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TEXAS CIVIL PROCEDURE

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

I. SUBJECT MATTER JURISDICTION

The supreme court took up taxpayer standing in two significant decisions during the Survey period. In *Bland Independent School District v. Blue*,[1] the court first addressed several procedural questions. Noting that standing is a prerequisite of subject matter jurisdiction, the court stated that the question of standing can be raised by a plea to the jurisdiction, as well as other procedural devices, including a summary judgment motion.[2] The court further held that, although the issue of standing should be determined without delving into the merits of the case, the trial court is not confined to the pleadings, but instead can and should hear such evidence as is necessary to decide whether it has jurisdiction.[3] "Whether a determination of subject matter jurisdiction can be made at a preliminary hearing or should await a full development of the merits of the case must be left largely to the trial court's sound exercise of discretion."[4] In this regard, the court contrasted a jurisdictional challenge based on amount in controversy, where the trial court should accept the plaintiff's good-faith allegations as true and not require it to prove its case at a preliminary hearing, with a challenge to, for example, associational standing, where an evidentiary inquiry into the nature and purpose of the organization may be necessary.[5]

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1. 34 S.W.3d 547 (Tex. 2000).
2. *Id.* at 553-54.
3. *Id.* at 554. *Accord* Wilmer-Hutchins Indep. Sch. Dist. v. Sullivan, 51 S.W.3d 293, 294 (Tex. 2001). Although the plaintiff in *Sullivan* pleaded that she had exhausted her administrative remedies, the uncontested evidence was to the contrary, and the trial court therefore lacked jurisdiction. *Id.* Moreover, the supreme court held that subject matter jurisdiction could not be conferred by estoppel based on the plaintiff's allegation that the school district misled her about the availability of an administrative remedy. *Id.* at 294-305.
4. *Blue*, 34 S.W.3d at 554.
5. *Id.*

Having addressed the procedural issues, the court turned to the substantive problem of taxpayer standing. The court recognized the long-standing general rule that taxpayers do not have the right to contest government decisions without showing some particularized injury,[6] as well as the established exception to this rule allowing a taxpayer to seek an injunction against the illegal expenditure of funds.[7] In *Blue*, the taxpayers sought to enjoin the school district's future payments under a lease financing agreement, pursuant to which the district had funded the already-completed construction of a school building.[8] The supreme court held that the equity exception to the rule precluding taxpayer standing did not extend to this situation.[9] The court reasoned that "the potential for disruption of government operation is too great to allow a taxpayer with no special injury distinct from the general public's to sue to prohibit the government from paying for goods and services it has already received and placed in permanent use."[10]

The high court also had to grapple with taxpayer standing before it could address the constitutionality of the Tarrant County jail's religious education program in *Williams v. Lara*.[11] Specifically, the court held that one of the plaintiffs could not claim taxpayer status by virtue of her payment of rent or sales taxes.[12] The other plaintiff, however, paid property taxes in Tarrant County and therefore qualified as a taxpayer.[13] Moreover, the court held that, because county employees spent a significant amount of time on the religious education program, its operation constituted an expenditure of public funds that the plaintiff-taxpayer had standing to seek to enjoin.[14]

Congressional redistricting took the supreme court to the intersection of ripeness and dominant jurisdiction in *Perry v. Del Rio*.[15] Four redistricting cases were set for trial on the same day, two in Travis County and two in Harris County, and it was left to the supreme court to decide which should proceed to trial first.[16] To do so, the court first had to resolve whether a trial court has subject matter jurisdiction over a claim that is not ripe when the case was filed, but subsequently ripens while it is still pending.[17] Relying on federal case law it found was consistent with

6. *Id.* at 555. *See also* Brown v. Todd, 53 S.W.3d 297 (Tex. 2001) (holding that neither citizen nor city council member had standing to challenge mayor's executive order prohibiting city employees from discriminating on the basis of sexual orientation).

7. *Blue*, 34 S.W.3d at 556.

8. *Id.* at 549.

9. *Id.* at 557-58.

10. *Id.* at 558.

11. 52 S.W.3d 171 (Tex. 2001).

12. *Id.* at 179-80.

13. *Id.* at 180.

14. *Id.* at 183.

15. 66 S.W.3d 239 (Tex. 2001).

16. *Id.* at 242.

17. *Id.* at 252.

its own ripeness jurisprudence,[18] the court held that a "claim's lack of ripeness when filed is not a jurisdictional infirmity requiring dismissal if the case has matured."[19] In determining which case should proceed, however, the court held that a party who files suit first will nevertheless be estopped from arguing dominant jurisdiction if his claims were not ripe.[20] Instead, the high court concluded that dominant jurisdiction would be conferred on the first court in which a claim that was ripe was filed, whether in an original or amended petition.[21]

In *Motor Vehicle Board of Texas v. El Paso Independent Automobile Dealer Assoc'n*,[22] the court of appeals reluctantly ordered the dismissal of the case for lack of jurisdiction because of the failure to join an indispensable party.[23] The plaintiff had sued various El Paso city and county officials, challenging the Texas "blue law" prohibiting the sale of motor vehicles on consecutive Saturdays and Sundays.[24] Although served with notice of the suit, the Texas Attorney General was not named as a party and declined to participate, stating that the local officials would adequately represent its interests.[25] When the local officials determined that the law was unconstitutional and entered into an agreed judgment, however, the Attorney General and the Motor Vehicle Board filed post-judgment motions to intervene and a notice of appeal.[26] Although the court of appeals chastised the Attorney General for delaying his entry into the case, it nevertheless concluded that the trial court lacked jurisdiction.[27] The court stated the failure to name the party responsible for enforcing a statute as a party to an action to declare the statute unconstitutional is one of the "rare cases in which failure to name an indispensable party will deprive a court of jurisdiction."[28]

II. SERVICE OF PROCESS

Most trial practitioners are aware that a non-appearing defendant must be served with new citation for an amended petition if the plaintiff seeks a more onerous judgment than that prayed for in the original pleading.[29] The Corpus Christi Court of Appeals applied this rule in a somewhat unusual manner in *Atwood v. B&R Supply & Equipment Co.*[30] The origi-

18. *Id.* at 250. The court opined that, although federal constitutional claims were asserted, the ripeness issued should be determined under state law. *Id.* at 249.
19. *Id.* at 252.
20. *Perry*, 66 S.W.3d at 252-53.
21. *Id.* at 253.
22. 37 S.W.3d 538 (Tex. App.—El Paso 2001, pet. denied).
23. *Id.* at 539.
24. TEX. TRANS. CODE ANN. § 728.002 (Vernon 1999); *Motor Vehicle Bd.*, 37 S.W.3d at 539.
25. *Id.*
26. *Id.* at 539-40.
27. *Id.* at 541-42.
28. *Id.* at 540 (citation omitted).
29. *See, e.g.*, Weaver v. Hartford Accident & Indem. Co., 570 S.W.2d 367, 370 (Tex. 1978).
30. 52 S.W.3d 265 (Tex. App.—Corpus Christi 2001, no pet.).

nal petition in that case, which was served on the defendants, was worded as a suit on a sworn account, but was not verified.[31] The second amended petition, on which the trial court granted default judgment, corrected this deficiency, but was never served on the defendants.[32] The appellate court reversed the default judgment.[33] The court reasoned that the original petition subjected the defendants only to the risk of a default judgment as to liability for breach of contract, whereas the amended petition converted the case to a proper suit on a sworn account and allowed the trial court to enter judgment not only as to liability, but also for damages.[34]

A trio of cases during the Survey period addressed whether a plaintiff exercised reasonable diligence in effecting service of citation so as to avoid a statute of limitations defense.[35] In *Harrell v. Alvarez*,[36] the court held that reasonable diligence was established as a matter of law where the citations were requested immediately, the clerk issued the citations within three weeks (which included the Thanksgiving holiday), and service was effected within five days of the issuance of the citations.[37] In *Keeton v. Carrasco*,[38] the court held that a fact question existed as to the plaintiffs' diligence, and a summary judgment on limitations grounds was therefore improper.[39] The plaintiffs in that case originally attempted service on the defendant doctor by certified mail, but the return receipt was not signed by the defendant, and personal service was not effected until sometime after the defendant failed to answer. Although the court recognized that this attempted service by mail was ineffective, it nevertheless allowed that it would not be uncommon for a member of the doctor's staff to sign the green card and, therefore, an ordinarily prudent attorney might not have suspected there was a problem until the defendant did not answer.[40] In *Belleza-Gonzalez v. Villa*,[41] on the other hand, the court held that an oral agreement between plaintiff's counsel and an insurance adjustor to withhold service of process while counsel searched for records was unenforceable under Rule 11[42] and, therefore, could not constitute reasonable diligence as a matter of law.[43]

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31. *Id.* at 267.

32. *Id.*

33. *Id.* at 268.

34. *Id.*

35. A plaintiff who files suit within the limitations period, but does not serve citation until after limitations has run, must have exercised "reasonable diligence" in effecting service or his claim will be time-barred. *See, e.g.*, Gant v. DeLeon, 786 S.W.2d 259, 260 (Tex. 1990).

36. 46 S.W.3d 483 (Tex. App.—El Paso 2001, no pet.).

37. *Id.* at 486.

38. 53 S.W.3d 13 (Tex. App.—San Antonio 2001, no pet.).

39. *Id.* at 20.

40. *Id.* at 19-20.

41. 57 S.W.3d 8 (Tex. App.—Houston [14th Dist.] 2001, no pet. h.).

42. TEX. R. CIV. P. 11.

43. *Villa*, 57 S.W.3d at 12.

III. SPECIAL APPEARANCE

As most practitioners are aware, special appearances are subject to the due order of pleading requirement. During the Survey period, the case of *Landry v. Daigrepont*[44] considered whether a defendant waived his special appearance by arguing his motion for new trial prior to obtaining a ruling on his special appearance.[45] After learning that a default judgment had been taken against him, the out-of-state defendant filed a motion for new trial, which expressly stated that it was "subject to [his] special appearance."[46] At the hearing before the trial court, defendant's counsel advised the court that the hearing concerned "a motion for new trial preceded technically by a special appearance both being heard [at the same hearing]."[47] Defendant's counsel stated that although the special appearance needed to precede any ruling by the court on the motion for new trial, he would begin with argument on the motion for new trial because it would be easier for the court to follow.[48] The trial court granted the motion for new trial and special appearance. The appellate court reversed based on Rule 120a(2),[49] which provides "any motion to challenge the jurisdiction provided for herein shall be heard and determined before a motion to transfer venue or any other pleading may be heard."[50] The court concluded that because the defendant's counsel had argued his motion for new trial before the special appearance had been determined, he had waived his special appearance.[51]

In *Stauffacher v. Lone Star Mud, Inc.*,[52] the court considered which party has the burden of proof when an alter-ego allegation is relied on as a basis for personal jurisdiction. Lone Star filed suit against Stauffacher and six other defendants, alleging that they had failed to pay for services provided in connection with an oil well in Fannin County, Texas. Stauffacher alleged that the trial court did not have personal jurisdiction over him because (1) he was not a Texas resident, (2) Lone Star's suit did not arise out of his personal business in Texas, (3) he did not individually conduct business in Texas, (4) he did not individually own property in Texas, (5) he had no personal involvement or individual interest in the subject matter of the suit, (6) he did not make any representations to Lone Star, either in an individual or representative capacity, and (7) he did not take any act constituting minimum contacts with Texas.[53] Lone Star responded alleging that the other defendants were Stauffacher's alter-egos and presented evidence of a significant connection between the

44. 35 S.W.3d 265 (Tex. App.—Corpus Christi 2000, no pet. h.).
45. *Id.* at 267.
46. *Id.*
47. *Id.* at 267-68.
48. *Id.* at 268.
49. TEX. R. CIV. P. 120a(2).
50. *Id.*; *Landry*, 35 S.W.3d at 268.
51. *Id.*
52. 54 S.W.3d 810 (Tex. App.—Texarkana 2001, no pet. h.).
53. *Id.* at 813.

other defendants and Stauffacher.[54] The trial court overruled the special appearance, and Stauffacher appealed.[55]

On appeal, Stauffacher, relying on *3-D Electric Co. v. Barnett Construction Co.*,[56] contended that Lone Star had the burden to demonstrate the existence of an alter-ego relationship and had failed to do so.[57] The court of appeals rejected Stauffacher's argument and held that the nonresident must negate all bases of personal jurisdiction to prevail in a special appearance, including allegations of alter-ego.[58] The court distinguished *Barnett Construction* on the basis that the trial court had initially overruled the special appearance in that case and only reconsidered its ruling on personal jurisdiction after a full trial on the merits.[59]

IV. VENUE

The propriety of interlocutory appeals to venue challenges was again the subject of several opinions during the Survey period. In *American Home Products Corp. v. Clark*,[60] the supreme court confirmed that section 15.003(c) of Texas Civil Practices and Remedies Code[61] does not provide a dissatisfied defendant with an interlocutory appeal from a trial court's venue decision under section 15.002.[62] In this Fen-Phen case, eleven plaintiffs sued ten defendants in Johnson County, Texas, for personal injuries allegedly arising out of their use of the diet drugs. Nine of the plaintiffs lived outside of Texas, and only one of the Texas residents lived in Johnson County. American Home challenged venue as to all plaintiffs except the Johnson County resident, in response to which the plaintiffs noted that they had all sued the Johnson County physician who had treated the Johnson County plaintiff. The trial court denied American Home's motion to transfer without specifying the bases for its decision. American Home then brought an interlocutory appeal. The appellate court abated the appeal, however, pending the trial court's issuance of a new order specifying the grounds for its decision. The trial court, relying upon the fact that each of the plaintiffs had sued the Johnson County physician, then concluded that venue was proper under section 15.005.[63]

The court of appeals and supreme court both affirmed, holding that the defendants did not have the right to take an interlocutory appeal because

54. *Id.*
55. *Id.* at 814.
56. 706 S.W.2d 135, 140 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).
57. *Stauffacher*, 54 S.W.3d at 816.
58. *Id.*
59. *Id.*
60. 38 S.W.3d 92 (Tex. 2000).
61. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(c) (Vernon Supp. 2002).
62. TEX. CIV. PRAC. & REM. CODE ANN. § 15.002 (Vernon Supp. 2002); *Clark*, 38 S.W.3d at 96.
63. TEX. CIV. PRAC. & REM. CODE ANN. § 15.005 (Vernon Supp. 2002); *Clark*, 38 S.W.3d at 95.

section 15.003[64] did not provide such a right where the trial court has ruled, as this one had, that venue was proper under section 15.002.[65] Justice Enoch authored a concurring opinion that acknowledged the propriety of the majority's technical reading of the venue statute, but noted that from the face of the petition it seemed clear that the Johnson County doctor had only treated the Johnson County plaintiff and none of the other plaintiffs.[66] As a result, the concurrence expressed amazement as to why the trial court would ever have issued an order concluding that each plaintiff had independently established venue, and noted that the trial of the case would be a complete waste, since improper venue is grounds for mandatory reversal.[67]

In *In re City of Irving*,[68] the defendants unsuccessfully sought a writ of mandamus to challenge the trial court's denial of their motion to transfer venue. In rejecting the writ, the appellate court held that, while the Texas Supreme Court acknowledged in *In re Masonite Corp.*[69] that an erroneous venue determination may be corrected by mandamus if the waste of judicial resources is so great as to make the situation a truly exceptional circumstance, simply the fact that the erroneous venue order will result in an eventual reversal does not, in and of itself, constitute such an "exceptional circumstance."[70]

That mandatory venue statutes do not trump the compulsory counterclaim requirements under Rule 97(a)[71] is the lesson of *Compass Exploration, Inc., v. B-E Drilling Co.*[72] B-E Drilling filed suit in Dallas County for breach of contract and on a sworn account for failure to pay certain invoices. Rather than challenging venue or filing a counterclaim, Compass instead filed another suit alleging breach of contract and negligence in Leon County while the Dallas County suit was still pending. After obtaining a favorable judgment in Dallas County, B-E Drilling then successfully moved for summary judgment in the Leon County suit on the basis of res judicata. The appellate court affirmed the summary judgment, rejecting Compass's argument that venue was mandatory in Leon County, noting that Compass failed to challenge venue in Dallas County, and holding that Compass's claims in the Leon County action were compulsory counterclaims and should have been brought in the original Dallas County suit.[73]

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64. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003.
65. TEX. CIV. PRAC. & REM. CODE ANN. § 15.002; *Clark*, 38 S.W.3d at 96.
66. *Id.* at 97-98 (Enoch, J., concurring).
67. *Id.* at 98.
68. 45 S.W.3d 777 (Tex. App.—Texarkana 2001, no pet. h.).
69. 997 S.W.2d 194, 199 (Tex. 1999).
70. *City of Irving*, 45 S.W.3d at 779; *See also In re* Colonial Cas. Ins. Co., 33 S.W.3d 399 (Tex. App.—Texarkana 2000, no pet. h.) (declining to extend the line of cases that allow a mandamus to be granted in the context of mandatory venue challenge beyond suits affecting the parent-child relationship).
71. TEX. R. CIV. P. 97(a).
72. 60 S.W.3d 273 (Tex. App.—Waco 2001, no pet. h.).
73. *Id.* at 278-79.

V. PARTIES

Once again, class actions were a hot topic during the Survey period. In *McAllen Medical Center, Inc. v. Cortez*,[74] the Texas Supreme Court considered (1) when an order certifying a settlement-only class becomes ripe for appellate review, and (2) whether a non-settling defendant has the right to challenge that certification order. Cortez filed a putative class action against a hospital and a surgeon, based on an alleged misrepresentation to patients that all of the hospital's surgeons were board certified.[75] Cortez reached a tentative settlement with the surgeon, and they jointly moved for certification of a class for purposes of approving the settlement.[76]

The trial court entered an order that (1) certified a class action for purposes of settlement with the surgeon only, (2) preliminarily approved the settlement, (3) scheduled a fairness hearing on the settlement, and (4) provided for class notice of the class action and the proposed settlement.[77] However, the class notice was not directed only to the surgeon's patients, but to all patients who had cardiac surgery at the hospital. The notice described class claims against both the cardiac surgeon *and* the hospital, but recited that it would not prejudice any other defendant's right to contest class certification with respect to the claims against it and that the court would rescind the certification if it did not approve the settlement after the fairness hearing.[78] The hospital filed an interlocutory appeal, and the parties agreed to postpone the fairness hearing pending the appellate rulings.[79]

On appeal, the hospital claimed that it was directly affected by, and therefore had standing to contest, the class certification, class notice, and settlement. The court of appeals dismissed the hospital's appeal, however, holding that it did not have jurisdiction because the hospital had not shown any injury that would give it standing to appeal.[80] The supreme court disagreed. The court first noted that it had never determined when an order certifying a settlement-only class becomes ripe for appellate review.[81] However, the court had previously held that a trial court must conduct a complete review of the criteria in Rule 42 before determining that a case may proceed as a class action and that its focus in this case was when that inquiry should occur so that it becomes ripe for appellate review.[82]

The surgeon argued that the class action inquiry would occur at the fairness hearing, and the trial court could review the Rule 42 criteria at

74. 66 S.W.3d 227 (Tex. 2001).
75. *Id.*
76. *Id.*
77. *Id.* at 231.
78. *Id.*
79. *Cortez*, 66 S.W.3d at 231.
80. *Id.* at 232.
81. *Id.*
82. *Id.* (citing Southwestern Ref. Co. v. Bernal, 22 S.W.3d 425, 435 (Tex. 2000)).

that time. The supreme court was not enamored with this argument, however, claiming that it echoed the "certify now and worry later" approach that it had previously rejected.[83] Because the court had previously held that a trial court should perform a rigorous analysis before ruling on whether all prerequisites of certification had been met, it saw no reason why "settlement-only classes" should merit less rigorous treatment.[84] Indeed, the court held that in deciding whether to certify a settlement-only class, the class action criteria designed to protect absent class members demanded even greater scrutiny.[85] Accordingly, the court found that the trial court's order was ripe for appellate review because it allowed the plaintiff and the surgeon to proceed without first meeting the Rule 42 criteria.[86]

Second, the court addressed whether the hospital had standing to challenge the trial court's certification order.[87] The court of appeals had relied on *TransAmerican Refining Corp. v. Dravo Corp.*[88] for the proposition that non-settling defendants generally have no standing to complain about a settlement.[89] The hospital argued that Rule 42 does not allow the trial court to certify a class action against fewer than all defendants and that the certification order injured the hospital in several ways, giving it standing to pursue its appeal. The supreme court determined that it did not need to decide whether Rule 42 prohibits piece-meal certification against individual defendants because it held that a non-settling defendant has standing to contest a certification of a settlement class *if* the non-settling defendant can show that it is adversely affected by the certification, which would necessarily be a case-specific inquiry.[90]

In *Bally Total Fitness Corp. v. Jackson*,[91] the supreme court had the opportunity to further refine its holding in *De Los Santos v. Occidental Chemical Corp.*,[92] where it had held that an interlocutory order was appealable when that order altered the fundamental nature of a class by changing a certified class from opt-out to mandatory and created conflict between class and its counsel.[93] In *Bally*, after certifying a class, the trial court granted a motion for partial summary judgment against the defendant and then overruled two of the defendants' motions to decertify the class.[94] The defendant filed an appeal and a petition for writ of mandamus, which the court of appeals denied based on its conclusion that it did not have jurisdiction to review these orders.[95]

83. *Id.*
84. *Cortez*, 66 S.W.3d at 232.
85. *Id.* at 233.
86. *Id.* at 234.
87. *Id.*
88. 952 F.2d 898, 899 (5th Cir. 1992).
89. 66 S.W.3d at 233.
90. *Id.* at 234.
91. 53 S.W.3d 352 (Tex. 2001).
92. 933 S.W.2d 493 (Tex. 1996).
93. *Id.* at 495.
94. *Bally*, 53 S.W.3d at 353.
95. *Id.*

The supreme court also disagreed with the defendant's arguments that *De Los Santos* authorizes appeals whenever interlocutory orders create incentives for class members to stay in an opt-out class.[96] First, the supreme court noted that its "narrow ruling" in *De Los Santos* was based primarily on its determination that "changing a class from opt-out to mandatory does not simply enlarge its membership; it alters the fundamental nature of the class."[97] In particular, the court stated that *De Los Santos* was not about "strategic opting in," which is what the defendant in the instant case was complaining of; instead, it was about forcing plaintiffs who had already opted out into a mandatory settlement class.[98] The court found that the trial court's orders in *Bally* did not change the nature of the class, nor did they affect the class members' relationships with each other or with class counsel.[99] Because the class members faced no legal bar to opting out as a result of the pre-notice partial summary judgment and they were not forced into a class against their will, *De Los Santos* was inapplicable.[100]

In *Northrup v. Southwestern Bell Telephone Co.*,[101] the court considered whether unnamed class members were required to formally intervene in a lawsuit to have standing to appeal the trial court's order approving its settlement.[102] The court held that in class action cases where the "settlement class" device is used (*i.e.*, where the class is certified simultaneously with or subsequent to the settlement of the class action), pre-settlement intervention is not required for an unnamed class member to have standing to appeal.[103] The court based its conclusion primarily on two reasons. First, the court held that imposing the intervention requirement on settlement class cases would operate to abrogate a party's right to interlocutory appeal of a class certification decision.[104] Second, the court held that the parties' intervention was not required under any existing Texas law or the statute authorizing interlocutory appeals.[105]

Two cases during the Survey period addressed the propriety of considering the merits of a class representative's claims prior to analyzing the requirements for class certification. In *MD Anderson Cancer Center v. Novak*,[106] the supreme court considered whether a named plaintiff's lack of individual standing at the time suit is filed precludes the court's exercise of subject matter jurisdiction over the class claims, or whether it is

96. *Id.* at 355.
97. *Id.* at 354.
98. *Id.* at 356.
99. *Bally*, 53 S.W.3d at 336.
100. *Id.*
101. No. 13-00-377-CV, 2001 Tex. App. LEXIS 4031 (Tex. App.—Corpus Christi June 14, 2001, no pet. h.).
102. *Id.* at *24.
103. *Id.* at *7-8.
104. *Id.* at *25.
105. *Id.* at *31 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(3)).
106. 52 S.W.3d 704 (Tex. 2001).

simply a factor to consider in deciding whether the named plaintiff would be a proper class representative.[107] Although this issue was a case of first impression in Texas, the United States Supreme Court had already adopted the rule that a plaintiff who lacks individual standing when the suit is filed cannot maintain a class action.[108] The *Novak* court agreed with this approach and held that when a named plaintiff lacks individual standing at the time the suit is filed, the court is deprived of subject matter jurisdiction over both the plaintiff's individual claims and claims on behalf of the class.[109]

In *Grizzle v. Texas Commerce Bank, N.A.*,[110] the court addressed whether the trial court can consider a motion for summary judgment against the class representative's claims before conducting a class certification hearing.[111] The defendants argued that the trial court could properly address the merits of the class representative's claim before deciding whether to certify a class, and, if the class representative had no live individual claims, she had no right to bring the suit on behalf of the putative class.[112] The appellate court agreed and held that until the trial court duly certifies a class, a suit brought as a class action is treated as if it were brought by the named plaintiff suing on her own behalf. Thus, the trial court was not required to conduct a class certification hearing before considering or ruling upon the defendant's motion for summary judgment.[113]

VI. PLEADINGS

In *Woodruff v. Wright*,[114] the court considered the somewhat unusual situation of whether a defendant can successfully obtain a summary judgment against plaintiffs whose names and respective claims were inadvertently removed from amended pleadings.[115] In *Woodruff*, several plaintiffs brought suit against three surgeons, based on their allegations of medical malpractice. At the request of the defendants, the case was divided for multiple trials on the separate claims of two groups of plaintiffs, referred to as the "Woodruff" plaintiffs and the "Davis" plaintiffs.[116] Shortly before the trial, involving only the Woodruff plaintiffs, the plaintiffs filed their "Twenty-First Amended Original Petition" on behalf of only the Woodruff plaintiffs and specifically set out only their claims against certain defendants.[117] Significantly, there was no "et al." designation for the other Davis plaintiffs, and they were not referred to directly or indirectly in the amended petition. The trial on the claims of the

107. *Id.* at 708.
108. *Id.* (citing O'Shea v. Littleton, 414 U.S. 488, 494 (1974)).
109. *Id.* at 711.
110. 38 S.W.3d 265 (Tex. App.—Dallas 2001, no pet. h.).
111. *Id.* at 274.
112. *Id.*
113. *Id.*
114. 51 S.W.3d 727 (Tex. App.—Texarkana 2001, pet. denied).
115. *Id.* at 730-32.
116. *Id.* at 730.
117. *Id.*

Woodruff plaintiffs ended in a mistrial, with sanctions assessed against plaintiffs' counsel. After the mistrial, plaintiffs then filed another "Twenty-First Amended Original Petition," which named only the Davis plaintiffs and set forth only their particular claims against the remaining defendants.[118] Again, there was no "et al." designation or reference, direct or indirect, to any of the Woodruff plaintiffs or their claims. Thereafter, plaintiffs filed their "Twenty-Second Amended Original Petition," which included all of the plaintiffs and their claims.

The defendants filed motions for summary judgment based on the non-suit of the claims against them by removal of their names and the claims against them from the two different Twenty-First Amended Original Petitions, arguing that the attempt to revive these causes of action in the Twenty-Second Amended Original Petition was barred by limitations.[119] The trial court granted the defendants' motions for summary judgment and, on appeal, the court analyzed the significance of the omission of the party plaintiffs and claims in the two amended pleadings.[120] The court first noted the well-established rule that an omission of claims against a party in a petition operates as a voluntary dismissal of that party from the lawsuit, but conceded that most of these cases referred to defendants whom the plaintiffs omitted from amended petitions, rather than omitted plaintiffs.[121] Indeed, the court found only one published case in which the court held that when a plaintiff intentionally omits its name from an amended pleading, that the plaintiff is effectively dismissed from the lawsuit.[122]

Plaintiffs argued that the Texas Supreme Court had held in *American Petrofina, Inc. v. Allen*[123] that the omission and subsequent renaming of a plaintiff in a later pleading did not prevent that plaintiff's claims from relating back to the time of the original pleading for purposes of limitations. In *American Petrofina*, however, there were 985 plaintiffs and only one was omitted from the petition, but was added later in an amended petition.[124] Further, all the claims in *American Petrofina* were identical and, therefore, the factual claims made in the petition were not impacted by the failure to name one particular plaintiff.[125]

In its decision to apply the reasoning of *American Petrofina* in *Woodruff*, the court first noted that the *American Petrofina* decision represented a departure from the traditional view regarding party omissions.[126] Specifically, in *American Petrofina*, the supreme court recognized that the omission of a party generally indicates an intent to non-suit, but because

118. *Id.*
119. *Woodruff*, 51 S.W.3d at 730-31.
120. *Id.* at 731.
121. *Id.*
122. *Woodruff*, 51 S.W.3d at 731 (citing Mercure Co. v. Rowland, 715 S.W.2d 677, 679 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.)).
123. 887 S.W.2d 829 (Tex. 1994).
124. *Woodruff*, 51 S.W.3d at 731.
125. *Id.*
126. *Id.* at 733.

the omission was inadvertent, the plaintiffs' amended pleadings related back to the original pleading and the claims were, therefore, not time-barred.[127] Although the court conceded that deleting seven of nine plaintiffs and then deleting the two remaining plaintiffs is materially different from omitting one out of a thousand plaintiffs, it recognized that the two different pleadings each referred solely to the specific plaintiffs who were preparing for trial.[128] The court concluded it was at least understandable that trial counsel might prepare a petition that focused solely on the upcoming trial without realizing the ramifications of this act on the other plaintiffs.[129] Thus, the court reversed the trial court's summary judgment.[130]

In *Buls v. Fuselier*,[131] the court considered whether the trial court had committed error when it submitted instructions on the inferential rebuttal defenses of sole proximate cause and new and independent cause in its jury charge, and allowed expert testimony on these issues, in the absence of an affirmative pleading by the defendant. Relying on *Charter Oaks Fire Insurance Co. v. Taylor*,[132] the plaintiffs contended that a simple, general denial is not enough to justify an instruction on inferential rebuttals and that such issues must be affirmatively raised by the pleadings.[133] The appellate court concluded, however, that *Charter Oaks* represented a divergence from a line of cases that held that evidence supporting an inferential rebuttal is admissible under a general denial.[134] The court further found that *Charter Oaks* had erroneously relied on *Evans v. Casualty Reciprocal Exchange*[135] for the proposition that the issue of sole proximate cause is submitted to the jury only when the pleadings raise the issue.[136] The court believed that *Charter Oaks* failed to recognize that *Evans* was discussing the *previous* treatment of inferential rebuttals under Texas's old special issues practice.[137] Similarly, the court found that the divergence in case law in this area was further exacerbated when another court of appeals, in *Reid v. Best Waste Systems, Inc.*,[138] incorrectly cited *Lemos v. Montez*[139] for the proposition that inferential rebuttals must be raised by the pleadings and the evidence.[140] Rather, the court concluded that in *Lemos*, the supreme court never mentioned that inferential rebuttals must be pled, and the court had actually analyzed whether evidence

127. *Id.*
128. *Id.*
129. *Woodruff*, 51 S.W.3d at 733.
130. *Id.*
131. 55 S.W.3d 204 (Tex. App.—Texarkana 2001, no pet. h.).
132. 658 S.W.2d 227, 228-29 (Tex. App.—Houston [1st Dist.] 1983, no writ).
133. *Buls*, 55 S.W.3d at 211.
134. *Id.*
135. 579 S.W.2d 353 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.).
136. *Buls*, 55 S.W.3d at 211-12.
137. *Id.* at 212.
138. 800 S.W.2d 644, 646 (Tex. App.—Houston [14th Dist.] 1990, writ denied).
139. 680 S.W.2d 798 (Tex. 1984).
140. *Buls*, 55 S.W.3d at 212.

adduced at trial supported their introduction by a jury instruction.[141] Based on the foregoing, the court held that a general denial was sufficient to justify an instruction on inferential rebuttals and that they need not be raised affirmatively by the pleadings.[142]

VII. DISCOVERY

In 1998, the supreme court held, in a mass tort case involving over 3,000 plaintiffs, that the failure to allow defendants to obtain the most basic discovery from the vast majority of those plaintiffs while the claims of a few selected plaintiffs were tried was an abuse of discretion.[143] The court was required to repeat this message during the Survey period in *In re Van Waters & Rogers, Inc.*,[144] a case it had previously sent back to the trial court for reconsideration of a similar order abating discovery in light of its holding in *Colonial Pipeline*.[145] When the trial court denied the defendant's motion to reconsider, the matter appeared before the supreme court again. The court held that a blanket abatement of discovery directed to over 400 plaintiffs, until a few selected claims were tried, constituted a clear abuse of discretion, especially since no plaintiff had yet gone to trial in the seven years the case was pending.[146] Moreover, the court warned that the selection of claims to be tried first should be based on the factors described in its precedent, such as similarity of injuries and periods of exposure,[147] rather than allowing plaintiff's counsel to unilaterally select which claims would be tried first.[148]

A municipality sought to withhold a consulting expert's report in response to a Texas Public Information Act request in *In re City of Georgetown*.[149] The city argued that the report was "expressly made confidential under other law"[150] and did not, therefore, have to be produced. A divided supreme court agreed, holding that the rules of evidence and procedure constituted "other law," protecting the report from disclosure.[151] The court also held that the city had not waived its objection by failing to raise this specific statutory exception when it requested a ruling from the Texas Attorney General.[152]

An alleged privilege waiver was also at issue in *In re Cooper*.[153] The relator in that case, after suffering a judgment in excess of his insurance

141. *Id.*
142. *Id.* at 213.
143. *In re* Colonial Pipeline Co., 968 S.W.2d 938 (Tex. 1998) (discussed in A. Erin Dwyer, et al. *Texas Civil Procedure*, 52 SMU L. REV. 1485, 1498 (1999)).
144. 62 S.W.3d 197 (Tex. 2001).
145. *In re* Van Waters & Rogers, Inc., 988 S.W.2d 740, 741 (Tex. 1998) (per curium).
146. *Van Waters*, 62 S.W.3d at 199.
147. *Id.* (citing *In re* Ethyl Corp., 975 S.W.2d 606, 611 (Tex. 1998) and *In re* Bristol-Meyers Squibb Co., 975 S.W.2d 601, 603 (Tex. 1998)).
148. *Van Waters*, 62 S.W.3d at 199.
149. 53 S.W.3d 328 (Tex. 2001).
150. TEX. GOV'T CODE ANN. § 552.022(b) (Vernon Supp. 2002).
151. *City of Georgetown*, 53 S.W.3d at 336.
152. *Id.*
153. 47 S.W.3d 206 (Tex. App.—Beaumont 2001, orig. proceeding).

coverage, assigned his claims against his insurers to the plaintiff in the underlying personal injury suit.[154] The plaintiff-assignee then filed a "Stowers" case against the insurers and sought discovery of the insured's attorney's litigation file.[155] The court of appeals held that the mere assignment of the Stowers claim did not carry with it a waiver of the insured's attorney-client privilege, although the parties could, and perhaps should, have included such a waiver.[156] In a concurring opinion, Justice Gaultney expressed his concern that the inevitable request for such waivers by assignees in future cases would further undermine the already uneasy relationship between insureds and counsel hired by their insurers.[157]

The court allowed a post-judgment deposition of the judgment-debtor's daughter in *In re Amaya*.[158] Although the daughter claimed to have no knowledge of the location of her father or his records, the court noted that the judgment creditor had offered some evidence that the father and daughter had business dealings together, and that the father had conveyed to the daughter a house in which, according to his prior testimony, documents had been located.[159] The court opined that the ability to depose a close family member in these circumstances was reasonably calculated to lead to discovery of the father's assets, and that there was no evidence of harassment or undue burden or cost.[160]

Rule 193.6 of the Texas Rules of Civil Procedure,[161] adopted as part of the 1999 revisions to the rules, gives a trial court far more discretion to allow a late-designated expert to testify than did prior Texas law. *Snider v. Stanley*,[162] however, teaches that a party must continue to exercise diligence in retaining and designating expert witnesses or risk the ability to use them. The plaintiffs in *Snider* disclosed their accident reconstruction experts prior to an October 1999 trial setting. The trial was continued to allow for mediation, and the plaintiffs' expert was deposed in late October. The case was reset for trial on February 7, 2000, and the defendants hired their own accident reconstruction expert on December 1, 1999. The expert's report was provided to defendants' counsel on January 7, 2000, who mailed it to plaintiffs' counsel the next day.

Under these circumstances, the court of appeals affirmed the trial court's decision to exclude the testimony of defendants' expert.[163] The court held that Rule 195.2[164] required the defendants to designate their

154. *Id.* at 207.
155. *Id.*
156. *Id.* at 209 & n.2.
157. *Id.* at 210-11 (Gaultney, J., concurring)
158. 34 S.W.3d 354 (Tex. App.—Waco 2001, orig. proceeding).
159. *Id.* at 358.
160. *Id.* at 358-59. Importantly, although the court considered the daughter's affidavit, it stated that it was not proper evidence because it had only been filed with the district clerk and not offered into evidence, or tendered to the judge, at the hearing on her motion for protection. *Id.* at 357 n.1.
161. TEX. R. CIV. P. 193.6.
162. 44 S.W.3d 713 (Tex. App.—Beaumont 2001, pet. denied).
163. *Id.* at 718.
164. TEX. R. CIV. P. 195.2.

experts at least 60 days, not 30 days, before trial.[165] Moreover, the appellate court held that the defendants' designation was not made with reasonable promptness or as soon as practical.[166] The court opined that the language of new Rule 192.7(c)[167] effectively overrules the supreme court's decision in *Mentis v. Barnard*.[168] *Mentis* held that, up until the thirty-day deadline before trial that applied under prior law, a party was under no obligation to disclose an expert's identity until she actually decided the expert would testify.[169] In contrast to *Mentis*, the *Snider* court suggested that the defendants should have designated their expert as soon as he was retained—even before they received his report.[170] Finally, the court rejected the defendants' arguments that the plaintiffs were not surprised or prejudiced, and held that the trial court did not abuse its discretion in refusing to grant a continuance to cure the late designation.[171]

VIII. DISMISSAL

Texas courts continued to wrestle with the sufficiency of notices of intent to dismiss for want of prosecution during the Survey period, even after the supreme court's pronouncement last year in *Villarreal v. San Antonio Truck & Equipment*.[172] In *Lynda's Boutique v. Alexander*,[173] the Austin court of appeals reversed and remanded a dismissal order for want of prosecution, where the order setting a scheduling conference stated that the failure to appear for the conference would result in a dismissal of the case. The appellant did not appear at the conference and the trial court dismissed the case. The appellate court held that such dismissal was improper because the plaintiff had not been provided with notice and an opportunity to be heard, since the order did not state that a dismissal was certain, but rather only indicated that a dismissal was one of several adverse actions that might occur if a party failed to appear at the conference.[174] The notice, moreover, failed to state the date and location of a dismissal hearing, and thus failed to comply with Rule 165a.[175] Finally, the dismissal order was also improper because the trial court failed to

165. *Snider*, 44 S.W.3d at 715.

166. *Id.* at 716-17.

167. TEX. R. CIV. P. 192.7(c).

168. 870 S.W.2d 14 (Tex. 1994).

169. *Id.* at 15-16.

170. *Snider*, 44 S.W.3d at 716-17 & n.5. Although this aspect of the opinion is probably dicta, given that the defendants designated their expert within 60 days of trial, the court's suggestion that a potential testifying expert should be designated before his opinions are known is surely foreign to most trial practitioners.

171. *Id.* at 717-18.

172. 994 S.W.2d 628 (Tex. 1999) (discussed in Thomas A. Graves et al., *Texas Civil Procedure* 54 SMU L. REV. 1629, 1655 (2001) [hereinafter 2001 *Annual Survey*]).

173. No. 03-00-00498-CV, 2001 Tex. App. LEXIS 6835 (Tex. App.—Austin Oct. 11, 2001, no pet. h.).

174. *Id.* at *6-7.

175. TEX. R. CIV. P. 165a; *Alexander*, 2001 Tex. App. LEXIS 6835, at *7.

hold a hearing before dismissing the case.[176]

The Dallas court of appeals also addressed the issue of proper notice in two cases during the Survey period. First, in *Lopez v. Harding*,[177] the appellate court reversed the dismissal of a case pursuant to an order issued only days after the suit had been filed, which provided, in pertinent part, that if the plaintiff failed to make a written request for a trial setting by a specified date, the case was subject to dismissal.[178] There, although the defendants had all answered, the parties had conducted discovery, and the plaintiff had requested a jury and tendered a jury fee, the plaintiff failed to request a trial setting by the date specified in the order. Accordingly, the trial court dismissed the case for want of prosecution. The appellate court reversed, holding that a dismissal would only have been proper if the plaintiff failed to appear for a hearing or trial of which he had notice, or if the case had not been disposed of within the time frame dictated by the supreme court's administrative standards.[179] The court rejected the appellees' argument that the trial court could dismiss the case under its own inherent authority, since the dismissal notice specifically stated that the case was subject to dismissal under Rule 165a,[180] and, therefore, it would be error for the trial court to invoke its inherent authority to dismiss the case.[181]

Second, in *Franklin v. Sherman Independent School District*,[182] a consolidated appeal of four cases involving identical facts, the court affirmed the dismissal of all four cases for want of prosecution.[183] Each case had been pending for over a year. The clerk in each case issued a notice that indicated that the case was subject to dismissal under Rule 165a[184] and set a deadline by which a motion to retain must be filed, or the case would be dismissed on a specified date. No motion to retain was filed in any of the cases, but counsel for each of the various plaintiffs wrote the court before the dismissal deadline and requested a trial setting. The trial court nevertheless dismissed the cases and subsequently denied verified motions to reinstate. In affirming the dismissals, the appellate court acknowledged that *Brown v. Brookshires Grocery*[185] and *Villarreal*[186] both held that specific notice of a dismissal hearing and an actual hearing are required. Nevertheless, the appellate court concluded that, while hearings should have been held prior to the entry of the dismissals, because the trial court held hearings on the motions to retain, any error commit-

176. *Alexandra*, 2001 Tex. App. LEXIS 6835, at *11-12.
177. No. 05-99-02101, 2001 Tex. App. LEXIS 3527 (Tex. App.—Dallas May 30, 2001, no pet. h.).
178. *Id.* at *1-3.
179. *Id.* at *5-6.
180. TEX. R. CIV. P. 165a.
181. *Lopez*, 2001 Tex. App. LEXIS 3527, at *6-7.
182. 53 S.W.3d 398 (Tex. App.—Dallas 2001, pet. denied).
183. *Id.* at 400.
184. TEX. R. CIV. P. 165a.
185. 10 S.W.3d 351 (Tex. App.—Dallas 1999, pet denied).
186. 994 S.W.2d 628 (Tex. 1999).

ted was harmless.[187]

The court in *In re Bro Bro Properties, Inc.*[188] granted a writ of mandamus to set aside a default judgment and turnover order entered against the defendant. In this property dispute case, the plaintiff originally sued several parties, but eventually filed notices of non-suit against all defendants, except for the appellant. The plaintiff then took a default judgment against the sole remaining defendant and obtained a turnover order requiring the defendant to tender certain proceeds into the registry of the court. The appellate court held that, because the trial court had not entered orders of non-suit, and the default judgment did not contain a "mother hubbard" clause, the judgment was interlocutory, and the trial court could properly consider the appellant's motion for new trial challenging the default judgment.[189] In reaching this conclusion, the appellate court rejected the argument that the notices of nonsuit were effective when filed, noting that the date of an order dismissing the case is determinative of when the trial court's plenary power expires.[190]

In *Slaughter v. Clement*,[191] the court held that a trial court could not adjudicate a case on the merits against the plaintiff for failing to appear for trial, and that the proper procedural mechanism to dismiss the action in such circumstances was a dismissal for want of prosecution, following notice and a hearing.[192]

Finally, in *3V, Inc. v. JTS Enterprises, Inc.*,[193] the appellate court, in a prior proceeding, had ordered that the underlying dispute be sent to arbitration and abated the case pending completion of the arbitration. Three years later, and without lifting the abatement, the trial court issued a notice of intent to dismiss because its record indicated a "settlement, verdict, or disposition of the case," but that no order had been submitted. In response, the plaintiff filed a single sentence motion to retain, in response to which the defendants moved to dismiss the case based on the plaintiff's failure to diligently pursue the arbitration. Thereafter, the trial court dismissed the case. The court of appeals reversed, holding that because the trial court's notice spoke only to dismissing the case for the failure to submit a final order, it was precluded from dismissing the case for any other reason absent a new notice.[194]

IX. SUMMARY JUDGMENT

Two appellate courts concluded that a party may raise the sufficiency of a movant's no-evidence summary judgment motion for the first time on

187. *Franklin*, 53 S.W.3d at 402-04.
188. 50 S.W.3d 528 (Tex. App.—San Antonio 2000, orig. proceeding).
189. *Id.* at 530-31.
190. *Id.* at 530.
191. No. 08-00-00174-CV, 2001 Tex. App. LEXIS 7051 (Tex. App.—El Paso Oct. 18, 2001, no pet. h.).
192. *Id.* at *4-6.
193. 40 S.W.3d 533 (Tex. App.—Houston [14th Dist.] 2000, no pet. h.).
194. *Id.* at 543-44.

appeal.[195] Both courts, while recognizing that other intermediate appellate courts had reached a contrary conclusion,[196] reasoned that a movant should not be able to prevail on a no-evidence summary judgment motion that violates the express provisions of Rule 166a(i).[197] Rule 166a(i) requires that the motion state the specific elements of the claim or defense as to which there is no summary judgment evidence.[198] Where the movant fails to meet these requirements, the nonmovant is not barred from raising the argument on appeal, even if it was not raised before the trial court.

In *Tempay, Inc. v. TNT Concrete & Construction, Inc.*,[199] the court addressed the question of what is a sufficient amount of time for discovery before the trial court may properly entertain a no-evidence motion for summary judgment. The court held that the answer to this question is case-specific and "is determined by the nature of the cause of action, the nature of the evidence necessary to controvert the no-evidence motion, and the length of time the case has been active in the trial court."[200] Further, trial courts may consider the length of time the no-evidence motion has been pending, the amount of discovery that has already occurred, and whether the movant has abused the discovery process by withholding key information and then moving for summary judgment on the basis of no evidence.[201] In this case, the appellate court reversed and remanded the summary judgment, holding that the non-movant had properly preserved its objection to the motion by filing a verified motion for continuance, and that the movant had improperly resisted discovery.[202]

In *Aghili v. Banks*,[203] the court reversed a summary judgment that was based, in large part, upon the affidavit of the attorney who also represented the movant, holding that the attorney's affidavit was not competent summary judgment evidence since his testimony did not fall within one of the five exceptions enumerated in Texas Disciplinary Rule of Professional Conduct 3.08,[204] and, therefore, the attorney was precluded from acting as both an advocate and a material fact witness.[205] Absent the attorney's testimony, the trial court found that a fact question existed

195. Cuyler v. Minns, 60 S.W.3d 209 (Tex. App.—Houston [14th Dist.] 2001, no pet. h.); Callaghan Ranch, Ltd. v. Killam, 53 S.W.3d 1 (Tex. App.—San Antonio 2000, pet. denied).

196. *See* Walton v. City of Midland, 24 S.W.3d 853, 857-58 (Tex. App.—El Paso 2000, no pet.); Williams v. Banc One, Texas, N.A., 15 S.W.3d 110, 117 (Tex. App.—Waco 1999, no pet.); Roth v. FFP Operating Partners, L.P., 994 S.W.2d 190, 194-95 (Tex. App.—Amarillo 1999, pet. denied).

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

198. *Id.*; *Cuyler*, 60 S.W.3d at 213-14; *Killam*, 53 S.W.3d at 3.

199. 37 S.W.3d 517 (Tex. App.—Austin 2001, pet. denied).

200. *Id.* at 522.

201. *Id.*

202. *Id.* at 523.

203. No. 14-98-01148-CV, 2001 Tex. App. LEXIS 7839 (Tex. App.—Houston [14th Dist.] Nov. 21, 2001, no pet. h.).

204. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.08 cmt. 4, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1998).

205. *Banks*, 2001 Tex. App. LEXIS 7839 at *12-15.

and therefore reversed the summary judgment.[206]

Finally, in *Cantu v. Peacher*,[207] the court addressed whether changes in a witness's testimony from a deposition to a subsequent affidavit are sufficient to create a fact question that warrants the denial of a motion for summary judgment. In its analysis of this problem, the court concluded that trial courts must examine the nature and extent of the differences in the facts asserted in the deposition and the affidavit.[208] If the differences fall into the category of a variation on the theme of the original testimony given, and the two are otherwise consistent in the major allegations, there may be grounds for impeachment, but no basis for vitiating the affidavit entirely.[209] If a subsequent affidavit clearly contradicts the witness's own prior testimony involving the material points of the suit, without explanation, the affidavit must be disregarded and will not create a fact question sufficient to defeat a summary judgment motion.[210]

X. JURY PRACTICE

In *In re the Interest of K.R.*,[211] a case discussed in last year's Survey article,[212] the supreme court held that the trial court did not commit reversible error by requiring the defendant, a father convicted of beating a six-month old to death for soiling his diaper, to appear handcuffed before the jury throughout his civil trial.[213] In reaching this conclusion, the court looked to guidance from the United States Supreme Court, and noted that while the high court has warned against such actions, it has never held that shackling a defendant throughout a trial constitutes reversible error irrespective of its effect on the judgment.[214] The court concluded from a review of the evidence that there was no indication that, in this case, the shackling of the defendant caused the jury to reach a different verdict.[215]

In *Preiss v. Moritz*,[216] the court held that the unsuccessful plaintiffs in a medical malpractice case were entitled to a new trial upon discovering that a juror was not qualified to serve on the panel, especially in light of the 10-2 verdict.[217] Although not known at the time of trial, the plaintiffs subsequently discovered that one of the jurors was under legal accusation of theft by check. The court noted that it did not believe that the juror had acted improperly by failing to disclose the accusation, since the juror assumed that she had cured any legal problem with the check by re-

206. *Id.* at *16.
207. 53 S.W.3d 5 (Tex. App.—San Antonio 2001, pet. denied).
208. *Id.* at 10.
209. *Id.*
210. *Id.* at 10-11.
211. 63 S.W.3d 796 (Tex. 2001).
212. *See* 2001 *Annual Survey* at 1663.
213. 63 S.W.3d 796 (Tex. 2002).
214. *Id.* at 799.
215. *Id.* at 800.
216. 60 S.W.3d 285 (Tex. App.—Austin 2001, no pet. h.).
217. *Id.* at 295.

turning to the store and paying the amount in full and attending a financial management class required by the court.[218] Nonetheless, because the juror was statutorily disqualified, and had voted in favor of the 10-2 verdict, the court held that the plaintiffs were materially injured as matter of law.[219]

Finally, in *Universal Printing Co. v. Premier Victorian Homes, Inc.*,[220] the court held that the trial court did not err in refusing the plaintiffs' request for a jury trial when they failed to timely pay the required jury fees.[221] Although the plaintiffs paid a filing fee when they initiated the case, the clerk did not credit any of that amount toward the jury fee. Upon discovering the matter, the plaintiffs immediately tendered an additional $30 in jury fees and requested an emergency hearing to place the case on the jury docket. The trial court denied the motion, but stated that if the case was not reached within 30 days, it would allow a jury on the next setting. The trial court, however, was able to reach the case within 15 days, and the case was tried without a jury. In affirming the trial court's decision, the court of appeals reconciled section 51.604 of the Texas Government Code,[222] which provides that the fee required under that section must be paid no later than the 10th day before the jury trial is scheduled to begin, with Texas Rule of Civil Procedure 216,[223] which requires that a jury fee be paid 30 days before trial. Specifically, the court held that these two rules supplement one another and are harmonized by section 51.604(c),[224] which states "the fee required by this section includes the jury fee required by Rule 216, Texas Rules of Civil Procedure, and any other jury fee allowed by law or rule."[225] Since the plaintiffs failed to pay the $10 fee required by Rule 216 more than 30 days before trial, the trial court did not abuse its discretion in denying them a jury trial, because the record indicated that granting a jury trial would have interfered with the administration of the trial court's docket.[226]

XI. JURY CHARGE

While broad-form jury submissions have been the norm in Texas practice for many years,[227] they can still create problems for trial practitioners. In *Torrington Company v. Stutzman*,[228] the supreme court reversed a jury verdict on the ground that a broad-form negligence question omitted

218. *Id.* at 288.
219. *Id.*
220. No. 01-99-00429-CV 2001 Tex. App. LEXIS 1140 (Tex. App.—Houston [1st Dist.] Feb. 22, 2001, no pet.).
221. *Id.* at *26.
222. TEX. GOV'T CODE ANN. § 51.604 (Vernon 1998).
223. TEX. R. CIV. P. 216.
224. TEX. GOV'T CODE ANN. § 51.604(c) (Vernon 1998).
225. *Id.*; *Universal Printing*, 2001 Tex. App. LEXIS 1140 at *17-18.
226. *Id.* at *20.
227. TEX. R. CIV. P. 277 ("In all jury cases the court shall, whenever feasible, submit the cause upon broad-form questions.").
228. 46 S.W.3d 829 (Tex. 2000).

required elements of the plaintiffs' negligent undertaking claim.[229] Although the charge included the usual definitions of "negligence," "ordinary care," and "proximate cause," the court gave the jury no instruction regarding the factual predicate necessary to establish a negligent undertaking duty.[230] The supreme court remanded the case in the interest of justice, rather than rendering judgment based on the defective charge, because it determined there had been no prior appellate guidance on how to properly submit a negligent undertaking claim.[231]

As discussed in last year's Survey article,[232] the supreme court held in *Crown Life Ins. v. Casteel*[233] that it was reversible error to submit a single, broad-form question that includes both valid and invalid theories of liability.[234] The two Houston appellate courts have now split on the question of whether *Casteel's* presumed harm rule also applies to the inclusion in a broad-form question of elements of damages on which no evidence was presented. In *Wal-Mart Stores, Inc. v. Redding*,[235] the court held that *Casteel* extends to this situation and that "the submission of an *element* of damages to the jury for which there is no supporting evidence is harmful error, where, as here, the charge error has been timely and specifically preserved."[236] In *Harris County v. Smith*,[237] on the other hand, the court held that the presumed harm standard of *Casteel* does not apply to the erroneous submission of an element of damages in a broad-form question.[238] The court reasoned that the policy concerns underlying *Casteel*, namely that a judgment not be entered against a defendant without the assurance that the jury actually found the defendant liable on a proper legal theory, simply are not compelling enough in the damages context to justify abandonment of traditional harmful error analysis.[239]

Finally, two appellate courts addressed the propriety of a jury instruction on spoliation of evidence during the Survey period, with markedly different results. In *Wal-Mart Stores, Inc. v. Johnson*,[240] the court of appeals upheld the inclusion of a spoliation instruction where the defendant

229. *Id.* at 833.

230. *Id.* at 837.

231. *Id.* at 841. The dissent objected to this disposition of the case, stating that the substantive elements of a voluntary undertaking claim, as well as the procedural requirement that a plaintiff obtain an appropriate jury finding, were both well established at the time the case was tried. *Id.* at 852 (Hecht, J., dissenting).

232. *See* 2001 *Annual Survey* at 1664 (2001).

233. 22 S.W.3d 378 (Tex. 2000).

234. *Id.* at 389.

235. 56 S.W.3d 141 (Tex. App.—Houston [14th Dist.] 2001, no pet. h.).

236. *Id.* at 153 (emphasis original) (footnote omitted). *Accord* Iron Mountain Bison Ranch, Inc. v. Easley Trailer Mfg., Inc., 42 S.W.3d 149 (Tex. App.—Amarillo 2000, no pet.). The dissent in *Redding* disagreed with the majority on both the substantive issue of *Casteel's* scope and whether the defendant properly preserved the error. *Redding*, 56 S.W.3d at 156-58 (Witting, J., dissenting).

237. No. 01-99-00729-CV, 2001 Tex. App. LEXIS 2238 (Tex. App.—Houston [1st Dist.] April 5, 2001, no pet. h.).

238. *Id.* at *13-14.

239. *Id.* at *21.

240. 39 S.W.3d 729 (Tex. App.—Beaumont 2001, pet. granted).

store could not produce a reindeer Christmas decoration that had fallen off a shelf and injured the plaintiff.[241] The court reached this conclusion despite testimony from the store's manager about the physical characteristics of the reindeer,[242] as well as what it acknowledged was a reasonable presumption that the reindeer had been sold as merchandise.[243] In *Lively v. Blackwell*,[244] on the other hand, the appellate court upheld the trial court's refusal to submit a spoliation instruction, or allow evidence, regarding the defendant's production of a blank videotape that purportedly captured the plaintiff's laproscopic surgery.[245] Although the evidence showed that the defendant doctor had the tape in his possession until it was produced in discovery, the court stated that the uncertainty of whether the surgery had in fact been successfully recorded in the first place justified the trial court's refusal to allow the "inflammatory" argument that the doctor had destroyed evidence.[246] If these two cases can be reconciled, it is on the basis that the trial court has wide discretion in determining whether to give a spoliation instruction.

XII. JUDGMENTS

The Texas Supreme Court issued several opinions of note regarding the subject of judgments during the Survey period. In *Compania Financiara Libano, S.A. v. Simmons*,[247] the court held that a suit to enforce provisions of a prior settlement agreement that were not included as part of an agreed final judgment did not constitute an impermissible collateral attack on that judgment, since the claims in the second suit did not exist at the time the original agreed judgment was entered.[248] In so holding, the court noted that parties often purposefully exclude settlement terms from an agreed judgment, and suit for a subsequent breach of the original, concurrent settlement agreement is not barred by the prior agreed judgment.[249]

The supreme court also held in *Furr's Supermarkets, Inc. v. Bethune*[250] that the trial court erred in refusing to tax costs in favor of the prevailing party under Rule 131[251] where the trial court's stated "good cause" for refusing to tax costs was the losing party's inability to pay costs and her emotional fragility.[252] The high court held that a litigant's emotional

241. *Id.* at 731-32.
242. Although it was apparently undisputed that the falling reindeer cut plaintiff's arm, the store manager testified that the reindeer were made of papier mache and weighed five to eight ounces, while the plaintiff testified they were made of wood and weighed about ten pounds each. *Id.* at 730.
243. *Id.* at 731-32.
244. 51 S.W.3d 637 (Tex. App.—Tyler 2001, pet. denied).
245. *Id.* at 642.
246. *Id.*
247. 53 S.W.3d 365 (Tex. 2001) (per curiam).
248. *Id.* at 367.
249. *Id.* at 368.
250. 53 S.W.3d 375 (Tex. 2001).
251. TEX. R. CIV. P. 131.
252. *Bethune*, 53 S.W.3d at 377.

state and financial situation were both insufficient as a matter of law to constitute "good cause," noting that "[s]tress associated with litigation is an unavoidable consequence of the adversarial process."[253]

In a case of first impression, the supreme court analyzed the single action rule and statute of limitations as applied to an asbestosis victim in *Pustejovsky v. Rapid-American Corp.*[254] In this case, the plaintiff had settled an asbestosis suit with one defendant in 1982. Years later, that same plaintiff developed asbestos-related cancer and brought suit again against several different defendants, who sought to bar those subsequent claims based on prior settlement. The court held that applying the single action rule under these circumstances would constitute an injustice in light of the medical evidence that showed an asbestos-related cancer might not manifest itself for many years after the exposure; thus, the application of the single action rule would be inconsistent with the transactional approach to res judicata.[255] The court, while specifically limiting its holding to asbestos-related diseases resulting from workplace exposure, rejected the Fifth Circuit's holdings to the contrary in *Gideon v. Johns-Manville Sales Corp.*,[256] *Graffagnino v. Fibreboard Corp.*,[257] and *Dartez v. Fibreboard Corp.*,[258] and held that the statute of limitations governing malignant asbestos-related conditions begins "when a plaintiff's symptoms manifest themselves to a degree or for a duration that would put a reasonable person on notice that he or she suffers from some injury and he or she knows, or with reasonable diligence should know, that the malignant asbestos-related condition is likely work-related."[259]

Finally, in *State and County Mutual Fire Insurance Co. v. Miller*,[260] the supreme court held that a declaratory judgment action filed by a reinsurer against both the primary insurer (State and County) and the insured (Miller) did not preclude Miller from asserting certain extra-contractual claims against State and County in a subsequent action.[261] The court first held that, because Miller and State and County were co-defendants in the first suit, and neither had filed a cross-action against the other, the doctrine of *res judicata* was no bar to Miller's claims.[262] The court further held that certain of Miller's extra-contractual claims were not barred by *collateral estoppel*, since those claims did not directly involve the issue of liability under the policy decided in the first action.[263]

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253. *Id.*
254. 35 S.W.3d 643 (Tex. 2000).
255. *Id.* at 652.
256. 761 F.2d 1129 (5th Cir. 1985).
257. 776 F.2d 1307 (5th Cir. 1985).
258. 765 F.2d 456 (5th Cir. 1985). The court also disapproved of the Beaumont appellate court's holding in Pecorino v. Raymark Indus. Inc., 763 S.W.2d 561 (Tex. App.—Beaumont 1989, writ denied). *Pustejovsky*, 35 S.W.3d at 653.
259. *Id.*
260. 52 S.W.3d 693 (Tex. 2001) (per curiam).
261. *Id.* at 694.
262. *Id.* at 696.
263. *Id.* at 697-98. The court also clarified that the applicable doctrine in concluding that Miller's contractual claims were barred was not "law of the case," as the court of

XIII. MOTION FOR NEW TRIAL

The Texas Supreme Court in *John v. Marshall Health Services, Inc.*,[264] clarified the timing requirements for filing a motion for new trial under Rule 329b(a)[265] in light of the language in Rule 306a(4),[266] when the movant lacks notice of the entry of a judgment when it was entered. Although Rule 329b(a)[267] requires that motions for new trial be filed within thirty days after the judgment is signed, Rule 306a(4)[268] provides that a party adversely affected by a judgment may, if properly proven under Rule 306a(5),[269] file a motion for new trial more than thirty days after the judgment is signed, provided that the other requirements of Rule 306a(4)[270] are met (*i.e.*, more than twenty days have passed after the judgment is signed before the party affected receives notice thereof, but less than ninety days have passed after the judgment has been signed). In *John*, the trial court signed its judgment for the defendants on September 8th, which the clerk filed on September 13th. The plaintiff's counsel did not learn of the judgment's signature and entry until September 30th, during a telephone conversation with the clerk. The plaintiff then filed his motion for new trial on October 13th, which was more than 30 days after the judgment had been signed.

The supreme court, noting a split of authority on this issue among the lower courts, reversed the decision of the appellate court and disapproved of those decisions that had held that a motion for new trial must be filed within thirty days after the party receives actual notice of entry of the judgment.[271] Instead, the court held that Rule 306a(4)[272] does not require that such a motion be filed within any specified period, provided the trial court retains its plenary power.[273]

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appeals had stated, but *collateral estoppel*, since the matter arose in the context of a new suit filed by Miller, not a "subsequent stage" of the original declaratory judgment action. *Id.* at 698 (quoting Hudson v. Wakefield, 711 S.W.2d 628, 630 (Tex. 1986)).

264. 58 S.W.3d 738 (Tex. 2001) (per curiam).

265. TEX. R. CIV. P. 329b(a).

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

267. TEX. R. CIV. P. 329b(a).

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

269. TEX. R. CIV. P. 306a(5).

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

271. *John* 58 S.W.3d at 741 n.12 (disapproving Thompson v. Harco Nat'l Ins. Co., 997 S.W.2d 607, 618 (Tex. App.—Dallas 1998, pet. denied); Gonzalez v. Sanchez, 927 S.W.2d 218, 221 (Tex. App.—El Paso 1996, no writ) (per curiam); Motalvo v. Rio Nat'l Bank, 885 S.W.2d 235, 237 (Tex. App.—Corpus Christi 1994, no writ) (per curiam); and Womack-Humphreys Architects, Inc. v. Barrasso, 886 S.W.2d 809, 816 (Tex. App.—Dallas 1994, writ denied)).

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

273. *John*, 58 S.W.3d at 741. The court also held that the plaintiff's "preliminary settlement" with some of the defendants, which had not become final at the time of trial, did not preclude the judgment entered by the trial court, which contained a "Mother Hubbard" clause, from becoming final and appealable. *Id.* at 740. The court noted that since the plaintiff had failed to either move for a separate trial with the settling defendants, get an agreed judgment with them, dismiss his claims against them, or seek any relief from those parties at trial, the judgment that was entered was properly considered final. *Id.*

XIV. DISQUALIFICATION OF JUDGES

The Texas Supreme Court addressed the timeliness of an objection to an assigned judge in *In re Canales*.[274] Overruling a court of appeals decision discussed in last year's Survey article,[275] the court held that an objection to a visiting judge, under chapter 74 of the Texas Government Code, must be made prior to the first hearing the judge presides over in the case, rather than the first hearing he presides over pursuant to a particular assignment order.[276] The court stated that the plain language of the statute compelled its conclusion, and the underlying policy considerations reinforced it.[277] The court noted, however, that both assignment orders in *Canales* were made pursuant to chapter 74 of the Government Code, and it expressly did not consider "whether an objection to a second assignment would be timely if the first assignment were made under some authority other than chapter 74."[278]

If a trial judge, presented with a timely recusal motion, declines to recuse himself, the presiding judge of the administrative district must set a hearing on the motion before himself or some other judge designated by him.[279] In *In re Flores*,[280] the presiding judge decided to hear the recusal motion himself and set the matter for hearing.[281] The relator filed an objection to the presiding judge under section 74.053(b),[282] which was denied.[283] The court of appeals held that the objection was properly overruled, since the presiding judge had not "assigned" the recusal motion to another judge pursuant to chapter 74, but instead heard the motion himself under the authority of Rule 18a.[284]

An unusual transfer between district court judges was at issue in *In re Cook Children's Medical Center*.[285] In this medical malpractice case, which was pending before Judge Paul Enlow, the presiding judge assigned another sitting district court judge, Bob McCoy, to hear a motion to dismiss for failure to file an expert report because Judge Enlow was in trial.[286] The assignment was for one day only, but was to continue thereafter as long as necessary for Judge McCoy to complete any trial that was

274. 52 S.W.3d 698 (Tex. 2001).

275. 2001 *Annual Survey* at 1671 (discussing *In re* Barrera, 9 S.W.3d 386 (Tex. App.—San Antonio 1999, orig. proceeding).

276. TEX. GOV'T CODE ANN. § 74.053(c) (Vernon 1998); *see Canales*, 52 S.W.3d at 700.

277. *Id.* at 702-03.

278. *Id.* at 704 (citation omitted).

279. TEX. R. CIV. P. 18a(d).

280. 53 S.W.3d 428 (Tex. App.—San Antonio 2001, orig. proceeding).

281. *Id.* at 429.

282. TEX. GOV'T CODE ANN. § 74.053(b) (Vernon 1998).

283. *Flores*, 53 S.W.3d at 430. The relator also filed a motion to recuse the presiding judge, but the court found that it was untimely. *Id.* at 429-30.

284. TEX. R. CIV. P. 18a; *Flores*, 53 S.W.3d at 431-32. The court brushed aside the relator's reliance on the presiding judge's having signed an order of "assignment" to himself, stating that such an order was unnecessary under Rule 18a. *Id.* at 431-32 & n.1.

285. 33 S.W.3d 460 (Tex. App.—Fort Worth 2000, orig. proceeding).

286. *Id.* at 461-62.

begun or pass on any matters growing out of the motion to be heard.[287] Judge McCoy granted the motion to dismiss and set a further hearing on attorneys' fees.[288] When the parties appeared for that hearing, however, they were sent to Judge Enlow, who informed them that he was taking the case back from Judge McCoy and who subsequently vacated the dismissal order.[289] On mandamus, the court of appeals held that, because Judge McCoy had not completed ruling on matters growing out of the motion to dismiss, the assignment order had not expired, and Judge Enlow did not have the authority to unilaterally transfer the case back to his court.[290] Although the appellate court recognized the broad discretion given trial courts to transfer cases and exchange benches, it interpreted the assignment order as giving Judge McCoy exclusive jurisdiction until the order terminated by its terms.[291]

XV. DISQUALIFICATION OF COUNSEL

Standing to move to disqualify an attorney was at issue in *In re Cap Rock Electric Cooperative, Inc.*[292] The surviving entity in a merger of electric cooperatives sought to disqualify the attorney who had previously represented its merger partner in certain litigation.[293] The court held that, because of the merger, the former client had ceased to exist and there was "no continuing attorney-client relationship deserving of protection" and disqualification was not warranted.[294]

XVI. MISCELLANEOUS

Section 65.011(1) of the Texas Civil Practice and Remedies Code authorizes the issuance of an injunction if "the applicant is entitled to the relief demanded and all or part of the relief requires the restraint of some act prejudicial to the applicant."[295] Although the statute makes no mention of an irreparable harm requirement, the supreme court held in *Town of Palm Valley v. Johnson*[296] that this requirement of equity continues under the statute as well.[297] The court explained that a contrary conclusion would mean that the statutory remedy would have wholly replaced the equitable one, which requires the additional showing of irreparable

287. *Id.* at 462.
288. *Id.*
289. *Id.*
290. *Cook Children's Med. Ctr.*, 33 S.W.3d at 463.
291. *Id.*; *see also* Mendoza v. Fleming, 41 S.W.3d 781 (Tex. App.—Corpus Christi 2001, no pet.) (judge assigned to preside over case in one judicial district in a county was authorized to continue to preside even after he transferred the case to another district court in the same county and consolidated it with an earlier-filed case in that court).
292. 35 S.W.3d 222 (Tex. App.—Texarkana 2000, orig. proceeding).
293. *Id.* at 224-25.
294. *Id.* at 228-29. The court also concluded that there was not a substantial relationship between the former representation and the case in which the motion to disqualify was brought. *Id.* at 231.
295. TEX. CIV. PRAC. & REM. CODE ANN. § 65.011(1) (Vernon 1997).
296. 44 Tex. Sup. Ct. J. 1186 (Sept. 20, 2001) (per curiam) (not released for publication).
297. *Id.*

harm.[298]

The enforcement of arbitration agreements continued to be a subject of dispute during the Survey period. In *In re American Homestar of Lancaster, Inc.*,[299] the supreme court held that the federal Magnuson-Moss Warranty Act[300] does not prohibit the enforcement of agreements to arbitrate warranty disputes.[301] The court found no congressional intent to preclude enforcement of such agreements in Magnuson-Moss and no inherent conflict between that statute and the Federal Arbitration Act ("FAA").[302] Significantly, in reaching this decision, the court considered, but refused to defer to, the Federal Trade Commission's position regarding the proper interpretation of Magnuson-Moss.[303]

Efforts to avoid arbitration agreements were also unsuccessful in *In re FirstMerit Bank, N.A.*[304] and *In re David's Supermarkets, Inc.*[305] In the former case, the supreme court rejected the plaintiff's arguments that an arbitration addendum to a consumer financing agreement was unconscionable or resulted from fraud or duress.[306] In the latter, the court held that the public policy concerns of Texas, as expressed in the workers' compensation statutes, could not override the FAA's mandate favoring the enforcement of arbitration agreements.[307]

While favoring arbitration generally, however, the Texas courts continue to protect the rights of parties who have not validly agreed to arbitrate. For example, in *Davidson v. Webster*,[308] the court held that an alternative dispute resolution policy signed by an employee was not binding on the employer and, therefore, the employee was not required to arbitrate his claims.[309] Additionally, the court in *Texas Enterprises, Inc. v. Arnold Oil Co.*[310] refused to compel a non-signatory to an arbitration agreement to submit to arbitration under a theory of equitable estoppel where the movant had unduly delayed its request for arbitration.[311] Finally, in *Glazer's Wholesale Distributors, Inc. v. Heineken USA, Inc.*,[312] the court held that a statute requiring arbitration, as applied to a party that had not contractually agreed to arbitrate, was an improper delegation of judicial authority in violation of the Texas Constitution.[313]

298. *Id.* at *1.
299. 50 S.W.3d 480 (Tex. 2001).
300. 15 U.S.C. §§ 2301-12, *et seq.* (West 1998).
301. *Am. Homestar*, 50 S.W.3d at 482.
302. 9 U.S.C. § 2 (West 1999); *Am. Homestar*, 50 S.W.3d at 490.
303. *Id.* at 490-92 (citing 16 C.F.R. § 703.5(j) (2002)).
304. 52 S.W.3d 749 (Tex. 2001).
305. 43 S.W.3d 94 (Tex. App.—Waco 2001, orig. proceeding).
306. *FirstMerit Bank*, 52 S.W.3d at 756-58.
307. *David's Supermarkets*, 43 S.W.3d at 99-100.
308. 49 S.W.3d 507 (Tex. App.— Corpus Christi 2001, pet. filed).
309. *Id.* at 514.
310. 59 S.W.3d 244 (Tex. App.—San Antonio 2001, no pet. h.).
311. *Id.* at 249-50.
312. No. 05-99-01685-CV, 2001 Tex. App. LEXIS 4401 (Tex. App.—Dallas June 29, 2001, no pet. h.).
313. *Id.* at *41-46; *see* TEX. CONST. art. V, § 1.

Severe sanctions in a non-discovery context were not well-received by the appellate courts during the Survey period. In *In re Bledsoe*,[314] the trial court struck the relator's pretrial pleadings for failure to timely comply with a docket control order.[315] The court of appeals held that such a death penalty sanction could not be justified in light of the lack of prejudice to the opposing party and the trial court's failure to first impose any lesser sanction.[316] Similarly, the court in *Prevost v. Insurance Advisors of Texas, Inc.*,[317] reversed an order sanctioning an attorney, and dismissing his client's case, that was based on the trial court's finding that an oral settlement had been reached and that the attorney had perpetrated a fraud on the court by denying the case had settled.[318] As there was no signed settlement agreement between the parties in accordance with Rule 11,[319] the court of appeals held that the attorney had not misrepresented anything, and the case could not be dismissed.[320]

314. 41 S.W.3d 807 (Tex. App.—Fort Worth 2001, orig. proceeding).
315. *Id.* at 810-11.
316. *Id.* at 813-14. *Accord In re* Patton, 47 S.W.3d 825 (Tex. App.—Fort Worth 2001, orig. proceeding).
317. 46 S.W.3d 289 (Tex. App.—Fort Worth 2001, pet. denied).
318. *Id.* at 291.
319. TEX. R. CIV. P. 11.
320. *Prevost*, 46 S.W.3d at 292-93.