (Tex. 1986).

572. 937 S.W.2d 444 (Tex. 1996).

573. See *id.* at 455. The Supreme Court expressed concern over "the amount of non-probative evidence cited by the court of appeals in determining that the jury's verdict was supported by factually as well as legally sufficient evidence." *Id.* at 455. However, since the petitioners did not ask the Court to remand the cause to the court of appeals for a second factual sufficiency review, the Court had no choice but to affirm the court of appeals on that point. See *id.* at 455. The Supreme Court specifically noted that "Texas Rule of Appellate Procedure 180 does not permit [the Court] to remand to the court of appeals for another evidentiary review in the interest of justice." *Id.* See also TEX. R. APP. P. 180 (stating:

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.

*Id.* (emphasis added). Similarly, under the new rules of appellate procedure, the Supreme Court may only remand the case to the trial court in the interest of justice. See TEX. R. APP. P. 60.3 (effective Sept. 1, 1997).

574. No. D-4095, 1997 WL 378632 (Tex. July 9, 1997), *aff'd in part, rev'd in part*, 1998 WL 59210 (Tex. Feb. 13, 1998).

575. No. 94-1057, 1997 WL 378632 (Tex. July 9, 1997).

576. 1997 WL 378632 at \*3.

577. *Id.*

578. The new constitutional amendment provides, "Notwithstanding Section 1, Article II, of this constitution and any other provision of this constitution, if the supreme court does not act on a motion for rehearing before the 180th day after the date on which the motion is filed, the motion is denied." TEX. CONST. art. V, § 31(d).

579. *State Farm*, 1997 WL 378632, at \*3.



[its] own business.”<sup>580</sup>

#### D. REQUEST THAT COURT OF APPEALS VACATE OR SET ASIDE TRIAL COURT'S JUDGMENT

As recognized by the Waco Court of Appeals in *Rothlander v. Ayala*,<sup>581</sup> former Texas Rule of Appellate Procedure 80(b) did “not permit the courts of appeals to ‘vacate’ or ‘set aside’ a judgment of the trial court.”<sup>582</sup> Because of this limitation in the rules, the Waco court interpreted a party’s request to vacate and set aside a judgment “as a request that [the court] reverse the judgment of the trial court.”<sup>583</sup> New Texas Rule of Appellate Procedure 43.2(e) expressly provides that the court of appeals may “vacate the trial court’s judgment and dismiss the case.”<sup>584</sup>

### XVIII. MOTION FOR REHEARING

In *Stangel v. Parker*,<sup>585</sup> the Supreme Court granted the petitioner relief from an order of the court of appeals denying his motion for an extension of time to file his motion for rehearing in the court of appeals.<sup>586</sup> The Court found that the motion for extension complied with the requirements of Texas Rule of Appellate Procedure 100(g),<sup>587</sup> as it was timely filed and it reasonably explained the need for more time, i.e., that petitioner needed time to retrieve his file from his former counsel and to obtain a new lawyer.<sup>588</sup> Under such circumstances, the denial by the Fort Worth Court of Appeals of the motion for extension for no stated reason constituted an abuse of discretion.<sup>589</sup>

In *Hansen v. Academy Corporation*,<sup>590</sup> the First District Court of Appeals effectively overruled its denial of an appellee’s motion for rehearing in a first appeal while reviewing a second appeal from the same case. In *Hansen*, the Academy Corporation (Academy) brought a declaratory judgment action to resolve who owed taxes on property leased by Acad-

580. *Id.*

581. 943 S.W.2d 546 (Tex. App.—Waco 1997, writ granted) (per curiam).

582. *Id.* at 546; see also TEX. R. APP. P. 80(b) (amended). Rule 80(b) stated: 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.

*Id.*

583. See *Rothlander*, 943 S.W.2d at 546.

584. TEX. R. APP. P. 43.2(e) (effective Sept. 1, 1997).

585. 945 S.W.2d 114 (Tex. 1997) (per curiam).

586. See *id.* at 114.

587. See TEX. R. APP. P. 100(g). Rule 100(g) states, in pertinent part, that “An extension of time may be granted for late filing in a court of appeals of a motion . . . for rehearing, if a motion reasonably explaining the need therefor is filed with the court of appeals not later than fifteen days after the last date for filing the motion.”

588. See *Stangel*, 945 S.W.2d at 114-15.

589. See *id.*

590. 961 S.W.2d 329 (Tex. App.—Houston [1st Dist.] 1997, pet. denied).

emy.<sup>591</sup> Hansen filed a counterclaim against Academy for breach of the lease agreement and alternatively pled intentional trespass, claiming that Academy used a small building and sign on the premises without Hansen's permission.<sup>592</sup> The trial court found that Academy was to pay the property taxes under the lease agreement.<sup>593</sup>

On appeal, the court of appeals reversed the trial court's judgment finding that Academy leased only the building with rights to use the parking lot.<sup>594</sup> As a result, Hansen, not Academy, was required to pay property taxes on the parking lot and the surrounding land.<sup>595</sup> The court remanded the case for the limited purpose of determining the amount of taxes owed on the building and the amount of attorney fees to be awarded under the Declaratory Judgment Act.<sup>596</sup>

Hansen subsequently filed a motion for rehearing, urging the court of appeals to remand his trespass claim in light of its decision that Academy had leased only the building rather than the entire premises.<sup>597</sup> The court denied the motion for rehearing without opinion.<sup>598</sup> Hansen nonetheless urged the trial court to consider his trespass claim.<sup>599</sup> The trial court refused to do so.<sup>600</sup>

Hansen filed a second appeal after remand, arguing that the trial court erred in not allowing Hansen to pursue his trespass claim on remand.<sup>601</sup> The court of appeals found that the trial court's authority on remand "was limited by the mandate to determine the actual amount of taxes to be reimbursed to Hansen by Academy [for taxes on the building], and to ascertain reasonable attorney fees [for Academy]".<sup>602</sup> As a result, the trial court did not err in refusing to hear Hansen's trespass claim.<sup>603</sup> Despite finding that the trial court had no authority to hear Hansen's trespass claim, however, the court decided to reconsider its original opinion in light of Hansen's continued assertion of his right to pursue his trespass claim.<sup>604</sup> The court of appeals effectively used the auspices of a second appeal to reconsider its decision in the first appeal after mandate had issued. While the ultimate outcome of the second appeal may have been the just result, the procedural authority for the court's reconsideration of its original opinion is curious.

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591. *See id.* at 333.

592. *See id.*

593. *See id.*

594. *See id.*

595. *See id.*

596. *See id.*

597. *See id.* at 334.

598. *See id.*

599. *See id.*

600. *See id.*

601. *See id.* at 335.

602. *Id.*

603. *See id.*

604. *See id.*

### XIX. APPELLATE ATTORNEYS' FEES

In *Cain v. Pruett*,<sup>605</sup> a deceptive trade practices case, the jury awarded the plaintiff nothing for appellate attorney's fees, and the plaintiff moved for judgment notwithstanding the verdict on that issue.<sup>606</sup> Despite the fact that plaintiff's counsel had testified at trial that the total sum of \$15,000 would be a reasonable fee for all appeals, the trial court granted the motion for judgment n.o.v. and entered an amended judgment awarding \$50,000 in appellate attorney's fees.<sup>607</sup> At oral argument, counsel stated to the court of appeals that the \$50,000 award of appellate attorney's fees was a clerical error.<sup>608</sup> The court of appeals reversed the award of \$50,000 in appellate attorney fees and entered judgment in accordance with the jury's zero finding, holding that "the evidence did not conclusively establish" that "any certain amount" of appellate attorney's fees was reasonable and that the jury could have concluded that appellate attorney's fees was included in the contingency fee arrangement between plaintiff and his counsel.<sup>609</sup>

### XX. SUPREME COURT JURISDICTION

In *Awde v. Dabeit*,<sup>610</sup> the Supreme Court addressed the question of "whether a request for findings of fact and conclusions of law following a [county court's] dismissal for want of prosecution and the imposition of sanctions extends the time for perfecting appeal."<sup>611</sup> The Court held that, while it "does not ordinarily have jurisdiction in cases in which a county court has original or appellate jurisdiction,"<sup>612</sup> the Court had jurisdiction because the case involved the construction of Texas Rule of Appellate Procedure 41(a)(1).<sup>613</sup> Citing its decision in *Del Valle Independent School District v. Lopez*,<sup>614</sup> the Supreme Court found that it also had jurisdiction to determine whether the court of appeals, which had dismissed the appeal for want of jurisdiction, itself had jurisdiction.<sup>615</sup>

605. 938 S.W.2d 152 (Tex. App.—Dallas 1996, no writ).

606. *See id.* at 159.

607. *See id.* at 159-60.

608. *See id.* at 159.

609. *Id.* at 160.

610. 938 S.W.2d 31 (Tex. 1997).

611. *Id.* at 32.

612. *Id.* *See* TEX. GOV'T CODE ANN. § 22.225(b)(1) (Vernon Supp. 1998). Section 22.225(b)(1) states, in pertinent part, that

Except as provided by Subsection (c), a judgment of a court of appeals is conclusive on the law and facts, and a writ of error is not allowed from the supreme court, in the following civil cases:

(1) a case appealed from a county court or from a district court when, under the constitution, a county court would have had original or appellate jurisdiction of the case . . . .

*Id.*

613. *See* TEX. R. APP. P. 41(A)(1).

614. 845 S.W.2d 808 (Tex. 1992).

615. *See Awde*, 938 S.W.2d at 32.