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Civil Procedure: Pre-Trial & Trial

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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

During the Survey period, the Texas Supreme Court addressed the standard for determining if an employee is covered by governmental immunity.[1] The suit involved one Texas Tech professor suing another for defamation, which allegedly caused the defamed professor to be passed over for promotion.[2] The defendant moved for summary judgment, arguing under the election-of-remedies provision in the Tort Claims Act[3] that the plaintiff's claims against her as an individual were barred because she made the allegedly defamatory statements within the course and scope of her employment for the university.[4] The trial court denied the defendant's motion for summary judgment, and the Amarillo Court of Appeals affirmed, holding that while the defendant's statements regarding the plaintiff "may fall within [the defendant's] duties for the University," she "did not conclusively establish that . . . she was serving any purpose of her employer, as opposed to furthering her own purposes only."[5]

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1. Laverie v. Wetherbe, 517 S.W.3d 748, 750 (Tex. 2017).
2. *Id.* at 750.
3. *Id.* at 752 (generally requiring a plaintiff to make an early decision on whether a governmental employee is sued for actions outside the scope of duties for the governmental employer or within the scope of employment, which would render the governmental entity vicariously liable); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(f) (West 2011).
4. *Laverie*, 517 S.W.3d at 751. In particular, the defendant was senior associate dean of the business school and a member of the search committee for an open position. *Id.* at 750.
5. *Id.*

The supreme court granted review and rejected the argument that an employee's subjective intent is ever relevant in determining whether a governmental employee is acting within the course and scope of employment.[6] The supreme court held that requiring an employee to prove a negative—that the employee's action was not done with an ulterior motive—would be inconsistent with the Tort Claims Act as well as with its prior, well-established "scope-of-employment" and respondeat superior case law.[7] The supreme court reaffirmed that whether a governmental employee is acting within the scope of employment is based exclusively on an objective review of the employee's actions and the nature of the employee's job duties.[8] After conducting the proper analysis, the supreme court held that the statements objectively were made within the scope of the defendant's employment such that, "[e]ven if [she] defamed [the plaintiff], she did so while fulfilling her job duties."[9] Because it was undisputed that the plaintiff's claims could have been made against the university, the supreme court reversed the court of appeals, dismissed the claims against the plaintiff in her individual capacity, and remanded the remaining claims against her in her official capacity for further proceedings.[10]

The Texas Supreme Court addressed another novel sovereign immunity issue in *Engelman Irrigation District v. Shields Brothers, Inc.*[11] This suit arose out of a long-standing dispute between a contractor and a governmental entity.[12] In 1992, the contractor obtained a judgment against the governmental entity under then-existing case law that made sovereign immunity inapplicable to the claim.[13] While the contractor was trying to collect on the judgment, the supreme court changed the sovereign immunity analysis in *Tooke v. City of Mexia*.[14] The governmental entity then brought suit seeking a declaration that the original, twenty-five-year-old judgment was void under the reasoning in *Tooke*. The trial court denied the claim, which was affirmed by the Corpus Christi Court of Appeals, and the supreme court granted review.[15] While recognizing that "[a] judicial decision generally applies retroactively," the supreme court held that this rule does not "allow reopening a final judgment where all direct appeals have been exhausted."[16] The supreme court therefore rejected the governmental entity's argument that because it was entitled to sovereign immunity under *Tooke*, the original judgment was void and could be col-

6. *Id.* at 756.
7. *Id.* at 752–55.
8. *Id.* at 753, 755.
9. *Id.* at 755–56.
10. *Id.* at 756.
11. 514 S.W.3d 746, 747 (Tex. 2017).
12. *Id.* at 747.
13. *Id.*
14. *Id.* at 748 (citing Tooke v. City of Mexia, 197 S.W.3d 325 (Tex. 2006)). According to the supreme court, *Tooke* held "that statutory 'sue and be sued' language is insufficient to waive immunity." *Id.* at 747.
15. *Id.* at 747.
16. *Id.* at 748–49.

laterally attacked.[17] "Favoring finality over uncertainty," the supreme court held that sovereign immunity and lack of subject matter jurisdiction cannot be equated for all purposes and reasoned that allowing collateral attack on final judgments based on changes in sovereign immunity law would undermine res judicata principles and respect for judgments.[18]

III. SPECIAL APPEARANCE

In *Jutalia Recycling, Inc. v. CNA Metals Limited*, the Fourteenth Houston Court of Appeals concluded that the trial court should have granted the defendants' special appearance and rendered judgment dismissing the plaintiff's claims.[19] In this case, the plaintiff sought to purchase scrap metals from a nonresident defendant and sent a "Purchase Contract" stating that "disputes are subject to Fort Bend County State of Texas Jurisdiction."[20] That same day, the defendant-seller responded with an "Agreement of Sale" that provided the state and federal courts in Richmond County, New York would have jurisdiction over disputes, which the plaintiff's representative signed above the notation "Accepted By Buyer."[21] When the goods arrived, the plaintiff inspected the materials, found them worthless, and sued the seller, among others, in Harris County for breach of contract.[22] The seller filed a special appearance, which the trial court denied, and the seller appealed.[23]

On interlocutory appeal, the court of appeals held that the seller had not consented to specific jurisdiction in Texas because it had not accepted the plaintiff's "Purchase Contract," but instead offered different venue terms in the sales agreements, which the plaintiff then accepted.[24] However, the court of appeals rejected the seller's argument that the parties' consent to jurisdiction in New York precluded personal jurisdiction over it in Texas, reasoning that consent to jurisdiction in one venue did not "foreclose the possibility" of sufficient minimum contacts to support a Texas court's exercise of personal jurisdiction.[25] Nonetheless, the court of appeals concluded that the seller's act of contracting with the plaintiff, a Texas resident, was insufficient to support the trial court's exercise of personal jurisdiction because the seller had "intended to avoid Texas by structuring their transactions in such a way as neither to profit from Texas law nor to subject themselves to jurisdiction there."[26] The court of appeals therefore "render[ed] judgment dismissing [plaintiff's] claims

17. *Id.* at 750.
18. *Id.* at 747, 751–53.
19. Jutalia Recycling, Inc. v. CNA Metals Ltd., 542 S.W.3d 90, 93 (Tex. App.—Houston [14th Dist.] 2017, no pet.).
20. *Id.* at 93.
21. *Id.*
22. *Id.* at 94.
23. *Id.*
24. *Id.* at 96.
25. *Id.*
26. *Id.* at 99.

against [the seller] for want of jurisdiction."[27]

In *Tran v. Tran*, the First Houston Court of Appeals concluded that a defendant had not waived his special appearance by waiting three years to request a hearing on it or by moving for continuance and responding on the merits to the plaintiffs' motion for partial summary judgment.[28] The court of appeals noted that the trial court addressed the defendant's special appearance before hearing any other matter and held that, despite the delay in noticing his special appearance for hearing, the defendant complied with Texas Rule of Civil Procedure 120a's requirements. The court of appeals found compliance because he had "filed his special appearance prior to filing his answer, participated in jurisdictional discovery only, and moved for a hearing on his special appearance," and only subject to the trial court's ruling on the special appearance, moved for continuance and responded to plaintiff's summary judgment response.[29]

IV. VENUE

In *Smith v. Smith*, the Fourteenth Houston Court of Appeals addressed whether a party waived his venue objection.[30] This case arose out of a business dispute between brothers.[31] The suit was filed in Harris County, and the defendant filed a motion to transfer venue to Bexar County.[32] The plaintiffs responded by arguing, among other things, that the defendant waived his objection to venue by taking various actions in the Harris County court.[33] Without stating its reasoning, the Harris County court denied the motion to transfer venue, and the defendant sought mandamus relief.[34] Finding support for the defendant's waiver in the record, the court of appeals held that "the trial court did not abuse its discretion in denying the [motion to transfer venue]."[35] Specifically, the court of appeals noted that the defendant (1) did not obtain a hearing on the transfer motion for eleven months; (2) responded to the plaintiffs' motions for summary judgment; and (3) joined in a motion for continuance, which argued the parties needed time to prepare the case.[36] The court of appeals reasoned that the eleven-month-delay in obtaining a hearing alone may not constitute waiver, but that delay combined with the defendant's participation in the trial court on the merits, without making the participation subject to the venue objection, was enough to support a finding of

27. *Id.* at 99–100.

28. Tran v. Tran, No. 01-16-00248-CV, 2017 WL 817183, at *3 (Tex. App.—Houston [1st Dist.] Mar. 2, 2017, no pet.) (mem. op.).

29. *Id.*

30. Smith v. Smith, 541 S.W.3d 251, 255 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

31. *Id.* at 254.

32. *Id.* at 254–55.

33. *Id.* at 255.

34. *Id.*

35. *Id.* at 258.

36. *Id.* at 256–57.

waiver of the objection.[37] Thus, the trial court could properly deny the venue transfer motion.[38]

V. PARTIES

In *Crawford v. XTO Energy, Inc.*, the Texas Supreme Court addressed whether adjacent landowners were necessary parties, under Texas Rule of Civil Procedure 39, to a dispute between a mineral lessor and its lessee.[39] In this case, Crawford inherited a tract of land for which XTO Energy, Inc. (XTO) held an oil-and-gas lease.[40] XTO pooled the lease on Crawford's land with hundreds of other leases, forty-four of which were on adjacent property.[41] Relying on a title opinion that Crawford's share of royalties was attributable to adjacent landowners under the strip-and-gore doctrine, XTO chose not to pay any royalties to Crawford and distributed his share to the adjacent landowners.[42] Thereafter, Crawford sued XTO, and XTO moved to abate the action and sought to compel Crawford to join the adjacent landowners as necessary parties.[43] The trial court granted XTO's motion and dismissed Crawford's claims when he failed to join the adjacent landowners to the suit. Crawford appealed, and a divided Amarillo Court of Appeals affirmed.[44]

The Texas Supreme Court disagreed, holding that the adjacent landowners were not necessary parties to the action under Rule 39.[45] The supreme court reasoned that none of the adjacent landowners had ever asserted an interest in Crawford's royalties, and XTO's assertion they had such an interest was insufficient.[46] The supreme court emphasized that the mere fact that Crawford's success would potentially reduce the amount of XTO's royalty payments to the landowners did not make them necessary parties to Crawford's claims against XTO.[47] Further, the supreme court noted that XTO could join the landowners under Texas Rule of Civil Procedure 37, but Crawford was not required to do so.[48] Accordingly, the supreme court reversed the dismissal of Crawford's claims against XTO and remanded the case to the trial court for further proceedings.[49]

In *Elness Swenson Graham Architects, Inc. v. RLJ II-C Austin Air, LP*, the Austin Court of Appeals concluded that a subsequent purchaser of a hotel had capacity to sue the architectural firm that originally contracted

37. *Id.* at 257–58.
38. *Id.* at 258.
39. Crawford v. XTO Energy, Inc., 509 S.W.3d 906, 912 (Tex. 2017).
40. *Id.* at 908.
41. *Id.*
42. *Id.* at 908–09.
43. *Id.* at 909.
44. *Id.*
45. *Id.* at 912.
46. *Id.*
47. *Id.* at 914.
48. *Id.*
49. *Id.*

with the hotel's developer for breach of the developer-architect contract, even though the purchaser was a stranger to the contract and there was no express assignment of causes of action to the purchaser.[50] In this case, after taking possession and discovering significant foundation problems, the plaintiff purchaser of the hotel sued the hotel's architect for breach of contract and other claims.[51] The architect moved for traditional and no-evidence summary judgment arguing that the purchaser lacked capacity to bring a claim under the developer-architect contract because it had not been validly assigned.[52] The purchaser cross-moved for summary judgment on the capacity issue; the trial court denied the architect's motions and granted the purchaser's cross-motion.[53] The architect appealed.[54]

On appeal, the architect argued that the trial court erred in concluding the purchaser had capacity to sue the architect for breach because the assignment of the developer-architect contract from the developer's assignee to the purchaser did not explicitly assign causes of action relating to the developer-architect contract.[55] As it had below, the purchaser argued that the developer's assignee's assignment to it of the developer-assignee's "right, title, and interest in and to all licenses, permits and all other intangible assets relating to the [hotel]"[56] included any causes of action arising from the developer-architect contract.[57] After considering the generally accepted meaning of the phrase "intangible assets," the en banc court of appeals agreed with the purchaser and concluded that "choses in action" were an "intangible asset" such that the assignor's or developer's assignment to the purchaser, even without express language to that effect, included all causes of action arising from the developer-architect contract.[58] The court of appeals therefore held that the purchaser had capacity to sue the architect for breach of contract.[59]

VI. PLEADINGS

The Texas Supreme Court addressed an issue of first impression under the Texas Citizens' Participation Act (TCPA) during the Survey period, and reached a conclusion contrary to several courts of appeals.[60] In *Hersh*, parents of a teenager who committed suicide sued a news organization and an individual who provided information for a news article re-

50. Elness Swenson Graham Architects, Inc. v. RLJ II–C Austin Air, LP, 520 S.W.3d 145, 155–56 (Tex. App.—Austin 2017, pet. denied).

51. *Id.* at 152.

52. *Id.*

53. *Id.* at 152–53.

54. *Id.* at 153.

55. *Id.* The architect had consented to the developer's assignment of the developer-architect contract to the assignee. *Id.* at 152.

56. *Id.* at 152.

57. *Id.* at 153–54.

58. *Id.* at 154–55.

59. *Id.* at 155–56.

60. Hersh v. Tatum, 526 S.W.3d 462, 467 (Tex. 2017).

garding their son's obituary not mentioning that he committed suicide.[61] The individual defendant moved to dismiss the case pursuant to the TCPA while denying that she made the news organization aware of the obituary at issue.[62] The trial court granted the motion to dismiss, but the Dallas Court of Appeals reversed based on its own prior precedent holding that a defendant who denies making the alleged communication is not protected by the TCPA.[63] The supreme court granted review.[64]

Initially, the supreme court noted that several courts of appeals had held that the TCPA cannot be invoked by a defendant who denies making the communication at issue.[65] The supreme court rejected these cases and held that if a plaintiff's pleadings demonstrate that the action is based on a communication covered by the TCPA, a defendant need not show more to invoke the statute's protection.[66] In other words, the supreme court reasoned that the legal basis of the action controls the TCPA's applicability, and that basis is best determined by the plaintiff's allegations.[67] Having found the TCPA was applicable in the underlying case despite the individual defendant's denial, the supreme court determined that the plaintiffs failed to establish a prima facie case for intentional infliction of emotional distress, reversed the judgment of the court of appeals, and remanded to the court of appeals to consider the remaining issues.[68]

During the Survey period, several intermediate courts of appeals also analyzed whether plaintiffs' petitions were sufficient to survive motions to dismiss under the TCPA. In *Kirkstall Road Enterprises, Inc. v. Jones*, the Dallas Court of Appeals concluded that a negligence suit filed against the producer of *The First 48*, a television program documenting murder investigations, by an individual who was featured on the program was not subject to dismissal under the TCPA.[69] In this case, the plaintiff alleged that he suffered four gunshot wounds because the defendants failed to sufficiently conceal his identity when the program aired.[70] The defendants moved to dismiss under the TCPA, the trial court denied the motion, and the court of appeals affirmed the denial.[71] The court explained that because the plaintiff's claim sought damages resulting from a bodily injury suffered as a result of the defendant's negligence, the claim fell within the TCPA's bodily injury exception.[72]

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61. *Id.* at 464.
62. *Id.* at 465.
63. *Id.*
64. *Id.*
65. *Id.* at 466–67.
66. *Id.* at 467.
67. *Id.*
68. *Id.* at 468.
69. Kirkstall Road Enters., Inc. v. Jones, 523 S.W.3d 251, 252–53 (Tex. App.—Dallas 2017, no pet.).
70. *Id.* at 252.
71. *Id.*
72. *Id.* at 253.

In *Van Der Linden v. Khan*, the plaintiff asserted claims against his neighbor for tortious interference with contract and with prospective business relations along with claims for defamation and defamation per se after his neighbor sent a private message through Facebook to three of his business associates accusing the plaintiff of admitting to giving money to the Taliban.[73] The trial court denied the neighbor's motion to dismiss the claims under the TCPA, and she brought an interlocutory appeal.[74] On appeal, the plaintiff argued that his claims were not subject to dismissal under the TCPA because he did not bring the suit for the purpose of discouraging the defendant's exercise of "her right to free speech—but instead solely because [she] intentionally interfered with [his] business deals . . . ."[75] The Fort Worth Court of Appeals rejected this argument out of hand, explaining that "[f]or reasons so obvious that further elaboration should not be necessary, financial support for a terrorist organization is an issue related to safety and community well-being" such that the neighbor's statement was an exercise of free speech as defined by the TCPA.[76] Accordingly, the court of appeals held that the action was "based on, relate[d] to, or [was] in response to [the neighbor's] exercise of her right of free speech" and thus subject to the TCPA regardless of the plaintiff's purpose in bringing the suit.[77] The court of appeals therefore reversed the trial court's order denying the neighbor's motion to dismiss except with respect to the plaintiff's defamation and defamation per se claims, which the court of appeals found were adequately pleaded, and remanded to the trial court.[78]

Whether the defendants' declaratory-judgment counterclaim adequately stated a claim under the Declaratory Judgments Act and did not simply repeat their affirmative defenses was at issue in *Garden Oaks Maintenance Organization v. Chang*.[79] In this case, the plaintiff homeowners' association sued two homeowners for deed restriction violations and sought injunctive relief, removal of offending structures, and damages.[80] The homeowners counterclaimed for a declaratory judgment that the association lacked authority to enforce any deed restrictions under the Texas Property Code and the association's bylaws.[81] After a jury trial, the trial court rendered judgment against the association and in favor of the homeowners, and the association appealed.[82] On appeal, the Fourteenth Houston Court of Appeals rejected the association's argument that the homeowners' declaratory-judgment counterclaim should have

73. Van Der Linden v. Khan, 535 S.W.3d 179, 186–88 (Tex. App.—Fort Worth 2017, pet. filed).
74. *Id.* at 188.
75. *Id.* at 189.
76. *Id.* at 189–90 (citation omitted).
77. *Id.* (internal quotation marks omitted).
78. *Id.* at 202.
79. 542 S.W.3d 117, 121 (Tex. App.—Houston [14th Dist.] 2017, no pet.).
80. *Id.* at 120–21.
81. *Id.* at 121.
82. *Id.* at 122–23.

been dismissed because it merely repeated their affirmative defenses.[83] The court of appeals reasoned that the counterclaim sought a declaration that the association could not enforce *any* of the deed restrictions rather than just the single restriction the association asserted the homeowners violated.[84] Accordingly, the court of appeals held that the homeowners' counterclaim stated a claim independent of their affirmative defenses to the association's claims.[85]

VII. DISCOVERY

The Texas Supreme Court analyzed the standards for the discovery of electronically stored information (ESI) in *In re State Farm Lloyds*.[86] The plaintiff insureds requested the production of ESI in native form, whereas the defendant insurer preferred to produce its documents in searchable static form.[87] The trial court ordered production in native form, provided it was not infeasible to do so, and the Corpus Christi Court of Appeals denied the insurer's request for mandamus relief.[88]

The insurer sought mandamus relief from the Texas Supreme Court, which issued its most detailed opinion to date regarding the standards for the discovery of ESI. As part of its analysis, the supreme court looked at the interplay between Rule 196.4, which allows the requesting party to specify the desired form of production, and Rule 192.4, which details limitations on discovery based on proportionality and reasonableness.[89] After rejecting the notion that Rule 196.4 gave the requesting party the unilateral right to dictate the form of production, the supreme court addressed how trial courts should resolve the responding party's objection that the requested form is unreasonable and that the information can be obtained through a "reasonably usable" alternative form, which entails consideration of whether the utility and benefits of the requested form are great enough to overcome the extra "burden, cost, or convenience" associated with it.[90]

Next, the supreme court turned to the factors considered in determining proportionality, which include: (1) the "[l]ikely benefit of the re-

83. *Id.* at 124.
84. *Id.* at 126.
85. *Id.* at 128.
86. 520 S.W.3d 595, 599 (Tex. 2017) (orig. proceeding).
87. *Id.* at 599. "Native" refers to the application form in which the producing party typically creates, uses, and stores data in the regular course of business, whereas data in "static" form, which is exemplified by PDF, TIFF, and JPEG files, is converted from native form and can be made searchable through optical character recognition software. *Id.* at 615 n.12, 601.
88. *Id.* at 599 (citing *In re* State Farm Lloyds, 519 S.W.3d 647, 657 (Tex. App.—Corpus Christi 2015, orig. proceeding) (per curiam) (mem. op.), *mand. denied*, *id.* at 615 (holding that the trial court did not abuse its discretion in finding that production in native form was neither unduly burdensome nor had a likely benefit that was outweighed by the burden or expense of such production).
89. *Id.* at 599.
90. *Id.* at 607.

quested discovery";[91] (2) the "needs of the case";[92] (3) the "amount in controversy";[93] (4) the respective resources of the parties;[94] (5) the "[i]mportance of the issues at stake in the litigation";[95] (6) the "importance of the proposed discovery in resolving the litigation";[96] and (7) "[a]ny other articulable factor bearing on proportionality."[97] After considering these factors, the trial court can order the production in the manner chosen by the responding party, "another form that is proportionally appropriate," or the requested form—provided that the requesting party has shown a "particularized need" for that method and has paid the reasonable cost associated with any extraordinary production efforts.[98] The supreme court thus denied mandamus relief without prejudice so that the insurer could re-urge its objections in light of these standards.[99]

In *In re National Lloyds Insurance Company*, the Texas Supreme Court addressed the discovery of the opposing party's billing records by a party seeking an award of attorney's fees.[100] In this multidistrict litigation (MDL) between insured homeowners and several insurers and claims adjustors, the plaintiffs sought to recover their attorney's fees. In the first MDL case to go to a verdict, counsel for one of the insurers, who was a designated expert on fees, testified over objection that the insurer's fees could be "a factor" in determining the reasonableness of the plaintiffs' fees.[101] A couple of months before trial, the plaintiffs sought a continuance and leave to serve written discovery requests seeking details regarding the fees and expenses incurred by the defendants.[102] The insurer challenged these requests as overly broad and seeking privileged information, and it contended that the requested information was irrelevant based primarily on its stipulation that it would not use its own fee information to challenge the reasonableness of the plaintiffs' fee claims.[103] The special master and MDL pretrial court rejected these objections and ordered the insurer to respond to these requests, and the Corpus Christi

91. *Id.* at 608. According to the supreme court, if the perceived "benefits of the requested form are negligible [or] nonexistent," then any showing of "enhanced effort[ ] or expense" warrants denial, whereas a showing of a "particularized need for the proposed discovery" may lead, once the other factors are taken into account, to the opposite conclusion. *Id.*

92. *Id.* This factor considers the relevance of the metadata (or other details) that the requesting party is seeking and the availability of that information from more accessible or less expensive sources. *Id.* at 608–09.

93. *Id.* at 610.

94. *Id.* This factor examines not only the financial wherewithal of the parties, but also the requesting party's ability to use the information in the requested format. *Id.* at 610–11.

95. *Id.* at 611.

96. *Id.*

97. *Id.* As part of this analysis, the supreme court sought to align the discovery of ESI under Texas law with that under the Federal Rules of Civil Procedure, notwithstanding the differences in the wording of the respective rules. *Id.* at 612–15.

98. *Id.* at 607.

99. *Id.* at 615.

100. *In re* Nat'l Lloyds Ins. Co., 532 S.W.3d 794, 798 (Tex. 2017) (orig. proceeding).

101. *Id.* at 799–800.

102. *Id.*

103. *Id.* at 801.

Court of Appeals denied the insurer's request for mandamus relief.[104] As part of its analysis, the court of appeals found that the insurer's billing information was relevant to the first and third *Arthur Andersen* factors ("the time and labor required" and "the fee customarily charged in the locality for similar legal services"),[105] had served as the basis of some of its expert's testimony,[106] and was within the scope of expert-witness discovery under Rule 192.3(e).[107]

The Texas Supreme Court, however, conditionally granted mandamus relief and directed the trial court to vacate its discovery order.[108] Initially, the supreme court found that a request for the opposing party's billing records in the aggregate reveals its attorneys' thought processes and thus invades the work-product exemption.[109] However, the supreme court left open the possibility that a "narrowly tailored request" that somehow did not invade the strategy or thought processes of the opposing party's attorneys might be permissible. Additionally, the supreme court acknowledged both the "substantial need" exception in Rule 192.5(b)(2) for the discovery of otherwise unavailable information and the possibility that the opposing party could waive the work product exemption through offensive use by either seeking its fees or using its own billing records to challenge the reasonableness of the plaintiffs' fees.[110]

Next, the supreme court turned its attention to the relevance of the plaintiffs' interrogatories, which sought factual information regarding the rates, hours, and expenses of the insurer's attorneys.[111] Once again, the supreme court held that, so long as the opposing party did not seek its fees or use the hours and rates of its counsel as a measuring stick, such information was not relevant because opposing parties have different motivations and roles and may elect to spend more or less time and effort on issues than the parties who are seeking to recover.[112] Additionally, a party seeking attorney's fees bears the burden of proving their fees are reasonable and necessary.[113] For example, the insurer may pay lower

104. *Id.*; *In re* Nat'l Lloyds Ins. Co., No. 13-15-00219-CV, 2015 WL 4380929, at *6 (Tex. App.—Corpus Christi July 14, 2015, orig. proceeding) (mem. op.).

105. *In re Nat'l Lloyds*, 2015 WL 4380929, at *5 (citing Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 818 (Tex. 1997)).

106. *Id.* at *4–5.

107. *Id.* at *5.

108. *In re Nat'l Lloyds*, 532 S.W.3d at 816.

109. *Id.* at 803. The supreme court rejected the plaintiffs' argument that any privileged information could be preserved through redaction, as redacted billing records would still reveal when, where, and how the insurer focused its efforts and might result in collateral disputes as to the propriety of the redactions. *Id.* at 806.

110. *Id.* at 806–07. The supreme court noted that billing records might be protected by the attorney-client privilege but found that the insurer had not established the applicability of that exemption. *Id.* at 807.

111. *Id.* at 807–08.

112. *Id.* at 808.

113. *Id.* at 809. In fact, in rejecting the plaintiffs' reliance on the two *Arthur Andersen* factors cited by the court of appeals, the supreme court observed that collateral litigation might ensue on the reasonableness of the opposing party's fees, and that in light of the differing perspectives and positions of the parties, attorneys might not be providing "similar legal services" in the same case. *Id.* at 810–11.

hourly rates to its attorneys with a promise of repeat business, yet it may be more demanding on them in terms of its reporting requirements.[114] And any marginal relevance of the opposing party's fee information might be outweighed by the dangers of unfair prejudice or misleading the jury.[115]

Finally, the supreme court examined the impact of the opposing party's designation of its counsel as an expert witness on attorney's fees.[116] Rule 192.3 permits discovery into the facts known by the expert with respect to his or her opinions and the documents that the expert received or reviewed, and provides that the work product exemption is inapplicable to this information.[117] As the supreme court observed, however, Rule 195 addresses discovery from experts, and while it allows disclosures, written reports, and depositions, it does not allow for the interrogatories and production requests that the plaintiffs had promulgated.[118] Since the plaintiffs were not invoking the permissible discovery devices, the supreme court found the trial court's reliance on Rule 192.3(e) to be misplaced.[119]

Sanctions arising out of the suspension of a deposition were the subject of *Wilson v. Shamoun & Norman, LLP*.[120] A law firm sued its former client for unpaid fees, and the firm served a deposition notice on the former client in an action which the client's new lawyer contended the trial court lacked jurisdiction.[121] After the client was sworn in, the new lawyer suspended the deposition, and the former firm filed a motion to compel and sought sanctions.[122] After the trial court entered sanctions of $1,837.50, the new lawyer and his firm appealed.[123]

The Dallas Court of Appeals affirmed.[124] After rejecting the appellants' challenges to the trial court's jurisdiction, the court of appeals turned to the propriety of the sanctions order.[125] Initially, the court of appeals found the appellants' reliance on Rule 199.5(g) to be misplaced, as that rule applied only when (1) the time limit for the deposition had expired or (2) the rules governing deposition conduct had been violated.[126] Since the appellants stopped the deposition based on jurisdictional concerns rather than conduct during the deposition, they could not rely on Rule 199.5(g).[127]

The court of appeals then turned to the trial court's finding that the appellants had "abus[ed] the discovery process" in violation of Rule

114. *Id.* at 811.
115. *Id.* at 813 (citing TEX. R. EVID. 403; TEX. R. CIV. P. 192.4).
116. *Id.* at 813–15.
117. *Id.* at 813–14; *see* TEX. R. CIV. P. 192.3(e)(3)–(4), (6), 192.5(c)(1).
118. *In re Nat'l Lloyds*, 532 S.W.3d at 814 (citing TEX. R. CIV. P. 195.1).
119. *Id.* at 814–15.
120. 523 S.W.3d 222, 224 (Tex. App.—Dallas 2017, pet. denied).
121. *Id.* at 224–25.
122. *Id.* at 225.
123. *Id.*
124. *Id.* at 233.
125. *Id.* at 228.
126. *Id.* at 229–30.
127. *Id.*

199.4, which prohibits parties from "seeking, making, and/or resisting discovery in a timely manner."[128] Admittedly unable to find any supporting authority, the court of appeals nonetheless held that the appellants could have avoided sanctions for aborting the deposition by filing a motion to quash to address their jurisdictional challenge.[129]

Finally, the court of appeals held that a finding of bad faith was not a prerequisite to the imposition of monetary (as opposed to death penalty) sanctions and that the sanctions imposed by the trial court were appropriate for the conduct at issue.[130]

The interplay between a trial court's docket control order and a discovery stay under chapter 74 of the Texas Civil Practice and Remedies Code was at issue in *Harvey v. Kindred Healthcare Operating, Inc.*[131] The docket control order established a deadline of March 30, 2015, for the plaintiff heirs to designate their experts.[132] The trial court sustained the defendant hospital's objection to the heirs' timely submitted reports and gave the heirs until May 7, 2015, to serve amended reports.[133] The hospital then filed a no-evidence motion for summary judgment, which was based on the heirs' failure to present expert testimony by the March 30, 2015, deadline in the docket control order. The hospital also objected to the amended expert report the heirs had served on May 7, 2015.[134] The trial court struck the expert witness affidavits that the heirs submitted with their response and entered summary judgment in the hospital's favor.[135]

The heirs appealed based solely on the grounds that "discovery was stayed under chapter 74" at the time the hospital sought summary judgment.[136] Section 74.351 of the Civil Practice and Remedies Code stays all discovery in a healthcare liability case and permits one thirty-day extension where the initial report is deficient.[137] "[B]ecause the amended expert report had not yet been served" and the trial court had not determined its adequacy at the time the hospital sought summary judgment, the Fourteenth Houston Court of Appeals held that discovery was stayed at the time of the expert designation deadline.[138] The court of appeals then held, based on Section 74.002(a) of the Civil Practice and

128. *Id.* at 230.
129. *Id.*
130. *Id.* at 230, 233.
131. 525 S.W.3d 281, 282 (Tex. App.—Houston [14th Dist.] 2017, no pet.). Under chapter 74, "a healthcare liability [plaintiff]" must "serve at least one expert report on the defendant or defendant's attorney within 120 days" of the defendant's answer. *Id.* at 286 n.4; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (West 2017).
132. *Harvey*, 525 S.W.3d at 283.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 284.
137. *Id.* at 284–85; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a), (c) (West 2017).
138. *Harvey*, 525 S.W.3d at 285.

Remedies Code,[139] that the discovery stay under chapter 74 superseded the expert designation deadline in the docket control order.[140] The court of appeals thus reversed the summary judgment and remanded the case for further proceedings.[141]

The discovery of potentially privileged documents was at the heart of *In re Fairway Methanol LLC*.[142] Following a workplace accident, the employer promptly began an investigation into the accident under the auspices of its law department.[143] Several months after the accident, the plaintiff and his wife sued the joint venture and two of the employer's affiliates and served discovery on the joint venture and the non-party employer seeking, among other documents, "all incident, accident and/or investigation reports," "all statements related to [the accident]," and all interview-related documents.[144] Both the joint venture and the employer asserted that they were withholding documents on the basis of the attorney-client privilege and the work product exemption, but following an in camera review, the trial court ordered the employer to produce the documents related to its investigation.[145]

The employer sought mandamus relief, which the Fourteenth Houston Court of Appeals granted with respect to the bulk of the documents at issue.[146] As part of its analysis, the court of appeals found that the employer had made a prima facie showing as to the applicability of the attorney-client privilege through an affidavit from the in-house counsel of one of its affiliates.[147] That finding included communications between and among members of the investigative team who did not necessarily have the authority to hire counsel and act on counsel's advice.[148] The employer also made a prima facie showing that the work product exemption applied, as a reasonable person would have believed—and the employer had a good faith belief—that there was a substantial chance litigation would ensue. The employer could establish a prima facie case regardless of the fact that the plaintiff had not manifested an intention to sue at the outset of the investigation and that the employer was potentially protected from a lawsuit by Section 408.001 of the Texas Labor Code, which establishes a worker's compensation claim as the employee's exclusive remedy.[149] The court of appeals conducted an in camera review of the documents at issue and found that the bulk of the documents were privi-

139. *Id.*; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 74.002(a) (providing that chapter 74 generally controls in the event of a conflict with "another law, including a rule of procedure or evidence or court rule").
140. *Harvey*, 525 S.W.3d at 285.
141. *Id.* at 286.
142. 515 S.W.3d 480, 485 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding).
143. *Id.*
144. *Id.* at 486.
145. *Id.* Since the joint venture "did not participate in any investigation," it did not have any investigation-related documents to produce. *Id.*
146. *Id.* at 495.
147. *Id.* at 489.
148. *Id.* at 488–89.
149. *Id.* at 491–92.

leged with the exception of a few documents that were prepared for business purposes, such as instituting remedial measures or conducting performance evaluations.[150]

The availability of discovery in an uninsured/underinsured motorist case was at issue in *In re Liberty County Mutual Insurance Company*.[151] At the insurer's request, the trial court severed and abated the plaintiff's extra-contractual claims, and the plaintiff subsequently served discovery requests regarding topics relating to the abated claims.[152] The plaintiff sought to depose the claims adjuster who verified the insurer's interrogatory answers and dropped her claim for breach of contract, leaving her with only a claim for declaratory relief.[153] After the trial court denied the insurer's motion to quash, the insurer sought mandamus relief.[154]

The First Houston Court of Appeals granted the requested relief, finding that the "scope of relevant discovery in uninsured motorist cases" focuses primarily on the potential liability and coverage of the uninsured driver and the extent of the insured's damages.[155] "Because [the insurer's] contractual obligations d[id] not ripen until after [the insured] ha[d] obtained a judgment against [the uninsured driver]," the requested deposition was irrelevant to the declaratory relief claim at issue.[156]

Ramirez v. Noble Energy, Inc.[157] addressed the standards for the withdrawal of merits-preclusive deemed admissions. The injured plaintiff failed to respond to the defendant's requests for admissions on time, and he served his responses one day after the deadline imposed in the order granting the defendant's motion to compel.[158] The defendant moved for summary judgment based on the deemed admissions and also sought sanctions for the plaintiff's alleged discovery misconduct.[159] The plaintiff moved to withdraw the deemed admissions and sought an extension of time to respond to the summary judgment motion. He contended that his failure to answer the deemed admissions on time was because his counsel's his long-time assistant had quit and the replacement assistant, then in training, quit without calendaring the response deadline.[160] The plaintiff never filed a response to the defendant's summary judgment motion, and the trial court entered summary judgment in the defendant's favor and denied both the defendant's motion for sanctions and the plaintiff's

150. *Id.* at 494–95.
151. 537 S.W.3d 214, 216 (Tex. App.—Houston [1st Dist.] 2017, orig. proceeding).
152. *Id.* at 217.
153. *Id.* at 218–19.
154. *Id.* at 219.
155. *Id.* at 220.
156. *Id.* at 221. The court of appeals also found that the claims adjuster's involvement in helping to answer and verify the insurer's interrogatory answers, the bulk of which addressed the abated extra-contractual claims, did not warrant her deposition. *Id.*
157. 521 S.W.3d 851 (Tex. App.—Houston [1st Dist.] 2017, no pet.).
158. *Id.* at 854.
159. *Id.* at 854–55.
160. *Id.* at 855.

motion to withdraw the deemed admissions.[161]

The First Houston Court of Appeals reversed, finding that the trial court erred in denying the plaintiff's motion to withdraw the deemed admissions.[162] To warrant the withdrawal of deemed admissions, the responding party must show "good cause by showing that the failure to timely respond . . . was an accident or mistake," such as a clerical error, and that the failure was "not intentional or the result of conscious indifference;" and lack of undue prejudice to the other party.[163] But where merits-preclusive requests are at issue, the burden is on the party propounding the requests to show "flagrant bad faith or callous disregard for the rules."[164] The requests at issue included that the defendant "admit that [he] was not a proper [party]," that he did not own the truck, and that the plaintiff's injury was caused by a "steel plate . . . on the truck that he drove."[165] Even though the plaintiff ultimately admitted the latter two requests, the court of appeals concluded that the first request was merits-preclusive as it improperly asked the plaintiff to admit the invalidity of his claim.[166] The court of appeals then found that the defendant had failed to show flagrant bad faith or callous disregard, as the staffing issues of the plaintiff's counsel sufficiently explained the delay, and since merits-preclusive requests were at issue, the plaintiff did not have to establish "good cause."[167]

In *In re Kubosh Bail Bonding*, the First Houston Court of Appeals noted that it is the client, not the attorney, who must have "a good faith belief that litigation would ensue" as required for the applicability of the work product exemption.[168] Even though one of the plaintiffs' lawyers submitted an affidavit regarding his beliefs, in the absence of proof regarding the potential clients' beliefs, the court of appeals found that the emails at issue were not work product.[169]

VIII. DISMISSAL

Throughout the Survey period, intermediate courts of appeals have continued to grapple with the proper application of Rule of Civil Procedure 91a. For example, the Fort Worth Court of Appeals addressed whether a suit could be dismissed under Rule 91a based on an affirmative

161. *Id.* at 856. The trial court never ruled on the plaintiff's motion for additional time to respond to the summary judgment motion. *Id.*

162. *Id.* at 862.

163. *Id.* at 856.

164. *Id.* at 857 (citing Marino v. King, 355 S.W.3d 629, 633 (Tex. 2011) (per curiam); Wheeler v. Green, 157 S.W.3d 439, 443 (Tex. 2005) (per curiam)).

165. *Id.*

166. *Id.* at 859.

167. *Id.* at 859–61.

168. *In re* Kubosh Bail Bonding, 522 S.W.3d 75, 87 (Tex. App.—Houston [1st Dist.] 2017, orig. proceeding).

169. *Id.* at 87–89. The court of appeals also made an alternative holding that the work product exemption was waived through offensive use, as "the Emails demonstrate[d] that the Plaintiffs' counsel and [a third party] worked together to set up" the telephone calls that established the basis for the prospective clients' claims. *Id.* at 90.

defense.[170] In this case, the trial court granted a Rule 91a motion based on the defendant's limitations defense, and the plaintiff appealed.[171] The court of appeals reversed, holding that in deciding a Rule 91a motion the trial court could only consider the plaintiff's petition, such that affirmative defenses raised only in the defendant's answer could not support dismissal.[172]

Additionally, two courts of appeals reached different conclusions regarding the appropriate standard for determining whether a petition should be dismissed under Rule 91a.[173] Specifically, the El Paso Court of Appeals held in *Aguilar v. Morales* that the review of a petition's allegations under Rule 91a should be similar to review of a complaint under Federal Rule of Civil Procedure 12(b)(6), which allows dismissal if the complaint fails to give "enough facts to state a claim to relief that is plausible on its face."[174] The Corpus Christi Court of Appeals disagreed in *Reaves v. City of Corpus Christi*.[175] In that case, the court of appeals analyzed the differences between the Texas and federal pleading standards and concluded that a petition should be dismissed under Rule 91a only if it appeared that the allegations, when accepted as true, failed to provide "fair notice of [any] cause of action that is cognizable under Texas law."[176]

Several cases in the Survey period also addressed various procedural issues in the application of Rule 91a. In *Aguilar*, the El Paso Court of Appeals decided whether a Rule 91a motion was timely filed after a venue transfer that was reversed on appeal.[177] In that case, plaintiffs originally filed suit in El Paso County against their sister and brother-in-law for the alleged wrongful death of their mother.[178] The sister moved to transfer the case to the probate court in Bexar County where the mother's estate administration was pending, and the El Paso County

170. Bedford Internet Office Space, LLC v. Tex. Ins. Group, Inc., 537 S.W.3d 717, 718 (Tex. App.—Fort Worth 2017, pet. filed).

171. *Id.* at 718–19.

172. *Id.* at 720.

173. *See* Reaves v. City of Corpus Christi, 518 S.W.3d 594 (Tex. App.—Corpus Christi 2017, no pet.); Aguilar v. Morales, 545 S.W.3d 670 (Tex. App.—El Paso 2017, pet. denied).

174. *Aguilar*, 545 S.W.3d at 676 (citation and internal quotation marks omitted). Notably, the court of appeals relied on more recent articulations by the U.S. Supreme Court of the federal dismissal standard. *Id.* (citing cases interpreting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)).

175. *Reaves*, 518 S.W.3d at 612.

176. *Id.* at 614. In reaching this conclusion, the court of appeals expressly rejected the *Twombly* and *Iqbal* dismissal standards as inconsistent with Texas pleading practice. *Id.* at 609–10. Instead, the court adopted a standard of review more consistent with the *Conley v. Gibson* federal standard preceding *Twombly* and *Iqbal*. *Id.* at 611 (citing Conley v. Gibson, 355 U.S. 41, 47, 78 (1957), *abrogated by* Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007)). Under the *Conley* standard, dismissal of a complaint "for failure to state a claim" was appropriate only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (citing *Conley*, 355 U.S. at 45–46).

177. *Aguilar*, 545 S.W.3d at 677.

178. *Id.* at 674.

court granted the motion.[179] After transfer, the defendants answered and then moved to dismiss under Rule 91a. The probate court granted the motion to dismiss, and plaintiffs appealed both the transfer and dismissal. The San Antonio Court of Appeals held that the transfer was improper and remanded the case to the El Paso County court.[180] On remand, the defendants again moved to dismiss under Rule 91a, which the trial court granted, and plaintiffs appealed again.[181] This time on appeal, the plaintiffs argued that the Rule 91a motion was untimely because the defendants did not file it within sixty days after the first pleading containing the challenged cause of action, which had been filed in the El Paso County court before the venue transfer.[182] The El Paso Court of Appeals rejected the plaintiffs' construction of Rule 91a's sixty-day requirement, reasoning that it would lead to absurd results particularly in cases where venue is transferred, and held that the defendants' second motion to dismiss related back to their first, timely-filed motion.[183]

In *Reaves*, the Corpus Christi Court of Appeals addressed other issues under Rule 91a, including the time limit for deciding Rule 91a motions and whether they could be considered a plea to the jurisdiction when immunity was raised.[184] In this case, the plaintiffs sued the City of Corpus Christi for injuries they sustained in a car accident caused by a high-speed police chase.[185] The City filed a Rule 91a motion to dismiss based on governmental immunity, which the trial court granted, and plaintiffs appealed.[186] On appeal, plaintiffs argued dismissal under Rule 91a was improper because the motion must be "granted or denied within 45 days after the motion is filed," and the trial court lost jurisdiction by failing to rule on the City's motion within forty-five days.[187]

In accord with the First Houston Court of Appeals, the court held that Rule 91a's forty-five-day-ruling requirement, while mandatory, was not jurisdictional.[188] The court of appeals, applying the factors of *Helena Chemical Co. v. Wilkins*, reasoned that enforcement of the forty-five-day deadline by mandamus would not further Rule 91a's objective, and there was "little reason to believe that the Legislature or the Texas Supreme Court intended for non-movants to use harmless deviations from this

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 677.

183. *Id.* at 679.

184. Reaves v. City of Corpus Christi, 518 S.W.3d 594, 597 (Tex. App.—Corpus Christi 2017, no pet.).

185. *Id.* at 598.

186. *Id.* at 598–99.

187. *Id.* at 601. The City's Rule 91a motion had been pending for 159 days at the time the trial court granted it. *Id.*

188. *Id.* at 601, 615 n.3 (citing Koenig v. Blaylock, 497 S.W.3d 595, 599 (Tex. App.—Austin 2016, pet. denied) (holding the deadline is not jurisdictional or mandatory); Walker v. Owens, 492 S.W.3d 787, 791 (Tex. App.—Houston [1st Dist.] 2016, no pet.)).

deadline to avoid the dismissal of their own baseless claims."[189] Next, the plaintiffs argued that a Rule 91a motion was not the equivalent of a plea to the jurisdiction, and under Rule 91a, the trial court was only allowed to look at the pleadings rather than extrinsic evidence as permitted in a jurisdictional plea.[190] The court of appeals agreed, holding that while there are similarities between a Rule 91a motion and a plea to the jurisdiction, since the City filed a Rule 91a motion, the Rule 91a standards of review applied.[191] Applying those standards (in conflict with *Aguilar* discussed above), the court of appeals reversed the trial court's grant of the City's Rule 91a motion and remanded for further proceedings.[192]

The El Paso Court of Appeals addressed the applicability of the forum non conveniens statute[193] to actions for wrongful death or personal injury, an issue of first impression.[194] The plaintiff, a Texas resident, argued that the trial court's dismissal of his claims for non-bodily injuries for forum non conveniens was precluded by Section 71.051.[195] The court of appeals framed the issue as whether the "personal injury" covered by Section 71.051 included any injuries caused by torts regardless of physical or bodily injury.[196] Finding no direct controlling authority, the court of appeals analyzed the statute to determine what the legislature meant by the term "personal injury."[197] After applying rules of statutory construction, the court of appeals held that "personal injury" meant "bodily injury," and therefore found that Section 71.051 did not preclude dismissal of plaintiff's claims solely for non-bodily injuries.[198]

IX. JURY PRACTICE

Allegedly improper jury argument was one of the subjects of *In re BCH Development*.[199] After the trial court entered summary judgment on the plaintiff homeowners' association's claims, the parties tried the association's entitlement to attorney's fees under Section 5.006 of the Property Code.[200] The association's expert testified that $579,954.45 would be a reasonable fee, and after the jury awarded only $290,000.00, the association sought and was granted a new trial.[201]

One of the grounds the trial court cited in its new trial order was that counsel for the defendant homebuilder had engaged in improper jury ar-

189. *Id.* at 603 (analyzing Helena Chem. Co. v. Wilkins, 47 S.W.3d 486, 494–95 (Tex. 2001)).
190. *Id.* at 604.
191. *Id.* at 605–06.
192. *Id.* at 615.
193. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(i) (West Supp. 2017).
194. Daniels v. New Mexico, 538 S.W.3d 139, 142–43 (Tex. App.—El Paso 2017, pet. denied).
195. *Id.* at 145.
196. *Id.* at 147.
197. *Id.*
198. *Id.* at 147–48.
199. 525 S.W.3d 920, 924 (Tex. App.—Dallas 2017, orig. proceeding).
200. *Id.* at 923.
201. *Id.* at 923–24.

gument.[202] As the Dallas Court of Appeals observed, a "complaint about improper, but curable, jury argument is waived" in the absence of a timely objection, whereas incurable jury argument can be raised for the first time in a motion for new trial.[203] Although the association had objected to two of the complained-of statements regarding the failure to segregate and the assertion that $150,000.00 would be a reasonable fee, the court of appeals found that the arguments were not improper, as they were both reasonable inferences from the evidence and did not violate the limine order.[204] The court of appeals also found that "the unobjected to arguments . . . did not amount to fundamental error."[205] Having rejected the association's other arguments, the court of appeals concluded that the new trial order was an abuse of discretion and conditionally granted mandamus relief.[206]

In *Texas Capital Bank v. Asche*, the Dallas Court of Appeals addressed potential jury misconduct arising from a LinkedIn contact.[207] In *Asche*, counsel for the children in a will contest inadvertently sent one of the jurors a LinkedIn invitation while he was investigating the jury.[208] The children's counsel notified the court, but the opposing parties' counsel, fearful of aggravating the situation, proposed waiting to see if the juror disclosed the contact.[209] The juror did not disclose the contact, and he accepted the invitation the day of the verdict but prior to the entry of judgment.[210] The opposing parties learned of the acceptance after the trial and moved for a new trial based on juror misconduct.[211] The trial court denied the motion, and the opposing parties appealed.[212]

The Dallas Court of Appeals affirmed on this issue, finding that the appellants failed to prove an abuse of discretion.[213] The appellants had supported their motion for new trial with post-trial deposition testimony from the juror and two of the children's lawyers, but the trial court did not conduct a hearing.[214] A prior decision of the court of appeals had held that a trial court may deny a motion for new trial based on alleged jury misconduct where the complaining party merely relies on affidavits

202. *Id.* at 924 (noting that the improper argument included "attacking the Association and its attorneys, criticizing the use of a contingency fee agreement and lack of segregation of fees, and stating that $150,000 was a reasonable fee through trial").
203. *Id.* at 928.
204. *Id.* at 928–29.
205. *Id.* at 928; *see also* De Leon v. Red Wing Brands of Am., Inc., No. 05-15-01517-CV, 2017 WL 3699654, at *8 (Tex. App.—Dallas Aug. 28, 2017, no. pet.) (mem. op.) (finding that jury argument to which no objection was made did not constitute incurable jury argument).
206. *In re BCH*, 525 S.W.3d at 930.
207. Tex. Capital Bank v. Asche, No. 05-15-00102-CV, 2017 WL 655923, at *17 (Tex. App.—Dallas Feb. 17, 2017, pet. dism'd) (mem. op.).
208. *Id.*
209. *Id.* at *17–18.
210. *Id.* at *18.
211. *Id.*
212. *Id.*
213. *Id.* at *20.
214. *Id.* at *18.

and does not request a hearing at which it can offer a live testimony establishing the misconduct.[215] In the absence of a hearing request, the court of appeals concluded that there was insufficient evidence in the record to find an abuse of discretion.[216] The court of appeals also found that, while the contact with the juror constituted misconduct, it was not "so highly prejudicial and inimical to fairness as to trigger" a presumption that the communication, in and of itself, showed "materiality and probable injury."[217]

X. JURY CHARGE

The propriety of the theory of recovery submitted to the jury was one of the subjects of *United Scaffolding, Inc. v. Levine*.[218] The plaintiff sued his employer's scaffolding contractor for injuries he sustained in a fall.[219] In the first trial, "[t]he trial court submitted a general-negligence question," which the contractor had offered, and the jury awarded the plaintiff $178,000.00 for his future medical expenses.[220] On the plaintiff's motion, the trial court granted a new trial, and following years of appellate wrangling, the case was re-tried.[221]

At the retrial, the trial court again offered "a general-negligence question to the jury," and the contractor neither objected to that question nor tendered a premises liability question.[222] After the jury awarded almost $2 million to the plaintiff, the contractor moved for judgment notwithstanding the verdict and alleged, "for the first time," that the plaintiff's claim truly sounded in premises liability, not general negligence.[223] The trial court entered judgment in the plaintiff's favor, and the Corpus Christi Court of Appeals affirmed.[224]

The Texas Supreme Court reversed and rendered judgment in the contractor's favor.[225] The supreme court noted that "[n]egligence and premises liability claims," while sharing some similarities, "are separate and distinct theories of recovery."[226] After determining that the plaintiff's claim ultimately sounded in premises liability, even though the contractor did not own the property, the supreme court then turned to the submis-

215. *Id.* (citing *In re* Zimmer, 451 S.W.3d 893, 902 (Tex. App.—Dallas 2014, orig. proceeding)).
216. *Id.* at *19–20.
217. *Id.* at *19 (citing Tex. Emp'rs Ins. Ass'n v. McCaslin, 317 S.W.2d 916, 921 (Tex. 1958)).
218. 537 S.W.3d 463, 467 (Tex. 2017).
219. *Id.* at 467–68.
220. *Id.* at 468.
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.* (citing United Scaffolding, Inc. v. Levine, 520 S.W.3d 631, 632 (Tex. App.—Corpus Christi 2015) (mem. op.), *rev'd*, 537 S.W.3d 463 (Tex. 2017)).
225. *Id.* at 483.
226. *Id.* at 471 (noting that negligence claims result from the owner's "affirmative, contemporaneous conduct," whereas a premises liability claim is "based on the owner's failure to take measures to make the property safe").

sion of the case to the jury.[227] First, the supreme court found that the plaintiff had waived his premises liability claim by failing to either request a question on the theory or secure findings on its elements.[228] Second, the supreme court concluded that the contractor had not waived this error by failing to object to the charge, as the contractor was under no obligation to object where it faced an omitted, as opposed to a defective, submission.[229] Third, the supreme court found that the contractor had not invited the error by requesting a general negligence charge in the first trial, as following the new trial order, invited error could arise only in the second trial.[230] Fourth, the contractor preserved its complaints regarding the submission of the wrong theory by asserting the argument in its motion for judgment notwithstanding the verdict.[231]

The failure to secure a necessary jury finding was an expensive mistake in *Enterprise Products Partners v. Energy Transfer Partners*.[232] The jury found that the parties were in a general partnership and that the defendant had breached its duty of loyalty, resulting in an award of over $319 million in actual damages and $150 million in disgorgement.[233] On appeal, the defendant contended that a partnership did not exist because the conditions precedent in the parties' agreements, which required approval by both boards of directors and the execution of definitive agreements, never occurred.[234] Agreeing with the defendant's analysis, the Dallas Court of Appeals then turned to whether the parties had waived the performance of these conditions precedent or they were otherwise nullified.[235] The plaintiff did not allege in its last petition that all conditions precedent had been satisfied, whereas the defendant specifically denied that they were.[236] The burden was thus on the plaintiff to prove an excuse for the failure to perform the conditions precedent, and since the plaintiff failed to secure a jury finding on waiver, the court of appeals reversed and rendered judgment in the defendant's favor.[237]

A party's failure to secure a jury finding on whether "a gas well was incapable of production in paying quantities" on the operative date was at issue in *BP America Production Co. v. Red Deer Resources, LLC*.[238] The top leaseholder sued to terminate the underlying lease on the grounds that the lease (1) "had not produced in paying quantities" as of a date certain, and (2) had "an unexcused total cessation of production"

227. *Id.* at 479–80.
228. *Id.* at 481.
229. *Id.*
230. *Id.* at 482.
231. *Id.*
232. 529 S.W.3d 531, 533 (Tex. App.—Dallas 2017, pet. filed).
233. *Id.*
234. *Id.* at 537.
235. *Id.* at 540–41.
236. *Id.* at 540.
237. *Id.* at 541, 545; *see also* Vance v. Popkowski, 534 S.W.3d 474, 481 (Tex. App.—Houston [1st Dist.] 2017, pet. filed) (holding that the plaintiffs had waived their affirmative defenses of abandonment and waiver by failing to secure jury findings on them).
238. 526 S.W.3d 389, 391 (Tex. 2017).

that was not saved by "the shut-in clause . . . because the [one remaining] well was incapable of producing in paying quantities" on the day after the date certain.[239] The jury found in favor of the top leaseholder on its second ground, and the trial court entered judgment in the top leaseholder's favor.[240] The court of appeals affirmed, essentially finding "that the lease could be terminated based on the jury's finding that the well" could not "produc[e] in paying quantities the day after it was shut in."[241]

The Texas Supreme Court, however, reversed and rendered judgment in favor of the leaseholder. The shut-in clause at issue provided that the leaseholder's payment of a "shut-in royalty within twelve months after the day gas is last sold or used" sustained the lease "for that prior twelve-month period," provided that "the well was capable of production in paying quantities over a reasonable period of time on the date that gas was last sold or used."[242] Since the critical "date under the shut-in clause [was] the date the last gas was sold or used," it was incumbent on the top leaseholder to prove that the one "well was incapable of production in paying quantities over a reasonable period of time as of" that date.[243]

The supreme court then turned to the top leaseholder's argument that the leaseholder "waived this issue by failing to [raise it] at the charge conference."[244] Although the leaseholder never informed the trial court that the question at issue was using the wrong date, the supreme court found that an objection was not required because the jury's answer to this question was immaterial as it used the wrong date.[245] Thus the leaseholder did not have to object at the charge conference and could instead raise this issue through a post-verdict motion.[246]

Jury charge issues were at the heart of *Duradril, L.L.C. v. Dynomax Drilling Tools, Inc.*[247] The defendant distributor owed a substantial debt to the plaintiff manufacturer, so the parties worked on an asset purchase agreement to exchange the distributor's assets for its debt.[248] The parties were unable to finalize the agreement, and after their relationship broke down, the manufacturer sued the distributor and the distributor's owner.[249] The jury found in the manufacturer's favor, and the trial court

239. *Id.* at 392–93. In general, a "shut-in royalty clause" is a "substitute or contractual method of production, which will maintain the lease in force . . . when a gas well is drilled" and "no market exists" for the gas. *Id.* at 395 (citing Hydrocarbon Mgmt., Inc. v. Tracker Expl., Inc., 861 S.W.2d 427, 432 (Tex. App.—Amarillo 1993, no writ)). To "negate [this] clause," the "party seeking to terminate the lease" must show "that the well was . . . not capable of producing in paying quantities," which is a determination that "must be made over a reasonable period of time." *Id.*

240. *Id.* at 393.

241. *Id.*

242. *Id.* at 397.

243. *Id.* at 398.

244. *Id.* at 401.

245. *Id.* at 402.

246. *Id.*

247. 516 S.W.3d 147, 153 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

248. *Id.* at 154.

249. *Id.*

entered a judgment of just over $1 million against the defendants.[250]

The Fourteenth Houston Court of Appeals rejected all of the defendants' complaints and affirmed. For example, the defendants asserted the trial court erroneously found that an asset purchase agreement existed where there was neither a written agreement nor "a finding of full performance," meaning that "enforcing the [agreement] would violate the statute[ ] of frauds."[251] According to the defendants, the trial court erred in failing to submit their proposed "instruction on 'full' performance," as counsel for the plaintiffs had "stipulated" they were arguing full performance, not partial performance, and Texas law required a showing of full performance to escape the statute of frauds.[252] The court of appeals rejected both of these grounds, finding that the plaintiffs' counsel had not made a binding stipulation and that Texas law recognizes a "partial-performance exception to the statute of frauds."[253] Thus, the court upheld the trial court's instruction, which was consistent with both Texas law and the Pattern Jury Charge.[254] The court of appeals also rejected the defendants' challenge that the charge failed to state it was the plaintiff who needed to partially perform, as they waived that complaint by failing to raise it at trial.[255]

XI. MOTIONS FOR NEW TRIAL

The Texas Supreme Court again addressed the propriety of granting a motion for new trial during this Survey period.[256] The case involved a dispute between attorneys and their client regarding a contingency fee. After obtaining a significant verdict for the client, the client settled the case, receiving money and a return of his interest in a business.[257] The client paid the attorneys their share of the monetary amount, but argued that the fee agreement did not allow the attorneys to obtain an interest in the business recovered.[258] The trial court initially found the fee agreement "ambiguous and submitted the issue to the jury," which "found that the attorneys were not entitled to an ownership interest in [the business]."[259] The trial court entered judgment based on the verdict, but then granted a motion for new trial.[260] In the second trial, the court found that "the [a]greement 'unambiguously' provide[d]" that the attorneys could

250. *Id.* at 155.
251. *Id.* at 158.
252. *Id.* at 160.
253. *Id.*
254. *Id.* at 161.
255. *Id.* at 162. The court of appeals also held that the defendants, in failing to make "timely, specific objection[s]," had waived any complaint that three broad-form jury questions "contained an invalid theory" and that the damages question failed to match the damages awarded to a specific defendant and thus imposed joint and several liability for contractual damages. *Id.* at 157–58, 165.
256. *In re* Davenport, 522 S.W.3d 452, 454 (Tex. 2017) (orig. proceeding).
257. *Id.* at 454–55.
258. *Id.* at 455.
259. *Id.*
260. *Id.*

obtain an interest in the business.[261] The client sought mandamus relief.

The supreme court began its analysis by summarizing its "evolving jurisprudence" regarding its review of orders granting new trial.[262] The supreme court noted that an order granting a motion for new trial had to be "specific," "legally appropriate," and "issued . . . for valid reasons."[263] The supreme court then analyzed the fee agreement and agreed with the trial court that the fee agreement was unambiguous, but found it unambiguously provided that the attorneys were not entitled to an interest in the business.[264] Accordingly, the supreme court held the trial court abused its discretion.[265] Interestingly, two justices concurred in the result but noted that the varying interpretations of the fee agreement made by the trial court and the majority led them to believe that the fee agreement was ambiguous.[266] Therefore, the concurring justices held the trial court improperly granted a motion for new trial because it was based on the trial court's erroneous ruling that the agreement was unambiguous.[267]

Two courts of appeals also addressed issues regarding motions for new trial during the Survey period.[268] Whether the granting of a motion for new trial could be appealed after the case was retried was at issue in *Nelson*.[269] There, the Fourteenth Houston Court of Appeals reaffirmed that "an order granting a new trial . . . is generally not subject to review" after entry of a subsequent judgment following "further proceedings in the trial court."[270] The First Houston Court of Appeals addressed a situation relating to the interplay of negligent and intentional acts.[271] This case arose out of a fire set in a community living center by one of the patients. The plaintiffs sued the patient and, despite the patient admitting that she started the fire, the jury did not find the patient negligent.[272] The trial court granted a motion for new trial reasoning that "the jury's failure to find [the patient's] negligence" was "so against the great weight of the evidence as to be clearly wrong and manifestly unjust" since it was undisputed that the patient started the fire.[273] The court of appeals found the granting of a new trial was an abuse of discretion for two reasons: (1) the jury could have determined that lighting the fire was not the proximate cause of injury because there was evidence in the record of numerous

261. *Id.* at 456.
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.* at 459.
266. *Id.* (Boyd, J., concurring).
267. *Id.* at 459–60.
268. *See In re* Wagner, No. 01-15-00774-CV, 2017 WL 6374549, at *1 (Tex. App.—Houston [1st Dist.] Dec. 14, 2017, no pet.) (orig. proceeding); Nelson v. Gulf Coast Cancer & Diagnostic Ctr. at Se., Inc., 529 S.W.3d 545, 547 (Tex. App—Houston [14th Dist.] 2017, no pet.).
269. *Nelson*, 529 S.W.3d at 549.
270. *Id.*
271. *In re Wagner*, 2017 WL 6374549, at *8.
272. *Id.* at *5.
273. *Id.*

other potential causes; and (2) an intentional act does not support a finding of negligence.[274] As noted in the concurring opinion, if the jury determined that the patient intentionally set the fire, it properly found that the patient did not negligently start the fire since the two concepts are mutually exclusive.[275]

XII. DISQUALIFICATION OF COUNSEL

The Texas Supreme Court applied the *American Home Products*[276] presumptions regarding nonlawyer employee conduct to disqualify a firm employing a paralegal in *In re Turner*.[277] In this case, while employed with the plaintiff's firm, the paralegal worked on the Turner matter. Her work included exchanging emails with opposing counsel, communicating directly with Turner, reviewing Turner's confidential client information, and attending meetings in which counsel discussed case strategy.[278] Eight months later, the defense firm, without knowledge of her prior employment, hired the paralegal and failed to "instruct[her] to refrain from working on any matters on which she might have worked" for any prior employers.[279] For several months afterwards, the paralegal worked on the Turner matter at the defense firm ("largely in a clerical capacity") until Turner's counsel noticed her participation and demanded that the defense firm immediately withdraw because of the conflict.[280] The defense firm "refused to withdraw" without "'proof' that [the paralegal] actually worked on the Turner matter" (which the paralegal denied) and took various remedial actions, including screening the paralegal from the case.[281]

The supreme court began its analysis by setting out the "two-step process" and applicable presumptions to determine whether "a nonlawyer employee's conduct" requires disqualification[282] and concluded its analysis by holding, under these facts, that disqualification was required.[283] The supreme court focused on the rebuttable shared-confidences pre-

274. *Id.* at *9–11.
275. *Id.* at *13–15 (Jennings, J., concurring).
276. *In re* Am. Home Prods. Corp., 985 S.W.2d 68, 71 (Tex. 1998) (orig. proceeding).
277. 542 S.W.3d 553, 555–56 (Tex. 2017) (per curiam).
278. *Id.* at 554.
279. *Id.* at 554–55. Apparently, the paralegal "did not disclose her prior employment at [the plaintiff's firm] on her resume" and did not "volunteer any information" about that prior employment during the interview with the defense firm. *Id.*
280. *Id.* at 555.
281. *Id.*
282. *Id.* Specifically, the supreme court explained that a firm must be disqualified if the nonlawyer employee "(1) obtained confidential information about the matter while working at the opposing firm and (2) then shared that information with her current firm." *Id.* at 555–56 (citing *In re* Guar. Ins. Serv., 343 S.W.3d 130, 134 (Tex. 2011) (orig. proceeding) (per curiam)). Since it was undisputed that the paralegal had "'actually worked' on the Turner matter while employed" by the plaintiff's firm, the supreme court held that she was "presumed to have obtained confidential information." *Id.* at 556 (citing *In re* Columbia Valley Healthcare Sys., L.P., 320 S.W.3d 819, 824 (Tex. 2010) (orig. proceeding)) (explaining that the presumption is irrebuttable to "prevent the moving party from being forced to reveal the very confidences sought to be protected").
283. *Id.* at 558.

sumption, explaining it could only be rebutted by showing that: (1) the employee had been directed not to "work on any matter[s] on which she worked during her prior employment" or matters of which she had information because of prior employment; and (2) "the firm took 'other reasonable steps to ensure'" the paralegal did not work on any of these matters "absent client consent."[284] The supreme court held that the defense firm did not "rebut the . . . shared-confidences presumption" because it had not properly "instruct[ed the paralegal] to refrain from working on the Turner matter until *after* learning of her conflict."[285] The supreme court emphasized there was no evidence that the defense firm provided *any* such instruction to the paralegal initially, warning that "[c]asual admonitions to refrain from working on conflicted matters are insufficient to meet the first prong" and the firm's "later-enacted" remedial measures under the second prong, even if effective, "were simply too late."[286] The supreme court reasoned that disqualification protects against the "threat of disclosure" rather than actual disclosure, and firms therefore "must instruct a nonlawyer to refrain from working on conflicted matters *before* she commences work on a particular matter" regardless of a firm's knowledge of the "precise conflict."[287] The supreme court therefore "conditionally grant[ed] mandamus relief and direct[ed] the trial court to grant [the] motion to disqualify" the defense firm.[288]

Two cases in the courts of appeals addressed whether alleged attorney conflicts required disqualification. In *Hendricks v. Barker*,[289] the Fourteenth Houston Court of Appeals held that "the trial court did not abuse its discretion [in] disqualifying" an attorney who had represented both the buyer and seller of real estate in a dispute over their contract for deed.[290] After executing the contract for deed, the buyer and seller disputed the amount owed under the contract, and the buyer filed suit against the seller seeking, among other things, possession of the property.[291] Nine days after answering the suit, the seller moved to disqualify the buyer's attorney, asserting that she had consulted the attorney three years before for assistance in preparing the deed for the same property.[292] The "trial court granted [the buyer's] motion to disqualify" and "dismissed the case for want of prosecution" ten months later when the

284. *Id.* at 556 (quoting *In re Columbia Valley*, 320 S.W.3d at 824).

285. *Id.* at 557. The supreme court declined to address the "effectiveness" of the defense firm's after-the-fact screening measures because the firm failed to meet the "first prong by instructing the nonlawyer employee to refrain from working on any conflicted matters." *Id.* at 556.

286. *Id.* at 556–57.

287. *Id.* at 557 (citing cases finding that second firm's initial instruction "not to perform work on any matter on which she worked during her former employment, including the conflicted matter" or "not to engage with matters on which [she] had worked previously" had "satisfied the first prong of the shared-confidences presumption").

288. *Id.* at 558.

289. 523 S.W.3d 152 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

290. *Id.* at 160.

291. *Id.* at 155.

292. *Id.* at 155, 160.

buyer did not appear for trial.[293] On appeal, the court of appeals held that the seller's four-page letter from the attorney focusing on preparation of the buyer's deed, requesting information to prepare that deed, and advising the seller about accounting issues with the buyer-seller contract for deed, along with the record of the hearing on the disqualification motion, was sufficient to support "an implied finding that an attorney-client relationship" between the attorney and seller "was created by the parties' conduct."[294] The court of appeals held that the finding was supported by the evidence of five facts,[295] which taken together "permit[ted] an inference that [the seller] intended for [the attorney] to provide legal services for her, and that [the attorney] agreed" to do so.[296] Having found the existence of an attorney-client relationship, the court of appeals had little trouble concluding that the attorney violated Rule 1.09 of the Texas Disciplinary Rules of Professional Conduct[297] and affirming the attorney's disqualification.[298]

On the opposite side of the spectrum, the Fort Worth Court of Appeals in *Busby v. Harvey* affirmed the trial court's denial of a motion to disqualify based on an attorney's alleged conflict of interest.[299] In this veterinary malpractice case, horse owners asserted malpractice claims against a veterinarian for treatment that allegedly resulted in severe injuries to one

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293. *Id.* at 155–56. Despite the prior disqualification order, the attorney filed the buyer's notice of appeal two days before the trial setting, claiming the buyer did not receive adequate notice of the setting. *Id.*

294. *Id.* at 158–59. The trial court did not explicitly make that finding in the record, but "articulated three concerns: first, that [the attorney] may have engaged [the seller] as a client; second, that [the attorney] may have been acting as a 'broker' between [the buyer and seller]; and third, that [the attorney] may have to be called as a fact witness against [the seller]." *Id.* at 159.

295. *Id.* at 159. The court of appeals relied on the following evidence:

> (1) [The attorney] had discussions with [the seller] concerning the controversy with [the buyer], which [the attorney] described as "a legal matter" in his letter; (2) [the attorney] requested documentation from [the seller] in order to resolve this controversy; (3) [the attorney] rendered legal advice to [the seller] regarding the use of contracts for deed; (4) [the attorney] advised [the seller] of his hourly rate, the amount of time he had already spent on services for her, and the total amount of time he expected to spend for resolution of her issues; and (5) [the seller] told [the attorney] that she believed he was her attorney.

Id.

296. *Id.*

297. *Id.* Rule 1.09 prohibits "a lawyer who personally has formerly represented a client" from later representing "another person in a matter adverse to the former client if it is the same or a substantially related matter." *Id.* at 158. Since the attorney's representation of the buyer and later the seller both involved the contract for deed between them, the court of appeals held that the seller] established as a matter of law that an appearance of impropriety exists and that she is entitled to a conclusive presumption that confidences and secrets were imparted to her former attorney." *Id.* at 159 (internal quotation marks and citation omitted). Further, the court of appeals held "[the seller] was not required to prove that she was actually prejudiced" by the conflict because it was presumed given the substantial relationship of the attorney's representation of the parties. *Id.* at 160.

298. *Id.* at 159–60.

299. Busby v. Harvey, No. 02-16-00311-CV, 2017 WL 3184732, at *1 (Tex. App.—Fort Worth July 27, 2017, no pet.).

of their horse's legs.[300] The owners moved to disqualify the veterinarian's attorney, claiming that they had contacted the attorney, the attorney had recommended a specific expert to them based on "sensitive" facts they disclosed, and the attorney, weeks later, appeared as counsel for the veterinarian.[301] The trial court denied the motion, the parties tried the case to a jury, and "[t]he jury found that no negligence of [the veterinarian] proximately caused" the horse's injury.[302] The owners appealed, challenging only the trial court's denial of the disqualification motion.[303]

The court of appeals detailed the conflicting evidence in the record from the owners and attorney regarding the communications between them,[304] but held that it need not decide under the circumstances whether the attorney's representation violated the disciplinary rules.[305] Instead, the court of appeals upheld the trial court's denial of the disqualification motion based on the owners' failure to show actual prejudice from the attorney's representation of the veterinarian.[306] In particular, the court of appeals rejected the owners' complaint that the attorney used "insider knowledge" gained from the owners for strategic advantage, noting as an example that the record reflected that the attorney never "referred to or . . . used the" owners' "difficulty in finding a local expert" at trial.[307] The court further reasoned that the owners had not shown that any of the attorney's criticisms of the owners' expert at trial "had anything to do with the contents of [the attorney's] pretrial conversation with [the owner] or that he would not have made those criticisms without speaking to [the owner]."[308] Finally, the court of appeals rejected the owners' argument that the attorney "unfairly" was able to choose both sides' experts, reasoning that after the mere referral, the attorney had nothing further to do with the owners' investigation, retention, designation, or presentation of the expert at trial.[309] The court of appeals therefore affirmed the trial court's refusal to disqualify the attorney.[310]

XIII. MISCELLANEOUS

For the first time, the Texas Supreme Court addressed in this Survey period responsible third-party practice under Chapter 33 of the Texas

300. *Id.*
301. *Id.*
302. *Id.* at *2.
303. *Id.*
304. *Id.* at *3–6. The owners' counsel testified that he contacted the attorney seeking legal advice not only about an expert but also about potentially adding him to the legal team and disclosed facts about the case. In contrast, the attorney testified the owner made it clear that he was not retaining him as an attorney, but wanted a referral for an expert because his retained attorney was having a difficult time locating anyone local, and did not disclose any facts about the case. *Id.* at *3–4.
305. *Id.* at *5.
306. *Id.* at *8.
307. *Id.* at *6–7.
308. *Id.* at *7.
309. *Id.* at *8.
310. *Id.*

Civil Practice and Remedies Code. In *In re Coppola*, the supreme court held that a defendant could designate an opposing party's transactional counsel as a responsible third party in a real estate dispute.[311] In this case, the buyers purchased unimproved land with the intention of building a veterinary clinic on the site, consulting two attorneys in connection with the transaction regarding various legal matters. When the buyers discovered after the closing that local ordinances required a twenty-five foot right-of-way for commercial improvements, thereby preventing their intended use of the property, they sued the sellers, who had provided a survey reflecting a fifteen foot right-of-way, for fraud and deceptive trade practices. Before trial, the sellers requested to designate the two attorneys the buyers had consulted pre-closing as responsible third parties. In their request, they alleged that the attorneys breached their duty of care by failing to advise the buyers of the right-of-way affecting their intended use of the site.[312] The buyers objected to the designation, asserting that the sellers "improperly sought to designate attorneys as responsible third parties"; the "trial court summarily denied the motion . . . without granting leave to replead."[313] The court of appeals denied the sellers mandamus relief.[314]

On mandamus, the Texas Supreme Court quoted Section 33.004's mandatory "shall grant" language,[315] emphasizing that despite timely objection: "[T]he court must allow the designation unless the objecting party establishes (1) the defendant did not plead sufficient facts concerning the person's alleged responsibility and (2) the pleading defect persists after an opportunity to replead."[316] The supreme court held that the trial court abused its discretion by denying the motion to designate for two reasons.[317] First, the supreme court determined that the motion, filed sixty-six days before the third trial setting, was timely because it "[found] nothing in the proportionate-responsibility statute supporting a construction of section 33.004(a) as limiting the phrase 'the trial date' to an initial trial setting rather than the trial date at the time a motion to designate is filed."[318] Second, the supreme court found that the trial court erred by denying the motion without granting the sellers leave to replead, rejected the buyers' policy arguments regarding designating attorneys, and explained that "nothing in the proportionate-responsibility statute precludes a party from designating an attorney as a responsible third party."[319] The supreme court declined to address whether the sellers' pleading of the attorneys' responsibility was sufficient because, regardless of any deficiency, "the trial court lacked discretion to deny the motion to

311. *In re* Coppola, 535 S.W.3d 506, 507 (Tex. 2017) (orig. proceeding) (per curiam).
312. *Id.* at 507.
313. *Id.*
314. *Id.*
315. *Id.* (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 33.004(f) (West 2015)).
316. *Id.* at 508 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 33.004(g)).
317. *Id.*
318. *Id.*
319. *Id.*

designate without affording [the sellers] an opportunity to replead."[320] Finally, the supreme court agreed with the majority of lower courts of appeals' determination that mandamus relief was appropriate for erroneous denial of responsible third party designations,[321] granted the sellers mandamus relief, and directed the trial court to vacate its order denying the third party designation motion.[322]

In *Chavez v. Kansas City Southern Railway Co.*, the Texas Supreme Court addressed the operative effect of evidentiary presumptions at trial and in summary judgment proceedings.[323] In this case, the parties' counsel signed a letter agreement of settlement after "the trial court granted [the plaintiff's] motion for new trial" following a defense jury verdict.[324] "[A]t a hearing to approve the" settlement, the plaintiff "appeared and stated that she 'wished not to go forward' and requested 'at least three months to find . . . another law firm' because she '[did] not feel comfortable with' the firm that had been representing her."[325] "The trial court reset the hearing, and the [defendant] moved to enforce the settlement."[326] While the plaintiff did not appear at the reset hearing, her former counsel advised the trial court that even though "she no longer represented" the plaintiff, the plaintiff "had consented to the settlement."[327] "The trial court granted the [defendant's] motion" to enforce the settlement and entered judgment accordingly, "awarding [the plaintiff] $531,000.00, of which $325,000.00 went" towards her former law firm's expenses.[328]

After the plaintiff's first appeal and remand of the case for defendant's failure to file the settlement agreement of record, the defendant filed the settlement agreement and moved for summary judgment on its newly added breach of contract claim. To show plaintiff's consent to the settlement, the defendant relied solely on evidence "that [the plaintiff] was represented during settlement negotiations by the same law firm that had represented her at trial, including the attorney who executed the settlement agreement."[329] The plaintiff responded to the motion, denying "by affidavit, that she . . . consented to the settlement."[330] The trial court granted the motion, and the plaintiff "appealed, arguing that her counsel

320. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 33.004(g); *In re* Smith, 366 S.W.3d 282, 288 (Tex. App.—Dallas 2012, orig. proceeding) ("[T]he trial judge was statutorily required to give relators an opportunity to replead before denying their motion, regardless of whether they made a specific request for time to replead.")).

321. *Id.* at 509 (citing *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124 (Tex. 2004) (orig. proceeding)).

322. *Id.* at 510.

323. Chavez v. Kan. City S. Ry. Co., 520 S.W.3d 898, 899 (Tex. 2017) (per curiam).

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.* at 900.

330. *Id.*

[lacked] authority to bind her to the settlement agreement."[331] The court of appeals affirmed, reasoning that "it would indulge every reasonable presumption to support a settlement agreement made by an attorney hired by a client."[332] The Texas Supreme Court granted review, reversed the grant of summary judgment, and remanded the case.[333]

The supreme court explained that even assuming that an attorney hired by a client is presumed to have authority to agree to a settlement on the client's behalf, that presumption is rebuttable, and the defendant could not rely on a presumption on summary judgment "to shift to the [plaintiff] the burden of raising a fact issue of rebuttal."[334] In other words, the supreme court held that the defendant had the summary judgment burden "to establish affirmatively that there was no genuine issue" that the plaintiff "actually authorized" the law firm to execute the "settlement agreement on her behalf."[335] Because the supreme court found the defendant's evidence that the plaintiff hired counsel and counsel agreed to the settlement failed to satisfy this burden, it held that the trial court erred in granting the summary judgment motion.[336]

XIV. CONCLUSION

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

331. *Id.*
332. *Id.* (internal quotation marks omitted).
333. *Id.* at 901.
334. *Id.* at 900. "The presumptions and burden of proof for an ordinary or conventional trial . . . are immaterial to the burden that a movant for summary judgment must bear." Mo.-Kan.-Tex. R.R. Co. v. City of Dallas, 623 S.W.2d 296, 298 (Tex. 1981) (internal quotation marks omitted).
335. *Id.* at 900–01.
336. *Id.* at 901.