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TEXAS CIVIL PROCEDURE

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THE major developments in the field of civil procedure during the Survey period occurred through judicial decisions and amendments to the Texas Rules of Civil Procedure.

I. SUBJECT MATTER JURISDICTION

The Texas Supreme Court held in *Essenburg v. Dallas County*,[1] that the statutory requirement that a plaintiff suing a county must first present her claim to the county commissioners[2] is not jurisdictional, but is instead merely a notice provision.[3] The high court rejected the court of appeals' attempt to analogize the presentment requirement to an exhaustion of administrative remedies requirement.[4] A presentment requirement is intended to promote settlement, noted the court, while an "exhaustion requirement seeks to assure that the appropriate body adjudicates the dispute—the hallmark of a jurisdictional statute."[5]

The ripeness doctrine avoids premature adjudication of claims and is a component of subject matter jurisdiction.[6] The supreme court revisited one of its long-standing precedents in this area during the Survey period. It held that an insurer's duty to indemnify is justiciable before the underlying suit against the insured is concluded if the insurer has no duty to defend, and the same reasons negating the duty to defend will likewise negate the duty to indemnify.[7] The court noted that the prior rule was based in part on the inability to predict whether the ultimate amount in controversy would exceed the then-minimum jurisdictional threshold for

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1. 41 TEX. SUP. CT. J. 1399 (Sept. 24, 1998).
2. TEX. LOC. GOV'T CODE ANN. § 81.041(a) (Vernon 1986).
3. *See Essenburg*, 41 TEX. SUP. CT. J. at 1400.
4. *See id.* at 1399-1400.
5. *Id.* at 1400.
6. *See* Patterson v. Planned Parenthood of Houston and Southeast Tex., Inc., 971 S.W.2d 439, 442 (Tex. 1998).
7. *See* Farmers Tex. County Mut. Ins. Co. v. Griffin, 955 S.W.2d 81, 84 (Tex. 1997), *overruling in part*, Firemen's Ins. Co. of Newark, N.J. v. Burch, 442 S.W.2d 331 (Tex. 1968).

district courts of five hundred dollars.[8] Because the 1985 constitutional amendments eliminated this jurisdictional minimum,[9] there remained no reason to await adjudication of the indemnification issue in the circumstance posited by the court.[10]

The plaintiffs in *Ford Motor Co. v. Cammack*,[11] sued under both the wrongful death and survival statutes.[12] They failed, however, to prove that they were the heirs or personal representatives of the deceased's estate entitled to bring a survival action.[13] Relying on the supreme court's holding that a party's right to bring a survival action is a question of standing,[14] the court of appeals held that the trial court lacked subject matter jurisdiction over the survival claim, notwithstanding the defendant's failure to specially except or file a verified plea in abatement challenging the "capacity" in which plaintiffs sued.[15]

II. SERVICE OF PROCESS

The court in *World Distributors, Inc. v. Knox*, rebuffed plaintiffs' creative attempt to sidestep their failure to strictly comply with the Texas long-arm statute[16] by claiming that the Secretary of State's mailing of citation to the defendant was proper service under Rule 108.[17] As grounds for its decision, the court noted: the plaintiffs' petition did not indicate an intent to serve under Texas Rule of Civil Procedure 108; the Secretary of State is not authorized by law to serve process; the Secretary of State is deemed to be an agent of a non-resident corporate defendant and cannot, therefore, be a "disinterested person" entitled to serve under the rule; and plaintiffs had not shown strict compliance with the rule in any event.[18]

Texas Rule of Civil Procedure 106(b) authorizes a trial court to order substituted service by delivery of the citation and petition to anyone over sixteen years of age at the defendant's usual place of business or abode or in any other manner the evidence shows will be reasonably effective to give the defendant notice.[19] *Rivers v. Viskozki*[20] stands as a reminder that, under the second prong of the rule, the trial court must specify the precise method of alternative service to be utilized.[21] Thus, the court's

8. *See Griffin*, 955 S.W.2d at 84.
9. *See* TEX. CONST. art. V, § 8 (conferring jurisdiction over "all actions, proceedings, and remedies" on district courts).
10. *See Griffin*, 955 S.W.2d at 84.
11. No. 14-95-01505-CV, 1998 WL 740901 (Tex. App.—Houston [14th Dist.] Sept. 3, 1998, no pet.h.).
12. *See id.* at *1.
13. *See id.* at *2-3.
14. *See* Shepherd v. Ledford, 962 S.W.2d 28, 31 (Tex. 1998).
15. *See Cammack*, 1998 WL 740901, at *2.
16. TEX. CIV. PRAC. & REM. CODE ANN. § 17.041, *et seq.* (Vernon Supp. 1999).
17. 968 S.W.2d 474 (Tex. App.—El Paso 1998, no pet. h.)
18. *See id.* at 478-479.
19. *See* TEX. R. CIV. P. 106(b).
20. 967 S.W.2d 868 (Tex. App.—Eastland 1998, no pet. h.).
21. *See id.* at 870.

order in that case, which effectively authorized the constable to determine a manner of service that would be reasonably effective to give notice to the defendant, was invalid.[22]

The court in *Rajan v. Shepard-Knapp*,[23] looked to federal law to determine the efficacy of state court process that was served after removal.[24] The case was remanded, and a default judgment was entered in the state court against one of the defendants.[25] By writ of error, the defendant argued that the service on him was defective and the default judgment invalid.[26] The court of appeals disagreed.[27] Relying on a federal statute governing removal procedures,[28] and two federal district court opinions,[29] the court held that the completion of service on defendant after removal was permissible.[30] Moreover, the court held that the failure of the plaintiff to file the return of citation in the federal court, as would have been required in state court, did not render the service defective since the Federal Rules of Civil Procedure did not require it.[31]

III. SPECIAL APPEARANCE

In *Dawson-Austin v. Austin*,[32] the supreme court agreed with all of the intermediate appellate courts that had considered the issue in holding that an unverified special appearance can be cured by amendment and does not constitute a general appearance.[33] The court also rejected an argument that the defendant's special appearance was waived by her filing, in the same instrument, a motion to quash service, a plea to the jurisdiction, and a plea in abatement without expressly stating that these latter motions were "subject to" the special appearance.[34] According to the court, the principle underlying both of its holdings, and the test for determining whether a defendant has entered a general appearance, is whether the defendant's pleading or motion acknowledges the court's jurisdiction

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22. *See id.*
23. 965 S.W.2d 47 (Tex. App.—Houston [1st Dist.] 1998, writ denied).
24. *See id.* at 49.
25. *See id.*
26. *See id.*
27. *See id.* at 49-50.
28. *See* 28 U.S.C. § 1448 (1994).
29. *See* Listle v. Milwaukee County, 926 F. Supp. 826 (E.D. Wis. 1996); Continental Illinois Nat'l Bank & Trust Co. of Chicago v. Protos Shipping, Inc., 472 F. Supp. 979 (N.D. Ill. 1979).
30. *See Rajan*, 965 S.W.2d at 49-50. The dissent argued that a federal appeals court case, Beecher v. Wallace, 381 F.2d 372 (9th Cir. 1967), reaching the opposite conclusion was the better-reasoned authority. *See Rajan*, 965 S.W.2d at 50-51 (Mirabel, J., dissenting).
31. *See id.* at 50 (quoting FED. R. CIV. P. 4(l) ("[f]ailure to make proof of service does not affect the validity of service")).
32. 968 S.W.2d 319 (Tex. 1998).
33. *See id.* at 322.
34. *See id.* at 322-23, *overruling*, Portland Sav. & Loan Ass'n v. Bernstein, 716 S.W.2d 532, 534-35 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.), *cert. denied*, 475 U.S. 1016 (1986).

or seeks affirmative relief.[35]

IV. VENUE

Under former Texas practice, venue was fixed in the county named in a plea of privilege[36] whenever a plaintiff nonsuited his action before the trial court made its venue determination.[37] Although the Texas Supreme Court refused to decide five years ago whether this "venue-fixing" rule survived the 1983 venue amendments,[38] *Geochem Tech. Corp. v. Verseckes*[39] presented the court with another opportunity to address the issue. The court of appeals in *Geochem* concluded that a nonsuit under the current rules of procedure had the same effect as under the former venue rules, *i.e.*, automatically fixing venue in the county to which transfer was sought.[40] The supreme court disagreed, holding that the effect a nonsuit has on venue depends on the state of the record at the time the nonsuit is filed.[41] Given the record as it existed when plaintiff nonsuited, the court determined that venue had not been fixed in the county to which defendants sought transfer.[42]

The plaintiff in *Geochem* sued two defendants in Dallas County seeking damages and injunctive relief. The defendants filed motions to transfer invoking the mandatory venue provision for injunctions.[43] The defendants sought transfer to two different counties, as one resided in Stephens County and the other in Van Zandt County. In an amended motion to transfer venue, however, the Van Zandt County defendant joined in the other defendant's request that the case be transferred to Stephens County. In support of the amended motion, this defendant filed an affidavit stating that he resided in both Stephens and Van Zandt counties. The plaintiff did not deny these venue facts, but instead nonsuited the Dallas County action and immediately refiled the case in Van Zandt

35. *See Austin*, 968 S.W.2d at 322-23. *See also* Puri v. Mansukhani, 973 S.W.2d 701, 706-07 (Tex. App.—Houston [14th Dist.] 1998, no pet.h.) (defaulted non-resident defendant's motion for new trial filed subject to his special appearance was not a general appearance, notwithstanding the inclusion of a statement of defendant's readiness to proceed to trial).

36. Prior to their amendment in 1983, the rules of procedure governing venue hearings provided for the filing of a "plea of privilege" as the procedural mechanism for challenging a plaintiff's choice of venue. *See* Tex. R. Civ. P. 84, 86, 87, 88, 89, 93, 120a, 385, 527 (1983). Complementing the Legislature's 1983 overhaul of the Texas venue statutes, Act of June 17, 1983, 68th Leg., R.S., ch 385 § 1, 1983 Tex. Gen. Laws 2119, 2119-24 (now codified at Tex. Civ. Prac. & Rem. Code Ann. §§ 15.001, *et seq.* (Vernon 1986 & Supp. 1999), the Texas Supreme Court promulgated amended procedural rules in 1983 that eliminated all references to the plea of privilege. *See* Order of June 15, 1983, *reprinted in* 46 Tex. B. J. 858, 858-859 (1983).

37. *See, e.g.*, Royal Petroleum Corp. v. McCallum, 134 Tex. 543, 135 S.W.2d 958, 967 (1940); Wilson v. Wilson, 601 S.W.2d 104, 105 (Tex. Civ. App.—Dallas 1980, no writ).

38. *See* Ruiz v. Conoco Inc., 868 S.W.2d 752, 756-57 (Tex. 1993).

39. 962 S.W.2d 541, 543 (Tex. 1998).

40. 929 S.W.2d 85, 89 (Tex. App.—Eastland 1996), *rev'd*, 962 S.W.2d 541 (Tex. 1998).

41. 962 S.W.2d at 543.

42. *See id.* at 544.

43. *See* Tex. Civ. Prac. & Rem. Code Ann. § 65.023(a) (Vernon 1986) (suit for injunctive relief must be brought in the county of defendant's domicile).

County against both defendants. Under these circumstances, the supreme court acknowledged that the mandatory venue facts had been established at the time of the nonsuit.[44] Because an individual may have more than one residence for venue purposes,[45] those facts established only that venue was proper in either Stephens County (the county to which defendants sought transfer) or Van Zandt County (the county in which plaintiff refiled its suit).[46] Observing that the venue statutes do not say that a plaintiff may choose venue only once,[47] the *Geochem* court disagreed with the court of appeals' conclusion that a plaintiff loses his right to choose venue when his first choice is a county of improper venue.[48]

In re Continental Airlines, Inc.[49] also involved the mandatory venue provision for injunctions. The City of Fort Worth sued the City of Dallas seeking a judgment declaring its rights under compacts and agreements between the cities concerning DFW International Airport and Love Field. When Continental Airlines subsequently announced plans to schedule passenger service from Love Field to Cleveland, Fort Worth amended its prayer to seek a specific declaration that these flights would violate the 1968 contracts between Dallas and Fort Worth. Shortly before the scheduled flights to Cleveland, Fort Worth sought and obtained temporary injunctive relief against Continental. Before granting the injunction, the trial court heard and denied the motions to transfer venue filed by Continental and other defendants. At that point, defendants invoked the appellate courts' original mandamus jurisdiction to enforce mandatory venue under section 15.0642 of the Texas Civil Practice and Remedies Code.[50]

As *Continental Airlines* represented the court's first opinion addressing section 15.0642,[51] the supreme court began by announcing that the standard of review under this provision is whether the trial court abused its discretion.[52] The court then held that the trial judge did not abuse his discretion in refusing to transfer venue because the injunction venue statute applies only to suits in which the relief sought is purely or primarily injunctive.[53] The temporary injunction Fort Worth sought, on the other hand, was ancillary inasmuch as the city's pleadings requested only declaratory relief and would not have supported a permanent injunction.[54] The court brushed aside the defendants' complaint that Fort Worth could

44. *See Geochem*, 962 S.W.2d at 543.
45. *See id.* at 543-44 (citing Snyder v. Pitts, 150 Tex. 407, 241 S.W. 136, 140 (1951)).
46. *See Geochem*, 962 S.W.2d at 544.
47. *See id.*
48. *See id.* The court of appeals had reasoned that "there can be only one first choice" because "any other posture would be to promote rather than prevent the very type of legal 'gamesmanship' sought to be prevented under the old law." *Geochem*, 929 S.W.2d at 89.
49. 41 TEX. SUP. CT. J. 1400, 1998 WL 652555 (Sept. 14, 1998).
50. TEX. CIV. PRAC. & REM. CODE ANN. § 15.0642 (Vernon Supp. 1999).
51. 1998 WL 652555, at *1.
52. *See id.* at *2.
53. *See id.* at *2 (citing Ex parte Coffee, 160 Tex. 224, 328 S.W.2d 283, 287 (1959)).
54. *See Continental Airlines*, 1998 WL 652555, at *2.

later use injunctive remedies to enforce its judgment if and when it obtained the declarations it sought. According to the court, the mere possibility that a defendant will disobey a trial court's final judgment, forcing it to resort to its injunctive powers as a means of enforcement, does not transform the suit into an injunction suit under Section 65.023(a).[55]

A number of cases decided during the Survey period, all involving breast implant litigation, addressed issues relating to the joinder provision of the venue statute.[56] Section 15.003(a) of that statute requires each plaintiff in a suit to establish proper venue independently of any other plaintiff.[57] Any person who is unable to make the required showing may not join or maintain the suit as a plaintiff unless, again independently of any other plaintiff, he establishes that: "(1) joinder or intervention in the suit is proper under the Texas Rules of Civil Procedure; (2) maintaining venue in the county of suit does not unfairly prejudice another party to the suit; (3) there is an essential need to have the person's claim tried in the county in which the suit is pending; and (4) the county in which the suit is pending is a fair and convenient venue [both] for the person seeking to join [as plaintiff]. . . and the persons against whom the suit is brought."[58] Anyone dissatisfied with the trial court's ruling on intervention or joinder can file an interlocutory appeal,[59] as did the defendants in *Bristol-Myers Squibb Co. v. Barner*.[60]

In *Barner*, the defendants filed a motion to transfer venue in which they questioned the propriety of joinder and specifically denied that the county of suit was a proper venue as to eight of the nine plaintiffs. Following the trial court's denial of the motion to transfer venue, defendants filed an interlocutory appeal premised entirely on section 15.003. The appellees apparently contended that the appellate court was without jurisdiction to review the trial court's decision on the motion to transfer venue due to section 15.064(a).[61] Although the court of appeals agreed that it could not review the venue determination per se, it held that it could review the decision permitting joinder of all nine plaintiffs, which presumably was subsumed in the trial court's order denying the motion to transfer.[62]

The San Antonio Court of Appeals reached a similar result in *Abel v. Surgitek*.[63] Citing *Barner* and two other cases decided during the Survey

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55. *See id.* at *4; TEX. CIV. PRAC. & REM. CODE ANN. § 65.023(a) (Vernon 1986) (suit for injunctive relief shall be brought in county of domicile).

56. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.003 (Vernon Supp. 1999).

57. *Id.* at § 15.003(a).

58. *Id.* at § 15.003(a)(1)-(4).

59. *See id.* at § 15.003(3)(c) (Vernon Supp. 1999) (providing for an interlocutory appeal on an accelerated basis).

60. 964 S.W.2d 299 (Tex. App.—Corpus Christi 1998, no pet.).

61. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(a) (Vernon 1986) (provides that "[n]o interlocutory appeal shall lie from the [venue] determination.").

62. *See Barner*, 964 S.W.2d at 301.

63. 975 S.W.2d 30 (Tex. App.—San Antonio 1998, pet. granted). *Editor's note*: The Texas Supreme Court has recently issued an opinion, as yet unreleased, which reverses the court of appeals' decision. *See* Surgitek v. Abel, No. 98-0592, 1999 WL 450864 (Tex.).

period,[64] the court held that an interlocutory appeal is available from a trial court's venue decision whenever that decision rests on whether a person properly established joinder under section 15.003(a).[65] "To hold otherwise", said the court, "would enable a defendant to defeat a plaintiff's right to interlocutory appeal by the label given to his motion."[66]

The court in *Surgitek* also opined as to the standard of review and burden of proof applicable on the interlocutory appeal. In keeping with the express terms of the statute,[67] the court first decided that it would judge whether the joinder was proper based on an independent determination from the record.[68] Notwithstanding the statutory mandate that plaintiff "establish" the joinder requirements,[69] the court next decided that plaintiffs need not prove these requirements by a preponderance of the evidence.[70] Instead, plaintiffs' prima facie proof would be accepted as controlling unless conclusively "destroyed" by evidence to the contrary.[71] The court sharply divided, however, in attempting to apply this somewhat lax standard. The justice authoring the plurality opinion of the court concluded that the appellants had made prima facie proof of "essential need"—one of the statutory requirements[72]—by proving the need to pool resources against common experts and issues.[73] Apparently accepting this reasoning, the concurring justice observed that intrastate plaintiffs could never join mass tort litigation if the court gave "essential need" its common meaning.[74] Nevertheless, he warned that courts should not thwart the legislative intent by failing to curb abusive joinder tactics.[75] The dissent, on the other hand, argued that the definition of "essential need" adopted by the majority did thwart the legislative intent by ignoring the common usage of the legislature's chosen term.[76]

64. *See* Bristol-Myers Squibb Co. v. Goldston, 957 S.W.2d 671, 673 (Tex. App.—Fort Worth 1997, pet. denied); Surgitek, Inc. v. Adams, 955 S.W.2d 884, 887-88 (Tex. App.—Corpus Christi 1997, pet. requested).

65. *See Surgitek*, 975 S.W.2d at 36.

66. *Id.*

67. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(c)(1) (Vernon Supp. 1999) (court of appeals shall make independent determination from the record and not under either an abuse of discretion or substantial evidence standard).

68. *See Surgitek*, 975 S.W.2d at 36-37.

69. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(a)(1)-(4) (Vernon Supp. 1999).

70. *See Surgitek*, 975 S.W.2d at 38.

71. *See id.*

72. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(a)(3) (Vernon Supp. 1999).

73. *See Surgitek*, 975 S.W.2d at 40.

74. *See id.* at 42 (Rickhoff, J., concurring).

75. *See id.* The concurring opinion explicitly recognized that eighty-five of the plaintiffs, all of whom were from outside the state, were "*Polaris* forum shoppers." *Id.*; *see generally* Polaris Inv. Mgt. Corp. v. Abascal, 890 S.W.2d 486 (Tex. App.—San Antonio 1994, orig. proceeding), *leave denied*, 892 S.W.2d 860 (Tex. 1995) (abusive joinder case in which puffing hyperbole enticed thousands of plaintiffs to Texas' most remote venue). The proper way to remove them, however, was to grant a traditional *forum non conveniens* motion. *See Surgitek*, 975 S.W.2d at 40 n.7.

76. *See id.* at 43, (Duncan, J., dissenting). The majority's conclusion that the required trial in Bexar County as to two of the plaintiffs was some evidence that Bexar County would be a fair and convenient forum for the defendants under § 15.003(a)(4) as to the

Finally, in *In re Smith Barney, Inc.*, the Texas Supreme Court announced that "[t]he doctrine of *forum non conveniens* applies even when a trial court's jurisdiction is clear."[77] Thus, according to the court, a foreign corporation's statutory power to sue in Texas does not afford it an absolute right to sue non-residents in Texas courts.[78] *Smith Barney* overrules the decision almost sixty years ago in *H. Rouw Co. v. Railway Express Agency*,[79] which had been the subject of some earlier criticism.[80]

V. PARTIES

The Texas Rules of Civil Procedure permit a trial court to certify a class action if the proposed representative parties establish all four prerequisites of Rule 42(a)[81] and at least one of the prerequisites of Rule 42(b).[82] In *Remington Arms Co. v. Luna*,[83] the trial court certified a class action under Rule 42(b)(4),[84] which requires the plaintiffs to show that common questions of law or fact predominate and that a class action is the superior method of resolving the controversy.[85] The court of appeals reversed, holding that the class action was inferior and unmanageable when compared to traditional litigation.[86] In reaching this conclusion, the appellate court agreed with the defendant that the class litigation would leave multiple individual issues unresolved, overburden the county of suit, and operate to coerce settlement.[87] Commenting upon the absence of other litigation about the precise product defect alleged in the suit, the court also found no evidence as to the "maturity" of the claim or the interest of potential class members in pursuing the claim.[88] Indeed, the record suggested a lack of interest beyond the four named plaintiffs and "even some indifference among them."[89] Under these circumstances, the

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other plaintiffs, 975 S.W.2d at 41, seems at odds with the statute's mandate that a plaintiff establish the joinder requirements independent of any other plaintiff.

77. 975 S.W.2d 593, 596 (Tex. 1998).

78. *See id.* at 597-598.

79. 154 S.W.2d 143 (Tex. Civ. App.—El Paso 1941, writ ref'd), *overruled by Smith Barney*, 975 S.W.2d at 598.

80. *See* '21' Int'l Holdings, Inc. v. Westinghouse Elec. Corp., 856 S.W.2d 479, 485-86 (Tex. App.—San Antonio 1993, no writ) (Peeples, J., concurring) (describing *H. Rouw* decision as poorly reasoned).

81. *See* TEX. R. CIV. P. 42(a) (setting forth requirements of numerosity, commonality, typicality, and adequacy of representation).

82. *See* TEX. R. CIV. P. 42(b); Forsyth v. Lake LBJ Inv. Corp., 903 S.W.2d 146, 149-50 (Tex. App.—Austin 1995, writ dism'd w.o.j.) (discussed in A. Erin Dwyer, et al, *Texas Civil Procedure Annual Survey of Texas Law*, 49 SMU L. Rev. 1371, 1378 (1996)).

83. 966 S.W.2d 641 (Tex. App.—San Antonio 1998, pet. denied).

84. *See* TEX. R. CIV. P. 42(b)(4).

85. TEX. R. CIV. P. 42(b)(4) lists several factors relevant to assessing the superiority of a class action, including the interest of class members in individually controlling separate litigation, the difficulties likely to be encountered in management of the class action, and whether its desirable to concentrate litigation of the claims in the particular forum.

86. *See Luna*, 966 S.W.2d at 644.

87. *See id.* at 643.

88. *See id.* at 644. The court also found no evidence in the record demonstrating litigation expenses, judicial resources, or manageability. *See id.*

89. *Id.*

court said "the trial [judge's] analysis [was] based on speculation and, as such, [constituted] an abuse of discretion."[90]

Two other class action cases involved issues relating to the Texas Deceptive Trade Practices Act (DTPA).[91] In *America Online, Inc. v. Williams*,[92] for example, the court held that the trial court abused its discretion by certifying a class action during the mandatory DTPA abatement period.[93] The trial court apparently agreed with America Online (AOL) that abatement was appropriate because the plaintiffs had failed to provide the requisite notice. Nevertheless, it proceeded with the certification hearing over AOL's objection on the basis that an abatement to permit pre-certification notice "made no sense."[94] Once the class was certified, the trial court ordered abatement until sixty days after notice on behalf of the entire class was given. In contrast, the appellate court held that the abatement was automatic and mandatory under the clear language of the statute.[95] Therefore, the trial court erred when it conducted the certification hearing because "[a]n abatement is a present suspension of all proceedings in the suit."[96]

Less clear to the court was what type of notice should be given in class actions.[97] The representative plaintiffs argued that no notice would be meaningful until the class was certified. The court rejected this argument, concluding instead that "[t]he DTPA notice in class actions should contain the specific allegations and demand by the named plaintiffs[,][together with a] demand that the defendant settle with others similarly situated."[98] Among other things, the court observed that, until a class was certified, the action should be treated as if it were brought by the plaintiffs suing on their own behalf.[99] Specifically, individual notice of the representatives' claims, said the court, would also further the important legislative goal of encouraging settlements.[100]

The defendant in *Methodist Hosps. of Dallas v. Tall*[101] also complained about a trial court's refusal to abate the class certification hearing, but with much less success. Plaintiffs filed both their petition and their later motion for class certification during the sixty day period of abatement. The court's order scheduling the class certification hearing was also signed during the abatement period. But the hearing itself occurred

90. *Id.*
91. *See* TEX. BUS. & COM. CODE §§ 17.41 *et seq.* (Vernon 1986 & Supp. 1999).
92. 958 S.W.2d 268 (Tex. App.—Houston [14th Dist.] 1997, no pet.).
93. *Id.* at 272; *see* TEX. BUS. & COM. CODE ANN. § 17.505(d) (Vernon Supp. 1999).
94. *Williams*, 958 S.W.2d at 273.
95. *See id.*
96. *Id.* at 272 (quoting Permanente Med. Ass'n of Tex. v. Johnson, 917 S.W.2d 515, 517 (Tex. App.—Waco 1996, orig. proceeding) (granting mandamus when trial court only partially abated proceedings)).
97. *See Williams*, 958 S.W.2d at 273.
98. *Id.* at 276.
99. *See id.* at 273; *see also* Palais Royal, Inc. v. Partida, 916 S.W.2d 650, 653 (Tex. App.—Corpus Christi 1996, orig. proceeding).
100. *See Williams*, 958 S.W.2d at 275-76.
101. 972 S.W.2d 894 (Tex. App.—Corpus Christi 1998, no pet. h.).

shortly after the abatement expired, so the court of appeals held that the order certifying the class did not violate any abatement.[102] Still, the appellate court reversed the order of class certification holding that the plaintiffs failed to establish numerosity.[103] The court refused to consider affidavits submitted by the plaintiffs in response to defendant's motion for reconsideration because they were not before the trial court at the time it ordered certification.[104] The court was also unwilling to rely on "bare assertions" in the petition that the defendant hospital routinely destroyed X-rays of its patients because these unsubstantiated allegations were not a matter of common knowledge.[105]

Questions about interlocutory appeals from class certification orders continue to bombard the courts. Section 51.014 of the Texas Civil Practice and Remedies Code, which authorizes the taking of interlocutory appeals in limited instances, allows a party to 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."[106] According to the Texas Supreme Court in *Stary v. DeBord*, that grant of appellate jurisdiction does not extend to interlocutory orders striking shareholder derivative claims.[107] Rule 42 also makes clear that the pendency of an appeal from an order certifying a class action suspends the effect of the trial court's order.[108] Therefore, the court in *Central Power & Light Co. v. San Juan*[109] held that the trial court's order authorizing plaintiff to send notices to potential class members was suspended once the defendant perfected its interlocutory appeal.[110] *O'Reilly v. Brodie* holds that non-class members have no standing to appeal a judgment approving the settlement of a class action.[111] Although the court considered the question a case of first impression in Texas,[112] it looked for guidance to federal law[113] and a recent decision of a sister court of appeals.[114] Finally, in

102. *See id.* at 897.
103. *See id.* at 899.
104. *See id.* at 898.
105. *See id.* at 899. In another case decided during the survey period, the same court acknowledged the principle that class certification may be determined on the basis of pleadings, but that the "certification determination usually should be predicated on more information than the petition itself" affords. Rio Grande Valley Gas Co. v. City of Pharr, 962 S.W.2d 631, 640 (Tex. App.—Corpus Christi 1997, pet. dism'd. w.o.j.).
106. Tex. Civ. Prac. & Rem. Code Ann. § 51.014(3)(a) (Vernon Supp. 1999).
107. 967 S.W. 2d 352, 353 (Tex. 1998) (per curiam).
108. See Tex. R. Civ. P. 42(a).
109. 962 S.W.2d 601 (Tex. App.—Corpus Christi 1997, pet. dism'd. w.o.j.).
110. *See id.* at 602. Because notices had already been sent pursuant to the trial court's order, the plaintiff was ordered to send a written notice of retraction to every recipient of the earlier class notice. *See id.*
111. 975 S.W.2d 57, 60 (Tex. App.—San Antonio 1998, pet. denied).
112. *See id.* at 59.
113. *See id.* at 59-60; Gould v. Alleco, Inc., 883 F.2d 281, 284 (4th Cir.), *cert. denied*, 493 U.S. 1058, 110 S.Ct. 870, 107 L.Ed.2d 953 (1989) (only named class members have standing to object to a settlement); *In re* Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297, 342-43 (N.D. Ga. 1993) (non-class members lacked standing to object to settlement).
114. *See O'Reilly*, 975 S.W.2d at 59; San Juan 1990-A, L.P. v. Meridian Oil Inc., 951 S.W.2d 159 (Tex. App.—Houston [14th Dist.] 1997, pet. denied).

Daughety v. National Ass'n of Homebuilders, the court of appeals found no fault with a trial court for failing to certify a class action on some basis other than what plaintiffs had requested.[115] Although the plaintiffs went to the class certification hearing on one basis, a nationwide class as to seven causes of action, they appealed the trial court's ruling on another basis, a different nationwide class based on one cause of action.[116] The court of appeals refused to countenance plaintiffs' change of heart, holding that a trial court's failure to grant a class action proponent less than he specifically requested does not constitute an abuse of discretion.[117]

VI. PLEADINGS

Rule 166a expressly permits the party opposing a motion for summary judgment to file an amended pleading after the summary judgment hearing with leave of court.[118] It is also well-established that a trial court does not abuse its discretion by refusing to consider amended pleadings filed after the hearing without leave.[119] Sometimes, however, a trial court's order granting leave to file an amended pleading in the summary judgment context is still not enough. The court in *Automaker, Inc. v. C.C.R.T. Co., Ltd.*[120] held that a trial judge cannot grant a motion to amend the pleadings once it has already rendered a summary judgment, even if the order granting leave is signed while the court still possesses plenary power.[121] The court remarked that "[p]ublic policy concerns favoring the finality of judgments counsel against allowing a party to set aside a judgment covertly, *e.g.*, by a post-judgment motion requesting permission to file amended pleadings."[122] If the losing party seeks to set aside or modify the summary judgment, it should do so openly by filing a motion for new trial or to modify the judgment.[123]

In *Friesenhahn v. Ryan*,[124] the supreme court reiterated that a court may not grant a "no cause of action" summary judgment without giving a party an adequate opportunity to amend.[125] Based on this rule, the court reversed a summary judgment entered by the trial judge after she had earlier sustained special exceptions to the causes of action brought by the plaintiffs in their representative capacities.[126] The trial court's ruling on the special exceptions put the plaintiffs on notice of the pleading defect,

115. 970 S.W.2d 178, 182 (Tex. App.—Dallas 1998, no pet. h.).
116. *See id.* at 181.
117. *See id.* at 182.
118. *See* TEX. R. CIV. P. 166a(c).
119. *See, e.g.*, Leinen v. Buffington's Bayou City Serv. Co., 824 S.W.2d 682, 685 (Tex. App.—Houston [14th Dist.] 1992, no writ); Hill v. Milani, 678 S.W.2d 203, 205 (Tex. App.—Austin 1984), *aff'd*, 686 S.W.2d 610 (Tex. 1985).
120. 976 S.W.2d 744 (Tex. App.—Houston [1st Dist.] 1998, no pet. h.).
121. *See id.* at 746.
122. *Id.*
123. *See id.*
124. 960 S.W.2d 656 (Tex. 1998).
125. *See id.* at 659 (citing Pietila v. Crites, 851 S.W.2d 185, 186 n.2 (Tex. 1993)).
126. *See Ryan*, 960 S.W.2d at 659.

but it did not permit them to amend their pleadings until after the summary judgment hearing. As a result, the supreme court determined that the trial judge had not afforded plaintiffs an opportunity to cure the pleading defects before she granted judgment.[127] The court also overturned the summary judgment entered against plaintiffs in their individual capacities on similar grounds.[128] Because the trial court had denied special exceptions addressed to the individual claims, plaintiffs were never on notice that these pleadings were deficient before the summary judgment was entered.[129]

VII. DISCOVERY

During the Survey period, the Texas Supreme Court adopted substantial revisions to the Texas Rules of Civil Procedure governing discovery. These new rules went into effect January 1, 1999. The major changes effected by these revisions are discussed below, as are significant cases decided during the Survey period that are of continuing relevance.

A. PROCEDURES

1. Rule Changes

The new discovery rules aim to streamline discovery procedures and to reduce the time and expense attendant to prior discovery practices. Toward this end, all cases must now be governed by a discovery control plan.[130] Generally speaking, Level One discovery control plans govern suits where the plaintiff seeks only monetary relief of less than $50,000.[131] All other suits are subject to Level Two discovery control plans, unless the court enters a tailored Level Three plan.[132] Under both Level One and Level Two, parties are limited to twenty-five interrogatories.[133] In addition the total number of hours of oral depositions (examination and cross-examination) is limited to six hours per party in a Level One case[134] and fifty hours per side in a Level Two case.[135]

The revised rules also add a new form of permissible discovery to state court practice—requests for disclosure.[136] Requests for disclosure allow a party, through a simple, one-sentence request, to obtain the basic information required in most lawsuits (*e.g.*, persons with knowledge of relevant facts, testifying experts, claimed damages, legal and factual

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127. *See id.*
128. *See id.*
129. *See id.*
130. *See* TEX. R. CIV. P. 190.1.
131. *See* TEX. R. CIV. P. 190.2(a).
132. *See* TEX. R. CIV. P. 190.3(a); 190.4(a).
133. *See* TEX. R. CIV. P. 190.2(c)(3); 190.3(b)(3).
134. *See* TEX. R. CIV. P. 190.2(c)(2). (The parties can, by agreement, expand this limit to ten hours.)
135. TEX. R. CIV. P. 190.3(b)(2). ("Side" refers to parties that are generally aligned. *Id.* If one side designates more than two experts, the other side is entitled to an additional six hours of deposition time for each additional expert.)
136. *See* TEX. R. CIV. P. 192.1(a).

contentions).[137] The responding party is not permitted to object or assert work product in response to a request for disclosure.[138] A party's response regarding its contentions or claimed damages is not admissible and may not be used for impeachment, however, if it has been amended or supplemented.[139]

Practitioners must also contend with new rules regarding the proper manner for responding to discovery. For example, parties no longer must verify interrogatory answers regarding persons with knowledge of relevant facts, trial witnesses, or legal contentions.[140] In addition, the rules now explicitly require a good faith basis for objections to written discovery,[141] as well as a provision that an objection may be waived if it "is obscured by numerous unfounded objections."[142] On the other hand, Rule 193.2(d) tries to eliminate prophylactic objections by allowing responses to be amended to state an objection that was inapplicable, or unknown after reasonable inquiry, when the original response was made.[143] New Rule 193 also revamps the method for asserting and preserving a claim of privilege, which is discussed *infra*. Finally, under Rule 193.7, documents produced by a party are automatically authenticated for use against that party unless, within ten days after the party has actual notice that a document will be used, an objection to its authenticity is made.[144]

Perhaps the most controversial of the amendments to the discovery rules are those affecting depositions. Examination and cross-examination of a witness in a deposition is now limited to six hours per side.[145] Private conferences between a witness and her attorney during the taking of the deposition are improper except for the purpose of determining the applicability of a privilege.[146] If lawyers or witnesses do not comply with this admonition, or are uncooperative, discourteous, or dilatory, the court may allow the jury to see or hear what transpired at a deposition that may reflect upon the credibility of the witness.[147]

In a similar vein, counsel are now required to limit their objections to deposition questions to "Objection, leading" and "Objection, form" and their objections to testimony to "Objection, nonresponsive."[148] Significantly, objections stated other than in the prescribed manner are

137. *See* TEX. R. CIV. P. 194.1; 194.2.
138. *See* TEX. R. CIV. P. 194.5.
139. *See* TEX. R. CIV. P. 194.6. This same rule prevails for amended or supplemental interrogatory answers addressing these subjects. *See* TEX. R. CIV. P. 197.3.
140. *See* TEX. R. CIV. P. 197.2(d)(2). The identification of expert witnesses, which has traditionally been obtained through interrogatories, can now only be obtained through a request for disclosure. *See* TEX. R. CIV. P. 195.1.
141. *See* TEX. R. CIV. P. 193.2(c).
142. *See* TEX. R. CIV. P. 193.2(e).
143. *See* TEX. R. CIV. P. 193.2(d).
144. *See* TEX. R. CIV. P. 193.7.
145. *See* TEX. R. CIV. P. 199.5(c).
146. *See* TEX. R. CIV. P. 199.5(d).
147. *See id.*
148. TEX. R. CIV. P. 199.5(e).

waived.[149] An attorney for a witness may, however, instruct the witness not to answer a question if necessary to protect a privilege, comply with a court order or the discovery rules, or protect a witness from an abusive question or one for which an answer would be misleading.[150]

2. Cases

Although trial courts have broad discretion over the scope and manner of conducting discovery, *In re Colonial Pipeline Co.*[151] reemphasizes that such discretion is not unbounded. In that case, brought by over 3,000 plaintiffs, the trial court prohibited any discovery from all but the ten plaintiffs whose claims had been selected to be resolved first.[152] While encouraging a trial court's innovation in managing mass tort cases, the supreme court held that blocking even the most basic discovery from the vast majority of claimants was an abuse of discretion.[153] The court also resolved two other procedural questions. First, it held that the trial court had no authority to order the defendants to create an inventory of all of the documents they had produced in other, related litigation.[154] Second, the court held that a party should ordinarily be allowed sufficient time to review the opposing party's written discovery responses prior to taking such party's deposition.[155] Thus, the trial court in *Colonial Pipeline* abused its discretion when, for no legitimate reason, it allowed the plaintiffs in the initial trial group to provide their written discovery responses at the time of their depositions.[156]

The scope of a discovery master's authority was at issue in *In re Sheets*.[157] The parties in that case consented to a master hearing discovery disputes, and a referral order was entered.[158] At one party's urging, the trial court entered a second order expanding the master's authority to all pretrial matters except summary judgment motions.[159] Finding that the other party had not consented to this expansion of authority, and that there was no evidence of the exceptional circumstances that would justify the use of a master in the absence of consent, the court of appeals held that the trial court abused its discretion in entering the second order.[160]

In recent years the Texas courts have grown protective of high-ranking corporate officials from whom "apex" depositions are sought. This trend continued during the Survey period. For example, the court in *In re El*

149. *See id.*
150. *See* Tex. R. Civ. P. 199.5(f).
151. 968 S.W.2d 938 (Tex. 1998).
152. *See id.* at 940.
153. *See id.* at 942.
154. *See id.*
155. *See id.* at 943.
156. *See id.*
157. 971 S.W.2d 745 (Tex. App.—Dallas 1998, orig. proceeding).
158. *See id.* at 746.
159. *See id.*
160. *See id.* at 747-48. *See also* Ex parte DeLeon, 972 S.W.2d 23, 25 (Tex. 1998) (master was without authority to enforce directive to witness with power of contempt).

Paso Healthcare System[161] issued a writ of mandamus to block an "apex" deposition despite the fact that the officer in question was president only of a division subsidiary and had, in any event, left the corporation since the time the deposition was originally requested.[162] *In re Daisy Manufacturing Co.*[163] involved the requested deposition of the defendant's chief executive officer. Although the executive had appeared on a television news program to speak to the safety of the defendant's products, the court of appeals overturned the trial court's decision to allow his deposition, holding that "[m]erely espous[ing] a generalized opinion concerning the safety of one of his company's products [did] not imbue that official with unique or superior knowledge of the product".[164]

B. PRIVILEGE

1. *Rule Changes*

The 1999 amendments worked several significant changes to Texas law of privilege. First, the rules now define work product for the first time[165] and provide that it is to be asserted as a privilege.[166] Specifically, work product is defined to include (1) materials prepared and mental impressions developed in anticipation of litigation or for trial by a party, its attorney, agents, or insurers,[167] and (2) party communications that were previously protected by former Rule 166b(3)(d).[168] The new rule distinguishes between "core" work product, which reflects the attorney's mental processes and is not discoverable, from other work product, which is discoverable upon a showing of substantial need and inability to obtain the substantial equivalent without undue hardship.[169] Finally, the rule provides that specified information that might have previously been claimed to be work product, including the identity of trial witnesses, is not protected.[170]

The procedure for invoking privilege has been substantially changed by new Rule 193. A party is no longer required to object on privilege grounds.[171] Instead, at the time a party makes an original or amended response to written discovery, it can assert a privilege by stating that information or materials have been withheld and identifying the specific requests to which the privilege assertion relates and the privilege(s) asserted.[172] The requesting party can then ask for identification of the in-

161. 969 S.W.2d 68 (Tex. App.—El Paso 1998, orig. proceeding).
162. *See id.* at 73-75.
163. 976 S.W.2d 327 (Tex. App.—Corpus Christi 1998, orig. proceeding).
164. *Id.* at 329.
165. *See* TEX. R. CIV. P. 192.5(a).
166. *See* TEX. R. CIV. P. 192.5(d).
167. *See* TEX. R. CIV. P. 192.5(a)(1).
168. *See* TEX. R. CIV. P. 192.5(a)(2).
169. *See* TEX. R. CIV. P. 192.5(b).
170. *See* TEX. R. CIV. P. 192.5(c). The new rules also eliminate the former exemption for witness statements. TEX. R. CIV. P. 192.3(h).
171. *See* TEX. R. CIV. P. 193.2(f).
172. *See* TEX. R. CIV. P. 193.3(a).

formation withheld, and the responding party must then produce a privilege log.[173] Significantly, this two-step procedure need not be followed in order to preserve a claim of attorney-client communication or work product created in connection with the pending litigation.[174] Moreover, the entire procedure is triggered only by the actual withholding of privileged information, and a party need not assert privilege just to protect against a waiver with respect to information or documents that are subsequently uncovered.[175]

A party need not request a hearing on its assertion of privilege in order to preserve it.[176] As under prior practice, however, if a hearing is requested, the party asserting the privilege has the burden of proving its applicability.[177] Moreover, if a party withholds materials or information based on a claim of privilege, it may not use that material or information at any hearing or trial unless it timely supplements.[178]

2. *Cases*

In re Anderson presented the rare case in which a claim of privilege successfully precluded a party from obtaining information that the rules explicitly make discoverable.[179] The plaintiff sought the identity of persons with knowledge of relevant facts, including those who had made similar complaints against the defendant-doctor.[180] The court held, however, that this information was not discoverable because the physician-patient privilege protected not only communications, but also the identity of patients.[181] Moreover, the court held that the privilege belonged to the patients and, therefore, was not waived by the doctor's failure to properly and timely object.[182]

C. SUPPLEMENTATION

The amended rules modify and clarify the body of case law developed over the last fifteen years in the area of supplementation of discovery responses. As a starting point, the rules now expressly impose on litigants a general duty to amend or supplement responses to written discovery that were incomplete or incorrect when made or that, while complete and correct when made, are no longer complete and correct.[183] This obligation is absolute in the case of requests for the identification of persons with knowledge of relevant facts, trial witnesses, and expert witnesses.[184]

173. *See* TEX. R. CIV. P. 193.3(b).
174. *See* TEX. R. CIV. P. 193.3(c).
175. *See* TEX. R. CIV. P. 193 cmt. 3.
176. *See* TEX. R. CIV. P. 193.4(b).
177. *See* TEX. R. CIV. P. 193.4(a).
178. *See* TEX. R. CIV. P. 193.4(c).
179. 973 S.W.2d 410 (Tex. App.—Eastland 1998, orig. proceeding).
180. *See id.* at 411.
181. *See id.* at 411-12.
182. *See id.* at 412.
183. *See* TEX. R. CIV. P. 193.5(a).
184. *See* TEX. R. CIV. P. 193.5(a)(1).

It is qualified as to all other information, however, such that an amended or supplemental response is necessary "unless the additional or corrective information has been made known to the other parties in writing, on the record at a deposition, or through other discovery responses."[185] Thus, the new rule looks to whether the substance of the changed or additional information has been adequately conveyed. Thus, the prior case law that refused to allow informal supplementation is effectively overruled.

Rule 193.5 requires an amended or supplemental response to be made "reasonably promptly" after a party discovers the need therefor.[186] Rather than setting an absolute deadline of thirty days before trial for supplementation, the new rule establishes a presumption that an amended or supplemental response served less than thirty days before trial was not made reasonably promptly.[187]

Amended and supplemental responses to written discovery requests must be in the same form as the original responses.[188] Moreover, if an original interrogatory answer was required to be verified, then any amended or supplemental answer must likewise be verified.[189] Of course, as discussed *supra*, interrogatory answers disclosing persons with knowledge of relevant facts, trial witnesses, and legal contentions no longer need to be verified, and expert witness disclosure is no longer even a permissible topic for interrogatories. Since these items make up a substantial percentage of the information that typically needs to be updated, the requirement that supplemental answers be verified likely will not prove to be onerous. Moreover, the failure to verify an amended or supplemental response where required does not render it untimely, unless the defect is pointed out and the responding party refuses to correct it.[190]

Rule 193.6 continues the general rule that a party may not introduce into evidence material or information that it has not timely disclosed, or offer the testimony of a witness (other than a named party) who was not timely identified, in an original, amended or supplemental discovery response.[191] Unlike old Rule 215(5), however, the new rule gives trial judges far more flexibility in deciding whether to impose this exclusionary sanction. In this connection, undisclosed information or witnesses can still be offered at trial if the court finds that "good cause" exists for the failure to timely make, amend, or supplement the response.[192] Under the new rule, moreover, a party may offer evidence or call witnesses who were not timely disclosed if the court finds that the other parties will not be unfairly surprised or prejudiced.[193] This is a new provision that breaks

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185. TEX. R. CIV. P. 193.5(a)(2).
186. TEX. R. CIV. P. 193.5(b).
187. *See id.*
188. *See* TEX. R. CIV. P. 193.5(b).
189. *See id.*
190. *See* TEX. R. CIV. P. 193.5(b).
191. *See* TEX. R. CIV. P. 193.6(a).
192. *See* TEX. R. CIV. P. 193.6(a)(1).
193. *See* TEX. R. CIV. P. 193.6(a)(2).

with prior Texas Supreme Court authority holding that lack of surprise or prejudice did not establish good cause.[194]

D. Sanctions

The supreme court addressed the propriety of a trial court's discovery sanction in *In re Ford Motor Co.*[195] The court of appeals had already struck down the news-making $10 million sanction that had been levied against Ford by the trial court in the underlying action.[196] On further mandamus review, the supreme court found that the defendant had not engaged in any sanctionable conduct at all.[197] Nevertheless, the court denied mandamus relief with respect to the order excluding certain evidence and requiring Ford to pay $25,000 in attorneys' fees incurred in the trial court, holding that Ford had an adequate remedy on appeal.[198] The high court found, however, that the trial court's award of additional attorneys' fees if Ford sought mandamus relief, regardless of whether it was successful, could not be remedied on appeal.[199] A penalty of this type risked such a "chilling effect" on a party's prospective exercise of its legal right that the court concluded it should be immediately remedied.[200]

Two cases decided during the Survey period permitted the imposition of so-called "death penalty" sanctions despite the trial court's failure to first impose less severe sanctions. *In re Zenergy, Inc.* involved what the court of appeals described as "an extensive course of flagrant discovery abuse."[201] In response to the relators' argument that the trial judge abused his discretion in striking their pleadings because he did not first test the effectiveness of lesser sanctions, the court of appeals noted that the sanctions proceedings were conducted over a period of almost a full year, and the relators continued their obstructive efforts throughout that time.[202] In addition, the trial judge was aware of similar sanctions that had been rendered against one of the relators, which the others relators also had knowledge of, which had not deterred their misconduct in this case.[203] On these somewhat novel bases, the court held that the trial judge could have properly concluded that lesser sanctions would not have

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194. *See, e.g.*, Morrow v. H.E.B., Inc., 714 S.W.2d 297, 298 (Tex. 1986).

195. 41 Tex. Sup. Ct. J. 1283 (July 14, 1998).

196. Ford Motor Co. v. Tyson, 943 S.W.2d 527, 529 (Tex. App.—Dallas 1997, orig. proceeding) (*discussed in* A. Erin Dwyer, et al. *Texas Civil Procedure Annual Survey of Texas Law*, 51 SMU L. Rev. 1383, 1394-95 [hereinafter 1998 Annual Survey]).

197. *See In Re* Ford Motor Co., 41 Tex. Sup. Ct. J. at 1287.

198. *See id.* at 1288.

199. *See id.* at 1289.

200. *See id.* The dissent argued that the majority's opinion was simply a further erosion of the rule announced in Walker v. Packer, 827 S.W.2d 833 (Tex. 1992), particularly since the amount of fees assessed in this case ($25,000) assuredly had no "chilling effect" on Ford's willingness to pursue mandamus relief. *See In re* Ford Motor Co., 41 Tex. Sup. Ct. J. at 1289-90 (Enoch, J., dissenting).

201. 968 S.W.2d 1(Tex. App.—Corpus Christi 1997, orig. proceeding).

202. *See id.*

203. *See id.*

induced compliance.[204]

The court in *Daniel v. Kelley Oil Corp.* appears to have relied on the severity of the alleged misconduct - fabrication of a tape recording - in holding that the trial court was not obliged to first impose lesser sanctions.[205] What is even more striking about the case, however, is that the issue of whether the tape recording was, in fact, fabricated was hotly disputed by both the fact and expert witnesses.[206] Over a sharp dissent,[207] a narrow majority of the *en banc* court held that the trial court was authorized to make a factual finding of fabrication of evidence,[208] and that the appellate court could not say, based on the record, that this finding was an abuse of discretion.[209]

VIII. DISMISSAL

The supreme court in *Newco Drilling Co. v. Weyand*[210] held that where the trial court enters a partial summary judgment and then dismisses the case for want of prosecution, those issues disposed of by summary judgment are deemed dismissed with prejudice, unless the rulings are later vacated by the trial court.[211] In so holding, the court reasoned that a plaintiff who simply allows its case to be dismissed for want of prosecution should not stand in a better position than a plaintiff who voluntarily nonsuits an action when partial summary judgment has been entered against it.[212]

Dismissals for want of prosecution were the subject of several opinions during the Survey period. Perhaps most extreme was the San Antonio appellate court's affirmation of a dismissal for want of prosecution in *Villarreal v. San Antonio Truck & Equipment Inc.*[213] In that case, the trial court issued a notice setting the case for dismissal and requiring the plaintiff to make an announcement by a specified date.[214] The day preceding the scheduled dismissal hearing, plaintiff's counsel filed a motion to set the case for a jury trial (but did not obtain a trial setting), and then complied with the trial court's notice by attending the dismissal hearing as scheduled. Nonetheless, the trial court dismissed the case for want of prosecution.[215] A divided appellate court affirmed, holding that the trial court did not abuse its discretion in exercising its inherent authority to

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204. *See id.*
205. 981 S.W.2d 230, 235 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).
206. *See id.* at 233.
207. *See id.* at 236-237 (Mirabel, J., dissenting).
208. *See id.* at 232.
209. *See id.* at 232.
210. 960 S.W.2d 654 (Tex. 1998).
211. *Id.* at 655.
212. *See id.* at 656 (citing Hyundai Motor Co. v. Alvarado, 892 S.W.2d 853, 855 (Tex. 1995)).
213. 974 S.W.2d 275 (Tex. App.—San Antonio 1998, pet. granted). *Editor's note*: The Texas Supreme Court has recently issued an opnion reversing the court of appeals' decision. *See* Villareal v. San Antonio Truck & Equipment, Inc., 994 S.W.2d 628 (Tex. 1999).
214. *See id.* at 276.
215. *See id.*

dismiss the case for want of prosecution for lack of apparent activity.[216]

In a case of apparent first impression, the court in *Dickerson v. Sonat Exploration Co.*,[217] held that where the district court initiates the dismissal of a cause of action for want of prosecution, and the dismissal notices are later returned to the court as undeliverable, it is incumbent upon the clerk of the court to reexamine the file for evidence of a more recent address.[218] Thus, the court granted the appellant's writ of error, holding that the failure to do so resulted in a deprivation of the appellant's constitutional right to notice.[219]

The Austin appellate court affirmed a trial court's dismissal for failure to prosecute in *Burton v. Hoffman*,[220] where the plaintiff's lead counsel had two cases set for trial the same day in different counties. Following the Austin trial court's denial of a motion for continuance the previous Friday, the plaintiff's counsel sent an associate to the trial court who appeared but refused to prosecute the case, claiming he was unprepared to proceed. In affirming the dismissal, the appellate court distinguished this case from a dismissal for want of prosecution under Rule 165a(1) because the associate refused to proceed with the lawsuit when it was called to trial.[221]

IX. SUMMARY JUDGMENT

Texas Rule of Civil Procedure 166a[222] permits a party to use unfiled discovery products as summary judgment evidence if the party timely files an appropriate notice containing specific references to the discovery it intends to use.[223] Appeals courts have split on the question whether a notice sufficiently complies with the rule's requirements when it cites only page numbers on the unfiled discovery, being referenced.[224] The court in *Salmon v. Miller*[225] could have avoided the question altogether inasmuch as the 166a(d) notice there made no specific reference to the page numbers or other location of the evidence relied upon, much less point out its exact language.[226] The court chose sides anyway, agreeing in dicta with those courts that have interpreted the "specific reference" language of the rule as requiring a party to "show the court language from an unfiled

216. *See id.* at 278.
217. 975 S.W.2d 339 (Tex. App.—Tyler 1998, pet. denied).
218. *Id.* at 342.
219. *See id.*
220. 959 S.W.2d 351 (Tex. App.—Austin 1998, no pet.).
221. *See id.* at 353-54 (noting that this holding was further justified based on counsel's knowledge of the conflicting trial settings and the admission of counsel at the prior continuance hearing that the wrong defendant had been sued); *See also* TEX. R. CIV. P. 165a(1).
222. TEX. R. CIV. P. 166a(d).
223. *See id.* (requiring movants to file the notice at least twenty-one days before the hearing and requiring respondents to file notice at least seven days before the hearing).
224. *Compare* Grainger v. Western Cas. Life Ins. Co., 930 S.W.2d 609, 613-614 (Tex. App.—Houston [1st Dist.] 1996, writ denied) *with* E.B. Smith Co. v. U.S. Fidelity & Guar. Co., 850 S.W.2d 621, 624 (Tex. App.—Corpus Christi 1993, writ denied).
225. 958 S.W.2d 424 (Tex. App.—Texarkana 1997, pet. denied).
226. *Id.* at 428.

deposition or other unfiled discovery document before the court rules on the summary judgment motion."[227] In a note to the prudent practitioner, the court also cited the supreme court's decision that the Rule 166a(d) statement of intent is satisfied when the discovery is actually attached to the motion.[228]

Farroux v. Denny's Restaurants, Inc.[229] also concerned the sufficiency of summary judgment evidence. The defendant in *Farroux* supported its motion for summary judgment with admissions made by the plaintiff in his deposition testimony. In response to the motion, the plaintiff submitted an affidavit in which he contradicted his earlier deposition testimony. The court of appeals held the affidavit was insufficient to create a fact issue because it did not explain the reason for the plaintiff's change in testimony.[230] Without an explanation for this change, the court assumed the sole purpose of the affidavit was to avoid judgment and, therefore, it presented only a "sham" issue of fact.[231] As support for these conclusions, the court cited supporting federal law[232] but ignored countervailing Texas authority.[233]

The Texas Supreme Court also addressed summary judgment procedure during the Survey period. In *CU Lloyd's of Texas v. Feldman*,[234] the high court announced that a court of appeals may not "render judgment on a party's liability for breach of contract without evidence of damages and when no declaratory judgment has been sought."[235] In order for an appellate court to reverse and render judgment when it is considering cross motions for summary judgment, both parties must ordinarily have sought final judgment relief in their motions.[236]

Finally, in *Holmes v. Ottawa Truck, Inc.*,[237] the court held that a summary judgment response served by mail need not be served ten days before the hearing.[238] Although the court acknowledged that Rule 21a[239]

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227. *Id.* (quoting E.B. Smith Co. v. U.S. Fidelity & Guar. Co., 850 S.W.2d 621 (Tex.App.—Corpus Christi 1993, writ denied)).

228. *See Salmon*, 958 S.W.2d at 427 (citing McConathy v. McConathy, 869 S.W.2d 341, 342 n.2 (Tex. 1994)).

229. 962 S.W.2d 108 (Tex. App.—Houston [1st Dist.] 1997, no pet.).

230. *See id.* at 111. (offering examples of possible explanations, including confusion during the deposition, or that additional, relevant materials were discovered after the deposition. *Id.* at 111, n.1).

231. *See id.* at 111.

232. *See id.*, (citing Bank of Illinois v. Allied Signal Safety Restraint Sys., 75 F.3d 1162, 1168-69 (7th Cir. 1996)).

233. *See* Randall v. Dallas Power & Light Co., 752 S.W.2d 4, 5 (Tex. 1988); *see also* Gaines v. Hamman, 163 Tex. 618, 626, 358 S.W.2d 557, 562 (1962).

234. 977 S.W.2d 568 (Tex. 1998).

235. *Id.* at 568.

236. *See id.* at 569.

237. 960 S.W.2d 866 (Tex. App.—El Paso 1997, pet. denied).

238. *Id.* at 869.

239. TEX. R. CIV. P. 21a (stating that service by mail shall be complete upon depositing the document in the mail, but extends the minimum notice by three days whenever a party has the right or is required to do some act within a prescribed period after the service of such notice by mail).

and Rule 166a(c)[240] were "seriously lacking in harmony," it declined to create different deadlines for the filing and for the service of a summary judgment response sent by mail.[241]

X. JURY PRACTICE

The Texas Supreme Court considered the constitutionality of Texas Disciplinary Rule of Professional Conduct 3.06(d),[242] which regulates lawyers' post-verdict communications with jurors in *Commission for Lawyer Discipline v. Benton*.[243] In *Benton*, an attorney representing an unsuccessful plaintiff in a personal injury case wrote each of the jurors four months after their service rearguing the merits of the case, and, in essence, admonishing the jurors for rendering an unjust judgment. The attorney admitted the conduct at issue during disciplinary proceedings, but argued that Rule 3.06(d)[244] was unconstitutional in that it violated his free speech rights, was over-broad and vague, and denied him equal protection under the law. The court concluded that, upon balancing an attorneys' role in the judicial process against his right to free speech, Rule 3.06(d) did not violate the attorney's free speech rights because his letter "created a substantial likelihood of material prejudice to the administration of justice."[245] The court also noted that the attorney's letter had the possible effect of negatively influencing jurors in future deliberations and discouraging future jury service, contrary to the intent of Rule 3.06(d).[246] The court further held that Rule 3.06(d)'s prohibition against comments that harass or embarrass a former juror was neither unconstitutionally over-broad nor a violation of equal protection guarantees under state or federal law.[247]

The court did, however, express more significant concerns about whether Rule 3.06(d) is unconstitutionally vague as it relates to the manner in which the term "calculated" modifies the verbs "harass," "embarrass" and "influence."[248] In that regard, the court interpreted the word "calculated" in Rule 3.06(d) as an objective one, meaning that a lawyer shall not make a communication that "an ordinary reasonable lawyer would foresee is likely to harass, embarrass, or influence an ordinary ju-

240. TEX. R. CIV. P. 166a(c) (providing that the adverse party may file and serve opposing affidavits or other written response to a motion for summary judgment not later than seven days prior to the day of hearing except on leave of court).

241. *See Holmes*, 960 S.W.2d at 869.

242. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.06(d).

243. 980 S.W.2d 425 (Tex. 1998).

244. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.06(d) provides:

> After discharge of the jury from further consideration of a matter with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.

Id.

245. *Benton*, 980 S.W. 2d at 432.

246. *See id.* at 432-433.

247. *See id.* at 436.

248. *See id.* at 438.

ror".[249] The court concluded that the verb "harass" was not unconstitutionally vague when it is defined as "(1) a course of conduct, (2) directed at a specific person, (3) causing or tending to cause substantial distress, and (4) having no legitimate purpose".[250] The court did find that the word "embarrass," as used in Rule 3.06(d), was unconstitutionally vague.[251] At trial, Benton admitted violating the "influence" clause of Rule 3.06(d). However, because the trial court based its punishment of the attorney on both the "harass" and the unconstitutionally vague "embarrass" clauses of the rule, the court remanded the case to the trial court for a new hearing on the punishment phase of the disciplinary proceeding.[252]

The Beaumont appellate court issued two opinions interpreting Rule 327's[253] mandate regarding juror misconduct during the Survey period. First, in *Doucet v. Owens-Corning Fiberglass Corp.*,[254] an asbestos case, the plaintiffs appealed a take-nothing judgment, claiming that juror misconduct deprived them of their right to a fair and impartial jury. Specifically, a juror incorrectly completed a juror information card by denying having been a party to civil litigation, and then failed to respond to a voir dire inquiry regarding prior asbestos-related claims. The appellate court concluded that the juror at issue had, in fact, failed to disclose his prior suit against an asbestos manufacturer.[255] Nonetheless the court concluded that although the plaintiffs had proved the existence of material juror misconduct, they were not entitled to a new trial because they could not prove that the juror's conduct likely resulted in harm or injury, as it appeared that the juror at issue would likely have been more biased in favor of the plaintiffs than the defendant.[256]

Second, and more importantly, the same panel in *Jackson v. Golden Eagle Archery, Inc.*,[257] determined that Texas Rules of Civil Procedure 327[258] was unconstitutional in precluding a litigant from proving certain types of juror misconduct, thereby depriving the party of its constitutional right to a fair and impartial jury.[259] Both procedural Rule 327(b) and evidentiary Rule 606(b)[260] preclude a juror from testifying about "any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions. . . ."[261] In fact, a juror may only testify if an "outside influence

249. *Id.* at 439.
250. *Id.* at 439-40.
251. *See id.* at 440.
252. *See id.* at 443.
253. TEX. R. CIV. P. 327.
254. 966 S.W.2d 161 (Tex. App.—Beaumont 1998, pet. denied).
255. *See id.* at 163.
256. *See id.* at 164-65.
257. 974 S.W.2d 952 (Tex. App.—Beaumont 1998, pet. granted).
258. TEX. R. CIV. P. 327.
259. *Jackson*, 974 S.W.2d at 958.
260. TEX. R. CIV. P. 327(b); TEX. R. EVID. 606(b).
261. TEX. R. CIV. P. 327(b).

was improperly brought to bear upon any juror."[262]

In this case, one of the jurors failed to disclose her bias against the plaintiff's lawsuit and then disobeyed the trial court's instructions against premature deliberations, all of which rendered her an incompetent juror. However, the evidence presented to support this conclusion all consisted of affidavits and testimony regarding statements of the errant juror made following jury selection and during deliberations, which are inadmissible under Texas Rule of Civil Procedure 327(b) and Texas Rule of Evidence 606(b). Therefore, the court concluded that Texas Rule of Civil Procedure 327(b) was unconstitutional because it prevents inquiry into the type of misconduct that occurred here.[263]

XI. JURY CHARGE

Several Texas courts addressed the issue of spoliation of evidence during the Survey period. Most significantly, in *Trevino v. Ortega*,[264] the Texas Supreme Court declined to recognize an independent cause of action for either intentional or negligent spoliation of evidence.[265] The court instead held that such claims of spoliation are best addressed within the context of the lawsuit affected by the alleged spoliation through the procedural tools available to the trial court, such as jury instructions and sanctions.[266] In reaching this conclusion, the court reasoned that the alleged damages resulting from evidence spoliation are speculative because evidence destruction "tips the balance in a lawsuit,"[267] but "does not create damages amenable to monetary compensation."[268] The court further held that the recognition of an independent tort for evidence spoliation could permit a party subsequently and collaterally to attack an adverse judgment, thus undermining the strong policy considerations in favor of finality of judgments.[269]

Consistent with the holding in *Trevino*, two appellate courts reviewed the propriety of jury instructions regarding spoliation of evidence, each finding error in the jury instruction sufficient to warrant a reversal and remand back to the trial court. In *Tucker v. Terminix International Co.*,[270] a homeowner sued Terminix under a variety of legal theories for the company's application of pesticides to the plaintiff's home. In connection with the dispute, the homeowner's counsel ordered soil samples to be gathered, tested, and then retained by a third party for purposes of the lawsuit. However, after conducting the tests and reducing its findings to writing, the testing company destroyed the soil samples before the de-

262. *Id.*
263. *See Jackson*, 974 S.W.2d at 958.
264. 969 S.W.2d 950 (Tex. 1998).
265. *Id.* at 953; *See also* Malone v. Foster, 977 S.W.2d 562 (Tex. 1998)
266. *See Trevino*, 969 S.W.2d at 953.
267. *Id.*
268. *Id.*
269. *See id.*
270. 975 S.W.2d 797 (Tex. App.—Corpus Christi 1998, pet. denied).

fendant could examine them. Although the trial court concluded that the destruction of the soil samples was not the plaintiff's fault, it nonetheless instructed the jury that it should infer that the destroyed evidence was unfavorable to the plaintiff.[271] Finding such an instruction to be harmful error, the appellate court reversed, concluding that no basis in law existed for a spoliation instruction when it was undisputed that the plaintiff did not destroy the evidence and had attempted to ensure the soil samples' preservation.[272]

In *Wal-Mart Stores, Inc. v. Middleton*,[273] the appellate court held that the trial court erred in submitting a spoliation instruction adverse to Wal-Mart regarding the loss of photographs that depicted the condition of the floor at a Wal-Mart location taken by a Wal-Mart employee immediately after the plaintiff slipped and fell.[274] In reaching this conclusion, the court found no evidence that Wal-Mart intentionally destroyed the photographs.[275] In the absence of such intent, the court concluded that a spoliation instruction was improper, further noting that an instruction would be warranted only if the party controlling the evidence neither produced nor testified about it.[276] Here, Wal-Mart affirmatively offered testimony from an employee about the condition of the floor at the time of the fall. Therefore, the spoliation jury instruction was held to be improper and reversible error.[277]

The Texas Supreme Court issued two other noteworthy opinions on the subject of jury charges during the Survey period. First, in *Dallas Market Center Development Co. v. Liedeker*,[278] a personal injury case, the court held that Rule 276's[279] mandate for an endorsement of "Refused" on all refused requests is not the exclusive means for preserving error on proposed but refused issues or instructions when it is clear from the record, as was the case here, that the objecting party timely submitted a proper issue or instruction, and the court refused that request.[280] Second, in *H.E.B. Grocery Co., v. Bilotto*,[281] the court held that a jury question, which predicated a damage question on a finding of fifty percent or less comparative negligence, did not constitute a violation of Rule 277[282] as an improper comment on the weight of the evidence, because Rule 277 permits damage questions to be conditioned upon a finding of liability.[283]

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271. *See id.* at 798.
272. *See id.* at 800.
273. 982 S.W.2d 468 (Tex. App.—San Antonio 1998, pet. denied).
274. *Id.* at 471.
275. *See id.* at 470.
276. *See id.*
277. *See id* at 471-72.
278. 958 S.W.2d 382 (Tex. 1997).
279. TEX. R. CIV. P. 276.
280. *Liedeker*, 958 S.W.2d at 386.
281. 985 S.W.2d 22 (Tex. 1998).
282. TEX. R. CIV. P. 277.
283. *Bilotto*, 985 S.W.2d at 25.

XII. JUDGMENTS

The Texas Supreme Court in *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*,[284] modified the proper method for calculating common-law prejudgment interest under *Cavnar v. Quality Control Parking, Inc.*,[285] holding that "prejudgment interest begins to accrue on the earlier of (1) 180 days after the date a defendant receives written notice of a claim or (2) the date suit is filed."[286] The court held that prejudgment interest accrues at the rate for post-judgment interest and must be computed as simple interest.[287] The court noted that prejudgment interest is a means of compensating a party for lost use of money damages due between the accrual of the claim and the date of judgment and reiterated that prejudgment interest is provided for either by common law or an enabling statute.[288] The court concluded that the calculation of prejudgment interest in this case was governed by common law, but reasoned that the common law rule announced in *Cavnar*[289] should be conformed to mirror the legislative scheme provided under the Texas Finance Code.[290]

Cavnar originally permitted recovery of prejudgment interest in a personal injury, wrongful death, and survival actions. Interest under *Cavnar* was to be compounded daily (based upon a 365-day year) beginning six months after the occurrence of the incident giving rise to the claim.[291] Two years after *Cavnar*, the Texas legislature instituted "tort reform" legislation, which largely codified *Cavnar*; under the statute, however, prejudgment interest would accrue on the earlier of (1) 180 days after the defendant received notice of the claim, or (2) the day suit was filed.[292] Because the claims asserted in *Johnson* did not fall within coverage of this new statute, the case would still be governed by common law.[293] In an effort to conform the common law approach to calculating prejudgment interest to the statute, the court declared that prejudgment interest claims governed by common law should also "accrue on the earlier of (1) 180 days after the date a defendant receives written notice of a claim, or (2) the date suit is filed, and that interest shall accrue at the rate for the post judgment interest, computed as simple interest."[294] Finally, the court made its holding applicable "to all cases in which judgment is rendered on or after December 11, 1997, and to all other cases currently in the

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284. 962 S.W.2d 507 (Tex. 1998).
285. 696 S.W.2d 549 (Tex. 1985).
286. *Johnson*, 962 S.W.2d at 531 (citing TEX. REV. CIV. STAT. art. 5069-1.05, § 6(a) (Vernon 1997)).
287. *See id.* at 532 (citing TEX. REV. CIV. STAT. art. 5069-1.05, § 6(g)).
288. *See id.* at 528 (citing Cavnar, 696 S.W. 2d at 552).
289. 696 S.W.2d at 552.
290. *See Johnson,* 962 S.W.2d at 528.
291. *See id.* at 528-29.
292. TEX. R. CIV. STAT. art. 5.06-1.05 § 6a.
293. *See Johnson*, 962 S.W. 2d at 528 n.9.
294. *Id.* at 531-32.

judicial process in which the issue has been preserved."[295]

The Texas Supreme Court, in *St. Paul Surplus Lines Ins. Co. v. Dal-Worth Tank Co.*[296] further held that, in light of its holding in *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*,[297] the trial court erred in trebling both prejudgment interest and actual damages, and that prejudgment interest in this case "should be awarded on actual damages at the rate of ten percent per annum, computed as simple interest, and should not be trebled."[298]

In *Mobil Oil Corp. v. Ellender*,[299] a case involving a wrongful death action arising out of alleged gross negligence, the Texas Supreme Court addressed the issue of settlement credits available to a non-settling defendant under Chapter 33 of the Texas Civil Practice and Remedies Code.[300] Under Texas Civivl Practice and Remedies Code section 33.012(b), where a claimant settles with one or more persons, the court must reduce the damages by a credit equal either to a dollar amount or a percentage based upon the amount of damages.[301] However, as the statute is silent on which party bears the burden to prove the settlement amount, the court deferred to the common law and concluded that the defendant seeking the credit bears the burden of proof.[302]

Here, because the settlement amount was placed in evidence by (1) an announcement of plaintiff's counsel in open court during trial, and (2) Mobil's written opposition to plaintiffs' motion for judgment, the court held that the defendant met its burden of proof.[303] More importantly, however, the court then addressed the allocation of the settlement credit between actual and punitive damages, where the settlement agreement is silent. On this issue the court held that for a settling party to avoid paying the non-settling party a credit equal to the entire amount, the settling party must submit a settlement agreement that allocates between actual and punitive damages before judgment is rendered.[304] The court then remanded the case with additional instructions that its holding "applies to all cases in which a valid settlement agreement is reached on or after May 8, 1998, and to all other cases currently in the judicial process in which the issue has been preserved."[305] For pre-May 8, 1998, cases, the court held that plaintiffs may prove through extrinsic evidence whether an allocation between actual and punitive damages was made.[306]

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295. *Id.* at 533.
296. 974 S.W.2d 51 (Tex. 1998).
297. *See* 962 S.W.2d 507; *see also supra* note 284 and accompanying text.
298. *St. Paul Surplus*, 974 S.W.2d at 54-55.
299. 968 S.W.2d 917 (Tex. 1998).
300. *See* TEX. CIV. PRAC. & REM. CODE § 33.012(b) (Vernon 1998).
301. *See id.*
302. *See Ellender*, 968 S.W.2d at 927.
303. *See id.*
304. *See id.* at 928.
305. *Id.* at 929.
306. *See id.*

J.D. Abrams, Inc. v. McIver,[307] discussed the appropriate settlement credits in cases in which a party brings individual claims as well as claims for injury to another person. In such cases, Texas Civil Practice and Remedies Code section 33.012(b), defines the "claimant" as both the plaintiff filing the claim and the injured party.[308] Accordingly, the credits for "all settlements" entered into by "the claimant" in that case included both settlements received by the plaintiff individually and as the guardian for the estate of her daughter.[309] While the court recognized this construction of the statute might impute a settlement credit to a party where the settlement funds actually went to another person, the court rationalized that a settling party might obtain the benefit of being able to settle a case with the other defendants without the delay or risk of a hearing at which the non-settling defendant could contest the allocation of settlement dollars.[310]

Finally, the court in *Fuller-Austin Insulation Co. v. Bilder*,[311] addressed the situation in which multiple defendants make conflicting settlement credit elections, but only one of the defendants remains a party to the action when the case is finally submitted to the jury. Although Texas Civil Practice and Remedies Code section 33.014 states how the issue is to be resolved where the election between or among the defendants is in conflict[312], the court held that where only one party remains an actual defendant when the case is submitted to the trier of fact, that party's election of settlement credits governs, even if it conflicts with the settlement credit elected by other defendants that have since been dismissed.[313]

In *Brinkman v. Brinkman*,[314] the court determined the effect of a prior divorce proceeding upon a subsequent civil suit between the same parties. In this case, the court affirmed summary judgment for the ex-husband based upon res judicata as a result of the prior divorce proceeding.[315] In so holding, the court reasoned that a party could not threaten certain claims to gain an advantage in a divorce proceeding and then, having known of those claims during the divorce, fail to assert them, only to bring a subsequent civil action seeking recovery for those same alleged wrongs.[316]

The subject of default judgment was addressed in two noteworthy cases during the Survey period. First, in *Okpala v. Coleman*,[317] a case involving a landlord tenant dispute, the court held that it was reversible error to

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307. 966 S.W.2d 87 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).
308. TEX. CIV. & REM. CODE ANN. § 33.011(1), *see J.D. Abrams*, 966 S.W. 2d at 96.
309. *See id.*
310. *See id.* 966 S.W.2d at 97.
311. 960 S.W.2d 914 (Tex. App.—Beaumont 1998, pet. granted) *case abated* Oct. 15, 1998.
312. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.014 (Vernon 1997).
313. *See Bilder*, 960 S.W.2d at 922-23.
314. 966 S.W.2d 780 (Tex. App.—San Antonio 1998, pet. denied).
315. *See id.* at 783.
316. *See id.*
317. 964 S.W.2d 698 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

enter a default judgment against a party who had not submitted a formal "answer" per Texas Rules of Civil Procedure 751 and 753, but had submitted discovery requests and responses.[318] The appellate court reached its conclusion by examining the discovery on file and holding that it sufficiently placed at issue the claims made the basis of the suit.[319] In *Southern Gulf Operators, Inc. v. Meehan*,[320] the court granted a writ of error and reversed a default judgment, finding that the record on appeal failed to conclusively show that, when the default was taken against it, the Secretary of State had forwarded a copy of the process served upon it by registered mail to the defendant.[321] Proof of service that was placed in the record after the entry of the default judgment did not suffice to comply with rigid service of process requirements.[322]

XIII. MOTION FOR NEW TRIAL

Orders are better than letters is the lesson to be learned from *In re Fuentes*.[323] In this mandamus proceeding, the trial court first denied the plaintiff's motion for new trial but then sent a letter notifying the parties of its decision to grant a new trial. In this letter, the court requested plaintiff's counsel to submit an appropriate order memorializing the court's ruling; however, for reasons not explained in the opinion, plaintiff's counsel failed to submit such an order within seventy-five days after the entry of judgment. When the trial court subsequently entered an order granting a new trial eighty days after the entry of judgment, the defendants sought mandamus relief, contending that the trial court's plenary jurisdiction had expired. The appellate court agreed that the trial court lacked jurisdiction, finding no indication that the trial judge's letter was ever a part of the court's record.[324] Moreover, even if the letter had been part of the record, it would not have sufficed because it did not grant or order a new trial.[325] Instead the letter clearly contemplated a future action by requesting that a formal order be submitted.[326]

In another mandamus proceeding, *In re R.W. Jones, Jr.*,[327] the appellate court held that the parties filing a motion for new trial following the entry of a default judgment against them failed to comply with the proof requirements in Rule 306(a)(4).[328] Although generally a motion for new

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318. *See id.* at 700.
319. *See id.*
320. 969 S.W.2d 586 (Tex. App.—Beaumont 1998, no pet. h.).
321. *Id.* at 588.
322. *See id.*
323. 960 S.W.2d 261 (Tex. App.—Corpus Christi 1997, orig. proceeding).
324. *See id.* at 264-65.
325. *See id.* at 265.
326. *See id.*
327. 974 S.W.2d 766 (Tex. App.—San Antonio 1998, orig. proceeding).
328. *See id.* at 768-69 (holding that the defendant's motion failed to establish whether they received notice between the twentieth day after judgment was signed and the day they claimed actual knowledge of the judgment being signed); *see generally,* TEX. R. CIV. P. 306(a)(4).

trial must be filed within thirty days after the entry of the judgment,[329] a trial court's plenary power to vacate, modify, or correct a final judgment may be extended under Rule 306a(4) where the party (or its attorney) adversely affected by the judgment did not receive notice thereof.[330] However, the party seeking to invoke Rule 306a(4) must file a sworn motion stating the date the party or its counsel received notice or acquired actual knowledge of the judgment and proving that such notice or knowledge was not gained within twenty days of the entry of judgment, which defendants failed to do.[331] The court rejected defendants' argument that proof of this fact could simply be inferred from the record and therefore concluded that the defendants failed to invoke the trial court's jurisdiction to extend the appellate timetable.[332]

Finally, in *Lowe v. Lowe*,[333] a post-answer default judgment case involving a divorce/child custody dispute, the court analyzed the appellant's motion for a new trial, under the well-established three-part test announced in *Craddock v. Sunshine Bus Lines, Inc.*,[334] and concluded that the trial court erred in denying such a motion.[335] Specifically, the court held that the appellant's failure to appear at trial was a result of misinformation from her attorney advising that she need not attend trial because the attorney had allegedly obtained a continuance.[336] Unfortunately, this was not the case. The court further found that the appellant had established a meritorious defense and that a new trial would not cause delay or injure the appellee because the motion for new trial was filed within days after the entry of a default judgment and the appellant had offered to pay court costs.[337] However, the court went on to voice its concern about applying the *Craddock* test to suits affecting the parent/child relationship, noting that *Craddock* was designed to be applied in traditional civil and commercial litigation that typically only involves the interests of two competing parties.[338] By contrast, suits affecting the parent/child relationship, by definition, include the rights of a third party, the child, which the *Craddock* test was not designed to consider.[339] Accordingly, the court urged the Texas Supreme Court to fashion a more appropriate rule for considering motions for new trial in suits involving parent/child

329. *See* TEX. R. CIV. P. 329b(d).
330. *See* TEX. R. CIV. P. 306a(4).
331. *See* TEX. R. CIV. P. 306a(5); *see also In re* Jones, 974 S.W.2d at 769.
332. *See In re* Jones, 974 S.W.2d at 769; *see also* TEX. R. CIV. P. 306a(5); *see also* TEX. R. APP. P. 4.2(a).
333. 971 S.W.2d 720 (Tex. App.—Houston [14th Dist.] 1998, pet. denied).
334. 133 S.W.2d 124 (Tex. 1939).
335. *Lowe*, 971 S.W.2d at 727.
336. *See id.* at 724 (Appellant's counsel had filed a motion for continuance based upon a conflicting case. However, the trial court overruled the motion for continuance and ordered appellant's counsel to appear for jury selection later that morning. When appellant's counsel failed to appear for trial, the trial court entered a default against appellant in which child custody and possession of the family home and other property were awarded to the father and appellant was further ordered to pay child support.)
337. *See id.* at 725.
338. *See id.*
339. *See id.* at 727.

relations.[340]

XIV. SEALING OF COURT RECORDS

The supreme court provided guidance on a number of procedural issues that have arisen under Texas Rule of Civil Procedure 76a[341] in *General Tire, Inc. v. Kepple*.[342] First, the court held that a protective order that restricts, but does not prohibit completely, the dissemination of documents produced in discovery is subject to the provisions of Rule 76a.[343] A trial court must first determine, however, whether the particular unfiled discovery at issue is a "court record" subject to the rule.[344] In making this determination, the trial judge does not have to follow the full range of Rule 76a procedures.[345] Specifically, although the trial court should allow interested parties to be heard on the issue, if no party or intervenor argues that the documents are court records, the court does not need to hold a hearing or make any findings on that issue.[346] If the argument is raised, the court must make this threshold determination, but public notice and a Rule 76a hearing are still not required unless the court finds that the discovery is, indeed, a court record.[347] Moreover, until the court determines that the documents are court records that cannot be sealed, it should not allow intervenors to examine the documents.[348]

Finally, the high court also resolved a split among the courts of appeals on the question of the appropriate standard of review of a trial court's decision under Rule 76a.[349] Specifically, the court opted for an abuse of discretion standard of review, rather than a sufficiency of the evidence standard.[350] The court reasoned that, in determining whether to seal court records, a trial judge "is not called upon to make a factual finding per se, but rather is required to balance the public's interest in open court proceedings against an individual litigant's personal or proprietary interest in privacy."[351] Because this type of balancing requires the exercise of judicial discretion, appellate courts should review the determination on

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340. *See id.*
341. *See generally*, TEX. R. CIV. P. 76a (regulating the sealing of court records).
342. 970 S.W.2d 520 (Tex. 1998).
343. *See* TEX. R. CIV. P. 76a; *see also Kepple*, 970 S.W.2d at 524 (noting that TEX. R. CIV. P. 166b(5)(c) (*repealed* Jan. 1, 1999) provided that any protective order entered thereunder conform with TEX. R. CIV. P. 76a with respect to all "court records" subject to the latter rule).
344. *See Kepple*, 970 S.W.2d at 524.
345. *See id.*
346. *See id.* at 525.
347. *See id.*
348. *See id.* at 524-525. The supreme court also rejected the plaintiff's argument that the defendant "filed" the documents in question when it produced them to the court for an *in camera* inspection, thereby making them court records regardless of whether they would otherwise meet the test for when unfiled discovery becomes a court record. *See id.* at 526.
349. *See id.* at 525-26; *see generally* TEX. R. CIV. P. 76a.
350. *See id.* at 526.
351. *Id.*

that basis.[352]

XV. DISQUALIFICATION AND RECUSAL OF JUDGES

Section 74.053 of the Texas Government Code[353] permits a litigant to disqualify an assigned or visiting judge if he objects before the first hearing or trial over which the assigned judge is scheduled to preside.[354] The question presented in *In re Houston Lighting and Power Co.*[355] was whether an assigned judge abused his discretion by declining to disqualify himself in the face of a section 74.053 objection made after the case had been transferred to his court.

This unusual chain of events began when the original judge voluntarily recused herself from the case. Over the next few months, the presiding judge of the region assigned four different judges to the case in succession, but on each occasion one or another of the parties objected to the assignment. Although the section 74.053 objections automatically disqualified the first three assigned judges,[356] the presiding judge's fourth assignment coincided with the administrative judge's order transferring the case to the newly assigned judge's court.[357] Because that judge regarded the transfer as nullifying his simultaneous assignment to the case as a "visiting judge," he did not disqualify himself.[358]

The court of appeals conditionally granted a writ of mandamus in the case, holding that the objection to the assigned judge was effective even though the case was ultimately transferred to that judge's court.[359] The intermediate court thought that treating the transfer of the case as superseding the assignment would elevate form over substance and "circumvent the right to object to assignments of local elected judges."[360] The supreme court disagreed, observing that section 74.053 allows objections only to assignments made under Chapter 74.[361] The administrative judge's power to transfer the case in *Houston Lighting*, on the other hand, derived from state and local procedural rules.[362] The high court

352. *See id.*
353. TEX. GOV'T CODE ANN. § 74.053(c) (Vernon 1998).
354. *See id.*
355. 976 S.W.2d 671 (Tex. 1998) (orig. proceeding).
356. *See id.* at 671.
357. *See id.*
358. *See id.*
359. *See In re* City of Wharton, 966 S.W.2d 855, 858 (Tex. App.—Houston, orig. proceeding), *overruled sub nom., In re* Houston Lighting & Power Co., 976 S.W.2d 671 (Tex. 1998).
360. *Id.* at 858 n.10.
361. *See Houston Lighting*, 976 S.W.2d at 672. *See* TEX. GOV'T CODE § 74.053(a) (Vernon 1998) (providing for objection "[w]hen a judge is assigned under this Chapter").
362. *See Houston Lighting*, 976 S.W.2d at 672-73 n.9; (citing TEX. R. CIV. P. 330(e); Harris (Tex.) CIV. DIST. CT. LOC. R. 3.2.5 "Any case may be transferred from one court to another court by written order of the Administrative Judge of the Civil Trial Division. . .). Both the government code and the Texas Constitution likewise authorize district courts within the same county to transfer cases and exchange benches. TEX. CONST. art. V, § 11; TEX. GOV'T CODE ANN. § 24.303, § 74.093 (Vernon 1988).

also noted that "[t]he policy concerns[363] reflected in the section 74.053 right to object to assigned visiting judges are not an issue in transfers between district courts within the same county."[364]

Two cases during the Survey period involved a party's motion to recuse a trial judge who was concurrently represented by the adverse party's attorney. In *Lueg v. Lueg*,[365] the Corpus Christi Court of Appeals affirmed the denial of the motion to recuse, but primarily because of deficiencies in the record.[366] In this connection, the court acknowledged that an attorney-client relationship between the judge and counsel for a party could cause the judge's impartiality to reasonably be questioned, even though Rule 18b(2)[367] does not overtly address that type of relationship.[368] Therefore, the court concluded that the attorney-client relationship between the judge and opposing counsel provided a prima facie basis for recusal.[369] At the same time, however, the court observed that the nature of the relationship might be sufficiently attenuated that it would raise no questions about impartiality.[370] By way of example, the court pointed out that the attorney could be representing the judge only as the nominal party in a mandamus proceeding or as a member of a large class of plaintiffs in a class action.[371] Because the record of the recusal hearing was devoid of evidence as to the specific nature of the attorney's representation of the trial judge, the appellate court decided it had no basis for concluding that recusal was mandated.[372]

The Texas Supreme Court confronted the same issue in *In re Union Pacific Resources Co.*[373] In that case, unlike *Lueg*, the court of appeals conditionally granted a writ of mandamus compelling the recusal of a trial judge who was being represented by defendants' counsel.[374] Expressing no opinion on the merits of the recusal motion, the supreme court conditionally granted a writ of mandamus and directed the court of appeals to withdraw its order.[375] Citing Rule 18a,[376] the supreme court held that

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363. According to the court, "the Legislature created the § 74.053 right to address 'the perceived abuse of the assignment system' and to further a party's interest in having their case heard by a locally elected or retired judge that had 'met the test of time with the voters.'" *Houston Lighting*, 976 S.W.2d at 673.

364. *Id.*

365. 976 S.W.2d 308 (Tex. App.—Corpus Christi 1998, pet. denied).

366. *See id.* at 311.

367. TEX. R. CIV. P. 18b(2)(a) (providing that "[a] judge shall recuse himself in any proceeding in which his impartiality might reasonably be questioned").

368. *See Lueg*, 976 S.W.2d at 311.

369. *See id.*

370. *See id.*

371. *See id.*

372. *See id.*

373. 969 S.W.2d 427 (Tex. 1998).

374. *See* Monroe v. Blackmon, 946 S.W.2d 533, 538 (Tex. App.—Corpus Christi 1997, orig. proceeding), *overruled sub nom., In re* Union Pacific Resources Co., 969 S.W.2d 427 (Tex. 1998).

375. *See In re* Union Pacific, 969 S.W.2d at 429.

376. TEX. R. CIV. P. 18a(f) (providing that an order denying a motion to recuse or disqualify the trial judge is reviewable for abuse of discretion on appeal from the final judgment).

mandamus was inappropriate in these circumstances because the complaining party had an adequate remedy by appeal.[377] The court distinguished cases involving disqualification of a trial judge on constitutional grounds and those in which a party exercises a statutory strike.[378] In each of those situations, disqualification is mandatory and any orders or judgments entered by the disqualified judge are void and without effect.[379] In contrast, the erroneous denial of a Rule 18a recusal motion does not void or nullify the trial court's subsequent acts.[380] Although a judgment rendered in such circumstances may be reversed on appeal, it is not fundamental error and can be waived.[381]

XVI. MISCELLANEOUS

A. Consolidation

The Texas Supreme Court addressed the question of whether, and how many, mass tort cases may be consolidated for trial in *In re Ethyl Corp.*[382] and *In re Bristol-Myers Squibb Corp.*[383] The court noted that trial judges should proceed with "extreme caution" in consolidating claims before the particular type of mass tort litigation is "mature," *i.e.*, where there has been full discovery and multiple jury verdicts in cases of that type.[384] For those mass torts where consolidation may be appropriate, the court then articulated a number of factors, known as the Maryland factors,[385] which the trial court should analyze to determine the extent to which the factual, legal, and procedural aspects of the cases lend themselves to consolidation.[386]

B. Timeliness of Filings

Two cases from the Fort Worth court of appeals during the Survey period rejected lawyers' efforts to extend their time for filing papers. In *Boone v. St. Paul Fire & Marine Insurance Co.*,[387] the court interpreted a statutory provision virtually identical to Texas Rule of Civil Procedure 4,[388] which enlarges a party's time to take some action if the last day of the prescribed period falls on a Saturday, Sunday, or legal holiday.[389] Although the court was willing to assume that an all-day closing of the

377. *See In re* Union Pacific, 969 S.W.2d at 429.
378. *See id.* at 428; *see generally* Tex. Const. art. V, § 11; Tex. Gov't Code § 74.053(d) (Vernon 1998).
379. *See In re* Union Pacific, 969 S.W.2d at 428.
380. *See id.*
381. *See id.*
382. 975 S.W.2d 606 (Tex. 1998).
383. 975 S.W.2d 601 (Tex. 1998).
384. *See Bristol-Myers*, 975 S.W.2d at 603.
385. *See Ethyl Corp.*, 975 S.W.2d at 611 (noting that the factors were first articulated in an unreported federal district court opinion from Maryland).
386. *See id.*; *see also Bristol-Myers*, 975 S.W.2d at 603.
387. 968 S.W.2d 468 (Tex. App.—Fort Worth 1998, pet. denied).
388. Tex. R. Civ. P. 4.
389. *See id.*; *see also Boone*, 968 S.W.2d at 469.

courthouse for inclement weather would qualify as a legal holiday for purposes of Rule 4, it refused to hold that a two-hour delay in the opening of the courthouse qualified as such.[390] In *Commercial Services of Perry, Inc. v. Wooldridge*,[391] the appellant sought to avail itself of the provisions of Texas Rule of Civil Procedure 5[392] which allows for extensions of time where good cause is shown.[393] Relying on the supreme court's standard of good cause in the discovery supplementation area, rather than the standard applied to motions to withdraw deemed admissions, the court held that inadvertence of counsel did not constitute good cause within the meaning of Rule 5.[394]

C. Sanctions

In re Bennett[395] stands for the proposition that the "state courts retain jurisdiction after removal of a case to federal court to sanction lawyers for pre-removal conduct so long as the sanction does not operate upon the merits of the underlying action."[396] The supreme court reasoned that this result was required if the abusive conduct were to be punished, since the federal courts have no authority to impose sanctions for pre-removal conduct.[397] On the other hand, *Karagounis v. Property Co. of America*[398] serves as a reminder that Rule 13[399] governs only the signing and filing of frivolous pleadings; thus, sanctions can not be imposed where the plaintiff is accused not of initiating a frivolous action, but of continuing his suit after the defendant has provided evidence that allegedly rebuts his contentions.[400]

Rule 13 requires a trial court to state with particularity in a sanctions order the good cause for finding that the pleadings in question are groundless and brought in bad faith or for purposes of harassment.[401] The court in *Gorman v. Gorman*[402] noted that the intermediate appellate courts are divided on the issues of whether a lack of particularity in a sanctions order may constitute harmless error and whether findings of fact and conclusions of law may satisfy the particularity requirement.[403] The *Gorman* court followed what it described as the majority position in holding that a lack of particularity in the sanctions order can be harmless

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390. *See Boone*, 968 S.W.2d at 470.
391. 968 S.W.2d 560 (Tex. App.—Fort Worth 1998, no pet.h.).
392. Tex. R. Civ. P. 5.
393. *See id.*; *see also Wooldridge*, 968 S.W.2d at 563.
394. *See id.* (citing Alvarado v. Farah Mfg. Co., 830 S.W.2d 911, 915 (Tex. 1992)); *See also* Wal-Mart Stores, Inc. v. Deggs, 968 S.W.2d 354, 356-57 (Tex. 1998).
395. 960 S.W.2d 35 (Tex. 1997), *cert. denied* 119 S. Ct. 66 (1998).
396. *Id.* at 40.
397. *See id.* (citing Willy v. Coastal Corp., 915 F.2d 965, 968 n.8 (5th Cir. 1990), *aff'd*, 503 U.S. 131 (1992)).
398. 970 S.W.2d 761 (Tex. App.—Amarillo 1998, pet. denied).
399. Tex. R. Civ. P. 13.
400. *See Karagounis*, 970 S.W.2d at 765.
401. Tex. R. Civ. P. 13.
402. 966 S.W.2d 858 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).
403. *Id.* at 867 & n.4 (citing cases).

error where the trial court's findings and conclusions include the particulars of good cause.[404]

D. Contempt

The supreme court addressed the interplay between contempt and appellate proceedings in *In re Gabbai*[405] and *In re Long*.[406] In the former case, the trial court cited a party for violating both its own decree and an order of the court of appeals.[407] The supreme court noted that a court generally lacks authority to enforce another court's order of contempt.[408] And even if, under some circumstances, a trial court should be able to enforce appellate court orders following issuance of the mandate, a question the supreme court declined to decide, the court of appeals in *Gabbai* had already specified that the punishment for violation of its order would be dismissal of the appeal.[409] Under these facts, the trial court had no authority to further punish the party for violating the appellate order.[410] In *Long*, the trial court held the district clerk in contempt for violating an injunction order.[411] However, because the district clerk had appealed, and the injunction was superseded during the pendency of that appeal, the district clerk should not have been cited for contempt until all appeals were exhausted and a mandate to enforce judgment was issued.[412]

E. Arbitration and ADR

Reversing a decision discussed in the 1998 Annual Survey,[413] the supreme court held that "absent a contrary agreement, a party against whom a claim is asserted does not waive its right to arbitrate by failing to initiate arbitration of that claim."[414] The court noted that it would be anomalous to require the defending party, even if it has successfully urged a court to compel arbitration, to present its opponent's case and pay a filing fee based on the size of the opponent's claim.[415] The high court also held in *In re Louisiana Pacific Corp.*[416] that, in a case where each party was contractually entitled to select its own arbitrator, the trial court should have allowed one of the parties to select a substitute arbitrator after it had withdrawn its initial choice in response to the opposing

404. *Id.* at 867-68.
405. 968 S.W.2d 929 (Tex. 1998).
406. 984 S.W.2d 623 (Tex. 1999).
407. *See Gabbai*, 968 S.W.2d at 930.
408. *See id.* at 931.
409. *Id.*
410. *See id.*
411. *Long*, 42 Tex. Sup. Ct. J. at 315.
412. *See id.* at 317.
413. *See* Bruce Terminix Co. v. Carroll, 953 S.W.2d 537 (Tex. App.—Waco 1997) (discussed in 1998 Annual Survey at 1415), *mand. granted*, 41 Tex. Sup. Ct. J. 941, 1998 WL 288930 (June 5, 1998).
414. *In re* Bruce Terminix Co., 41 Tex. Sup. Ct. J. 941, 1998 WL 288930, at *3 (June 5, 1998).
415. *See id.*
416. 972 S.W.2d 63 (Tex. 1998).

party's objection.[417]

Two decisions during the Survey period reflect a split of authority on the question of whether a trial court is authorized to address issues of procedural prerequisites to arbitration, such as whether proper notice has been provided. The court in *L&L Kempwood Associates, L.P. v. Omega Builders, Inc.*[418] held that the notice of arbitration provision in the contract at issue constituted a condition precedent, which, if it was not met, negated the existence of any agreement to arbitrate.[419] Thus, the trial court had the authority to address the notice issue.[420] The court in *In re Gardner Zemke Co.*[421] reached the opposite conclusion, holding that a "trial court is not authorized to address questions of procedural arbitrarily such as the satisfaction of conditions precedent to a right of arbitration."[422] According to the *Gardner Zemke* court, once a party establishes that an agreement to arbitrate exists, these type of procedural questions should be left to the arbitrator.[423]

Finally, the court in *Texas Department of Transportation v. Pirtle*[424] held that the trial court did not abuse its discretion in assessing costs, including attorneys' and mediator's fees, against a party upon finding that it failed to mediate in good faith.[425] The court distinguished *Decker v. Lindsay*[426] because, unlike that case, the recalcitrant party in *Pirtle* did not file a written objection to the mediation order.[427]

417. *Id.* at 65.
418. 972 S.W.2d 819 (Tex. App.—Corpus Christi 1998, pet. filed).
419. *Id.* at 823.
420. *See id.* at 825.
421. 978 S.W.2d 624 (Tex. App.—El Paso, 1998, no pet.h.).
422. *Id.* at 627.
423. *Id.*
424. 977 S.W.2d 657 (Tex. App.—Fort Worth, 1998, pet. denied).
425. *Id.* at 658.
426. 824 S.W.2d 247, 248 (Tex. App.—Houston [1st Dist.] 1992, no writ).
427. *Pirtle*, 977 S.W.2d 658.