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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.

I. SUBJECT MATTER JURISDICTION

In *Quaestor Investments, Inc. v. State of Chiapas*,[1] the supreme court considered the issues that arise when a state court acquires jurisdiction over a case that has been remanded by a federal court. After a default judgment had been entered, defendant removed the case to federal court, but it was eventually remanded to state court. Defendant then filed a petition for writ of error in state court to set aside the default judgment. Plaintiff contended that the application for writ of error was untimely,

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1. 997 S.W.2d 226 (Tex. 1999).

and the resolution of this contention depended upon when the state court reacquired jurisdiction of the case after remand. The supreme court held that jurisdiction revests in the state court when the federal district court executes the remand order and mails a certified copy to the state court.[2] According to the court, "there is no requirement that the state court take any action (e.g., entering the order in the state court docket) to reassert jurisdiction."[3]

In *Trinity Universal Insurance Co. v. Sweatt*,[4] the court of appeals considered a trial court's jurisdiction over a declaratory judgment action. In this case, an insurer sued its insured seeking a declaratory judgment that the insured's claim was not a covered loss under the policy and that the policy was void because the insured had made material misrepresentations in procuring it. The insured counterclaimed for breach of contract and subsequently obtained an order from the trial court dismissing the insurer's claims for declaratory relief and attorneys' fees. The court of appeals, however, disagreed and held that insurer was entitled to a declaration of the rights and liabilities of the parties under the policy and to assert the claim for attorneys' fees under the declaratory judgment statute.[5] The appellate court distinguished other cases where courts considered claims for declaratory relief by a plaintiff who also had claims for remedies at law or in equity which were on file at the time they filed the declaratory claims. The court also observed that, while it is improper for a potential defendant to seek a declaratory judgment of non-liability in a tort action, this principle did not apply to the present case because it was a contract action. According to the court, construction and validity of contracts "are the most obvious and common uses of the declaratory judgment action."[6]

The ability of a state court to enjoin a related federal court proceeding was the subject of *Bodine v. Webb*.[7] After an insurance company encountered severe financial difficulties, a state district court appointed a receiver and rendered a permanent injunction barring others from bringing claims against the insurance company or the receiver outside of the receivership proceeding. Subsequently, appellants filed suit in federal district court, invoking jurisdiction under the Employment Retirement Income Security Act of 1974 ("ERISA"),[8] and claimed that the retirement benefit plan of the insurance company had been mismanaged by a number of parties, including the receiver. The receiver then sought and obtained an order enforcing the prior injunction which enjoined the appellants from pursuing their federal lawsuit.

For a number of reasons, the court of appeals held that the state court

2. *See id.* at 229.
3. *Id.* at 228.
4. 978 S.W.2d 267 (Tex. App.—Fort Worth 1998, no pet.).
5. *See id.* at 269.
6. *Id.* at 271.
7. 992 S.W.2d 672 (Tex. App.—Austin 1999, no pet.).
8. 29 U.S.C. §§ 1001-1461 (West 1985 & Supp. 1998).

did not have authority to enjoin the federal court proceeding.[9] First, while state courts may maintain and exercise their jurisdiction over in rem or quasi in rem proceedings to the exclusion of other courts, they cannot enjoin a federal in personam action.[10] The court of appeals determined that appellants' federal lawsuit was an in personam action because it was not directly against the receivership property, but was brought to secure a judgment against defendants that had mismanaged the retirement plan. Further, the relief sought in the federal court proceeding could well extend beyond any receivership property and could reach the individual defendants' assets, which further indicated that the federal lawsuit was in personam. Second, the court noted that to enjoin a federal suit, a state court must have jurisdiction, at least, concurrent with the federal court. Noting that most ERISA suits are within the exclusive jurisdiction of the federal court, the court of appeals observed that a state court's concurrent jurisdiction over ERISA claims by beneficiaries is limited to suits: (1) to recover benefits due under the terms of the plan; (2) to enforce rights under the plan; or (3) to clarify rights to future benefits.[11] Given that appellants' claims were for breach of fiduciary duty relating to the administration of an ERISA plan, the court held that such claims fell within the exclusive jurisdiction of the federal courts and, therefore, the state court could not enjoin appellants from proceeding in federal court.

Finally, in *Arteaga v. Jackson*,[12] the court of appeals considered the minimum amount-in-controversy that must exist in order to invoke the district court's jurisdiction. As an initial matter, the court held that, as a result of certain changes to Texas constitutional and statutory provisions, the district court's minimum amount-in-controversy jurisdiction was reduced from $500 to $200.01.[13] In this case, plaintiff alleged in his petition that he was damaged in the amount of $200.00 but, in his prayer for relief, he also sought recovery of $700 in treble damages. The court of appeals analyzed his petition and determined that he had no viable claim for treble damages, as his claim was essentially for breach of contract. Accordingly, the court concluded that the relief sought by the plaintiff was an amount below the jurisdictional minimum of the district court and, therefore, the case was properly dismissed for want of jurisdiction.[14]

II. SERVICE OF PROCESS

Rule 106 generally provides that process may be served upon a defendant either in person or by mail.[15] Upon a motion supported by affidavit, however, the trial court can authorize a substitute method of process.[16]

9. *See Bodine*, 992 S.W.2d at 678.
10. *See id.* at 676.
11. *See id.* at 677.
12. 994 S.W.2d 342 (Tex. App.—Texarkana 1999, pet. denied).
13. *See id.*
14. *See id.* at 343.
15. *See* TEX. R. CIV. P. 106(a).
16. *See* TEX. R. CIV. P. 106(b).

In *Stankiewicz v. Oca*,[17] the trial court authorized substitute service by leaving the citation at the defendant's residence with anyone over 16 years of age. Subsequent to this order, citation was served personally upon the defendant. On appeal from a default judgment, the defendant claimed that personal service was not valid because the trial court had authorized a substitute means of service. The court of appeals rejected this argument, noting that service in person is the preferred method. The court of appeals held that "unless the trial court's order authorizing substitute service expressly states that substitute service is the exclusive method, a preferred type of service [such as personal service] remains available."[18]

Two cases during the Survey period addressed issues related to service of process made through the Secretary of State. In *Commercial Union Assurance Co. v. Silva*,[19] plaintiffs served their petition by serving the Secretary of State and providing him with the address of the defendant insurer, which was referenced in the insurance policy in question. The court of appeals determined that the service was defective, because the defendant insurance company had previously notified the Insurance Commissioner of a new address for its agency, which was different than the one originally shown in the policy.[20] Even though the insureds were not notified of this change in address, the appellate court still held that the new address must be provided to the Secretary of State.

In *14850 Quorum Associates, Ltd. v. Moore Business Forms, Inc.*,[21] plaintiff served a defendant partnership through the Secretary of State. The court of appeals, however, concluded that a default judgment could not stand because the record failed to demonstrate that service through the Secretary of State was appropriate.[22] In this connection, the applicable statute provides that service on a Texas limited partnership through the Secretary of State is proper only when (i) such partnership fails to appoint or maintain a registered agent in Texas or the registered agent cannot be found with reasonable diligence at the registered office, and (ii) the general partner of the limited partnership cannot be found with reasonable diligence.[23] Here, plaintiff's petition alleged only that the defendant partnership was a Texas limited partnership doing business in Dallas County and could be served through the Secretary of State. The record, however, did not show that the partnership had failed to appoint or maintain a registered agent in Texas and that its general partner could not be found with reasonable diligence. Under those circumstances, the court held that the record did not contain facts demonstrating that the

17. 991 S.W.2d 308 (Tex. App.—Fort Worth 1999, no pet.).
18. *Id.* at 311.
19. 988 S.W.2d 798 (Tex. App.—San Antonio 1999, no pet.).
20. *See id.* at 802.
21. 7 S.W.3d 166 (Tex. App.—Dallas 1998, no pet.).
22. *See id.* at 169.
23. *See* TEX. R. CIV. STAT. ANN. art. 6132a-1 § 1.08(b) (Vernon Supp. 1998).

partnership was amenable to service through the Secretary of State.[24]

In *Barker CATV Construction, Inc. v. Ampro, Inc.*,[25] an en banc Houston Court of Appeals decided to whom citation must be directed. Rule 99[26] provides that citation shall "be directed to the defendant." On the other hand, Rule 15[27] provides that "unless otherwise expressly provided by law or these rules, every writ and process shall be directed to any sheriff or any constable within the State of Texas." The en banc court harmonized these two rules by holding that a citation may be directed to both the sheriff or constable, as the officer serving it, and the defendant as the person being served.[28] The court, however, indicated that a citation directed only to the sheriff or constable (and not to the defendant as well) would be defective. Although the en banc court determined that the citation was not defective since it was directed to both the officer serving it and the defendant, a panel of the court, which decided the remaining issues on appeal, concluded that the return of service did not support the default judgment.[29] In this connection, the return reflected that service was made upon the defendant corporation (Barker CATV Construction) by serving it on "James Barker." The panel concluded, however, that the return of service should have reflected that it was delivered to the defendant corporation "through its registered agent James M. Barker." In short, according to the court, "James Barker" on the original return did not establish that the person served was, in fact, the defendant's agent for service of process nor did it establish that the defendant corporation was served. Rather, the original return showed only that a person named "James Barker" was served with a petition in which he was not sued.

III. SPECIAL APPEARANCE

Two cases addressed an issue that often arises in the personal jurisdiction context, namely, whether a defendant waives its special appearance challenging jurisdiction by taking other, inconsistent action in the trial court. In *Transportes Aereos de Coahuila, S.A. v. Falcon*,[30] the trial court had entered a default judgment against an Mexican airline even though a special appearance had been filed prior to the entry of such judgment. After the Mexican airline requested a hearing on its special appearance and a hearing had been set, the parties filed an agreed motion for new trial related to the default judgment and the trial court subsequently entered an order setting it aside. Distinguishing an earlier supreme court

24. *14850 Quorum Assoc.*, 7 S.W.3d at 169.

25. 989 S.W.2d 789 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

26. TEX. R. CIV. P. 99.

27. TEX. R. CIV. P. 15.

28. *See Ampro*, 989 S.W.2d at 792.

29. *Id.* at 792-93; *see* Verlander Enterprises, Inc. v. Graham, 932 S.W.2d 259, 261 (Tex. App.—El Paso, no writ); Bavarian Autohaus, Inc. v. Holland, 570 S.W.2d 110, 113 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ).

30. 5 S.W.3d 712 (Tex. App.—San Antonio 1999, no pet. h.).

case,[31] which had found a waiver of the special appearance as a result of the filing of a motion for a new trial, the court of appeals in *Falcon* noted that in the present action, the agreed motion contained no statement announcing that the defendant was ready to try the case, and there was no evidence that a hearing was requested or held on the motion before the special appearance was heard.[32] There was likewise no evidence that the defendant had approved the order granting the new trial. Accordingly, the court held there was no waiver of the special appearance.[33]

In *GFTA v. Varme*,[34] the supreme court considered the issue of whether a defendant consented to personal jurisdiction by including in its special appearance a challenge to the method of serving citation. In this case, the defendant filed an instrument entitled "Verified Special Appearance and, Subject to Special Appearance, its Motion to Dismiss." In that pleading, defendant contested personal jurisdiction on the basis that it lacked minimum contacts with Texas and also claimed that it was not amenable to service because the method of service violated various constitutional, foreign law, and procedural provisions. The supreme court concluded that defendant had not waived its personal jurisdiction challenge by also attacking the method of service.[35] Although the court recognized that a mere challenge to the method of service alone fails as a special appearance and constitutes a general appearance, it held that a party does not waive its personal jurisdiction challenge by also contesting the method of service in its special appearance.[36]

IV. VENUE

In *In re Missouri Pacific Railroad Co.*,[37] the Texas Supreme Court outlined the criteria for determining where a corporation's principal place of business is located. In this Federal Employers Liability Act ("FELA") suit, plaintiff asserted that, under the relevant venue statute,[38] venue was proper because the defendant's principal office in Texas was located in the county where the suit was filed. Initially, the supreme court considered the issue of whether a corporation may have more than one principal office in Texas for venue purposes. The court observed that this issue was complicated due to the language in various provisions of the venue statute.[39] The FELA venue statute provided for suit "in the county where the defendant's principal place of office in this state is located." On the other hand, the general definition of "principal office" in

31. *See* Liberty Enters., Inc. v. Moore Transp. Co., 690 S.W.2d 570, 571 (Tex. 1985).
32. *Falcon*, 5 S.W.3d at 716-17.
33. *See id.*
34. 991 S.W.2d 785 (Tex. 1999).
35. *See id.* at 786.
36. *See id.* at 786-87.
37. 998 S.W.2d 212 (Tex. 1999).
38. TEX. CIV. PRAC. & REM. CODE § 15.618.
39. *See In re Missouri Pacific*, 998 S.W.2d at 216.

§ 15.001[40] defines principal office as "a principal office of the corporation . . . in the state in which the decision makers for the organization within this state conduct the daily affairs of the organization." The court concluded that in light of the latter definition, a corporation can have more than one principal office for venue purposes, but the court rejected the plaintiff's argument that a principal office can be any place where a company official makes decisions about the company's business.[41] In this connection, the court noted that such a broad definition would include agencies or representatives and, under the venue statute, the mere presence of an agency or representative does not establish a principal office.[42] Accordingly, the court concluded that "decision makers" who "conduct the daily affairs" are officials of a different order than agents or representatives.[43] The court also determined that an office clearly subordinate to and controlled by another Texas office could not be a principal office and that the "daily affairs" of a company cannot mean relatively common, low-level managerial decisions.[44] In short, the court decided that "principal office" means the location where there are "decision makers" who conduct the "daily affairs" of the company on a day-to-day basis, and their decisions must be of a higher level than typically made by an agent or representative.[45]

The court further held that to establish a prima facie case that a corporation has a principal office in the county of suit, a party must offer evidence of the corporate structure and the authority of the officers in the county of the suit as compared with the remainder of the state.[46] In this case, the evidence showed that the corporate employee in the county of suit was "not an executive officer" and had the least authority of any of the corporate decision makers located within the state.[47] In contrast, the evidence demonstrated that there were, at least, six executive officers located in a different county who conducted the company's railroad operations, oversaw legal affairs, and made higher-level decisions related to the operation of the company's railroads.[48] Under those circumstances, the court held that the corporation did not have a principal place of business in the county of suit and, therefore, venue was improper.[49]

Several cases wrestled with venue issues under § 15.003 of the venue statute, which governs suits in which multiple plaintiffs seek to maintain venue in a single county.[50] In general, this statute provides that, in a suit where more than one plaintiff is joined, each plaintiff must, indepen-

40. TEX. CIV. PRAC. & REM. CODE § 15.001(a).
41. *See In re Missouri Pacific*, 998 S.W.2d at 216.
42. *See id.*; *see also* TEX. CIV. PRAC. & REM. CODE § 15.001(a).
43. *Id.* at 217.
44. *In re Missouri Pacific*, 998 S.W.2d at 217.
45. *Id.* at 219.
46. *See id.* at 220.
47. *Id.*
48. *Id.* at 221.
49. *See id.*
50. TEX. CIV. PRAC. & REM. CODE § 15.003(a).

dently of any other plaintiff, establish proper venue.[51] A plaintiff who is unable to independently establish proper venue may not join in the suit unless certain requirements are met, including a showing that there is an essential need to have the plaintiff's claim tried in the county in which the suit is pending.[52] In *Surgitek Bristol-Myers Corp. v. Abel*,[53] the supreme court held, in addressing whether these requirements have been met, the trial court has discretion to allow a broader range of proof than in a typical venue hearing.[54] Specifically, the trial court may allow the parties to offer testimony. Further, the court may consider all evidence, both the plaintiff's and defendant's, and is not restricted to making its venue determination based solely on whether the plaintiff has made a prima facie case for joinder. In this case, the court concluded that the plaintiffs in question had not established that there was an essential need to have their claims tried in the county in which the suit was pending. In this regard, plaintiffs' claimed need to pool their resources against common experts and on common issues was held to be insufficient.[55]

Similarly, in *Blaylock Prescription Center v. Lopez-Guerra*,[56] the court held that the plaintiffs in question had not met the requirements of § 15.003 for a number of reasons. In this case, two plaintiffs sued for alleged injuries resulting from the use of a diet drug known as "fen/phen." The suit was filed in the county where one of the plaintiffs resided and had purchased the drug, and where her prescribing physician was located. The other plaintiff resided in a different county, where she had purchased the drug and her prescribing physician was located. On appeal, the court of appeals held that the second plaintiff had not established that she was entitled to join in the lawsuit. Initially, the court noted that the second plaintiff had to establish that her joinder in the suit was proper under the Texas Rules of Civil Procedure and, in turn, this required her to demonstrate that there was a logical relationship between the two claims, *i.e.*, there was, at least, some facts which were relevant to both claims. Here, while the legal claims may have been the same, the two plaintiffs resided in different counties, were seen by different doctors

51. *See id.*

52. Section 15.003(a) provides:

In a suit where more than one plaintiff is joined each plaintiff must, independently of any other plaintiff, establish proper venue. Any person who is unable to establish proper venue may not join or maintain venue for a suit as a plaintiff unless the person, independently of any other plaintiff, 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 for the person seeking to join in or maintain venue for the suit and the persons against whom the suit is brought.

53. 997 S.W.2d 598 (Tex. 1999).

54. *See id.* at 602.

55. *See id.* at 603.

56. 986 S.W.2d 658 (Tex. App.—Corpus Christi 1998, no pet.).

who prescribed different combinations of drugs over different periods of time, and such drugs were produced by different manufacturers. Under those circumstances, the court concluded that the joinder was not proper.[57]

On the other hand, in *Bristol-Myers Squibb Co. v. Goldston*[58] the appellate court held that certain nonresident plaintiffs had established that there was an essential need to have their products liability claims tried in the county of suit. In this regard, plaintiffs offered evidence that they all had the same treating physician who officed in the county of suit, all of their fact and expert witnesses were residents "in or around" such county, and they were all represented by the same attorney who averred that there would be a three-year delay if the suit was transferred to the county that defendant claimed was the proper forum.[59] Along the same line, plaintiffs in *American Home Products Corp. v. Bernal*[60] met the requirements for joinder under § 15.003. In this fen/phen case, the court of appeals determined that plaintiffs' claims arose from the same transaction or occurrence, as each plaintiff claimed injury from the design, manufacture, and marketing of fen/phen, and their claims arose out of the introduction of the drug into the stream of commerce.[61] The court did not find persuasive defendant's argument that common issues did not exist because each plaintiff had distinct medical histories and received different warnings from their treating physicians. The court of appeals also ascertained no unfair prejudice to the defendants if the case was not transferred. In this connection, plaintiffs had submitted affidavits that established there would be no greater ability to subpoena witnesses if the case was transferred, and that verdicts for plaintiffs and defendants in the county of suit had been equally split. Finally, the court held that there was an essential need to have the case tried in plaintiffs' choice of forum. Relying on a detailed affidavit from plaintiffs' counsel, the court determined that the essential need existed because, given the economic realities involved in a lawsuit of this magnitude, it was apparent that plaintiffs derived significant - even critical - benefits from pooling their resources.[62]

Finally, in *In re Masonite Corp.*[63] the supreme court considered whether the trial court has any discretion to transfer plaintiffs' claims to the counties of their choice after it has been determined that the criteria of § 15.003 have not been met. In this case, after it was conceded that certain of the plaintiffs could not meet the requirements of § 15.003, the trial court transferred the claims of those plaintiffs to their counties of residence. The defendant, however, had previously offered prima facie

57. *See id.* at 664; *see also* TEX. R. CIV. P. 40.

58. 983 S.W.2d 369 (Tex. App.—Fort Worth 1998, no pet.).

59. *Id.* at 376.

60. No. 13-99-089-CV, 1999 WL 640034 (Tex. App.—Corpus Christi Aug. 19, 1999, no pet. h.).

61. *See id.* at *3.

62. *See id.* at *5.

63. 997 S.W.2d 194 (Tex. 1999).

proof that Dallas County was the proper venue and had requested a transfer of venue to such county. Under those circumstances, the court held that the trial court had no discretion to transfer venue except to Dallas County, even if venue would have originally been proper in the county of the plaintiffs' residences.[64]

Two cases considered issues related to forum non-conveniens. In *Owens Corning v. Carter*,[65] the supreme court addressed various constitutional issues related to § 71.051 of the Texas Civil Practice Code, which sets forth the law of Texas as to forum non-conveniens in all personal injury or death actions.[66] Although this statute allows a court to dismiss a foreign plaintiff's claim under the doctrine of forum non-conveniens, it provides that a court may not stay or dismiss a plaintiff's claim if the plaintiff is a legal resident of Texas. The supreme court held that this section did not violate the Privilege and Immunities Clause of article 4 of the United States Constitution. As a basis for this ruling, the court opined that the statute did not discriminate on the basis of citizenship, but rather solely on the basis of residence.[67]

In *Baker v. Bell Helicopter Textron, Inc.*,[68] a wrongful death action was filed against a helicopter manufacturer and others arising from a crash of a helicopter off the coast of Australia. The court of appeals held that the trial court acted properly in dismissing the case based on the forum non-conveniens statute.[69] Although the defendant manufacturer had its principal place of business in Texas, the court emphasized that the crash had occurred in Australia, the plaintiffs were residents of Australia or Scotland, the helicopter was owned and operated by Australian entities, the crash was investigated by Australian entities, and virtually all fact witnesses were located in Australia. Under those circumstances, the court concluded that the interests of justice would best be served by having the case tried in Australia.[70] The court also recognized that although there ordinarily is a strong presumption in favor of a plaintiff's choice of forum, this presumption applies with less force when the plaintiffs, as here, were from foreign countries.[71]

Two cases considered procedural issues related to venue. In *General Motors Corp. v. Castaneda*,[72] defendant's venue motion was reset for hearing several times and was not finally heard until 20 months after the suit had been filed and just before trial. Plaintiff contended that defendant had waived any challenge to venue by filing certain discovery motions and motions for continuance without making them subject to their

64. *See id.* at 197-98.
65. 997 S.W.2d 560 (Tex. 1999).
66. *See* TEX. CIV. PRAC. & REM. CODE § 71.051 (Vernon Supp. 2000).
67. *Owens Corning*, 997 S.W.2d at 569-70.
68. 985 S.W.2d 272 (Tex. App.—Fort Worth 1999, pet. denied).
69. *See id.*
70. *See id.* at 278.
71. *See id.*
72. 980 S.W.2d 777 (Tex. App.—San Antonio 1998, no pet.).

motion for transfer of venue. Based on the evidence, however, the court concluded that the parties understood these pretrial motions were subject to the pending venue motion.[73] Further, as the dissent noted, discovery is expressly authorized under the discovery rules prior to a venue hearing. Therefore, neither discovery nor seeking protection from discovery waives a transfer motion.[74] Additionally, the requests for continuance were not inconsistent with the venue objection because the continuances were necessary to allow for a venue hearing prior to trial.[75]

In *Pines of Westbury, Ltd. v. Paul Michael Construction, Inc.*,[76] plaintiff sued three defendants. In response to a venue challenge, plaintiff claimed that venue was proper under section 15.061 of the Texas venue statute[77] which generally provided that if venue is established as to one defendant, then venue of an action exists over all properly joined defendants. Because one of the defendants was not a resident of Texas, the trial court agreed that venue was proper in the county of suit where the plaintiff resided. Subsequently, the lower court granted summary judgment in favor of the nonresident defendant and thereafter proceeded to trial against the remaining defendants. On appeal, the court held that once summary judgment was granted in favor of the nonresident defendant, the trial court no longer had venue over the remaining defendants.[78] Hence, the trial court erred in proceeding with the trial and instead should have transferred the case.

V. PARTIES

Class actions were a hot topic during the Survey period. In *In re Alford Chevrolet-Geo*,[79] the supreme court addressed the scope of discovery that should be allowed prior to a ruling on class certification. In this class action, plaintiffs claimed that numerous motor vehicle dealerships had passed on their inventory taxes to consumers as an itemized charge in addition to the advertised or negotiated purchase price of the vehicles. Plaintiffs submitted written discovery that sought a broad range of information, including, among other things, every oral and written communication with purchasers and a variety of other persons regarding the vehicle inventory tax. Defendants objected and sought an order bifurcating discovery as to class certification and the merits, which the trial court denied. Although it acknowledged that courts often limit discovery pending class determination, the supreme court recognized that litigants generally need some discovery to effectively support or oppose a class certification motion.[80] In many cases, discovery is needed to establish the

73. *See id.*
74. *See id.* at 785 (Butts, J., dissenting).
75. *See id.* at 786.
76. 993 S.W.2d 291 (Tex. App.—Eastland 1999, no pet.).
77. TEX. CIV. PRAC. & REM. CODE § 15.061 (Vernon 1995) (repealed).
78. *See Pines of Westbury*, 993 S.W.2d at 291.
79. 997 S.W.2d 173 (Tex. 1998).
80. *See id.* at 182.

commonality of issues or typicality of claims, and such discovery is frequently enmeshed with the merits.[81] Accordingly, the court held that it is within the trial court's discretion to schedule discovery and decide whether and how much discovery is warranted to determine any class certification questions. In short, the propriety of bifurcating class and merits discovery depends on analysis of the separability of class certification and merits issues in each case. Here, the court found that the defendants failed to demonstrate that the certification and merits issues were clearly separable.[82] As an example, the court observed that discovery about representations made to purchasers were not only relevant to the merits but the class issues as well. Class wide discovery on this subject would reveal whether there were variations in the representations to the class members, which would weigh against certification. On the other hand, class wide discovery could also uncover a common thread of deceit running through the dealerships' various representations, which would weigh in favor of class certification.

The court also warned against the use of nonspecific bifurcation orders. As a practical matter, the court noted that such orders would likely precipitate numerous disputes about whether a particular interrogatory or document request pertained to certification or the merits and could unreasonably interfere with the discovery of facts essential to the class determination.[83] Rather, the court encouraged the use of specific discovery orders that directly addressed the amount and nature of discovery needed for class certification. Finally, the court rejected defendants' contention that the discovery in question was unduly burdensome because defendants had failed to produce any evidence supporting this claim and, instead, had only argued in general terms that merits discovery should be abated until a decision on class certification.[84]

The courts of appeals also discussed the propriety of class actions in a variety of cases. In *Entex v. City of Pearland*,[85] a city brought a class action on behalf of 211 municipalities against a natural gas distributor and its corporate parent, seeking a judgment regarding the meaning of "gross receipts" in a franchise agreement entered into between the distributor and the municipalities served by such distributor. Pursuant to the agreement, the distributor paid a percentage of gross receipts to the municipalities in return for the use of right-of-ways to distribute its natural gas to its customers. The principal issue on appeal was whether the suit infringed on the sovereignty of municipal class members to perform nondelegable governmental functions provided by the Texas constitution and, hence, made class certification inappropriate. More specifically, defendant contended that the class representative was seeking to control and administer franchise ordinances of all Texas cities served by the distribu-

81. *See id.*
82. *See id.*
83. *See id.*
84. *See id.* at 184.
85. 990 S.W.2d 904 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

tor as well as its own ordinance. Recognizing that a municipality cannot delegate its authority to another municipality to grant a franchise, regulate a utility's practices, or to fix a utility's rates, the appellate court nevertheless held that the governing body of a municipality may choose the procedure by which it litigates issues involving municipal ordinances, including through participation in a class action suit. The court emphasized that each municipal class member would be afforded the opportunity to opt out of the class action suit and, in making that decision, should review the pleadings and issues involved in the suit in light of its municipal charter, its own franchise ordinance, other pertinent laws, and the economic and political impact of a judgment favorable to the class. Further, each municipal class member would also have the opportunity to monitor the litigation and settlement of the suit, and to utilize various procedures, such as appearing in the suit, to protect its interests.[86] Accordingly, the court concluded that the trial court did not abuse its discretion in certifying the class of municipalities.[87]

In *HiLo Auto Supply, L.P. v. Beresky*,[88] the court certified a multi-state class action brought on behalf of a class of purchasers of batteries from an auto parts supplier. The principal claim was that the auto supplier had sold "old" and "used" automotive batteries as "new batteries." Affirming the trial court's class certification decision, the appellate court emphasized that the issue of whether the auto parts supplier offered old or used batteries for sale as new throughout its chain of stores was a single unifying issue common to the entire class.[89] As to potential variances among state laws, the court of appeals noted that the trial court had not made a choice-of-law decision as part of the certification order and could modify the class should issues about variances in state law later develop. As to defendant's argument that the resolution of the class members' claims would give rise to a multitude of individual fact issues, the court observed that such individual issues could be resolved through the filing of individual proofs of claim and that class action treatment would avoid repeated litigation of the common issues in individual actions.

In *Tana Oil & Gas Corp. v. Bate*,[90] certain royalty owners brought a class action against a lessee for breach of its oil and gas leases and its implied duty to market gas under such leases. In this case, the leases between the class members and the defendant contained identical language, and each class member's gas was sold by the lessee under the terms of a single purchase contract. Accordingly, the court of appeals held that common issues regarding the merits of the claim would predominate over any individual issues and, hence, class action treatment was appropriate.[91] The court also observed that a class action was a supe-

86. *See id.* at 912.
87. *See id.* at 904.
88. 986 S.W.2d 382 (Tex. App.—Beaumont 1999, no pet.).
89. *See id.* at 387-88.
90. 978 S.W.2d 735 (Tex. App.—Austin 1998, no pet.).
91. *See id.*

rior method for adjudicating claims in this case because the class members had an interest in recovering underpaid gas royalties, the class action mechanism allowed for an efficient means to resolve disputes involving individual claims too small to justify the expense of litigation, class counsel had already conducted extensive discovery that would benefit all class members, and the trial court had familiarized itself with voluminous amounts of discovery previously produced in the case.[92]

In *Rainbow Group, Ltd. v. Johnson*,[93] four hair stylists, representing other former and current hair stylists employed by a hair salon chain, brought an action against the chain for breach of oral employment contracts and violation of the Fair Labor Standards Act. Affirming the trial court's decision certifying the proposed class, the court of appeals initially determined that the numerosity requirement had been satisfied, even though 87 of the 400 class members signed an affidavit indicating that they were opting out of the lawsuit. In this regard, the court pointed out that the chain employed the remaining hair stylists in 12 stores spread geographically throughout the state and, thus, joinder of remaining members of the class was still impracticable. The court then found numerous common issues that warranted class action treatment, including whether the hair salon chain had a policy of holding hair stylists "off the clock" or of refusing to pay them for mandatory meetings, whether such policy violated their contracts, and whether the employment contracts were modified by the employees' acceptance of paychecks from the hair salon. Although the claims in the suit were based on breach of individual, oral employment agreements, class action treatment was still appropriate because the chain maintained one employee manual, one employee orientation form, and one set of employee policies for use in all of its stores.[94]

In contrast to the foregoing decision, the court of appeals in *Spera v. Fleming, Hovenkamp & Graceson, P.C.*[95] affirmed the denial of a motion for the class certification. In this action, the proposed class consisted of several thousand former clients of a law firm that had represented the class members in a prior suit regarding defective pipe materials, which had eventually been settled. In the present case, the plaintiffs claimed, among other things, that the law firm had committed negligence, made misrepresentations, and breached its fiduciary duties owed to the class. Although the plaintiffs asserted that the factual and legal bases of their claims against the law firm were common to all class members, the court of appeals disagreed and, in this connection, pointed to the testimony of the plaintiffs' own class action expert who had testified that there were, at least, three subgroups within the class: (1) former clients who had received nothing from the earlier litigation; (2) former clients who had settled their interests in the earlier litigation and had settled their dispute

92. *See id.* at 743.
93. 990 S.W.2d 351 (Tex. App.—Austin 1999, pet. dism'd w.o.j.).
94. *Id.* at 357-58.
95. 4 S.W.3d 805 (Tex. App.—Houston [14th Dist.] 1999, no pet. h.).

over attorneys' fees with the law firm; and (3) former clients who had settled their interest in the earlier litigation but had not settled their dispute over attorneys' fees. Further, according to the court, even if the duties were the same as to each of these three subgroups, whether the duties were breached and whether the injuries were proximately caused by any breach would differ between these three subgroups.[96] Although the plaintiffs placed much emphasis on "dear client" letters sent to all of the former clients regarding their claims and the settlement, the appellate court noted that multiple individual issues still existed, such as determining which potential class members relied on any negligent or intentional misrepresentation in the letters, who among the class members suffered mental anguish type harm, and what duty or duties were variously owed to the different class members. Accordingly, the appellate court concluded that it was within the trial court's discretion to refuse certification.[97]

In *Gillespie v. Scherr*,[98] the court also addressed issues related to the duties, if any, owed by class counsel to members of an uncertified class. In this action, the defendant law firm had previously filed a class action on behalf of all chiropractors in Texas against certain insurance companies. The class, however, was never certified and a settlement was eventually entered into and approved for some, but not all, of the named plaintiffs. Subsequently, certain members of the proposed class, who were not named plaintiffs, asserted claims against class counsel. The court of appeals held, however, that the attorneys' act of filing a class action suit did not, absent certification, establish an implied attorney-client relationship with those chiropractors who were not named as plaintiffs in the prior lawsuit.[99] Thus, attorneys for the named plaintiffs in the class action suit owed no pre-certification duty to potential class members that could be a basis for a claim of malpractice.[100]

Finally, two cases addressed certain procedural issues related to class actions. In *Elm Creek Owners Association v. H.O.K. Investments, Inc.*,[101] plaintiff sought to quiet its title to certain land within a subdivision and, as a part of its action, moved to certify a mandatory class of defendants who were current and former owners of property in such subdivision. Prior to notice being sent to the proposed class about the action, the trial court certified the mandatory class. The court of appeals held that due process did not require pre-certification notice to the mandatory class members and that any interest protected by due process arose only when the class was certified at which point the rules of civil procedure required

96. *See id.* at 811.

97. *See id.* at 812.

98. 987 S.W.2d 129 (Tex. App.—Houston [14th Dist.] 1998, pet. denied).

99. *See id.* at 132.

100. *See id.* at 131-32.

101. No. 04-99-00173-CV, 1999 WL 511942 (Tex. App.—San Antonio July 21, 1999, no pet. h.).

only post-certification notice.[102] In *Christian v. ICG Telecom Canada, Inc.*,[103] the court of appeals held that shareholders of the corporation were not required to seek certification of a class of similarly-situated shareholders in order to maintain a shareholder derivative suit. In this regard, the court determined that the Texas legislature intended to establish a separate procedural system governing shareholder derivative actions brought under the Business Corporation Act, rather than requiring compliance with all the procedures for class actions under the Rules of Civil Procedure.[104]

VI. PLEADINGS

During the Survey period, the courts considered a variety of issues related to pleadings. In *Jenkins v. Jenkins*,[105] a former husband claimed that his ex-wife's bankruptcy trustee had no legal right to sue him for alimony payments that were not part of her bankruptcy estate. Applying Rule 93,[106] the court of appeals held that the former husband's contention was waived because he did not file a verified plea challenging the capacity of the bankruptcy trustee to bring suit.[107] In this connection, the court distinguished between a challenge to the capacity of a party to bring suit and a challenge based on a lack of standing. According to the court, when a defendant challenges a plaintiff's legal right to bring suit, it is a challenge to capacity and must be supported by a verified pleading.[108] In contrast, the issue of standing concerns whether the plaintiff was personally aggrieved and therefore has a justiciable interest in the controversy. Here, the former husband was arguing that the trustee had no legal right, *i.e.*, no capacity, to sue him for property that was not part of the bankruptcy estate and, hence, such challenge had to be supported by a verified pleading.

In *In re Sondley*,[109] the court held that the party was not entitled to have his pro se pleadings considered by the trial court when he was also represented by counsel in the proceeding. In short, a party is entitled to represent himself or to be represented by an attorney, but he is not entitled to representation partly by counsel and partly pro se.[110] In *D'Tel Communications v. Roadway Package Services, Inc.*,[111] the court considered whether a party may add a counterclaim on appeal to the county court from the justice court. The court of appeals ruled that a party may not plead any counterclaim in an appeal to the county court that it did

102. *See id.* at *3. *See* TEX. R. CIV. P. 42(c)(2).
103. 996 S.W.2d 270 (Tex. App.—Houston [1st Dist.] 1999, no pet. h.).
104. *See id.* at 274-75.
105. 991 S.W.2d 440 (Tex. App.—Fort Worth 1999, pet. denied).
106. TEX. R. CIV. P. 93(2).
107. *See id.* at 444.
108. *Jenkins*, 991 S.W.2d at 443.
109. 990 S.W.2d 361 (Tex. App.—Amarillo 1999, orig. proceeding).
110. *See id.* at 362.
111. 987 S.W.2d 213 (Tex. App.—Eastland 1999, no pet.).

not plead in the justice court, irrespective of whether the counterclaim is compulsory or permissive.[112] The court noted, however, that the appropriate remedy for misjoinder of the counterclaim was not dismissal, but severance of the counterclaim.[113]

Finally, in *Whole Foods Market Southwest L.P. v. Tijerina*,[114] the court discussed the circumstances under which a trial amendment may be allowed after a jury's verdict. In this case, a former employee injured on the job sued her employer for negligence and retaliatory discharge. Although her petition at the time of trial requested, among other things, punitive damages as a result of defendant's alleged wrongful and/or retaliatory discharge, it did not expressly plead malicious termination in support of the request for punitive damages. After a favorable jury verdict, which included an award for punitive damages, the plaintiff moved to file a trial amendment so as to expressly plead malicious termination, which the trial court granted. Concluding that the trial court's ruling was not erroneous, the court of appeals noted that defendant had failed to meet its burden of establishing that the post-verdict trial amendment prejudiced its case.[115] First, defendant had not shown that it could not have anticipated that plaintiff would request punitive damages for retaliatory discharge, particularly as the issue had been raised in her proposed jury questions, both parties had addressed malicious termination in their opening statements, and defendant had objected to the submission to the jury of questions regarding malicious termination on the basis of sufficiency of the evidence. Second, defendant did not establish that the claim for malicious termination changed the nature of the trial as it had not shown that it would have tried its case any differently from the way it did nor had it set forth what additional evidence, if any, it would have presented to rebut the claim of malicious termination.[116]

VII. DISCOVERY

The new Texas discovery rules, which were discussed at some length in last year's article,[117] have thus far been the subject of only limited judicial interpretation by the appellate courts. The supreme court and intermediate appellate courts did, however, address a number of other important discovery issues during the Survey period. For example, as discussed *supra*, *In re Alford Chevrolet-Geo*[118] involved the question of whether the defendants in a class action were entitled to an order bifurcating class and merits discovery.[119] The supreme court held that, because the defendants

112. *See id.* at 214.
113. *See id.*
114. 979 S.W.2d 768 (Tex. App.—Houston [14th Dist.] 1998, no pet.).
115. *See id.* at 777.
116. *See id.*
117. *See* A. Erin Dwyer, et al., *Texas Civil Procedure*, 52 SMU L. REV. 1485, 1496-1502 (1999) [hereinafter *1999 Annual Survey*].
118. 997 S.W.2d 173 (Tex. 1999).
119. *See id.* at 175.

"did not clearly distinguish class and merits discovery, [they were] not entitled to an order bifurcating the two."[120] In doing so, the court recognized that discovery, particularly in class actions, can be used as "'a weapon capable of imposing large and unjustifiable costs on one's adversary.'"[121] But, said the court, whether class and merits discovery are clearly separable must be evaluated on a case-by-case basis.[122] Because the defendants had failed to explain how the two should be separated, and the supreme court in fact concluded they were likely to be intertwined, the trial court did not abuse its discretion in refusing to enter a bifurcation order.[123] Moreover, the court pointed out that a non-specific order bifurcating class and merits discovery would merely beg the question of which side of the line particular discovery requests fell on and would serve no useful purpose.[124]

In *In re Continental General Tire, Inc.*,[125] the supreme court addressed for the first time the trade secret privilege codified in 1983 in the Texas Rules of Evidence.[126] Rule 507[127] provides that a party has a privilege against disclosure of trade secrets "if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice."[128] The supreme court interpreted this rule to mean that, once a party has established that the requested information is a trade secret, "the burden shifts to the requesting party to establish that the information is necessary for a fair adjudication of its claim or defense."[129] Relevance alone is insufficient to meet this standard.[130] The trial judge must balance, on the facts of each particular case, the extent to which the information is needed by the requesting party against the potential harm to the resisting party from disclosure.[131] If trade secret information is ordered produced, the trial court should ordinarily make it subject to an appropriate protective order.[132]

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120. *Id.* at 175-76.

121. *Id.* at 180 (quoting Frank H. Easterbrook, Comment, *Discovery as Abuse*, 69 B.U.L. Rev. 635, 636 (1989)).

122. *See Alford*, 997 S.W.2d at 182.

123. *See id.* at 182-83. In a vigorous and lengthy dissent, Justice Hecht argued that the majority was placing the entire burden of coming forward with a "specific, detailed precertification discovery plan" on the defendants, "without requiring the plaintiffs to show how much discovery is justified." *Id.* at 185-86 (Hecht, J., dissenting).

124. *See id.* at 183.

125. 979 S.W.2d 609 (Tex. 1998).

126. *See id.* at 610-11.

127. TEX. R. EVID. 507.

128. *Id.*

129. *Continental General*, 979 S.W.2d at 610.

130. *Id.* at 613-14. *See also In re* Frost, 998 S.W.2d 938, 939 (Tex. App.—Waco 1999, orig. proceeding) (requesting party's argument of why customer of list was relevant, without evidence that it was necessary for fair adjudication of claim, was insufficient to overcome trade secret privilege).

131. *Continental General*, 979 S.W.2d at 612-13.

132. *See id.* at 613 & n.3. The supreme court rejected the plaintiffs' suggestion that in actions between parties that are not business competitors, disclosure of relevant trade secret information should always be compelled, subject to an appropriate protective order. *See id.* at 613. Conversely, the court also rejected the defendant's argument that the trade secret privilege should be absolute because of the risk that any protective order might be violated or that the trade secret information might later be found to be a "court record"

The supreme court also struck down, on First Amendment grounds,[133] a discovery order compelling the disclosure of a nonprofit corporation's contributor list.[134] The court concluded that the corporation had made the required prima facie showing that the trial court's order impermissibly burdened their First Amendment associational rights by offering "non-speculative evidence of economic and political reprisals against itself and its contributors."[135] Because the taxpayer plaintiffs failed to show that the identity of the contributors was substantially related to a compelling government interest, therefore, the trial court abused its discretion in ordering disclosure of that information.[136]

Under the new procedural rules that went into effect in Texas on January 1, 1999, witness statements are now specifically discoverable.[137] The court in *In re W&G Trucking, Inc.*[138] held that this new rule applied to a witness statement obtained before January 1, 1999, and that the application of the new rule in this manner did not deprive the relator of any substantive right.[139] In this regard, the court noted that even under the old discovery rules, the relator was not assured that the witness statement would have been protected, as the trial court could have ordered it produced upon a showing of substantial need and undue hardship.[140]

Finally, two cases decided during the Survey period addressed attempts to block requested discovery based on non-privilege confidentiality concerns. In the first, *In re Continental Insurance Co.*,[141] the court held that parties "cannot protect relevant information from discovery by confidentiality provisions in contracts, even settlement agreements."[142] Moreover, the court warned that an agreed confidentiality provision cannot require a party to assert frivolous objections to producing discoverable information, and that parties "abuse the discovery process if the only reason they resist discovery is because they have agreed not to surrender the information without a court order."[143] In *In re Doctors Hospital of Laredo, L.P.*,[144] the court relied on a 1970 Texas Supreme Court case in holding that "income tax schedules and calendars of nonparty witnesses are not discoverable to show bias."[145] The court rejected the argument

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that is subject to disclosure under TEX. R. CIV. P. 76a. *See Continental General*, 979 S.W.2d at 614.

133. U.S. CONST. amend I ("Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble").

134. *See In re* Bay Area Citizens Against Lawsuit Abuse, 982 S.W.2d 371, 375 (Tex. 1998).

135. *Id.* at 376-77.

136. *Id.* at 378-79.

137. *See* TEX. R. CIV. P. 192.3(h).

138. 990 S.W.2d 473 (Tex. App.—Beaumont 1999, orig. proceeding).

139. *See id.* at 475.

140. *See id.*

141. 994 S.W.2d 423 (Tex. App.—Waco 1999, orig. proceeding).

142. *Id.* at 425.

143. *Id.* at 426.

144. 2 S.W.3d 504 (Tex. App.—San Antonio 1999, orig. proceeding).

145. *Id.* at *2 (citing Russell v. Young, 452 S.W.2d 434 (Tex. 1970)).

that new Rule 192.3(e)(5),[146] which now specifically permits discovery into the bias of any testifying expert, was intended to overrule the precedent protecting a nonparty's personal financial records.

VIII. DISMISSAL

In *Villarreal v. San Antonio Truck & Equipment*,[147] the Texas Supreme Court reversed the trial court's dismissal of an action for want of prosecution, criticizing the wording of the Bexar County District Clerk's dismissal notice for failing to properly notify litigants of the local trial court's requirements to avoid a dismissal. In this case, the trial court issued a notice setting the case for dismissal. The plaintiff's counsel, after filing proper motions to retain the case and set it on the jury docket, timely appeared and announced ready for trial at the dismissal hearing. The trial court nonetheless dismissed the case, which decision the appellate court affirmed. The supreme court reversed and reinstated the case, initially holding that the actions of the plaintiff's counsel deprived the trial court of authority under Rule 165a(1)[148] to dismiss the case. The court then examined whether the trial court's inherent authority permitted the dismissal of the action. A prerequisite to the exercise of such inherent authority is adequate notice to the parties of the trial court's intent to exercise it, however, and the court concluded that the clerk's notice failed to state that the case would be dismissed absent a showing of good cause. Since the plaintiff's counsel appeared and announced ready as instructed, the trial court abused its discretion in dismissing the case under its inherent authority. The court disapproved of the language in several other court of appeals' decisions interpreting the Bexar County dismissal notice contrary to the holding in this case.[149]

Addressing the effect of the plaintiffs' voluntary nonsuit of a defendant and subsequent attempt to reinstate and sanction that defendant after entry of a final judgment, the court in *In re Simon Property Group (Delaware), Inc.*[150] conditionally granted a writ of mandamus, concluding that the trial court lacked jurisdiction over the dismissed defendant. The plaintiffs had nonsuited one of several defendants following receipt of an affidavit indicating that that defendant did not own an interest in the property at issue. More than thirty days following the entry of a judgment in their favor, the plaintiffs then sought to reinstate their claims against (and sanction) the dismissed defendant based on evidence adduced at trial. The court of appeals first noted that the only provision in

146. TEX. R. CIV. P. 192.3(e)(5).

147. 994 S.W.2d. 628 (Tex. 1999).

148. TEX. R. CIV. P. 165a(1).

149. *See* Ozuna v. Southwest Bio-Clinical Lab., 766 S.W.2d 900 (Tex. App.—San Antonio 1989, writ denied); Knight v. Trent, 739 S.W.2d 116 (Tex. App.—San Antonio 1987, no writ); Gaebler v. Harris, 625 S.W.2d 5 (Tex. App.—San Antonio 1981, writ ref'd n.r.e.); Laird v. Jobes, 580 S.W.2d 413 (Tex. Civ. App.—San Antonio 1979, no writ).

150. 985 S.W.2d 212 (Tex. App.—Corpus Christi 1999, orig. proceeding).

the procedural rules for a motion to reinstate is Rule 165a(3),[151] which provides that such motion must be filed within thirty days of the order dismissing the case for want of prosecution. Because reinstatement of a nonsuited defendant did not fall squarely within this rule, the court analogized this situation to a motion for new trial and concluded that a motion to reinstate filed more than thirty days after the entry of the final judgment was untimely. The court then concluded that because the trial court's jurisdiction over the nonsuited defendant had expired, it also lacked the authority to sanction that defendant.

IX. SUMMARY JUDGMENT

Two appellate courts handed down conflicting opinions during the Survey period regarding the requirements to preserve error over objections to summary judgment evidence, following changes to Rule 33.1 of the Texas Rules of Appellate Procedure.[152] The Fort Worth Court of Appeals, in *Frazier v. Yu*,[153] held that the objecting party did not need a written order sustaining evidentiary objections to preserve the point of error on appeal. In this auto accident dispute, the defendant moved for summary judgment under Rule 166a(i),[154] arguing that there was no evidence that the accident proximately caused the plaintiff's injuries. The plaintiff filed a response and supporting affidavits, to which the defendant then filed written objections. The trial court granted the defendant's motion for summary judgment, indicating on the docket sheet that "plaintiff nor attorney submitted any summary judgment evidence nor did she appear." After the hearing, but before the entry of judgment, the plaintiff moved for leave to amend the challenged affidavits; however, the trial court never expressly ruled on that motion.

On appeal, the plaintiff argued first that the above-quoted docket notation evidenced the trial court's failure to consider the plaintiff's proffered affidavits. Second, the plaintiff contended that the defendant had failed to preserve his evidentiary objections by not obtaining written rulings thereon. The appellate court disagreed, noting that the adoption of Texas Rule of Appellate Procedure 33.1,[155] effective September 1, 1997, relaxed the former requirement that a party objecting to summary judgment evidence obtain an express, written ruling on such objections.[156] Thus, the court held that "error is preserved as long as the record indicates in some way that the trial court ruled on the objection either expressly or implicitly."[157] Here, the appellate court reasoned, the trial court was clearly aware of the evidentiary objections, as they were in writing, and implicitly

151. TEX. R. CIV. P. 165a(3).
152. TEX. R. APP. P. 33.1.
153. 987 S.W.2d 607 (Tex. App.—Fort Worth 1999, pet. denied).
154. TEX. R. CIV. P. 166a(i).
155. TEX. R. APP. P. 33.1.
156. *See, e.g.*, Camden Mach. & Tool v. Cascade Co., 870 S.W.2d 304, 310 (Tex. App.—Fort Worth 1993, no writ).
157. *Frazier*, 987 S.W.2d at 610.

sustained those objections, as evidenced by the language in its order granting the dispositive motion, which stated that the trial court had "reviewed all *competent* summary judgment evidence."[158] Because the plaintiff failed to challenge either the evidentiary ruling on appeal or to assign error to the trial court's failure to allow her leave to amend her allegedly deficient affidavits, the summary judgment was affirmed.

In *Harris v. The Spires Council of Co-Owners*,[159] on the other hand, a Houston appellate court ruled that the summary judgment movant failed to preserve error by not obtaining a written ruling on a form evidentiary. Specifically, while the movant had filed written objections to an affidavit as containing hearsay, supposition, and assumption, he failed to obtain a written ruling on those objections. The majority held that such failure constituted a waiver of the objections on appeal and, therefore, reversed the summary judgment decision in part. Until the Texas Supreme Court resolves the conflict between these cases, the careful practitioner may still wish to continue to seek written rulings on objections to summary judgment evidence.

In *Upchurch V. Albear*,[160] a dispute between attorneys and their clients related to the settlement of toxic tort cases, the attorneys filed a summary judgment motion that was accompanied by a voluminous record, which they did not index, reference, or cite in their summary judgment materials. The clients objected to this failure to properly cite the summary judgment evidence, but the trial court elected not to address the record at all and instead issued its ruling based solely on the law. The appellate court reversed, holding that the clients' objections to this evidence were well-founded and that they were entitled to fair notice of the movants' contentions. Moreover, the court reasoned that although the trial court has a duty to determine whether material fact questions exist, the parties must still specifically cite to the evidence on which they rely.

Several appellate courts addressed the rare intersection between summary judgment and mandamus practice during the survey period. The court in *In re Mission Consolidated Independent School District*[161] conditionally granted a writ of mandamus after the trial court failed to rule on a "no evidence" summary judgment motion, which the non-movant had failed to even respond to after eight months. The court noted that mandamus is not available either to challenge the denial of a summary judgment motion or to force a trial court to grant a no evidence motion. However, where the trial court refuses even to rule on such a motion in a reasonable time, mandamus is appropriate in light of the clear language of Rule 166a(i)[162]—*i.e.*, that the court *must* grant the motion unless the

158. *Id.* (emphasis original).

159. 981 S.W.2d 892 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

160. 5 S.W.3d 274 (Tex. App.—Amarillo 1999, no pet. h.).

161. 990 S.W.2d 459 (Tex. App.—Corpus Christi 1999, orig. proceeding).

162. TEX. R. CIV. P. 166a(i).

respondent produces summary judgment evidence raising a genuine issue of material fact.

In *In re Mohawk Rubber Co.*,[163] also a mandamus proceeding, the court held that ten years is "more than 'adequate time for discovery.'" In this mass tort action, the defendant had moved for summary judgment under Rule 166a(i),[164] arguing that there was no evidence linking its products to the injuries claimed by some two hundred plaintiffs. The trial court denied the summary judgment motion (without prejudice), acknowledging the lack of evidence proving causation, but also noting that a case management scheduling order had since been issued, and that additional discovery might lead to the discovery of evidence proving causation. In response to the petition for writ of mandamus, the appellate court first noted that it lacked the authority in the context of a mandamus proceeding to require the trial court to rescind its summary judgment order. Nevertheless, it went on to explain how the trial court had improperly analyzed and applied the no-evidence summary judgment rule. Specifically, Rule 166a(i)[165] does not require that the summary judgment motion attack the evidentiary components that may prove an element of the opponent's cause of action; rather, the rule only requires the motion to be specific in alleging the lack of evidentiary support for an essential element of a claim of defense.[166] Moreover, Rule 166a(i)[167] does not require that a respondent marshal all of its evidence, only that it present *some* summary judgment evidence raising a genuine issue of material fact on the element attacked. Finally, the appellate court criticized the language in the trial court's case management scheduling order that provided for more time to complete discovery, because Rule 166a(i)[168] does not require that discovery be completed, only that an "adequate" time for discovery has passed. Here, because the case had been on file for ten years, and the defendant's no-evidence summary judgment motion had been on file for nearly a year before the trial court addressed it, the plaintiffs had been granted a sufficient opportunity to conduct adequate discovery. Therefore, the court required the trial court to issue a new scheduling order that provided dates by which the plaintiffs were required to specify the production of causation information.

The court in *In re Lee*[169] refused to grant a petition for writ of mandamus from the denial of a summary judgment motion, in which the defendant asserted that statements made in an attorney's letter were absolutely privileged from a defamation claim. Although the court acknowledged the absolute privilege related to statements in litigation, it held that the privilege was only an affirmative defense and not an absolute bar or im-

163. 982 S.W.2d 494 (Tex. App.—Texarkana 1998, orig. proceeding).
164. TEX. R. CIV. P. 166a(i).
165. TEX. R. CIV. P. 166a(i).
166. *See Mohawk Rubber*, 982 S.W.2d at 498.
167. TEX. R. CIV. P. 166a(i).
168. *Id.*
169. 995 S.W.2d 774 (Tex. App.—San Antonio 1999, orig. proceeding).

munity from suit that warranted a mandamus relief.[170]

In *Lampasas v. Spring Center, Inc.*,[171] the court addressed when a pleading amendment may defeat a no evidence summary judgment motion. In this negligence action, the defendant moved for summary judgment based in large part upon the absence of a legal duty owed to the plaintiff. The plaintiff amended his pleadings three days before the original hearing date on the motion, but only to assert additional negligence theories. The trial court then reset the summary judgment hearing for three weeks after the amended pleading was filed and, upon hearing, granted the motion. The appellate court affirmed, holding that a party does not necessarily defeat a Rule 166a(i)[172] motion simply by amending its pleadings without adducing additional summary judgment evidence, especially where the same legal theories remain at issue.[173]

The subject of so-called Mother Hubbard clauses in the context of summary judgment proceedings once again challenged the appellate courts during the Survey period. In *Midkiff v. Hancock East Texas Sanitation, Inc.*,[174] the plaintiff sued both his employer and the lessee of the premises upon which he was injured. The employer moved for summary judgment, following which the trial signed an order that granted the employer's dispositive motion and stated that "all relief requested and not expressly granted is DENIED."[175] Plaintiff appealed from this order. However, the appellate court concluded that the mere inclusion of the above-quoted language did not automatically render the trial court's order final, as it did not dispose of all claims and all parties.[176] Rather than dismissing the appeal for lack of jurisdiction, however, the court elected instead under Rule 44.3[177] to abate the appeal and remand the action to the district court either to sever the claims against the employer or to enter an order disposing of all the claims against the co-defendant.[178]

The court in *Harris County Flood Control District v. Adam*[179] also addressed the effect of a Mother Hubbard clause in a summary judgment proceeding. In this property dispute, 220 property owners sued some fifty defendants, including several governmental units, two of which successfully moved for summary judgment. The order that granted the dispositive motions of the two defendants also severed them from the original proceeding and contained the following language: "All other relief not specifically granted is denied."[180] The court rejected the argument that this language disposed not only of the severed proceeding, but also of the

170. *See id.* at 776.
171. 988 S.W.2d 428 (Tex. App.—Houston [14th Dist.] 1999, no pet.).
172. TEX. R. CIV. P. 166a(i).
173. *See Lampasas*, 988 S.W.2d at 436.
174. 996 S.W.2d 414 (Tex. App.—Beaumont 1999 no pet.).
175. *Id.* at 415.
176. *See id.* at 416.
177. TEX. R. APP. P. 44.3.
178. *See Midkiff*, 996 S.W.2d at 416.
179. 988 S.W.2d 423 (Tex. App.—Houston [1st Dist.] 1999, no pet.).
180. *Id.* at 426.

original proceeding as well. The court held that when a trial court enters a severance order with the intent of making the severed action final and appealable, the "Mother Hubbard clause in [such] a severance order [creates] a final and appealable judgment *only* as to the parties and claims in the severed cause."[181]

In *Rodriguez v. NBC Bank*,[182] the court similarly held that the inclusion of a Mother Hubbard clause ("All relief not expressly granted herein is denied") in a summary judgment order, did not (and could not) purport to grant or deny more relief than the moving party sought and, therefore, did not dispose of all claims and all parties, particularly the claims asserted against a defendant that had not moved for summary judgment.

X. JURY PRACTICE

The Texas Supreme Court in *Yanes v. Soward*[183] held that "if the death or serious illness of a family member renders a juror unable to discharge his responsibilities, trial may proceed with fewer than twelve jurors." In this medical malpractice action, a juror advised the trial court of his grandfather's serious illness and anticipated death. As a result of its inquiry, the trial court then concluded that the juror was sufficiently distracted by the circumstances of his grandfather's illness that he was "disabled" under Rule 292[184] from sitting due to a mental incapacity. Although counsel for both parties objected to the trial court's examination of the juror as "overly suggestive," and thus to the court's disability finding, neither counsel (perhaps wisely so) elected to question the juror. Finding ample evidence of the juror's mental incapacity based on his grandfather's illness, the supreme court held that the trial court did not abuse its discretion in dismissing the juror as disabled and allowing the case to proceed to verdict.

A Houston appellate court in *In the Interest of K.R.*,[185] held that the trial court did not commit reversible error by requiring the appellant, who had been convicted of reckless injury to a child in a prior criminal case, to appear handcuffed during the entire trial of a suit to terminate his parental rights. Noting the absence of any Texas civil jurisprudence on the issue, the appellate court looked to Texas criminal opinions and federal civil cases for guidance in reaching its conclusion. The court first held that the presumption that exists in criminal cases against requiring a party to appear before the jury wearing handcuffs should apply to civil cases.[186] The court then analyzed whether the trial court's error in keeping the appellant shackled during the trial was sufficiently prejudicial that it was calculated to, and probably did, cause the rendition of an improper

181. *Id.* at 427 (emphasis original).
182. 5 S.W.2d 756 (Tex. App.—San Antonio 1999, no pet. h.).
183. 996 S.W.2d 849 (Tex. 1999).
184. TEX. R. CIV. P. 292.
185. No. 14-98-00118-CV; 1999 WL 672525 (Tex. App.—Houston [14th Dist.] Aug. 31, 1999, no pet. h.).
186. *See id.* at *2-4.

judgment. Here, although the trial court failed to specify its justification for keeping the appellant handcuffed throughout the proceedings, the appellate court held that such error was harmless because the jury was permitted to hear extensive evidence about the acts that formed the grounds of the appellant's criminal conviction.[187] The trial court also instructed the jury to infer nothing relating to the issue of termination of parental rights from the appellant's handcuffs, other than that he was incarcerated for the offense. The court concluded, however, by limiting its holding to the facts of the case.

XI. JURY CHARGE

The Texas Supreme Court issued two opinions of note regarding jury charges during the Survey period. In *Crown Life Insurance Company v. Casteel*,[188] an action by an insured against an agent and an insurer over a vanishing premium life insurance policy, the jury received a single broad-form question on the issue of the insurer's liability to the agent (who claimed to have been injured in selling the policy) based on thirteen independent grounds of liability, including several under the Texas Deceptive Trade Practices—Consumer Protection Act ("DTPA").[189] The supreme court first held that the agent had standing to sue the insurer under Article 21.21[190] for unfair and deceptive practices, but lacked standing to assert claims under the DTPA.[191] In light of this ruling, the court went on to hold that the trial court committed harmful error in submitting invalid theories of liability to the jury in a single broad-form jury question where it could not be determined whether the jury based its verdict on one or more of the invalid theories. Because the court was unable to conclude that the jury's liability answer was not based on an improper theory, a reversal was required.[192]

In *Texas Workers' Compensation Insurance Fund v. Mandlbauer*,[193] the supreme court held that a plaintiff lacked standing to complain on appeal regarding the trial court's refusal to submit an inferential rebuttal jury instruction, which refusal was only harmful to the defendant. Because inferential rebuttals are defensive theories, the court concluded that the trial court's failure to submit such an instruction could only have harmed the defendant.

XII. JUDGMENTS

The preclusive effect of a prior judgment was the subject of two Texas Supreme Court cases during the Survey period. In the first, *Ingersoll-*

187. *See id.*
188. 43 TEX. SUP. CT. J. 348, 2000 WL 72142 (Jan. 27, 2000).
189. TEX. BUS. & COM. CODE ANN. § 17.41, *et seq.*
190. TEX. INS. CODE ANN. ART. 21.21 § 16.a.
191. *Casteel*, 43 TEX. SUP. CT. J. at 352.
192. *Id.* at 354-55.
193. 988 S.W.2d 750 (Tex. 1999).

Rand Co. v. Valero Energy Corp.,[194] the court reaffirmed that a contractual indemnity claim does not accrue until the indemnitee's liability becomes fixed and certain.[195] Thus, the court held that the indemnity claim at issue was not a compulsory counterclaim and was not barred by *res judicata* based on the failure of the defendant to assert it as a counterclaim in a prior case.[196] The court distinguished its prior decision in *Getty Oil v. Insurance Co. of North America*,[197] in which it had concluded that the indemnitee's claim was barred by *res judicata*, because in *Getty* the indemnitee had already sought the same relief by cross-claim in the earlier action.[198]

The high court's second opinion, *Quinney Electric, Inc. v. Kondos Entertainment, Inc.*,[199] involved the doctrine of collateral estoppel or issue preclusion. The defendants in that case invoked collateral estoppel as a defense to a breach of contract claim, arguing that the plaintiff had prevailed on the same contract against a third party in bankruptcy court.[200] Surprisingly, the court of appeals agreed that the plaintiff's claim was precluded.[201] The supreme court reversed, noting "the court of appeals misunderstood the basic function of collateral estoppel—to prevent a party from relitigating an issue that the party previously litigated and *lost*."[202] Because the plaintiff had won in bankruptcy court, it was not precluded from relitigating its claim against different parties in state court.[203]

The supreme court addressed the proof required to support a default judgment in *Texas Commerce Bank, N.A. v. New*.[204] The court held that hearsay affidavits admitted, without objection, at a default judgment hearing are legally sufficient to support a default judgment on both damages and attorney's fees.[205] Of course, as the court noted, the defendant's failure to answer results in the liability allegations of the petition being deemed admitted.[206]

The supreme court also discussed the proper interpretation of the statute governing settlement credits in *Drilex Systems, Inc. v. Flores*.[207] The plaintiffs in that case were an injured worker and his wife and three children.[208] Prior to trial, the plaintiffs settled with one of the defendants

194. 997 S.W.2d 203 (Tex. 1999).
195. *See id.* at 207.
196. *See id.* at 207-09. The court noted that the case before it raised an anomalous situation in which the indemnitor was also the plaintiff seeking damages from the indemnitee; the more common situation is for the indemnitee, having been sued by a third party, to look to the indemnitor either by a third-party claim or a separate suit. *Id.* at 208.
197. 845 S.W.2d 794 (Tex. 1992), *cert. denied*, 510 U.S. 820 (1993).
198. *See Valero Energy*, 997 S.W.2d at 209 (citing *Getty*, 845 S.W.2d at 630).
199. 988 S.W.2d 212 (Tex. 1999).
200. *See id.* at 213.
201. *See id.*
202. *Id.* (emphasis original).
203. *See id.*
204. 3 S.W.3d 515 (Tex. 1999).
205. *See id.* at 516.
206. *See id.* at 515.
207. 1 S.W.3d 112 (Tex. 1999).
208. *See id.* at 115.

and entered into an agreed judgment that specified how the settlement payment would be allocated among each of the plaintiffs.[209] Based on the plain language of the governing statute,[210] the supreme court held that, regardless of the agreed-upon allocation, all of the plaintiffs had to be treated as one "claimant," and the total damages recovered by all of them against the non-settling defendants had to be reduced by the total amount of the prior settlement.[211] After this reduction, in order to give effect to the jury's verdict, the remaining damages should then be allocated to the individual plaintiffs based on their respective percentages of the jury's total damage award.[212] Although the court acknowledged that this methodology might cause some plaintiffs to recover more than the jury awarded, and might cause others to have their awards reduced by settlement payments made to their co-plaintiffs, such a result was mandated by the statutory language.[213] Moreover, said the court, the statutory method protects non-settling defendants from manipulation of the settlement allocation by the plaintiffs, who will often be family members with a common interest.[214]

The court of appeals in *Martin v. Dosohs I, Ltd.*[215] followed what it called the majority rule in Texas in holding that a suit for declaratory judgment is not available to obtain a judicial interpretation of a prior judgment.[216] The court reasoned that a contrary decision would effectively permit a new method of review of judgments and would constitute an impermissible collateral attack on the prior judgment.[217]

Finally, the oft-misunderstood judgment nunc pro tunc was the subject of decisions by both Houston courts of appeals in *In re Rollins Leasing, Inc.*[218] and *Amato v. Hernandez*.[219] In both cases, the appellate courts rejected the trial court's entry of a judgment nunc pro tunc.[220] In *Rollins Leasing*, the trial court purported to correct a "clerical error" in the prior judgment that dismissed the entire case, rather than just one defendant, pursuant to a settlement.[221] Even though the real parties in interest argued that the settlement agreement and motion to dismiss clearly contemplated only the dismissal of one defendant, the court of appeals held that this did not show that only a clerical error, as opposed to a judicial

209. *See id.*
210. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.012(b)(1) (Vernon 1997).
211. *See Flores*, 42 TEX. SUP. CT. J. at 1126-27.
212. *See id.* at 1127.
213. *See id.* at 1128.
214. *See id.*
215. 2 S.W.3d 350 (Tex. App.—San Antonio 1999, pet. denied).
216. *See id.* at 353.
217. *See id.* The court also noted that the proper procedure for challenging such a claim is not a plea in abatement but a plea in bar, such as a summary judgment motion. *See id.* at 354.
218. 987 S.W.2d 633 (Tex. App.—Houston [14th Dist.] 1999, orig. proceeding).
219. 981 S.W.2d 947 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).
220. *See Rollins Leasing*, 987 S.W.2d at 636-37; *Amato*, 981 S.W.2d at 949-50.
221. *See Rollins Leasing*, 987 S.W.2d at 635.

error, had been made.[222] A clerical error, for purposes of nunc pro tunc, is when the written judgment does not accurately reflect the judgment actually rendered by the court.[223] Because the only judgment rendered by the visiting judge in that case was the one he signed, the error in the judgment was a judicial error.[224] Similarly, the judgment nunc pro tunc in *Amato*, which added to the judgment a defendant who had not been properly served, was not a correction of a clerical error and was, therefore, void.

XIII. MOTION FOR NEW TRIAL

Holding that the filing of an amended motion for new trial did not extend the trial court's plenary jurisdiction, the Texas Supreme Court conditionally granted a writ of mandamus in *In re Dickason*,[225] directing the trial court to vacate as void an untimely order granting a new trial. Although a trial court retains plenary power for thirty days after overruling a timely motion for a new trial, the filing of an amended motion does not further affect the appellate timetable.

The Texas Supreme Court construed the mandate of Rule 329b(c)[226] that a motion for new trial can only be granted by a "written order signed" in *In re Barber*.[227] The court held that an agreed order setting aside a default judgment bearing the facsimile signature of the presiding judge, which had been affixed by the court coordinator, met the requirements of this rule even in the absence of a signed original order. In the underlying proceeding, one of the defendants timely filed and served an answer, which plaintiff's counsel admitted receiving. Nonetheless, for reasons not explained by the court, the plaintiff sought a default judgment, which the trial court granted without realizing the defendant had answered (apparently because the district clerk was behind on his filing). The defendant timely moved to set aside the default judgment and for a new trial. Before the hearing on those motions, the parties submitted an agreed order granting a new trial, on which the court coordinator stamped the then-presiding judge's signature. Before the judge could actually sign the original order, however, he died of a heart attack. When a subsequent trial judge levied monetary sanctions for discovery abuse against the plaintiff's counsel, he sought to have that sanction order declared void, arguing that the trial court's plenary jurisdiction had expired because the agreed order setting aside the default judgment had never been properly entered.

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222. *See id.* at 637.
223. *See id.* at 636.
224. *See id.* at 637. As the court further stated the test, "the question is not what the trial judge 'intended' to render, but what the judge 'actually' rendered." *Id.* (quoting Nat'l Unity Ins. Co. v. Johnson, 926 S.W.2d 818, 821 (Tex. App.—San Antonio 1996, orig. proceeding).
225. 987 S.W.2d 570 (Tex. 1998) (per curiam).
226. TEX. R. CIV. P. 329b(c).
227. 982 S.W.2d 364 (Tex. 1999).

The supreme court conditionally granted a writ of mandamus based on its review of affidavits from the court coordinator that she had affixed the trial court's stamped signature to the agreed order at the trial judge's direction. The court concluded that in the absence of any evidence controverting that the trial court approved the agreed order and directed that its signature be stamped on it, the court's stamped signature met the requirements of Rule 329b(c).[228] The dissent argued that under *Stork v. State*,[229] a facsimile signature is only valid if it is affixed in the trial court's presence, which requirement the dissent reasoned the majority had effectively abandoned. Finding that the benefits of the tripartite requirements of a facsimile signature announced in *Stork* (*i.e.*, immediate authority, direction, and presence) outweighed the disadvantages cited by the majority opinion, the dissenters would have denied the writ of mandamus.

XIV. DISQUALIFICATION OF JUDGES

The Seventy-Sixth Legislature enacted several changes affecting the authority of judges. First, a judge who has jurisdiction over a suit pending in one county is now authorized to conduct any of the proceedings in the case, other than trial on the merits, in a different county unless a party objects.[230] Second, the legislature conformed the practice in the constitutional county courts to that of the district courts by allowing the presiding judge to appoint a visiting judge to serve whenever a county court judge is absent, incapacitated, or disqualified.[231] Finally, the legislature added a new provision to the civil Practice and Remedies Code governing third or subsequent motions for recusal or disqualification in a case.[232] A sitting judge who declines recusal after such a "tertiary recusal motion" shall continue to preside over the case and may sign orders, although all such orders must be vacated if the motion is ultimately granted.[233]

In re Perritt[234] involved the interplay between Rule 18a's[235] procedure for the assignment of a judge to hear a recusal motion and a party's right to object to the assignment of a visiting judge.[236] The supreme court held that a judge assigned by the presiding judge of the administrative judicial district to hear a recusal motion is subject to objection and mandatory disqualification.[237] The court reasoned that while the procedure for re-

228. TEX. R. CIV. P. 329b(c).
229. 114 TEX. CRIM. 398, 23 S.W.2d 733, 735 (1930).
230. *See* TEX. GOV'T CODE ANN. § 74.094(e) (Vernon Supp. 2000).
231. *See* TEX. GOV'T CODE ANN. § 26.011 (Vernon Supp. 2000). Prior to its amendment, the statute required the governor to appoint a "special judge" to sit for the disqualified or absent county judge. *See* TEX. GOV'T CODE ANN., § 26.011 (Vernon 1988).
232. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 30.016 (Vernon Supp. 2000).
233. *See id.* The statute also provides that if the motion is denied, the movant and its attorneys are jointly and severally liable for a mandatory award of the reasonable and necessary attorneys' fees and costs incurred by the non-movant. *Id.*
234. 992 S.W.2d 444 (Tex. 1999).
235. *See* TEX. R. CIV. P. 18a.
236. *See* TEX. GOV'T CODE ANN. § 74.053(b) (Vernon 1998).
237. *See id.*; *Perritt*, 992 S.W.2d at 445.

ferral of a recusal matter is described by Rule 18a,[238] the presiding judge's authority to assign the matter to another judge derives from Chapter 74 of the Government Code, and the assigned judge is therefore subject to a party's objection under that statute.[239]

In re PG&E Reata Energy, L.P.[240] upheld the validity of a local administrative judge's orders transferring to himself a number of cases in which motions to recuse the sitting judge had been filed and, in several of the cases, had already been granted by the regional presiding judge.[241] The court noted the recusal process was separate from the process for the transfer of cases within a particular county in the interest of the orderly administration of justice.[242] According to the court, the transfers for judicial convenience did no violence to the interests protected by the rules governing recusal, and litigants do not have a proprietary right to have their cases heard by any particular judge—even one who was assigned by the presiding judge after a successful motion to recuse.

XV. DISQUALIFICATION OF COUNSEL

The Texas Supreme Court issued several significant opinions in the attorney disqualification arena during the Survey period. The first, *In re Epic Holdings, Inc.*,[243] examined the proper application of the disciplinary rule governing an attorney's representation in a matter adverse to a former client.[244] Several of the plaintiff's lawyers were formerly partners or associates in a law firm, since dissolved, that had represented an individual and corporate defendants in connection with the formation of the corporation.[245] Although plaintiff's claims arose out of events occurring later in the corporation's history, the court nevertheless found they were related to the legal work performed by the prior firm because plaintiff alleged the corporation was created in a manner that allowed the directors to abuse their power.[246] Moreover, after reviewing the strategy employed by plaintiff's counsel at trial, the court held that the attorneys

238. *See* TEX. R. CIV. P. 18a.

239. *See Perritt*, 992 S.W.2d at 447. Interestingly, the court also held that relator was entitled to mandamus relief when the assigned judge refused to recuse himself, even though relator was not the party that objected to the assignment. *See id.* at 446.

240. *See* 4 S.W.3d 897 (Tex. App.—Corpus Christi 1999, pet. denied).

241. *See id.* The same court had previously granted mandamus relief because the administrative judge lacked authority under the local rules to unilaterally transfer cases to his own court. *See In re* Rio Grande Valley Gas Co., 987 S.W.2d 167, 176 (Tex. App.—Corpus Christi 1999, pet. denied). After the local rules were amended to grant him such authority, however, the administrative judge re-transferred the cases to himself. *See PG&E Reata*, 4 S.W.3d at 897.

242. *See id.* at 900.

243. 985 S.W.2d 41 (Tex. 1998).

244. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.09, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1998) (TEX. STATE BAR R. art. X, § 9) (generally prohibiting lawyer's representation of a client in a matter adverse to a former client if the validity of the lawyer's service to the former client is questioned or the subject matter is the same or is substantially related).

245. *See* 985 S.W.2d at 44, 48-50.

246. *See id.* at 50-51.

questioned the validity of the work done by their former firm while they were still members of it, and that the relationship between that work and the plaintiff's claims, as the attorneys chose to prosecute them, was therefore substantial.[247] Because the rule against such representation protects the integrity of the legal process, disqualification was mandated.[248]

The supreme court addressed several disqualification issues in *In re American Home Products Corp.*[249] The court first concluded that plaintiffs' counsel were not disqualified based on their retention of a testifying expert who had previously served as a consulting expert for the defendants in the same litigation.[250] The court noted that the expert was also a treating physician for some of the plaintiffs, although the defendants were unaware of that fact when they hired him as a consultant.[251] The court then analyzed the disqualification issue solely as a question of the discoverability of the consulting expert's identity, factual knowledge, and mental impressions and opinions.[252] The court concluded that even though some communications between defendant's counsel and the expert may have been in anticipation of litigation, the expert was also subject to being called as a witness by plaintiffs since he was a treating physician.[253] Accordingly, the facts known to the expert, regardless of their source, were subject to discovery, and plaintiffs' counsel were not disqualified.[254]

Defendants fared better when the court turned to whether plaintiffs' counsel should be disqualified by their hiring of a paralegal who had previously assisted defendants in the same litigation.[255] Relying on its prior decision in *Phoenix Founders, Inc. v. Marshall*,[256] the court reiterated the rule that a legal assistant or other nonlawyer that migrates from one side of a case to another is conclusively presumed to have received confidential information in her former employment, although the presumption that she has shared that information with her new employer may be re-

247. *See id.* at 51-52. *See also* In re Butler, 987 S.W.2d 221, 226-27 (Tex. App.—Houston [14th Dist.] 1999, orig. proceeding) (trial court could reasonably conclude that prior representation of insurer in a case alleging breach of duty to defend and wrongful denial of coverage was substantially related to representation of a client asserting similar claims against insurer, even though arising from a factually unrelated incident).

248. *See Epic Holdings*, 985 S.W.2d at 52. The court also dispatched plaintiff's argument that the conflict of interest had been waived by the defendants' delay in raising it, holding that it was the way plaintiff presented her case at trial, rather than anything inherent in the claim, that called the law firm's services into question and required the disqualification. *See id.* at 52-53.

249. 985 S.W.2d 68 (Tex. 1998).

250. *See id.* at 73-74.

251. *See id.* at 74.

252. *See id.* (citing TEX. R. CIV. P. 166b(2)(e)).

253. *See American Home Prods.*, 985 S.W.2d at 73.

254. *See id.* at 73-74.

255. *See id.* at 74. Although the parties argued about whether the paralegal was really a "freelance consultant" when she worked for defendants, *see id.*, the court noted that such distinctions were unimportant to the nature of her relationship with the defendants or the professional obligations attendant thereto. *See id.* at 77.

256. 887 S.W.2d 831 (Tex. 1994).

butted.[257] The only rebuttal evidence offered by the paralegal's new employer in *American Home Products*, however, was his own testimony that no confidential information was disclosed.[258] The court held this was insufficient to overcome the presumption in the absence of any evidence that the new employer took precautions to screen the paralegal off from any work on the case.[259]

After holding that the lawyer who hired the paralegal was disqualified, the court then addressed whether his co-counsel should likewise be disqualified.[260] Balancing the various competing interests, the court announced several imputation rules to be applied in disqualification cases. First, the new employer's failure to screen a "tainted" nonlawyer (*i.e.*, one presumed to possess confidential information of the adversary) does not automatically result in the disqualification of co-counsel.[261] Instead, a court should disqualify co-counsel only if the nature of his relationship with the nonlawyer is such that there is a "substantial likelihood" that confidential information was shared.[262] Once it is established that there was contact between the nonlawyer and co-counsel, the burden is on co-counsel to show that there was no reasonable prospect that the opponent's confidential information was disclosed and that it was not in fact disclosed.[263]

The court then turned to the more difficult issue of whether co-counsel should be disqualified because of his contact with the disqualified attorney-employer, who was himself disqualified only because of the presumption that the tainted nonlawyer shared the adversary's confidential information with him.[264] In this situation, the court held the complaining party must first demonstrate "that there were substantive conversations between disqualified counsel and co-counsel, joint preparation for trial by those counsel, or the apparent receipt by co-counsel of confidential information."[265] If this showing is made, a rebuttable presumption arises that disqualified counsel shared the imputed confidential information with co-counsel.[266] Co-counsel then has the burden of rebutting the presumption with evidence that disqualified counsel did not disclose any confidential information to him.[267]

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257. *See American Home Prods.*, 985 S.W.2d at 75.
258. *See id.*
259. *See id.*
260. *See id.* at 77.
261. *See id.*
262. *See id.* Of course, disqualification is also required if the nonlawyer *actually* shares confidential information with co-counsel. *See id.*
263. *See id.*. at 77-78. The court also noted that even if the nonlawyer and co-counsel communicated about matters from which the nonlawyer should have been screened by her new employer, disqualification still would not be required if the communications were solely *from* co-counsel *to* the nonlawyer. *See id.* at 78.
264. *See id.* at 79.
265. *See id.* at 81.
266. *See id.*
267. *See id.* The court further held that party seeking disqualification is not entitled to broadly pierce the attorney-client and work product privileges that might exist between disqualified counsel and co-counsel. *See id.* The court cautioned, however, that if it later

In re Users System Services, Inc.[268] posed the question "whether a lawyer should be disqualified from continuing to represent a litigant in a civil case for meeting with an opposing party, at the party's request, if prior to the meeting the party stated that he was no longer represented by counsel, but his former attorney had not moved to withdraw from the case."[269] The supreme court answered no, holding that so long as the attorney for the plaintiff had no reason to disbelieve that one of the defendants had discharged his counsel, then the attorney was not required to confirm the defendant's statements with opposing counsel or await the latter's formal withdrawal as counsel of record in the litigation.[270] The court further noted that, even if the attorney's actions could be viewed as a violation of the "spirit" of the so-called anti-contact rule,[271] the remaining defendants were not prejudiced and, therefore, disqualification would be inappropriate in any event.

XVI. MISCELLANEOUS

The supreme court examined the proper application of "the Rule"[272] in *Drilex Systems, Inc. v. Flores*.[273] The defendant in that case invoked the Rule, but then let one of its testifying experts, Acock, remain in the courtroom during the testimony of plaintiffs' first witness.[274] Moreover, after hearing that testimony, Acock then talked to the witness as well as another expert.[275] The trial court excluded Acock's testimony, and the court of appeals affirmed.[276]

The supreme court held that the trial court acted within its discretion in excluding Acock's testimony.[277] The court noted that once the Rule is invoked, all non-exempt witnesses must be placed thereunder and excluded from the courtroom; the burden is on a party seeking to exempt a witness from the Rule to establish that the witness's presence is essential to its presentation of the case.[278] Although such an exemption is often

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becomes apparent in discovery or at trial that co-counsel possesses the adversary's confidential information, then discovery of the source of the information should be allowed notwithstanding those privileges. *See id.* at 81-82.

268. 42 TEX. SUP. CT. J. 836 (June 24, 1999).

269. *Id.*

270. *See id.* at 838-39.

271. DISCIPLINARY RULE 4.02(a) states:

In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization of entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. TEX. DISCIPLINARY R. PROF'L CONDUCT 4.02(a).

272. *See* TEX. R. CIV. P. 267 and TEX. R. EVID. 614 (describing procedure for swearing in trial witnesses and excluding them from the courtroom).

273. 1 S.W.3d 112 (Tex. 1999).

274. *See id.* at 115.

275. *See id.* at 116.

276. *See id.*

277. *See id.* The court also held that the excluded testimony would have been cumulative in any event. *See id.*

278. *See id.* at 117.

granted for expert witnesses, the court rejected the defendant's argument that all experts are automatically exempt.[279] Because the defendant had not sought to exempt Acock from the Rule, and Acock violated the Rule by remaining in the courtroom and discussing the case with other witnesses, the trial court had the discretion to exclude his testimony.[280] Indeed, the court held exclusion was proper even though the trial court had not expressly placed Acock under the Rule or instructed him not to discuss the case with others.[281]

Texas Rule of Civil Procedure 28[282] allows individuals and entities doing business under an assumed name to sue and be sued in that name.[283] In *Chilkewitz v. Morton I. Hyson, M.D., P.A.*,[284] a medical malpractice case, the plaintiff first sued Morton I. Hyson, M.D., individually, only to find out after limitations had run that Dr. Hyson was not personally involved in the events in question, and that Morton I. Hyson, M.D., P.A. ("P.A."), was the proper party.[285] When the plaintiff then tried to avail himself of Rule 28's provisions, pointing out that there was some evidence that the P.A. did business under the assumed name Morton I. Hyson, M.D., the association argued this was an attempt to toll limitation in violation of section 10.01 of the Medical Liability and Insurance Improvement Act.[286] The supreme court rejected this argument, holding that "Rule 28 is not a tolling provision when a party is sued in the name under which it conducts business and that party has actual notice of the suit."[287] Because the P.A. did business under Dr. Hyson's name, it was party to the suit from the outset, albeit under that assumed name, and Rule 28 did not operate to toll the statute of limitations.[288]

Non-discovery sanctions were the subject of several decisions during the Survey period. In *Roberts v. Golden Crest Waters, Inc.*,[289] the trial court struck all of the plaintiffs' witnesses and then dismissed the case with prejudice based upon the plaintiff's failure to file a required pretrial statement and list of witnesses.[290] Although the court of appeals recognized a trial court's authority to impose sanctions for the failure to comply with a pretrial order, it held that a "death penalty" sanction, such as dismissal, must be consistent with the standards announced by the su-

279. *See id.* at 118.

280. *See id.* at 119. The court noted that it may sometimes be an abuse of discretion to exclude a witness for violation the Rule. *See id.* at 120. The defendant did not argue abuse of discretion on appeal, however, only that Acock was exempt from the Rule. *See id.*

281. *See id.* The supreme court stated that having invoked the Rule, the defendant was obliged to ensure that its witnesses complied. *See id.*

282. TEX. R. CIV. P. 28.

283. *See id.*

284. 43 TEX. SUP. CT. J. 52 (Oct. 21, 1999).

285. *See id.* at 52-53.

286. *See* TEX. REV. CIV. STAT. ANN. at 4590i, § 10.01 (Vernon Supp. 2000); *Chilkewitz*, 43 TEX. SUP. CT. J. at 53-54.

287. *See id.* at 55.

288. *See id.*

289. 1 S.W.3d 291 (Tex. App.—Corpus Christi 1999, no pet. h.).

290. *See id.* at *1.

preme court in the discovery context.[291] Applying these standards, the court held that the trial court abused its discretion because there was no indication that the plaintiffs themselves (as opposed to their attorneys) had a role in the sanctionable conduct, there was no prejudice to the defendants, and the trial court never considered lesser sanctions.[292]

The appellate courts also reversed the imposition of sanctions in *McWhorter v. Sheller*[293] and *Texas Parks and Wildlife Department v. Davis*.[294] In *McWhorter*, the trial judge sanctioned the defendant's attorney for secretly tape recording a telephone conference with the judge and opposing counsel, in which the judge communicated her findings of fact and conclusions of law.[295] The attorney indicated that she recorded the conference so that an order could be prepared accurately reflecting the judge's ruling, and the appellate court noted the trial judge did not find that the attorney had acted in bad faith.[296] Thus, while emphasizing that the attorney's conduct was inappropriate,[297] the court of appeals reversed the imposition of sanctions.[298]

In *Texas Parks and Wildlife Department v. Davis*,[299] the trial court sanctioned the defendant for allegedly failing to negotiate in good faith during court-ordered mediation.[300] The court of appeals reversed the sanction, holding that while parties may be compelled to attend mediation, they cannot be compelled to negotiate in good faith or settle their disputes.[301] In doing so, the court expressly declined to follow a contrary decision from one of its sister courts of appeal.[302]

Under both the Federal Arbitration Act[303] and the Texas Arbitration Act,[304] one of the grounds for vacating an arbitration award is "evident partiality" on the part of a neutral arbitrator.[305] The Texas Supreme Court has held that evident partiality is proven if the arbitrator failed to "disclose facts which might, to an objective observer, create a reasonable

291. *See id.* (citing Transamerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917 (Tex. 1991)).

292. *See Roberts*, 1999 WL 668814 at *2.

293. 993 S.W.2d 781 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

294. 988 S.W.2d 370 (Tex. App.—Austin 1999, no pet.).

295. *See McWhorter*, 993 S.W.2d at 788.

296. *See id.* at 789.

297. *See id.* at 788-89 & n. 2 (citing TEX. DISCIPLINARY R. PROF'L CONDUCT 8.04(A)(3) and 59 TEX. BAR J. 181 (Ethics Opinion 514 (Feb. 1996)).

298. *See McWhorter*, 993 S.W.2d at 789. The court warned, however, that attorneys who engage in the same conduct in the future probably will not escape sanctions. *See id.*

299. 988 S.W.2d 370.

300. *See id.* at 375.

301. *See id.* The court appeared to rely on the statutory provisions for confidentiality of mediation sessions as one of the bases for its decision. *See id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. 154.073 (Vernon Supp. 2000)).

302. *See Davis*, 988 S.W.2d at 375 (citing Texas Dep't of Transp. v. Pirtle, 977 S.W.2d 657 (Tex. App.—Fort Worth 1998, pet. denied)).

303. *See* 9 U.S.C.A. § 1, *et seq.* (West 1999).

304. TEX. CIV. PRAC. & REM. CODE ANN. § 171.001, *et seq.* (Vernon Supp. 2000).

305. 9 U.S.C.A. § 10(a)(2); TEX. CIV. PRAC. & REM. CODE ANN. § 171.014.

impression of the arbitrator's partiality."[306] In *Thomas James Associates, Inc. v. Owens*,[307] the court held that an arbitrator's failure to disclose that he had been sued as a result of his service on an arbitration panel did not satisfy this standard.[308] Although the arbitration respondent in *Owens* argued that this experience might cause the arbitrator to "'bend over backwards' to favor future claimants," the court noted that the opposite argument was equally plausible.[309] Conversely, in *Texas Commerce Bank v. Universal Technical Institute of Texas, Inc.*,[310] the court held that an arbitrator's failure to disclose that he had previously represented one of the parties in a $1.5 million lawsuit might create a reasonable impression of partiality and, therefore, justified vacating the arbitration award at issue.[311]

306. Burlington N. R.R. Co. v. TUCO, Inc., 960 S.W.2d 629, 636 (Tex. 1997) (discussed in A. Erin Dwyer, et al., *Texas Civil Procedure*, 51 SMU L. REV. 1383, 1415 (1998)).

307. No. 05-97-00273-CV, 1999 WL 669583 (Tex. App.—Dallas Aug. 30, 1999, no pet. h.).

308. *See id.* at *4.

309. *See id.*

310. 985 S.W.2d 678 (Tex. App.—Houston [1st Dist.] 1999, pet. dism'd w.o.j.).

311. *See id.* at 681.

Essay


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