SMU DEDMAN SCHOOL OF LAW

SMU Law Review

Volume 54
Issue 3 *Annual Survey of Texas Law*

Article 20

2001

Texas Civil Procedure

Thomas A. Graves

Donald Colleluori

Gary D. Eisenstat

Follow this and additional works at: https://scholar.smu.edu/smulr

Recommended Citation

Thomas A. Graves, et al., *Texas Civil Procedure*, 54 SMU L. Rev. 1629 (2001)
https://scholar.smu.edu/smulr/vol54/iss3/20

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.

Texas Civil Procedure

*Thomas A. Graves**
*Donald Colleluori***
*Gary D. Eisenstat****

THE major developments in the field of civil procedure during the Survey period occurred through judicial decisions.

I. SUBJECT MATTER JURISDICTION

Ripeness was the subject of a number of opinions during the Survey period. In *Waco Indep. Sch. Dist. v. Gibson*,[1] a challenge was made to a school district's student promotion policy, which required students to obtain satisfactory scores on a standardized assessment test in order to advance to the next grade. Plaintiff sued for injunctive relief to prevent the school district from implementing the testing plan and alleged that "minority students in the district will be harmed because they will fail the exams in disproportionate numbers and therefore be retained under the new policy."[2] Although the school district raised ripeness for the first time on appeal, the supreme court addressed the issue because "ripeness and standing are components of subject matter jurisdiction that cannot be waived."[3] In addressing the issue, the supreme court observed that, under the ripeness doctrine, the court considers whether, at the time a lawsuit is filed, the facts are sufficiently developed "so that an injury has occurred or is likely to occur, rather than being contingent or remote."[4] According to the court, "[a] case is not ripe when determining whether the plaintiff has a concrete injury depends on contingent or hypothetical facts, or upon events that have not yet come to pass."[5] In this case, the court concluded that at the time the suit was filed, the alleged harm to the students caused by retention was still contingent on uncertain events. "Although it [was] well-documented that minority pass rates [on certain standardized tests] have been disproportionately lower than white stu-

* B.B.A, New Mexico State University; J.D., Southern Methodist University. Partner, Figari Davenport & Graves, L.L.P., Dallas, Texas.
** B.A., Dickinson College; J.D., New York University. Partner, Figari Davenport & Graves, L.L.P., Dallas, Texas.
*** B.S. University of Colorado; J.D., Boston University. Partner, Figari Davenport & Graves, L.L.P., Dallas, Texas.

1. 22 S.W.3d 849 (Tex. 2000).
2. *Id.* at 850.
3. *Id.* at 851.
4. *Id.* at 852 (quoting Patterson v. Planned Parenthood of Houston & Southeast Tex., Inc., 971 S.W.2d 439, 442 (Tex. 1998).
5. *Gibson*, 22 S.W.3d at 852.

dents' pass rates, there was no evidence in this record that minorities will fail to be remediated in disproportionate numbers" by the school district's program.[6] Accordingly, because plaintiffs' alleged injury remained contingent on the results of both the standardized tests, and if necessary, the remediation program, their claim was not ripe for review.[7]

In *Texas Dep't of Banking v. Mount Olivet Cemetery Ass'n.*,[8] the issue was "whether certain funds from prepaid funeral contracts escheat to the State by virtue of the abandoned-property laws."[9] The plaintiff, a cemetery association, brought an action requesting injunctive relief to prohibit the State from requiring delivery of the allegedly abandoned funds to the Comptroller and a declaration that plaintiff was not required to deliver the funds at issue to the Comptroller.[10] Although the State had sent a notice of statutory violation to the plaintiff, and the letter had been referred to the Comptroller for enforcement action, the State argued that the action was not ripe because the cemetery association had not actually suffered any injury (*i.e.*, had not been required to remit any of the prepaid funds) and there was no agency order in place affecting its rights. Disagreeing with this contention, the court of appeals noted that "ripeness does not require an actual injury; [rather, plaintiff] is only required to show that an injury is likely to occur." Although no state agency had actually undertaken an enforcement action, the court concluded that, given the notice and referral to the Comptroller for enforcement, the case was ripe for review.[11]

Paulsen v. Texas Equal Access to Justice Found.[12] concerned issues related to the Interest on Lawyer's Trust Account ("IOLTA") program. In this case, an attorney and certain banking associations sued the Texas Equal Access to Justice Foundation (the "Foundation"), seeking declaratory and injunctive relief related to IOLTA. Prior to the filing of the action, the United States Supreme Court had held that "interest earned on an IOLTA account is the private property of the clients of the attorney who established the account" and this holding created uncertainty regarding the constitutionality of the IOLTA program.[13] In *Paulsen*, the plaintiff attorney sought declaratory relief because he claimed to be in an ethical quandary. If he continued to participate in the IOLTA program, there was an issue as to whether he breached an ethical duty to his client if he agreed to turn the interest over to the defendant Foundation. On the other hand, if he did not give the interest to the Foundation, then he was concerned that he would be subject to sanctions for ethical violations. The resolution of these issues centered on how broadly the prior Supreme

6. *Id.*
7. *Id.* at 3.
8. 27 S.W.3d 276 (Tex. App.—Austin 2000, no pet. h.).
9. *Id.* at 278.
10. *Id.* at 280.
11. *Id.* at 283.
12. 23 S.W.3d 42 (Tex. App.—Austin 1999, no pet. h.).
13. *Id.* at 43-44 (citing Phillips v. Washington Legal Found., 524 U.S. 156, 172 (1998)).

Court decision could be read. The court of appeals concluded that the attorney was seeking essentially an advisory opinion about the Supreme Court's decision and that there was no actual justiciable controversy between the attorney and the Foundation because the parties were all in agreement that an attorney could ethically participate in the Texas IOLTA program.[14]

As to the banking associations, they claimed to face "uncertainty and insecurity in the performance of current contracts with the Foundation" relating to the IOLTA program.[15] Although section 37.004 of the Uniform Declaratory Judgment Act provides that "a contract may be construed either before or after there has been a breach,"[16] the appellate court observed that there still "must be some showing that litigation is imminent between the parties unless the contractual uncertainties are judicially resolved."[17] Although there was a letter from a non-party advising the banking associations that certain lawyers were planning a class action against a number of banks related to the IOLTA program, the court observed that this threat from a stranger was too remote to support a claim for declaratory relief.[18] In short, there was no threat of litigation by the Foundation and, further, any liability of the banking associations would be to clients of depositing attorneys, not to the Foundation.

The Texas Supreme Court also had occasion to define what constitutes a jurisdictional challenge. In *Texas Dep't of Transp. v. Jones*,[19] the supreme court drew a distinction between a government's immunity from liability and its immunity from suit. The former refers to protection of the State from liability for a judgment even if the Legislature has expressly consented to the suit. According to the court, immunity from liability does not affect the court's subject matter jurisdiction.[20] On the other hand, "immunity from suit bars an action against the state unless the state expressly consents to the suit."[21] Thus, governmental immunity from suit defeats a trial court's subject matter jurisdiction and is properly asserted in a plea to the jurisdiction.[22]

In *Dubai Petroleum Co. v. Kazi*,[23] the supreme court considered whether the statutory requirements of section 71.031 of the Texas Civil Practice & Remedies Code, which permits personal injury or wrongful death actions by a citizen of a foreign country, are jurisdictional. Concluding that the statutory requirements are not jurisdictional, the court held that a trial court in this type of wrongful death case had jurisdiction

14. *Paulsen*, 23 S.W.3d at 45-46.
15. *Id.* at 45.
16. *Id.* at 46 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 37.004(b) (Vernon 1997)).
17. *Paulsen*, 23 S.W.3d at 46.
18. *Id.*
19. 8 S.W.3d 636 (Tex. 1999).
20. *Id.* at 638.
21. *Id.*
22. *Id.* at 638.
23. 12 S.W.3d 71 (Tex. 2000).

based on the general grant of jurisdiction under the Texas Constitution, not because of compliance with section 71.031.[24]

The physical location of court proceedings and its effect on jurisdiction were addressed in two decisions. In *Dal-Briar Corp. v. Tri-Angl Equities, Inc.*,[25] suit was filed in the 34th Judicial District Court of Hudspeth County and, at the time of the suit, the 34th Judicial District included Culberson, El Paso, and Hudspeth counties. After the filing of the suit, Hudspeth and Culberson counties were removed from the 34th Judicial District and the Legislature created the new 394th judicial district comprised of Brewster, Culberson, Hudspeth, Jeff Davis and Presidio counties. Accordingly, the case was transferred as a matter of law to the 394th District. Thereafter, the district court judge conducted certain hearings in El Paso County and also signed an order transferring the case to the 34th District Court in El Paso County. On appeal, the court held that the district court was without authority to conduct proceedings in El Paso because it was not in the 394th Judicial District where the suit was pending at the time of the hearings.[26] Thus, any orders entered as a result of such El Paso hearings were void and of no effect. As to the transfer order, however, appellants failed to establish where that order was signed and, accordingly, relying on a presumption in favor of jurisdiction, the court of appeals held that the transfer order was not invalid.[27]

The trial in *Cruz v. Hinojosa*[28] occurred, in part, at a Knights of Columbus hall located across from the courthouse in Starr County. Article V of the Texas Constitution provides that a court "shall conduct its proceedings at the county seat of the county in which the case is pending, except as otherwise provided by law."[29] The term "county seat" has been defined as "'that town or city where the seat of the county government is located, where the courthouse is, where the courts are held and the county officers perform their functions' or 'the place where the courthouse is situated.'"[30] Accordingly, the court of appeals held that the trial at the hall was within the county seat and, therefore, the trial court had jurisdiction to conduct proceedings at that location.[31]

Finally, the courts addressed a number of miscellaneous issues related to jurisdiction. In *Bridas Corp. v. Unocal Corp.*,[32] the court of appeals considered whether the trial court has jurisdiction to issue an anti-suit injunction while the final judgment of the case is pending on appeal. Several months after appeal had been filed, a party obtained an injunction from the trial court prohibiting the other side from proceeding with the

24. *Id.* at 76.
25. 22 S.W.3d 520 (Tex. App.—El Paso 2000, no pet. h.).
26. *Id.* at 522-23.
27. *Id.* at 523.
28. 12 S.W.3d 545 (Tex. App.—San Antonio 1999, no pet. h.).
29. *Id.* at 548 (quoting TEX. CONST. art. V, § 7).
30. *Id.* at 548-49.
31. *Id.* at 549.
32. 16 S.W.3d 887 (Tex. App.—Houston [14th Dist.] 2000, no pet. h.).

filing of a lawsuit in a foreign country. On appeal, the enjoined party complained that the trial court was powerless to enter the anti-suit injunction because, in light of the appeal and the passage of time, the court no longer had jurisdiction. Disagreeing with this contention, the court of appeals noted that the trial court continues to retain jurisdiction to protect or enforce its judgment while a case is pending on appeal and accordingly, an anti-suit injunction was appropriate.[33]

In *Weidner v. Sanchez*,[34] a personal injury suit was filed in the county court at law alleging actual damages of $95,000, which was within the jurisdictional limits of $100,000 for such county courts. Subsequently, plaintiff amended the petition to assert that her injuries were now permanent and, therefore, sought actual damages of $210,000. Recognizing that, in certain instances, jurisdiction continues even if a plaintiff subsequently amends the petition by increasing the amount in controversy above the court's jurisdictional limits, the court of appeals held that the lower court had jurisdiction.[35] In this connection, the court noted that a subsequent amendment increasing the jurisdictional amount does not affect jurisdiction if the additional damages accrued because of the passage of time and if there is an absence of proof that allegations in the original petition were made fraudulently or in bad faith.[36] In this case, the appellate court found plaintiff and her attorney did not know that her injuries were permanent at the time she filed the original petition. Rather, her treating physician did not reach that conclusion until some time after the suit had been filed, and plaintiff thereafter amended her petition to assert additional damages based on the permanent nature of the injury. Although defendants offered evidence that plaintiff's attorney had pleaded the $95,000 value in at least 41 other lawsuits in county court, the court of appeals held that this "suspicious" pattern did not alone establish bad faith.[37]

In *Southwest Intelecom, Inc. v. Hotel Networks Corp.*,[38] the parties had stipulated in their contract to "jurisdiction and venue in Ramsey County, Minnesota as if [the contract] were executed in Minnesota."[39] The court of appeals did not, however, interpret this clause to mandate that Minnesota courts had exclusive jurisdiction over the controversy. Rather, the court held that the jurisdictional clause only required the parties to submit to the jurisdiction of the courts of Ramsey County, Minnesota, in the event that a suit related to the agreement was brought in that state.[40]

33. *Id.* at 890.
34. 14 S.W.3d 353 (Tex. App.—Houston [14th Dist.] 2000, no pet. h.).
35. *Id.* at 363.
36. *Id.* at 361.
37. *Id.* at 361-62.
38. 997 S.W.2d 322 (Tex. App.—Austin 1999, pet denied).
39. *Id.* at 323.
40. *Id.* at 325.

II. SERVICE OF PROCESS

For purposes of statutes of limitation, the mere filing of a lawsuit is not sufficient to meet the requirements of bringing suit within the limitations period. To "bring suit," a plaintiff must file his action and have the defendant served with process.[41] When a plaintiff does not serve the defendant until after the limitation period runs, the date of service relates back to the date suit was filed only if plaintiff exercises diligence in effectuating service. Two cases addressed the sufficiency of a plaintiff's efforts to diligently serve process so as to avoid a limitations defense. In *Witt v. Heaton*,[42] suit was brought for personal injuries resulting from a car accident that occurred on September 7, 1995. On September 4, 1997, the suit was filed and citation was requested on the same date. Thereafter, the district clerk mailed the citation to a constable but it was subsequently returned because the defendant resided outside the constable's jurisdiction. On December 30, 1997, a letter was sent to a different constable requesting service of citation upon the defendant who was thereafter served approximately four weeks later. Given that plaintiff had offered a reasonable explanation for the delay of service of process, namely, the clerk's error in sending the citation to the wrong constable, the appellate court held that summary judgment on the basis of limitations was not warranted.[43]

In *Boyattia v. Hinojosa*,[44] plaintiff requested the clerk to issue citation for a county defendant at the time she filed her original petition and also directed that the citation be delivered to a constable for service at the same time. Although the county citation was issued on the day the petition was filed, the clerk inexplicably delayed three months before delivering it to the constable for service. Recognizing that "a party may ordinarily rely on the clerk to perform his duty within a reasonable amount of time," the court of appeals nonetheless held that "an unexplained three-month delay [was] not a reasonable time for the clerk to deliver a citation."[45] Therefore, plaintiff became obligated to make an effort to ensure that delivery of service was accomplished.[46] Accordingly, the court concluded that summary judgment based on limitations was appropriate.[47] On the other hand, other defendants were served with process within two weeks after the suit was filed. According to the court, two weeks was not an unreasonable amount of time to allow a clerk to perform his duties under the rules and, therefore, there was no inaction by the clerk that plaintiff was obligated to recognize and act upon to correct.[48]

41. Broom v. MacMaster, 992 S.W.2d 659, 664 (Tex. App. —Dallas 1999, no pet.).
42. 10 S.W.3d 435 (Tex. App.—Beaumont 2000, no pet. h.).
43. *Id.* at 438.
44. 18 S.W.3d 729 (Tex. App.—Dallas 2000, no pet. h.).
45. *Id.* at 734.
46. *Id.*
47. *Id.*
48. *Id.*

Several cases considered the sufficiency of service of process so as to support a default judgment. In *Hercules Concrete Pumping Serv., Inc. v. Bencon Management & Gen. Contracting Corp.*,[49] the return of citation reflected that it had been served on George W. Brock of "Hercules Concrete Pumping." The court of appeals found the service to be defective for two reasons. First, the return did not specify the position held by "George Brock" with the defendant company, even though Brock had been identified in the petition as its registered agent. Second, the return did not establish that "Hercules Concrete Pumping" was the defendant "Hercules Concrete Pumping Services, Inc."[50]

Two courts also addressed procedures that must be followed in order to serve or to effectuate service through the Secretary of State. In general, Texas statutes provide that a plaintiff may serve the Secretary of State, as agent for a corporation, when the corporation fails to appoint or maintain a registered agent in the State or when its registered agent cannot, with reasonable diligence, be found at the registered office.[51] In *Nat'l Multiple Sclerosis Society v. Rice*,[52] plaintiff first attempted to serve process by serving the registered agent of defendant corporation, but the citation was not served because the certified mail was returned unaccepted. Thereafter, plaintiff served the Secretary of State, but the Secretary of State was unsuccessful in forwarding citation to the defendant because process was returned to the Secretary bearing the notation "forwarding order expired." Other than the foregoing, there was nothing in the record that described the attempts made to locate and serve the registered agent of the defendant corporation. Under those circumstances, the court concluded that plaintiff did not use "reasonable diligence to locate the agent and to serve him before she attempted substitute service through the Secretary of State."[53] In *Interaction, Inc. v. State of Texas*,[54] the State attempted to serve citation on the defendant company's registered agent, but such service was not executed because the registered agent had moved to Lebanon. The name and title of the defendant company's vice president and his address were handwritten on the return. Rather than serving the vice president, however, the State then effectuated substitute service on the defendant company through the Secretary of State. Appealing from a default judgment, defendant contended that the State should have served the vice president whose name and address were noted on the first return of service. The court of appeals concluded that the State was not required to attempt service on another corporate officer before employing substitute service on the Secretary of State.[55]

---

49. No. 01-99-00665-CV, 2000 Tex. App. LEXIS 959 (Tex. App.—Houston [1st Dist.] 2000, no pet. h.).
50. *Id.* at *6.
51. *See* TEX. BUS. CORP. ACT. ANN. art. 2.11(B) (Vernon 1980); TEX. REV. CIV. STAT. ANN. art. 1396-2.07(A) (Vernon 1997).
52. 29 S.W.3d 174 (Tex. App.—Eastland 2000, no pet. h.).
53. *Id.* at 177.
54. 17 S.W.3d 775 (Tex. App.—Austin 2000, no pet. h.).
55. *Id.* at 779.

Two courts considered the lack of verification on a return of service as affecting its validity. In *Dolly v. Aethos Communications Sys., Inc.*,[56] the trial court entered an order allowing substitute service on the defendant by, among other things, allowing it to be attached to the door at defendant's usual place of residence and also required the return of service to be verified. Subsequently, a return was filed, and on the bottom of the return and after the signed verification, it stated "posted to front door." Finding that this return was defective, the court noted that verification was deficient because the language "posted to front door" was ambiguous and appeared after the verification. Moreover, the court observed that the blanket statement that a citation was executed pursuant to rules of procedure, even if verified, is not sufficient; rather, it must verify specific facts related to the act of service.[57] In *Bautista v. Bautista*,[58] service was effectuated through a private process server pursuant to Rule 107.[59] Recognizing that Rule 107 requires return of service of process to be verified, the court of appeals reversed a default judgment because the return in this case, although reflecting service, was not verified.[60]

Rule 103 provides that "citation" may be served anywhere by any sheriff or constable or other person authorized by law or, by any person authorized by "written order of the court who is not less than eighteen years of age."[61] The rule further provides that "no person who is a party to or interested in the outcome of a suit shall serve any process."[62] In *Palomin v. Zarsky Lumber Co.*,[63] the appellate court held that service by a bookkeeper of the law firm representing the plaintiff was not in violation of Rule 103.[64] Importantly, the court determined that the bookkeeper had served process after her normal work hours at the law firm, that she received a separate fee for serving defendant, and was not working as an employee of the law firm when she served process.[65]

In *Renaissance Park v. Davila*,[66] the court considered an issue of first impression under section 92.003 of the Texas Property Code, which defines who is a landlord's agent for service of process.[67] In this case, the defendant owned certain apartments in which plaintiff had formerly been a tenant. Apparently, at the time she had been a tenant, the apartments were owned by another company. Pursuant to section 92.003, plaintiff effectuated service on the defendant's on-premises manager or rent collector at the apartments. The court of appeals, however, concluded that

56. 10 S.W.3d 384 (Tex. App.—Dallas 2000, no pet. h.).
57. *Id.* at 389.
58. 9 S.W.3d 250 (Tex. App.—San Antonio 1999, no pet.).
59. TEX. R. CIV. P. 107.
60. *Bautista*, 9 S.W.3d at 251.
61. TEX. R. CIV. P. 103.
62. *Id.*
63. 26 S.W.3d 690 (Tex. App.—Corpus Christi 2000, no pet. h.).
64. *Id.* at 695.
65. *Id.* at 695.
66. 27 S.W.3d 252 (Tex. App.—Austin 2000, no pet. h.).
67. TEX. PROP. CODE ANN. § 92.003 (Vernon 1995).

the service was defective because plaintiff did not affirmatively allege, as required by the Property Code, that she had not received written notice of the name and address of the management company or the owner of the building before serving the on-premises manager or rent collector. More importantly, the court held that plaintiff was not entitled to invoke section 92.003 because she did not allege a landlord-tenant relationship had ever existed between herself and the defendant.[68] The court held that, "in order for a tenant to serve a landlord under section 92.003, the tenant must allege that she had a landlord-tenant relationship with that particular landlord at some point in time."[69] The court, however, declined to decide whether, in order to take advantage of section 92.003, the tenant must allege that the landlord-tenant relationship existed at the time of service.[70]

Finally, in *In the Interest of A.Y.*,[71] the court discussed the requirements for publication notice in order to terminate a parent-child relationship. In this case, the trial court entered an order allowing publication notice after a state official had filed an affidavit to the effect that she had been unable to locate the absent father or his current address, although she had discovered that he last lived in Memphis, Tennessee. Subsequently, citation was published in El Paso. On appeal, counsel for the absent father complained that publication of citation was inadequate as it should have been published in Memphis, Tennessee, the last known place that the absent father had lived. The court of appeals, however, determined that "in suits affecting the parent-child relationship, citation by publication may be served as in other civil cases," and that, except for certain suits involving land, publication citation is to be made in the county where the suit is pending.[72] Accordingly, the court concluded that publication notice was sufficient and did not violate the due process rights of the absent father, particularly as he had not been seen, communicated with, or supported his children for many years.[73]

III. SPECIAL APPEARANCE

As most practitioners are aware, challenges to personal jurisdiction are asserted in state court by means of a special appearance. Two cases during the Survey period addressed procedures related to special appearance. Recognizing that the plaintiff has the initial burden to plead sufficient allegations to show jurisdiction in Texas, the court in *Frank A. Smith Sales, Inc. v. Atlantic Aero, Inc.*,[74] considered whether the plaintiff had met its burden. As an initial matter, the court observed that it was an unanswered question under Texas law as to whether the court should

68. *Davila*, 27 S.W.3d at 257.
69. *Id.*
70. *Id.*
71. 16 S.W.3d 387 (Tex. App.—El Paso 2000, no pet. h.).
72. *Id.* at 389.
73. *Id.* at 389-90.
74. 31 S.W.3d 742 (Tex. App.—Corpus Christi 2000, no pet. h.).

look only to the plaintiff's petition in determining whether this burden had been met or could consider other documents on file, such as a response to the special appearance.[75] The court declined, however, to decide that issue because it concluded that the plaintiff had not met its burden, even considering both the petition and its response to the special appearance.[76] Specifically, in neither instrument was there any allegation that the tort in question was committed, in whole or in part, in the State of Texas. The court did decide, however, that an argument made at a hearing on the special appearance could not be considered a "pleading" and, hence, such argument could not serve as a basis for satisfying the plaintiff's initial burden to plead sufficient allegations to show jurisdiction in Texas.[77]

In *N803RA, Inc. v. Hammer*,[78] defendants were sued for alleged deficient work on an airplane, which was performed in the State of Florida. After suit was filed, defendants sent a pro se letter on company letterhead to the district clerk denying the petition's allegations and requesting that the suit be dismissed. Additionally, at the end of the letter, defendants noted that all of the work was performed in Florida and none performed in Texas. Subsequently, defendants hired a Texas attorney who filed a verified special appearance, which was sustained by the trial court. On appeal, the principal issue was whether the earlier letter constituted a general appearance and, hence, a waiver of defendant's challenge to personal jurisdiction. The court of appeals held that the letter was an answer because defendants had "responded to the petition and asked the court to make a judgment on the case, which constituted an answer."[79] Relying on Rule 120a,[80] the court observed that a special appearance may be contained in the same instrument as an answer without waiver of such special appearance, and the special appearance may be amended to cure defects.[81] Here, the court determined that, although the letter constituted an answer, it did contain a challenge to the court's jurisdiction because defendants contended that they did not belong in a Texas court for work that took place exclusively in Florida. Hence, they did not waive their challenge to jurisdiction.[82] In reaching that result, the court noted that "*pro se* pleadings should be liberally construed."[83]

IV. VENUE

The appellate courts continue to wrestle with venue issues under section 15.003 of the venue statute, which governs suits in which multiple

75. *Id.* at 746.
76. *Id.*
77. *Id.* at 748.
78. 11 S.W.3d 363 (Tex. App.—Houston [1st Dist.] 2000, no pet. h.).
79. *Id.* at 366.
80. TEX. R. CIV. P. 120a.
81. *Hammer*, 11 S.W.3d at 366.
82. *Id.* at 367.
83. *Id.*

plaintiffs seek to maintain venue in a single county.[84] In general, this statute provides that, "in a suit where more than one plaintiff is joined each plaintiff must, independently of any other plaintiff, establish proper venue."[85] 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."[86] In *Am. Home Prods. Corp. v. Bernal*,[87] a suit involving the Fen/Phen diet drug, plaintiffs contended that they had established the essential need because the plaintiffs had joined together for the purpose of achieving "mutual support" and to derive a "significant economic benefit" from joining together, and it would benefit all the parties to avoid duplicative discovery caused by multiple lawsuits. Relying on an earlier supreme court decision,[88] the court held that a need to pool resources did not constitute an "essential need" within the meaning of section 15.003.[89] Further, the court of appeals observed that plaintiffs could have sued in the county of defendants' residence and, thereby, received the benefits from pooling their resources.[90]

Section 15.003 also provides for an interlocutory appeal under that section of the venue statute.[91] In *Am. Home Prods. Corp. v. Adams*,[92] another fen/phen case, the trial court found that each plaintiff had independently established proper venue in accordance with section 15.002 (setting forth the general rule of proper venue) and section 15.005 (dealing with venue as to multiple defendants). Appealing from this adverse decision, the defendant asserted that the court of appeals had jurisdiction over any ruling by a trial court in a multi-plaintiff case, regardless of the stated basis for the ruling in the trial court's order. Disagreeing

---

84. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003 (Vernon 1986 & Supp. 2001).
85. *Id.* § 15.003(a).
86. 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 the 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.

Id.

87. 5 S.W.3d 344 (Tex. App.—Corpus Christi 1999, no pet.).
88. Surgitek, Bristol-Myers Corp. v. Abel, 997 S.W.2d 598 (Tex. 1999).
89. *Bernal*, 5 S.W.3d at 348 (citing *Surgitek*, 997 S.W.2d at 604).
90. *Id.*
91. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(c).
92. 22 S.W.3d 121 (Tex. App.—Fort Worth 2000, no pet. h.).

with this position, the court of appeals held that it did not have jurisdiction where, as here, the trial court had based its venue decision expressly on another section of the venue statute.[93] In *Dayco Prods., Inc. v. Ebrahim*,[94] a number of plaintiffs filed suit against the defendant and, after the court denied defendant's motion to transfer venue, additional plaintiffs were joined. Defendant then filed a motion for reconsideration and motion to transfer as to the new plaintiffs. Thereafter, the trial court denied the motions and defendant appealed pursuant to section 15.003. The court of appeals held that defendant's "motion for reconsideration did not extend its time for filing an interlocutory appeal" under section 15.003.[95] Given that defendant did not file its notice of appeal within the 20-day time limit for such an interlocutory appeal, the court held it was without jurisdiction to consider defendant's appeal as to the trial court's original determination, although the appeal was timely as to the ruling on the subsequently-added plaintiffs.[96] Finally, in *Labrador Oil Co. v. Norton Drilling Co.*,[97] the appellate court held that section 15.003 does not afford a right of interlocutory appeal in regard to venue determinations related to the joinder of multiple defendants under section 15.005 of the venue statute.[98]

In *City of Fort Worth v. Zimlich*,[99] the Texas Supreme Court considered a city's challenge to venue provisions under the Whistle-Blower Act, which allow a plaintiff to bring suit in the county in which the plaintiff resides or in Travis County.[100] In this case, plaintiff had sued a city (Fort Worth) in Travis County. The City asserted that it was unconstitutional to require it to submit to an inconvenient venue. Disagreeing with this contention, the supreme court noted that the legislature has the power to require a city to submit to an inconvenient venue. The court also rejected the city's contention that venue in Travis County violated separation of powers because it allegedly allowed Travis County courts to review the administrative decisions of a far-removed local government.[101] In this connection, the court observed that the Texas Constitution only guarantees separation of the state legislative, executive, and judicial branches of the government.[102]

In *Berg v. AMF, Inc.*,[103] the court of appeals addressed the Texas forum non conveniens statute in a case involving events in a foreign country. In this occupational injury case, the plaintiff, a former Canadian but a current Arizona resident, worked for a Canadian subsidiary and had

---

93. *Id.* at 124.
94. 10 S.W.3d 80 (Tex. App.—Tyler 1999, no pet. h.).
95. *Id.* at 83.
96. *Id.*
97. 10 S.W.3d 717 (Tex. App.—Amarillo 1999, no pet. h.).
98. *Id.* at 719-20.
99. 29 S.W.3d 62 (Tex. 2000).
100. TEX. GOV'T CODE ANN. § 554.007 (Vernon 1994 & Supp. 2001).
101. *Zimlich*, 29 S.W.3d at 72.
102. *Id.*
103. 29 S.W.3d 212 (Tex. App.—Houston [14th Dist.] 2000, no pet. h.).

been exposed to various chemicals as a result of his job of spraying a coating mixture that was manufactured by the defendant's parent company in Houston. The court of appeals held that the trial court's dismissal of the action pursuant to the Texas forum non conveniens statute[104] was not an abuse of discretion.[105] In this connection, the court observed that, even if Canadian law was more unfavorable to the plaintiff, that should not be given substantial weight.[106] Instead, the court placed particular emphasis on the fact that (a) the majority of the witnesses in the case were located in Canada; (b) a review of the Canadian plant would be imperative; and (c) the treating physicians and the witnesses to the use of the chemicals were all located in Canada.[107] Additionally, the court also addressed an exception in the forum non conveniens statute, which "prohibits a judge from dismissing the case if the party opposing dismissal can make a prima facie showing that an act or omission that was a proximate or producing cause of the injury or death occurred in [Texas]."[108] The court found the exception to be inapplicable. Although the plaintiff had established that the chemicals were mixed in and shipped from Houston for use in Canada and that he suffered severe pulmonary disease as a result of his exposure to chemicals in the 1970s, he had not offered proof, particularly expert testimony, that the chemicals that were mixed in Houston and shipped to Canada caused the kind of lung damage that he had sustained.[109]

Section 5(B) of the Texas Probate Code authorizes a statutory probate court to transfer a suit pending in a district or other court to the probate court when the suit in the non-probate court is one in which a personal representative of an estate pending in the probate court is a party.[110] *In re Ramsey*,[111] a suit involving the affairs of a partnership in which the decedent had been a partner, was instituted in district court. The representative of the decedent's estate was, however, named to the suit, and the probate court ordered that the partnership action be transferred to it. The court of appeals held that, although venue of the partnership suit may have been appropriate where it was filed, the express transfer authority granted by section 5(B) applies notwithstanding the venue statute and, when faced with the probate court's transfer order, the district court was required to transfer the suit.[112]

Finally, in *Mabon Ltd. v. Afri-Carib Enters., Inc.*,[113] the Court addressed the issue of whether a forum selection clause was exclusive. In

104. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(b) (Vernon 1997 & Supp. 2001).
105. *Berg*, 29 S.W.3d at 219.
106. *Id.* at 216.
107. *Id.* at 218.
108. *Id.* at 219 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(f) (Vernon 1997 & Supp. 2001)).
109. *Id.* at 220.
110. TEX. PROB. CODE ANN. § 5(B) (Vernon Supp. 2000).
111. 28 S.W.3d 58 (Tex. App.—Texarkana 2000, no pet. h.).
112. *Id.* at 61.
113. 29 S.W.3d 291 (Tex. App.—Houston [14th Dist.] 2000, no pet. h.).

this case, the clause in question stipulated that the Country of Nigeria "shall have venue" in regard to the dispute at hand. The court, however, found that this language did not mean that the dispute could only be resolved by Nigerian courts. In this regard, the court construed the language as meaning that "Nigerian courts shall be an acceptable venue for the assertion of claims" but that such language did not provide for exclusive jurisdiction in Nigeria.[114] Rather, according to the court, "an enforceable forum selection clause must contain explicit language regarding exclusivity."[115] The court also held that a motion to dismiss is the proper method by which to enforce a forum selection clause and, further, a party can waive its right to enforce such a clause by acting inconsistently with regard to such right, such as seeking affirmative relief or requesting a jury trial.[116]

V. PARTIES

Class actions continued to be a hot topic during the Survey period. In *Intratex Gas Co. v. Beeson*,[117] the Texas Supreme Court considered, first, whether a class may be defined by the ultimate liability issue (a "failsafe" class) and, second, whether an appellate court may redefine an erroneously defined class. In this action, plaintiffs claimed that the defendant gas company had not taken natural gas in ratable proportions from wells of more than 900 producers. The lower court certified a class that was defined as all persons who were producers of natural gas sold to the defendant during a specified time period whose gas was taken by the defendant in quantities less than the ratable portions.[118] In deciding that this definition was erroneous, the supreme court noted that a representative plaintiff must demonstrate not only that an identifiable class exists, but that it is susceptible to precise definition, and the class members must be presently ascertainable by reference to objective criteria.[119] In turn, according to the court, "this means that the class should not be defined by criteria that are subjective or that require an analysis of the merits of the case."[120] Here, the supreme court found that the trial court's definition failed to meet this criteria because there was no way of ascertaining whether a given producer was a member of the class until a determination of ultimate liability was made as to that person (*i.e.*, defendant had not ratably taken gas from such person).[121] The supreme court, however, declined to modify the class definition on appeal. Instead, it remanded the case for the trial court to consider redefinition. In this regard, the supreme court was of the view that a remand, rather than a redefinition

114. *Id.*
115. *Id.* at 297.
116. *Id.*
117. 22 S.W.3d 398 (Tex. 2000).
118. *Id.* at 402.
119. *Id.* at 403.
120. *Id.*
121. *Id.* at 404-05.

by an appellate court, was more consistent with the trial court's discretion in regard to class certification and its responsibility to manage a class action.[122]

Subsequently, in *Ford Motor Co. v. Sheldon*,[123] the supreme court reached a similar result. In this DTPA and breach of warranty case, the court considered a class definition that included "those purchasers of certain specified Ford vehicles who suffered past or future diminution in value damages or out-of-pocket expenses from peeling paint and who *allege* that the cause of the peeling is the lack of spray primer in the paint process."[124] The high court determined that simply including the phrase "allege" did not overcome the problems with the failsafe class definition that had been identified in its earlier *Intratex Gas* decision. In this regard, the court held that class membership could not be clearly ascertained because "there [was] no realistic means for the trial court to determine which class members 'allege that the peeling or flaking was caused by a defective paint process' so the court would have to undertake a monumental task of inquiring individually into each proposed class member's state of mind."[125]

Although the *Intratex Gas* and *Sheldon* decisions have an important bearing on the class certification practice in Texas, the supreme court's decision in *Southwestern Ref. Co. v. Bernal*[126] is even more significant. The principal issues in this case were (a) the propriety of certifying a class of 904 plaintiffs for alleged personal injuries arising from a refinery tank fire explosion, and (b) a trial plan that was approved by the court of appeals, with some modifications, for the class action.

As modified by the court of appeals, the trial plan envisioned four phases.[127] The first phase addressed the alleged liability of the defendants to the named class representatives on the various legal theories, including liability for gross negligence, and whether defendants were responsible for the explosion and whether the released materials were capable of causing harm to the class. The second phase was to determine proximate cause and actual damages for the named class representatives. The third phase addressed the amount of punitive damages for the entire class. The fourth and final phase would determine proximate cause and actual damages for the remaining unnamed class members. Regarding this trial plan, the fundamental issue was whether class actions were exempt from the supreme court's pronouncement in *Transp. Ins. Co. v. Moriel.*[128] In *Moriel*, the court set forth certain procedures for bifurcation of actual and punitive damage issues at trial that, according to the court, were intended to ensure that punitive damages awards are not

122. *Id.* at 406.
123. 22 S.W.3d 444 (Tex. 2000).
124. *Id.* at 449.
125. *Id.* at 454-55.
126. 22 S.W.3d 425 (Tex. 2000).
127. *Id.* at 429-30.
128. 879 S.W.2d 10 (Tex. 1994).

"grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages."[129] The supreme court concluded that class actions were not exempt from the requirements of *Moriel* and that the trial plan endorsed by the court of appeals did not comply with the legal principles announced in that case.[130] In particular, the court found fault with the trial plan because it allowed the jury to decide punitive damages for the entire class without knowing the severity of the offense or the extent of compensatory damages for each of the unnamed class members.[131]

As to the propriety of class certification in this case, the court focused on the requirements of Rule 42(b)(4),[132] which requires the trial court to determine whether common questions of law or fact predominate over questions affecting only individual class members and whether the class treatment is superior to other available methods for the fair and efficient adjudication of the controversy. The court held that these elements of the class action rule had not been met.[133] First, the supreme court expressly rejected the approach of "certify now and worry later" about how the case would be tried, a view which had been endorsed by at least some other courts.[134] According to the supreme court, it is improper to certify a class without knowing how claims can and will likely be tried and, accordingly, a trial court certification order must indicate how the claims will be tried so that conformance with Rule 42 may be meaningfully evaluated.[135]

Second, the court considered the application of the class action device generally in personal injury cases and whether, in this case, individual issues were likely to predominate common ones. As a general matter, the supreme court observed that class actions will "rarely be an appropriate device" for resolving personal injury cases due to individual causation and damage issues.[136] Here, the court found that the causation and damage issues were uniquely individual to each class member because, among other things, the proximity of the explosion to each of the class members' homes varied; there was evidence that prevailing winds blew the smoke away from certain of the class members' homes; and the class members were scattered in varied locations (*e.g*, some were inside their homes, others were outside, some walking, some driving).[137] The court further found that the trial plan endorsed by the court of appeals would not overcome this problem because, regardless of whether the defendant was legally responsible for the explosion and whether the released materials were capable of causing the harm, the answers to those questions would

129. *Bernal*, 22 S.W.3d at 433.
130. *Id.*
131. *Id.*
132. TEX. R. CIV. P. 42(b)(4).
133. *Bernal*, 22 S.W.3d at 436-38.
134. *Id.* at 435.
135. *Id.*
136. *Id.*
137. *Id.*

not establish "(i) whether and to what extent each class member was exposed; (ii) whether the exposure was the proximate cause of harm to each class member; (iii) whether and to what extent other factors contributed to the alleged harm; and (iv) the damage amount that should compensate each class member."[138] Although the supreme court observed that the class action device is unquestionably a valuable tool in protecting the rights of Texas citizens, the class action procedure is not meant to alter the parties' burdens of proof, right to jury trial, or the substantive requirements to recovery under a given tort.[139]

Of course, the foregoing trilogy of supreme court cases generated substantial discussion in subsequent appellate court opinions addressing class action issues. In *Henry Schein, Inc. v. Stromboe*,[140] two dentists filed suit against a defendant and its subsidiaries regarding deficiencies in software packages that were designed to aid dentists in the management of their records. The dentists asserted claims, individually and on behalf of a class, for breach of contract, breach of warranty, fraud, negligent misrepresentation, estoppel, and violation of the DTPA. Following a five-day evidentiary hearing, the court certified a class that essentially consisted of all purchasers of certain versions of defendant's software. Finding that the trial court had not abused its discretion in certifying the class, the court of appeals specifically addressed the question of whether common issues in this case would predominate at trial over individual issues in light of the *Bernal* holding. As an initial matter, the court of appeals observed that there were numerous common issues, such as, the nature of the defects in the software, the extent of defendant's knowledge about those defects, defendant's alleged uniform misrepresentations about the software and technical support that it would provide, and defendant's alleged common scheme of sending and billing class members for unsolicited software.[141] The court observed that based on the evidence in the record and the arguments of the parties at the class certification hearing, these common issues were the most heavily disputed and would be the focus of most of the trial court's and parties' efforts. Further, the court of appeals distinguished this case from the situation presented in *Bernal*. First, the court observed that the breach of contract issue was one of the most significant and that, if the jury answered the question concerning software programming defect as to one class member, then the issue of breach would be answered as to all class members.[142] Further, the court determined that the issue of damages could be determined on a class-wide basis from defendant's own records because the plaintiffs sought, as their primary measure of damages, the disgorgement of the amounts that had been paid to defendant for the software. Further, the issue of exemplary damages was also a common one that could be resolved by asking

138. *Id.* at 436-37.
139. *Bernal*, 22 S.W.3d at 437.
140. 28 S.W.3d 196 (Tex. App.—Austin 2000, no pet. h.).
141. *Id.* at 205.
142. *Id.* at 206.

the jury whether defendant committed the alleged acts knowingly. In short, all of plaintiffs' complaints centered around the conduct of the defendant, not the conduct of the individual class members.[143]

The court of appeals also rejected defendant's argument that individual questions of reliance precluded class certification. The appellate court concluded that the issue of reliance was relevant only to plaintiff's claims for common-law fraud and, as a practical matter, the fraud claim was ancillary to and subsumed by plaintiffs' DTPA claim which, according to the court, did not require proof of reliance.[144] Further, in class actions involving allegations of fraud, the court emphasized the importance of distinguishing between cases where the misrepresentations vary and those in which the misrepresentations are substantially the same. In the latter case, class certification is more appropriate.[145] Finally, the court held that the mere fact that some damages may have to be computed separately for different class members did not preclude class certification. The court of appeals held that, even if some damages have to be determined individually, they may be efficiently determined through proof of claims forms, individual damage hearings, or other manageable means. Finally, the court noted that if it accepted defendant's arguments, the class action mechanism would be rendered virtually useless.[146]

Following the Supreme Court's lead in *Bernal*, the court of appeals in *Entergy Gulf States, Inc. v. Butler*,[147] reversed an order certifying a class on behalf of a power company's customers who allegedly suffered various damages as a result of power outages triggered by a major ice storm. The court of appeals found that common issues were not likely to predominate over individual issues because the class members' damages were different and the causal link between their injuries and defendant's conduct could vary from member to member.[148] Further, the appellate court was also influenced by the observation in *Bernal* that claims for personal injury are rarely appropriate for class certification and, in this case, plaintiffs had included claims for personal injuries in their pleadings.

The appellate courts also considered certain procedural issues related to class actions. In *McAllen Med. Ctr., Inc. v. Cortez*,[149] the court of appeals held that a non-settling defendant does not have standing to object to a preliminary certification of a "settlement only class" against a settling co-defendant. The court did recognize that there was a possible exception to this general rule, namely, if the settlement purports to strip the non-settling defendant of rights of contribution or indemnity from other defendants, but it did not find such exception to be applicable here.[150] In

143. *Id.*
144. *Id.*
145. *Id.* at 207.
146. *Id.*
147. 25 S.W.3d 359 (Tex. App.—Texarkana 2000, no pet. h.).
148. *Id.* at 363.
149. 17 S.W.3d 305 (Tex. App.—Corpus Christi 2000, no pet. h.).
150. *Id.* at 309.

Monsanto Co. v. Davis,[151] at a class certification hearing, the trial court had excluded certain materials offered by defendant from a companion class action on the basis that defendant had failed to produce those documents in discovery before the hearing. Finding error with the exclusion of this evidence, the court of appeals observed that "material on which a trial court bases its certification ruling need not be admissible evidence" and that the rules prohibiting introduction of undisclosed material into evidence at a trial are not applicable to a certification hearing.[152]

After a class had been certified in a case involving the receipt by defendant of a lender's finance charge for loans secured by anticipated federal income tax refunds, the lender in *H&R Block, Inc. v. Haese*[153] added a paragraph to its loan application form utilized by the defendant. The new paragraph provided, in part, that a borrower's disputes with the lender or the defendant over the loan agreement or any prior refund loan agreement must be arbitrated and that class actions were prohibited without the parties' consent. The trial court subsequently entered an order prohibiting the defendant and its counsel from communicating with or entering into any agreement with any member of the class as it related to the foregoing provisions and stating that these provisions were not enforceable by any defendant against any member of the class. Recognizing that a trial court is the guardian of the class as certified and it may take necessary actions to police the conduct of the proceedings before it and to protect the integrity of a pending class action, the court of appeals held that the trial court's order was proper in regard to existing loan agreements and communications about the same.[154] The court concluded, however, that the trial court abused its discretion to the extent that its order restricted defendant's communications or agreements with class members regarding new loans.[155]

Finally, in *Allegro Isle Condominium Ass'n v. Casa Allegro Corp.*,[156] the court of appeals affirmed the trial court's refusal to grant relief in a declaratory judgment action to settle the rights of neighboring property owners concerning an easement between them. The appellate court found that the trial court did not abuse its discretion by refusing to grant relief to either party because the mortgagees for the properties in question had not been joined.[157] Although recognizing that the trial court might have had discretion to proceed with the case, the court of appeals found that it had not abused its discretion in requiring the mortgagees to be joined as necessary and proper parties. In this regard, the court noted that resolution of the easement issue could affect property values and

---

151. 25 S.W.3d 773 (Tex. App.—Waco 2000, no pet. h.).
152. *Id.* at 784-85.
153. No. 13-97-673-CV, 2000 Tex. App. LEXIS 4408 (Tex. App.—Corpus Christi 2000, no pet. h.).
154. *Id.*
155. *Id.* at *13-*14.
156. 28 S.W.3d 676 (Tex. App.—Corpus Christi 2000, no pet. h.).
157. *Id.*

thereby affect the mortgagees' security interests.[158]

VI. PLEADINGS

In *Horizon/CMS Healthcare Corp. v. Auld*,[159] defendant alleged that plaintiff's claim for punitive damages was limited by section 41.008 of the Texas Civil Practice & Remedies Code. As it turned out, based on the date the cause of action in question had accrued, defendant's answer referred to the wrong section of the Code and, instead, section 41.007 was the punitive damage cap applicable to this case. Nonetheless, the supreme court held that defendant was entitled to a reduction in the punitive damages awarded by the jury. Recognizing that Texas follows a "fair notice" standard of pleading, the supreme court found that defendant's answer gave adequate and fair notice to plaintiff, and the trial court of defendant's intent to invoke the punitive damages cap found in the Texas Civil Practice & Remedies Code, even though the pleading referred to an incorrect version of the statute.[160] In another decision related to pleadings, the supreme court held in *Kinnear v. Texas Comm'n on Human Rights*[161] that immunity from liability is an affirmative defense. Accordingly, because the defendant in this case never pleaded sovereign immunity, the court held that it had waived such defense.[162]

Two cases considered the role of special exceptions as a predicate to the dismissal of an action. In *Godley Ind. Sch. Dist. v. Woods*,[163] defendant alleged that plaintiff's suit was barred because plaintiff failed to exhaust administrative remedies. Subsequently, defendant filed a plea to the jurisdiction on that basis, and the court dismissed plaintiff's claims. Recognizing that a plea to jurisdiction may be an appropriate vehicle for raising a failure to exhaust administrative remedies challenge, the court of appeals decided that dismissal was inappropriate in this case. Because the plaintiff may have been able to amend its petition to establish the court's jurisdiction, the appellate court held that plaintiff was entitled to an opportunity to do so before the plea to jurisdiction could be granted. Accordingly, the defendant, as the opposing party, had the burden of prompting the court to alert plaintiff to its pleading defect and should have done so by a special exception.[164] In reaching this result, the Court observed that, in connection with jurisdictional challenges, a defendant generally has two choices. If after analyzing the petition, the defendant believes that the plaintiff cannot amend the petition to show jurisdiction under any circumstance, it may file a plea to the jurisdiction. If that position is correct, the plea should be granted. If, on the other hand, the petition is susceptible to amendment to show the court's jurisdiction, then

158. *Id.* at 680.
159. 34 S.W.3d 887 (Tex. 2000).
160. *Id.* at 896-97.
161. 14 S.W.3d 299 (Tex. 2000).
162. *Id.* at 300.
163. 21 S.W.3d 656 (Tex. App.—Waco 2000, no pet. h.).
164. *Id.* at 660.

the defendant should file a special exception and obtain an order to amend. If the plaintiff fails or refuses to amend and defendant still believes the pleading does not confer jurisdiction on the court, a plea to jurisdiction may be filed.[165] Similarly, in *Hunter v. Johnson*,[166] the court held that before a defendant seeks a dismissal for failure to state a cause of action, he must, as a general rule, file a special exception so that the plaintiff may have the opportunity to amend his pleading in order to cure the alleged defect in his claim.[167] The court recognized that special exceptions are not required, however, when the party pleads itself out of court, *i.e.*, when the plaintiff's pleadings clearly demonstrate the lack of a valid cause of action.[168]

The Texas courts also considered a number of miscellaneous issues related to pleadings. In *Walzier v. Newton*,[169] the court of appeals held that sole proximate cause is not an affirmative defense and, therefore, evidence on that issue may be introduced without the necessity of pleading sole proximate cause.[170] On the other hand, in *Johnston v. McKinney Am., Inc.*,[171] the court held that a defendant, relying upon a warranty disclaimer, must plead the disclaimer as an affirmative defense.[172]

Finally, in *Mitchell v. Laflamme*,[173] a breach of restrictive covenant case, the court held that the plaintiff was entitled to an award of attorneys' fees even though his petition did not reference the correct statutory basis for such an award. The court of appeals noted that, although the petition sought attorneys' fees under other statutes (albeit not the correct one), it also included a general prayer for attorneys' fees and contained sufficient allegations of fact to meet the criteria for an award of attorneys' fees under the correct statute.[174]

VII. DISCOVERY

The Texas courts began to create a body of case law interpreting the 1999 amendments to the Texas Rules of Civil Procedure during the Survey period.

A. Discovery Procedures

The supreme court again revisited the issue of "apex" depositions in *In re Alcatel USA, Inc.*[175] and *In re Daisy Mfg. Co.*[176] In *Alcatel*, the court

165. *Id.* at 661.
166. 25 S.W.3d 247 (Tex. App.—El Paso 2000, no pet. h.).
167. *Id.* at 249-50.
168. *Id.* at 250.
169. 27 S.W.3d 561 (Tex. App.—Amarillo 2000, no pet. h.).
170. *Id.* at 563-64.
171. 9 S.W.3d 271 (Tex. App.—Houston 1999, no pet. h.).
172. *Id.* at 280.
173. No. 14-98-00185-CV, 2000 Tex. App. LEXIS 6845 (Tex. App.—Houston [14th Dist.] 2000, no pet. h.).
174. *Id.* at *14.
175. 11 S.W.3d 173 (Tex. 2000).
176. 17 S.W.3d 654 (Tex. 2000).

made clear that the guidelines for apex depositions it first announced in *Crown Cent. Petroleum Corp. v. Garcia*[177] involve two discrete tests: first, if the high-ranking corporate official arguably has any "unique or superior personal knowledge of discoverable information" the deposition should be allowed; second, if the foregoing standard is not met, then the deposition will not be allowed unless the party seeking discovery has attempted in good faith to obtain the information through less intrusive means, which proved to be unsatisfactory or inadequate, and there is a reasonable indication that the official's deposition is calculated to lead to the discovery of admissible evidence.[178] The court went on to hold that these guidelines apply even to business disputes about which high-level executives are more likely to have some knowledge.[179] Thus, the court held that merely showing that the two chairmen-level officers at issue in *Alcatel* possessed relevant information was insufficient to justify taking their depositions.[180] Similarly, in *Daisy Mfg.*, the court held that the plaintiff's allegation that the defendant's chief executive officer had ultimate responsibility and authority, as well as access to the information on which discovery was sought, was insufficient to justify allowing his deposition under the *Crown Cent.* standard.[181]

Two appellate courts addressed the proper locale of a deposition during the Survey period. In *Vega v. Davila*,[182] two Mexican nationals were served with subpoenas to give their depositions in Corpus Christi while waiting at the Corpus Christi airport for a flight home after having given depositions (by agreement) in a related lawsuit.[183] The court of appeals first held that, while persons who enter the jurisdiction solely to appear as witnesses may normally be immune from service of process, the subpoenas in *Vega* were permissible because the two cases were connected.[184] Further, the court concluded that, under Rule 201(5),[185] the foreign nationals were required to appear for their depositions in Nueces County where they were served.[186] In *Prudential Property and Cas. Co. v. Dow Chevrolet-Olds, Inc.*,[187] on the other hand, the court held that a plaintiff insurance company's filing of a subrogation lawsuit in Texas did not subject its insureds, who lived in Arizona, to being deposed in Texas since the insureds were not "parties" to the suit.[188]

Part of the 1999 amendments to the Texas Rules of Civil Procedure was the addition of Rule 202,[189] which combined the former rules governing

177. 904 S.W.2d 125 (Tex. 1995).
178. *Alcatel*, 11 S.W.3d at 175-76 (quoting *Crown Central*, 904 S.W.2d at 128).
179. *Id.* at 179-80.
180. *Id.* at 180.
181. *Daisy Mfg.*, 17 S.W.3d at 659-60.
182. 31 S.W.3d 376, 377 (Tex. App.—Corpus Christi, no pet. h.).
183. *Id.* at 377-78.
184. *Id.* at 379-80.
185. TEX. R. CIV. P. 201(5) (Vernon 1986) (repealed 1999).
186. *Vega*, 31 S.W.3d at 380.
187. 10 S.W.3d 97 (Tex. App.—Texarkana 1999, pet. dism'd).
188. *Id.* at 104.
189. TEX. R. CIV. P. 202.

depositions to perpetuate testimony and bills of discovery. Two cases decided during the Survey period addressed the proper procedures under this new rule. In *In re Akzo Noble Chem., Inc.*,[190] the court held that if suit is anticipated, a petition under Rule 202 must be filed in the county where venue of the anticipated suit would lie, and not where the witness resides.[191] The court also held that depositions are the only form of discovery authorized by Rule 202, and, therefore, the trial court erred in entering an order requiring the relator to make an accident scene available for inspection.[192] In *Valley Baptist Med. Ctr. v. Gonzalez*,[193] the court held that a trial court's order granting a petition under Rule 202 is not appealable when the deposition is sought in anticipation of filing suit against the proposed deponent.[194]

In re Guzman[195] involved a trial court's order requiring a party to execute authorizations for the release of documents, including medical and employment records, by third parties.[196] The appellate court noted that the effect of the trial court's ruling was to order the party to create documents (*i.e.*, the authorizations) that did not already exist.[197] Finding nothing in the rules of procedure requiring the creation of documents solely for the purpose of responding to a request for production, the court conditionally granted a writ of mandamus directing the trial court to vacate its order.[198]

B. Privileges and Exemptions

Under the 1999 amendments to the Texas Rules of Civil Procedure, "witness statements" are now generally discoverable[199] and are expressly excluded from the definition of "work product."[200] The new rules do not preclude, however, the possibility that a witness statement may be privileged or exempt from discovery for some other reason.[201] Thus, in *In re Fontenot*,[202] the court held that a doctor's narrative report to his attorney and insurance carrier was protected by the attorney-client privilege and therefore exempt from discovery, despite the fact that it also qualified as a witness statement.[203]

---

190. 24 S.W.3d 919 (Tex. App.—Beaumont 2000, no. pet. h.).
191. *Id.* at 920.
192. *Id.* at 921.
193. 18 S.W.3d 673 (Tex. App.—Corpus Christi 1999), *vacated and dism'd as moot*, 33 S.W.3d 821 (Tex. 2000).
194. *Id.* at 675.
195. 19 S.W.3d 522 (Tex. App.—Corpus Christi 2000, no pet.).
196. *Id.* at 523.
197. *Id.* at 525.
198. *Id.*
199. Tex. R. Civ. P. 192.3(h).
200. Tex. R. Civ. P. 192.5(c)(1). *See generally In re* Jiminez, 4 S.W.3d 894, 896 (Tex. App.—Houston [1st Dist.] 1999, orig. proceeding) (holding witness statement discoverable over work product objection).
201. Tex. R. Civ. P. 192, cmt. 9.
202. 13 S.W.3d 111 (Tex. App.—Fort Worth 1999, orig. proceeding).
203. *Id.* at 114.

The supreme court rejected a hyper-technical privilege waiver argument in *In re University of Texas Health Ctr. at Tyler.*[204] There, the plaintiff served three virtually identical deposition notices with accompanying requests for production of documents.[205] The defendant served written objections, a motion for protective order, and a motion to quash in response to the first and third deposition notices, but filed nothing in response to the second notice.[206] The high court held that this failure did not constitute a waiver, as the defendant had already made its objections clear and "was not required to reiterate its objections when only the date and time of the deposition were changed."[207]

The supreme court also reaffirmed, in *In re Union Pacific Resources Co.*,[208] that a party relying on a non-privilege objection to discovery is not always required to submit evidence in support of its objections.[209] The defendant insurer in that case sought discovery about an unrelated coverage dispute the plaintiff had with another insurance carrier.[210] The court concluded that the trial court did not need evidence to determine that the requested information was irrelevant and not discoverable.[211]

Finally, two cases decided during the Survey period demonstrate the courts' reluctance to allow discovery that unnecessarily burdens or jeopardizes the rights of non-parties. *In re Arras*[212] involved a deposition subpoena requiring a non-party (an insurance claims representative) to produce documents containing information that was readily discoverable from the defendant, including the address and telephone number of the defendant and the identity of persons with knowledge of relevant facts.[213] The court found that, under these circumstances, Rule 192.4[214] required the trial court to grant a motion for protective order since there were clearly more convenient, less burdensome, and less expensive means for the plaintiffs to obtain the information (such as requests for disclosure.)[215] In *In re Temple-Inland, Inc.*,[216] the court ordered relators to produce documents that identified persons who, for a variety of reasons, were prohibited from entering on premises under the realtors' control.[217] However, the court also required that a protective order be entered regarding the use of such documents in order to protect the persons identi-

---

204. 33 S.W.3d 822 (Tex. 2000).
205. *Id.* at 826.
206. *Id.*
207. *Id.*
208. 22 S.W.3d 338 (Tex. 1999).
209. *Id.* at 341.
210. *Id.* at 339.
211. *Id.* at 341. Indeed, the court noted that it was unclear what evidence the plaintiff *could* adduce on the relevancy questions. *Id.*
212. 24 S.W.3d 862 (Tex. App.—El Paso, 2000, orig. proceeding).
213. *Id.* at 863.
214. TEX. R. CIV. P. 192.4.
215. *Arras*, 24 S.W.3d at 864. Indeed, the plaintiffs had already obtained the information from defendant through disclosure requests. *Id.*
216. 8 S.W.3d 459 (Tex. App.—Beaumont 2000, orig. proceeding).
217. *Id.* at 461-62.

fied from harassment, annoyance, and invasions of privacy.[218]

C. SANCTIONS

New Rule 193.6(a)[219] represents a more forgiving standard for the sanction of exclusion of evidence that was not timely disclosed in discovery, as evidenced by *Best Indus. Unif. Supply Co. v. Gulf Coast Alloy Welding, Inc.*[220] The plaintiff in that case listed Dagmar Serrata, its credit manager, as one of two persons with knowledge of relevant facts in response to a request for disclosure.[221] Although Serrata resigned four to five months before trial and was replaced by Raymond Sebesta, plaintiff's counsel failed to supplement its disclosures.[222] The trial court refused to allow Sebesta to testify and, the plaintiff having no other evidence, entered a take-nothing judgment.[223] The court of appeals reversed, holding that there would be no surprise or unfair prejudice to defendant in allowing Sebesta to testify.[224] In doing so, the court noted that Sebesta would have testified to the same damage calculations as Serrata, the exact amounts of which were disclosed in the pleadings, and that the defendant had never attempted to depose Serrata when it thought that she would be testifying on that subject.[225]

Deemed admissions were the subject of *Steffan v. Steffan.*[226] The defendant husband in that case appeared and signed agreed temporary orders but never formally answered.[227] He also failed to respond to requests for admissions that were served on him.[228] Following the entry of a default judgment against him, the trial court granted the husband's motion for new trial but would not allow him to withdraw his deemed admissions or introduce evidence that conflicted with such admissions.[229] On appeal, the court rejected the husband's argument that the requests for admissions served on him were a legal nullity since he had not answered in the case.[230] The court found nothing in the rules of procedure that prohibits a defendant from being served with requests for admission before his filing of an answer or other appearance.[231] The appellate court also held that the trial court had not abused its discretion in refusing to allow the deemed admissions to be withdrawn, reasoning that the fact

---

218. *Id.* at 462-63.
219. TEX. R. CIV. P. 193.6(a).
220. 07-00-0326-CV, 2000 Tex. App. LEXIS 1031 (Tex. App.—Amarillo Oct. 18, 2000. no. pet. h.).
221. *Id.* at *1.
222. *Id.* at *2.
223. *Id.*
224. *Id.* at *8.
225. *Id.*
226. 29 S.W.3d 627 (Tex. App.—Houston [14th Dist.] 2000, no pet. h.).
227. *Id.* at 629.
228. *Id.*
229. *Id.*
230. *Id.* at 629-30.
231. *Id.* at 630. The court noted there was no due process concern since the husband had, in fact, received the requests. *Id.* at n.2.

that the husband was proceeding *pro se* did not constitute "good cause" for his failure to comply with the rules of procedure.[232]

VIII. SEALING OF COURT RECORDS

A trial court's ruling that it had continuing jurisdiction to determine whether documents produced in a lawsuit were "court records" within the meaning of Rule 76a[233] splintered the Texas Supreme Court in *In re The Dallas Morning News, Inc.*[234] In the underlying case, the newspaper intervened under Rule 76a[235] and moved for access to the documents almost three months after the trial court's plenary jurisdiction had expired.[236] The trial court concluded that, although no sealing order had been entered, it had continuing jurisdiction to determine if the documents were "court records" and set a hearing at which that issue would be determined.[237] The defendants appealed and filed an application for writ of mandamus.[238] On mandamus, the court of appeals determined that the district court lacked jurisdiction under Rule 76a[239] and directed the district court to "vacate its order setting a hearing."[240]

In a *per curiam* opinion, the supreme court held only that the court of appeal should not have granted mandamus relief.[241] Four justices concurred in this result on the ground that an adequate appellate remedy existed and mandamus was therefore inappropriate.[242] Moreover, these justices also stated that the defendants' appeal (which was still pending) was premature because, at that point, all the trial court had done was assume jurisdiction and set a hearing to determine if the documents were, in fact, subject to Rule 76a.[243] Four other concurring justices thought, however, that mandamus would be an appropriate remedy under the circumstances but that the court of appeals had wrongly concluded that the trial court did not retain continuing jurisdiction over the newspaper's attempt to gain access to the documents in question.[244] Finally, Justice Baker concurred in part and dissented in part, agreeing that Rule 76a(8)[245] requires a party to appeal, rather than mandamus, any order relating to the sealing of court records, but disagreeing with the conclusion that the defendants' appeal was premature.[246] Accordingly, Justice

---

232. *Stefan*, 29 S.W.3d at 631.
233. TEX. R. CIV. P. 76a.
234. 10 S.W.3d 298 (Tex. 1999).
235. TEX. R. CIV. R. 76a.
236. *Dallas Morning News*, 10 S.W.3d at 298-99.
237. *Id.* at 299.
238. *Id.*
239. TEX. R. CIV. P. 76a.
240. In re Kaiser Foundation Health Plan, 997 S.W.2d 605, 607 (Tex. App.—Dallas 1998, orig. proceeding).
241. *Dallas Morning News*, 10 S.W.3d at 299.
242. *Id.* at 304-05 (Gonzalez, J., concurring).
243. TEX. R. CIV. P. 76a; *Dallas Morning News*, 10 S.W.3d at 305.
244. *Dallas Morning News*, 10 S.W.3d at 299-303 (Abbott, J., concurring).
245. TEX. R. CIV. P. 76a(8).
246. *Dallas Morning News*, 10 S.W.3d at 306 (Baker, J., concurring and dissenting).

Baker would have remanded the case to the court of appeals to determine the issue under the appellate standards of review.[247]

IX. DISMISSAL

The sufficiency of the Bexar County dismissal docket notice was again the subject of litigation during the Survey period in *Scoville v. Shaffer.*[248] Previously, the Texas Supreme Court, in *Villareal v. San Antonio Truck,*[249] held that the Bexar County dismissal docket letter violated litigants' due process rights by failing to advise that one possible outcome at a dismissal docket hearing was the dismissal of the case based upon the court's inherent power to manage its own docket.[250] Following the *Villareal* decision, the Bexar County clerk specified in its revised dismissal notice that a dismissal was a possible outcome at a dismissal hearing. In this legal malpractice suit, after the *pro se* plaintiff took no action to prosecute his claims for nearly three years, the court clerk sent the new dismissal notice. The trial court then dismissed the case and subsequently refused to reinstate it. The appellate court affirmed, concluding that the revised notice adequately advised the plaintiff of dismissal as a potential result at a dismissal hearing, which was appropriate given the lack of activity on the case.[251]

In *Garcia v. Mireles*[252] the appellate court affirmed the trial court's dismissal of the plaintiff's case as a sanction for failing to attend a mediation. Ironically, plaintiff's counsel had successfully moved the court initially to order the case to mediation, but later repeatedly rescheduled, and then failed to attend the mediation. The appellate court affirmed the dismissal, holding that the trial court had authority to dismiss the case under both Rule 165a[253] and its own inherent power under common law and that it did not abuse its discretion by granting the defendant's motion to dismiss the case as a sanction.[254]

The El Paso Court of Appeals conditionally granted a writ of mandamus compelling the trial court to cease its jurisdictional exercise over a case that had been dismissed in *In re Wal-Mart Stores, Inc.*[255] In this slip and fall case, the trial court issued a notice of intent to dismiss for want of prosecution and, following a hearing, entered an order dismissing the case. According to an affidavit from the then-presiding trial judge, however, this order was entered in error and contrary to the trial court's intent. In fact, the court clerk also had advised counsel that the order had

---

247. *Id.*
248. 9 S.W.3d 201 (Tex. App.—San Antonio 1999, no pet.).
249. 994 S.W.2d 628, 629 (Tex. 1999).
250. *See* Thomas A. Graves, et al., *Texas Civil Procedure*, 53 SMU L. Rev. 1341,1360 (2000) [hereinafter 2000 *Annual Survey*].
251. *Scoville*, 9 S.W.3d at 202.
252. 14 S.W.3d 839 (Tex. App.—Amarillo 2000, no pet.).
253. Tex. R. Civ. P. 165a.
254. *Garcia*, 14 S.W.3d at 843.
255. 20 S.W.3d 734, 736 (Tex. App.—El Paso 2000, orig. proceeding).

been mistakenly entered and that the case had not been dismissed. Unfortunately for the plaintiff, however, no order was ever entered vacating the dismissal order, no pretrial order was entered, no trial date was set as required by Rule 165a,[256] and no motion to reinstate the case was filed. Therefore, after the trial court's plenary jurisdiction expired, Wal-Mart treated the case as dismissed. When the subsequent trial judge attempted to schedule the case for a pretrial conference, almost two years after the original dismissal order had been entered, Wal-Mart filed its petition for writ of mandamus. The appellate court granted the mandamus, concluding that the trial court lacked jurisdiction over the case following the expiration of its plenary jurisdiction. The court also held that a trial court was not free to correct judicial errors (unlike clerical errors) after its plenary jurisdiction had expired.[257]

In a similar case, the court in *In re Bokeloh*[258] conditionally granted a petition for writ of mandamus to declare as void a trial court's order of reinstatement entered following the expiration of its plenary power. In this real estate dispute, the plaintiffs filed suit in August 1998 for alleged misrepresentations. After the suit had been on file for almost six months, the trial court notified the plaintiffs of its intent to dismiss for want of prosecution. In response, the plaintiffs filed a verified motion to retain, explaining the reason for their difficulties in effectuating service of process on some of the defendants. The trial court, nonetheless, dismissed the case on March 31, 1999. However, the clerk did not send the notice of the dismissal until April 29, 1999, which plaintiffs' counsel received on May 3, 1999.

Plaintiffs' counsel immediately advised the clerk of their motion to retain, and the court, on its own motion, reinstated the lawsuit the next day, on May 4, 1999. Thereafter, all remaining defendants were served and appeared. In February 2000, in the face of an April 2000 trial setting, the defendants moved unsuccessfully to have the trial court vacate its order of reinstatement. Two days before the case was set for trial, the defendants filed their petition for writ of mandamus, which, reluctantly, the appellate court conditionally granted. Reasoning that because the plaintiffs moved to retain the case, rather than reinstate it, the trial court had lost jurisdiction to vacate the order of dismissal, even though plaintiffs' counsel did not receive the notice of the order of dismissal until after the trial court's plenary jurisdiction had expired. In rationalizing what even the appellate court acknowledged was a "harsh and unyielding" result, the court noted that Rule 165a[259] requires a party to file a motion to *reinstate*, rather than to *retain* and that neither the title nor the substance of plaintiffs' motion could be rationally construed as a motion to reinstate, which would have been required to extend the trial court's plenary jurisdiction.

256. TEX. R. CIV. P. 165a.
257. *Wal-Mart*, 20 S.W.3d at 740-41.
258. 21 S.W.3d 784 (Tex. App.— Houston [14th Dist.] 2000, orig. proceeding).
259. TEX. R. CIV. P. 165a.

Moreover, because the trial court took none of the procedurally-mandated steps under Rule 165a,[260] such as notice and a hearing, the court further declined to treat the motion to retain as motion to reinstate. The appellate court also rejected plaintiffs' argument that the court's plenary jurisdiction should have been extended under Rule 306a[261] due to the defect in their late receipt of the notice of the order of dismissal. Because plaintiffs failed to file a sworn motion, give notice of a hearing, present evidence of their actual receipt of the notice, or obtain an order containing written findings regarding their receipt of the notice of dismissal as is required to reset the commencement of the trial court's plenary power, the appellate court determined that Rule 306a[262] was inapplicable. In its concluding footnote,[263] the appellate court acknowledged the severity of its ruling, given that the dismissal was initially the result of an administrative error, which then appeared to be cured by the trial court's own actions, followed by a year of litigation without objection. The court ultimately concluded, however, that because the procedural defects were jurisdictional, it had no choice but to reach the conclusion it did, leaving the plaintiffs with only their bill of review for relief.[264]

In *Musquiz v. Harris County Flood Control Dist.*,[265] involving a landowner's appeal of a condemnation award, the court affirmed the dismissal of an action for failure to prosecute, which inured to the landowner's benefit. After the flood control district filed an action to condemn certain realty, a special commission entered a monetary award for the value of the land taken. The landowner filed its objections to the award in district court, which under the condemnation statute, had the effect of vacating the award and converting the case into a normal lawsuit in which the flood control district was the plaintiff. The landowner failed, however, to serve the flood control district with citation or notice of its objections to the award. After the case had been on file for nearly a year without action, the trial court issued a notice of intent to dismiss for want of prosecution. Neither party appeared at the status conference, following which the trial court issued a notice dismissing the flood control district's cause of action for want of prosecution. However, forty-four days after allegedly dismissing the case for want of prosecution, the trial court then entered a judgment reinstating the special commission's award and granting the district a perpetual easement across the landowner's property. The appellate court reversed, holding that by the time the trial court affirmed the commission's decision, it lacked plenary power to issue any further orders. Therefore the appellate court affirmed the dismissal of the entire action, noting the absence of any post-judgment motions after the entry

260. *Id.*
261. TEX. R. CIV. P. 306a.
262. *Id.*
263. *Bokeloh*, 21 S.W.3d at 793, n.10.
264. *Id.* at 793-94.
265. 31 S.W.3d 664 (Tex. App.—Houston [1st Dist.], no. pet. h.).

of the original dismissal order.[266]

X. SUMMARY JUDGMENT

The Fort Worth court of appeals in *Cimarron Hydrocarbons Corp. v. Carpenter*[267] extended the holding in *Craddock v. Sunshine Bus Lines Inc.*[268] to late filed-summary judgment responses. Specifically, the court held that a party's late-filed summary judgment response could be considered as timely filed upon a showing of some excuse (not necessarily a good excuse), coupled with the absence of intentional failure to respond, and a prima facie showing that if the summary judgment is set aside, the moving party will be in no worse position than if the summary judgment response had been timely filed.

Preservation of error regarding objections to summary judgment evidence remained the subject of disagreement among the appellate courts. In *Well Solutions, Inc. v. Stafford*,[269] which arose out of an automobile accident, a third-party defendant moved for summary judgment contending it had not manufactured the trailer involved in the accident. The nonmoving party responded by attaching summary judgment evidence designed to disprove the movant's allegations that it had not manufactured the trailer. The movant then objected to this summary judgment evidence as inadmissible hearsay and incompetent. However, the trial court did not rule upon these objections orally at the hearing, in a written order, or in the summary judgment order. The appellate court held that by failing to obtain a ruling thereon, the movant waived its objections to the summary judgment evidence.[270] The appellate court rejected the argument that the trial court implicitly sustained the objections by granting the summary judgment motion, thereby declining to follow the holding of the Fort Worth Court of Appeals,[271] which had adopted such reasoning, and instead electing to follow the holding of a Houston appellate court in *Dolcefino v. Randolph*.[272] Given this continued split in authority, the cautious practitioner should still endeavor to secure some form of recorded ruling sustaining or overruling objections to summary judgment evidence to preserve that issue for appeal.

In *Garcia v. National Eligibility Express, Inc.*,[273] the court held that a party may not rely upon its own interrogatory answers in responding to a motion for summary judgment, even where the opposition puts them into evidence and relies upon them. Moreover, the court concluded that the

---

266. *Id.* at 668. The appellate court did not address the circumstances regarding the plaintiff's failure to serve the district with citation.
267. 35 S.W.3d 692 (Tex. App.—Fort Worth, no. pet. h.).
268. 133 S.W.2d 124 (Tex. App.—Fort Worth 1939).
269. 32 S.W.3d 313 (Tex. App. —San Antonio 2000, no pet. h.).
270. *Id.* at 316-17.
271. *See* Frazier v. Yu, 987 S.W.2d 607, 610 (Tex. App.—Fort Worth 1999, pet. denied); Blum v. Julian, 977 S.W.2d 819, 823-24 (Tex. App.—Forth Worth 1998, no pet.).
272. 19 S.W.3d 906, 926 (Tex. App.—Houston [14th Dist.] 2000, no pet. h.).
273. 4 S.W.3d 887 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

interrogatory answers were incompetent summary judgment evidence and could not create a fact issue, even though the opposing party raised the issue for the first time on rehearing in the court of appeals.[274]

The court in *Dickson Construction, Inc. v. Fidelity & Deposit Co. of Maryland*[275] addressed the length of time permitted for discovery before a "no evidence" summary judgment motion is considered ripe. In this case, the defendants originally moved for summary judgment based upon limitations, which the trial court granted. The appellate court affirmed that decision with respect to all claims but one for fraud on which it determined that limitations had not yet run. Following a remand of that claim, the defendants again moved for summary judgment regarding the plaintiff's fraud claim under Rule 166a(i),[276] which the trial court granted. The appellate court affirmed the no evidence summary judgment, noting that the proper period to consider for purposes of evaluating whether sufficient opportunity had been given for discovery to occur was not the length of time the case had been before the trial court following the remand, but the total time the case had been on file since its inception. Because more than two years had passed since the plaintiff originally filed suit, the appellate court affirmed the dismissal of the plaintiff's fraud claim based upon no evidence of reliance or damages, which the court reasoned should have been readily available to the plaintiff to prove since the suit's inception.[277]

In *Smith v. McCleskey, Harriger, Brazill, & Graf, L.L.P.*,[278] the court reversed and remanded a no evidence summary judgment decision entered in favor of a law firm, holding that the motion was deficient because it failed to state the elements for which it claimed there was no evidence. In so ruling, the court found that a general recitation in the summary judgment motion that it owed no duty to the plaintiff was insufficient to meet the requirements of Rule 166a(i).[279]

XI. JURY PRACTICE

This year's Survey period yielded a bumper crop of opinions relating to Texas civil juries, ranging from admissible evidence to prove jury misconduct, jury shuffles, and parties appearing in shackles before juries.

In *Golden Eagle Archery, Inc. v. Jackson*,[280] the Texas Supreme Court rejected constitutional challenges to the procedural and evidentiary rules that prohibit testimony regarding jury deliberations to prove juror misconduct.[281] In this products liability case, the plaintiff moved for a new trial following a jury verdict in his favor, alleging undisclosed juror bias

274. *Id.* at 889-90.
275. 5 S.W.3d 353 (Tex. App.—Texarkana 1999, pet. denied).
276. TEX. R. CIV. P. 166a(i).
277. *Dickson*, 5 S.W.3d at 356-57.
278. 15 S.W.3d 644 (Tex. App. Eastland 2000, no pet.).
279. TEX. R. CIV. P. 166a(i).
280. 24 S.W.3d 362 (Tex. 2000).
281. TEX. R. CIV. P. 327(b); TEX. R. EVID. 606(b).

and misconduct. In support of his contention, the plaintiff sought to introduce affidavits from his attorney and three jurors regarding the acts of another juror. The trial court denied the motion for new trial, concluding that the affidavits were incompetent evidence because they pertained to jury deliberations. The supreme court reversed the decision of a divided lower court, which had concluded the trial court erred in limiting the evidence available to prove misconduct. In so holding, the supreme court rejected the petitioner's argument that Rule 327(a)[282] creates an exception to Rule 327(b)[283] that would allow a juror to testify regarding jury deliberations to prove juror misconduct in voir dire. Instead, the court held that Rule 327(b) does not preclude testimony from a juror regarding outside influences brought to bear on jurors; nor does it prohibit a juror from testifying about reasons to disqualify another juror, provided, however, that the relevant information was not obtained during jury deliberations.[284] The court clarified that, contrary to the holding of several lower appellate courts,[285] the term "jury deliberations" refer only to that period when the jury weighs the evidence to arrive at a verdict, but does not include conduct or discussions that occur *before* the charge is read and formal deliberations begin.[286] Here, the court concluded that the evidence presented regarding alleged juror misconduct prior to deliberations was admissible, but that such evidence failed to establish juror misconduct sufficient to warrant a new trial.[287] As to plaintiff's complaint that Rules 327(b)[288] and 606(b)[289] violated his due process rights, the court concluded that these rules could not be viewed in isolation from the other procedural safeguards relating to the goal of a fair and impartial jury and that other mechanisms existed to ensure such a result, without violating the sanctity of jury deliberations.[290]

Crowson v. The Kansas City S. Ry. Co.,[291] also involved allegations of jury misconduct in a railway personal injury case where a juror brought a textbook into the deliberating room that contained tables used to discount lost future wages to their present value. The appellate court held

282. TEX. R. CIV. P. 327(a).

283. TEX. R. CIV. P. 327(b).

284. *Golden Eagle*, 24 S.W.3d at 371-72.

285. Baley v. W/W Interests, Inc., 754 S.W.2d 313, 316 (Tex. App.—Houston [14th Dist.] 1988, writ denied), and its progeny had held that jury deliberations include communications regarding the case that occur between and among jurors, regardless of the time and place where the discussions occur.

286. *See, e.g.*, Mitchell v. Southern Pac. Transp. Co., 955 S.W.2d 300, 322 (Tex. App.—San Antonio 1997, no writ); Durbin v. Dal-Briar Corp., 871 S.W.2d 263, 272 (Tex. App.—El Paso 1994, writ denied); Wilson v. Texas Parks & Wildlife Dept., 853 S.W.2d 825, 831 (Tex. App.—Austin 1993), *rev'd on other grounds*, 886 S.W.2d 259 (Tex. 1994).

287. *Golden Eagle*, 24 S.W.3d at 372.

288. TEX. R. CIV. P. 327(b).

289. TEX. R. EVID. 606(b).

290. For example, the court noted that jurors may be questioned by voir dire during trial and corrective actions taken, the jurors may be polled, and attorneys are permitted to contact jurors to discuss the case, provided that the contact is respectful. *Golden Eagle*, 24 S.W.3d at 375.

291. 11 S.W.3d 300 (Tex. App.—Eastland 1999, no pet. h.).

that such information did not constitute an "outside influence" sufficient to render it admissible to prove juror misconduct, especially where the information contained in the textbook was essentially identical to what one of the experts presented at trial.[292]

Two appellate courts wrestled with the mechanisms for jury shuffles under the Texas Rules of Civil Procedure during the Survey period. In *Whiteside v. Watson*[293] counsel for one of the defendants requested a jury shuffle under Rule 223,[294] as a result of which the bailiff took the jury cards, and shuffled them face down like a deck of playing cards. The cards were then turned face up and the jurors were reseated according to the new order. The trial was then adjourned for lunch. Although counsel for one of the plaintiffs not a party to the appeal was present for this event, counsel for the appellee was not. Following the lunch recess, counsel for the appellee and counsel for the co-plaintiff successfully sought a new shuffle because the original shuffling methodology failed to comply with Rule 223's[295] requirements that the juror cards be placed in a *receptacle*, shuffled, and drawn by the presiding judge. Following this second shuffle, done over appellants' objection that Rule 223[296] only permits one shuffle, the jury was seated.

On appeal, the appellant court rejected a myriad of arguments regarding the "second" shuffle. First, the appellate court held that a literal translation of the last sentence of Rule 223,[297] which permits only one shuffle, would do violence to prior language in that rule, mandating the use of a receptacle to shuffle the jury cards. Therefore, the appellate court held that it was proper to conduct a second shuffle that complied with the technical requirements of the rule regarding the manner of the shuffle itself. Second, the court rejected appellants' argument that the second shuffle did not comply the technical requirements of Rule 223[298] that "the presiding judge" (rather than the bailiff) actually retrieves the cards from the receptacle.[299] Third, the court rejected appellants' contention that because the appellee did not object during the first shuffle, it waived any right to complain, such that the trial court should never have performed the second shuffle. Finally, the court concluded that even if error did occur, it was harmless because the appellant failed to show that the "double shuffle" likely resulted in the rendition of an improper verdict.

292. *Id.* at 304-05.
293. 12 S.W.3d 614 (Tex. App.—Eastland 2000, pet. denied).
294. TEX. R. CIV. P. 223.
295. *Id.*
296. *Id.*
297. *Id.*
298. *Id.*
299. The court noted a technical discrepancy in the language of Rule 223. The first portion of the rule states that the trial court *shall cause* the names of all members of such assigned jury panel to be placed in a receptacle, then shuffled and drawn, but the last portion of the Rule states that the shuffle and drawing shall be done *by the trial judge*. However, the court rejected the technical argument that a shuffle and draw by the bailiff (as opposed to the trial court itself) was reversible error. *Whiteside*, 12 S.W.3d at 619-20.

In *Carr v. Smith*,[300] a medical malpractice case, the parties agreed upon a lengthy confidential juror questionnaire, which was presented to a segregated panel of potential jurors on the first day of trial. The next morning, after this panel had been viewed by representatives for both sides and after the parties had reviewed the panel's responses to the lengthy questionnaire, counsel for one of the defendants requested a jury shuffle. Over the plaintiffs' objection, the trial court permitted the panel to be shuffled. The trial then proceeded to verdict, though the plaintiffs nonsuited the defendant that had successfully requested the jury shuffle prior to verdict. Following the entry of the verdict in favor of the remaining defendant, the plaintiffs moved unsuccessfully for a mistrial and a new trial based upon the jury shuffle. The appellate court concluded that although the party who requested the shuffle was no longer before the court, the case must, nonetheless, be remanded for a new trial. In reaching this conclusion, the court reasoned that under Rule 223,[301] any shuffle of the jury panel must occur "prior to voir dire examination by any party . . ." The court rejected the argument that voir dire begins when the panel is brought into the courtroom, viewed by the attorneys, and oral questioning has begun, reasoning that it should make no difference if the parties acquire information about potential jurors from oral or written questions. Once the process has begun, any shuffle of the jury is improper because it destroys the randomness inherent in the original jury panel list selection. In light of the foregoing, the court concluded that the plaintiffs need not demonstrate harmful error as the *Whiteside* court required. Rather, the *Carr* court reasoned that "the improper grant of [sic] shuffle is tantamount to a denial of one's right to a trial by jury."[302] Therefore, the court adopted a "relaxed" harmless error standard, requiring only that the complaining party show that the trial was materially unfair, without having to show more.[303] Since this case was hotly contested with sharply conflicting evidence, the court determined that the plaintiffs were not required to show additional harmful error and therefore remanded the case.

Two Houston courts struggled with the issue of parties appearing before the jury in shackles during the Survey period and reached vastly different conclusions about the harm of such an event. In *Carson v. Gomez*[304] the plaintiff, a prisoner in the state penitentiary at the time, sued several prison guards, alleging that they attacked him. Following a verdict for the guards, the plaintiff appealed, claiming that the trial court erred in refusing to discharge the panel after it saw him enter the courtroom wearing prison garb and handcuffs. Although the court noted the general rule that, except for good cause, no one should be tried while restrained (and if one is restrained, the judge should try to minimize the

300. 22 S.W.3d 128 (Tex. App.—Fort Worth 2000, no pet.).
301. TEX. R. CIV. P. 223.
302. *Carr*, 22 S.W.3d at 134.
303. *Id.* at 136.
304. 14 S.W.3d 778 (Tex. App.—Houston [1st Dist.] 2000, no pet.).

potential for harm) the court concluded that the record did not reflect the plaintiff's restraint during the entire trial. At most, the court held, the jury saw the plaintiff enter the courtroom momentarily restrained by handcuffs. The majority expressly rejected the plaintiff's unsworn (but unrebutted) statement in his brief that he was restrained during the entire trial, holding that appellate Rule 38.1[305] did not require it to take the word of a convicted felon. Although acknowledging that restraints could be prejudicial where the jury is required to determine the attacker's identity, the court concluded that no harmful error occurred, apparently choosing not to believe that the record established the plaintiff's claim that he was restrained before the jury for more than a moment.

By stark contrast, an en banc panel of the Houston appellate court in *In the Interest of K.R., a Child*[306] withdrew its prior opinion discussed in last year's Survey article[307] and held that the appellant's appearance before the jury in shackles was harmful error and remanded the case for a new trial. In this case, the State of Texas and the Department of Protective and Regulatory Services filed suit to terminate the appellant's parental rights after he had been convicted of striking and killing his wife's son from a prior relationship. Although the appellate court concluded that the evidence before the jury was clearly sufficient to support its decision to terminate the appellant's parental rights, it concluded that the case must be remanded for a new trial because the trial court (over the appellant's objection and warnings from all counsel) left the appellant restrained during the entire proceeding. Determining that the issue of whether requiring the appellant to appear before the jury in shackles violated his constitutional rights was one of first impression, the court concluded that one's parental rights are fundamental and enjoy a strong presumption.[308] Moreover, when an individual's level of dangerousness is a question for the jury to decide, it would violate an individual's right to a fair trial to compel that person to appear and remain before the jury bound in physical restraints, particularly in the absence of a finding by the trial court that such restraint was necessary.

The court in *Allen v. Blackledge*[309] held that it was reversible error to allow a case to proceed to trial when similarly aligned parties had improperly coordinated their peremptory strikes. In this real estate dispute, a group of 36 homeowners sued their subdivision and its developers under a variety of theories. Prior to empaneling the jury, the trial court granted six strikes each to the two groups of defendants, having concluded that their interests were sufficiently adverse to warrant such an arrangement.[310] The trial court also ordered those defendants to exercise their peremptory strikes independently. After the strikes had been made,

305. TEX. R. APP. P. 38.1.
306. 22 S.W.3d 85 (Tex. App.—Houston [14th Dist.] 2000, no pet.).
307. *2000 Annual Survey* at 1305.
308. *Id.* at 93.
309. 35 S.W.3d 61 (Tex. App.—Houston [14th Dist.], no pet. h.).
310. *Id.*

the plaintiffs' counsel objected, noting the complete lack of duplication among the defendants in their strikes. The trial court then determined that the two groups of defendants, while having exercised their strike rights independently, had secretly agreed in advance that one group would exercise its rights from the top of the list while the other group would draw from the bottom. The appellate court reversed the trial court's denial of the plaintiffs' motion for a mistrial, holding that such coordination between the defendants constituted reversible error.[311] The appellate court further rejected the defendants' argument that any error had been waived, noting that the plaintiffs could not have determined the defendants' collusion until after it occurred and its results became obvious.[312]

In *Garcia v. Spohn Health Sys. Corp.*,[313] which involved a medical malpractice claim, the court wrestled with how to treat a verdict where the jury was deadlocked regarding a doctor's liability, yet unanimous in its finding that the hospital was not liable. Based upon this verdict, the trial court entered a judgment in favor of the hospital and declared a mistrial regarding the remaining case. The appellate court affirmed the judgment based on the partial verdict, noting that Texas law requires the entry of judgment based upon the verdict when possible.[314]

XII. JURY CHARGE

The Texas Supreme Court in *Crown Life Ins. Co. v. Casteel*[315] held that a judgment entered on a single, broad form jury question that included several invalid liability theories was harmful error where it was not possible to distinguish between the legally valid and invalid bases for the jury's verdict. In this vanishing premium life insurance case, the insureds sued both their insurer and agent regarding alleged misrepresentations made about their life insurance policy. The agent, meanwhile, asserted cross-claims against the insurer, including alleged violations of the Texas Deceptive Trade Practices—Consumer Protection Act ("DTPA")[316] and the Texas Insurance Code.[317] The trial court submitted a single, broad form question to the jury (over the insurer's timely and specific objections) regarding the insurer's liability to the agent, that included the DTPA and Insurance Code claims. The high court held that the while the agent had standing under these statutes to assert some of his claims against the insurer, he lacked standing to assert other theories of liability.[318] Because the charge included both valid and invalid liability theories, it was not

311. *Id.*
312. *Id.*
313. 19 S.W.3d 507 (Tex. App.—Corpus Christi 2000, pet. denied).
314. *Id.* at 510.
315. 22 S.W.3d 378 (Tex. 2000); *see* Kansas City So. Ry. Co. v. Stokes, 20 S.W.3d 45 (Tex. App.—Texarkana 2000, no pet. h.).
316. TEX. BUS. & COM. CODE ANN. § 17.41, *et. seq.* (Vernon 1987).
317. TEX. INS. CODE ANN. art. 21.21 § 16a (Vernon 1981).
318. *Crown Life*, 22 S.W.3d at 389.

possible to determine the bases for the jury's verdict. Therefore the court concluded that it was entirely possible that the jury had reached its conclusions based upon invalid liability theories and reversed the judgment in favor of the agent. The court disapproved of several appellate court decisions[319] which held such error to be harmless if any evidence supports a properly submitted liability theory.

The supreme court again considered *Texas Workers' Compensation Ins. Fund v. Mandlbauer*[320] during the Survey period, and reversed and rendered judgment for the insurance fund.[321] In this worker's compensation dispute, the employee injured his back at work and then left his employer the following year. After changing jobs, the employee claimed that a subsequent back injury was the result of the prior incident, which the insurance carrier disputed. The trial court entered judgment for the insurer consistent with the jury's verdict, from which the employee appealed. The employee alleged that the trial court erred in refusing to submit a requested instruction regarding whether the incident was a "producing cause" or the injury "resulted from" incident. The court held that because neither the plaintiff's pleadings, the statute, nor the charge were framed under a "producing cause" theory, it was not an abuse of discretion for the trial court to refuse such an instruction.[322] Therefore, the supreme court reversed the appellate court's decision remanding the case for a new trial and rendered judgment for the insurer.

The high court in *Borneman v. Steak & Ale of Texas, Inc.*[323] reversed and remanded a dram shop case back to the appellate court for consideration of issues not reached, holding that while the jury charge was incorrect regarding an element of the plaintiff's claim, the error in the charge was a defect and not an omission, such that the charge was "not 'so defective'" to warrant a rendition of the judgment.[324] *In the Interest of V.L.K.*[325] involved a child custody case, and the supreme court held that because the statutory parental presumption applies only in original custody determinations, not in a suit to modify custody rights, the trial court did not err in refusing to submit such an instruction to the jury.[326]

In *Molina v. Moore*[327] the appellate court reversed and rendered judgment consistent with the jury verdict for damages following deliberations in which the jury was given a single broad form question regarding dam-

---

319. *See Crown Life*, at 389 (citing Provident Am. Ins. Co. v. Castaneda, 914 S.W.2d 273 (Tex. App.—El Paso 1996), *rev'd on other grounds*, 988 S.W.2d 189 (Tex. 1998); Hart v. Berko, Inc., 881 S.W.2d 502 (Tex. App.—El Paso 1994, writ denied); Bernstein v. Portland Sav. & Loan Ass'n, 850 S.W.2d 694 (Tex. App.—Corpus Christi 1993, writ denied); Ford Motor Co. v. Pool, 688 S.W.2d 879 (Tex. App.—Texarkana 1985), *aff'd in part and rev'd in part on other grounds*, 715 S.W.2d 629 (Tex. 1986)).

320. 34 S.W.3d 309 (Tex. 2000).

321. *2000 Annual Survey* at 1366.

322. *Texas Workers'*, 39 S.W.3d at 300.

323. 22 S.W.3d 411 (Tex. 2000).

324. *Id.* at 413.

325. 24 S.W.3d 388 (Tex. 2000).

326. *Id.* at 339-40.

327. 33 S.W.3d 323 (Tex. App.—Amarillo 2000, no pet. h.).

ages, and in response provided a written answer that included handwritten notations that appeared to show how the jury apportioned its damage number among several different elements. The trial court had used the jury's notations to apportion damages among three topics in the single, broad form question. The appellate court reversed, holding that while the marginal notations may have reflected the jury's deliberative processes, they could not be used to enter a judgment for less than the total amount awarded by the jury in response to this single question, to which neither side objected.[328]

XIII. JUDGMENTS

While the effect of Mother Hubbard clauses,[329] particularly in the summary judgment context, continued to plague lower appellate courts[330] during the Survey period, the Texas Supreme Court in *Lehmann v. Har-Con Corp.*[331] attempted to again clarify the standard for determining the finality of judgments in cases disposed of without a conventional trial on the merits. The court concluded that "[w]e no longer believe that a Mother Hubbard clause in an order or in a judgment issued without a full trial can be taken to indicate finality."[332] In *Lehmann*, the supreme court reversed and remanded two appeals from summary judgment orders that each contained a Mother Hubbard clause, but that did not dispose of all parties, claims, and issues. In so doing, the high court held that

> in cases in which only one final and appealable judgment can be rendered, a judgment issued without a conventional trial is final for purposes of appeal if and only if either it actually disposes of all claims and parties then before the court, regardless of its language, or it states with unmistakable clarity that it is a final judgment as to all claims and all parties.[333]

The court, after surveying the development of Texas law regarding the finality of judgments, noted that determining with certainty when a judgement is final "has proved elusive."[334] As a result, parties who are unsure of the finality of a judgment must err in favor of appealing or risk losing the right to appeal. To illustrate its point, the court stated that:

> [a] judgment that finally disposes of all remaining parties and claims, based on the record in the case, is final, regardless of its language. A judgment that actually disposes of every remaining issue in a case is not interlocutory merely because it recites that it is partial or refers

328. *Id.* at 325.
329. A Mother Hubbard clause refers to language in a judgment to the effect that "all relief not granted herein is denied."
330. *See, e.g.*, Kistler v. Stran, 22 S.W.3d 103 (Tex. App.—Houston [14th Dist.] 2000, no pet.); Harris County v. Nash, 22 S.W.3d 46 (Tex. App.—Houston [14th Dist.] 2000, pet. filed); Scott v. Poindexter, No. 04-98-00101-CV, 2001 WL 273086 (Tex. App.—San Antonio Mar. 21, 2001, no pet. h.).
331. 44 Tex. S. Ct. J. 364 (Feb. 1, 2001), 2000 WL 33146410 (Feb. 1, 2001).
332. *Id.* at *1.
333. *Id.*
334. *Id.* at *4.

to only some of the parties or claims.[335]

Further the court held that "the language of an order or judgment *can* make it final, even though it should have been interlocutory, if that language expressly disposes of all claims and all parties."[336] Thus, the court reversed its prior holding in *Mafrige v. Ross*[337] and held that "the inclusion of a Mother Hubbard clause—by which we mean the statement 'all relief not granted is denied,' or essentially those words—does not indicate that a judgment rendered without a conventional trial is final for purposes of appeal."[338] The court further strongly suggested that a statement like "This judgment finally disposes of all parties and all claims and is appealable" would accurately indicate the trial court's intent to issue a final appealable judgment and should be included by practitioners and trial courts in their summary judgment orders.[339]

Post-answer default judgments were also the subject of review during the Survey period. The Fourteenth Court of Appeals in *Withrow v. Schou*[340] declined to follow the holding of its sister court in *Transoceanic Shipping Co. v. Gen. Universal Sys., Inc.*,[341] regarding the propriety of a default judgment taken where notice to the defaulting party was in question. The court in *Transoceanic* held that a post-answer default judgment was improper where the record conclusively showed that the notice letter from the clerk of the setting at issue was returned to the clerk stamped "RETURN TO SENDER; UNDELIVERABLE AS ADDRESSED; FORWARDING ORDER EXPIRED."[342] By contrast, the court in the *Withrow* case held that where the clerk sends notice to the last known address of a party or its attorney, the clerk has fulfilled its legal obligation under Rule 245,[343] which imposes upon the party or its attorney an obligation to notify the court of a current mailing address.[344] Because the clerk sent the notice at issue to the appellant's last known address, the court rejected the appellant's due process concerns that a default judgment was taken without proper notice. In a variation on the theme, the court in *Palacios v. Winters*[345] reversed and remanded a post-answer default judgment, holding that the trial court erred in failing to grant the appellant's motion for new trial where the appellant failed to appear at

335. *Id.* at *8.
336. *Id.* (emphasis added).
337. 866 S.W.2d 590 (Tex. 1993).
338. *Lehmann*, 2000 WL 33146410 at *10.
339. *Id.* at *14. Justice Baker issued a concurring opinion in which he agreed with the majority's end result, but suggested instead that trial court's summary judgment orders specify (1) the claims brought by each party, (2) the grounds upon which summary judgment was sought, (3) each ground upon which the trial court granted summary judgment, and (4) each ground upon which the trial court denied summary judgment. *Id.* at *16 (Baker, J., concurring).
340. 13 S.W.3d 37 (Tex. App.—Houston [14th Dist.] 1999, no pet.).
341. 961 S.W.2d 418 (Tex. App.—Houston [1st Dist.] 1997, no pet.).
342. *Id.* at 420.
343. Tex. R. Civ. P. 245.
344. *Withrow*, 13 S.W.3d at 41.
345. 26 S.W.3d 734 (Tex. App.—Corpus Christi 2000, no pet.).

trial, but the clerk had failed to send a written order memorializing the jury trial setting, as required under Rule 166.[346]

Collateral attacks on judgments were also the subject of appellate review during the Survey period. In *Simmons v. Compania Financiera Libano, S.A.*[347] involving an oil and gas dispute, the parties entered into a Rule 11 agreement to resolve the case. The trial court then entered an agreed judgment that incorporated some, but not all, of the terms of the Rule 11 agreement, and which contained a Mother Hubbard clause stating that all relief not granted by way of a claim or a counterclaim was denied. Subsequently one of the parties allegedly failed to perform under the terms of the Rule 11 agreement, following which the other party successfully brought a second suit to enforce the terms of the agreement. The appellate court held that because the agreed judgment contained a Mother Hubbard clause, the second suit constituted an improper collateral attack on the original agreed judgment.[348] The court therefore reversed and rendered the judgment in the second suit, holding that the agreed judgment effectively extinguished the Rule 11 agreement.

In *Spera v. Fleming, Hovenkamp & Grayson, P.C.*[349] a group of plaintiffs sued their attorneys over the attorneys' fees awarded to the lawyers in the resolution of mass tort actions relating to polybutylene pipes used in the construction of homes. Following the original settlement, the attorneys sought to enforce their contingency fee agreement and recover $87 million in fees and $20 million in reimbursements. The trial court conducted a fairness hearing and reduced the fee to $37 million and the reimbursed expenses to $10 million. The plaintiffs then brought suit against their attorneys, asserting a variety of claims, including breach of fiduciary duty, all of which the trial court disposed of by summary judgment in favor of the attorneys. On appeal, the court affirmed the summary judgment decision, except for claims related to the plaintiffs' breach of fiduciary duty claim, on which the appellate court reversed. The appellate court rejected the attorneys' argument that the plaintiffs' claims constituted a collateral attack on the original decision of the trial court in the fairness hearing, reasoning that, among other things, the plaintiffs were not seeking to set aside the fee award but rather were alleging that the attorneys breached a duty to disclose a conflict of interest, which was distinct from an attack on the attorneys' fee award itself.[350]

The court in *Purcell Constr., Inc. v. Welch*[351] affirmed and modified the trial court's judgment to include the full amount of prejudgment interest allowed by law. The trial court had decreased the amount of pre-judgment interest awarded to the plaintiff on the basis of its docket congestion. Noting that the trial court's docket is not one of the statutorily

346. TEX. R. CIV. P. 166.
347. 14 S.W.3d 338 (Tex. App.—Houston [14th Dist.] 2000, no pet.).
348. *Id.* at 340.
349. 25 S.W.3d 863 (Tex. App.—Houston [14th Dist.] 2000, no. pet.).
350. *Id.* at 871.
351. 17 S.W.3d 398 (Tex. App.—Houston [1st Dist.] 2000, no pet.).

permissible reasons for modifying an award of pre-judgment interest, the appellate court held that the plaintiff was entitled to the full amount of pre-judgment interest permitted by law.[352]

XIV. MOTION FOR NEW TRIAL

The Texas Supreme Court in *Lane Bank Equip. Co. v. Smith Southern Equip., Inc.*[353] held that a timely filed post-judgment motion for sanctions extends the thirty-day period in which a trial court may exercise its plenary power over its judgment. In this business dispute, three weeks after the trial court initially granted the defendant's summary judgment motion, the defendant moved for sanctions and the rendition of a new final judgment. Approximately two weeks after granting the original summary judgment, the trial court entered a new judgment that included an award of attorneys' fees as a sanction against the plaintiff. On appeal, the plaintiff contended that the trial court's plenary jurisdiction had expired thirty days after the entry of the original judgment and that the subsequent judgment, including the sanction award, was void. Construing Rule 329b,[354] the court disagreed and held that although sanctions could not be awarded after the expiration of a trial court's plenary jurisdiction,[355] a timely filed post-judgment motion that seeks a substantive change in an existing judgment qualifies as a motion to modify under Rule 329b(g), and therefore extends both the trial court's plenary jurisdiction and the appellate timetable.[356]

The appellate court in *Quanaim v. Frasco Restaurant & Catering*[357] relied on the supreme court's reasoning in *Lane Bank* to determine which of three summary judgment orders, all entered on different dates, disposed of all issues and all parties such that it would be considered a final judgment for purposes of calculating the timeliness of an appeal. In this personal injury case, the defendants filed multiple summary judgment motions, all of which the trial court granted via three separate orders, issued on May 5, 11, and 18. The appellate court concluded that the May 11th summary judgment order, although not identified on its face as a final order, disposed of all parties and all issues and was therefore the operative order for calculating appellate timetables. The court was also forced to address, however, whether the May 18th order could be considered as a modification of the May 11th order under the holding in *Lane Bank* for the purposes of extending the appellate timetable. The court concluded that the May 18th order, which identified a different ground for summary judgment, should be construed as a "change" sufficient to

352. *Id.* at 403.
353. 10 S.W.3d 308 (Tex. 2000).
354. TEX. R. CIV. P. 329b.
355. *See Lane* at 311 (discussing Hjalmarson v Langley, 840 S.W.2d 153 (Tex. App.—Waco 1992, orig. proceeding)).
356. *Id.* at 314.
357. 17 S.W.3d 30 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

restart the appellate timetable under Rule 329b(h).[358]

In *Wembley Inv. Co. v. Herrera*,[359] the supreme court held that a party was not precluded from seeking to set aside a default judgment by a bill of review when it had initially diligently pursed a ruling on a motion for new trial filed while the default judgment was still interlocutory. In this slip and fall case, the plaintiff was injured at work and filed suit against several parties. As a result of some confusion by the insurer for some of the defendants, no answer was filed on behalf of the petitioner, and the trial court entered an interlocutory default judgment against the petitioner and others. Because the clerk failed to mail a notice of the default judgment, however, the petitioner did not learn of its entry until approximately eight months later, and immediately filed both a motion for new trial and a petition for a bill of review. Thereafter, unbeknownst to the petitioner, certain subrogation claims were dismissed, which caused the interlocutory default judgment to become final. The trial court granted the bill of review and entered a take nothing judgment in favor of the petitioner on summary judgment. However, the appellate court reversed, holding that the petitioner had not been diligent in pursuing its motion for new trial. The supreme court reversed and remanded to the appellate court for consideration of the merits of the appeal, holding that the petitioner's failure to pursue its motion for new trial resulted from the accidents or wrongful acts of others and not from lack of due diligence.[360]

Interpreting the nuances of Rule 329b[361] regarding the "granting" and "ungranting" of a motion for new trial, the court in *Ferguson v. Globe-Texas Co.*[362] dismissed an appeal as untimely. The trial court originally entered a take-nothing judgment for the appellee, following which the appellant timely moved for a new trial. Thereafter, outside the thirty-day time period prescribed in Rule 329b(b),[363] the appellant filed an amended motion for new trial. The trial court then entered an order that appeared to grant both the timely motion for new trial and the untimely amended motion for new trial. Approximately four months later, however, the trial court granted motions to reconsider the previous motion for a new trial and reinstated the original take-nothing judgment. Although recognizing a split in authority among several jurisdictions, the appellate court dismissed the appeal, holding that because the motions to reconsider were not timely, the order granting them was void. In so holding, the court reasoned that a contrary interpretation of Rule 329b(e)[364] might permit a trial court to try a case initially on its merits, then order and hold a second trial, but then go back and overrule the motion for a

358. *Id.* at 39-40 (citing TEX. R. CIV. P. 329b(h)).
359. 11 S.W.3d 924 (Tex. 1999) (per curium).
360. *Id.* at 928.
361. TEX. R. CIV. P. 329b.
362. 35 S.W.3d 688 (Tex. App.—Amarillo 2000, no. pet. h.).
363. TEX. R. CIV. P. 329b(b).
364. TEX. R. CIV. P. 329b(e).

new trial and enter a judgment on the first verdict.[365] Therefore, the court concluded that a trial court may only vacate an order granting a new trial during the period in which its plenary power continues, *i.e.*, 75 days after the date the judgment is signed.

XV. DISQUALIFICATION OF JUDGES

Objections to assigned judges continued to be a source of controversy during the Survey period. *In re Barrera*[366] involved a judge who was assigned under Section 74.053 of the Government Code[367] on two separate occasions. Because the assigned judge had heard a motion for protective order in the case pursuant to the first assignment, he ruled that a party's objection to his second assignment was untimely.[368] The court of appeals disagreed, holding that the objection was timely since the judge had not yet heard any matter under the second assignment.[369]

The supreme court has previously explained that a judge assigned to hear a recusal motion is subject to a party's right to object to the assignment.[370] The court in *O.C.S., Inc. v. PI Energy Corp.*[371] elaborated on this rule, holding that a party otherwise entitled to object to a judge assigned to hear a recusal motion is not deprived of that right simply because the assigned judge is a "regular" sitting judge of another court and not a former or retired judge.[372] The court distinguished the assignment of a sitting judge pursuant to section 74.053[373] from a transfer of the case between district courts, the latter of which does not implicate the same policy concerns.[374]

In re Cuban[375] addressed the procedural requirements for objecting to an assigned judge. The visiting judge in that case signed an *ex parte* temporary restraining order at the time suit was filed and set a hearing on the application for temporary injunction.[376] Before the injunction hearing, and at a time the district clerk's office was closed, the defendant filed a motion to dissolve the restraining order and an objection to the visiting judge with the sitting judge of another court.[377] The defendant also filed a second objection at the time of the temporary injunction hearing, albeit three minutes after the visiting judge took the bench, but the visiting

365. *Ferguson*, 35 S.W.3d at 691.
366. 9 S.W.3d 386 (Tex. App.—San Antonio 1999, orig. proceeding).
367. Tex. Gov't Code Ann. § 74.053 (Vernon 1998).
368. *Barrera*, 9 S.W.3d at 388-89.
369. *Id.* at 390.
370. *In re* Perritt, 992 S.W.2d 444, 445 (Tex. 1999).
371. 24 S.W.3d 548 (Tex. App.—Houston [1st Dist.] 2000, no pet. h.).
372. *Id.* at 552-53.
373. Tex. Gov't Code Ann. § 74.053 (Vernon 1998).
374. *PI Energy*, 24 S.W.3d 554 at n. 8 (citing In re Houston Lighting & Power Co., 976 S.W.2d 671, 673 (Tex. 1998) (transfer of case to district court rendered moot prior assignment of judge of that court to the case)).
375. 24 S.W.3d 381 (Tex. App.—Dallas 2000, orig. proceeding).
376. *Id.* at 382.
377. *Id.*

judge refused to recognize either objection.[378] The court of appeals held, however, that the defendant's first objection was proper and timely and that disqualification was mandated.[379] The court reasoned that the objection was properly filed with a sitting judge at a time that the clerk's office was closed.[380] Moreover, the court held there was no requirement that the objection be given to the visiting judge in order to have been effective.[381] Finally, the court noted that while an objection must be filed before the visiting judge takes the bench for action in the case, the defendant's objection was not waived by virtue of the fact that the visiting judge had entered a temporary restraining order without notice to the defendant.[382]

Finally, the court in *Brosseau v. Ranzaut*[383] was faced with the question of whether a district judge was disqualified under Article V, Section 7 of the Texas Constitution.[384] Specifically, the defendant complained that the district judge was not a member in good standing with the State Bar of Texas at the time he signed the judgment in the case and that he was, therefore, constitutionally disqualified from sitting. The court of appeals disagreed, holding that the constitution requires only that a district judge be licensed when he is initially elected.[385]

XVI. DISQUALIFICATION OF COUNSEL

In re George[386] addressed the extent to which an attorney should have access to the work product of his predecessor counsel who has been disqualified.[387] In a previous opinion, the supreme court disqualified plaintiff's original counsel because (1) their prior law firm had represented the defendants in substantially related matters, and (2) they questioned the validity of the work performed by their prior firm.[388] When new counsel thereafter appeared for the plaintiff, the defendants took the position that such counsel should not "receive, review or use" any of the disqualified attorneys' work product.[389] The trial court disagreed and entered an order permitting the disqualified attorneys to transfer their entire file to the successor attorneys, but prohibiting them from communicating with each other any further about the case.[390]

---

378. *Id.*
379. *Id.* at 383. In light of this ruling, the court did not reach the issue of the timeliness of the second objection. *Id.*
380. *Cuban*, 24 S.W.3d at 383.
381. *Id.*
382. *Id.*
383. 28 S.W.3d 235 (Tex. App.—Beaumont 2000, no pet. h.).
384. TEX. CONST. art. V, § 7 ("Each district judge shall be elected by the qualified voters at a General Election and shall be a citizen of the United States and of this State, who is licensed to practice law in this State . . .").
385. *Brosseau*, 28 S.W.3d at 236.
386. 28 S.W.3d 511 (Tex. 2000).
387. *Id.* at 512.
388. *Id.* (citing *In re* EPIC Holdings, 985 S.W.2d 41 (Tex. 1998)).
389. *George*, 28 S.W.3d at 512.
390. *Id.* at 514.

In a lengthy opinion, the supreme court identified two separate issues. First, the court held that, "when an attorney is disqualified, successor counsel is presumptively entitled to obtain [from the disqualified attorney] the pleadings, discovery, correspondence and all other materials in the public record or exchanged by the parties."[391] The court then turned to the harder question of what access successor counsel should have to work product and concluded that some type of restriction was necessary in order to prevent the new attorneys from acquiring confidential information of the adverse party.[392] Surveying the approaches taken by various courts around the country as to the extent of such a restriction, the court found none of them fully satisfactory.[393] Accordingly, the court created its own standard, which begins with a rebuttable presumption that the work product contains confidential information of the disqualified attorney's former client and should not, therefore, be provided to successor counsel.[394] This presumption can be rebutted by demonstrating that there is not a substantial likelihood that the work product in question contains or reflects such confidential information.[395]

In addition to announcing the new governing standard, the supreme court also provided guidance on the mechanisms by which it should be applied. Specifically, the court noted that when the issue arises, the trial judge should order the disqualified attorney to produce an inventory of the work product, setting forth the type of work, the subject matter, the claims to which it relates, and any other relevant factors.[396] The trial court must then determine if the presumption has been rebutted, utilizing such criteria as whether the particular work product concerns claims that are unrelated to the prior representation or is otherwise of the type that is unlikely to contain confidential information (*e.g.*, deposition summaries, legal research).[397] If the trial court cannot make its determination from the inventory alone, it may consider other evidence presented or even inspect the material *in camera*.[398] If it is still uncertain, then the presumption remains unrebutted and the work product should not be turned over.[399]

---

391. *Id.* at 515.
392. *Id.* at 517.
393. *Id.*
394. *George*, 28 S.W.3d at 518.
395. *Id.*
396. *Id.*
397. *Id.*
398. *Id.* at 519.
399. *George*, 28 S.W.3d at 519. The dissent found the majority's procedure unworkable and, in light of the importance of a lawyer's duty to protect a clients' confidences, advocated a complete bar on the transfer of work product to successor counsel. *Id.* at 525-26 (Brister, J. (Assigned), dissenting).

XVII. MISCELLANEOUS

A. ARBITRATION

Of likely interest to practitioners, the court in *In re Godt*[400] held that a legal malpractice claim arising from a medical malpractice suit constituted a claim for personal injuries (rather than a contractual claim or a claim for economic injuries) under the Texas Arbitration Act[401] and that the trial court therefore erred in compelling the client to arbitrate her malpractice claims against the attorney. The court declined to reach the client's claim that the arbitration agreement with her attorney was void under public policy, but did note that Rule 1.08 of the Texas Disciplinary Rules prohibits an attorney from making "an arrangement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement."[402]

Courts reached vastly divergent results on what acts were sufficient to constitute a waiver of one's rights to arbitration during the Survey period. In *Pennzoil Co v. Arnold Oil Co.*,[403] and *In re Certain Underwriters at Lloyd's*,[404] the court held that parties to arbitration agreements had not waived their rights to compel the enforcement of such agreements by: seeking and obtaining a severance; successfully moving for summary judgment on choice of law issues; filing a petition and an answer and then participating in a three-week rescission trial to verdict; taking more than 75 depositions; and conducting extensive written discovery (*Lloyd's*); or unsuccessfully moving for a change of venue; serving written discovery and participating in depositions; requesting a continuance of the trial date; and filing a motion for summary judgment the same day it filed a motion to compel arbitration (*Pennzoil*).

In contrast, in *Menna v. Romero*,[405] involving a dispute between an insurance agency and its agents, the defendant answered a suit and concurrently moved to compel arbitration. That same day, the defendant also filed a motion for continuance of the preliminary injunction hearing. On the first day of the injunction hearing, the defendant also filed a plea to the jurisdiction and a motion to abate based upon the arbitration agreement. Nevertheless, the trial court held that the defendant had waived its

---

400. 28 S.W.3d 732 (Tex. App.—Corpus Christi 2000, no. pet. h.).

401. *Id.* at 738; TEX. CIV. PRAC. & REM. CODE ANN. § 171.001, *et. seq.* (Vernon 1997 & Supp. 2001).

402. *Id.* at 739 n.7 (quoting Tex. Disciplinary R. Prof'l Conduct 1.08(g), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (Vernon 1998)). *See also In re* Turner Brothers Trucking Co., 8 S.W.3d 370, 377 (Tex. App.—Texarkana 1999, no pet.) (holding that arbitration agreement between employee and company retained by employer to resolve disputes was unconscionable under federal law and thus unenforceable where employee was functionally illiterate and could not have knowingly consented to arbitrate his personal injury claims).

403. 30 S.W.3d 494 (Tex. App.—San Antonio 2000, no pet. h.).

404. 18 S.W.3d 867 (Tex. App.—Beaumont 2000, no pet.).

405. No. 04-99-00475-CV, 2001 WL 193626 (Tex. App.—San Antonio Feb. 28, 2001, no pet. h).

right to enforce the arbitration agreement by participating in the injunction hearing without first urging its motion to compel arbitration. The appellate court reversed, noting that plaintiff failed to prove that he would be adversely affected by the arbitration.[406]

The court in *In Re MHI Partnership, Ltd.*[407] conditionally granted a writ of mandamus and ordered the trial court to rule on a pending motion to compel arbitration upon which the trial court had declined to rule either way until after the completion of discovery. The court in *In re Jebbia* [408] also conditionally granted a writ of mandamus regarding the enforceability of an arbitration agreement and held that the trial court was required to hold an evidentiary hearing on that issue where the summary judgment-type evidence before it raised a fact question regarding the enforceability of the arbitration agreement.

Construing section 171.098(a)(3) of the Texas Civil Practice and Remedies Code,[409] the court in *Prudential Sec., Inc. v. Vondergoltz*[410] dismissed an appeal for lack of jurisdiction, holding that the trial court's denial of an application to confirm an arbitration award and simultaneous granting of an application to vacate an arbitration award were not subject to an interlocutory appeal. Noting that this was an issue of first impression for Texas state courts, the appellate court looked to the Fifth Circuit's[411] interpretation of a prior version of the state statute,[412] and concurred with the Fifth Circuit's view, that the statute did not permit such an appeal.[413]

B. Sanctions

Appellate courts consistently affirmed sanction awards during the Survey period arising under a variety of scenarios. For example, in *Randolph v. Jackson Walker L.L.P.*,[414] the court affirmed a Rule 13[415] death penalty sanction in a defamation case where the plaintiffs had sued a television station, one of its reporters, and their attorneys. The trial court granted a motion for sanctions brought by the defendant attorneys and struck the plaintiffs' pleadings against those defendants. Thereafter, the plaintiffs amended their pleadings, but excluded any reference to the attorneys in their amended petition. The appellate court affirmed the sanction award, first holding that by amending their pleadings to omit any reference to the attorneys, the plaintiffs had effectively non-suited their claims against those defendants and therefore waived their right to complain about the sanction award on appeal.[416] Notwithstanding the waiver, however, the

406. *Id.* at *3.
407. 7 S.W.3d 918 (Tex. App.—Houston [14th Dist.] 2000, no pet.)
408. 26 S.W.3d 753 (Tex. App.—Houston [14th Dist] 2000, no pet. h.).
409. Tex. Civ. Prac. & Rem. Code § 171.098(a)(3)(Vernon).
410. 14 S.W.3d 329 (Tex. App.—Houston [14th Dist.] 2000, no pet.).
411. Atlantic Aviation, Inc. v. EBM Group, Inc., 11 F.3d 1276 (5th Cir. 1994).
412. Tex. Rev. Civ. Stat. Ann. art. 238-2 (repealed).
413. *Prudential*, 14 S.W.3d at 330-31.
414. 29 S.W.3d 271 (Tex. App.—Houston [14th Dist] 2000, no pet. h.).
415. Tex. R. Civ. P. 13.
416. *Id.* at 274.

court further affirmed the death penalty sanction, citing as evidence an offer by the plaintiffs' counsel before the sanction hearing to dismiss the plaintiffs' claims against the attorneys in exchange for their agreement to withdraw from representing the remaining defendant. The court held that this offer evidenced that the plaintiffs' claims against the attorneys were brought solely for purposes of harassment in attempting to coerce the defendants' counsel to withdraw.[417]

In *Skepnek v. Mynatt*,[418] the court imposed a $30,000 sanction against an attorney for initially filing a special appearance affidavit that was later proved false during depositions, after which the attorney again proffered the same false affidavit in another special appearance pleading. The appellate court affirmed the sanction, holding that by first failing to withdraw the false affidavit and then filing it a second time, the attorney violated section 10.001 of the Texas Civil Practice and Remedies Code.[419]

The court in *Roberts v. Rose*[420] affirmed a sanction award levied against an attorney after the trial court ordered the parties to mediation at which neither the plaintiff nor his counsel appeared. Although the monetary sanction award was originally issued against both the plaintiff and his attorney, the trial court later rescinded the sanction against the plaintiff after he testified that he did not appear at the mediation because his attorney advised him not to attend due to a scheduling conflict, after which the subject was never discussed again. However, the appellate court let stand the sanction award against the attorney for essentially neglecting the case and misinforming his client.[421]

C. Other Rulings

The Texas Supreme Court in *Qwest Communications Corp. v. AT&T Corp.*[422] held that a trial court's interlocutory order constituted a temporary injunction and was thus appealable under section 51.014(a)(4) of the Texas Civil Practice and Remedies Code. This suit arose out of a dispute between two telecommunications companies regarding damages sustained to fiber optic cables. After AT&T obtained an *ex parte* temporary restraining order, the parties announced to the court at the temporary injunction hearing that they had resolved the dispute made the subject of the injunction hearing and then read their agreement into the record. The trial court issued an oral ruling rendering judgment on the application for temporary injunction and instructed the parties to submit a written order. The parties could not agree to the terms of the written order and, following a subsequent clarification hearing, the trial court signed an order that matched the agreement previously read into the record, from

417. *Id.* at 281.
418. 8 S.W.3d 377 (Tex. App.—El Paso 1999, pet. denied).
419. Tex. Civ. Prac. & Rem Code Ann. § 10.001 (Vernon 1986 & Supp. 2000).
420. 37 S.W.3d 31 (Tex. App.—San Antonio 2000, no pet. h.).
421. *Id.* at 35.
422. 24 S.W.3d 334 (Tex. 2000).

which Qwest appealed. The supreme court held that because the order, made effective immediately, restricted Qwest's operations during the pendency of the litigation, it qualified as a temporary injunction, even though the order did not set the cause for trial or set an amount for a bond.[423] The high court reasoned that, while the absence of these two elements subjected the order to being attacked as void, it did not change the order's function or classification as an injunctive order, which subjected it to an interlocutory appeal.

423. *Id.* at 338.