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CIVIL PROCEDURE: PRE-TRIAL & TRIAL

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

I. SUBJECT MATTER JURISDICTION

In recent years, the Texas Supreme Court's docket has been crowded with cases raising issues of subject matter jurisdiction. This trend continued during the Survey period. In *Rusk State Hospital v. Black*,¹ the supreme court reaffirmed the principle that governmental immunity from suit implicates a trial court's subject matter jurisdiction.² Accordingly, a court of appeals can consider the immunity defense even if it is raised for the first time on interlocutory appeal under Section 51.014(a) of the Civil Practice and Remedies Code.³ Although that statute creates an exception to the general rule allowing appeals only from final judgment and is therefore strictly construed, the supreme court reasoned it could not be construed so as to effectively "require appellate courts to address the merits of cases without regard to whether the courts have jurisdiction."⁴

In reaching its decision, the majority recognized (but declined to address) the argument that saying governmental immunity "implicates" subject matter jurisdiction does not necessarily "equate" to a lack of subject matter jurisdiction for all purposes.⁵ In a partial dissent, however, Justice Lehrmann was not so reticent.⁶ Her dissent argued that immunity is properly understood as

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1. *Rusk State Hosp. v. Black*, 392 S.W.3d 88 (Tex. 2013).

2. *Id.* at 95.

3. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a) (West 2009); see *Black*, 392 S.W.3d at 95.

4. *Black*, 392 S.W.3d at 95.

5. *Id.*

6. *Id.* at 102 (Lehrmann, J., concurring and dissenting). The majority described the dissent as advocating a "change in the nature of immunity in Texas," which it acknowledged was an

implicating both subject matter and personal jurisdiction, and because a party's objection to the latter can be waived (unlike a lack of subject matter jurisdiction), governmental entities should be required to raise their immunity defense in the trial court.⁷ The dissent pointed out the significant consequences of equating immunity with a lack of subject matter jurisdiction, specifically that it would allow a governmental entity (or the plaintiff suing it for that matter) to litigate a case to conclusion and, if dissatisfied with the result, simply attack the judgment as void after the fact.⁸ Given the seriousness of the dissent's concern, it seems likely that the supreme court will have to address this issue again soon in another case where it has been properly raised and briefed.

After raising the issue itself, the Texas Supreme Court concluded that the plaintiff homeowners had standing to challenge administrative interpretations issued by the Finance and Credit Union Commissions pursuant to their authority under the 2003 amendment to the constitutional provision governing home equity loans in Texas.⁹ Although the challenged interpretations were not in effect when the homeowners had secured their own home equity loans, and they did not specifically allege that they intended to acquire new loans, plaintiffs argued that the potential interference with their prospective interest in future home equity loans was sufficient to establish standing. The supreme court agreed.¹⁰ The court focused on the unique circumstances of the home equity amendment's safe-harbor provision that protects lenders who comply with the Commissions' interpretations.¹¹ Thus, the applicable interpretations could not injure a home equity borrower because the constitutional provision deemed the lender's compliance with those interpretations lawful.¹² The only injury that could be redressed, therefore, was the injury to a party's interest in obtaining a future home equity loan unimpaired by the Commissions' alleged misinterpretations.¹³ Under these circumstances, the supreme court seemingly relaxed the ordinary requirement that a plaintiff show a concrete and particularized injury.¹⁴ Indeed, the court suggested that even a homeowner who did *not* intend to apply for a new loan suffered an injury as well because of the Commissions' misinterpretations.¹⁵ The opinion makes clear, however, that the home equity provision at issue "create[d] an exceptional context in which to assess standing,"¹⁶ and it is doubtful whether litigants can extend the supreme court's reasoning to establish standing for plaintiffs claiming this type of passive injury in other cases.

Standing in the class action context was at issue in *Heckman v. Williamson*

important issue but was unnecessary to its decision and had not been raised by the parties. *Id.* at 97.

7. *Id.* at 104-08.

8. *Id.* at 107-08.

9. Fin. Comm'n of Tex. v. Norwood, 418 S.W.3d 566, 584 (Tex. 2013).

10. *Id.* at 582-83.

11. *Id.* at 581.

12. *Id.*

13. *Id.*

14. *Id.* at 583.

15. *Id.* at 583-84.

16. *Id.* at 584.

County.¹⁷ The court of appeals had dismissed the case for lack of subject matter jurisdiction because “not one of the named plaintiffs had standing to pursue *all* of the putative class’s claims.”¹⁸ The Texas Supreme Court reversed, requiring only that at least one named plaintiff have standing for *each* claim asserted in the case.¹⁹ The supreme court noted that this is the consensus rule in the federal courts, and it follows logically from the fundamental principle that courts must analyze the standing of each individual plaintiff to bring each individual claim.²⁰ The fact that the named plaintiff also seeks to represent a class should not increase his burden to establish standing.²¹

II. SPECIAL APPEARANCE

In *Moncrief Oil International, Inc. v. OAO Gazprom*, the Texas Supreme Court elaborated on the type of evidence that will or will not be sufficient to establish that a non-resident has the requisite minimum contacts for personal jurisdiction.²² The plaintiff there alleged that the defendants misappropriated trade secrets that were disclosed to them in Texas and tortiously interfered with the plaintiff’s existing and prospective business relationships by using those trade secrets to compete. Noting that “specific jurisdiction requires us to analyze jurisdictional contacts on a claim-by-claim basis,”²³ the supreme court first held that the defendants’ attendance at two meetings in Texas where the trade secrets were allegedly disclosed to them was sufficient to show that they had purposefully availed themselves of doing business in Texas.²⁴ The supreme court brushed away the defendants’ argument that their only purpose in coming to Texas was to discuss settlement of a separate dispute, explaining that at the jurisdictional phase, the relevant inquiry is the defendants’ actual business contacts with the state and not what they thought or intended.²⁵

Conversely, the supreme court also held that the special appearance evidence was insufficient to establish specific jurisdiction as to the tortious interference claim.²⁶ This claim focused on the defendants’ alleged attempt to convince a third party not to proceed in a joint venture with the plaintiff, as well as their establishment of a competing enterprise in Texas. Even though the defendants’ original receipt of the plaintiff’s claimed trade secrets was a necessary predicate to the interference claim, the supreme court held that “but-for causation alone is insufficient” and that the interference claim was centered on discussions between the defendants and the third party that occurred in California.²⁷ Since

17. Heckman v. Williamson Cnty., 369 S.W.3d 137 (Tex. 2012).

18. *Id.* at 150 (emphasis original).

19. *Id.*

20. *Id.* at 151–53.

21. *Id.* at 153–54.

22. *Moncrief Oil Int’l, Inc. v. OAO Gazprom*, 414 S.W.3d 142 (Tex. 2013).

23. *Id.* at 150.

24. *Id.* at 154.

25. *Id.* The supreme court also rejected the defendants’ argument that the information they received at the meetings was not truly trade secret, noting that this went to the merits of the plaintiff’s claim and not personal jurisdiction. *Id.* at 156, n.15.

26. *Id.* at 156.

27. *Id.* at 157.

the competing enterprise in Texas was a separate legal entity, and the plaintiff did not establish that it was the defendants' alter ego, these facts also failed to support the exercise of specific jurisdiction.²⁸

Texas courts continue to grapple with the effect of e-commerce on traditional personal jurisdiction principles. In a case of first impression in Texas, the Dallas Court of Appeals rejected an attempt to ground jurisdiction on the choice of law and forum selection clauses from a document that was available on the plaintiff's website and referred to in the contract documents.²⁹ The court of appeals explained that, although the document was referred to in the parties' agreement, it was not specifically incorporated by reference.³⁰ Nor did the agreement plainly state that the referenced document contained additional terms and conditions or was otherwise intended to become part of the contract; instead, it suggested that the document contained "informative material only."³¹

III. VENUE

In *In re Lopez*,³² the Texas Supreme Court was asked to determine the appropriate county for a motion to vacate an arbitration award when the hearing has been held in a different county than the one designated in the parties' agreement. Here, the arbitration agreement provided that "[t]he arbitration hearing and all related proceedings shall be conducted in Victoria County, Texas, unless otherwise agreed upon."³³ The parties decided to hold the arbitration hearing in Travis County instead. Afterwards, the losing party filed an application to vacate the arbitration award in Victoria County. It argued that venue was mandatory in Victoria County under Section 171.096(b) of the Texas Civil Practice and Remedies Code, which states that if an arbitration agreement "provides that the hearing before the arbitrators is to be held in a county in this state, a party must file the initial application [to vacate the arbitration award] with the clerk of the court of that county."³⁴ The prevailing parties, however, argued that venue was mandatory in Travis County under Section 171.096(c) of the same code, which states that "if a hearing before the arbitrators has been held, a party must file the initial application [to vacate the arbitration award] with the clerk of the court of the county in which the hearing was held."³⁵ The supreme court concluded that because the latter provision speaks specifically to the situation in which the hearing has already occurred, it should control, and the court required that the motion to vacate be filed in the same county where the arbitration hearing had been held.³⁶

28. *Id.*

29. *Bob Montgomery Chevrolet, Inc. v. Dent Zone Cos.*, 409 S.W.3d 181, 193 (Tex. App.—Dallas 2013, no pet.).

30. *Id.* at 190.

31. *Id.*

32. *In re Lopez*, 372 S.W.3d 174 (Tex. 2012).

33. *Id.* at 175.

34. TEX. CIV. PRAC. & REM CODE ANN. § 171.096(b) (West 2009).

35. *Id.* § 171.096(c).

36. *Lopez*, 372 S.W.3d at 176.

IV. PARTIES

The Texas Supreme Court once again addressed the differences between misnomer and misidentification in *Reddy Partnership/5900 North Freeway, LP v. Harris County Appraisal District*.³⁷ In this property tax case, the Harris County Appraisal District (HCAD) mailed a Notice of Appraised Value of Property to “Reddy Partnership, ETAL.” A notice of protest was filed by Reddy Partnership, ETAL and rejected by the HCAD’s appraisal review board. Subsequently, Reddy Partnership, ETAL petitioned for judicial review to challenge the board’s determination. Fifteen months later, after the statute of limitations to appeal the board’s order had expired, HCAD contended that the trial court lacked subject matter jurisdiction because “Reddy Partnership, ETAL” was not the owner of the property and, therefore, lacked standing. Reddy Partnership, ETAL amended its petition to name Reddy Partnership/5900 North Freeway, LP as the plaintiff and owner of the property, alleging that it had not properly identified itself in the original petition. “The trial court granted HCAD’s jurisdictional plea and dismissed the suit. . . . The court of appeals affirmed, holding that because the suit had not been filed by the property owner, the trial court lacked subject matter jurisdiction.”

The supreme court first discussed the differences between the doctrines of misidentification and misnomer. “Misnomer arises when a party misnames itself or another party, but the correct parties are [actually] involved” in the suit.³⁸ In contrast, misidentification “arises when two separate legal entities actually exist and a plaintiff mistakenly sues the entity with a name similar to that of the correct entity.”³⁹ The court noted that there are harsh consequences for misidentification but not for misnomer.⁴⁰ Instead, trial courts generally should allow plaintiffs to correct their pleadings when they have misnamed but sued the correct defendant.⁴¹ The supreme court held that in cases like this, where the plaintiff has misnamed itself, the rationale for flexibility that governs in the typical misnomer case “applies with even greater force.”⁴²

V. PLEADINGS

In *John C. Flood of DC, Inc. v. SuperMedia, LLC*,⁴³ the Dallas Court of Appeals analyzed the concepts of “standing” and “capacity.” In this case, the plaintiff filed suit for breach of contract and *quantum meruit* to collect amounts allegedly due for advertising services. The defendants filed a general denial and further asserted that the plaintiff lacked the capacity to sue and that the defendants were not liable in the capacity in which they were sued. However, the defendants did

37. *Reddy P’ship/5900 N. Fwy, LP v. Harris Cnty. Appraisal Dist.*, 370 S.W.3d 373 (Tex. 2012).

38. *Id.* at 376 (internal quotations omitted).

39. *Id.*

40. *Id.* (internal quotations omitted).

41. *Id.* at 377.

42. *Id.*

43. *John C. Flood of DC, Inc. v. SuperMedia, LLC*, 408 S.W.3d 645 (Tex. App.—Dallas 2013, pet. denied).

not verify their answer as required by Rule 93(1).⁴⁴ The plaintiff subsequently moved for summary judgment, and one hour prior to the hearing on plaintiff's motion, the defendants filed an amended answer that included a verified denial alleging that plaintiff lacked capacity to sue and that the defendants were not liable in the capacity in which they were sued. The trial court granted summary judgment and the defendants appealed.

On appeal, the defendants argued that the plaintiff had failed to establish it had standing because it was neither a direct party nor a third party beneficiary under the contract at issue. The court of appeals initially noted that the defendants had confused the concepts of standing and capacity.⁴⁵ "A plaintiff has *standing* when it is personally aggrieved, regardless of whether it is acting with legal authority; a party has *capacity* when it has the legal authority to act, regardless of whether it has a judicable interest in the controversy."⁴⁶ Unlike standing, a litigant can waive its claim that an opposing party does not have the capacity to participate in a suit.⁴⁷ Here, the issue was not whether the plaintiff had standing to bring the suit, but instead whether it could recover in the capacity in which it sued.

Based on the foregoing, the court then analyzed whether the defendants had waived their capacity argument because their verified denial was untimely. The court explained that it will generally presume the trial court granted leave to file a late pleading, even though the filer did not request leave, when: "(1) the record fails to show that the trial court did not consider the amended pleading; and (2) there is not a sufficient showing of surprise or prejudice on the part of the opposing party."⁴⁸ However, that presumption does not apply when the judgment does not affirmatively state that the trial court considered all the pleadings on file.⁴⁹ Here, because the final judgment stated that the trial court considered all the pleadings "timely filed," the court of appeals concluded that the amended answer was not considered and affirmed the summary judgment.⁵⁰

VI. DISCOVERY

Discovery sanctions continued to be a frequent topic in the case law during the Survey period. In *JNS Enterprise, Inc. v. Dixie Demolition, LLC*,⁵¹ for example, the Austin Court of Appeals upheld the imposition of death-penalty sanctions against plaintiffs who the trial court found had fabricated back-dated contracts and a performance guarantee that formed the basis of their claims, and then testified falsely about the documents in their depositions.⁵² The court of appeals

44. TEX. R. CIV. P. 93(1) (requiring that a pleading denying legal capacity be verified by affidavit).

45. *Flood*, 408 S.W.3d at 651.

46. *Id.* at 650 (emphasis original).

47. *Id.*

48. *Id.* at 654 (citing *Goswami v. Metro Sav. & Loan Ass'n*, 751 S.W.2d 487, 490 (Tex. 1988)).

49. *Id.*

50. *Id.* at 654-55.

51. *JNS Enter., Inc. v. Dixie Demolition, LLC*, 430 S.W.3d 444 (Tex. App.—Austin, no pet.).

52. *Id.* at 447.

quickly dispatched the plaintiffs' argument that the lack of a prior order compelling discovery or imposing lesser sanctions meant that imposition of death-penalty sanctions was impermissible. The court stated that the nature of the sanctionable conduct was such that it could not be corrected by a court order, and less severe orders could not effectively address or punish the conduct.⁵³ While the court correctly recognized that Texas law does not always require that lesser sanctions first be tested (only that they be considered)⁵⁴ the opinion's discussion of why such lesser sanctions could not have been effective is fairly superficial. Instead, the court's focus remained fixed on the particularly egregious nature of the misconduct involved. In effect, the court was saying that only this punishment fits the crime the plaintiffs committed.⁵⁵ Perhaps, not surprisingly, other courts have agreed that if anything justifies the immediate imposition of death-penalty sanctions, it is this type of fabrication of evidence and attempted corruption of the judicial process.⁵⁶

The Texarkana Court of Appeals shot down a novel attempt to rely on the "apex deposition" doctrine⁵⁷ in *In re Titus County*.⁵⁸ Titus County initiated an eminent domain proceeding to acquire property owned by a real estate company and William D. Priefert, individually and as trustee. Priefert was also the chief executive officer of the corporate defendant. When the County sought his deposition, Priefert invoked the apex doctrine and submitted an affidavit stating that he did not have personal or unique knowledge about the properties and arguing that the County should be required to first depose the company's chief financial officer. The court of appeals rejected Priefert's argument, explaining that the apex doctrine does not automatically protect high-ranking corporate officers in every case, but instead applies when they are noticed for deposition solely because of their corporate position.⁵⁹ In addition, the doctrine does not apply to preclude the deposition of a named party.⁶⁰ Therefore, even if Priefert could avail himself of the apex protection in his role as chief executive officer, he would still be subject to a deposition as one of the landowners and a party to the condemnation claim.⁶¹

53. *Id.* at 453.

54. *Id.* at 456.

55. *Id.* ("[T]he offensive conduct—i.e., fabricating the evidence necessary to support its claims—trumpets that [plaintiffs'] claims lack merit.").

56. *Id.* at 456–57 (citing *Daniel v. Kelley Oil Corp.*, 981 S.W.2d 230, 235 (Tex. App.—Houston [1st Dist.] 1998, pet. denied); *First Nat'l Bank of La. v. Lustig*, 96 F.3d 1554, 1573 (5th Cir. 1996)); see also *Gunn v. Fuqua*, 397 S.W.3d 358, 375 (Tex. App.—Dallas 2013, pet. denied) ("Death penalty' sanctions are appropriate as an initial sanction only in the egregious and exceptional case when they are 'clearly justified and it is fully apparent that no lesser sanctions would promote compliance with the rules.'") (quoting *GTE Commc'ns Sys. Corp. v. Tanner*, 856 S.W.2d 725, 729 (Tex. 1993)).

57. The term "apex" deposition refers to the deposition of a corporate party's president or similar high-ranking official. See *Crown Cent. Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 127 (Tex. 1995). To prevent such depositions from being used as a litigation tactic merely to harass a corporate defendant or apply settlement pressure, the Texas Supreme Court has developed guidelines for when and how such depositions may be taken. *Id.* at 128.

58. *In re Titus Cnty.*, 412 S.W.3d 28 (Tex. App.—Texarkana 2013, no pet.).

59. *Id.* at 35.

60. *Id.*

61. *Id.*

A request for a pre-suit deposition of the Comptroller of Public Accounts under Rule 202⁶² was at issue in *Combs v. The Texas Civil Rights Project*.⁶³ The Austin Court of Appeals rejected the Comptroller's argument that the Rule 202 petition was an independent suit that was barred by sovereign immunity.⁶⁴ The court went on to explain, however, that a pre-suit deposition cannot "be used solely to investigate potential claims that are otherwise barred by sovereign immunity."⁶⁵ Examining the plaintiffs' pleadings, the court of appeals concluded that although the alleged conduct by the Comptroller would fall within the ultra vires exception to sovereign immunity, such conduct would not support a claim for retrospective relief (such as damages), and the plaintiffs' pleadings and the Comptroller's evidence negated the possibility of an award of any type of prospective relief.⁶⁶ Accordingly, the court vacated the order granting the Rule 202 petition and dismissed the cause for lack of jurisdiction.⁶⁷

Finally, the Texas Supreme Court provided guidance on what it termed the "allied litigant" privilege in *In re XL Specialty Insurance Co.*⁶⁸ In this suit against a workers' compensation carrier, the injured employee sought discovery of communications that passed between the insured employer and the carrier's outside counsel during the administrative proceeding. The supreme court held that those communications were not privileged under Texas law.⁶⁹ The court explained that, unlike what is often called the "common interest" privilege, Texas Rule of Evidence 503(b)(1)(c)⁷⁰ protects only communications between a client (or her lawyer) and the lawyer for another party made in the context of a pending action.⁷¹ Although the privilege is potentially available to all parties to an action and not just defendants (hence the label "allied litigant" rather than "joint defense"), it does not extend to communications made in furtherance of joint or common interests outside of litigation.⁷²

In the case before it, the supreme court concluded that the allied litigant privilege did not apply because the employer was neither represented by the insurer's attorney nor a party to the action.⁷³ The opinion recognizes, however, that the workers' compensation scenario is unusual because suit is brought directly against the insurer and not the insured employer.⁷⁴ The supreme court noted that the result may well be different in the more typical situation where an insurer-retained counsel represents the insured in litigation and also communicates with the insurer that pays the bills.⁷⁵ In the latter situation, the

62. TEX. R. CIV. P. 202.

63. *Combs v. The Tex. Civil Rights Project*, 410 S.W.3d 529 (Tex. App.—Austin 2013, pet. denied).

64. *Id.* at 534.

65. *Id.* at 535 (citations omitted).

66. *Id.* at 537–38.

67. *Id.* at 538–49.

68. *In re XL Specialty Ins. Co.*, 373 S.W.3d 46 (Tex. 2012).

69. *Id.* at 56.

70. TEX. R. EVID. 503(b)(1)(c).

71. *XL Specialty*, 373 S.W.3d at 51–52.

72. *Id.* at 52.

73. *Id.* at 53.

74. *Id.* at 54.

75. *Id.*

retained lawyer might be found to represent both the insurer and the insured,⁷⁶ or the insurer might be deemed a “representative” of the insured client within the meaning of Rule 503 based on its right to retain counsel and control the litigation.⁷⁷

VII. DISMISSAL

The Texas Supreme Court in *CTL/Thompson Texas, LLC v. Starwood Homeowner’s Association, Inc.*⁷⁸ held that a plaintiff’s nonsuit during an appeal of an action under Texas Civil Practices & Remedies Code § 150.002(f)⁷⁹ would not moot the defendant’s appeal of the trial court’s refusal to dismiss that action with prejudice.⁸⁰ Suits for professional negligence against licensed engineers or architects must be accompanied by an expert’s affidavit opining as to the claim’s merits.⁸¹ If a plaintiff fails to comply with this requirement, the trial court must dismiss the action, but that dismissal may be with or without prejudice.⁸² Here, after the plaintiff filed its suit, the defendant moved to dismiss, claiming that the plaintiff’s supporting affidavit was deficient. The trial court denied the motion, and the defendant filed an interlocutory appeal. Before the court of appeals could rule, the plaintiff nonsuited the action. The appellate court then dismissed the appeal as moot. The supreme court reversed, however, holding that the defendant’s request for a dismissal with prejudice constituted a request for affirmative relief that should survive the nonsuit, just as a defendant’s request for sanctions survives a nonsuit.⁸³

In *Roberts v. Wells Fargo Bank, N.A.*,⁸⁴ the trial court sent a letter to counsel advising it had granted a motion for partial summary judgment and requesting that an order be prepared reflecting that ruling. The plaintiff then nonsuited the case before the court actually signed an order. The El Paso Court of Appeals held that this nonsuit did not preclude the trial court from subsequently entering an order dismissing the plaintiff’s claims with prejudice.⁸⁵ While a plaintiff has an absolute right of nonsuit under Rule 162⁸⁶ prior to the introduction of his evidence at trial, the act of signing a judgment that the trial court had already rendered was merely administrative; thus, the plaintiff’s nonsuit could not preclude the trial court from effectuating its order.⁸⁷

76. *Id.* at 54–55. The supreme court reaffirmed that whether the insurer and the insured are joint clients of the lawyer is a matter of contract between the parties. *Id.* at 55 (citing *Unauthorized Practice of Law Comm. v. Am. Home Assurance Co.*, 261 S.W.3d 24, 42 (Tex. 2008)).

77. *Id.* at 55 (citing TEX. R. EVID. 503(a)(2)).

78. *CTL/Thompson Tex., LLC v. Starwood Homeowner’s Ass’n, Inc.*, 390 S.W.3d 299 (Tex. 2013).

79. TEX. CIV. PRAC. & REM. CODE § 150.002(f).

80. *CTL/Thompson*, 390 S.W.3d at 300.

81. TEX. CIV. PRAC. & REM. CODE § 150.002(a).

82. *Id.* § 150.002(e).

83. *CTL/Thompson*, 390 S.W.3d at 300–01.

84. *Roberts v. Wells Fargo Bank, N.A.*, 406 S.W.3d 702 (Tex. App.—El Paso 2013, no pet.).

85. *Id.* at 706.

86. TEX. R. CIV. P. 162.

87. *Roberts*, 406 S.W.3d at 706.

VIII. JURY PRACTICE

In *In re Frank Kent Motor Co.*, the Texas Supreme Court conditionally granted a writ of mandamus to enforce a jury waiver in the employment context.⁸⁸ The supreme court held that the employer's alleged threat to terminate an at-will employee for not signing a jury waiver did not constitute coercion and would not, therefore, invalidate the waiver.⁸⁹ The court reasoned that because the employer had the right to terminate the employee at any time, the actual or threatened exercise of that legitimate right would not void the waiver.⁹⁰ Analogizing to employment arbitration agreements, which courts have held may also be enforced in the at-will context, the supreme court found no reason to treat jury waivers differently.⁹¹

In *BNSF Railway Co. v. Wipff*, the Fort Worth Court of Appeals addressed whether a trial court erred in denying a request to shuffle a jury panel that was made after the jurors had completed a questionnaire "under penalty of perjury."⁹² Although the trial court had denied the defendant's request to shuffle the panel as untimely because counsel had already received and reviewed the questionnaire, the court of appeals rejected that conclusion because the trial court had not yet delivered the instructions to the jury as required under Rule 226a.⁹³ The appellate court then determined that the trial court's failure to shuffle the jury was both presumed and proved harmful, as the defendant showed that it had seated two objectionable jurors that it would have otherwise struck had it not already used its other peremptory strikes.⁹⁴

IX. JUDGMENTS

Dueling judgments regarding the same real property were the subject of the Texas Supreme Court's ruling in *Texas Department of Transportation v. A.P.I. Pipe and Supply, LLC*.⁹⁵ In a condemnation action, the trial court originally entered judgment in 2003 that gave the City of Edinburg fee-simple title in certain land, subject to a drainage easement in favor of the Department of Transportation, and awarded the landowner compensation. The following year, the trial court entered a *nunc pro tunc* judgment pursuant to Rule 306a(6)⁹⁶ that "purported to render the [original] 2003 judgment 'null and void.'"⁹⁷ In the second judgment, the City only received an easement, not fee-simple title. The original property owner then purported to sell the property to a third party pursuant to the second judgment. But the supreme court held that the second *nunc pro tunc* judgment was void because it went far beyond simply correcting clerical errors in

88. *In re Frank Kent Motor Co.*, 361 S.W.3d 628, 632–33 (Tex., cert. denied, 133 S. Ct. 167 (2012)).

89. *Id.* at 631.

90. *Id.* at 632.

91. *Id.* at 631–32.

92. *BNSF Ry. Co. v. Wipff*, 408 S.W.3d 662, 664–66 (Tex. App.—Fort Worth 2013, no pet.)

93. *Id.* at 647–68; TEX. R. CIV. P. 226a.

94. *BNSF*, 408 S.W.3d at 668–69.

95. *Tex. Dep't of Transp. v. A.P.I. Pipe & Supply, LLC*, 397 S.W.3d 162, 165 (Tex. 2012).

96. TEX. R. CIV. P. 306a(6).

97. *A.P.I.*, 397 S.W.3d at 165.

the original judgment.⁹⁸ Therefore, any transfer of title based upon the second judgment was also invalid.⁹⁹

In two cases during the Survey period, the Texas Supreme Court went to great lengths to overturn default judgments that were attacked through a bill of review. In *Mabon Ltd. v. Afri-Carib Enterprises, Inc.*,¹⁰⁰ the plaintiff filed suit alleging breach of contract. The defendant hired counsel who filed an answer and a special appearance. While the clerk sent notice of the trial setting to defendant's counsel, the defendant did not receive such notice either directly or from its counsel. The attorney neither appeared for trial nor challenged the approximately \$1.4 million post-answer default judgment entered against the defendant. In response to collection efforts to enforce the judgment, the defendant immediately hired new counsel who filed an unsuccessful restricted appeal.¹⁰¹ The supreme court allowed the bill of review, finding that the defendant had no actual notice of the trial setting or the default judgment entered against it.¹⁰² As the court noted, "we have never held that a party must show that it diligently monitored the case status, especially after a party hires an attorney to represent it."¹⁰³ In short, the court seemed unwilling to penalize the defendant for the negligence of its first counsel where it demonstrated its diligence immediately upon learning of the judgment.

Similarly, in *PNS Stores, Inc. v. Rivera*, the supreme court granted a bill of review challenging a default judgment that had been entered nine years earlier, finding that there was some evidence of extrinsic fraud that tolled the applicable four-year limitations period.¹⁰⁴ In this dispute, the plaintiff first sued the defendant in a slip-and-fall case in state court in 1998. After the defendant removed the case to federal court, the federal court granted summary judgment for the defendant in 2000, but it dismissed the case without prejudice. Three months later (after limitations had run), the plaintiff filed a second suit regarding the same incident and served the defendant through its registered agent without notifying its counsel. The trial court then entered a default judgment against the defendant for approximately \$1.5 million. The plaintiff waited six years to abstract the judgment and then another three years to attempt execution. By that time, the judgment was worth over \$3.5 million dollars. Obviously suspicious of the lengthy delay, the supreme court found some evidence of extrinsic fraud where the plaintiff's counsel knew, but failed to provide the clerk with, the defendant's last known address, which meant the defendant did not receive notice of the default judgment.¹⁰⁵ This, the court reasoned, was sufficient to raise a fact issue on the limitations defense.¹⁰⁶

Finally, in *Phillips v. Bramlett*, the Texas Supreme Court held that "where an appellate court remands a case to the trial court for entry of judgment consistent

98. *Id.* at 166-68.

99. *Id.* at 168.

100. *Mabon Ltd. v. Afri-Carib Enter., Inc.*, 369 S.W.3d 809, 810 (Tex. 2012).

101. *Id.* at 811.

102. *Id.* at 813.

103. *Id.*

104. *PNS Stores, Inc. v. Rivera*, 379 S.W.3d 267, 275 (Tex. 2012).

105. *Id.*

106. *Id.* at 277.

with [its] opinion, and the trial court is not required to admit new or additional evidence to enter that judgment,” post-judgment interest should accrue from the date of the original judgment rather than from the date of the new judgment.¹⁰⁷

X. MOTIONS FOR NEW TRIAL

In *In re Columbia Medical Center of Las Colinas*, the Texas Supreme Court announced the rule that when a trial court grants a motion for new trial, it must articulate a reasonably specific basis for doing so beyond being “in the interests of justice and fairness.”¹⁰⁸ In two opinions during the Survey period, the high court expounded on that ruling and highlighted the challenges that trial judges often face in adjudicating motions for new trials. First, in *In re United Scaffolding, Inc.*, the supreme court held that a trial court did not satisfy *Columbia Medical Center’s* edict when it granted a new trial based upon several grounds, the last of which was “in the interests of justice and fairness,” with each of the listed grounds separated by the phrase “and/or.”¹⁰⁹ This phrase, the supreme court reasoned, left open the possibility that “in the interests of justice and fairness” could have been the only ground for granting a new trial, which would not be proper under *Columbia Medical Center*.¹¹⁰

Second, in *In re Toyota Motor Sales, U.S.A.*, the supreme court held that even where the trial court has properly articulated its ground for granting a new trial, an appellate court may nonetheless conduct its own independent review of the merits of that decision.¹¹¹ In this wrongful death case, the plaintiff’s counsel inadvertently introduced certain evidence at trial that it had sought to exclude by a motion in limine. Thereafter, the defendant’s counsel referenced that evidence during both witness examinations and closing argument, correctly noting that the plaintiff’s counsel had already placed the evidence before the jury. The trial court granted a new trial, claiming that the defendant’s counsel had violated a limine order and referenced evidence outside the record. The supreme court held that while great deference is given to the trial court’s judgment, the record did not support this stated basis for granting a new trial, and it therefore granted mandamus relief.¹¹²

Writing on the first element of the *Craddock*¹¹³ test for setting aside default judgments—i.e., “that the defendants’ failure to answer was neither intentional nor the result of conscious indifference”—the Texas Supreme Court reversed a \$1.8 million default judgment in *Milestone Operating, Inc. v. ExxonMobil Corp.*¹¹⁴ The defendant’s representative in that case testified that he did not recall being

107. *Phillips v. Bramlett*, 407 S.W.3d 229, 239 (Tex. 2013).

108. *In re Columbia Med. Ctr. of Las Colinas*, 290 S.W.3d 204, 206 (Tex. 2009).

109. *In re United Scaffolding, Inc.*, 377 S.W.3d 685, 687–89 (Tex. 2012).

110. *Id.* at 689. Beyond the specific holding in the case before it, the supreme court also added its voice to those courts and commentators who have sharply criticized the use of “and/or” in any legal writing. *Id.* at 689 and n.3.

111. *In re Toyota Motor Sales, U.S.A.*, 407 S.W.3d 746, 758 (Tex. 2013).

112. *Id.* at 758–59.

113. *Craddock v. Sunshine Bus Lines, Inc.*, 134 Tex. 388, 133 S.W.2d 124 (1939).

114. *Milestone Operating, Inc. v. ExxonMobil Corp.*, 388 S.W.3d 307, 308–09 (Tex. 2012) (per curiam).

served or turning the petition over to legal counsel, as was the normal practice. Although plaintiff presented evidence from a witness who saw the process server hand-deliver service of process to the defendant's representative, the court noted that the plaintiff had not controverted the representative's testimony (nor could it have) that he could not recall receiving the pleadings. Likewise, plaintiff had not controverted the representative's testimony detailing the normal procedure he observed of turning the suit over to its counsel when the company was served. Therefore, the court found that the defendant had not acted intentionally or with conscious indifference toward the suit and remanded the case for a trial on the merits.¹¹⁵

In *Sutherland v. Spencer*, the Texas Supreme Court overturned a default judgment even where both defendants acknowledged having been served but simply forgot to answer.¹¹⁶ The plaintiff did not (and likely could not) controvert the defendants' excuse that they did not answer the suit because they left the citations in a stack of papers on a desk at their office and were away because of bad weather and the Christmas holiday season. The majority held that this excuse was sufficient to prove that the defendants had not acted intentionally or with conscious indifference.¹¹⁷ This holding prompted a lengthy dissent that "I forgot" is not an acceptable excuse for late tax returns or missing homework assignments and should not satisfy the standard for new trial motions either.¹¹⁸

XI. DISQUALIFICATION OF JUDGES

Although it arose in a criminal context, the discussion in *Youkers v. State*¹¹⁹ regarding a judge's use of social media should be of interest to civil trial practitioners as well. In this case of first impression, the Dallas Court of Appeals addressed whether a trial judge's status as Facebook "friends" with a litigant should constitute a ground for recusal. The court of appeals noted that no rule or canon of ethics prohibits a judge's use of social media, and that "judges do not 'forfeit [their] right to associate with [their] friends and acquaintances nor [are they] condemned to live the life of a hermit.'"¹²⁰ Just as a judge is not automatically required to recuse because she has a business relationship or casual friendship with a party, the mere designation of someone as a Facebook "friend" is insufficient to reasonably question the judge's impartiality.¹²¹ This is a subject that will undoubtedly continue to arise in the recusal context, and the court of appeals' approach in *Youkers* provides a sensible framework for evaluating such motions.

115. *Id.* at 310.

116. *Sutherland v. Spencer*, 376 S.W.3d 752, 755-56 (Tex. 2012).

117. *Id.* at 755.

118. *Id.* at 756 (Jefferson, C.J., dissenting).

119. *Youkers v. State*, 400 S.W.3d 200, 205 (Tex. App.—Dallas 2013, pet. ref'd).

120. *Id.* at 205 (quoting Comm. on Jud. Ethics, State Board Tex. Op. 39 (1978)). The court also noted that because Texas has an elected judiciary, judges use the internet and social media for campaigning and fundraising. *Id.*

121. *Id.* at 206.

XII. DISQUALIFICATION OF COUNSEL

*In re Texas Windstorm Insurance Association*¹²² involved an unusual scenario in which the City of Santa Fe and its attorney sought to disqualify the opposing counsel because he had previously represented the city's attorney but not the city itself. The City, represented by Craig Eiland, sued the Texas Windstorm Insurance Association (TWIA) for failure to properly pay overhead and profit on a Hurricane Ike claim. TWIA hired Chris Martin to defend the suit. Some twenty months before, however, Martin had consulted with and advised Eiland in connection with a similar claim against TWIA that Eiland was handling for Galveston County. Indeed, Eiland testified that he had sought out Martin's expertise with respect to the overhead and profit issue in particular. The City and Eiland filed motions to disqualify Martin, which the trial court granted.¹²³ A divided First District Court of Appeals disagreed that sufficient ground for disqualification had been established, however, and conditionally granted mandamus relief.¹²⁴

Although the evidence was disputed, the trial court found as a factual matter that Martin had a prior attorney-client relationship with Eiland, and the court of appeals was required to accept that finding for purposes of mandamus review.¹²⁵ Nevertheless, the majority held that Martin's representation of TWIA did not violate the disciplinary rule governing former-client conflicts of interest.¹²⁶ The majority emphasized that Martin's former client was not the City but Eiland, who was not a party to the case before it.¹²⁷ Although the court recognized that the person seeking disqualification does not necessarily have to be a party-opponent, there must still be a level of adversity between him and his former lawyer that justifies the presumption that the lawyer's current representation posed a risk of unfair prejudice to the movant.¹²⁸ In concluding that was not the case, the court observed that Eiland had, in his prior representation of Galveston County, already disclosed to TWIA the substance of the arguments about overhead and profit that Martin had suggested to him.¹²⁹ In sum, the majority found that the only real "risk to Eiland is that opposing counsel will be vigorously advancing arguments against his clients in these cases, which is a situation in every adversarial lawsuit and is not the concern of Rule 1.09."¹³⁰

The majority also concluded that the two matters were not substantially related, even accepting the trial court's factual finding that Martin had obtained

122. *In re Texas Windstorm Ins. Ass'n*, 417 S.W.3d 119 (Tex. App.—Houston [1st Dist.] 2013, orig. proceeding).

123. *Id.* at 125.

124. *Id.* at 140.

125. *Id.* at 136.

126. *Id.* at 130–32. Rule 1.09(a) prohibits a lawyer "who personally has formerly represented a client in a matter" from thereafter representing "another person in a matter adverse to the former client: . . . (2) if the representation in reasonable probability will involve a violation of Rule 1.05; or (3) if it is the same or a substantially related matter." TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.09(a), reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (West 2009) (Tex. State Bar R. art. X, § 9).

127. *TWIA*, 417 S.W.3d at 130.

128. *Id.*

129. *Id.* at 131.

130. *Id.* at 132.

confidential information about Eiland's handling of Hurricane Ike cases through his prior representation.¹³¹ Specifically, the opinion notes again that Eiland himself was not asserting a claim against TWIA, and there was no evidence that the "lawyer-to-lawyer consultation" was specifically related to the City's claims against TWIA.¹³² And even though the two matters had issues in common, such as the overhead and profit issue and the substantive claim, that did not compel disqualification in the absence of evidence that the underlying facts were sufficiently similar.¹³³

In a lengthy dissent, Justice Terry Jennings took the majority to task for substituting its factual determinations for those of the trial judge who heard all of the evidence over the course of a five-day hearing.¹³⁴ The dissent argued that whether matters are substantially related is a "fact-intensive inquiry of whether 'a lawyer *could have* acquired confidential information concerning a prior client that *could be* used either to that prior client's disadvantage or for the advantage of the lawyer's current client or some other person.'" ¹³⁵ Given the trial judge's finding, which was supported by competent evidence, that Martin had in fact obtained confidential information about Eiland's negotiation and litigation strategies for these claims, the dissent reasonably questioned how the majority could find an abuse of discretion.¹³⁶ Rather than strictly adhering to the standards for mandamus review, therefore, it appears the majority was trying to erect a bulwark against a wave of future disqualification motions based on these types of lawyer-to-lawyer consultations.¹³⁷

XIII. MISCELLANEOUS

In *In re Service Corp. International*,¹³⁸ the Texas Supreme Court had the opportunity to determine when it is appropriate for a trial court to appoint an arbitrator. After the defendant answered and asserted that the dispute was subject to a mandatory arbitration agreement, the parties were unable to agree on an arbitrator. The plaintiff asked the court to appoint an arbitrator, claiming that the defendant had waived its right to seek an appointment by the American Arbitration Association (AAA). The trial court agreed and selected an arbitrator. The defendant then filed a petition for writ of mandamus.

The parties agreed that the dispute was governed by Section 5 of the Federal Arbitration Act, which provides that the court shall designate the arbitrator if any party fails to avail itself of a contractually agreed-upon method for selecting an arbitrator.¹³⁹ In this case, the arbitration contract provided: "[T]he arbitrator

131. *Id.* at 135.

132. *Id.* at 136.

133. *Id.* at 136-37.

134. *Id.* at 147-48 (Jennings, J. dissenting).

135. *Id.* at 149-50 (quoting TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.09(a) cmt. 4B) (emphasis added by Justice Jennings).

136. *Id.* at 149-50.

137. Indeed, Justice Jennings' dissent was sympathetic, noting that he too might have reached the same conclusion if he was sitting as the factfinder. *Id.* at 141.

138. *In re Serv. Corp. Int'l*, 355 S.W.3d 655 (Tex. 2011) (per curiam).

139. *Id.* at 658-59; 9 U.S.C. § 5.

shall be selected by mutual agreement of the parties. If the parties fail to or are unable to agree on the selection of an appropriate arbitrator, the AAA shall select the arbitrator pursuant to its rules and procedures upon the application of one or both parties.”¹⁴⁰

The arbitration agreement therefore set forth only two ways for the parties to select an arbitrator: (1) mutual agreement; or (2) if the parties cannot agree, the AAA selects the arbitrator. Thus, the supreme court analyzed whether one or both of the parties “failed to avail” itself of the agreed-upon arbitrator selection method or if there was a “lapse” in the selection of an arbitrator. The supreme court held that these exceptions in Section 5 should only be invoked by the trial court when there is some “mechanical breakdown in the arbitrator selection process” or if “one of the parties refuses to comply, thereby delaying arbitration indefinitely.”¹⁴¹ In this case, the court found that a seven month delay did not qualify as either a lapse or failure to avail because it included the period in which the parties tried to reach agreement and did in fact agree on an arbitrator, “only to have him recused” because of a conflict of interest.¹⁴² The trial court selected an arbitrator only one month after the agreed-upon arbitrator had been disqualified. Under these circumstances, the court determined that the trial court had abused its discretion in not allowing the AAA the opportunity to select the arbitrator.¹⁴³

In *Ellman v. JC General Contractors*,¹⁴⁴ the El Paso Court of Appeals found that the defendants had substantially invoked the judicial process so as to waive their right to arbitration. In January 2009, the plaintiff filed its original petition. A few days later, the defendants answered, raising special exceptions and affirmative defenses, and asserted counterclaims for breach of contract, fraud, breach of warranty, and declaratory judgment. The parties engaged in extensive discovery, and the trial court set the case for trial on July 12, 2010. On June 7, 2010, the parties filed a joint motion for continuance on the ground they would not be ready for trial and needed to conduct additional discovery. The trial court granted the joint motion for continuance, and for the next eight months, the parties engaged in additional discovery. In February 2011, the trial court entered an order setting a pretrial conference on December 14, 2011, and a jury trial on January 23, 2012. The trial court also ordered the parties to mediation. The parties continued to engage in discovery and the defendants prepared and filed pretrial materials. Finally, “on October 11, 2011, thirty-five months after filing suit, and approximately three and one-half months before the trial setting,” defendants asserted a demand for arbitration.¹⁴⁵ After making this demand, however, defendants continued to take depositions and filed a motion to compel discovery in addition to their motion to compel arbitration.

The court of appeals first noted that the plaintiff faced a very high burden to

140. *Serv. Corp.*, 355 S.W.3d at 659.

141. *Id.*

142. *Id.* at 660.

143. *Id.* at 661.

144. *Ellman v. JC Gen. Contractors*, 419 S.W.3d 516, 521-22 (Tex. App.—El Paso 2013, no pet.)

145. *Id.* at 519.

demonstrate that the defendants had substantially invoked the judicial process to the plaintiff's prejudice. The court then reviewed several cases where, despite significant litigation activity, the Texas courts found no waiver of a party's right to arbitration.¹⁴⁶ In this case, however, the court found that the defendant had substantially invoked the judicial process and waived its right to arbitration because of the considerable delay, expense, and damage to the plaintiff's legal position.¹⁴⁷ Moreover, the court found that the plaintiff had been prejudiced because it had revealed its entire legal strategy during the pendency of the litigation.¹⁴⁸

146. *Id.* at 521 (citing *Walker v. J.C. Bradford & Co.*, 938 F.2d 575, 578 (5th Cir. 1991); *Tenneco Resins, Inc. v. Davy Int'l*, 770 F.2d 416, 420-21 (5th Cir. 1985); *Gen. Guar. Ins. Co. v. New Orleans Gen. Agency, Inc.*, 427 F.2d 924, 928-29 (5th Cir. 1970)).

147. *Id.* at 522.

148. *Id.*