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Appellate Practice and Procedure

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I. INTRODUCTION

THIS Survey period reflected a noted shift the willingness of Texas Supreme Court to correct both substantive and procedural errors. This shift is perhaps most obvious in the mandamus arena, where the appellate courts collectively granted mandamus relief in more than half of the surveyed cases, and even granted mandamus review of a trial court's interlocutory interpretation of a contract because that ruling "severely compromised" a party's case.[1] The supreme court also granted review to address conflicts among Texas appellate courts on the proper standards of review in numerous substantive areas, including rulings on personal jurisdiction,[2] termination of parental rights,[3] and primary jurisdiction.[4] The supreme court further appears increasingly willing to find conflicts jurisdiction over interlocutory appeals.[5] However, it is important to note that the supreme court has undergone substantial changes in the last year. Several justices retired or otherwise decided not to run for reelection. As a result, one-third of the current justices on the supreme court were not sitting on the court during this Survey period. Only time will tell if the new supreme court will continue this trend toward error correction.

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1. *See, e.g., In re* Allstate, 85 S.W.3d 193, 196 (Tex. 2002).
2. *See* BMC Software Belgium, N.V. v. Marchand, 83 S.W.3d 789, 793-94 (Tex. 2002).
3. *See In re* C.H., 89 S.W.3d 17 (Tex. 2002).
4. *See* Subaru of Am., Inc. v. David McDavid Nissan, Inc., 84 S.W.3d 212, 222 (Tex. 2002).
5. *See* Schein v. Stromboe, No. 00-1162, 2002 WL 31426407 (Tex. Oct. 31, 2002); Texas Natural Res. Conservation Comm'n v. IT-Davy, 74 S.W.3d 849 (Tex. 2002); Texas Dept. of Transp. v. Garza, 70 S.W.3d 802 (Tex. 2002).

II. APPELLATE REVIEW BEFORE FINAL JUDGMENT

A. Mandamus

During this Survey period, Texas courts granted mandamus relief in sixty-five percent of all mandamus cases surveyed. In many instances relief was granted without even addressing whether the cases met the standards for mandamus review.

1. Mandamus Jurisdiction

The Texas Supreme Court's mandamus jurisdiction is governed by section 22.002(a) of the Texas Government Code, which provides that the supreme court can issue writs of mandamus "against a district judge, a court of appeals or a justice of a court of appeals, or any officer of state government except the governor, the court of criminal appeals, or a judge of the court of criminal appeals."[6] Despite the overwhelming number of cases where mandamus relief was granted during this Survey period, the courts continued to take heed of the jurisdictional limitations on their powers over entities not expressly identified in section 22.002(a).

In the case of *In re TXU Electric Co.*, TXU sought to compel the Public Utility Commission ("PUC") to rescind orders requiring TXU to reverse efforts to mitigate its estimated stranded costs.[7] TXU argued that such action was necessary to "preserve the integrity of the Legislature's plan for deregulation."[8] In a per curiam opinion, a divided Texas Supreme Court refused to grant mandamus relief, and several justices filed concurring and dissenting opinions addressing the threshold issue of whether the supreme court had jurisdiction to issue mandamus against the three-member panel of PUC commissioners.[9]

Justice Baker, joined by Justice Rodriguez, concluded that section 22.002(a)'s grant of jurisdiction to issue writs of mandamus against "an officer of state government" did not authorize the court to mandamus the PUC.[10] Justice Baker concluded that this language extended only to individual state officers and not to a commission or board of officers.[11] Because the Public Utilities Regulatory Act authorizes the three-member commission to act only as an entity, the concurrence concluded that the Court did not have original mandamus jurisdiction over the PUC and should dismiss TXU's petition for lack of jurisdiction.[12]

Justice Phillips, joined by Justices Enoch and Godbey (sitting by assignment), concluded that the court had jurisdiction, but held that TXU could not prove that relief was unavailable in the district court, in which TXU

6. *See* Tex. Gov't Code Ann. § 22.002(a) (Vernon Supp. 2003).
7. *See In re* TXU Elec. Co., 67 S.W.3d 130, 131 (Tex. 2001) (per curiam).
8. *Id.* at 134-35 (Phillips, C.J., concurring).
9. *Id.* at 131 (per curiam).
10. *Id.* at 137-38 (Baker, J., concurring).
11. *Id.* at 138 (Baker, J., concurring).
12. *Id.* at 139 (Baker, J., concurring).

had sought similar relief.[13] Justice Phillips reasoned that the supreme court's mandamus authority was "not a general, supervisory power" and that irreparable harm would not befall TXU absent supreme court intervention.[14]

Justice Hecht, joined by Justices Owen and Jefferson, filed a dissenting opinion in *TXU* arguing that the supreme court had jurisdiction to mandamus the individual members of the PUC, that there was no adequate remedy, and that mandamus relief should have been granted.[15] The final opinion in *TXU* was authored by Justice Brister (also sitting by assignment), who agreed with Justice Hecht that there was no adequate legal remedy but would have found that the PUC did not abuse its discretion or violate a duty imposed by law.[16]

The courts of appeals mandamus jurisdiction is governed by Section 22.221(b) of the Texas Government Code, which gives courts of appeals authority to issue writs of mandamus against "a judge of a district or county court in the court of appeals district."[17] In the case of *In re Davis*,[18] the Texarkana Court of Appeals held that it had no mandamus jurisdiction over a case that had been transferred from Harris County seeking the issuance of a writ against a Harris County judge.

The legislature has also provided Texas trial courts with mandamus jurisdiction over certain types of rulings. Specifically, under the Texas Public Information Act, Texas trial courts have the authority to issue writs of mandamus in three circumstances: (1) where a governmental body refuses to request an attorney general's decision on whether information is public; (2) where a governmental body refuses to supply public information; and (3) where a governing body refuses to supply information that the attorney general has determined is public information not excepted from disclosure.[19] In *Thomas v. Cornyn*, the Austin Court of Appeals held that the Houston Chronicle was entitled to request mandamus relief from the trial court where a sheriff refused to supply certain reports deemed public under the Public Information Act and basic information determined to be public by the attorney general in previous rulings.[20]

To be entitled to mandamus relief, a relator must have a justiciable interest in the underlying controversy.[21] However, a relator need not be a party to the underlying litigation or proceedings in order to seek man-

13. *Id.* at 132-36 (Phillips, C.J., concurring).
14. *Id.* at 135 (Phillips, C.J., concurring).
15. *Id.* at 150-71 (Hecht, J., dissenting).
16. *Id.* at 145-50 (Brister, J., concurring).
17. TEX. GOV'T CODE ANN. § 22.221(b) (Vernon Supp. 2003).
18. *In re* Davis, 87 S.W.3d 794, 795 (Tex. App.—Texarkana 2002, pet. dism'd w.o.j.).
19. TEX. GOV'T CODE ANN. § 552.321 (Vernon Supp. 2003); City of Garland v. Dallas Morning News, 22 S.W.3d 351, 355 (Tex. 2000).
20. Thomas v. Cornyn, 71 S.W.3d 473, 481-82 (Tex. App.—Austin 2002, orig. proceeding).
21. *See In re* Houston Chronicle, 64 S.W.3d 103, 106 (Tex. App.—Houston [14th Dist.] 2001, orig. proceeding).

damus relief.[22] In another case involving the Houston Chronicle, the Fourteenth Court of Appeals held that the Chronicle, as a non-party, properly sought mandamus relief because it had a justicable interest in a trial court's gag order restraining counsel, defendants, and witnesses from making extrajudicial statements to the media regarding a pending high-profile criminal prosecution.[23]

2. Adequate Remedy by Law

A writ of mandamus will issue "when there is no other adequate remedy by law."[24] In the case of *In re Allstate*,[25] the supreme court held that a trial court's ruling *declaring a contract provision unenforceable* could be remedied by mandamus. *Allstate* involved a provision in standard personal automobile insurance policies imposing a costly appraisal review process on insured individuals. In ruling on the insurance company's "motion to invoke appraisal," the trial court determined that the appraisal provision in the personal automobile insurance policy was unenforceable on public policy grounds.[26] The supreme court concluded that the trial court's interpretation was an abuse of discretion, and, because the ruling would have vitiated the relators' ability to defend the plaintiffs' breach of contract claim, mandamus relief was proper.[27]

3. Mandamus Over Particular Orders

a. Discovery Rulings

There are at least three situations in the discovery context when mandamus is proper because an appeal is not an adequate remedy.[28] First, when a trial court erroneously orders the disclosure of privileged information, mandamus will issue to prevent compulsory disclosure.[29] For example, mandamus is the proper remedy when the trial court improperly denies a motion to quash the depositions of persons who are entitled to legislative immunity.[30] Mandamus will also issue when a party's request

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22. *Id.*

23. *Id.*

24. *In re* Allstate, 85 S.W.3d 193, 197 (Tex. 2002) (Baker, J., dissenting); *but see In re* Koehn, 86 S.W.3d 363 (Tex. App.—Texarkana 2002, orig. proceeding) (issuing mandamus to compel the trial court to order severance of lawsuit into two actions without analyzing whether relator had an adequate legal remedy); *In re* Bradle, 83 S.W.3d 923 (Tex. App.—Austin 2002, orig. proceeding) (issuing mandamus where trial court's order requiring a separate trial on punitive damages to be heard by a new jury constituted a "clear failure ... to analyze and apply the law correctly," without analyzing whether relator had an adequate legal remedy).

25. *Allstate*, 85 S.W.3d at 196.

26. *Id.* at 195.

27. *Id.* at 196.

28. *See In re* Family Hospice, Ltd., 62 S.W.3d 313, 316 (Tex. App.—El Paso 2001, orig. proceeding).

29. *Id.*; *In re* Perry, 60 S.W.3d 857, 862 (Tex. 2002).

30. *See Perry*, 60 S.W.3d at 862 (trial court improperly denied a motion to quash the depositions of Legislative Redistricting Board members, concluding such members were cloaked with evidentiary and testimonial privileges under the doctrine of legislative immunity).

for discovery is overly broad and is not reasonably calculated to lead to the discovery of admissible evidence.[31]

Second, mandamus is proper when the trial court disallows discovery, and the missing discovery cannot be made part of an appellate record, thereby precluding appellate review.[32]

Third, when a party's ability to present a viable claim or defense is vitiated or severely compromised, appellate remedies may be inadequate.[33] In the case of *In re Van Waters & Rogers, Inc.*, the supreme court granted mandamus relief from the trial court's orders abating almost all of the discovery in a mass toxic-tort suit to allow plaintiffs to try certain "test claims" first.[34] The supreme court reasoned that relators' defenses were severely compromised because they were precluded from obtaining basic information from 3,265 plaintiffs until after the claims of the initial trial group were resolved, and that, without such evidence, "memories fade with time," "evidence may be lost or corrupted," and "documents may be destroyed in compliance with document retention programs."[35] The supreme court noted, most importantly, that there were four different pipelines with different toxic substances involved, and without discovery of basic information, relators would have been forced to defend themselves against claims that may not have involved substances contained in their own pipelines.[36]

Another situation in which mandamus is proper, because a party's claim or defense is severely compromised by a trial court's discovery ruling, is when a trial court improperly imposes death penalty sanctions against a party for discovery abuses.[37]

However, mandamus is not proper, and an appeal is an adequate remedy, when the trial court improperly grants an extension of time to file an expert report relating to a health care liability claim under article 4590i, section 13.01(g) of the Texas Revised Civil Statutes.[38]

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31. *See In re* American Home Assurance Co., 88 S.W.3d 370, 376-77 (Tex. App.—Texarkana 2002, orig. proceeding) (order compelling, among other things, the production of information on insurance reserves was overly broad); *In re* United Servs. Auto. Assoc., 76 S.W.3d 112, 116 (Tex. App.—San Antonio 2002, orig. proceeding) (order compelling production of unredacted reports prepared for non-party insurance companies was overly broad); *but see In re* Senior Living Props., L.L.C., 63 S.W.3d 594, 597-98 (Tex. App.—Tyler 2002, orig. proceeding) (order that compelled the deposition of a nursing home representative on issues of insurance coverage but that did not compel disclosure of individual settlements was not overly broad); *In re* Shipmon, 68 S.W.3d 815, 821 (Tex. App.—Amarillo 2002, orig. proceeding) (order compelling production of documents and records without time limitation was overly broad).

32. *See Family Hospice Ltd.*, 62 S.W.3d at 316.

33. *Id.* at 316-17 (granting mandamus relief when the trial court improperly refused to compel disclosure of non-privileged documents).

34. *In re* Van Waters & Rogers, Inc., 62 S.W.3d 197, 200-01 (Tex. 2001).

35. *Id.* at 199.

36. *Id.*

37. *See In re* Harvest Cmtys. of Houston, Inc., 88 S.W.3d 343, 349 (Tex. App.—San Antonio 2002, orig. proceeding); *In re* U-Haul Int'l, Inc., 87 S.W.3d 653, 657 (Tex. App.—San Antonio 2002, orig. proceeding); *In re* Polaris Indus., Inc., 65 S.W.3d 746, 754-56 (Tex. App.—Beaumont 2001, orig. proceeding).

38. *See In re* Morris, 93 S.W.3d 388, 389 (Tex. App.—Amarillo 2002, orig. proceeding).

b. Orders Entered Without Jurisdiction

Ordinarily, complaints of improper jurisdiction can be remedied by direct appeal.[39] However, mandamus relief is appropriate when one court interferes with another court's jurisdiction.[40] For example, section 5B of the Texas Probate Code authorizes a statutory probate court to transfer claims to itself from a district court when the claims are "appertaining to or incident to an estate pending in the statutory probate court."[41] In the case of *In re Swepi*, the Texas Supreme Court held that the statutory probate court's transfer order failed to meet the standard established by section 5B and granted mandamus relief, compelling the transfer of the case back to district court.[42]

Mandamus relief is also available when jurisdictional claims raise issues of sovereign immunity and comity.[43] In the case of *In re China Oil*,[44] the Fourteenth Court of Appeals held that the trial court abused its discretion in exercising jurisdiction over a suit brought against a foreign sovereign, despite a claim of immunity under the Foreign Sovereign Immunities Act. Also, in a case involving a dispute over whether the trial court had exclusive, continuing jurisdiction over a child custody matter after the child had moved to another state, the Amarillo Court of Appeals held that mandamus will issue even if there is an adequate remedy by appeal.[45]

Finally, mandamus will lie when a judgment is void due to lack of jurisdiction.[46] In such an instance, it is unnecessary for the relator to pursue other remedies even if they exist.[47]

c. Venue Rulings

Under section 15.0642 of the Texas Civil Practice and Remedies Code,

39. *See In re* McCormick, 87 S.W.3d 746, 749 (Tex. App.—Amarillo 2002, orig. proceeding) (citing Bell Helicopter Textron, Inc. v. Walker, 787 S.W.2d 954, 954-55 (Tex. 1990)); *In re* State of Texas, 65 S.W.3d 383, 387-88 (Tex. App.—Tyler 2002, orig. proceeding) (holding that the trial court lacked jurisdiction to issue orders during the administrative phase of an eminent domain proceeding under the Texas Property Code, but refusing to grant relief because the State had an adequate remedy by appealing the administrative award to the county court at law).

40. *See In re* Swepi, L.P., 85 S.W.3d 800, 809 (Tex. 2002); *see also In re* Sims, 88 S.W.3d 297, 302-04 (Tex. App.—San Antonio 2002, orig. proceeding) (granting mandamus relief to remedy an improper ruling on a dominant jurisdiction claim).

41. TEX. PROB. CODE ANN. § 5B (Vernon 2003).

42. *Swepi*, 85 S.W.3d at 808-09.

43. *In re* China Oil & Gas Pipeline Bureau, 94 S.W.3d 50 (Tex. App.—Houston [14th Dist.] 2002, orig. proceeding).

44. *Id.* at *3-4.

45. *McCormick*, 87 S.W.3d at 749 (finding no clear abuse of discretion in retaining jurisdiction over child custody case).

46. *See In re* Luster, 77 S.W.3d 331, 335 (Tex. App.—Houston [14th Dist.] 2002, orig. proceeding) (holding that the trial court did not have plenary power to vacate or "ungrant" an order granting a new trial, that the amended judgment was void, and that mandamus was the proper remedy).

47. *Id.*

mandamus will issue to enforce a mandatory venue statute.[48] In the case of *In re Pepsico, Inc.*, the relator sought mandamus relief from the trial court's order striking relator's mandatory venue argument contained in an amended motion to transfer venue.[49] Real parties in interest argued that mandamus was not the proper remedy because the trial court's ruling, based on waiver, was reviewable on appeal.[50] The Texarkana Court of Appeals disagreed, concluding that mandamus was proper because "the real nature of [relator's] petition for mandamus is an effort to enforce a mandatory venue statute."[51] Thus, the court of appeals concluded that mandamus was available to remedy the trial court's abuse of discretion.[52] Because the mandatory venue argument contained in the amended motion related back to the original motion to transfer venue, the court of appeals granted mandamus relief and ordered the trial court to reinstate the amended motion to transfer venue and to consider its allegations in determining venue.[53]

d. Rulings Relating to Temporary Restraining Orders

In the case of *In re Texas Natural Resource Conservation Commission*,[54] the Texas Supreme Court held, as a matter of first impression, that mandamus was available to remedy a temporary restraining order that violated time limitations set forth in Texas Rule of Civil Procedure 680.[55] While a temporary restraining order is generally not appealable, a temporary injunction is an appealable interlocutory order.[56] The supreme court concluded that the trial court's improper extension of the time limit for the temporary restraining order beyond Rule 680's fourteen-day deadline did not convert the temporary restraining order into an appealable temporary injunction.[57] Thus, because there was no adequate remedy by appeal, mandamus was available.[58]

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48. TEX. CIV. PRAC. & REM. CODE ANN. § 15.0642 (Vernon 2002).

49. *In re* Pepsico, Inc., 87 S.W.3d 787, 788 (Tex. App.—Texarkana 2002, orig. proceeding). In *Pepsico*, the relator filed a motion to transfer venue concurrently with its answer asserting, in part, that venue should be transferred under Texas Rule of Civil Procedure 86 (governing mandatory venue). *Id.* at 789; TEX. R. CIV. P. 86. Relator later filed an amended motion to transfer venue arguing that venue was proper in another county under a specific mandatory venue statute. *Pepsico*, 87 S.W.3d at 789. The trial court refused to consider the mandatory venue argument, reasoning that relator had waived that argument by failing to raise it before or contemporaneously with its answer. *Id.*

50. *Id.* at 789.

51. *Id.*

52. *Id.*

53. *Pepsico*, 87 S.W.3d at 793-94.

54. *In re* Texas Natural Res. Conservation Comm'n ("TNRCC"), 85 S.W.3d 201, 206 (Tex. 2002).

55. Rule 680 provides that "[e]very temporary restraining order granted without notice . . . shall expire by its terms within such time after signing, not to exceed fourteen days, as the court fixes." TEX. R. CIV. P. 680. The trial court's order extended the TRO by forty-two days without relator's consent. *TNRCC*, 85 S.W.3d at 202-03.

56. *TNRCC*, 85 S.W.3d at 204.

57. *Id.*

58. *Id.*

e. Void Orders

Void orders are reviewable by mandamus.[59] If a trial court "fails to observe a mandatory statutory provision conferring a right or forbidding a particular action," that action may sometimes be declared void.[60] If the challenged order is void, the relator need not show that it lacks an adequate appellate remedy.[61]

f. Orders Regarding Arbitration

A party seeking to compel arbitration by mandamus must establish both (1) the existence of an arbitration agreement subject to the Federal Arbitration Act (FAA) and (2) that the claim at issue falls within the scope of the arbitration agreement.[62] In the case of *In re J.D. Edwards*, the parties disputed whether the plaintiff's fraudulent inducement claim fell within the scope of an arbitration agreement that compelled arbitration of disputes "involving" a licensing agreement.[63] The Texas Supreme Court concluded that, even though the claim was based on pre-contract conduct, whether the contract between the parties was induced by fraud was a dispute "involving" the licensing agreement.[64] The trial court therefore abused its discretion in denying the motion to compel as to the fraudulent concealment claim.[65] Moreover, the court held that the licensing agreement's reference to the Uniform Arbitration Act did not invoke the Texas Arbitration Act (under which there is an adequate remedy by interlocutory appeal).[66] Thus, mandamus relief was granted.

In the case of *In re EGL Global Logistics, L.P.*,[67] the First Court of Appeals held that the trial court correctly applied the doctrine of equitable estoppel to allow the defendant, who did not sign an arbitration agreement, to compel arbitration. The court held that the plaintiff was equitably estopped from resisting defendant's motion to compel arbitration because the plaintiff (who had signed an arbitration agreement with related parties) raised allegations of "substantially interdependent and concerted misconduct by both the non-signatories" and the signatories.[68]

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59. *See In re* Consol. Freightways, Inc., 75 S.W.3d 147, 151 (Tex. App.—San Antonio 2002, orig. proceeding).

60. *Id.*

61. *Id.* (concluding that the statutory stay contained in TEX. INS. CODE ANN. art. 21.28-C § 17 is mandatory, that the trial court's order entered in violation of the stay was void, and that mandamus would issue).

62. *In re* J.D. Edwards World Solutions Co., 87 S.W.3d 546, 549 (Tex. 2002).

63. *Id.* at 550-51.

64. *Id.*

65. *Id.*

66. *Id.* at 551.

67. *In re* EGL Global Logistics, L.P., 89 S.W.3d 761, 764-65 (Tex. App.—Houston [1st Dist.] 2002, orig. proceeding).

68. *Id.* at 765.

g. Judge's Refusal to Disqualify Himself

Mandamus will issue to compel a district judge to disqualify himself from presiding over a child custody modification proceeding where the judge's former law partner represented relator in an earlier divorce proceeding in which the same custody issues were adjudicated.[69] Additionally, any orders or judgments already rendered in the modification proceeding were "void and without effect."[70]

h. Orders Relating to Elections

This Survey period produced a number of mandamus decisions examining the limits to the general rule of strictly construing the Election Code. In the case of *In re Gamble*,[71] for example, the Texas Supreme Court held that a candidate's fault in filing a defective election application does not automatically preclude the courts from fashioning equitable relief. But for the candidate's failure to pursue his entitlement to equitable relief to a final decision on the merits, the supreme court would have found no abuse of discretion by the court of appeals in issuing mandamus to allow a post-deadline amendment to the election application so that the party chair could place the candidate's name on the ballot.[72]

Four justices filed a concurring opinion in *Gamble* advocating a strict construction of the Election Code.[73] They would have held that the Election Code's rules and filing deadlines are absolute and that candidates must be held accountable for properly completing and timely filing their applications for a place on the ballot.

In the case of *In re Phillips*,[74] the Austin Court of Appeals granted Texas Supreme Court Chief Justice Thomas Phillips' petition for writ of mandamus seeking to compel the Texas Libertarian Party Chair to declare its non-lawyer candidate ineligible for the office of Chief Justice.

4. Mandamus Procedures

Parties seeking mandamus relief must comply with Texas Rule of Appellate Procedure 52.3, which requires, among other things, that the relator (1) provide the court with a clear and concise argument with citations to authority and the mandamus record, (2) verify all factual allegations contained in the petition, and (3) attach an appendix to the petition containing a certified or sworn copy of the document showing the matter

69. *See In re* O'Connor, 92 S.W.3d 446, 449 (Tex. 2002).
70. *Id.*
71. *In re* Gamble, 71 S.W.3d 313 (Tex. 2002).
72. *Id.* at 317-19. *In re* Elwell, No. 10-02-213-CV, 2002 WL 1808990, at *3 (Tex. App.—Waco Aug. 7, 2002, orig. proceeding); *In re* Vera, 71 S.W.3d 819, 820-21 (Tex. App.—Eastland 2002, orig. proceeding); *In re* Ducato, 66 S.W.3d 558, 561 (Tex. App.—Fort Worth 2002, orig. proceeding). Other courts have similarly granted or denied mandamus relief to compel the inclusion of various candidates' names on ballots despite the candidates' technical mistakes in filing their applications.
73. *Gamble*, 71 S.W.3d at 320-27 (Baker, J., concurring).
74. *In re* Phillips, 96 S.W.3d 418, 419 (Tex. App.—Austin 2002, orig. proceeding).

complained of.[75] In *In re Kuhler*,[76] the Amarillo Court of Appeals denied mandamus relief where the relator's unverified petition merely stated that, "based upon the facts of this case, due process was clearly violated," without any substantive analysis.[77] In the case of *In re Pasadena Independent School District*, the Amarillo Court of Appeals denied mandamus relief where the relator failed to provide the court of appeals with a complete reporter's record, which was required for a review of the trial court's determinations of fact under a deferential standard of review.[78] And in *In re Chavez*, mandamus was denied where relator failed to attach, via appendix or otherwise, the motion containing petitioner's complaint.[79]

Moreover, although mandamus is not an equitable remedy, its issuance is controlled by equitable principles.[80] Thus, Texas courts can deny mandamus relief based on delay alone. In *In re East Texas Salt Water Disposal Co.*, the Tyler Court of Appeals held that relator's request for mandamus relief was barred by laches where relator waited ten years before pursuing such relief from a trial court's repeated refusal to withdraw relator's deemed admissions.[81]

B. Interlocutory Appeals

1. *Conflicts Jurisdiction in the Supreme Court*

The Texas Supreme Court has no jurisdiction in the absence of an express constitutional or legislative grant.[82] As a general rule, jurisdiction over interlocutory appeals is final in the courts of appeals. However, the legislature created exceptions to this general rule for certain interlocutory appeals, including those meeting the "conflicts jurisdiction" standards set forth in section 22.001(a)(2) of the Government Code.[83] Under this standard, the supreme court has "conflicts jurisdiction" over interlocutory appeals when "one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court on a ques-

75. Tex. R. App. P. 52.3(h), (j).

76. *In re* Kuhler, 60 S.W.3d 381, 384-85 (Tex. App.—Amarillo 2001, orig. proceeding).

77. The court further noted that it might have overlooked relator's lack of verification if the court could have verified the accuracy of the relator's factual allegations by the court's own review of the mandamus record. *Id.* However, relator also failed to attach a record of the hearing at which the court issued the order in dispute, so the court had no competent evidence with which it could evaluate the veracity of relator's allegations. *Id.* at 385.

78. *In re* Pasadena Indep. Sch. Dist., 76 S.W.3d 144, 147-48 (Tex. App.—Amarillo 2002, orig. proceeding).

79. *In re* Chavez, 62 S.W.3d 225, 227 (Tex. App.—Amarillo 2001, orig. proceeding) (relator sought an order compelling the trial court to hold a hearing on relator's Motion for a Free Copy of the Trial Appellate Record).

80. *See* Rivercenter Assoc. v. Rivera, 858 S.W.2d 366, 367 (Tex. 1993) (orig. proceeding).

81. *In re* East Tex. Salt Water Disposal Co., 72 S.W.3d 445, 448-49 (Tex. App.—Tyler 2002, orig. proceeding).

82. Collins v. Ison-Newsome, 73 S.W.3d 178, 180 (Tex. 2001).

83. *Id.*; Tex. Gov't Code Ann. §§ 22.225(c); 22.001(a)(2) (Vernon 1988 & Supp. 2003).

tion of law material to a decision of the case."[84] To have conflicts jurisdiction, the rulings in the two cases must be "so far upon the same state of facts that the decision of one case is necessarily conclusive of the decision in the other."[85] For jurisdictional purposes, cases conflict *only* if the conflict "is upon the very question of law actually decided." Factual identity between the cases is not required, but cases do not conflict if "a material factual difference legitimately distinguishes their holdings."[86]

Applying these principles over an interlocutory appeal from a trial court's denial of the appellants' motion for summary judgment based on an assertion of immunity, the Texas Supreme Court in *Collins* concluded that the standards for a conflict were not met in any of the four cases cited by appellants. The supreme court rejected the first case on the ground that it was decided after the court of appeals decided *Collins*.[87] The supreme court pointed out that, under section 22.001(a)(2) of the Government Code, the court's conflicts jurisdiction is limited to circumstances in which "one of the courts of appeals holds differently from a *prior* decision of another court of appeals."[88] Since the *Enriquez* decision cited by appellants was decided after the court of appeals decided *Collins*, it was not a "prior decision" of another court of appeals, under the statute's plain language.[89]

The court rejected the second case cited by appellants, *Williams v. Chatman*,[90] concluding that the courts of appeals in the two cases (*Collins* and *Williams*) did not announce conflicting rules of law but, instead, based their holdings specifically on the sufficiency of the summary judgment evidence. In *Williams*, the Amarillo Court of Appeals concluded that the defendants' summary judgment evidence established as a matter of law that they were acting within the scope of their duties when the incident occurred; whereas, the court of appeals in *Collins* concluded that defendants failed to conclusively prove they were acting within the scope of their duties.[91] The supreme court further distinguished the two cases by noting that *Williams* involved claims of negligence while the plaintiff in *Collins* asserted intentional torts.[92] Because the courts of appeals in each case based their holding specifically on the sufficiency of the summary judgment evidence, which the supreme court noted was "a highly fact-specific inquiry driven by the different nature of the claims in each case," the supreme court could not conclude that the decision in *Williams* was "necessarily conclusive" of *Collins*.[93]

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84. *Id.*
85. *Collins*, 73 S.W.3d at 181.
86. *Id.* (quoting Coastal Corp. v. Garza, 979 S.W.2d 318, 319 (Tex. 1998)).
87. *Id.* at 180 (rejecting Enriquez v. Khouri, 13 S.W.3d 458 (Tex. App.—El Paso 2000, no pet.) as creating a basis for conflicts jurisdiction).
88. *Id.* (quoting TEX. GOV'T CODE ANN. § 22.001(a)(2)) (emphasis added).
89. *Id.*
90. Williams v. Chatman, 17 S.W.3d 694 (Tex. App.—Amarillo 1999, pet. denied).
91. *Williams*, 17 S.W.3d at 699; *Collins*, 73 S.W.3d at 180.
92. *Collins*, 73 S.W.3d at 181-82.
93. *Id.* at 182.

The supreme court rejected the remaining two decisions cited by the appellants as conflicting decisions among the courts of appeals, on the basis that the decisions were not designated for publication and therefore had no precedential value.[94] Having no precedential value, the supreme court reasoned, the cases could not "operate to overrule" a later case and, therefore, could not be the basis for conflicts jurisdiction.[95]

The dissent in *Collins* criticized the majority's conclusions on a number of grounds. First, the dissent argued that a direct conflict existed between one of the unpublished opinions cited by the appellants and the case before the court because the court of appeals in each case required different levels of proof to establish immunity.[96] The dissent also contended that conflicts jurisdiction is available when the conflict is among different panels of the same court of appeals (the conflict does not have to be among two separate courts of appeals) and that the Rules of Appellate Procedure governing the publication of opinions do not deprive unpublished opinions of significance in determining the supreme court's jurisdiction.[97] The dissent harshly concluded that "[c]onfusion, and waste, which 'conflicts jurisdiction' is designed to avoid, are the hallmarks of the Court's 'conflicts jurisdiction' jurisprudence. 'Conflicts jurisdiction,' in the Court's hands, is not a functional tool for resolving conflicts in the law but a contorted choreography for dancing around them." [98]

The Texas Supreme Court revisited the issue of conflicts jurisdiction in *Texas Department of Transportation v. Garza*, where the jurisdictional analysis was more straight-forward.[99] *Garza* involved a personal injury lawsuit filed by the plaintiffs against the Texas Department of Transportation for failing to correct "the absence, condition, or malfunction of a road sign within a reasonable time after notice."[100] The defendant was granted summary judgment based on sovereign immunity and the plaintiffs filed an interlocutory appeal to the Corpus Christi Court of Appeals (*Garza I*). The court of appeals reversed the trial court's judgment, holding that the speed limit sign at issue was a condition that should have been corrected by the defendant, thereby waiving defendant's immunity from suit.[101]

94. *Id.* at 183. *See* TEX. R. APP. P. 47.7. Rule 47 has since been amended to extinguish the designation of opinions as "unpublished." However, under new Rule 47, while cases previously not designated for publication may be cited, they still have no precedential value. TEX. R. APP. P. 47.7.

95. *Collins*, 73 S.W.3d at 183. The court rejected one of the unpublished opinions for the additional reason that is was not a decision of "another court," as required by Government Code § 22.225(c), but was decided by a different panel of the same court as the case on appeal. *Id.* at 188 (Hecht, J., dissenting).

96. *Id.* at 188-89 (Hecht, J., dissenting, joined by Owen, J.) (discussing Outman v. Allen ISD Bd. of Trs., No. 380-963-95, 1999 WL 817694 (Tex. App.—Dallas Oct. 14, 1999, no pet.) (not designated for publication).

97. *Id.* at 191-92.

98. *Id.* at 193.

99. Texas Dep't of Transp. v. Garza, 70 S.W.3d 802 (Tex. 2002).

100. *Id.* at 804.

101. *Id.*

On remand, the defendant moved to dismiss for lack of jurisdiction, reasserting its sovereign immunity defense. The trial court denied this motion, and the defendant filed a second interlocutory appeal to the Corpus Christi Court of Appeals (*Garza II*). In the second appeal, the Corpus Christi court expressly adopted the reasoning of the panel in *Garza I*, *i.e.*, that the speed limit sign at issue was a condition that should have been corrected by the defendant and immunity from suit was waived.[102]

On appeal to the supreme court from the second interlocutory appeal, the defendant argued that conflicts jurisdiction existed because the opinion in *Garza II* conflicted with the opinion from the Austin Court of Appeals in *Bellnoa v. City of Austin*.[103] Although the plaintiff argued that there was no conflict, the Austin Court of Appeals in *Bellnoa* expressly declined to follow the Corpus Christi court's decision in *Garza I*, which the *Garza II* court had adopted. Recognizing conflicts jurisdiction over the interlocutory appeal, the supreme court concluded that the *Garza I* court's holding, which was expressly adopted by the *Garza II* court, "would necessarily operate to overrule the *Bellnoa* court's decision if both had been rendered by the same court."[104]

A few months after *Garza*, the Texas Supreme Court again found that it had conflicts jurisdiction in *Texas Natural Resource Conservation Commission v. IT-Davy*, another case involving the doctrine of sovereign immunity.[105] The conflict resulted from the Austin Court of Appeals' holding that the defendant had waived immunity from suit by engaging in conduct beyond the mere execution of a contract, which was in direct conflict with the prior rejection by the Amarillo Court of Appeals in *Ho v. University of Texas at Arlington*[106] of any waiver-by-conduct exception to sovereign immunity when a private party sues the State.[107] Conflicts jurisdiction existed over the *IT-Davy* interlocutory appeal, because the Austin court's decision in *IT-Davy* "would operate to overrule *Ho* if the same court of appeals had rendered the decision."[108]

Reaffirming that conflicts jurisdiction requires a conflict that is "on the very question of law actually involved and determined," the Texas Supreme Court in *State Farm Mutual Automobile Insurance Co. v. Lopez* found no conflicts jurisdiction where the alleged conflict arose from statements by the court of appeals that were *dicta*.[109] In *Lopez*, an interlocu-

102. *Id.* at 804-05.
103. *Id.* at 805 (citing Bellnoa v. City of Austin, 894 S.W.2d 821 (Tex. App.—Austin 1995, no writ)).
104. *Id.* at 805-06.
105. Texas Natural Res. Conservation Comm'n v. IT-Davy, 74 S.W.3d 849, 852 (Tex. 2002).
106. Ho v. University of Tex. at Arlington, 984 S.W.2d 672 (Tex. App.—Amarillo 1998, pet. denied).
107. *Id.* at 682-83.
108. *IT-Davy*, 74 S.W.3d at 853.
109. State Farm Mut. Auto. Ins. Co. v. Lopez, 46 Tex. Sup. Ct. J. 129, No. 01-0540, 2002 WL 31426668, at *1 (Tex. Oct. 31, 2002) (per curiam).

tory appeal from a trial court order certifying a class, the petitioners argued that the court of appeals' opinion conflicted with the supreme court's opinion in *Southwestern Refining Co. v. Bernal*, where the Texas Supreme Court stated that "[a] trial court's certification order must indicate how the claims will likely be tried so that conformance with Rule 42 may be meaningfully evaluated."[110] Arguing that a conflict existed, the petitioners pointed to language in the court of appeals' opinion on rehearing in *Lopez* that "we do not read . . . *Bernal* . . . to require a trial plan in every class certification order."[111] Rejecting this statement as a basis for jurisdiction, the supreme court held "[d]icta cannot be the basis of conflicts jurisdiction."[112]

On the same day it decided *Lopez*, the Texas Supreme Court issued its opinion in *Schein v. Stromboe*, but reached a very different result.[113] Like *Lopez*, *Schein* involved an interlocutory appeal from a court of appeals' affirmation of a trial court's class certification order, and the alleged basis for conflicts jurisdiction in the supreme court rested upon a conflict with *Bernal*.[114] Unlike in *Lopez*, however, a majority of the supreme court in *Schein* found that the court of appeals' opinion conflicted with the court's opinion in *Bernal*.[115] Perhaps recognizing the inconsistencies between the holdings in *Lopez* and *Schein*, the supreme court granted rehearing in *Lopez*.[116]

In *Schein*, the majority concluded that *Schein* and *Bernal* conflicted in two respects.[117] First, while giving lip-service to the supreme court's admonitions in *Bernal* that "a cautious approach to class certification is essential" and that certification is not appropriate "if it is not determinable from the outset that the individual issues can be considered in a manageable, time-efficient, yet fair manner," the court of appeals failed to indicate how, or even if, a number of the plaintiffs' claims would be tried.[118]

Acknowledging that the court of appeals did not overtly refuse to follow *Bernal*, the *Schein* majority nonetheless found that the court of appeals' failure to properly apply *Bernal* reflected a conflict. In defense of its position that this situation created a conflict, the court argued that "outspoken disagreement is not necessary to invoke our conflicts jurisdiction. . . . What is required for conflict jurisdiction is that the two decisions cannot stand together."[119] In other words, a conflict does not disappear merely because the court of appeals asserts that it is following the proper standards. The supreme court concluded that it would not be possible,

110. Southwestern Ref. Co. v. Bernal, 22 S.W.3d 425, 435 (Tex. 2000).
111. State Farm Mut. Auto. Ins. Co. v. Lopez, 68 S.W.3d 701, 702 (Tex. App.—Corpus Christi 2001)(op. on reh'g), *dism'd per curiam*, 2002 WL 31426668 (Tex. Oct. 31, 2002).
112. *Lopez*, 2002 WL 31426668, at *1.
113. Schein v. Stromboe, No. 00-1162, 2002 WL 31426407 (Tex. Oct. 31, 2002).
114. *Id.* at *1, *8.
115. *Id.* at *8-10.
116. State Farm Mut. Auto. Ins. Co. v. Lopez., 46 Tex. Sup. Ct. J. 129 (May 8, 2003).
117. *Id.* at *8-11.
118. *Id.* at *8-9.
119. *Id.* at *9.

applying the same standards to both cases, "to reverse the certification order in *Bernal* and affirm the order in [*Schein*]."[120] Accordingly, under *Schein*, conflicts jurisdiction may exist where the court of appeals correctly states the law but misapplies it.[121]

The supreme court also found that conflicts jurisdiction existed in *Schein* because the court of appeals' standard of review, both as stated and as applied, conflicted with the standard set forth in *Bernal*.[122] Under *Bernal*, the trial court and court of appeals must find "actual, not presumed, conformance with [Tex. R. Civ. P. 42]" when conducting the class certification analysis.[123] In its opinion in *Schein*, the court of appeals held that, in reviewing the class certification order, it would "entertain every presumption in favor" of the trial court's decision.[124] Noting that, in *Bernal*, the supreme court expressly refused to indulge every presumption in favor of the trial court's ruling, the supreme court concluded that the *Schein* court of appeals' contrary holding conflicted with *Bernal*.[125] Accordingly, under *Schein*, conflicts jurisdiction may exist where the standards of review applied in two cases are in conflict.

The dissenting justices argued that the majority's opinion "starkly illustrates its desire to expand [the Court's] interlocutory-appeal jurisdiction beyond the clear parameters the Legislature has imposed."[126] Noting that *Bernal* involved personal injury claims while *Schein* did not, the dissenting justices pointed to the supreme court's previous holding in *Collins* that the differences between personal injury classes and non-personal injury classes "are so significant as to defeat conflicts jurisdiction."[127] The dissenters accused the supreme court of ignoring significant factual and legal differences between the two cases, grounding its conflicts analysis "on nothing more than disagreement with the court of appeals' result," something that "has never been sufficient to invoke our interlocutory-appeal jurisdiction, until today."[128]

The dissent similarly criticized the majority's finding of conflicts jurisdiction based on the differing standards of review employed by the two courts of appeals, arguing first that different standards were not used and second that, even if they were, "we have long recognized that inconsistent statements are not sufficient for conflicts jurisdiction."[129] According to the dissent, a court of appeals' articulation of the review standard cannot

120. *Id.*
121. *Id.*
122. *Id.* at *10-11.
123. *Bernal*, 22 S.W.3d at 435.
124. *Schein*, 2002 WL 31426407, at *10-11.
125. *Id.*
126. *Id.* at *19 (O'Neill, J., dissenting, joined by Enoch, J. and Hankinson, J.). Not surprisingly, the majority opinion was authored by Justice Hecht, who wrote the dissenting opinion ten months earlier in *Collins v. Ison-Newsome*, 73 S.W.3d 178 (Tex. 2001), arguing in favor of finding conflicts jurisdiction. *Id.* at 185 (Hecht, J., dissenting, joined by Owen, J.).
127. *Schein*, 2002 WL 31426407, at *20.
128. *Id.*
129. *Id.* at *22.

constitute a conflict "on the very question of law actually involved and determined" and, thus, "cannot invoke our jurisdiction over this interlocutory appeal."[130]

2. Dissent Jurisdiction in the Supreme Court

In addition to conflicts jurisdiction as a basis for the supreme court's jurisdiction over interlocutory appeals, the supreme court may review such appeals if the justices of the court of appeals disagree on a question of law material to the decision (dissent jurisdiction).[131] During the Survey period, the supreme court exercised this jurisdiction in *American Type Culture Collection, Inc. v. Coleman*, an interlocutory appeal from the denial of a special appearance.[132] The supreme court held that it had jurisdiction to review the appeal because one justice of the court of appeals dissented from the denial of the appellant's petition for *en banc* rehearing. The supreme court found dissent jurisdiction even though the dissenting court of appeals' justice did not sit on the original panel deciding the case.[133]

3. Interlocutory Appeals in the Courts of Appeals

a. Orders Subject to Interlocutory Appeal

i. Denial of summary judgment based on immunity

Section 51.014(a)(5) of Texas Civil Practice & Remedies Code provides for an interlocutory appeal from the denial of "a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state."[134] Under this provision, interlocutory review is available to both the individual and his employer seeking summary judgment based on the doctrine of official immunity.[135] The employer may take advantage of section (5) because its claim of sovereign immunity may be based on the individual's assertion of qualified immunity.[136] Moreover, the employer's theory of sovereign immunity may be asserted on either the actual or hypothetical assertion of official or qualified immunity.[137] Under these circumstances, the employer's denial of summary judgment is within the

130. *Id.*
131. TEX. GOV'T CODE ANN. § 22.225(b)(4) (Vernon Supp. 2003).
132. American Type Culture Collection, Inc. v. Coleman, 83 S.W.3d 801, 804 (Tex. 2002).
133. *Id.* at 805.
134. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(5) (Vernon Supp. 2003).
135. Brazos Transit Dist. v. Lozano, 72 S.W.3d 442, 443 (Tex. App.—Beaumont 2002, no pet.) (citing Putthoff v. Ancrum, 934 S.W.2d 164, 166 n.2 (Tex. App.—Fort Worth 1996, writ denied)).
136. *Id.* at 443-44 (citing City of Houston v. Kilburn, 849 S.W.2d 810, 812 (Tex. 1993)).
137. Baylor Coll. of Med. v. Tate, 77 S.W.3d 467, 470 (Tex. App.—Houston [1st Dist.] 2002, no pet.). However, the summary judgment motion must be based on the assertion of official immunity by an individual and liability of the governmental entity premised on vicarious liability. *Id.*

ambit of section (5).[138] Section (5), however, does not provide for an interlocutory appeal where the employer and employee are denied summary judgment based on assertions of only *sovereign* immunity and there is no assertion of qualified immunity on behalf of the employee (actual or hypothetical).[139]

ii. Denial of plea to the jurisdiction by governmental entity

In contrast to subsection (a)(5), section 51.014(a)(8) of the Texas Civil Practice & Remedies Code permits an interlocutory appeal from the denial of an assertion of sovereign immunity, but only if the procedural vehicle for such assertion is a plea to the jurisdiction.[140] This provision does not provide for an interlocutory appeal from the denial of a motion for summary judgment just because it is based on an assertion of sovereign immunity. In fact, the basis of the plea in section (8) is not limited; the purpose of section (8) was to add eligible orders to the types of orders subject to interlocutory appeal, not to provide a basis for interlocutory appeal from the denial of any motion so long as it is based on sovereign immunity.[141] Rather, the legislature made a *plea to the jurisdiction* eligible for interlocutory appeal "regardless of its basis, not because of it."[142]

iii. Order appointing receiver

Under section 51.014(a)(1) of the Texas Civil Practice & Remedies Code, a party may appeal an interlocutory order appointing a receiver.[143] An order *dissolving* a receivership is not appealable, and the disposition of receivership funds also may not be challenged by interlocutory appeal, even if such disposition has the effect of creating a *de facto* receivership.[144]

iv. Orders allowing or denying intervention or joinder

Section 15.003(c) of the Texas Civil Practice & Remedies Code provides a limited right of interlocutory appeal as to joinder and intervention

138. *Lozano*, 72 S.W.3d at 443-44.

139. *Id.* at 444; *Tate*, 77 S.W.3d at 470-71.

140. *Lozano*, at 444-45. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8) (Vernon Supp. 2003).

141. *Id.* at 444 (citing City of Austin v. L.S. Ranch, Ltd., 970 S.W.2d 750 (Tex. App.—Austin 1998, no pet.)).

142. *Id.* Notably, however, a motion for summary judgment based on an assertion of immunity from suit, as opposed to immunity merely from liability, may be properly construed as a plea to the jurisdiction, the denial of which would provide a basis for interlocutory appeal under section (8). *See Tate*, 77 S.W.3d at 471-73 (concluding that motion for summary judgment could not be construed as plea to the jurisdiction because it was based on immunity from liability and not immunity from suit).

143. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(1) (Vernon Supp. 2003).

144. Waite v. Waite, 76 S.W.3d 222, 223 (Tex. App.—Houston [14th Dist.] 2002, pet. denied). In *Waite*, the trial court dissolved the receivership while the receivership order was pending on interlocutory appeal but the funds under the receiver's control had been deposited into the registry of the court, creating a *de facto* receivership. *Id.*

decisions of the trial court.[145] This provision may not be used to obtain interlocutory appellate review of a trial court's venue rulings.[146] The legislature has provided that no interlocutory appeal is available from a trial court's determination of a venue question.[147]

Accordingly, when analyzing whether an interlocutory appeal is permitted under section 15.003(c), the court of appeals must accept the trial court's venue determination with respect to a given plaintiff and, if the trial court determines that venue is proper under section 15.002, the court of appeals' inquiry is over. This is so, even if the trial court "erroneously[ ] decides that venue is proper under section 15.002." [148] Section 15.003(c) allows an interlocutory appeal only for one specific purpose: "to contest the trial court's decision allowing or denying intervention or joinder."[149]

b. Procedure

Texas Rule of Appellate Procedure 26.1(b) requires a notice of appeal in an accelerated appeal to be filed within 20 days from the date the order is signed.[150] Despite the supreme court's direction to the courts of appeals to construe the Rules of Appellate Procedure reasonably so that the right to appeal is not lost by imposing requirements not absolutely necessary to effect the purposes of a rule,[151] courts of appeals are prohibited from enlarging the time for perfecting an appeal in a civil case and have no discretion but to dismiss an appeal for want of jurisdiction when the notice of appeal is late.[152]

c. Attorney's Fees

In an appeal brought pursuant to section 51.014(6) of the Texas Civil Practice & Remedies Code, which permits an interlocutory appeal by a media defendant from the denial of summary judgment, the court of appeals "shall" order the appellant to pay all costs and reasonable attorney fees of the appeal if the order is affirmed.[153] The court of appeals can grant such fees on motion filed after the court of appeals' opinion is issued.[154]

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145. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(c) (Vernon 2002).

146. Electronic Data Sys. Corp. v. Pioneer Elec. (USA) Inc., 68 S.W.3d 254, 257 (Tex. App.—Fort Worth 2002, no pet.).

147. *Id.* See TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(a) (Vernon 2002).

148. *Pioneer Elec. (USA) Inc.*, 68 S.W.3d at 258 (citing American Home Prods. Corp. v. Clark, 38 S.W.3d 92, 95 (Tex. 2000)).

149. *Id.* (citing *Clark*, 38 S.W.3d at 96).

150. TEX. R. APP. P. 26.1(b).

151. *See* Verburgt v. Dorner, 959 S.W.2d 615 (Tex. 1997).

152. *In re* T.W., 89 S.W.3d 641 (Tex. App.—Amarillo 2002, no pet.); TEX. R. APP. P. 2.

153. *See* New Times, Inc. v. Isaacks, 91 S.W.3d 844, 864 (Tex. App.—Fort Worth 2002, pet. filed); TEX. CIV. PRAC. & REM. CODE § 51.015 (Vernon 1997).

154. *New Times, Inc.*, 91 S.W.3d at 864.

d. Stay of Trial Pending Appeal

Under section 51.014(b) of the Texas Civil Practice & Remedies Code, an interlocutory appeal "shall have the effect of staying the commencement of trial in the trial court pending resolution of the appeal."[155] The stay, which requires *commencement* of trial stayed after an appeal has been filed, is "mandatory and allows no room for discretion."[156] Accordingly, a trial court that begins trial after such an appeal is filed commits error and must begin the trial anew after resolution of the appeal.[157]

III. PRESERVATION OF ERROR

There are three basic steps to preserving error. First, state a clear objection. Second, get a ruling on the objection. Third, make certain that your objection and ruling are both in the appellate record.[158] The cases in this Survey period show that putting these steps into practice can be a minefield for the unwary practitioner, especially in light of the varying application of the rules among different appellate courts.

A. MAKING A TIMELY COMPLAINT

1. No Objection Required

Some arguments can be raised for the first time on appeal. For instance, substantive defects in evidence, such as the failure of an expert to be qualified to testify on a particular subject or the fact that an affidavit is conclusory, can be pointed out for the first time on appeal.[159] Additionally, the Fourteenth Court of Appeals, has held that in a bench trial legal sufficiency challenges can be raised for the first time on appeal.[160] In

155. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(b) (Vernon Supp. 2003).

156. *Waite*, 76 S.W.3d at 223.

157. *Id.*

158. Preservation of error is governed by Rule 33.1 of the Texas Rules of Appellate Procedure, which provides:

> (a) In General. As a prerequisite to presenting a complaint for appellate review, the record must show that:
>
> (1) the complaint was made to the trial court by a timely request, objection, or motion that:
>
> (A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and
>
> (B) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure; and
>
> (2) the trial court:
>
> (A) ruled on the request, objection, or motion, either expressly or implicitly; or
>
> (B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.

TEX. R. APP. P. 33.1.

159. Trusty v. Strayhorn, 87 S.W.3d 756 (Tex. App.—Texarkana 2002, no pet.).

160. *See* Renteria v. Trevino, 79 S.W.3d 240, 241-42 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

reaching this conclusion, the court looked to former Rule 52(d) of the Texas Rules of Appellate Procedure, which expressly provided that legal sufficiency challenges to a non-jury trial need not be preserved in the trial court.[161] The court then looked to the comment to current Rule 33.1 of the Texas Rules of Appellate Procedure, which provides that former Rule 52 was omitted from the new rule as unnecessary because Rule 324 of the Texas Rules of Civil Procedure addresses what types of challenges must be preserved in the trial court.[162] The court then turned to Rule 324, which requires a motion for new trial only to preserve factual (not legal) sufficiency challenges and concluded that, in a bench trial, legal sufficiency challenges can be raised for the first time on appeal.[163]

2. *Objection Required*

In most instances, a proper objection must be raised in the trial court before error can be assigned on appeal. In cases where a party has failed to preserve error through a proper objection, that party is often left making some very creative arguments on appeal. The arguments in this Survey period are no exception.

For instance, in *Trusty v. Strayhorn*,[164] the Texarkana Court of Appeals rejected the defendants' argument that because it was successful on summary judgment it did not need to object to its opponent's summary judgment evidence.[165] Defendants reasoned that Rule 166a(f)[166] requires only the party seeking to reverse a summary judgment to object to summary judgment proof.[167] Considering the conflicting authorities on the issue, the court concluded that "the better rule is that a party seeking affirmance of a summary judgment is required to object to claimed defects in the form of summary judgment affidavits" and obtain a ruling on such objections.[168] Because defendants failed to obtain a ruling from the trial court on their objections to the form of the summary judgment affidavit, defendants waived any argument that plaintiff's affidavit did not constitute proper summary judgment evidence.[169]

In other cases, appellate courts have found waiver where the objection raised in the trial court did not match the complaint on appeal. In *O'Kehie v. Harris Leasing Co.*,[170] the Texarkana Court of Appeals held that a party who objected to admission of certain exhibits at trial on the

161. *Id.* at 242.
162. *Id.*
163. *Id.*
164. *Trusty*, 87 S.W.3d at 756.
165. *Id.* at 762.
166. Tex. R. Civ. P. 166a(f). Rule 166a(f) of the Texas Rules of Civil Procedure provides in relevant part: "Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party . . . ."
167. *Trusty*, 87 S.W.3d at 762.
168. *Id.* at 763.
169. *Id.* at 764.
170. O'Kehie v. Harris Leasing Co., 80 S.W.3d 316, 318 (Tex. App.—Texarkana 2002, no pet).

grounds that the exhibits were not properly sequenced and could not be reconciled could not complain on appeal that some of the exhibits were presented to the jury even though they were never introduced. The court concluded that the time to object to the wrong exhibits going to the jury would have been in the trial court.[171]

Similarly, in *Celanese Ltd. v. Chemical Waste Management, Inc.*,[172] the Texarkana Court of Appeals found that the plaintiff waived any argument that the charge did not address its claims of lost profits and lost value because its only objection to the damage issue at charge conference was that the question submitted an improper measure of damages.[173] The appellate court also found fault with the plaintiff for failing to tender a proposed instruction requesting the damage elements it complained on appeal had been absent from the charge.[174]

Where a party fails to invoke a procedural right in the trial court, that party will not be permitted to complain on appeal of the trial court's *sua sponte*, yet incorrect, efforts to exercise that right. In *Suggs v. Fitch*,[175] the Texarkana Court of Appeals held that a defendant could not complain on appeal about the procedure used by the trial court in its *sua sponte* polling of the jury because the defendant never requested the polling in the first place.[176]

3. *Steps to a Proper Objection*

The Texas Supreme Court provided guidance during this Survey period as to how to make a proper objection. In *Miga v. Jensen*,[177] the defendant objected twice during the charge conference that plaintiff's damages were limited to the value of the stock at the time of breach. On the second objection the trial court interrupted the defendant saying "you've got your objection on the record."[178] The supreme court stated that the "trial court's subsequent refusal to limit the damages submission as requested effectively overruled the objection" and concluded that error had been preserved by a proper timely objection ruled on by the trial court.[179]

B. Getting a Ruling

How does a court implicitly rule on a parties' objections? This question has plagued the courts since Rule 33 of the Texas Rules of Appellate Procedure was amended to permit review where a trial court has ruled on

171. *Id.*
172. Celanese Ltd. v. Chemical Waste Mgmt., 75 S.W.3d 593, 600-01 (Tex. App.—Texarkana 2002, pet. denied).
173. *Id.*
174. *Id.*
175. Suggs v. Fitch, 64 S.W.3d 658 (Tex. App.—Texarkana 2001, no pet.).
176. *Id.* at 660.
177. Miga v. Jensen, 96 S.W.3d 207 (Tex. 2002).
178. *Id.* at 212.
179. *Id.*

a request "either expressly or implicitly."[180] The outcome has been something similar to the United States Supreme Court's standard on pornography: they know it when they see it.

During the Survey period, the Texarkana Court of Appeals attempted to reconcile the various authorities interpreting what constitutes an implied ruling on an objection under Rule 33 of the Texas Rules of Appellate Procedure.[181] As the Texarkana court noted, several opinions from the Fort Worth Court of Appeals have found an implied ruling on objections to summary judgment evidence based on a broad summary judgment order.[182] However, the Texarkana court refused to presume that by granting summary judgment for a party, the trial court necessarily implicitly ruled in that parties' favor on all evidentiary objections.[183] Rather, the court concluded that a party still has a burden under Rule 33.1 to obtain a ruling on all objections, but that the burden is satisfied if:

> (1) the record affirmatively indicates that the trial court ruled on the objections to the summary judgment proof in granting summary judgment or (2) the grounds for summary judgment and the objections to the summary judgment proof are of such a nature that the granting of summary judgment necessarily implies a ruling on the objections.[184]

In applying this standard, the court explained that it is not enough to show that the court considered the objections, but the party must also show that the court ruled on those objections.[185] Only where the trial court could not have granted summary judgment without having ruled on the objections to the evidence will the court imply a ruling.[186]

In a case before the First Court of Appeals, the plaintiff argued on appeal that by refusing to submit the plaintiffs' requested jury question on its DTPA claims, the trial court implicitly granted defendants' motion for directed verdict on those claims.[187] In *Fletcher v. Minnesota Mining & Manufacturing Co.*, the trial court denied defendants' motion for directed verdict on plaintiffs' DTPA claims. Plaintiffs then submitted their DTPA claims as part of a mass fourteen-question proposed jury charge, which was refused by the trial court.[188] On appeal, plaintiffs argued that the refusal of their charge submission was an implicit directed verdict on plaintiffs' DTPA claims.[189] The First Court of Appeals rejected this argument, holding that the denial of a jury charge submission does not consti-

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180. TEX. R. APP. P. 33.1(a)(2)(A).
181. *Trusty*, 87 S.W.3d at 760.
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.* at 761.
186. *Id.*
187. Fletcher v. Minnesota Mining & Mfg. Co., 57 S.W.3d 602, 604-05 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).
188. *Id.*
189. It is not clear why plaintiffs did not challenge the trial court's refusal to submit their DTPA claim to the jury. *Id.* at 605.

tute an implied directed verdict on that claim.[190] In reaching this conclusion, the court noted several factors weighing against plaintiffs' argument. First, the trial court's ruling on the charge submission was in response to a mass submission and the ruling was not directed specifically at the DTPA submission.[191] Second, by including the DTPA claim in the proposed charge, plaintiffs clearly believed that the claim remained viable after the trial court's denial of defendants' directed verdict.[192] Third, the trial court expressly ruled on plaintiffs' motion for directed verdict and denied it.[193]

While many courts are grappling with implicit rulings, some courts are still being asked to consider what constitutes an explicit "signed" order for purposes of Rule 33.1 of the Texas Rules of Appellate Procedure. In *Cummings v. Cire*,[194] the Amarillo Court of Appeals held that a docket entry notation indicating denial of summary judgment "does not constitute a signed order for purposes of appeal."[195] There was no discussion in the opinion of whether Rule 33.1 required such a "signed" order to preserve error or whether the docket entry could ever constitute an implicit ruling.

C. Offers of Proof and Bills of Exception

Making a record for the appellate court can be wrought with traps for the unwary. Rule 33.2 of the Texas Rules of Appellate Procedure provides a process for submitting a formal bill of exception for evidence that would not otherwise appear in the record.[196] Rule 33.2 permits a party to file such a bill "no later than 30 days after the filing party's notice of appeal is filed."[197] In contrast, Rule 103 of the Texas Rules of Evidence requires a party to present any excluded evidence to the trial court by offer of proof *before* the charge is read to the jury.[198] At least some courts have held that failure to strictly comply with the procedures for making an offer of proof under Rule 103 waives review of excluded evidence in the court of appeals, even when such evidence is otherwise in the appellate record.

In *Fletcher v. Minnesota Mining & Manufacturing Co.*,[199] the trial court excluded testimony from one of the plaintiffs' experts at trial. Plaintiffs asked the court to allow them to make an offer of proof, but plaintiffs failed to do so before the charge was submitted to the jury.[200] In fact, even after the jury returned a no-liability verdict in favor of the defend-

190. *Id.*
191. *Id.*
192. *Fletcher*, 57 S.W.3d at 605.
193. *Id.*
194. Cummings v. Cire, 74 S.W.3d 920 (Tex. App.—Amarillo 2002, pet. granted).
195. *Id.* at 923.
196. Tex. R. App. P. 33.2.
197. Tex. R. App. P. 33.2(e)(1).
198. Tex. R. Evid. 103(a), (b).
199. *Fletcher*, 57 S.W.3d at 602.
200. *Id.* at 605.

ants and the trial court entered a take-nothing judgment against plaintiffs, plaintiffs still failed to make an offer of proof.[201] Plaintiffs' first effort to place the missing evidence regarding their expert witness into the record came 30 days after they perfected appeal.[202] However, even this submission was incorrect in that it failed to attach the evidence included in the offer of proof.[203] Plaintiffs finally submitted the proper evidence in an amended bill of exceptions more than three months after the trial court's plenary power had expired.[204]

The Fourteenth Court of Appeals found that plaintiffs waived any error in excluding their expert because they failed to make a proper offer of proof by not submitting the relevant evidence to the trial court before the charge was read to the jury.[205] The court reasoned that the "offer of proof serves primarily to enable the reviewing court to assess whether excluding the evidence was erroneous and, if so, whether the error was harmful."[206] Because the purpose of the offer of proof is to give the court a chance to correct error before the case goes to the jury, a party cannot rely on the bill of exceptions provision under Rule 33.2 of the Texas Rules of Appellate Procedure to obviate a party's duty to make an offer of proof.[207]

Perhaps the most significant lesson from the court's ruling in *Fletcher* is highlighted by the dissenting opinion. In her dissent, Judge Margaret Mirabal notes that even though the plaintiffs did not satisfy the offer of proof or formal bill of exceptions requirements, there was nonetheless significant evidence in the record of the subject matter of the excluded expert's testimony.[208] In defendants' pretrial motion to exclude the expert's testimony, defendants attached "34 exhibits primarily consisting of [the expert's] testimony in previous breast implant cases."[209] These exhibits further provided details of the expert's background, education and experience.[210] Additionally, at the pretrial hearing on defendant's motion to exclude the expert, plaintiffs' counsel summarized the expert's testimony. Yet, the Fourteenth Court of Appeals still found waiver.[211]

IV. JUDGMENTS

A. Finality in the Summary Judgment Context

Following its 2001 decision in *Lehmann v. Har-Con Corp.*,[212] the su-

201. *Id.*
202. *Id.*
203. *Id.* at 606.
204. *Id.*
205. *Id.*
206. *Id.* at 608.
207. *Id.* at 608-09.
208. *Id.* at 610 (Mirabal, J. dissenting).
209. *Id.*
210. *Id.*
211. *Id.*
212. Lehmann v. Har-Con Corp., 39 S.W.3d 191 (Tex. 2001).

preme court continued during the Survey period to monitor the court of appeals' decisions regarding finality, admonishing that the inclusion of "Mother Hubbard" language in an order issued without a full trial cannot be taken as an indication of finality.[213] For example, in *Nash*, a suit filed against both individual and institutional defendants, the Texas Supreme Court looked to the pleadings filed by the plaintiff to determine the number of parties in the lawsuit and to the order granting summary judgment to determine the trial court's disposition of those parties. Noting that the order referred only to the motion for summary judgment of the individual defendants, and did not mention the institutional defendants, the supreme court reversed the court of appeals' conclusion that the Mother Hubbard clause made the order final.[214]

The supreme court, however, verified during the Survey period that even if the record fails to show an adequate motion or other legal basis for the trial court's disposition, if the language of the summary judgment order shows finality, the judgment is final, regardless of the correctness of the trial court's adjudication of all parties and issues.[215] Thus, the trial court's express language in *Ritzell* that "Plaintiff . . . Individually and as Next Friend of [her son], . . . take nothing" was "unequivocally clear" in adjudicating all claims and parties in the case, rendering the judgment final, despite the defendant's failure to move for summary judgment on the son's claims.[216]

B. Finality After a Conventional Trial on the Merits

Unlike in the summary judgment context, the rule of *North East Independent School District v. Aldridge*[217] still stands that a judgment containing a "Mother Hubbard" clause entered after a conventional trial on the merits is presumed final (the so-called "*Aldridge* presumption").[218] Under the Texas Supreme Court's 1966 holding in *Aldridge*,

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213. Nash v. Harris County, 63 S.W.3d 415, 416 (Tex. 2001) (per curiam). A Mother Hubbard clause states, in effect, that "all relief not granted herein is hereby denied." *Id.*

214. *Id.* at 415-16. Similarly, in *Parking Co. of Am. v. Wilson*, 58 S.W.3d 742 (Tex. 2001) (per curiam), the supreme court reversed the court of appeals' conclusion that a summary judgment order was final because it included a Mother Hubbard clause where the order was entitled "Partial Summary Judgment," expressly "granted in part and denied in part" the motion for summary judgment, and the record reflected that the plaintiff's claim for attorney's fees was not disposed of by the order but subsequently tried to the bench. *Id.* at 742.

Post-*Lehmann*, the courts of appeals are following the principles laid down by the supreme court in *Lehmann*, determining finality in the summary judgment context based not on the presence or absence of Mother Hubbard language but on an independent examination of the trial court record to determine whether the order disposes of all claims and parties. *See, e.g.*, Braeswood Harbor Partners v. Harris County Appraisal Dist., 69 S.W.3d 251, 252 (Tex. App.—Houston [1st Dist.] 2002, no pet.). The court of appeals in *Braeswood* further held that the trial court's failure to dispose of all parties in the summary judgment order could not be corrected by a nunc pro tunc summary judgment properly disposing of all parties. *Id.*

215. Ritzell v. Espeche, 87 S.W.3d 536, 537 (Tex. 2002) (per curiam).

216. *Id.*

217. N.E. Indep. Sch. Dist. v. Aldridge, 400 S.W.2d 893 (Tex. 1966, writ ref'd n.r.e.).

218. *Id.* at 897-98.

When a judgment, not intrinsically interlocutory in character, is rendered and entered in a case regularly set for a conventional trial on the merits, no order for a separate trial having been entered pursuant to Rule 174, Texas Rules of Civil Procedure, it will be presumed for appeal purposes that the Court intended to, and did, dispose of all parties legally before it and of all issues made by the pleadings between such parties.[219]

During the Survey period, the supreme court examined the applicability of the *Aldridge* presumption in a situation where the plaintiff proceeded to trial on the merits against some, but not all, of the defendants, while pursuing settlement with the remaining defendants.[220] The supreme court concluded that the judgment entered following the trial was presumed final where "Mother Hubbard" language was present, even where the trial court and all parties were aware of the pending, unfinalized, settlement. The supreme court held: "Whether the judgment was final should not depend on one party's testimony that he did or did not finalize a settlement with parties from whom he sought no relief at trial."[221] While not disagreeing with the plaintiff's argument that the *Aldridge* presumption "should not be rigidly applied to make judgments final contrary to litigants' reasonable expectations," the supreme court concluded that the presumption was "entirely appropriate" where there was nothing to indicate that the trial court did not intend the judgment to finally dispose of the entire case.[222]

As noted above, the supreme court held in *Aldridge* that the presumption does not apply when the judgment is "not intrinsically interlocutory in character."[223] In a case of first impression, the San Antonio Court of Appeals in *Infonova Solutions, Inc. v. Griggs* explored the meaning of this phrase.[224] In *Infonova,* the plaintiff sued on a sworn account seeking the unpaid balance on the account plus attorney's fees. Prior to trial, the defendant paid the unpaid balance and the case went to a bench trial on attorneys' fees. Thereafter, the trial court signed an order denying the plaintiff's claim for fees. The order did not contain a "Mother Hubbard" clause.[225] The trial court later signed a judgment which included "Mother Hubbard" language and incorporated the court's previous ruling on the request for attorney's fees.[226]

On appeal, the defendants argued that the trial court's initial order denying attorney's fees was a final order from which the plaintiff's deadline ran for its notice of appeal. Rejecting this argument, the court of appeals

219. *Id.*
220. John v. Marshall Health Servs., Inc., 58 S.W.3d 738, 739-40 (Tex. 2001) (per curiam).
221. *Id.* at 740.
222. *Id.*
223. *Aldridge*, 400 S.W.2d at 897-98.
224. Infonova Solutions, Inc. v. Griggs, 82 S.W.3d 613, 615-16 (Tex. App.—San Antonio 2002, no pet.).
225. *Id.* at 615.
226. *Id.*

defined an "intrinsically interlocutory" order as "one that does not inherently resolve the merits of a case."[227] Because, under this definition, an order denying a request for attorney's fees "does not inherently resolve the merits of the claim upon which [the] award . . . depends," the court concluded that such an order, standing alone, is "intrinsically interlocutory."[228]

C. Finality in the Severance Context

As a general rule, the severance of an interlocutory judgment into a separate cause makes the severed judgment final. As explained by the Texas Supreme Court in *Harris County Flood Control District v. Adam,*[229] the severed judgment is final *not* because it contains "Mother Hubbard" language but because it disposes of all parties and issues in the new cause.[230] Moreover, presence of such language in the severed judgment does not constitute a final judgment in the original cause—the purpose of the severed order is to sever claims that have been adjudicated into a separate cause, not to adjudicate claims remaining in the original cause.[231]

However, in keeping with its current trend of focusing on the substance, rather than mere form, of events at the trial court level in determining finality, the Texas Supreme Court in *Diversified Financial Systems, Inc. v. Hill, Heard, O'Neal, Gilstrap & Goetz, P.C.*[232] concluded that a severance order expressly contemplating that the severed claims would "proceed as such to final judgment or other disposition in [the trial court]," precludes a final judgment in the severed action until the later judgment is signed.[233]

Following the trend set by the supreme court, the Texarkana Court of Appeals looked beyond the form of the judgment in *Cudd Pressure Control, Inc. v. Sonat Exploration Co.* to hold that the trial court's judgment, "although having the appearance of a final judgment," was not final.[234] In that multiple-party case, the trial court ordered separate trials for a

227. *Id.*

228. *Id.* at 616. The San Antonio Court of Appeals subsequently applied this definition of "intrinsically interlocutory" in Williams v. Medrano, No. 04-02-00508-CV, 2002 WL 31253966 (Tex. App.—San Antonio Oct. 9, 2002, no pet.) (not designated for publication), where, seeking to recover attorneys' fees from their former clients, appellants intervened in a personal injury action in which their former clients were among the plaintiffs. *Id.* at *1. The attorney's fees claim was tried to the court and the court signed a judgment disposing of the claim. On appeal from that judgment, the San Antonio court determined that the judgment was inherently interlocutory because it did not inherently resolve the plaintiffs' personal injury claims. *Id.*

229. Harris Cty. Flood Control Dist. v. Adams, 66 S.W.3d 265 (Tex. 2001) (per curiam).

230. *Id.* at 266.

231. *Id.*

232. Diversified Fin. Sys., Inc. v. Hill, Heard, O'Neal, Gilstrap & Goetz, P.C., 63 S.W.3d 794 (Tex. 2001) (per curiam).

233. *Id.* at 795.

234. Cudd Pressure Control, Inc. v. Sonat Exploration Co., 74 S.W.3d 185, 189 (Tex. App.—Texarkana 2002, pet. denied).

defendant's cross-claims against a co-defendant and its third-party claims against a third-party defendant.[235] Prior to its cross-claims going to trial, the defendant amended its claims against its co-defendant. In the amendment, the defendant eliminated any reference to the third-party defendant.

Examining the finality of the judgment rendered after trial on the cross-claims, the court of appeals noted the general rule that the omission of a defendant from a plaintiff's amended petition has the effect of dismissing that defendant from the lawsuit.[236] The court affirmed the applicability of this rule in the situation where there has been no order for separate trials and all the parties remain set for a single trial together. The court rejected the rule, however, in cases, like *Cudd*, involving multiple parties where the trial court has ordered separate trials (as opposed to a severance) for some of those parties. Under these circumstances, a plaintiff (or third-party plaintiff) "does not automatically dismiss a previously named party (co-plaintiff or defendant) by filing pleadings pertaining to one separate trial that omit that party whose rights or liabilities are the subject of another separate trial in the same case."[237] Noting that such practice should be avoided because of the confusion it causes in determining the finality of judgments, the court of appeals nonetheless concluded that the judgment in *Cudd* was not final because a portion of the same case remained live in the trial court.[238]

V. THE TRIAL COURT'S PLENARY POWER

Texas Rule of Civil Procedure 329b provides that the trial court will maintain plenary jurisdiction for 30 days after a motion for new trial is denied by the trial court in writing or by operation of law.[239]

In *Health Care Centers of Texas, Inc. v. Nolen*,[240] the trial court, following a trial in which the jury found the defendant negligent and grossly negligent and awarded the plaintiff actual damages and exemplary damages, granted the defendant's motion for judgment notwithstanding the verdict on the issues of gross negligence and exemplary damages and signed a judgment on April 27, 1999, awarding plaintiff only her actual damages.[241] After the plaintiff filed a motion for new trial, the trial court signed an order on June 29, 1999, granting plaintiff a new trial on the gross negligence claim and severing that claim from plaintiff's remaining claims.[242] On August 10, 2000, the trial court signed an order granting

235. The trial court had previously severed into a separate cause the cross-claims and third-party claims among the defendants and third-party defendant. *Id.* at 186.
236. *Id.* at 188 (citing Crofts v. Court of Civil Appeals, 362 S.W.2d 101, 104 (Tex. 1962)).
237. *Id.*
238. *Id.* at 188-89.
239. TEX. R. CIV. P. 329b.
240. Health Care Ctr. of Tex., Inc. v. Nolen, 62 S.W.3d 813 (Tex. App.—Waco 2001, no pet.).
241. *Id.* at 814.
242. *Id.*

plaintiff's motion to reinstate the jury's verdict, and on November 13, 2000, the court signed a final judgment in the severed action recognizing the jury's previously disregarded verdict on gross negligence and punitive damages.[243]

The defendant complained on appeal that the trial court erred when it reinstated the exemplary damages verdict and entered judgment thereon because its plenary power had expired before November 13, 2000.[244] The Waco Court of Appeals reversed and rendered, holding that "[a]ccording to settled case law, a trial court's authority to set aside an order granting a new trial expires when its plenary power over the original judgment expires."[245] According to the court of appeals, the trial court's authority to set aside its June 29, 1999, order granting plaintiff a new trial on her gross negligence claim expired on Monday, July 12, 1999, 76 days[246] after the original judgment was signed on April 27, 1999.[247] As a result, the trial court lacked authority to enter either the August 10, 2000, order reinstating the jury's verdict or the November 13, 2000, final judgment.[248]

In *Sadeghian v. Shaw*,[249] the plaintiff filed his original petition in small claims court in Denton County, and the case was transferred on defendants' motion to a justice court in Fannin County.[250] The defendant filed a counterclaim for damages and attorney's fees, obtaining a default judgment on May 30, 2000, when the plaintiff failed to appear at the scheduled trial.[251] Following the resolution of disputes in justice court and county court regarding the plaintiff's appeal bond,[252] the county court of Fannin County dismissed the case on March 1, 2001, ordering that all parties take nothing, only to reinstate the same case on its docket one day later, finding that it had been dismissed by accident.[253]

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243. *Id.*

244. *Id.* at 816.

245. *Nolen*, 62 S.W.3d at 816 (citing Porter v. Vick, 888 S.W.2d 789, 789-90 (Tex. 1994) (orig. proceeding); Fulton v. Finch, 346 S.W.2d 823, 826-27 (Tex. 1961) (orig. proceeding); Ferguson v. Globe-Texas Co., 35 S.W.3d 688, 690-92 (Tex. App.—Amarillo 2000, pet. denied); Garza v. Gonzalez, 737 S.W.2d 588 (Tex. App.—San Antonio 1987, orig. proceeding)). *See also* TEX. R. CIV. P. 329b(c), which provides: "In the event an original or amended motion for new trial or a motion to modify, correct or reform a judgment is not determined by written order signed within seventy-five days after the judgment was signed, it shall be considered overruled by operation of law on expiration of that period."

246. The court of appeals noted that, although the trial court's plenary power extends for seventy-five days after the date of the original judgment under TEX. R. CIV. P. 329b(c), when the 75th day falls on a Sunday, TEX. R. CIV. P. 4 extends the period to the end of the following Monday (unless it is a legal holiday). *See* TEX. R. CIV. P. 4 ("The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday.").

247. *Nolen*, 62 S.W.3d at 816.

248. *Id.*

249. Sadeghian v. Shaw, 76 S.W.3d 229 (Tex. App.—Texarkana 2002, no pet.).

250. *Id.* at 230.

251. *Id.*

252. *Id.*

253. *Id.*

In May 2001, the defendant filed a plea to the jurisdiction and motion to transfer to the district court of Fannin County, arguing that the district court had exclusive jurisdiction of the matter.[254] The county court granted defendant's motion to transfer on June 6, 2001.[255] On September 7, 2001, the same county court filed an order that (i) affirmed its October 20, 2000 order dismissing the plaintiff's appeal and its March 1, 2001 order dismissing the case with all parties taking nothing; (ii) vacated its March 1, 2001 order which reinstated the case; (iii) vacated its June 6, 2001 order which transferred the case to the district court; and (iv) "in summation," dismissed the plaintiff's appeal with prejudice.[256]

The Texarkana Court of Appeals, observing that "[i]t appears that at this point, the county court's intention was for all parties to take nothing,"[257] held that the trial court's September 7, 2001 order "was voidable and constituted an abuse of discretion" because the county court had only thirty days after it signed the transfer order on June 6, 2001, to vacate or modify the order, and did not set the order aside until approximately three months later, well after its plenary power had expired.[258]

In *In re Luster*,[259] the Fourteenth Court of Appeals followed the rule in *Porter v. Vick*[260] and *Fulton v. Finch*[261] that the trial court may only vacate or "ungrant" an order granting a new trial during its plenary power period.[262] The original judgment in favor of the defendant was signed January 26, 2001, and the trial court granted the plaintiff's timely filed motion for new trial by order signed on April 11, 2001.[263] The trial court then entered an order on November 5, 2001, vacating its April 11, 2001, order and reinstating the judgment in favor of the defendant.[264] Because the trial court's plenary power expired on April 11, 2001, 75 days after its original judgment was signed on January 26, 2001, the trial court's November 5, 2001 order and amended final judgment were void.[265]

In *In re T.G.*,[266] the First Court of Appeals addressed the relationship between the trial court's plenary power and its power to sanction.[267] Following the rule in *Lane Bank Equipment Co. v. Smith Southern Equip., Inc.*,[268] the court of appeals held that the October 27, 2000 filing by appellants of a motion for new trial and an amended motion for sanctions ex-

254. *Shaw*, 76 S.W.3d at 230.
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.* at 231 (citing TEX. R. CIV. P. 329b(d), (e), (g)).
259. *In re* Luster, 77 S.W.3d 331 (Tex. App.—Houston [14th Dist.] 2002, orig. proceeding).
260. Porter v. Vick, 888 S.W.2d 789 (Tex. 1994).
261. Fulton v. Finch, 346 S.W.2d 823 (Tex. 1961).
262. *Luster*, 77 S.W.3d at 334.
263. *Id.* at 335.
264. *Id.*
265. *Id.*
266. *In re* T.G., 68 S.W.3d 171 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).
267. *Id.* at 175-77.
268. Lane Bank Equip. Co. v. Smith S. Equip, Inc., 10 S.W.3d 308 (Tex. 2000).

tended the trial court's plenary power over its September 28, 2000 judgment of dismissal until January 11, 2001, thereby extending the trial court's power to sanction for the same time period.[269] Appellants' motion for new trial and amended motion for sanctions were not disposed of by written order, and were accordingly overruled by operation of law on December 12, 2000.[270] The trial court retained plenary jurisdiction and the power to sanction for an additional 30 days after that.[271] The court of appeals held that, because the trial court signed no additional orders in the 30 days after December 12, 2000, it lost plenary power over its judgment of dismissal on the 105th day after the judgment was signed,[272] and any orders signed by the trial court after January 11, 2001 were void.[273]

VI. PERFECTION OF APPEAL

A. Rule 306a

Under Texas Rule of Civil Procedure 306a(1), the periods for filing post-judgment motions and for calculating the trial court's plenary power runs from the date the judgment is signed.[274] Clerks are to notify parties immediately when a judgment is signed.[275] Rule 306a(4) provides that if, within twenty days after judgment is signed, a party neither receives the clerk's notice or acquires actual notice of the judgment, then the relevant time periods shall begin on the date the party received notice of the judgment (not to exceed ninety days).[276] In order to trigger the Rule 306a(4) extension, Rule 306a(5) provides that a party must file a sworn motion the date the party first received notice of the judgment.[277] However, the rule does not set a deadline for filing a Rule 306a(5) motion.

In *John v. Marshall Health Services, Inc.*,[278] the Texas Supreme Court addressed that issue. Before *John*, a conflict existed among the courts of appeals regarding whether a motion to extend post-judgment deadlines under Rule 306a(5) of the Texas Rules of Civil Procedure must be filed within thirty days of the date the movant learned that the judgment had been signed. Four courts of appeals had held that such a motion must be

269. *T.G.*, 68 S.W.3d at 176-77.

270. *Id.* at 177 (citing Cecil v. Smith, 804 S.W.2d 509, 511 (Tex. 1991)); Tex. R. Civ. P. 329b(c) ("In the event an original or amended motion for new trial or a motion to modify, correct or reform a judgment is not determined by written order signed within seventy-five days after the judgment was signed, it shall be considered overruled by operation of law on expiration of that period.").

271. *T.G.*, 68 S.W.3d at 177 (citing Thomas v. Oldham, 895 S.W.2d 352, 356 (Tex. 1995)); Philbrook v. Berry, 683 S.W.2d 378, 379 (Tex. 1985).

272. *T.G.*, 68 S.W.3d at 177 (citing *Philbrook*, 683 S.W.2d at 379); Tex. R. Civ. P. 329b(e), 329b(g).

273. *T.G.*, 68 S.W.3d at 178.

274. Tex. R. Civ. P. 306a(1).

275. Tex. R. Civ. P. 306a(3).

276. Tex. R. Civ. P. 306a(4).

277. Tex. R. Civ. P. 306a(5).

278. John v. Marshall Health Servs., Inc., 58 S.W.3d 738, 741 (Tex. 2001).

filed within thirty days of the date the movant received notice,[279] while two had held that a Rule 306a(5) motion could be filed at any time within the trial court's plenary jurisdiction, measured from the date determined under Rule 306a(4).[280]

The supreme court agreed with the latter and disapproved of all cases reaching a contrary result.[281] The court reasoned that Rule 306a "simply imposes no deadline, and none can be added by decision, other than the deadline of the expiration of the trial court's jurisdiction."[282]

B. Extending the Appellate Timetable

A party can extend the appellate timetables and the trial court's plenary power over its judgment by filing, within thirty days of the trial court's judgment, a Rule 329b motion for new trial or to modify, correct, or reform the judgment, or by requesting findings of fact and conclusions of law, if such findings could properly be considered by the appellate court.[283] *Amending* a Rule 329b motion, however, does not extend the appellate timetable or the trial court's plenary power.[284] Nor does a request for findings of fact and conclusions of law when the judgment appealed from was rendered as a matter of law without an evidentiary hearing.[285]

Moreover, any change in the trial court's judgment while it retains ple-

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279. *See* Health Servs., Inc. v. John, 12 S.W.3d 888, 891 (Tex. App.—Texarkana 2000), *rev'd*, 58 S.W.3d 738 (Tex. 2001); 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); Montalvo v. Rio Nat'l Bank, 885 S.W.2d 235, 237 (Tex. App.—Corpus Christi 1994, no writ); Womack-Humphreys Architects, Inc. v. Barrasso, 886 S.W.2d 809, 816 (Tex. App.—Dallas 1994, writ denied).

280. *See* Green v. Guidry, 34 S.W.3d 669, 670 (Tex. App.—Waco 2000, no pet.); Grondona v. Sutton, 991 S.W.2d 90, 92 (Tex. App.—Austin 1998, pet. denied); Vineyard Bay Dev. Co. v. Vineyard on Lake Travis, 864 S.W.2d 170, 172 (Tex. App.—Austin 1993, writ denied).

281. *See John*, 58 S.W.3d at 741.

282. *Id.*

283. *See* Tex. R. App. P. 26.1; Williams v. Flores, 88 S.W.3d 631, 632 (Tex. 2002). However, under Texas Rule of Civil Procedure 329, a defendant who was served by publication and who has not previously appeared can file a motion for new trial within two years after judgment. Thus, in *S.P. Dorman Exploration Co. v. Mitchell Energy Co., L.P.*, 71 S.W.3d 469, 470 (Tex. App.—Waco 2002, no pet.), the court held that the appellate timetable ran from the date of the filing of the motion for new trial.

284. *See T.G.*, 68 S.W.3d at 176 (citing *In re* Dickason, 987 S.W.2d 570, 571 n.4 (Tex. 1998)).

285. *See* Ford v. City of Lubbock, 76 S.W.3d 795, 797-98 (Tex. App.—Amarillo 2002, no pet.) (although it is sometimes proper for courts to hold evidentiary hearings on pleas to the jurisdiction, findings of fact were not required and request for such findings did not extend appellate timetable where no evidence was received at trial court's hearing on appellant's plea to jurisdiction); Foster v. Williams, 74 S.W.3d 200, 204 (Tex. App.—Texarkana 2002, pet. denied) (request for findings and conclusions will not extend the period for filing a notice of appeal from a judgment dismissing an action to quiet title based on limitations where the trial court heard no evidence); Ross v. Guerra, 83 S.W.3d 899, 900 (Tex. App.—Texarkana 2002, no pet.) (request for findings and conclusions will not extend the period for filing a notice of appeal from a summary judgment).

nary power will restart the appellate timetable.[286] When a trial court amends a judgment, an issue arises regarding whether the appellant has only thirty days in which to file a notice of appeal, or whether an earlier-filed motion for new trial has the effect of extending the appellate deadline from the amended judgment.[287] A number of courts have held that, in instances in which a Rule 329b motion is filed before the judgment is amended, it is sufficient to extend the time for filing the notice of appeal for ninety days after the amended judgment is signed, so long as the substance of the motion could properly be raised with respect to the amended judgment.[288] Some courts reason that this is so because the motion is treated as a premature motion.[289]

In *Gunnels v. City of Brownfield*, the Amarillo Court of Appeals held that a motion for new trial was sufficient to extend the time for filing a notice of appeal to 90 days from the date of the signing of the amended judgment because the motion assailed the sufficiency of the evidence to support summary judgment.[290]

But what about a motion for new trial that has been expressly overruled or overruled by operation of law before the trial court amends its judgment? Can such a "dead" motion be considered effective to extend the time for filing a notice of appeal from an amended judgment? As the Amarillo Court of Appeals in *Gunnels* acknowledged, there is no clear answer in Texas. The Dallas Court of Appeals has held that a motion for new trial that was overruled by operation of law prior to the entry of the amended judgment would not extend the appellate timetable because it can no longer be said to "assail" the subsequent amended judgment.[291] But the Amarillo Court of Appeals disagreed, holding that there is no requirement that a prematurely-filed motion for new trial be a "live pleading" to extend the appellate timetable from an amended judgment.[292]

C. Extensions of Time to File a Notice of Appeal

Texas Rule of Appellate Procedure 26.3 provides that a party may extend the deadline for filing a notice of appeal by filing a motion to extend time within fifteen days after the deadline has expired, reasonably ex-

286. *T.G.*, 68 S.W.3d at 176; Gunnels v. City of Brownfield, No. 07-02-0121-CV, 2002 WL 825567 (Tex. App.—Amarillo May 1, 2002, no pet.) (both citing Lane Bank Equip. Co. v. Smith S. Equip. Co., 10 S.W.3d 308 (Tex. 2000)).

287. *See Gunnels*, 2002 WL 825567, at *2.

288. *Id.* (citing Maddox v. Cosper, 25 S.W.3d 767, 770 n.3 (Tex. App.—Waco, no pet.) and Clark v. McFerrin, 760 S.W.2d 822, 825 (Tex. App.—Corpus Christi 1988, writ denied)).

289. *See, e.g., Gunnels*, 2002 WL 825567, at *3 (citing Dunn v. City of Tyler, 848 S.W.2d 305, 306 (Tex. App.—Eastland 1993, no writ).

290. *Id.*

291. *Id.* (citing A.G. Solar & Co., Inc. v. Nordyke, 744 S.W.2d 646, 647-48 (Tex. App.—Dallas 1988, no writ)).

292. *Gunnels*, 2002 WL 825567, at *3 (citing Harris Co. Hosp. Dist. v. Estrada, 831 S.W.2d 876, 879-80 (Tex. App.—Houston [1st Dist.] 1992, no writ)).

plaining the need for an extension.[293] In *Williams v. Flores*, the Texas Supreme Court held that a party who filed his notice of appeal twelve days after it was due triggered the application of Rule 26.3 by mailing his motion for extension of time on the fifteenth day after the deadline for filing the notice of appeal had expired.[294]

Moreover, under the authority of the supreme court's decision in *Verburgt v. Dorner*, a motion for extension will be implied if the appellant filed a notice of appeal within the fifteen-day period and can present a reasonable explanation for the late filing.[295]

In the case of *In re B.G.*, the Waco Court of Appeals held that counsel's unawareness of a change in the law constituted a "reasonable explanation" which would support an implied extension under *Verburgt*. The *B.G.* appeal was governed by a recent amendment to the Family Code requiring that appeals from orders terminating parent-child relationships follow the rules for accelerated appeals.[296] Under the amendments, such appeals must be filed within 20 days after the order is signed, and post-trial motions will not extend the timetable for filing the notice of appeal.[297]

In *B.G.*, the appellant filed her notice of appeal seven days late under the changed law.[298] After the court notified appellant that her notice of appeal could be considered timely if she offered a reasonable explanation for the delay, her counsel responded that "he did not realize that the Legislature had amended the pertinent statutes to make his appeal accelerated" and that he "mistakenly believed that the motion for new trial extended the time for the filing of the notice of appeal (which it would have done under prior law)."[299] The Waco court concluded that this was a reasonable explanation for the late filing of the notice of appeal and allowed the appeal.[300]

However, when faced with a similar appeal from a termination order, the Amarillo Court of Appeals distinguished *B.G.* and refused to imply an extension because the appellant waited approximately three months after the termination order was signed before filing her notice of

293. *See* TEX. R. APP. P. 26.3.

294. Williams v. Flores, 88 S.W.3d at 632 (citing TEX. R. APP. P. 9.2(b), regarding the filing of documents by U.S. mail). The court did not, however, consider whether appellant gave a reasonable explanation for the extension, and remanded the case to the court of appeals for further proceedings. *Id.*

295. *See In re* B.G., No. 10-02-019-CV, 2002 WL 1339502, at *1 (Tex. App.—Waco June 19, 2002, no pet.); Verburgt v. Dorner, 959 S.W.2d 615, 617 (Tex. 1997).

296. *See* TEX. FAM. CODE ANN. §§ 109.002(a), 263.405(a) (Vernon 1998).

297. *Id.* § 263.405(c); TEX. R. APP. P. 26.1(b).

298. *See B.G.*, 2002 WL 1339502, at *1.

299. *Id.*

300. *Id.* at *1-2; *see also In re* M.A.H., No. 10-02-234-CV, 2002 WL 31319959, at *1-2 (Tex. App.—Waco Oct. 16, 2002, no pet.) (holding that the court would review the appeal as timely perfected if appellant provided a reasonable explanation for failing to appeal termination order within time periods established for accelerated appeals).

appeal.[301]

D. The Notice of Appeal

1. *Bona Fide Attempt*

Should the Rules of Appellate Procedure be interpreted so liberally that they allow the filing of a docketing statement to serve as a notice of appeal sufficient to invoke the jurisdiction of the appellate court? Deciding the issue as one of "first impression," the Texarkana Court of Appeals surprisingly answered that question, "yes."

In *Foster v. Williams*,[302] the appellants failed to properly perfect appeal because they filed a docketing statement in the court of appeals rather than filing a notice of appeal in the trial court. Appellants argued that the docketing statement should serve as a notice of appeal because it contained the essential information required by Texas Rule of Appellate Procedure 25.1(d).[303] The court of appeals noted that the two documents are totally different:

> A notice of appeal is filed with the trial court clerk and should identify the court and style of the case, state the date of judgment, state that the party wishes to appeal, state the court to which an appeal is taken, and state the names of parties. A copy is to be filed with the appellate court.
>
> The docketing statement is filed with the appellate court, and it is required to contain more detailed information than a notice of appeal. A docketing statement does not contain language stating that the party wishes to appeal. Rather, it assumes that the party wishes to appeal, and it presupposes that a valid notice of appeal has been filed. Its purpose is purely administrative, to provide the information that allows the appellate court to both properly docket the appeal and efficiently move it forward through the appellate system.[304]

Despite the differences in the purpose and function of the two documents, the court cited supreme court authority stating that the appellate rules should be interpreted liberally and that appellate courts have jurisdiction over any appeal in which the party files an instrument in a bona fide attempt to invoke the appellate court's jurisdiction.[305] Based on that authority, the court of appeals overlooked the appellants' failure to file a notice of appeal and construed their docketing statement as a bona fide attempt to perfect an appeal.[306]

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301. *See In re* T.W., 89 S.W.3d 641, 642 (Tex. App.—Amarillo 2002, no pet.) (op. on reh'g); *see also Ross*, 83 S.W.3d at 901 (refusing to imply a request for an extension where notice of appeal was filed over two months after it was due).

302. Foster v. Williams, 74 S.W.3d 200, 202 (Tex. App.—Texarkana 2002, pet. denied).

303. *Id.* at 201.

304. *Id.* at 202.

305. *Id.* at 203 (citing Jones v. Stayman, 747 S.W.2d 369, 370 (Tex. 1987) and Linwood v. NCNB of Tex., 885 S.W.2d 102, 103 (Tex. 1994)).

306. *Id.*; *see also In re* M.A.H., No. 10-02-234-CV, 2002 WL 31319959, at *1 (Tex. App.—Waco Oct. 16, 2002, no pet.) (citing *Foster* and construing a motion for new trial and an affidavit of indigence as a "bona fide attempt" to invoke the court's jurisdiction); *B.G.*,

Texas Rule of Appellate Procedure 20.1(c)(1) provides that an indigent must file an affidavit of indigence "with or before the notice of appeal."[307] However, the tender of an affidavit of indigence or an appropriate filing fee is not a prerequisite to perfection.[308] Thus, in *Wells v. Breton Mill Apartments*,[309] the Amarillo Court of Appeals held that the deadlines for tendering an affidavit of indigence or a filing fee could be extended under Texas Rule of Appellate Procedure 2[310] and accepted appellant's late-filed affidavit of indigence.

2. *Who Must File a Notice of Appeal*

Another issue relating to the notice of appeal is whether an appellee must file a notice of appeal. In *Lubbock County v. Trammel's Lubbock Bail Bonds*,[311] the Texas Supreme Court refused to grant the relief the county sought in its Petition for Review because the county, appellee in the court of appeals, had failed to file a notice of appeal. In *Lubbock County*, both the county and the bail-bond companies moved for summary judgment, and the trial court granted partial relief for both parties.[312] Only the bail-bond companies filed notices of appeal in the court of appeals.[313] The court of appeals reversed, and the county sought relief in the Texas Supreme Court.[314] The supreme court concluded that a fact question existed on the county's summary judgment motion, but refused to grant relief because the county waived that argument by failing to file a notice of appeal from the trial court's judgment.[315]

3. *Must a Notice of Appeal be Filed to Appeal a Particular Order?*

This Survey period saw the development of a conflict among courts of appeals regarding whether an appellant must file a separate notice of appeal from an order denying indigency status or whether a notice of appeal from the ultimate judgment is sufficient. The Texarkana Court of Appeals, following earlier decisions from the Waco court, concluded that "the simplest way to deal with this type of situation is to require a party who wishes to appeal from the order on indigency [to] file a separate

2002 WL 1339502, at *2 (holding that a defective notice of appeal that failed to state that the appeal was accelerated was a "bona fide attempt" to invoke the court's jurisdiction).

307. Tex. R. App. P. 20.1(c)(1).

308. *See In re* Arroyo, 988 S.W.2d 737, 738 (Tex. 1998).

309. Wells v. Brenton Mill Apartments, 85 S.W.3d 823, 824 (Tex. App.—Amarillo 2001, no pet.) (op. on reh'g), *dism'd for want of prosecution*, No. 07-01-0320-CV, 2002 WL 1801753 (Tex. App.—Amarillo Aug. 6, 2002, no pet.).

310. Texas Rule of Appellate Procedure 2 provides that an appellate court may, "to expedite a decision or for other good cause," suspend a rule's operation and order a different procedure. Tex. R. App. P. 2.

311. Lubbock Cty. v. Trammel's Lubbock Bail Bonds, 80 S.W.3d 580, 584 (Tex. 2002).

312. *Id.* at 582.

313. *Id.*

314. *Id.* at 583.

315. *Id.* at 584 (citing Tex. R. App. P. 25.1, which provides that a "party who seeks to alter the trial court's judgment . . . must file a notice of appeal.").

notice of appeal from its appeal of a judgment."[316]

The Amarillo Court of Appeals disagreed.[317] It reasoned that allowing the appellant to challenge the order sustaining the contest to appellant's affidavit of indigency as part of her existing appeal "eliminate[d] a source of possible confusion about the number of records required to be filed, docketing of and filings in more than one appeal from a single substantive trial court case, considerations of whether severance or consolidation of appeals should occur, and similar practical issues."[318] The court therefore concluded that a separate notice of appeal appealing the denial of indigency status was not required.[319]

Texas Rule of Appellate Procedure 25.1(d)(2) provides that an appellant's notice of appeal must include the date of the judgment or order appealed from.[320] However, this rule does not require parties to recite the date each adverse order was signed, so long as the final judgment is appealed.[321] In *Texas Sting v. R.B. Foods, Inc.*, the San Antonio Court of Appeals held that the appellant whose notice of appeal referenced the date of a default judgment and not the date of a separate dismissal order did not fail to perfect the appeal of the latter because "a final judgment may consist of several orders that cumulatively dispose of all the parties and issues." [322]

E. Perfection in Special Circumstances

Garza v. Texas Alcoholic Beverage Commission[323] involved the procedures for perfecting an appeal from a Texas Alcoholic Beverage Commission (TABC) order denying a liquor license. Texas Alcoholic Beverage Code section 11.67 provides that an appeal of a liquor license denial must be tried to the district court within ten days after the appeal of the administrative order is filed with the district court.[324] In *Garza*, the district court conducted a hearing within the required ten days but did not sign a judgment until nineteen days after the appeal was filed.[325]

The Texas Supreme Court held that section 11.67 requires that a judgment must be rendered no later than ten days after the appeal is filed, that a district court is not precluded from performing the ministerial act of memorializing a timely rendition in a signed judgment after the ten-day period, but that any judgment signed after the ten-day period that

316. Rodgers v. Mitchell, 83 S.W.3d 815, 817-18 (Tex. App.—Texarkana 2002, no pet.) (citing Baughman v. Baughman, 65 S.W.3d 309 (Tex. App.—Waco 2001, pet. denied)).

317. *In re* Gary, No. 07-01-0466-CV, 2002 WL 1806800, at *2 (Tex. App.—Amarillo Aug. 7, 2002, no pet.).

318. *Id.*

319. *Id.*

320. Tex. R. App. P. 25.1(d)(2).

321. Texas Sting v. R.B. Foods, Inc., 82 S.W.3d 644, 648-49 (Tex. App.—San Antonio 2002, pet. denied).

322. *Id.* at 648.

323. Garza v. TABC, 89 S.W.3d 1, 2 (Tex. 2002).

324. Tex. Alco. Bev. Code Ann. § 11.67(b)(2) (Vernon 1995).

325. *Garza*, 89 S.W.3d at 2.

differs from the timely rendition of judgment is void.[326] In *Garza*, the district court did not render judgment within the ten-day period.[327] Thus, the court concluded, judgment was rendered as a matter of law against the party appealing the denial of the liquor license, and the district court had a ministerial duty to sign a judgment affirming the TABC's denial.[328]

Appeals from a county court's ruling disposing of stolen property in the state of Texas "shall be heard" by a court of appeals, and the appeal is governed by the rules for civil appeals generally.[329] However, Texas Code of Criminal Procedure article 47.12 governs the procedures for the county court hearing and mandates that a party who intends to appeal an order of seizure must "give oral notice of appeal at the conclusion of the hearing and must post an appeal bond by the end of the next business day."[330] In *Phillips v. State*,[331] the First Court of Appeals held that the appellant did not timely perfect his appeal because he failed to give oral notice and to post a bond as required by the criminal code.

F. Supersedeas Bonds

In *Miller v. Kennedy & Minshew Professional Corp.*,[332] the Fort Worth Court of Appeals clarified that a trial court, either before or after its plenary power expires, has the authority to review the sufficiency of the sureties on a supersedeas bond without regard to whether the circumstances have changed since the trial court originally approved the bond.

VII. THE RECORD ON APPEAL

A. Sealing the Record

Monsanto Co. v. Davis[333] was an interlocutory appeal[334] from the trial court's denial of a motion for protection and to seal a letter claimed to have been inadvertently disclosed to opposing counsel.[335] Relying on Texas Rule of Appellate Procedure 29.3,[336] the Waco Court of Appeals entered a broad sealing order applicable to two appellate proceedings,

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326. *Id.* at 6.
327. *Id.* at 7.
328. *Id.* at 9-10.
329. Tex. Code Crim. Proc. Ann. art. 47.12(b) (Vernon 1981 & Supp. 2003).
330. *Id.* art. 47.12(c).
331. Phillips v. State, 77 S.W.3d 465, 467 (Tex. App.—Houston [1st Dist.] 2002, no pet.).
332. Miller v. Kennedy & Minshew Prof'l Corp., 80 S.W.3d 161, 164 (Tex. App.—Fort Worth 2002, Rule 24.4 proceeding [leave denied]).
333. Monsanto Co. v. Davis., 2002 WL 31041838 (Tex. App.—Waco Sept. 11, 2002, no pet.).
334. The opinion states that the appeal is interlocutory but does not explain how it has jurisdiction over the interlocutory discovery issues on appeal.
335. *Id.*
336. Tex. R. App. P. 29.3. Texas Rule of Appellate Procedure 29.3 states: "When an appeal from an interlocutory order is perfected, the appellate court may make any temporary orders necessary to preserve the parties' rights until disposition of the appeal and may require appropriate security. But the appellate court must not suspend the trial court's order if the appellant's rights would be adequately protected by supersedeas or another order made under Rule 24."

directing the clerk of the court of appeals to seal, during the pendency of the appeal, the original and all copies of the letter in the appeal and in a related mandamus proceeding.[337] The court of appeals reasoned that, if the parties seeking the sealing order prevailed, "the fact that the document in question has effectively remained open to public inspection would significantly undermine the effectiveness of any relief to which they may show themselves entitled."[338]

B. Failure to Request the Record

In *Hiroms v. Scheffey*,[339] a medical malpractice and negligent credentialing case, the Fourteenth Court of Appeals held that the appellants' failure to request or file a reporter's record prevented the court of appeals from addressing the merits of appellants' issue that the trial court abused its discretion by submitting the Texas Pattern Jury Charges' definitions of "negligence"[340] and "ordinary care"[341] in the court's charge.[342] Without a reporter's record, the court of appeals determined that it could not consider "the record as a whole" and the "evidence presented" to determine whether appellants had met their burden to show error requiring reversal.[343]

C. Supplementing the Record

In *Aguilar v. LVDVD, L.C.*,[344] an appeal from a summary judgment, the appellee moved to supplement the record with a reporter's record of the summary judgment hearing, arguing that it showed the trial court's rulings on 23 objections to the appellants' summary judgment affidavits.[345] The appellants moved to strike the supplementation of the record,[346] relying on *City of Houston v. Clear Creek Basin Authority*[347] and *El Paso Associates, Ltd. v. J.R. Thurman & Co.*[348] for the proposition that recording of summary judgment hearings is a practice "neither necessary nor appropriate" to the purposes of a summary judgment hearing.[349] The El Paso Court of Appeals denied the motion to strike, holding that the

337. *Davis*, 2002 WL 31041838, at *1.
338. *Id.*
339. Hiroms v. Scheffey, 76 S.W.3d 486 (Tex. App.—Houston [14th Dist.] 2002, no pet.).
340. Malpractice, Premises, Products, Texas Pattern Jury Charges, No. 50.1 (2000).
341. *Hiroms*, 76 S.W.3d at 488.
342. *Id.* at 488-89.
343. *Id.* (citing Melendez v. Exxon Corp., 998 S.W.2d 266, 278 (Tex. App.—Houston [14th Dist.] 1999, no pet.); Island Recreational Dev. Corp. v. Republic of Tex. Sav. Ass'n, 710
S.W.2d 551, 555 (Tex. 1986) (op. on reh'g).
344. Aguilar v. LVDVD, L.C., 70 S.W.3d 915 (Tex. App.—El Paso 2002, pet. denied).
345. *Id.* at 916.
346. *Id.*
347. City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671 (Tex. 1979).
348. El Paso Assocs., Ltd. v. J.R. Thurman & Co., 786 S.W.2d 17 (Tex. App.—El Paso 1990, no writ).
349. *Aguilar*, 70 S.W.3d at 916 (citing *Clear Creek*, 589 S.W.2d at 677) (citing Richards v. Allen, 402 S.W.2d 158, 161 (Tex. 1966); Tex. R. Civ. P. 166a(c)).

prohibition against oral testimony in *Clear Creek*,[350] *Thurman*,[351] and Rule 166a(c)[352] does not limit the trial court's discretion to regulate attorney argument at an oral hearing.[353] Where, as here, the objections ruled on at the hearing were presented to the trial court in writing,[354] Rule 166a(c),[355] and *Clear Creek*[356] allow a transcription of proceedings to enable the appellate court "to examine the transcript and determine whether the issue was actually presented to and considered by the trial judge."[357] The court also cited Appellate Procedure Rule 33[358] as further support for its ruling.[359]

D. The Scope of the Record in a PURA Direct Appeal

In *City Public Service Board of San Antonio v. Public Utility Commission of Texas*,[360] the Austin Court of Appeals noted the significant differences in the appellate record and the nature of appellate review between direct appeals challenging the validity of a competition rule under the Texas Public Utility Regulatory Act ("PURA")[361] and appeals challenging Public Utility Commission actions, which are brought and reviewed under the substantial evidence rule.[362] In a PURA direct appeal challenging the validity of competition rules, judicial review is limited to the commission's rule-making record, which consists of: "(1) the notice of the proposed rule; (2) the comments of all interested persons; (3) all studies, reports, memoranda, or other materials on which the commission relied in adopting the rule; and (4) the order adopting the rule."[363] By contrast, other challenges to actions by the Commission, including rate orders, are brought under the substantial evidence rule.[364] Review under the substantial evidence rule determines whether, on the basis of the record

350. *Clear Creek*, 589 S.W.2d at 673.
351. *Thurman*, 786 S.W.2d at 19.
352. Tex. R. Civ. P. 166a(c) provides in pertinent part that "No oral testimony shall be received at the hearing."
353. *Aguilar*, 70 S.W.3d at 917 (citing Johnson v. Pumjani, 56 S.W.3d 670, 673 (Tex. App.—Houston [14th Dist.] 2001, no pet.) ("[A]ny oral hearing would be limited to attorney argument, and regulation of argument lies within the sound discretion of the trial court.")).
354. *Id.*
355. Tex. R. Civ. P. 166a(c) states in pertinent part that "[i]ssues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal."
356. *Clear Creek*, 589 S.W.2d at 677.
357. *Aguilar*, 70 S.W.3d at 917.
358. Tex. R. App. P. 33.1(a)(2)(A) provides in pertinent part that "[a]s a prerequisite to presenting a complaint for appellate review, the record must show that . . . the trial court ruled on the request, objection, or motion, either expressly or implicitly."
359. *Aguilar*, 70 S.W.3d at 917.
360. City Pub. Serv. Bd. of San Antonio v. Public Util. Comm'n of Tex., 96 S.W.3d 355 (Tex. App.—Austin 2002, no pet.).
361. *Id.* at 358 (citing Tex. Util. Code Ann. § 39.001(e) (Vernon Supp. 2002)).
362. *Id.* at 360 (citing Tex. Util. Code Ann. § 15.001 (Vernon 1998)).
363. *Id.* at 358 (quoting Tex. Util. Code Ann. § 39.001(e) (Vernon Supp. 2002)).
364. *Id.* at 360 (citing Tex. Util. Code Ann. § 15.001 (Vernon 1998) ("Any party to a proceeding before the commission is entitled to judicial review under the substantial evidence rule.")).

before the agency, there was any reasonable basis for the challenged actions,[365] and the record in such an appeal would include:

> (1) each pleading, motion, and intermediate ruling; (2) evidence received or considered; (3) a statement of matters officially noticed; (4) questions and offers of proof, objections, and rulings on them; (5) proposed findings and exceptions; (6) each decision, opinion, or report by the officer presiding at the hearing; and (7) all staff memoranda or data submitted to or considered by the hearing officer or members of the agency who are involved in making the decision.[366]

Because the suit was a purported challenge by direct appeal to the validity of a 1999 Rule, the court determined that it could only look to the notice of the proposed rule, the comments of all interested persons, any materials on which the Commission relied in adopting the rule, and the order adopting the rule.[367] The court could not review agency records relating to challenged rate orders because the records of these orders and proceedings would only be available in an appeal conducted under chapter 2001 of the Government Code, not a direct appeal.[368]

E. THE SCOPE OF THE RECORD IN A SEVERED CAUSE

In *New Hampshire Ins. Co. v. Tobias*,[369] an appeal from a default judgment in which the interlocutory default was made final by the entry of a severance order, the Austin Court of Appeals held that "all documents filed in a cause before a severance are part of the record of the severed cause."[370] As a result, the court held that the clerk of the trial court must, when properly requested, "place into the appellate record for the severed cause relevant documents that were filed in the original cause before the severance order."[371]

VIII. WAIVER ON APPEAL

It is well established that grounds of error not asserted by points of error or argument in the court of appeals are waived.[372] The absence of adequate briefing and argument will also result in waiver.[373] In the sum-

365. *Id.* at 361 (citing TEX. GOV'T CODE ANN. § 2001.175(e) (Vernon 2000) ("A court shall conduct the review sitting without a jury and is confined to the agency record, except that the court may receive evidence of procedural irregularities alleged to have occurred before the agency that are not reflected in the record.")); Gulf States Utils. Co. v. Public Util. Comm'n of Tex., 947 S.W.2d 887, 890 (Tex. 1997).

366. TEX. GOV'T CODE ANN. § 2001.060 (Vernon 2000).

367. *Public Util. Comm'n of Tex.*, 96 S.W.3d at 361.

368. *Id.* at 360 (citing TEX. GOV'T CODE ANN. § 2001.060).

369. New Hampshire Ins. Co. v. Tobias, 80 S.W.3d 146 (Tex. App.—Austin 2002, no pet.).

370. *Id.* at 148 (citing Padilla v. LaFrance, 907 S.W.2d 454, 459 (Tex. 1995)).

371. *Id.* at 148-49.

372. *See* Jacobs v. Satterwhite, 65 S.W.3d 653, 655-56 (Tex. 2001) (citing San Jacinto River Auth. v. Duke, 783 S.W.2d 209, 209-10 (Tex. 1990)).

373. *See* Campbell v. State, 85 S.W.3d 176, 184 (Tex. 2002) (concluding that a legal sufficiency claim was not properly before the court because (1) petitioner's court of appeals briefing did not challenge the evidence's legal sufficiency, and (2) while petitioner's

mary judgment context, waiver results when an appellant uses specific points of error or issues on appeal to attack a summary judgment and fails to attack one of the possible grounds on which the judgment was granted.[374] In that instance, summary judgment must be affirmed.[375]

In *Jacobs v. Satterwhite*, the Texas Supreme Court found waiver where the plaintiff failed to appeal every possible ground upon which the trial court could have granted summary judgment.[376] In that case, the plaintiff alleged claims of professional negligence and breach of contract.[377] The defendant moved for summary judgment on only the professional negligence claim, but the trial court granted summary judgment on both claims without stating the grounds for its ruling.[378] In the court of appeals, the plaintiff argued that the trial court improperly granted summary judgment on the contract claim because the defendant's summary judgment motion did not address that claim.[379] However, the plaintiff did not appeal the professional negligence claim.[380] The court of appeals reversed summary judgment without distinguishing between the two claims.[381]

On review to the supreme court, the supreme court concluded that the plaintiff had waived his argument that summary judgment was improper on the professional negligence claim by failing to raise it on appeal.[382] Therefore, the court of appeals erred in reversing summary judgment because the unchallenged professional negligence claim provided an independent basis for affirming the judgment.[383]

Strather v. Dolgencorp of Texas, Inc.[384] similarly involved an appellant's failure to challenge all grounds upon which the trial court might have granted summary judgment. In *Strather*, the defendant moved for summary judgment on two grounds: defective parties and limitations.[385] The trial court's order granting summary judgment did not recite its reasons; yet, Strather appealed only the defective parties issue.[386]

Before deciding that Strather's failure to appeal limitations required affirmance of the summary judgment, the Texarkana Court of Appeals

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supreme court briefing contained a heading stating that evidence was legally insufficient, the briefing did not discuss the appropriate standard, nor did it demonstrate why the evidence did not support the trial court's judgment as a matter of law); *but see* Tex. State Bank v. Amaro, 74 S.W.3d 392, 398 (Tex. 2002) (finding no waiver on appeal where party's brief to the court of appeals made the objection at issue clear).

374. *See* Strather v. Dolgencorp of Tex., Inc., 96 S.W.3d 420, 422-23 (Tex. App.—Texarkana 2002, no pet.).

375. *Id.* at 423.

376. *Jacobs*, 65 S.W.3d at 655.

377. *Id.*

378. *Id.*

379. *Id.*

380. *Id.*

381. *Id.* at 654.

382. *Id.* at 655-56.

383. *Id.*

384. *Strather*, 96 S.W.3d at 423-25.

385. *Id.* at 421.

386. *Id.* at 421-22.

noted a possible basis for finding no waiver.[387] Before the trial court had ruled on the summary judgment motion, Strather had amended his petition to make it clear that his injury occurred within the limitations period, which arguably removed limitations as a possible basis for the trial court's summary judgment and relieved Strather from the duty of raising the issue on appeal.[388] The court of appeals concluded, however, that the amended pleading made no difference in the waiver analysis:

> It is not uncommon . . . for a party, in order to avoid summary judgment, to amend his or her pleadings in response to a motion for summary judgment. Were we to remove Strather's burden of attacking each of the possible grounds for granting summary judgment by simply referencing his amended pleadings and assuming the trial court could not have granted summary judgment in light of those amended pleadings, we would effectively be placing ourselves in the role of the trial court in ruling on the motion for summary judgment.[389]

The court therefore "decline[d] to set such a precedent, especially because the burden of attacking each possible ground alleged in the summary judgment motion is relatively light."[390]

IX. SPECIAL APPEALS

A. Restricted Appeals

A restricted appeal is a direct attack on the judgment of the trial court.[391] As provided by Texas Rule of Appellate Procedure 30:

> A party who did not participate—either in person or through counsel—in the hearing that resulted in the judgment complained of and who did not timely file a postjudgment motion or request for findings of fact and conclusions of law, or a notice of appeal within the time permitted by Rule 26.1(a), may file a notice of appeal within the time permitted by Rule 26.1(c).[392]

Under Rule 26.1(c), the notice of restricted appeal must be filed within six months after the trial court signed the judgment or order.[393] The requirements of Rule 26.1(c) and Rule 30 "are jurisdictional and will cut off a party's right to seek relief by way of a restricted appeal if they are not

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387. *Id.* at 423.
388. *Id.*
389. *Id.*
390. *Id.*
391. Tex. R. App. P. 30.
392. Tex. R. App. P. 30. Rule 30 also provides that restricted appeals "replace writ of error appeals to the court of appeals" and that "[s]tatutes pertaining to writ of error appeals to the court of appeals apply equally to restricted appeals." *Id.* "The restricted appeal replaced the former writ of error practice when the supreme court adopted the current appellate rules in 1997." Campbell v. Fincher, 72 S.W.3d 723, 724 (Tex. App.—Waco 2002, no pet.); Taylor v. Taylor, 63 S.W.3d 93, 96 (Tex. App.—Waco 2001, no pet.); Tex. R. App. P. 30 cmt.
393. Clopton v. Pak, 66 S.W.3d 513, 515 (Tex. App.—Fort Worth 2001, pet. denied); Seeley v. KCI USA, Inc., 100 S.W.3d 276, 277 (Tex. App.—San Antonio 2002, no pet.).

met."[394] The six-month period under Rule 26.1(c) begins to run the day *after* the judgment or order is signed; the day the order is signed is not included in calculating the deadline for the notice of appeal.[395]

Further, participation "through counsel" includes a situation where appellant's counsel agrees to the dispositive order or judgment, even if neither the appellant nor his attorney actually attended the hearing that resulted in the disposition order or judgment.[396] A restricted appeal "is not available to give a party who suffers an adverse judgment at its own hands another opportunity to have the merits of the case reviewed."[397] The question under Rule 30 is whether appellant "participated in the 'decision-making event' that resulted in the order adjudicating appellant[s] rights."[398] The agreement by an appellant's attorney to the order adjudicating appellant's rights constitutes participation "through counsel" under Rule 30, even if neither appellant nor his counsel attended the hearing preceding the order.

While the scope of review in a restricted appeal has been called "peculiar,"[399] the review is the same as an ordinary appeal, that is, a review of the entire case. [400] "A review of the entire case includes a review of legal and factual sufficiency claims."[401] The error complained of, however, "must appear on the face of the record."[402] The "face of the record," for purposes of a restricted appeal, "consists of all the papers on file in the appeal, including the reporter's record."[403]

The absence of any evidence to support at least one element of each of the plaintiff's causes of action "constitutes error apparent on the face of the record."[404] In contrast, error is not "apparent on the face of the record" where an appellant seeks to reverse a judgment appearing valid on the face of the record because of something occurring after the judgment was rendered (for example, the failure of the clerk to send notice of the judgment).[405] To permit an appellant to succeed on such an issue "would be rewarding him for not appearing or participating, for whatever reason, in the trial proceeding."[406] The appellant's remedy under these circumstances is to seek a bill of review, not a restricted appeal. [407]

394. *Clopton*, 66 S.W.3d at 515.
395. *Id.* at 515-16; TEX. R. APP. P. 4.1(a).
396. *Clopton*, 66 S.W.3d at 516.
397. *Id.*
398. *Id.*
399. *Taylor*, 63 S.W.3d at 96.
400. *Id.* (quoting Gunn v. Cavanaugh, 391 S.W.2d 723, 724 (Tex. 1965)); *Clopton*, 66 S.W.3d at 516; O'Neal v. O'Neal, 69 S.W.3d 347, 348 (Tex. App.—Eastland 2002, no pet.).
401. Sutton v. Hisaw & Assoc. Gen. Contractors, Inc., 65 S.W.3d 281, 284 (Tex. App.—Dallas 2001, pet. denied).
402. *O'Neal*, 69 S.W.3d at 348; *Taylor*, 63 S.W.3d at 96; *Clopton*, 66 S.W.3d at 516.
403. *O'Neal*, 69 S.W.3d at 348.
404. *Sutton*, 65 S.W.3d at 286.
405. *Campbell*, 72 S.W.3d at 724-25.
406. *Id.*
407. *Id.*; *accord* Jackson v. Gutierrez, 77 S.W.3d 898, 901 n.2 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

B. Bill of Review

"A bill of review is an equitable proceeding by a party to a former action who seeks to set aside a judgment that is no longer appealable or subject to challenge by a motion for new trial."[408] Like a restricted appeal, a bill of review is a "direct attack on a judgment."[409] However, unlike a restricted appeal, a bill of review is considered not by the court of appeals, but by the same trial court that rendered the judgment under attack.[410] "The requirement that a bill of review be filed in the same court that rendered the judgment under attack is a matter of jurisdiction."[411] Relief by bill of review is available "only if a party has exercised due diligence in pursuing all adequate legal remedies."[412] Accordingly, if legal remedies were available but ignored, "relief by bill of review is unavailable."[413] This is true, "even if the failure to pursue remedies was the result of the negligence or mistake" of a party's attorney.[414]

While a bill of review is an equitable proceeding, the fact that an injustice has occurred "is not sufficient to justify relief by bill of review."[415] This is so because it is "fundamentally important that some finality be accorded to judgments." Accordingly, a bill of review seeking relief from an otherwise final judgment "is scrutinized by the courts 'with extreme jealousy, and the grounds on which interference will be allowed are narrow and restricted.'"[416]

The complainant in a bill of review proceeding must normally demonstrate that she:

> (1) has a meritorious defense to the claim alleged to support the judgment, (2) was prevented from making that defense because of the fraud, accident, or wrongful act of the opposing party, and (3) was not at fault or negligent.[417]

However, "a judgment entered in the absence of service of process and with substantial adverse consequences to the party in default is a violation of due process, and may be set aside without any showing of meritorious cause."[418]

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408. Jones v. Texas Dep't of Protective & Regulatory Servs., 85 S.W.3d 483, 487 (Tex. App.—Austin 2002, no pet.).

409. Richards v. Commission for Lawyer Discipline, 81 S.W.3d 506, 508 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

410. *Id.*

411. *Id.*

412. *Id.*

413. *Id.*; Garcia v. Tenorio, 69 S.W.3d 309, 312 (Tex. App.—Fort Worth 2002, pet. denied).

414. *Garcia*, 69 S.W.3d at 312.

415. *Id.*

416. *Id.*

417. *Id.*

418. *In re* Ham, 59 S.W.3d 326, 331 (Tex. App.—Texarkana 2001, no pet.).

C. Direct Appeals to the Texas Supreme Court

The Texas Supreme Court has jurisdiction over direct appeals from "an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a [Texas] statute."[419] During the Survey period, the Texas Supreme Court found in *Hodges* that it had direct appeal jurisdiction over the trial court's judgment in which the court declared section 162.015 of the Texas Election Code unconstitutional as applied to the appellee (a Democratic Party judicial candidate) and permanently enjoined the Democratic Party from declaring the appellee ineligible for a place on the general election ballot.[420] The supreme court also found that it had "extended jurisdiction" over the appellee's cross-point challenging the statutory construction of section 162.015. As the supreme court explained, "when this Court has appellate jurisdiction over any issue, it acquires 'extended jurisdiction' over all other questions of law properly preserved and presented."[421]

On direct appeal, the supreme court's review is confined to questions of law, and questions raising constitutional concerns are reviewed *de novo*.[422]

X. FRIVOLOUS APPEALS

Under Texas Rule of Appellate Procedure 45, appellate courts are authorized to award "just damages" to a prevailing party if the court determines an appeal is frivolous. While bad faith is not required, dispositive, or even material in deciding whether an appeal is frivolous, "the presence of bad faith could be relevant in determining the amount of the sanction."[423] In applying Rule 45, the court of appeals must "exercise prudence and caution and use careful deliberation . . . objectively determining whether an appeal is frivolous."[424] The court looks at the record "from the viewpoint of the advocate," deciding whether "he had reasonable grounds to believe the case could be reversed."[425] While the right to appeal is a "most sacred and valuable one," the court stated:

> We will not permit spurious appeals, which unnecessarily burden parties and our already crowded docket, to go unpunished. Such appeals take the court's attention from appeals filed in good faith,

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419. Tex. Gov't Code Ann. § 22.001(c) (Vernon Supp. 2003); Tex. Const. art. V, § 3-b. *See* State v. Hodges, 92 S.W.3d 489, 490 (Tex. 2002).

420. *Hodges*, 92 S.W.3d at 490. The Democratic Party argued that the appellee was disqualified as a nominee for the Democratic Party because he had voted in the Republican Party primary. *Id.* at 489.

421. *Id.*

422. *Id.* In *Hodges*, the supreme court ultimately concluded that the statute was not unconstitutional as applied to the appellee judicial candidate, reversed the trial court's judgment, and rendered judgment that the appellee was ineligible for a place on the general election ballot as a judicial candidate for the Democratic Party. *Id.* at 502.

423. Malone v. Abraham, Watkins, Nichols & Friend, No. 01-99-01192-CV, 2002 WL 1722337, at *8 (Tex. App.—Houston [1st Dist.] July 24, 2002, no pet.).

424. *Id.*

425. *Id.*

> wasting court time that could and should be devoted to those appeals. No litigant has the right to put a party to needless burden and expense or to waste the court's time that would otherwise be spent on the sacred task of adjudicating the valid disputes of Texas citizens.[426]

Although these standards are not easily met, the First Court of Appeals had no problem granting appellate sanctions in *Malone*, where counsel for appellants had filed eighty-nine separate lawsuits against appellees in retaliation for counsel's loss of an earlier case involving the division of attorney's fees, the eighty-nine lawsuits were filed in bad faith and for the purposes of harassment, and the lawsuits were frivolous (asserting claims for which appellants had no standing and which were not cognizable under Texas law). Concluding that the appeal was objectively frivolous, warranting the assessment of appellate sanctions, the court of appeals stated: "[O]ur system of justice should not allow everybody to sue everybody else for everything. This case presents some good examples of claims we should not allow."[427]

XI. APPELLATE REMEDIES

The court of appeals' judgment should conform to its analysis in its opinion.[428] When it does not, the supreme court may remand the claims at issue to the court of appeals with instructions to resolve the conflict between the court of appeals' reasoning and its judgment.[429]

When the supreme court announces a new proposition of law that provides a possible basis for recovery that did not exist at the time of trial, the appropriate remedy on appeal is a remand for an evidentiary hearing or new trial, as appropriate.[430] Generally, such a remand is warranted as being "in the interest of justice" under Rules 43.3 and 60.3 of the Texas Rules of Appellate Procedure.

Similarly, such a remand is justified when the supreme court bases its decision on the fact that it has never considered how a particular claim should be submitted to the jury and the law regarding the submission at issue had, prior to its decision, remained unclear.[431] When, however, a question submitted to the jury is immaterial, rendition, not remand, is

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426. *Id.* at *9 (quoting Bradt v. West, 892 S.W.2d 56, 79 (Tex. App.—Houston [1st Dist.] 1994, writ denied)).

427. *Id.* (quoting *Bradt,* 892 S.W.2d at 81); *compare* Brazos Transit Dist. v. Lozano, 72 S.W.3d 442, 445 (Tex. App.—Beaumont 2002, no pet.) (appellate sanctions not warranted where appellant's arguments had some support); Clopton v. Pak, 66 S.W.3d 513, 517 (Tex. App.—Fort Worth 2001, pet. denied) (appellate sanctions not warranted where appellant pursued restricted appeal and issue of "participation" was unclear under available case law).

428. TEX. R. APP. P. 47.1.

429. TEX. R. APP. P. 59.1, 60.2(d); Texas Assoc. of Sch. Boards, Inc. v. Bass, 92 S.W.3d 488, 489 (Tex. 2002) (per curiam).

430. Utts v. Short, 81 S.W.3d 822, 830 (Tex. 2002). The usual basis for such a remand is TEX. R. APP. P. 60.3, although not expressly cited to the court in *Utts*.

431. Torrington Co. v. Stutzman, 46 S.W.3d 829, 840-41 (Tex. 2000).

appropriate. A question to the jury is rendered immaterial when one party fails to include, over objection, the essential elements of a claim. Under these circumstances, the proper remedy on appeal is rendition of judgment.[432]

As the Tyler Court of Appeals concluded in *LaGloria Oil & Gas Co. v. Carboline Co.*, however, other factors may alter the remedy on appeal.[433] In that case, the jury question on defendants' limitations defense omitted an essential element. Recognizing that normally the proper appellate remedy would be to render judgment, the court nonetheless remanded for a new trial on both liability and limitations.[434] The trial court had held a separate trial on limitations prior to a finding on liability, which the court of appeals concluded caused great potential for confusion on appeal and possibly resulted in confusion in the court below as to whether the omitted element was appropriate for the issue submitted to the jury. Under these circumstances, the court concluded that remand for a new trial was appropriate.[435]

XII. MOOT APPEALS

The rule in Texas has been that a debtor's voluntary payment and satisfaction of an adverse judgment moots the controversy, waives the debtor's right to appeal, and requires dismissal of the case.[436] The reason for this rule is to prevent a party who freely decides to pay a judgment from changing his mind and pursuing recovery of the payment with the court's aid. "A party should not be allowed to mislead his opponent into believing that the controversy is over and then contest the payment and seek recovery."[437]

This rule was recently "clarified" by the Texas Supreme Court in *Miga v. Jensen*[438] to include circumstances in which the judgment is "involuntarily" paid because the judgment debtor feels "anxious" about the accrual of post-judgment interest. In *Miga*, the supreme court argued that the payment rule is not that any payment toward satisfying a judgment, including a voluntary payment, moots the controversy and waives the right to appeal the judgment. Rather, payment does not moot the judgment debtor's appeal when the payment is made under "economic duress," which, the court decided, includes duress implied by the accrual of post-judgment interest.[439] Accordingly, where the appellant is "justifiably anxious to avoid the . . . interest which would accrue while the case was

432. *Id.* at 839.
433. LaGloria Oil & Gas Co. v. Carboline Co., 84 S.W.3d 228, 241-43 (Tex. App.—Tyler 2001, pet. denied).
434. *Id.*
435. *Id.*
436. Highland Church of Christ v. Powell, 640 S.W.2d 235, 236 (Tex. 1982).
437. *Id.*; *see* Riner v. Briargrove Park Prop. Owners, Inc., 858 S.W.2d 370 (Tex. 1993) (per curiam).
438. Miga v. Jensen, 96 S.W.3d 207 (Tex. 2002).
439. *Id.* at 211.

on appeal," payment of the judgment does not moot the appeal.[440] The majority reasoned that "[o]ne must be able to halt the accrual of post-judgment interest, yet still preserve appellate rights."[441] Such a party "should be able to decide without fear of a Hobson's choice—that is, that the party might presumptively waive its appellate prospects."[442]

The majority cautioned, however, that the party's intention to appeal the judgment must be clear. A party should not be allowed "to simply change his mind about pursuing the case or mislead his opponent into thinking the controversy is over."[443] The "safe practice" when paying the judgment is for the party to explicitly reserve his right to appeal on the record.[444] Payment on a judgment, therefore, "will not moot an appeal of that judgment if the judgment debtor clearly expresses an intent that he intends to exercise his right of appeal and appellate relief is not futile."[445]

Calling the majority's holding "a significant departure from the Texas rule," the dissent argued that "involuntary payment" under Texas law occurs only in situations where the judgment debtor is faced with duress in the nature of losing his property through execution of the judgment, as opposed to merely facing the accrual of a higher interest rate on the judgment than would accrue on (for example) Treasury Bonds posted to secure a supersedeas bond.[446] Texas law, the dissent explained, assumes that a party's payment of the judgment is voluntary and *does* moot the appeal, unless the judgment debtor demonstrates that the payment was involuntary (as defined under Texas law). In direct opposition, the federal approach assumes that a party's paying the judgment *does not* moot the appeal, "unless payment is by way of compromise or shows an intention to abide by the judgment, payment is coupled with the acceptance of benefits under the judgment, or compliance with the judgment renders appellate relief futile."[447] Under the majority's holding, the dissent concluded, the Texas presumption that the appeal is moot unless the judgment debtor proves the payment was involuntary "no longer applies." "[A]fter today, a Texas judgment debtor need only show an intent to appeal . . . to preserve appellate rights."[448]

XIII. STANDARDS OF REVIEW

During this Survey period, the Texas Supreme Court granted review in numerous cases to resolve conflicts among the appellate courts as to the proper standard of review to apply on appeal. The supreme court disap-

440. *Id.*
441. *Id.*
442. *Id.*
443. *Id.* at 212.
444. *Id.* The court added that making such a reservation does not make the payment conditional. *Id.*
445. *Id.*
446. *Id.* at 224-27 (Schneider, J., dissenting).
447. *Id.* at 225.
448. *Id.*

proved the application of the abuse of discretion standard in several instances, including in review of personal jurisdiction rulings and rulings on primary jurisdiction. In another landmark decision, the supreme court adopted a "firm belief or conviction" standard of review in cases involving termination of parental rights.

A. Review of Rulings on Personal Jurisdiction

In this Survey period, the Texas Supreme Court resolved a longstanding dispute among appellate courts as to the proper standard of review of an interlocutory appeal from a ruling on personal jurisdiction.[449] As the supreme court noted, the San Antonio Court of Appeals has consistently reviewed rulings on special appearance for an abuse of discretion while most courts review such rulings under a sufficiency of the evidence standard.[450] The supreme court held that in the special appearance context, the trial court's factual findings should be reviewed for legal and factual sufficiency while conclusions of law should be reviewed *de novo*.[451] The supreme court expressly disapproved "of those cases applying an abuse of discretion standard only."[452]

B. Review of Rulings on Exclusive and Primary Jurisdiction

The supreme court also rejected the abuse of discretion standard in reviewing a ruling on the question of primary jurisdiction.[453] In *Subaru of America, Inc. v. David McDavid Nissan, Inc.*,[454] the Texas Supreme Court acknowledged that a question of exclusive jurisdiction is a question of law which must be reviewed *de novo*.[455] The supreme court further resolved an open question regarding the proper standard of review for a trial court's grant or denial of a motion for dismissal or abatement based on the primary jurisdiction doctrine. The supreme court concluded that primary jurisdiction often requires an analysis of statutory construction.[456] Because statutory construction matters are generally questions of law, primary jurisdiction issues are also questions of law, which are reviewed *de novo*.[457]

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449. *See* BMC Software Belgium, N.V. v. Marchand, 83 S.W.3d 789, 793-94 (Tex. 2002).

450. *See Id.* (citing Klenk v. Bustamante, 993 S.W.2d 677, 681 (Tex. App.—San Antonio 1998, no pet.)). *But see* Lonza AG v. Blum, 70 S.W.3d 184, 188-89 (Tex. App.—San Antonio 2001, pet. denied) (applying a sufficiency of the evidence standard of review where the trial court entered findings of fact).

451. *See BMC Software*, 83 S.W.3d at 794.

452. *Id.*

453. Subaru of Am., Inc. v. David McDavid Nissan, Inc., 84 S.W.3d 212, 222 (Tex. 2002).

454. *Id.*

455. *Id.*

456. *Id.*

457. *Id.*

C. Review in Termination of Parental Rights Cases Under Clear and Convincing Evidence Standard

In *In re C.H.*,[458] the supreme court resolved a conflict among Texas appellate courts on the standard of review in cases involving the termination of parental rights. Section 161.001(1), (2) of the Family Code provides that a court may only terminate the parent-child relationship if the court finds by clear and convincing evidence that (1) the parent has engaged in certain listed acts and (2) "termination is in the best interest of the child."[459]

Texas appellate courts have split on whether the "clear and convincing evidence" requirement under section 161 of the Family Code requires application of a traditional sufficiency of the evidence standard of review or some intermediate or heightened standard of review.[460] Reasoning that "the burden of proof at trial necessarily affects appellate review of the evidence," the supreme court adopted a new standard of review for termination findings, *to wit*, "whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the State's allegations."[461] In adopting this standard, the supreme court disapproved of opinions applying a factual sufficiency standard, highly probable standard, or any other standard that is inconsistent with the court's announced standard.[462] The supreme court also imposed a duty on the appellate court to clearly explain why "it concluded a reasonable jury could not form a firm conviction or belief from all the evidence" that termination would be in the best interest of the child.[463]

Applying the newly-articulated standard of review, the supreme court admonished the court of appeals for disregarding evidence that the jury presumably considered clear and convincing in concluding that there was not factually sufficient evidence to terminate the parental rights of a father who had been in prison for years and had taken no steps to care for or participate in his child's life.[464]

D. Review of Ruling on Motion for New Trial After Summary Judgment

In *Carpenter v. Cimarron Hydrocarbons Corp.*,[465] the Texas Supreme Court resolved yet another conflict among the appellate courts on the proper standard of review, this time addressing the question of whether

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458. *In re* C.H., 89 S.W.3d 17 (Tex. 2002).
459. Tex. Fam. Code Ann. §161.001(1), (2) (Vernon 2002).
460. *C.H.*, 89 S.W.3d at 19.
461. *Id.* The court based its reasoning on the fact that the clear and convincing standard is "constitutionally-mandated." *Id.* The concurrence recognized that until the United States Supreme Court requires independent appellate review in parental termination cases (as is currently required in cases of punitive damages and defamation claims), the court would not sanction a *de novo* review. *Id.* at 22 (Hecht, J., concurring).
462. *Id.*
463. *C.H.*, 89 S.W.3d at 22.
464. *Id.* at 21. *See also In re* N.K., 89 S.W.3d 29 (Tex. 2002) (per curiam).
465. Carpenter v. Cimarron Hydrocarbons Corp., 98 S.W.3d 682 (Tex. 2002).

the equitable standard under *Craddock v. Sunshine Bus Lines*,[466] for setting aside a default judgment, should also apply to review of a motion for new trial after summary judgment is granted when the nonmovant failed to timely respond.[467] The supreme court held that *Craddock* "does not apply to a motion for new trial filed after summary judgment is granted on a motion to which the nonmovant failed to timely respond when the respondent had notice of the hearing and an opportunity to employ the means" available under the rules of procedure to alter the deadlines imposed under Rule 166a of the Texas Rules of Civil Procedure.[468] The supreme court reasoned that *Craddock* should be limited to instances where the party did not learn of the scheduled event until the motion for new trial stage.[469] The standard should not apply where the rules provide for appellate relief, such as with a motion for leave to file untimely summary judgment evidence.[470]

However, as noted by the concurrence, the new standard (good cause) adopted by the court to review a motion for leave to file late-filed summary judgment evidence is only marginally different from *Craddock*.[471] To show good cause, the nonmovant must show (1) that the failure to timely respond was not intentional or the result of conscious indifference, but the result of an accident or mistake, and (2) that allowing the late response will occasion no undue delay or otherwise injure the party seeking summary judgment.[472]

Notably, this standard is less onerous than *Craddock* because it eliminates the requirement that the party show a meritorious response to the summary judgment motion. Otherwise, the standard is the same.

E. Deemed Findings on Appeal

Rule 279 of the Texas Rules of Appellate Procedure permits the trial court "to make and file written findings" on an omitted element of a claim when requested to do so by a party and where there is factually sufficient evidence to support such a finding.[473] Where no such written findings are made, an omitted element can be deemed found by the court

466. Craddock v. Sunshine Bus Lines, 133 S.W.2d 124 (Tex. 1939). Under *Craddock*, a default judgment can be set aside when the defendant establishes (1) the failure to answer was not intentional or the result of conscious indifference, but the result of an accident or mistake, (2) the motion for new trial sets up a meritorious defense, and (3) granting the motion will occasion no undue delay or otherwise injure the plaintiff. *Id.* at 126.

467. *Carpenter*, 98 S.W.3d at 683-85.

468. *Id.* at 684.

469. *Id.* at 685.

470. *Id.*

471. *Id.* at 689 (Hecht, J., concurring).

472. *Id.* at 685, 688. The concurrence would offer a slightly different standard, requiring a new trial upon (1) a showing that the failure to respond was not intentional or due to conscious indifference, but rather, was due to accident or mistake; (2) production of sufficient summary judgment evidence to raise a material fact issue; and (3) a showing that granting a new trial will occasion no delay or otherwise injure the opposing party. *Id.* at 689 (Hecht, J., concurring).

473. *See* Tex. R. Civ. P. 279.

"in such a manner as to support the judgment."[474] In *Gulf States Utility Co. v. Low*,[475] the Texas Supreme Court held that in cases where a party does not secure a finding on a deemed element of a claim in the trial court, Rule 279 "provides for deemed findings only as a basis for affirming the trial court's judgment."[476] In *Low*, a plaintiff complaining that his utility company unlawfully terminated his electricity obtained favorable findings on claims of negligence and violations of the Deceptive Trade Practices Act, damages (including past mental anguish), and attorneys' fees.[477] The trial court entered a judgment for $12,100, but did not award attorneys' fees.[478] On appeal, the court of appeals modified the judgment based on a deemed finding that the utility company knowingly engaged in unconscionable conduct to include an award of mental anguish damages.[479] The supreme court concluded that Rule 279 did not permit the court of appeals to make deemed findings to enlarge the judgment.[480] Rather, because Low did not ask the trial court to make deemed findings, the court of appeals could only make deemed findings consistent with the judgment.[481]

474. *Id.*
475. Gulf States Util. Co. v. Low, 79 S.W.3d 561, 564-66 (Tex. 2002).
476. *Id.* at 565.
477. *Id.* at 563.
478. *Id.*
479. *Id.*
480. *Low*, 79 S.W.3d at 563.
481. *Id.*