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CIVIL PROCEDURE: PRE-TRIAL & TRIAL

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I. INTRODUCTION

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

II. SUBJECT MATTER JURISDICTION

The Texas Supreme Court issued several opinions relating to subject matter jurisdiction. In *Wasson Interests, Ltd. v. City of Jacksonville*, the Texas Supreme Court addressed whether the common law distinction between governmental and proprietary acts applies to a breach of contract claim.¹ This case involved a lease entered into by the City of Jacksonville and the Wassons, which required the leased property be used for residential purposes only.² When the City served an eviction notice for failure to abide by the lease, the Wassons sued for breach of contract. The trial court granted summary judgment for the City, and the Tyler Court of Appeals affirmed based on governmental immunity.³ Specifically, the court of appeals found that immunity was the “default position,” and it had not been waived by the City.⁴ The Wassons appealed to the supreme court.

The supreme court recognized that prior to its decision in *Tooke v. City of Mexia*,⁵ it was generally assumed that the governmental and proprietary acts distinction applied in the contract context.⁶ However, because of some language in the *Tooke* decision, several courts of appeals concluded that the distinction did not apply to contract claims.⁷ Before beginning its

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1. *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 429–30 (Tex. 2016).

2. *Id.* at 430.

3. *Id.* at 431.

4. *Id.*

5. 197 S.W.3d 325 (Tex. 2006).

6. *Wasson Interests*, 489 S.W.3d at 436 & n.9.

7. *Id.* at 435 n.8.

analysis, therefore, the supreme court made clear that it had not reached that issue in *Tooke*, such that courts' reliance on the *Tooke* language was misplaced.⁸ The supreme court proceeded to exhaustively analyze the issue using a two-step process, concluding that the proprietary-governmental dichotomy should apply in the contract context just as it does in the tort context.⁹ The supreme court therefore held that the City did not have immunity, as entering into the lease was a proprietary act, and remanded to the court of appeals for review of the City's alternative grounds for summary judgment.¹⁰

In *McIntyre v. El Paso Independent School District*,¹¹ the Texas Supreme Court addressed when a school district could be sued without the claimant having exhausted administrative remedies provided for in the Education Code. The plaintiffs in the trial court homeschooled their children and "refused to sign a homeschool verification form provided by El Paso Independent School District."¹² They were subsequently "criminally charged with contributing to truancy," and plaintiffs alleged that the charges were in retaliation for their refusal to sign the verification form.¹³ The plaintiffs sued the district and various officers for allegedly violating plaintiffs' constitutional rights.¹⁴ The defendants "filed pleas to the jurisdiction, special exceptions, and motions to dismiss," which the trial court denied.¹⁵ The defendants then filed an interlocutory appeal, arguing, among other things, that the plaintiffs had failed to exhaust administrative remedies. The El Paso Court of Appeals agreed with the defendants, and the plaintiffs sought review in the supreme court.

The supreme court noted that the Education Code granted the Commissioner of Education the exclusive authority to address certain education-related disputes and required the exhaustion of administrative remedies before Texas courts had jurisdiction over those matters.¹⁶ The supreme court found, however, that not every dispute arising in an education context is within the scope of the Commissioner's exclusive authority, such that whether a plaintiff was required to exhaust administrative remedies depends on the claim asserted rather than the identity of the defendant.¹⁷ For the exhaustion requirement to apply, the supreme court held that the claim must be based on either the school laws themselves or a school board's violation of the school laws.¹⁸ Finding plaintiffs' alleged constitutional violations were not based on school laws, the supreme

8. *Id.* at 434 & n.7.

9. *Id.* at 439.

10. *Id.*

11. 499 S.W.3d 820, 821 (Tex. 2016).

12. *Id.* at 822.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 823 (citing TEX. EDUC. CODE ANN. § 7.057(a) (West 2012); *Clint Indep. Sch. Dist. v. Marquez*, 487 S.W.3d 538, 544–45 (Tex. 2016)).

17. *Id.* at 825.

18. *Id.* at 826.

court held plaintiffs were not required to exhaust administrative remedies and dismissal of their claims was therefore improper.¹⁹

In a mandamus proceeding, the Texas Supreme Court held that a potential claim must be ripe for a court to have jurisdiction to allow pre-suit discovery under Rule 202 of the Texas Rules of Civil Procedure.²⁰ The supreme court noted that while Rule 202 allows pre-suit discovery regarding an anticipated action and potential claims, a claim means an existing right, not a speculative or future right, and an action means a suit over which the trial court would currently have jurisdiction.²¹ Because the claim on which discovery was sought was not ripe, it did not support subject matter jurisdiction, and discovery under Rule 202 was not permitted.²²

The Waco Court of Appeals likewise held that pre-suit discovery under Rule 202 cannot be granted if the claim sought to be investigated would be barred by sovereign or governmental immunity.²³ The court agreed with several other appellate courts that Rule 202 does not waive sovereign immunity, and to the extent a proposed claim would be barred by sovereign immunity, it was an abuse of discretion to grant Rule 202 discovery.²⁴

III. SPECIAL APPEARANCE

For the first time, the Texas Supreme Court evaluated whether an allegedly defamatory television broadcast that could be received in Texas, but did not originate in Texas, was sufficient to show that non-resident defendants purposefully availed themselves of the benefits of conducting activities in Texas to support personal jurisdiction.²⁵ In *TV Azteca v. Ruiz*, a Mexican recording artist, who was a current Texas resident, sued two Mexican broadcasters and a Mexican news anchor for defamation after they aired a report from Mexico asserting that the recording artist had criminally lured underage girls into sexual relationships with her manager in the 1990s.²⁶ The non-resident broadcasters and news anchor filed special appearances, arguing that the mere fact the broadcast had traveled into Texas was insufficient to support jurisdiction over them.²⁷ The supreme court agreed with respect to the news anchor, but held that under the circumstances, Texas courts could exercise specific jurisdiction

19. *Id.* at 827–29.

20. *In re DePinho*, 505 S.W.3d 621, 622 (Tex. 2016) (per curiam) (orig. proceeding).

21. *See id.* at 623–24 (citing *Claim*, BLACK'S LAW DICTIONARY (10th ed. 2014); *Suit*, BLACK'S LAW DICTIONARY (10th ed. 2014)).

22. *Id.* at 625.

23. *Vestal v. Pistikopoulos*, No. 10-16-00034-CV, 2016 WL 4045081, at *3, *5 (Tex. App.—Waco July 27, 2016, orig. proceeding) (mem. op.).

24. *See id.* at *3.

25. *TV Azteca v. Ruiz*, 490 S.W.3d 29, 46 (Tex. 2016), *cert. denied*, No. 16-481, 2017 WL 2722433 (U.S. June 26, 2017).

26. *Id.* at 35–36.

27. *Id.* at 35, 44.

over the broadcasters.²⁸ The supreme court reasoned that the recording artist submitted evidence demonstrating that the broadcasters “intentionally targeted Texas through their broadcasts” by promoting the broadcast in Texas to increase their Texas audience and substantially benefited from the broadcast in Texas by selling advertising to Texas businesses.²⁹ The supreme court found that the broadcasters’ conduct went beyond merely transmitting from Mexico and that such conduct showed the broadcasters’ intent to serve the Texas market and therefore purposefully avail themselves of the benefits of conducting activities in Texas.³⁰ The supreme court further held that the broadcasters’ acts targeted at the Texas market allegedly caused injury to the recording artist in Texas such that a Texas court’s exercise of specific personal jurisdiction over them was appropriate.³¹

The permissible scope of jurisdictional discovery under Rule 120a of the Texas Rules of Civil Procedure was at issue in *In re Federal Corp.*³² The Corpus Christi Court of Appeals granted a Taiwanese relator mandamus relief from part of a trial court’s order requiring it to respond to hundreds of Rule 120a discovery requests propounded by a plaintiff injured in an automobile accident allegedly caused by a faulty tire that was designed, manufactured, and shipped by the relator.³³ The court of appeals instructed the trial court to vacate that part of its order, finding the Rule 120a requests that sought information about the relator’s activities in states other than Texas were overbroad and could have been more narrowly tailored.³⁴ The appellate court refused, however, to grant mandamus relief on the requests seeking information about the relator’s compliance with U.S. laws and regulations, reasoning that such requests were as tailored as possible and could demonstrate that the relator “sought to purposefully serve the American market [] in some way.”³⁵

IV. SERVICE OF PROCESS

During the Survey period, several courts addressed whether a plaintiff exercised diligence in effecting service of process to determine if the service date should relate back to the filing of the petition when the petition preceded the expiration of the applicable limitations period but service was not achieved until afterwards. In *Shaw v. Lynch*,³⁶ the First Houston Court of Appeals held that a four-week delay between receipt of a citation and service did not demonstrate a failure to exercise diligence as a

28. *Id.* at 34–35; 56.

29. *Id.* at 49–50; 56.

30. *Id.* at 49–50.

31. *Id.* at 54–55.

32. No. 13-16-00219-CV, 2016 WL 6519110, at *1 (Tex. App.—Corpus Christi Nov. 1, 2016, orig. proceeding) (mem. op.).

33. *Id.* at *1, *9.

34. *Id.* at *5.

35. *Id.* at *6.

36. No. 01-15-00040-CV, 2016 WL 1388986, at *4 (Tex. App.—Houston [1st Dist.] Apr. 7, 2016, no pet.) (mem. op.).

matter of law because an “ordinary, prudent attorney may not suspect a problem [with service] until an answer is not filed” by the expected answer date.³⁷ The court of appeals reasoned that delays in cases in which lack of diligence had been found as a matter of law were “significantly longer . . . than four weeks.”³⁸ Further, the appellate court found a fact issue existed because plaintiff’s counsel testified that “four Mondays” after the citations issued, he took steps to investigate whether service had been effected; and realizing it had not, he asked the process server to locate and serve the defendant “as expeditiously as possible” such that summary judgment in favor of the defendant on limitations grounds was unwarranted.³⁹

Delay in service was also addressed in *Zamora v. Tarrant County Hospital District*,⁴⁰ where the El Paso Court of Appeals considered how many “business days” elapsed when assessing whether a plaintiff exercised diligence in serving a defendant during the holidays.⁴¹ The appellate court reversed the trial court’s grant of summary judgment to a defendant on limitations, finding a fact issue existed as to the plaintiff’s diligence when the plaintiff’s attorney admitted that the citation, although received in the mail, “got lost in the shuffle at his office in the days leading up to his Christmas vacation,” and therefore was not served for twenty-eight days.⁴² The court of appeals calculated that “[e]xcluding weekends, Christmas Eve, Christmas Day, New Year’s Eve, and New Year’s Day, the total delay period between receipt of citation from the district clerk and [the plaintiff’s] counsel was nine business days,” and held the nine-business-day delay was insufficient to establish plaintiff’s lack of diligence as a matter of law.⁴³

On the other end of the spectrum, the Fort Worth Court of Appeals affirmed a trial court’s grant of summary judgment in favor of defendants who were served over nine months after the filing of the petition in *Washko v. Simon Property Group, Inc.*⁴⁴ In this case, the delay resulted from the plaintiff’s failure to pay the required fee for a service copy of the citations. Plaintiff’s counsel did not realize this error until eight months later during a “case review” in which counsel noticed that defendants had not answered.⁴⁵ The appellate court found that, without evidence explaining the months-long delay between the time the answers would have been due and the time the error was discovered, the nine-month delay demon-

37. *Id.* at *4–5 (quoting *Keeton v. Carrasco*, 53 S.W.3d 13, 20 (Tex. App.—San Antonio 2001, pet. denied)).

38. *Id.* at *4.

39. *Id.*

40. 510 S.W.3d 584 (Tex. App.—El Paso 2016, pet. denied).

41. *Id.* at 591–92.

42. *Id.* at 586–87, 591.

43. *Id.* at 591–92.

44. No. 02-15-00257-CV, 2016 WL 3027544, at *1 (Tex. App.—Fort Worth May 26, 2016, no pet.) (mem. op.).

45. *Id.*

strated the plaintiff's lack of diligence as a matter of law.⁴⁶

V. VENUE

The Texas Supreme Court addressed several venue-related issues during the Survey period. In *In re J.B. Hunt Transport, Inc.*, the supreme court clarified the standards for lower courts to determine the proper resolution of venue disputes based on dominant jurisdiction.⁴⁷ The underlying case involved an accident between a truck and a vehicle in Waller County.⁴⁸ The trucking company sued the vehicle occupants in Waller County to recover for property damage.⁴⁹ “Ten days later, the [vehicle] occupants sued [the trucking company] in Dallas County to recover personal-injury damages.”⁵⁰ The Dallas County trial court denied the trucking company's plea in abatement, which asserted dominant jurisdiction in Waller County under the first-filed rule.⁵¹ After the Dallas Court of Appeals summarily denied the trucking company's request for mandamus relief, the trucking company sought relief in the supreme court.

The supreme court began its analysis by determining whether the subject matter of the two lawsuits was inherently interrelated.⁵² In deciding the question, the supreme court noted that its prior opinions directed that Rule 97 of the Texas Rules of Civil Procedure should guide the analysis, but had misstated the compulsory counterclaim rule in a way that affected the outcome of the case.⁵³ The vehicle occupants argued that their claims were not compulsory under Rule 97 because they were the subject of the pending action in Dallas County before they were required to answer the trucking company's Waller County suit. In ruling against the vehicle occupants, the supreme court clarified that, while its prior opinions stated that a counterclaim is compulsory if “it is not at the time of filing the answer the subject of a pending action,”⁵⁴ Rule 97 actually refers to “the time of filing the *pleading*.”⁵⁵ The supreme court therefore held that, under a correct reading of Rule 97, “a counterclaim is compulsory if . . . it was not the subject of a pending action when the original suit was commenced.”⁵⁶ Because the vehicle occupants' claims were not the subject of a pending action at the time the trucking company commenced the Waller County suit, the supreme court held that the vehicle occupants' claims were compulsory counterclaims in the Waller County action, demonstrat-

46. *Id.* at *2–3.

47. *In re J.B. Hunt Transp., Inc.*, 492 S.W.3d 287 (Tex. 2016) (orig. proceeding).

48. *Id.* at 289.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 292 (citing *Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 247 (Tex. 1988)).

53. *Id.* at 292–93.

54. *Id.* at 292 (citing *Wyatt*, 760 S.W.2d at 247; *Ingersoll-Rand Co. v. Valero Energy Corp.*, 997 S.W.2d 203, 207 (Tex. 1999)).

55. *Id.* (quoting TEX. R. CIV. P. 97(a)).

56. *Id.* at 293.

ing that the subject matter of the two suits was inherently interrelated.⁵⁷ With regard to the dominant jurisdiction question, the supreme court held that the Dallas County trial court abused its discretion in denying the trucking company's plea in abatement because the Waller County court had dominant jurisdiction under the first-filed rule.⁵⁸ The supreme court therefore granted the trucking company mandamus relief,⁵⁹ ordering the Dallas County trial court to grant the trucking company's plea.⁶⁰

In *In re Nationwide Insurance Company of America*, the Texas Supreme Court addressed whether a party waived a forum-selection clause by participating in a case.⁶¹ A former employee sued his employer for breach of contract in Texas, although the contract at issue had a forum-selection clause designating Ohio as the place to file suit.⁶² Early in the suit, counsel for the employer indicated that "his client would seek to enforce the forum-selection clause."⁶³ The employer nevertheless engaged in significant activity in the Texas trial court, including filing special exceptions, serving written discovery, obtaining an agreed confidentiality and protective order, and filing two motions to dismiss.⁶⁴ Two years after the case was filed, and after changing counsel, the employer moved to dismiss the Texas proceeding based on the forum-selection clause.⁶⁵ The employee argued in response that the employer's substantial participation waived the forum-selection clause and that the employee was prejudiced because his contract claim was now barred by Ohio limitations.⁶⁶ The trial court denied the motion to dismiss, and the Austin Court of Appeals summarily denied mandamus relief. The supreme court found that the trial court abused its discretion in denying the employer's motion to dismiss.⁶⁷

The supreme court began its analysis by noting that waiver in the context of a forum-selection clause is more akin to estoppel and requires "substantially invoking the judicial process to the other party's detriment or prejudice."⁶⁸ The supreme court reiterated that the employee's time,

57. *Id.*

58. *Id.* at 293–98.

59. *Id.* at 300. In granting mandamus relief, the supreme court resolved a split among the appellate courts as to whether mandamus relief was available to correct an erroneously denied plea in abatement based on dominant jurisdiction. *Id.* at 299 n.53 (noting conflicting decisions on the issue). The supreme court held that the more recent mandamus standard articulated in *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124 (Tex. 2004) (orig. proceeding), controlled over the more stringent standard of *Abor v. Black*, 695 S.W.2d 564 (Tex. 1985). See *In re J.B. Hunt Transp.*, 492 S.W.3d at 298.

60. *In re J.B. Hunt Transp.*, 492 S.W.3d at 300.

61. *In re Nationwide Ins. Co. of Am.*, 494 S.W.3d 708, 710 (Tex. 2016) (orig. proceeding).

62. *Id.*

63. *Id.* at 711.

64. *Id.* at 713. The TEX. R. CIV. P. 91a motions to dismiss were not ruled on because the employee voluntarily non-suited the challenged claims. See *id.*

65. *Id.* at 711.

66. *Id.*

67. *Id.* at 710.

68. *Id.* at 713 (citing *In re ADM Inv'r Servs., Inc.*, 304 S.W.3d 371, 374 (Tex. 2010) (orig. proceeding)).

effort, and funds expended in the Texas litigation were not a sufficient detriment to avoid a forum-selection clause.⁶⁹ Further, the supreme court held that the employee's claimed prejudice based on the now time-barred contract claim was insufficient to defeat the forum-selection clause because the employer agreed to waive the limitations defense in any Ohio proceeding.⁷⁰ The supreme court reasoned that the employee's injury was merely theoretical, as he never actually suffered the prejudice given the employer's waiver of limitations.⁷¹

VI. PARTIES

In *In re Empire Scaffold, LLC*, the Beaumont Court of Appeals held that a trial court abused its discretion in denying a motion to strike a petition in intervention filed by eight plaintiffs who pled that they had "a legal and equitable interest" in the underlying suit but who would not have been entitled to recover the relief sought in their own names.⁷² The employees' claims against their employers were based on their respective employment agreements to which the intervenors were not parties.⁷³ The appellate court held that the motion to strike should have been granted because the intervenors did not have any right to relief under the employment agreements at issue.⁷⁴ The court of appeals reasoned that the "principal detriment to allowing the intervention" under the circumstances was that it would allow the intervenors to circumvent a standing order prohibiting unrelated plaintiffs from suing in the same action to avoid the county's random assignment system.⁷⁵

At issue in *J. Fuentes Colleyville, L.P. v. A.S.*⁷⁶ was whether a restaurant should be permitted to intervene in a "friendly suit" to obtain court approval of the settlement between a minor injured in an automobile accident, her underinsured motorist insurer, and the intoxicated driver who caused the accident after being served alcohol at the restaurant. The restaurant pled that it was not seeking money damages in the suit but intended only "to defend and defeat" the minor's allegations that the driver was intoxicated and that his intoxication was the proximate cause of the minor's injuries.⁷⁷ On the minor's motion, the trial court struck the restaurant's intervention, and the restaurant appealed. The Fort Worth Court of Appeals found the restaurant's pled interest implausible because the minor's petition explicitly stated that suit was "filed for the sole and specific purpose of obtaining judicial approval of the settlements," and

69. *Id.* (citing *In re Automated Collection Techs., Inc.*, 156 S.W.3d 557, 559–60 (Tex. 2004) (per curiam) (orig. proceeding)).

70. *Id.* at 714.

71. *Id.*

72. *In re Empire Scaffold, LLC*, No. 09-16-00052-CV, 2016 WL 1469185, at *1 (Tex. App.—Beaumont Apr. 14, 2016, orig. proceeding) (per curiam) (mem. op.).

73. *Id.* at *2.

74. *Id.*

75. *Id.*

76. 501 S.W.3d 239, 240–41 (Tex. App.—Fort Worth 2016, no pet.).

77. *Id.* at 242.

the appellate court noted that it could not “be said with any seriousness that the original petition reflect[ed] a conventional effort to impose liability upon [the driver] and [the insurer] for the purpose of obtaining a judgment against them for damages.”⁷⁸ The appellate court concluded that the trial court did not abuse its discretion in striking the intervention because the restaurant did not allege any facts showing it had an interest affected by the minor’s suit.⁷⁹ The court of appeals further held that even if the restaurant had a justiciable interest, the trial court would have been within its discretion to strike the plea because the restaurant was “fully capable of protecting [its] interests” in a separately filed suit against it for Dram Shop Act violations in which it could assert contributory negligence claims or designate non-parties as responsible third parties.⁸⁰ Given this, the appellate court concluded that allowing the restaurant to intervene in the minor’s suit would complicate already resolved litigation.⁸¹

VII. PLEADINGS

A petition for a pre-suit deposition under Rule 202 of the Texas Rules of Civil Procedure requires a petitioner to “present evidence to meet its burden to establish the facts necessary to obtain the deposition.”⁸² Noting that the Dallas, Tyler, and Amarillo Courts of Appeals have all held that a verified petition alone, without more, is not adequate to satisfy this burden, the Corpus Christi Court of Appeals determined that it need not reach that issue when a verified petition’s allegations were so “vague and conclusory” as to the necessity for pre-suit Rule 202 depositions in the petitioner’s investigation of a potential claim for tortious interference with the lawful use of property that it could be denied on that basis alone.⁸³

A developer asserted a breach of contract claim against a builder’s president who signed a contract on behalf of the builder in *Mission Grove, L.P. v. Hall*.⁸⁴ The developer alleged that the builder’s president was personally liable for the damages resulting from the breach because he had personally guaranteed the contract, but the president obtained summary judgment on the breach claim since he had not signed in his individual capacity.⁸⁵ Over four years after the original petition was filed, the developer amended its petition, adding claims “for promissory estop-

78. *Id.* at 243–44.

79. *Id.* at 244.

80. *Id.* at 244–45.

81. *Id.*

82. *In re East*, 476 S.W.3d 61, 68 (Tex. App.—Corpus Christi 2014, orig. proceeding) (citing *In re Hochheim Prairie Farm Mut. Ins. Ass’n*, 115 S.W.3d 793, 796 (Tex. App.—Beaumont 2003, orig. proceeding); *In re Dall. Cty. Hosp. Dist.*, No. 05-14-00249-CV, 2014 WL 1407415, at *2 (Tex. App.—Dallas Apr. 1, 2014, orig. proceeding) (mem. op.)).

83. *Id.* at 69.

84. 503 S.W.3d 546, 549–50 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

85. *Id.* at 550.

pel, fraud and negligent misrepresentation.”⁸⁶ The president moved for summary judgment on those claims, arguing that the newly-asserted claims did not relate back to the original petition and therefore were barred by limitations.⁸⁷ The trial court granted the motion, and the developer appealed.⁸⁸ The Fourteenth Houston Court of Appeals reversed the trial court’s grant of summary judgment on the later-filed claims, holding that those claims were based on the same transaction or occurrence as the timely-filed contract claim.⁸⁹ The appellate court rejected the president’s argument that the later-filed claims should not relate back because the contract claim was disposed of on summary judgment, explaining that a “valid cause of action” does not have to be meritorious for later-asserted claims based on the same transaction to relate back to the filing of the original petition.⁹⁰

The Dallas Court of Appeals analyzed the sufficiency of a petition in *Paz v. Fatima Construction & Cleaning Co.*, which was a suit for breach of contract, fraud, and violations of the Deceptive Trade Practices Act (DTPA) asserted against four defendants, including a limited liability company and three individuals.⁹¹ When all defendants failed to answer, the plaintiffs moved for and obtained a default judgment holding the defendants jointly and severally liable for approximately two million dollars.⁹² An individual defendant, Paz, filed a motion for new trial, which the trial court denied, and Paz appealed.⁹³ The court of appeals held that the petition failed to give Paz sufficient information to enable her to determine the legal or factual basis of the allegations that she was responsible for the other three defendants’ conduct.⁹⁴ The appellate court concluded that the allegations that Paz was a “de facto” manager of the limited liability company, its “primary agent[]” in the business transactions, and that Paz had “obligated [it] to provide services to customers whom she knew had no intention of fully paying off their accounts,”⁹⁵ even when taken as true, did not state a DTPA or fraudulent misrepresentation claim against Paz and did not provide fair notice of any other potential cause of action against her.⁹⁶

VIII. DISCOVERY

Once again, applications for pre-suit depositions under Rule 202 of the Texas Rules of Civil Procedure were the subject of multiple opinions dur-

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 556–57.

90. *Id.*

91. *Paz v. Fatima Construction & Cleaning Co.*, No. 05-15-00911-CV, 2016 WL 4050405, at *1 (Tex. App.—Dallas July 27, 2016, no pet.) (mem. op.).

92. *Id.* at *1–2.

93. *Id.* at *2.

94. *Id.* at *3.

95. *Id.* at *1.

96. *Id.* at *3.

ing the Survey period. In *In re DePinho*,⁹⁷ the Texas Supreme Court addressed whether a trial court can order a Rule 202 deposition to investigate unripe claims. The petitioner was a medical doctor at MD Anderson Cancer Center who feared he would not receive credit for his role in the preparation of an antibiotic with the potential to treat cancer and type-2 diabetes. Roughly one month before his employment contract was set to expire, he filed a petition to take Rule 202 depositions of two of his colleagues to investigate a tortious interference claim.⁹⁸ The trial court authorized the depositions, albeit with limitations on their time and scope, and the First Houston Court of Appeals denied the relators' request for mandamus relief.⁹⁹

The supreme court, however, granted mandamus relief.¹⁰⁰ According to the supreme court, for a Rule 202 deposition to be appropriate, the trial court "must have subject-matter jurisdiction over the anticipated action," which cannot be used to adjudicate claims that are not yet ripe or must be brought in another forum (such as patent actions, which can only be brought in federal court).¹⁰¹ Since the petitioner was seeking to investigate claims (1) for tortious interference with a patent application that had not yet been filed; and (2) arising out of his employment, which was ongoing at the time he filed his petition, the supreme court held that the trial court erred in ordering the depositions.¹⁰²

The intersection of Rule 202 and sovereign immunity was at issue in *Vestal v. Pistikopoulos*.¹⁰³ In this case, one faculty member at Texas A&M University sought to depose a former staff member, who had accused him of harassing her, to determine if he had defamation or other tort claims against her.¹⁰⁴ The respondent filed a plea to the jurisdiction, claiming that (1) the university's "sovereign immunity . . . extend[ed] to her for conduct within the course and scope of her employment"; and (2) the deposition "would interfere with an ongoing sexual harassment investigation."¹⁰⁵ The trial court ordered the deposition to proceed and overruled the respondent's plea to the jurisdiction, and she sought mandamus relief.¹⁰⁶ After noting that Rule 202 does not waive sovereign immunity, the Waco Court of Appeals found that the petitioner's Rule 202 petition was too broad, as it did not distinguish between alleged statements within the course and scope of the respondent's employment, which could potentially implicate sovereign immunity, and statements outside the course

97. 505 S.W.3d 621, 622 (Tex. 2016) (per curiam) (orig. proceeding).

98. *Id.*

99. *Id.* at 622–23 (citing *In re DePinho*, No. 01-14-00878-CV, 2015 WL 1544535, at *1 (Tex. App.—Houston [1st Dist.] Apr. 2, 2015, orig. proceeding) (per curiam) (mem. op.)).

100. *Id.* at 625.

101. *Id.* at 623 (quoting *In re Doe*, 444 S.W.3d 603, 608 (Tex. 2014) (orig. proceeding)).

102. *Id.* at 623–25.

103. No. 10-16-00034-CV, 2016 WL 4045081, at *1 (Tex. App.—Waco July 27, 2016, orig. proceeding) (mem. op.).

104. *Id.*

105. *Id.*

106. *Id.*

and scope of her employment, which would not implicate immunity.¹⁰⁷ The court of appeals thus concluded that the trial court erred in denying the respondent's plea to the jurisdiction and in granting the Rule 202 petition, but it gave the petitioner leave to amend his petition to avoid immunity or other issues that were not discoverable.¹⁰⁸

The scope of a discovery order was the subject of *In re National Lloyds Insurance Co.*¹⁰⁹ The plaintiffs filed several suits against the defendant insurer, in which they claimed they were underpaid for the losses they sustained as a result of two hail storms that occurred in Hidalgo County in March 2012 and April 2012.¹¹⁰ Claims arising out of the storms were transferred to a pre-trial court, which appointed a master to help review discovery disputes.¹¹¹ The pre-trial court ordered the insurer to produce various categories of documents, including all emails, reports attached thereto, and follow-up correspondence regarding the insurer's management reports, and it assessed \$15,726.25 as sanctions for attorney's fees.¹¹² The insurer moved for reconsideration based on a recent Texas Supreme Court decision barring the discovery of evidence related to other insurance claims,¹¹³ but the pre-trial court denied the motion.¹¹⁴ The Corpus Christi Court of Appeals denied mandamus relief, finding that the insurer had "waived any objection to the relevance or breadth" of the discovery requests at issue.¹¹⁵ The Texas Supreme Court, however, disagreed and conditionally granted mandamus relief.¹¹⁶ Initially, the supreme court found that, even though the insurer "ultimately withdrew its objections and privilege assertions" to the discovery requests at issue, it had preserved its complaint by objecting from the outset that the management reports and emails at issue were overbroad, irrelevant, and contrary to the supreme court's earlier decision.¹¹⁷ In turn, even though the plaintiffs had tailored their requests to the Hidalgo County storms in March through April 2012, the pre-trial master's order was not so limited, and the responsive reports encompassed claims in different counties with different causes and dates of loss.¹¹⁸ Although the plaintiffs contended these reports were relevant to their extra-contractual and punitive damages claims, in which they sought to show that the insurer had a pattern

107. *Id.* at *5.

108. *Id.*

109. 507 S.W.3d 219, 220–21 (Tex. 2016) (per curiam) (orig. proceeding).

110. *Id.* at 220.

111. *Id.* at 221.

112. *Id.* at 222.

113. *Id.* (citing *In re Nat'l Lloyds Ins. Co.*, 449 S.W.3d 486, 489–90 (Tex. 2014) (per curiam) (orig. proceeding)).

114. *Id.*

115. *Id.* at 222–23 (citing *In re Nat'l Lloyds Ins. Co.*, No. 13-14-00713-CV, 2015 WL 3751701, at *7 (Tex. App.—Corpus Christi May 29, 2015, orig. proceeding) (mem. op.)).

116. *Id.* at 226.

117. *Id.* at 223–26. According to the supreme court, the insurer preserved its complaints through its response briefing to the plaintiffs' motion to enforce the pretrial master's ruling and to compel. *Id.* at 223.

118. *Id.* at 225.

and practice of defrauding its insureds, the supreme court held they were unable “to discover documents unrelated to the insurance event at issue.”¹¹⁹ The supreme court thus conditionally granted mandamus relief, directing the pre-trial court to vacate its order requiring the production of the management reports and emails and requesting a reevaluation of the sanctions.¹²⁰

In contrast, the Corpus Christi Court of Appeals declined to grant mandamus relief regarding a discovery order in *In re Navistar, Inc.*¹²¹ In this case, the plaintiff had purchased fifteen trucks with engines manufactured by the defendant that were allegedly defective, and the plaintiff secured orders from the trial court requiring the production of documents pertaining to an investigation by the Securities and Exchange Commission (SEC) regarding the defendant’s representations with respect to its development of a “next generation” engine.¹²² The defendant sought mandamus relief, contending that the trial court abused its discretion in requiring the production of documents on products that the defendant had not manufactured and the plaintiff had not used.¹²³ After acknowledging that the Texas Supreme Court had granted mandamus relief in product-liability cases regarding the production of documents on products the plaintiff never used, the court of appeals found that discovery of other products could be appropriate where there was a “connection between the alleged defect and the discovery ordered.”¹²⁴ In light of the fact that there were some similarities between the two engines, the court of appeals found that the trial court did not err in ordering the production of documents regarding the SEC investigation.¹²⁵

The intersection of trade secrets and discovery was at issue in *In re M–I L.L.C.*¹²⁶ An employee of the defendant accepted a position with a competitor and filed suit to invalidate his non-compete agreement, and his former employer counterclaimed for breach of that agreement and asserted third-party claims against his new employer for misappropriation of trade secrets and tortious interference.¹²⁷ At the temporary injunction hearing, the former employer tried “to establish its trade secrets through the oral testimony of” one of its employees, and it sought to exclude from the courtroom, among other individuals, the new employer’s designated representative.¹²⁸ When the trial court denied this request, the former

119. *Id.* (citing *In re Nat’l Lloyds Ins. Co.*, 449 S.W.3d 486, 489–90 (Tex. 2014) (per curiam) (orig. proceeding)).

120. *Id.* at 226.

121. 501 S.W.3d 136, 143 (Tex. App.—Corpus Christi 2016, orig. proceeding).

122. *Id.* at 138.

123. *Id.* at 141.

124. *Id.* at 141–42 (citing *In re Exmark Mfg. Co.*, 299 S.W.3d 519, 529–30 (Tex. App.—Corpus Chisti 2009, orig. proceeding)).

125. *Id.* at 142. The court of appeals also rejected the defendant’s claim that the requested documents need not be produced because they related to a confidential governmental investigation. *Id.* at 142–43.

126. 505 S.W.3d 569, 572 (Tex. 2016) (orig. proceeding).

127. *Id.* at 573.

128. *Id.*

employer obtained a recess so it could petition the court of appeals for a writ of mandamus, and when it filed its petition, the former employer “submitted *in camera* . . . an affidavit . . . detailing the testimony [its employee] was prepared to offer.”¹²⁹ The court of appeals rejected both the former employer’s mandamus petition as well as the motion of the former employee and the new employer to obtain access to the affidavit.¹³⁰

The former employee and the new employer then moved the trial court to compel the production of the affidavit on the ground that it was a discoverable witness statement under Rule 194.2 of the Texas Rules of Civil Procedure.¹³¹ Without reviewing the affidavit, the trial court ordered its disclosure, and the former employer sought mandamus relief from the Texas Supreme Court regarding the trial court’s disclosure order.¹³² The supreme court granted mandamus relief, finding that, since the affidavit “was the only evidence that could substantiate whether it did, in fact, contain trade secrets, the trial court had . . . to review it *in camera* before ruling on whether . . . it contained trade secrets.”¹³³ Even though Rule 507(a) of the Texas Rules of Evidence provides a privilege for trade secrets that “will not tend to conceal fraud or otherwise work injustice,” the supreme court determined that the trial court could not reach a conclusion on Rule 507(a)’s applicability without first reviewing the affidavit.¹³⁴

The propriety of death-penalty sanctions was the subject of *In re First Transit Inc.*¹³⁵ Following a multi-vehicle, multi-collision accident, the plaintiffs filed a wrongful death and survival action against (among other defendants) the operator of a bus involved in the accident.¹³⁶ The defendants hired an expert on accident reconstruction, who began his investigative analysis the day after the accident.¹³⁷ The plaintiffs sought information and documents regarding the expert’s opinions, and they filed multiple motions to compel to obtain those items.¹³⁸ The trial court ordered the production of the expert’s entire file and stated that the defendants’ failure to comply would result in their inability to elicit any testimony from him.¹³⁹ The expert’s deposition was scheduled shortly before trial, and on the eve of it, the defendants produced forty pages of recently created documents.¹⁴⁰ The plaintiffs cancelled the deposition and filed a

129. *Id.*

130. *Id.* (citing *In re M-I L.L.C.*, No. 14-14-00705-CV, 2014 WL 5591575 (Tex. App.—Houston [14th Dist.] Nov. 4, 2014, orig. proceeding) (per curiam) (mem. op.)).

131. *Id.*

132. *Id.* at 573–74.

133. *Id.* at 579 (citing *Weisel Enters., Inc. v. Curry*, 718 S.W.2d 56, 58 (Tex 1986) (per curiam) (orig. proceeding)).

134. *Id.* at 579–80 (quoting TEX. R. EVID. 507(a)).

135. 499 S.W.3d 584, 598 (Tex. App.—Houston [14th Dist.] 2016, orig. proceeding).

136. *Id.* at 588.

137. *Id.*

138. *Id.* at 589–90.

139. *Id.* at 590.

140. *Id.*

motion to exclude the expert's testimony.¹⁴¹ The trial court excluded the expert from testifying, and the defendants sought mandamus relief.¹⁴²

The Fourteenth Houston Court of Appeals found that the trial court abused its discretion and granted mandamus relief.¹⁴³ The court of appeals initially noted that, even though death-penalty sanctions were typically associated with the striking of pleadings or the rendering of a default judgment, any case-determinative sanctions, "including those that exclude essential evidence," could amount to death-penalty sanctions.¹⁴⁴ Since the expert was the "[d]efendants' only retained expert on negligence and causation," the exclusion of his testimony "effectively preclude[d] the presentation of [their] defense."¹⁴⁵ The court of appeals then determined that, even though the expert created the documents on the eve of his deposition and the defendants had violated the discovery order, it observed that one possible lesser sanction was the exclusion of those newly-created documents.¹⁴⁶ Since the record did not contain any indication that the trial court had considered lesser sanctions or a reasonable explanation as to the appropriateness of its exclusion of the expert, the court of appeals found that the trial court abused its discretion.¹⁴⁷ Finally, the court of appeals rejected the plaintiffs' assertion that the exclusion of the expert should be affirmed on the basis of the defendants' failure to describe the expert's mental impressions and opinions pursuant to Rule 194.2(f)(3) of the Texas Rules of Civil Procedure, as the plaintiffs had not raised that ground before the trial court.¹⁴⁸

In *Medina v. Raven*, the First Houston Court of Appeals addressed various issues regarding deemed admissions.¹⁴⁹ The defendant sought summary judgment on the basis of deemed admissions regarding liability, and she contended that the underlying requests had been served on counsel for plaintiffs.¹⁵⁰ In their response, the plaintiffs asserted that they had responded to the requests, albeit not within thirty days of the date the requests were first mailed.¹⁵¹ At the hearing, the defendant argued that, since the plaintiffs "had not [moved] to have their admissions un-

141. *Id.* at 591.

142. *Id.*

143. *Id.* at 598.

144. *Id.* at 592 (citing *In re RH White Oak, LLC*, 442 S.W.3d 492, 501 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding) (per curiam)).

145. *Id.* at 593.

146. *Id.* at 593–94.

147. *Id.* at 594–95. *But see* *Alma Invs., Inc. v. Bahia Mar Co-Owners Ass'n*, 497 S.W.3d 137, 144 (Tex. App.—Corpus Christi 2016, pet. denied) (upholding the imposition of death-penalty sanctions where the trial court had considered and imposed lesser sanctions, which were ineffective).

148. *In re First Transit*, 499 S.W.3d at 595–96. Chief Justice Kem Thompson Frost dissented, finding that the defendants did not violate the trial court's order by producing documents one or two days after the defendants' expert created them. *Id.* at 601–02 (Frost, C.J., dissenting).

149. *Medina v. Raven*, 492 S.W.3d 53, 54 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

150. *Id.* at 54–55.

151. *Id.* at 55–56.

deemed,” she was entitled to summary judgment, whereas the plaintiffs alleged that the requests had initially been sent to the wrong address and that, if the trial court was not inclined to deny the motion for summary judgment, they would file a motion to undeem the admissions.¹⁵² After the trial court entered summary judgment in the defendant’s favor, the plaintiffs filed motions for new trial and to set aside the deemed admissions.¹⁵³ The trial court denied both motions, and the plaintiffs appealed.¹⁵⁴

The court of appeals reversed and remanded, finding that the trial court abused its discretion in denying the plaintiffs’ motion to set aside merits-preclusive admissions.¹⁵⁵ As the court of appeals correctly noted, deemed admissions should be withdrawn “upon a showing of (1) good cause, and (2) no undue prejudice.”¹⁵⁶ The court of appeals found that these standards were met, as the defendant had obtained the plaintiffs’ responses before moving for summary judgment, the plaintiffs believed that their responses to the requests were timely, and there was a misunderstanding as to the identity of the plaintiffs’ counsel at the time.¹⁵⁷ In response to the defendant’s argument that the plaintiffs had failed to attach any affidavits or other evidence establishing these elements, the court of appeals noted that, when dealing with merits-preclusive admissions, “good cause exists absent bad faith or callous disregard of the rules.”¹⁵⁸ The court of appeals also noted that the defendant had not presented any evidence that she was prejudiced by the withdrawal of the deemed admissions.¹⁵⁹

During the Survey period, Texas courts also applied existing standards to address efforts to take “apex” depositions,¹⁶⁰ the propriety of sanctions for various types of misconduct,¹⁶¹ the standing of a patient to object to the production of his medical records by a third party,¹⁶² and the

152. *Id.* at 56.

153. *Id.*

154. *Id.* at 58.

155. *Id.* at 64.

156. *Id.* at 58 (quoting *Wheeler v. Green*, 157 S.W.3d 439, 442 (Tex. 2005) (per curiam)).

157. *Id.* at 59.

158. *Id.* at 62 (citing *In re Sewell*, 472 S.W.3d 449, 456 (Tex. App.—Texarkana, orig. proceeding)).

159. *Id.* at 64.

160. See *In re Semgroup Corp.*, No. 04-16-00230-CV, 2016 WL 3085875, at *2–3 (Tex. App.—San Antonio June 1, 2016, orig. proceeding) (mem. op.) (finding that the trial court abused its discretion in ordering “apex” depositions where the plaintiffs failed to show that the potential deponents had “unique or superior knowledge of the discoverable information” and had failed to exhaust other less intrusive methods to obtain the information they were purportedly seeking).

161. See, e.g., *Buttler v. Sutcliffe*, No. 02-15-00319-CV, 2016 WL 4491224, at *5 (Tex. App.—Fort Worth Aug. 26, 2016, no pet.) (mem. op.) (concluding that the trial court did not abuse its discretion in sanctioning the plaintiff for her deposition-related misconduct).

162. See *In re R.C.K.*, No. 09-16-00132-CV, 2016 WL 3197585, at *2 (Tex. App.—Beaumont June 9, 2016, orig. proceeding) (per curiam) (mem. op.) (holding that a patient has standing to object to the production of his medical records by his third-party medical providers).

need to provide contemporaneous time records in support of an award of attorney's fees entered as a sanction for discovery misconduct.¹⁶³

IX. DISMISSAL

In an issue of first impression, *Thuesen v. Amerisure Insurance Co.*¹⁶⁴ addressed whether fees could be awarded under Rule 91a of the Texas Rules of Civil Procedure if the claims challenged as baseless were nonsuited. The question presented was “whether a trial court may consider a Rule 91a movant a ‘prevailing party’ entitled to attorney’s fees under the rule if the trial court determines the respondent nonsuited the claims to avoid an adverse ruling on the 91a motion.”¹⁶⁵ The Fourteenth Houston Court of Appeals noted that Rule 91a.5(a) provided that “[t]he [trial] court may not rule on a motion to dismiss if, at least [three] days before the date of the hearing, . . . the challenged cause of action” is nonsuited.¹⁶⁶ Based on this clear language, the court of appeals held that if a party timely non-suits the challenged claims, “the movant cannot recover costs and attorney’s fees . . . because [it] is not the prevailing party.”¹⁶⁷ The court noted, however, that it was not addressing what the outcome would be if the non-suit occurred “before the trial court rule[d] on the Rule 91a motion but less than three days before the hearing date.”¹⁶⁸

In *Watson v. Hardman*, a case involving the dismissal of claims under the Texas Citizens’ Participation Act (TCPA),¹⁶⁹ the Dallas Court of Appeals decided another issue of first impression: whether a Rule 202 action is a “judicial proceeding” encompassed by the TCPA.¹⁷⁰ The court ultimately concluded that a Rule 202 petition asks a court for relief in the form of pre-suit discovery and the proceeding can be a contested matter.¹⁷¹ Accordingly, the court held that a Rule 202 petition is a communication pertaining to a judicial proceeding protected under the TCPA.¹⁷² In so holding, the court rejected the argument that only “communication[s] made in a judicial proceeding” concerning the public interest “qualify as an exercise of the right to petition” under the TCPA.¹⁷³ The

163. See *CHRISTUS Health Gulf Coast v. Carswell*, 505 S.W.3d 528, 539–40 (Tex. 2016) (reversing an award of attorney’s fees and sanctions where the prevailing party failed to produce its fee bills or other evidence permitting the trial court to determine the fees that were actually incurred).

164. 487 S.W.3d 291, 294 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

165. *Id.*

166. *Id.* at 300 (quoting TEX. R. CIV. P. 91a.5(a)).

167. *Id.* at 301 (citing TEX. R. CIV. P. 91a.5, a.7).

168. *Id.* at 301 n.4 (citing TEX. R. CIV. P. 91a.5(c)).

169. TEX. CIV. PRAC. & REM. CODE §§ 27.001–.011 (West 2014). The TCPA provides, among other things, that certain communications made in a judicial proceeding cannot form the basis of claims against the communicating party. *Id.* § 27.003.

170. *Watson v. Hardman*, 497 S.W.3d 601, 605–06 (Tex. App.—Dallas 2016, no pet.) (citing CIV. PRAC. & REM. § 27.001(4)(A)(1)).

171. *Id.* at 606 (citing TEX. R. CIV. P. 202.1–.4).

172. *Id.*

173. *Id.*

court reasoned that the TCPA does not include a public interest requirement, rendering any communication in a judicial proceeding an exercise of the right to petition.¹⁷⁴ The court therefore determined that claims based on statements in a Rule 202 petition should be dismissed under the TCPA.¹⁷⁵

Two appellate courts reached different conclusions in deciding whether a hearing is required on a motion to reinstate after a dismissal for want of prosecution under Rule 165a of the Texas Rules of Civil Procedure. In *Curnutt v. Conocophillips Co.*, the trial court dismissed the case after a full hearing was held on a motion to retain.¹⁷⁶ After the case was dismissed, the plaintiff filed a motion to reinstate, although there was a dispute as to when the motion was actually filed with the trial court.¹⁷⁷ It was nonetheless clear that the trial court never held a hearing on the motion.¹⁷⁸ The El Paso Court of Appeals found that the plaintiff waived his complaint by failing to adequately explain in his brief why the trial court was required to hold a hearing on the motion to reinstate.¹⁷⁹ The court also held that any error in the trial court's failure to hold a hearing was harmless since a full hearing was held on the motion to retain prior to dismissal, and nothing new was raised by the motion to reinstate.¹⁸⁰

The Amarillo Court of Appeals came to a different conclusion when faced with almost identical facts.¹⁸¹ In that case, the trial court gave notice of intent to dismiss for want of prosecution and set a hearing.¹⁸² The plaintiff filed a motion to retain the case and a hearing was held, although there was no reporter's record.¹⁸³ The trial court dismissed the case, and the plaintiff filed a motion to reinstate.¹⁸⁴ The trial court did not hold a hearing on the motion to reinstate, which was overruled by operation of law.¹⁸⁵ On appeal, the plaintiff argued that "the trial court abused its discretion . . . by failing to hold [a hearing] on the motion to reinstate."¹⁸⁶ While recognizing that appellate courts were split on the issue, the court of appeals held that the language of Rule 165a required the trial court to set a hearing on a motion to reinstate regardless of a request by the mo-

174. *Id.* (citing *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015) (per curiam)).

175. *Id.*

176. *Curnutt v. Conocophillips Co.*, 508 S.W.3d 641, 642 (Tex. App.—El Paso 2016, no pet.).

177. *Id.* at 643.

178. *Id.*

179. *Id.* at 643–44.

180. *Id.* at 644 (citing TEX. R. APP. P. 44.1(a); *Dueitt v. Arrowhead Lakes Prop. Owners, Inc.*, 180 S.W.3d 733, 741 (Tex. App.—Waco 2005, pet. denied)).

181. *Parker v. Cain*, 505 S.W.3d 119, 123 (Tex. App.—Amarillo 2016, no pet.).

182. *Id.* at 120.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 120–21.

vant.¹⁸⁷ Given the language of Rule 165a, the court of appeals held that the burden was on the trial court to set a hearing and its failure to do so required reversal, despite also holding that the trial court did not abuse its discretion in dismissing the case.¹⁸⁸

X. JURY PRACTICE

In *Crosstex North Texas Pipeline, L.P. v. Gardiner*,¹⁸⁹ the Texas Supreme Court provided a lengthy and detailed analysis of Texas nuisance law. After analyzing the history of this claim, the supreme court concluded that “nuisance” does not refer to “a cause of action or to the defendant’s conduct or operations”; rather, it focuses on “the particular type of *legal injury* that can support a claim.”¹⁹⁰ The supreme court also concluded that the interference must be “‘substantial’ and cause[] ‘discomfort or annoyance’ that is ‘unreasonable.’”¹⁹¹ Having announced the standards, the supreme court then turned to some of the resulting procedural issues, including whether the determinations of (1) whether the interference was unreasonable; (2) “whether the defendant [acted] intentionally or negligently”; and (3) “whether the interference result[ed] from abnormally dangerous activities” presented fact questions for the jury.¹⁹² Consistent with its prior rulings, the supreme court held that these issues were for the jury, unless the underlying facts were undisputed or reasonable minds could not differ on them.¹⁹³ The propriety of an injunction, however, was a decision for the trial court, which was to be made “after the case ha[d] been tried and the jury discharged.”¹⁹⁴

Less than a week later, the Fourteenth Houston Court of Appeals determined, without citing *Crosstex*, that Texas does not recognize a cause of action resulting from a prospective nuisance.¹⁹⁵ In *1717 Bissonnet, LLC*, the jury found that the project at issue, if built, would be a nuisance, and the trial court entered judgment awarding the homeowners the lost market value of their properties but disregarding the jury’s findings that the homeowners had also been damaged in the use and enjoyment of their property.¹⁹⁶ Both the homeowners and the developer appealed. The developer argued that the jury’s liability finding, which turned on

187. *Id.* at 122–23 (quoting TEX. R. CIV. P. 165(a)(3), which provides that the court clerk shall “deliver a copy of the motion [to reinstate] to the judge, who shall set a hearing on the motion as soon as practicable”).

188. *Id.* at 123.

189. 505 S.W.3d 580 (Tex. 2016).

190. *Id.* at 594 (citing *City of Tyler v. Likes*, 962 S.W.2d 489, 504 (Tex. 1997)).

191. *Id.* at 595.

192. *Id.* at 609 (citing *Nat. Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 155 (Tex. 2012)).

193. *Id.* (citing, e.g., *Justiss*, 397 S.W.3d at 155; *Hernandez v. Tokai Corp.*, 2 S.W.3d 251, 261 (Tex. 1999)).

194. *Id.* at 610 (quoting *Schneider Nat’l Carriers, Inc. v. Bates*, 147 S.W.3d 264 (Tex. 2004)).

195. *1717 Bissonnet, LLC v. Loughhead*, 500 S.W.3d 488, 497–500 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

196. *Id.* at 491–92.

whether the project, if built, would constitute a nuisance, should be disregarded because there is no cause of action for “prospective nuisance.” The court of appeals agreed, finding that a prospective nuisance can be addressed only through an injunction, not an award of damages, leaving no liability issues for the jury to decide.¹⁹⁷

In *In re Athans*, the Fourteenth Houston Court of Appeals initially found that the jury’s verdict was not contrary to the overwhelming weight of the evidence and that the trial court had abused its discretion in granting a new trial based on an alleged charge error of which neither side complained.¹⁹⁸ The court of appeals then turned to the voir dire conduct of the defendants’ counsel. The trial court had instructed counsel “not to discuss [evidentiary details] or argue the case during voir dire,” and it found that a new trial was warranted due to the failure of the defendants’ counsel to comply with these admonitions.¹⁹⁹ The court of appeals disagreed, finding that the plaintiff waived any complaint about this conduct by failing to object at the time, which meant a new trial could be granted only if the error was “so fundamental that a gross injustice would result absent a new trial.”²⁰⁰ Since this standard was not met, the court of appeals granted mandamus relief, ordering the trial court to vacate its new trial order.²⁰¹

Claims of improper competition, coupled with conflicting jury answers, were at issue in *Hill v. Premier IMS, Inc.*²⁰² In this case, an employer sued its former employee for various claims arising out of his decision to join a competitor, and the former employee counterclaimed for unpaid commissions. The jury found in the employer’s favor, and the former employee appealed, alleging (among other errors) that the jury’s finding that the employer had failed to pay certain commissions conflicted with its decision not to award any damages.²⁰³ The First Houston Court of Appeals found that the former employee had failed to preserve error on this issue, and thereby waived any complaint, by failing to object to this inconsistency before the trial court discharged the jury.²⁰⁴

The sufficiency of objections to the members of the jury panel was at issue in *Greenwood Motor Lines, Inc. v. Bush*.²⁰⁵ This case arose out of a truck accident, and the trial court entered judgment in favor of the plain-

197. *Id.* at 496–97. This was true even though the homeowners might have been damaged as a result of the plan to build the project. *Id.* at 498.

198. *In re Athans*, 478 S.W.3d 128, 138, 140 (Tex. App.—Houston [14th Dist.] 2015, orig. proceeding).

199. *Id.* at 140.

200. *Id.* at 141 (citing *United States v. Walton*, 909 F.2d 915, 924 (6th Cir. 1990); *In re Toyota Motor Sales, USA, Inc.*, 407 S.W.3d 746, 758–59 (Tex. 2013) (orig. proceeding)).

201. *Id.*

202. No. 01-15-00137-CV, 2016 WL 2745301, at *1 (Tex. App.—Houston [1st Dist.] May 10, 2016, no pet.) (mem. op.).

203. *Id.* at *9.

204. *Id.*

205. No. 05-14-01148-CV, 2016 WL 7488859, at *1 (Tex. App.—Dallas Dec. 30, 2016) (mem. op.), *opinion withdrawn and superseded*, No. 05-14-01148-CV, 2017 WL 1550035, at *1 (Tex. App.—Dallas Apr. 28, 2017, no pet. h.) (mem. op.).

tiff based upon a jury verdict of over four million dollars.²⁰⁶ On appeal, the defendant truck driver alleged error in the trial judge's striking for cause all of the potential jurors who would not commit to awarding an unlimited amount of non-economic damages to the plaintiff, who favored tort reform, or who were sympathetic to trucking companies.²⁰⁷ The Dallas Court of Appeals rejected this argument, noting that the improper striking of potential jurors for cause can constitute reversible error only if the appellant shows he was denied a trial by a fair and impartial jury.²⁰⁸ Since the truck driver did not object to any of the jurors on the panel that was actually seated, the court of appeals presumed he was afforded a fair and impartial jury and thus overruled his complaint.²⁰⁹

XI. JURY CHARGE

The need to secure a jury finding on a critical issue was one of the subjects of *Patterson v. Brewer Leasing, Inc.*²¹⁰ Following a fatal accident, the plaintiffs filed a wrongful death action against the truck driver and several entities, including Texas Stretch, which allegedly hired the driver, and Brewer Leasing, a related entity that purportedly owned or leased the tractor-trailer combination. The plaintiff settled with many of the defendants, including Texas Stretch and its insurer, but the release did not include Brewer Leasing since Brewer Leasing's insurer refused to cooperate.²¹¹ The plaintiffs took a post-answer default judgment against Brewer Leasing, and the trial court found that Texas Stretch employed the driver and that both entities were his statutory employer under the theory of "logo liability."²¹² After obtaining an assignment of Brewer Leasing's claims against its insurer, the plaintiffs filed a bill of review proceeding against Brewer Leasing, alleging that it "had concealed evidence about the . . . cocaine in [the driver's] system at the time of the accident."²¹³ The trial court set aside the post-answer default judgment, as well as the covenant not to execute and assignment, and set the plaintiffs' claims against Brewer Leasing for trial.²¹⁴

At the trial, the plaintiffs contended that "Brewer Leasing was primarily responsible for [the driver's] negligence as lessee of the truck" and that Brewer Leasing had ratified the driver's actions, whereas Brewer Leasing contended it was "only the owner, not the lessee," and that Texas Stretch and others were responsible.²¹⁵ Even though Brewer Leasing's

206. *Id.* at *2.

207. *Id.* at *3.

208. *Id.* (citing *Solomon v. Steitler*, 312 S.W.3d 46, 59 (Tex. App.—Texarkana 2010, no pet.); *City of Hawkins v. E.B. Ger. & Sons*, 425 S.W.2d 23, 26 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.)).

209. *Id.* (citing *Solomon*, 312 S.W.3d at 59).

210. 490 S.W.3d 205, 218 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

211. *Id.* at 207–08.

212. *Id.* at 208.

213. *Id.*

214. *Id.* at 212.

215. *Id.*

logo and Texas Department of Transportation (TxDOT) number were on the truck, and there was a written lease agreement stating that Texas Stretch had leased the tractor to Brewer Leasing, the individual who owned both entities testified that Brewer Leasing in fact owned the truck and was leasing it to Texas Stretch.²¹⁶ The jury found that the tractor was not leased to Brewer Leasing and that Brewer Leasing had not ratified or approved the driver's gross negligence.²¹⁷

In its post-trial motion for entry of judgment, the plaintiffs contended that Brewer Leasing was vicariously liable because it owned the trailer and was “judicially estopped [from denying] ownership of the tractor.”²¹⁸ After the trial court denied the plaintiffs' post-trial motions, the plaintiffs appealed, arguing that Brewer Leasing was liable because its “representations and evidence at trial [established it] owned the tractor and trailer—both regulated vehicles—and . . . there was no written lease . . . shifting liability to any other entity.”²¹⁹ According to the plaintiffs, both federal law and state law require a written lease, and in the absence of such a lease Brewer Leasing was vicariously liable as the owner.²²⁰ The First Houston Court of Appeals rejected this argument, finding that even though federal law and state law permit a vehicle owner to shift liability through a written lease agreement to a lessee operating the vehicle, the absence of such a written agreement does not render an oral lease ineffectual.²²¹ Since the plaintiffs failed to secure a jury finding on respondeat superior, and the issue was not conclusively established by the evidence, the plaintiffs waived this complaint.²²²

In contrast, the Fourteenth Houston Court of Appeals rejected a waiver argument in *Oiltanking Houston, L.P. v. Delgado*,²²³ which was a wrongful death action against a landowner arising out of the explosion of a storage tank on its premises. The plaintiffs sought to establish the landowner's liability under Chapter 95 of the Texas Civil Practice and Remedies Code, which addresses a property owner's liability for the acts of independent contractors.²²⁴ After the plaintiffs obtained a twenty-one million dollar jury verdict in their favor, the landowner appealed.²²⁵ After analyzing the terms and history of Chapter 95, the court of appeals turned to the plaintiffs' contention that the landowner had “waived all arguments regarding Chapter 95 because [it] failed to request and obtain jury findings” on the applicability of Section 95.002.²²⁶ The court of appeals

216. *Id.* at 213–14.

217. *Id.* at 214–15.

218. *Id.* at 215.

219. *Id.* at 217.

220. *Id.* at 218–19.

221. *Id.* at 219–20.

222. *Id.* at 221 (citing Jerry L. Starkey, TBDL, L.P. v. Graves, 448 S.W.3d 88, 102 (Tex. App.—Houston [14th Dist.] 2014, no pet.)).

223. 502 S.W.3d 202, 204–05 (Tex. App.—Houston [14th Dist.] 2016, pet. denied).

224. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 95.002, 95.003 (West 2011).

225. *Oiltanking*, 502 S.W.3d at 206.

226. *Id.* at 210.

disagreed, finding that there were no disputed facts underlying the applicability of Section 95.002, as the landowner was a “property owner,” the decedent was an “employee of a contractor,” and his claim arose “from the condition or use of an improvement to real property where the contractor constructs, repairs, renovates, or modifies the improvement.”²²⁷

The trial court’s failure to define a key term in the jury charge was at issue in *In re Athans*.²²⁸ The plaintiff contended two of its former employees, while they were still employed, solicited other employees to work for a new entity. The plaintiff sued the former employees for violating their non-compete covenants, breaching their fiduciary duty, and aiding and abetting the others’ breaches; it also sued the new entity for tortious interference and for aiding and abetting the former employees.²²⁹ After a jury verdict in the defendants’ favor, the plaintiff filed motions for judgment notwithstanding the verdict and new trial, arguing that the jury’s verdict was against the overwhelming weight of the evidence and that the defendant’s counsel had committed improper and incurable jury argument during closing regarding the meaning of “solicit.”²³⁰ The trial court granted the motion for new trial on both grounds, and the defendants sought mandamus relief to set aside the new-trial order.²³¹

After determining that the jury’s finding—that the former employees did not breach their fiduciary duties—was not contrary to the overwhelming weight of the evidence,²³² the Fourteenth Houston Court of Appeals turned to the issue of whether the trial court erred in granting a new trial based on an alleged charge error when neither side objected to the error.²³³ Since that failure to object would have resulted in a waiver on an appeal from a final judgment, the court of appeals considered whether the same preservation-of-error rules applied in the review of a trial court’s decision to order a new trial.²³⁴ After examining the treatment of this issue in federal courts and in Texas criminal cases, the court of appeals declined to resolve this issue. It concluded that regardless of whether those rules apply, the defendants failed to preserve error as to any deficiencies in the charge, and a new trial was not appropriate because any error was not “so fundamental that a gross injustice would [have resulted] absent a new trial.”²³⁵ The court of appeals thus concluded that “the trial court abused its discretion in granting a new trial for

227. *Id.* at 210–11 (quoting CIV. PRAC. & REM. § 95.002). The court of appeals ultimately found that there was no evidence that the landowner had actual knowledge of the danger or condition resulting in the injury, as required by Section 95.003(2), and it thus reversed the trial court’s judgment and rendered a take-nothing judgment in favor of the landowner. *Id.* at 216–18.

228. 478 S.W.3d 128, 134–35 (Tex. App.—Houston [14th Dist.] 2015, orig. proceeding).

229. *Id.* at 131.

230. *Id.*

231. *Id.* at 132.

232. *Id.* at 138.

233. *Id.* at 139.

234. *Id.*

235. *Id.* at 139–40 (citing *United States v. Walton*, 909 F.2d 915, 924 (6th Cir. 1990); *In re Toyota Motor Sales, USA, Inc.*, 407 S.W.3d 746, 758–59 (Tex. 2013) (orig. proceeding)).

this [charge error].”²³⁶

The distinction between an objection to the formulation of a jury question and the submission of the question itself was critical to the result in *Loera v. Fuentes*.²³⁷ In this car-wreck case, the defendants contended that the plaintiffs’ injuries were caused by their failure to wear seatbelts, and even though the jury found the defendants partially culpable and awarded substantial damages, the trial court entered a take-nothing judgment based on the plaintiffs’ non-use of seatbelts. On appeal, the plaintiffs challenged one of the jury questions on the ground that it was immaterial, and the defendants responded that the plaintiffs had waived that error by not raising it in the charge conference.²³⁸ The El Paso Court of Appeals determined that, since the plaintiffs’ objection was to the submission of a question that had resulted in the entry of the judgment, as opposed to the specific terms of that question, they had preserved error; however, this was a hollow victory, as the court of appeals nonetheless ruled that the submission of the question was proper.²³⁹

The failure to submit proposed jury questions was one of the subjects of *Smith v. Overby*.²⁴⁰ In this case, the plaintiffs sued their contractor for breach of warranty, breach of contract, and negligence, and secured a six-figure judgment.²⁴¹ On appeal, the contractor challenged the trial court’s refusal to include jury questions on whether its offer of repair was reasonable and whether the plaintiffs had failed to mitigate their damages.²⁴² Under the Residential Construction Commission Act, a contractor can potentially limit a plaintiff’s damages by making a written settlement or repair offer within fifteen days of the Residential Construction Commission’s determination, and the parties can agree in writing to extend this deadline.²⁴³ The contractor’s written offer of repair was not made by the fifteen-day deadline, and since there was no evidence that the homeowners had agreed to extend that deadline, the San Antonio Court of Appeals found no error in the trial court’s refusal to submit a jury question regarding the reasonableness of the contractor’s untimely offer.²⁴⁴ The court of appeals also rejected the contractor’s challenges to the trial court’s refusal to submit a jury question on mitigation, as it did not meet

236. *Id.* at 140 (citing *In re Toyota*, 407 S.W.3d at 758; *In re United Scaffolding, Inc.*, 377 S.W.3d 685, 688–89 (Tex. 2012) (orig. proceeding)).

237. 511 S.W.3d 761, 765–66 (Tex. App.—El Paso 2016, no pet.).

238. *Id.* at 766.

239. *Id.* at 767–68.

240. No. 04-15-00436-CV, 2016 WL 4444437, at *1 (Tex. App.—San Antonio Aug. 24, 2016, no pet.) (mem. op.).

241. *Id.*

242. *Id.* at *2–3.

243. *Id.* at *2 (citing TEX. PROP. CODE ANN. § 27.004 (West 2014)).

244. *Id.* at *2–3; see also *Gunn v. McCoy*, 489 S.W.3d 75, 114–16 (Tex. App.—Houston [14th Dist.] 2016, pet. filed) (concluding that the trial court did not abuse its discretion in refusing to include three instructions); *Pattillo v. Franco*, No. 14-15-00628-CV, 2016 WL 4533508, at *3–4 (Tex. App.—Houston [14th Dist.] Aug. 30, 2016, no pet.) (mem. op.) (holding that the trial court’s refusal to include requested instructions was not an abuse of discretion and probably did not cause the rendition of an improper judgment).

its burden of showing that the plaintiffs' conduct was "not that of a prudent homeowner," and in the absence of that showing, it was not entitled to the submission of a jury question on mitigation.²⁴⁵

XII. MOTIONS FOR NEW TRIAL

The Texas Supreme Court, in *In re Bent*,²⁴⁶ once again addressed the standard for determining whether a motion for new trial was properly granted by a trial court. The case involved a dispute between an insurer and its insured regarding claims under a homeowners' policy.²⁴⁷ Although the insured prevailed at trial on some claims, the trial court granted the insured's motion for new trial for several reasons, including that "the jury's finding that [the insurer] did not breach the homeowner's policy was contrary to the great weight and preponderance of the evidence" and that the evidence did not support the damages award.²⁴⁸ The insurer sought mandamus relief from the First Houston Court of Appeals, which concluded that the trial court abused its discretion in ordering a new trial.²⁴⁹ The insured then sought relief from the Texas Supreme Court. While the supreme court agreed with the result, it disagreed with the court of appeals' finding that the trial court's explanation of its reasons for granting the insured a new trial was facially sufficient under established precedent.²⁵⁰ In that regard, the supreme court found that the trial court's order conflated legal grounds with factual sufficiency grounds, and was thus not facially sufficient either.²⁵¹

XIII. DISQUALIFICATION OF COUNSEL

The Dallas Court of Appeals, in *In re VSDH Vaquero Venture, Ltd.*, held that an attorney's violation of Rule 3.08 of the Disciplinary Rules of Professional Conduct²⁵² was not a legally sufficient basis for the trial court to grant a new trial in the absence of a motion to disqualify.²⁵³ The underlying dispute involved a house VSDH sold to husband and wife purchasers with an option for the purchasers to require VSDH to buy back the house at the original sales price. The purchasers sought to exercise the

245. *Overby*, 2016 WL 4444437, at *3.

246. 487 S.W.3d 170, 175–79 (Tex. 2016) (orig. proceeding).

247. *Id.* at 173–74.

248. *Id.* at 175.

249. *Id.*

250. *Id.* at 180.

251. *Id.* at 179. The supreme court explained that if a jury finding was barred by a legal conclusion, a new trial was inappropriate, and instead a judgment notwithstanding the verdict was in order; if, on the other hand, the jury finding lacked sufficient factual support, the trial court failed to specifically identify the lack of evidence that undermined the jury's finding. *Id.*

252. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.08(a), reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2013) (generally prohibits a lawyer from acting as both an advocate and a witness in an adjudicatory proceeding when the lawyer's testimony is or may be necessary to establish an essential fact on behalf of the lawyer's client).

253. *In re VSDH Vaquero Venture, Ltd.*, No. 05-15-01513-CV, 2016 WL 2621073, at *8 (Tex. App.—Dallas, May 6, 2016, orig. proceeding) (mem. op.).

repurchase option early at a discount and were allegedly told by the attorney-partner of VSDH that VSDH was insolvent and unable to perform the repurchase option.²⁵⁴ The purchasers thereafter sold the house to a third party at a loss. The attorney-partner of VSDH filed suit against the purchaser on VSDH's behalf for breach of the option, and the purchasers counterclaimed for repudiation. Several weeks before the trial setting, VSDH filed a motion for continuance on the ground that the purchasers had named the attorney-partner representing VSDH at trial as a witness. The purchasers then filed a motion to disqualify the attorney "because they did not want him to again use [R]ule 3.08 as an excuse for continuance."²⁵⁵ The trial court granted the motion to disqualify, and the court of appeals, on mandamus review, found that the trial court had abused its discretion in doing so because the purchasers had not presented evidence that the attorney's testimony was necessary and went to an "essential fact," or that purchasers would be prejudiced by the attorney's dual advocate-witness role.²⁵⁶ The trial court vacated the disqualification order, and the case proceeded to trial with the attorney representing VSDH.

During a trial recess, the attorney informed the trial court that it had become apparent that he may be compelled to testify adversely to VSDH on the solvency issue in violation of Rule 3.08. The attorney and VSDH then filed a joint motion to withdraw, and VSDH moved for a mistrial. The trial court held a hearing on the motions and determined that the trial should proceed without ruling on the motion to withdraw. After the purchasers rested, VSDH called the attorney to testify, and the purchasers neither objected nor moved to disqualify the attorney at that time.²⁵⁷ The jury found in favor of VSDH on all issues, and the purchasers filed a motion for new trial, claiming that VSDH's attorney violated Rule 3.08.²⁵⁸ The trial court granted the motion for new trial, and VSDH sought mandamus review.²⁵⁹

On mandamus, the court of appeals determined that the sole basis for the trial court's grant of a new trial was VSDH's attorney's violation of Rule 3.08²⁶⁰ and the resulting prejudice to the purchasers.²⁶¹ The appellate court then held that in the absence of a timely motion to disqualify, which the purchasers did not file despite being aware that the attorney may testify, the violation of Rule 3.08 standing alone was an insufficient legal basis to grant the purchasers a new trial.²⁶² The court of appeals

254. *Id.* at *1.

255. *Id.* at *2.

256. *Id.* (citing *In re VSDH Vaquero Venture, Ltd.*, No. 05-14-00958-CV, 2014 WL 4262167, at *2 (Tex. App.—Dallas Aug. 28, 2014, orig. proceeding) (mem. op.)).

257. *Id.* at *4.

258. *Id.*

259. *Id.*

260. *Id.* at *4 n.4 (interpreting the trial court's conclusion that the attorney ran "afoul" of Rule 3.08 as a violation since the parties had done so).

261. *Id.* at *6.

262. *Id.* at *7.

noted that the purchasers' decision not to move to disqualify was likely tactical, given that "it was only after the jury rendered an adverse verdict that they claimed they should have been protected by [R]ule 3.08's prohibitions."²⁶³ The appellate court concluded that the purchasers waived any complaint about the Rule 3.08 violation, granted mandamus relief, and ordered the trial court to vacate the new trial order and render judgment in favor of VSDH on the jury's verdict.²⁶⁴

XIV. MISCELLANEOUS

There were a number of cases in the Survey period addressing important, previously unanswered questions under the Texas Civil Practice and Remedies Code, including two by the Texas Supreme Court. In *Hoskins v. Hoskins*,²⁶⁵ the Texas Supreme Court held that statutory grounds for vacating an arbitration award enumerated in the Texas General Arbitration Act (TAA) are exclusive,²⁶⁶ and distinguished the TAA from the Federal Arbitration Act²⁶⁷ in holding that common law doctrines such as "manifest disregard for the law" or "gross mistake" are unavailable to vacate an award unless the parties' arbitration agreement otherwise brings those doctrines within the purview of the TAA's enumerated grounds.²⁶⁸ In *Wal-Mart Stores, Inc. v. Forte*, the Texas Supreme Court

263. *Id.* at *8 n.6.

264. *Id.* at *9.

265. 497 S.W.3d 490 (Tex. 2016).

266. *Id.* at 497. The supreme court noted that the TAA states that an award shall be confirmed unless grounds are offered for vacating it under Section 171.088 of the Texas Civil Practice and Remedies Code. *Id.* at 494 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 171.087 (West 2011)). In turn, Section 171.088 states the award shall be vacated if:

- (1) it was "obtained by corruption, fraud, or other undue means";
- (2) "the rights of a party were prejudiced by"
 - (i) "evident partiality by an arbitrator appointed as a neutral arbitrator";
 - (ii) "corruption in an arbitrator"; or
 - (iii) "misconduct or willful misbehavior of an arbitrator"
- (3) the arbitrators
 - (i) "exceeded their powers";
 - (ii) "refused to postpone the hearing after a showing of sufficient cause";
 - (iii) "refused to hear evidence material to the controversy"; or
 - (iv) "conducted the hearing, contrary to [various statutory provisions], in a manner that substantially prejudiced the rights of a party"; or
- (4) "there was no agreement to arbitrate, the issue was not adversely determined in a proceeding under Subchapter B, and the party did not participate . . . without raising the objection."

Id. (noting that the "text could not be plainer: the trial court 'shall confirm' an award unless vacatur is required under one of the enumerated grounds in section 171.088").

267. *Id.* at 498 (Willett, J., concurring) (noting that the supreme court's decision that the enumerated TAA grounds are exclusive "avoid[s] the sort of quagmire that surrounds the TAA's federal counterpart," the Federal Arbitration Act, with regard to the availability and applicability of common law vacatur doctrines like manifest disregard).

268. *Id.* at 494. For example, the supreme court distinguished its decision in *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 88 (Tex. 2011), explaining that the complaint there, that an arbitrator committed reversible error, fell within the "exceeded their powers" vacatur ground of the TAA since the parties had agreed to limit the arbitrator's power "to that of a judge, whose decisions are reviewable on appeal." *Hoskins*, 497 S.W.3d at 494–95. The supreme court noted that there was no limitation "on the arbitrator's authority to issue a decision unsupported by the law" in the *Hoskins* arbitration agreement, and thus no basis

answered certified questions from the United States Court of Appeals for the Fifth Circuit in the affirmative about whether “civil penalties” under the Texas Ophthalmology Act (Ophthalmology Act)²⁶⁹ constituted “exemplary damages” limited by Chapter 41 of the Civil Practice and Remedies Code.²⁷⁰ The Fifth Circuit certified the questions²⁷¹ after a jury awarded four individual optometrists \$3.953 million in civil penalties against Wal-Mart, representing the maximum \$1,000 daily penalty under the Ophthalmology Act for the period the optometrists operated under violating leases.²⁷² While expressing concern that its answers may be hypothetical,²⁷³ the supreme court concluded that Chapter 41 applied to private recovery of “civil penalties” under the Ophthalmology Act, and the civil penalties awarded to the optometrists constituted “exemplary damages” under Chapter 41 such that they were not recoverable in the absence of the optometrists’ recovery of other damages.²⁷⁴

Lower appellate courts grappled with the meaning of the terms “award” and “judgment” when used in the Texas Rules of Civil Procedure in two cases with arguably conflicting results. The meaning of Rule 169’s limitation on a plaintiff’s recovery in fast-track cases to a judgment not exceeding \$100,000 was at issue in *Cross v. Wagner*.²⁷⁵ Following a car accident, the plaintiff filed suit and invoked Rule 169’s “expedited actions process.”²⁷⁶ After trial, the jury found both the plaintiff and the defen-

for the complaining party to argue “manifest disregard of the law” fell within the “exceeded [their] powers” or any other enumerated ground of the TAA. *Id.* at 495.

269. TEX. OCC. CODE ANN. §§ 351.001–.068 (West 2012 & Supp. 2016). In general, the Ophthalmology Act prohibits commercial retailers of ophthalmic goods from attempting to control the practice of optometry.

270. Wal-Mart Stores, Inc. v. Forte, 497 S.W.3d 460, 461 (Tex. 2016). In the underlying suit, four optometrists brought suit against Wal-Mart claiming its leases for in-house Vision Centers violated the Ophthalmology Act by attempting to dictate the number of hours worked by the lessee optometrists. *Id.* at 462–63.

271. The certified questions, verbatim, were:

1. Whether an action for a “civil penalty” under the [Ophthalmology Act] is an “action in which a claimant seeks damages relating to a cause of action” within the meaning of Chapter 41 of the Texas Civil Practice and Remedies Code. In other words, are civil penalties awarded under Tex. Occ. Code § 351.605 “damages” as that term is used in Tex. Civ. Prac. & Rem. Code § 41.002(a).
2. If civil penalties awarded under the [Ophthalmology Act] are “damages” as that term is used in Tex. Civ. Prac. & Rem. Code § 41.002(a), whether they are “exemplary damages” such that Tex. Civ. Prac. & Rem. Code § 41.004(a) precludes their recovery in any case where a plaintiff does not receive damages other than nominal damages.

Id. at 463–64. The supreme court answered “yes” to both. *Id.* at 467.

272. *Id.* at 462–63. The district court had “instructed the jury that the [o]ptometrists ‘do not claim that they have suffered any physical or economic damages [and] only seek to recover civil penalties.’” *Id.* at 463.

273. *Id.* at 461. The State argued that the supreme court should decline to answer the certified questions since they were based on an incorrect statement of Texas law—namely, that the Ophthalmology Act allowed a private right of action for civil penalties in the first place. *Id.* at 464. Three dissenting judges would have declined to answer the certified questions for this reason. *Id.* at 467–68 (Boyd, J., dissenting).

274. *Id.* at 467.

275. 497 S.W.3d 611, 612 (Tex. App.—El Paso 2016, no pet.).

276. *Id.* at 613.

dant negligent, assigning fault to the plaintiff at 49% and the defendant at 51%, and found plaintiff suffered \$170,225.22 in damages.²⁷⁷ At the plaintiff's request and over the defendant's objection, the trial court entered judgment in favor of the plaintiff for \$92,718.19, representing the damages found by the jury reduced by the plaintiff's percentage of fault, plus pre-judgment interest and court costs. The defendant appealed, arguing that the judgment should have been limited to \$51,000, representing her 51% responsibility for the maximum \$100,000 jury award, since the case was tried as a Rule 169 expedited action.²⁷⁸ The El Paso Court of Appeals rejected the argument that Rule 169 operated as a cap of \$100,000 on the jury's damages award, reasoning that the Rule's plain language made it clear that the limitation applied to a plaintiff's recovery of a judgment over \$100,000 but did not affect the amount of damages a plaintiff could ask the fact-finder to award or the amount a fact-finder could award.²⁷⁹

In *Bobo v. Varughese*,²⁸⁰ the Texarkana Court of Appeals addressed for the first time whether pre-judgment interest is considered in making the comparison between a Rule 167 settlement offer and judgment for purposes of shifting litigation costs.²⁸¹ After a trial, the jury returned a verdict in favor of the plaintiff passenger in a vehicle that collided with the defendant's vehicle in the amount of \$40,358.21. On the plaintiff's motion, the trial court entered judgment in the plaintiff's favor for \$49,072.28, which included the award, pre-judgment interest, and court costs. The defendant moved to modify the judgment, arguing that the judgment, if pre-judgment interest was properly calculated, was less favorable than the defendant's rejected Rule 167 settlement offer of \$55,000.²⁸² After re-calculating the pre-judgment interest, the trial court entered an amended final judgment of \$43,823.13 for the plaintiff, determined that the defendant was entitled to recover \$44,857.27 in litigation costs incurred after rejection of the Rule 167 offer, and entered a take-nothing judgment in favor of the defendant after offsetting the defendant's litigation costs against the plaintiff's judgment.²⁸³

The plaintiff appealed, arguing that Rule 167 and Chapter 42 of the Texas Civil Practice and Remedies Code²⁸⁴ both refer to "the judgment to be awarded" and "the judgment to be rendered" respectively rather

277. *Id.* at 612.

278. *Id.*

279. *Id.* at 614–15 (citing TEX. R. CIV. P. 169(b), cmt. 4).

280. 507 S.W.3d 817 (Tex. App.—Texarkana 2016, no pet.) (noting that the issue "appears to be a case of first impression").

281. *See id.* at 823; *see also* TEX. R. CIV. P. 167.4(a), (b)(1) (providing that when a judgment is less than 80% of a rejected settlement offer made under the Rule, the court "must award the offeror litigation costs against the offeree from the time the offer was rejected to the time of judgment"). Litigation costs under the Rule include "reasonable attorney fees." TEX. R. CIV. P. 167.4(c)(4).

282. *Bobo*, 507 S.W.3d at 819–20.

283. *Id.* at 819.

284. *Id.* at 821 n.8 (citing TEX. CIV. PRAC. & REM. CODE ANN. §§ 42.001–.005 (West 2015), the enabling statute allowing the promulgation of Rule 167).

than a jury “verdict” or “award,” thus showing that pre-judgment interest should be included in the calculation for comparison purposes.²⁸⁵ The court of appeals reviewed the legislative history of Chapter 42 and the promulgation and text of Rule 167, noting that neither defines the terms “award,” “judgment,” “judgment award,” or “monetary claims.”²⁸⁶ The court analyzed the legislature’s use of the term “award” throughout the Civil Practice and Remedies Code to mean certain types of damages awarded by the fact-finder and concluded that the term “award” in Section 42.004 referred to “the damages awarded by the fact-finder, rather than the final judgment rendered by the trial court.”²⁸⁷ Since Rule 167.4 was intended to implement Section 42.004, the court held that the term “judgment” as used in Rule 167.4(b)(1) and (2) had to mean “the damages awarded by the fact-finder” and not the “judgment rendered by the trial court.”²⁸⁸ The court of appeals thus held that “prejudgment interest is not considered when comparing ‘the judgment award on monetary claims’ to ‘an offer to settle those claims’ under Rule 167.4(b).”²⁸⁹ The appellate court found that the trial court therefore properly offset the defendant’s litigation costs from the plaintiff’s award and affirmed the take-nothing judgment in favor of the defendant.²⁹⁰

Whether a named defendant could designate a former co-defendant as a responsible third party under Chapter 33 of the Texas Civil Practice and Remedies Code was at issue in *In re CVR Energy, Inc.*²⁹¹ In this case, two plaintiffs’ husbands had been killed in an explosion at a named defendant’s refinery. They sued, alleging that the refinery operator defendant’s negligence and gross negligence caused the deaths. The refinery operator defendant was wholly owned by CVR, which was also named as a defendant to the suit. Over the next twenty months, CVR did not name the refinery operator co-defendant as a potential responsible third party in response to the plaintiffs’ disclosure requests. Fifty-five days before trial, however, the plaintiffs non-suited the refinery operator defendant, and twenty-six days later, CVR disclosed the former refinery operator defendant as a potential responsible third party and moved to designate it under Chapter 33.²⁹² Plaintiffs objected, the trial court denied CVR’s mo-

285. *Id.* at 821. The plaintiff also argued that if pre-judgment interest had been properly calculated by the trial court, the total amount of her judgment, including pre-judgment interest, was 81.09% of the Rule 167 settlement offer. *Id.* Although the court of appeals determined that the trial court had improperly calculated the pre-judgment interest, it found the error harmless given its holding that pre-judgment interest was not considered for Rule 167 comparison purposes discussed above. *Id.* at 829.

286. *Id.* at 827–28. The court also noted that Rule 167.2 does not define the term “interest” either.

287. *Id.* at 828.

288. *Id.*

289. *Id.* at 829 (quoting TEX. R. CIV. P. 167.4).

290. *Id.*

291. 500 S.W.3d 67, 70 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding).

292. *Id.* at 72–73 (citing TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.001–.017 (West 2015) (setting out Texas’s proportionate responsibility scheme)).

tion to designate, and CVR sought mandamus relief.²⁹³

On mandamus, the First Houston Court of Appeals noted the two limitations on a defendant's ability to designate a responsible third party under Section 33.004. First, a defendant could not designate within sixty days of trial absent a finding of good cause.²⁹⁴ Second, a defendant could not designate if it was obligated to disclose the potential responsible third party earlier, failed to do so, and limitations on a plaintiff's claim against the untimely disclosed party had run in the interim.²⁹⁵ The court of appeals held, however, that neither limitation precluded CVR's designation of the former refinery operator defendant as a responsible third party under the circumstances.²⁹⁶ With respect to the first limitation, the court found that CVR had no obligation to disclose the refinery operator as a potential responsible third party while it was named as a co-defendant in the suit, reasoning that the ordinary meaning of the phrase "third party" is "a party that is not otherwise a party to the litigation."²⁹⁷ With regard to the time limitation, the court of appeals found that there was good cause for CVR's designation of the refinery operator within the sixty-day period before trial because plaintiffs non-suited the co-defendant within that period.²⁹⁸ The court of appeals further held that CVR's amendment of its disclosures and motion to designate the refinery operator within thirty days of the non-suit was "reasonably prompt" under Rule 193.5(b) and demonstrated "good cause" under Section 33.004(a).²⁹⁹ The court of appeals granted CVR mandamus relief, ordering the trial court to grant CVR's motion to designate the former co-defendant as a responsible third party.³⁰⁰

XV. CONCLUSION

The Texas Supreme Court and intermediate courts of appeals have continued in this Survey period to expand precedent on existing procedural rules to guide the trial courts in properly managing their dockets.

293. *Id.* at 72.

294. *Id.* at 73 (citing CIV. PRAC. & REM. § 33.004(a)).

295. *Id.* (citing and quoting CIV. PRAC. & REM. § 33.004(d)).

296. *Id.* at 79.

297. *Id.* at 78. The court relied on the common meaning of the terms used because the "current version of the responsible-third-party statute does not address whether a person may simultaneously be a defendant and a responsible third party." *Id.* at 75.

298. *Id.* at 79.

299. *Id.*

300. *Id.* at 84.