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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 this Survey period, the Texas Supreme Court clarified the appropriate standards for determining whether a municipality was engaged in a proprietary or governmental function when entering into a contract.¹ In a prior opinion in the same case, the supreme court held that the proprietary-governmental dichotomy applied to contract claims against municipalities, explaining that lower courts' reliance on language in *Tooke v.*

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1. *Wasson Interests, Ltd. v. City of Jacksonville*, 559 S.W.3d 142, 147 (Tex. 2018) (Wasson II).

*City of Mexia*² for the contrary proposition was misplaced.³ The underlying suit involved a lease entered into by the City of Jacksonville with the Wassons for a lot located on a lake constructed to serve as the City's primary water source.⁴ The Wassons sued the City after it terminated their lease for failure to comply with use restrictions, and the trial court and court of appeals held that the Wassons' suit was barred by governmental immunity.⁵ In *Wasson I*, the supreme court reversed without addressing "whether the contract at issue was proprietary or governmental" and remanded to the court of appeals to determine that issue.⁶ On remand, the court of appeals held that the lease arose in connection with its governmental functions because the City's actions, including terminating the Wassons' lease, were "to maintain a safe and healthy water supply for its citizens and to preserve the property values of the lease lots."⁷ In *Wasson II*, the supreme court again granted review, reversed the court of appeals' holding that the City was immune, and remanded for consideration of the City's other defenses to the breach of contract claim.⁸

Specifically, the supreme court clarified that the City's reasons for taking the actions complained of in the lawsuit were not relevant in evaluating the proprietary-governmental inquiry.⁹ Instead, the relevant question was whether the City was acting in a governmental or proprietary capacity when it entered into the lease.¹⁰ In other words, "the focus belongs on the nature of the contract, not the nature of the breach."¹¹ In determining the character of the lease, the supreme court looked to the Texas Tort Claims Act for "the general definitions" of proprietary and governmental functions.¹² Applying this framework, the supreme court stated an activity was governmental "only if it is essential" to the performance of governmental duties.¹³ The supreme court concluded that the City engaged

2. 197 S.W.3d 325, 343 (Tex. 2006).

3. *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 434 n.7 (Tex. 2016) (*Wasson I*). *Wasson I* was discussed in the 2017 survey. Amanda Sotak et al., *Civil Procedure: Pre-Trial and Trial*, 3 SMU ANN. TEX. SURV. 69, 69–70 (2017), available at <https://scholar.smu.edu/smuatxs/vol3/iss1/> [<https://perma.cc/35X6-DQPN>].

4. *Wasson II*, 559 S.W.3d at 145, 148.

5. *Id.* at 146; *Wasson I*, 489 S.W.3d at 430–31.

6. *Wasson II*, 559 S.W.3d at 146.

7. *Id.* at 148.

8. *Id.* at 154.

9. *Id.* at 148.

10. *Id.* (explaining that the only relevant inquiry is the nature of the City's activity or conduct in leasing the property surrounding the lake to the Wassons and others for private use).

11. *Id.* at 149 (citing and quoting *Wasson I* and the court of appeals' opinion on remand, 513 S.W.3d 217, further explaining that the supreme court remanded for the court of appeals to address "whether the *contract at issue* was propriety or governmental" and not what "the [City's] actions *in terminating* the lease" were) (emphasis original). *Id.* at 148.

12. *Id.* at 150 (citing TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.0215(a), defining governmental functions, and 101.0215(b), defining proprietary functions).

13. *Id.* at 153 (citing *City of Houston v. Shilling*, 240 S.W.2d 1010, 1011–12 (Tex. 1951), in which the supreme court rejected the claim that a city's discretionary operation of a garbage truck repair shop was "closely related or necessary" to governmental function of garbage collection, emphasizing that the activity at issue must do more than merely "touch upon" the governmental function to qualify).

in a proprietary act when it entered into the lease,¹⁴ reasoning that the City's decision to lease the lakefront was a voluntary, proprietary choice that did not necessarily further the governmental function of managing the water supply, and the City was therefore not immune from the Wassons' suit.¹⁵

In *Meyers v. JDC/Firethorne, Ltd.*, the Texas Supreme Court disposed of a developer's suit against a county commissioner seeking approval of land development plats on a ground not raised by the parties.¹⁶ While the underlying suit involved various governmental actors and entities, the sole claim before the supreme court was the developer's claim against the county commissioner in his official capacity that both the trial court and court of appeals held was not barred by governmental immunity.¹⁷ Despite the parties' and lower courts' focus on immunity,¹⁸ the supreme court reversed the court of appeals' judgment and dismissed the developer's claim with prejudice on an entirely different basis, holding that "the developer ha[d] not shown a substantial likelihood that the injunction [sought] against the county commissioner will remedy its alleged injury."¹⁹ In other words, the supreme court found the parties' debate over the commissioner's authority was "ultimately a question of whether [the developer] has standing to seek this injunction against [the commissioner]," and thus proceeded to address that threshold issue.²⁰

The supreme court began by noting that the standing doctrine, which requires "a concrete injury to the plaintiff and a real controversy between the parties that will be resolved by the court," emanates from the separation of powers and open courts provisions of the Texas constitution.²¹ In cases challenging the legality of government action or inaction, the supreme court emphasized that establishing standing may be more difficult because its existence "depends on the unfettered choices made by independent actors not before the courts" who exercise broad discretion.²² A plaintiff must therefore plead facts showing that discretion has been or will be exercised "in such a manner as to produce causation and permit redressability."²³ Turning to the developer's claim, the supreme court

14. *Id.* at 154.

15. *Id.* at 153–54.

16. *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 479–80 (Tex. 2018).

17. *Id.* at 483–84.

18. Specifically, on review, the commissioner contended that "governmental immunity bars [the developer's] *ultra vires* suit against him because he is not the county official responsible for" plat applications while the developer argued the commissioner was the proper *ultra vires* defendant because he "lacked authority" to halt review of its plat applications. *Id.* at 484.

19. *Id.* at 480.

20. *Id.* at 484 ("Because it is a component of subject matter jurisdiction, standing cannot be waived and may be raised for the first time on appeal.").

21. *Id.* (citing TEX. CONST. art. I, § 13). The supreme court noted that the Texas standing test paralleled the federal test for Article III standing, and therefore "look[ed] to federal standing requirements for guidance." *Id.* at 485.

22. *Id.* at 486.

23. *Id.* (citing and quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992)).

held it failed to satisfy the “third standing requirement—often referred to as ‘redressability’” because there was no remedy that “the trial court could fashion against [the commissioner] that would afford relief as to [the developer’s] plat applications.²⁴ In particular, the supreme court reasoned that the developer’s injury could not possibly be remedied by the injunctive relief sought because the commissioner individually lacked the legal authority to receive, process, or approve the plat applications in dispute.²⁵ Without showing the commissioner’s authority to respond to the relief requested, the supreme court held the developer had no standing and dismissed its claims.²⁶

The Texas Supreme Court enforced an expansive interpretation of the election of remedies provision of the Texas Tort Claims Act²⁷ in *University of Texas Health Sciences Center at Houston v. Rios*.²⁸ In that case, a medical resident sued a governmental medical center and several faculty physicians alleging defamation and tortious interference.²⁹ The attorney general answered for the defendants and moved to dismiss the claims against the physicians pursuant to Section 101.106(e).³⁰ In response, the resident amended his petition, dropping all his claims against the center except for breach of contract, leaving the physicians as the only tort defendants.³¹ The defendants filed an amended motion to dismiss but continued to argue the physicians should be dismissed under Section 101.106(e).³² The trial court dismissed the contract claim against the center and refused to dismiss the physicians.³³ The “court of appeals divided on both reason and result,”³⁴ and the supreme court granted the

24. *Id.* at 485–88.

25. *Id.* at 488–89 (citing “the warning [it] issued” in *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 155 (Tex. 2012), that “[i]f . . . a plaintiff suing in a Texas court requests injunctive relief . . . but the injunction could not possibly remedy his situation, then he lacks standing to bring that claim.”).

26. *Id.* at 489.

27. Under the election provision, a plaintiff must make an election on filing suit whether to sue individual employees on the theory that they acted independently and are solely liable or to sue the governmental unit for vicarious liability. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(a), (b) (requiring a plaintiff at the time suit is filed to make an irrevocable election between proceeding against the governmental entity or its employees, which election “forever bars any suit or recovery by the plaintiff against any individual employee of the governmental unit [or the governmental unit] regarding the same subject matter”).

28. 542 S.W.3d 530, 532 (Tex. 2017).

29. *Id.*

30. *Id.* at 532 (TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(e) provides if “suit is filed under [this chapter] against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit.”).

31. *Id.* at 533.

32. *Id.*

33. *Id.*

34. The court of appeals affirmed the trial court’s judgment, with one justice reasoning that defendants had the burden to prove the physicians were the center’s employees and had not done so. A second justice concurred in the judgment, reasoning that while the physicians were entitled to dismissal under Section 101.106(e) under the original motion, when defendants filed their amended motion, the Section 101.106(e) ground was no longer applicable. The dissenting justice argued that the physicians’ employment by the center

defendants' request for review.³⁵

Relying on the election provision's plain language, the supreme court reversed, holding that the physicians were entitled to dismissal from the suit "immediately" upon the filing of the defendants' original motion to dismiss.³⁶ As such, the resident's nonsuit of his tort claims against the medical center could not affect the physicians' entitlement to dismissal of the tort claims asserted against them in the "original petition, as requested in defendants' original motion to dismiss."³⁷ Further, the supreme court rejected the resident's argument that "defendants lost their right to argue for dismissal of the tort claims originally asserted" by amending their motion to dismiss because, even assuming that Rule 65 of the Texas Rules of Civil Procedure³⁸ applied to motions:³⁹ (1) "it is the filing of a motion to dismiss, not its content, that triggers the right to dismissal" such that Rule 65, which speaks to content of the pleadings, "does not nullify the fact that it was filed" in the first place;⁴⁰ and (2) to the extent Rule 65 is inconsistent with Section 101.106(e), "the statute prevails."⁴¹

In a case of first impression, the Texarkana Court of Appeals addressed whether a proposed class plaintiff's suit becomes moot if the defendant provides the relief sought after suit is filed, but before a class is certified, in *Growden v. Good Shepherd Health System*.⁴² An uninsured plaintiff sued a hospital under the Texas Declaratory Judgments Act for herself and others similarly situated, asserting that the hospital's charges for uninsured patients were unreasonable compared to insured patients, and seeking a declaration that the putative class was only liable for the reasonable value of the services.⁴³ Two days after filing her petition, the plaintiff moved for class certification and requested a scheduling order.⁴⁴ Eleven months later, the hospital moved to dismiss the plaintiff's claims

had not been "effectively challenged" by the resident, and would have dismissed the physicians because that result was "compelled by the plain text of 101.106(e)." *Id.* at 534.

35. *Id.*

36. *Id.* at 537 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(e)).

37. *Id.*

38. *Id.* at 538 (stating TEX. R. CIV. P. 65 "provides that when an 'instrument' is amended, 'the instrument for which it is substituted shall no longer be regarded as a part of the pleading in the record of the cause.'").

39. The supreme court declined to decide this question but noted that Rules 62 through 67 of the Texas Rules of Civil Procedure "address amendments to pleadings," and "[n]one refers to motions." *Id.* at 538 n.48.

40. The supreme court further explained that "[a]mendments do not always avoid the consequences of filing." *Id.* at 538 (discussing sanctions for fictitious pleadings under Rule 13).

41. *Id.*

42. 550 S.W.3d 716, 723 (Tex. App.—Texarkana 2018, no pet.).

43. *Id.* at 720–21. The plaintiff admitted her uninsured daughter to the emergency room for several hours, agreed to pay "the total charges for services rendered," and received a bill thirty days later for \$25,308.92 based on the hospital's "Chargemaster" rates, which "were substantially higher than the charges for the same services for commercially insured patients and patients covered by Medicare, Medicaid, or workers' compensation." *Id.* at 720.

44. *Id.* at 721.

as moot because she had “paid nothing” for her daughter’s care and it had unconditionally waived and would not collect the amounts charged.⁴⁵ The trial court found the plaintiff’s claims moot and dismissed the suit for lack of jurisdiction.⁴⁶ The court of appeals reversed, agreeing with the plaintiff that the hospital’s unilateral act “picking-off” her individual claim did not moot the class claims or her claim for attorneys’ fees under the Declaratory Judgments Act.⁴⁷ The court of appeals reasoned that while no Texas court had yet adopted the “picking-off” exception to mootness recognized by federal courts in the class action context, the Texas Supreme Court had adopted the “inherently transitory exception” in class action cases and discussed several other exceptions that had been “extensively explored” by federal courts.⁴⁸ Noting that a “majority of federal courts of appeal have recognized the picking-off exception,”⁴⁹ the court of appeals held that the exception applied⁵⁰ because: (1) plaintiff’s motion for class certification was pending when the hospital waived the bill and she had diligently pursued discovery supporting the class claims, including filing a motion to compel; and (2) it appeared that the hospital’s waiver of the bill “was not pursuant to any standard policy or procedure, but rather a strategic, ad hoc decision” designed to dispose of the case.⁵¹ Accordingly, the court of appeals held that mootness of plaintiff’s individual claim did not moot the substantive class claims or the class attorneys’ fee claim, and the trial court therefore erred in dismissing.⁵²

Finally, the First Houston Court of Appeals addressed a trial court’s continuing jurisdiction under Texas Rule of Civil Procedure 76a.⁵³ When a journalist sought to unseal a deposition taken in 1997, the interested parties moved to dismiss the motion for lack of jurisdiction, which the

45. *Id.*

46. *Id.* at 720–21.

47. *Id.* at 720.

48. *Id.* at 723 (citing cases in which the Texas Supreme Court discussed, but did not apply, the “capable of repetition yet evading review” and “collateral consequences” exceptions to the mootness doctrine in the class action context that, like the “picking-off” exception, have been explored in “federal decisions and authorities,” which the court of appeals noted were “pervasive,” persuasive guidance in applying Rule 42 of the Texas Rules of Civil Procedure).

49. *Id.* at 724 (noting the “picking-off exception” expands the “the relation-back doctrine” recognized by the United States Supreme Court in *Sosna v. Iowa*, 419 U.S. 393 (1975) and “was developed to prevent defendants from strategically avoiding litigation by settling or buying off individual named plaintiffs in a way that would be ‘contrary to sound judicial administration.’”) (citation omitted).

50. *Id.* at 727 (explaining that federal courts considered the following factors in applying the “picking-off exception”: (1) “when the defendant satisfied the named plaintiff’s claim”; (2) “whether the satisfaction resulted from the standard operating procedure of the defendant, rather than an ad hoc procedure”; and (3) whether “there is pending before the district court a timely filed and diligently pursued motion for class certification.”) (citations omitted).

51. *Id.*

52. *Id.* Further, the court of appeals held that the plaintiff’s individual claim for attorneys’ fees likewise survived the mootness of her substantive claims because the Declaratory Judgments Act does not require prevailing party status for recovery of attorneys’ fees. *Id.*

53. *See* TEX. R. CIV. P. 76a.

trial court granted.⁵⁴ The journalist appealed, and the court of appeals affirmed.⁵⁵ The court of appeals reasoned that since the trial court's plenary power expired long before the unsealing motion was filed, the trial court would only have jurisdiction to consider the motion if the materials sought to be unsealed were "court records" as defined by Rule 76a.⁵⁶ Because the 1997 deposition had been submitted only for *in camera* review,⁵⁷ it was not a Rule 76a court record, and the trial court lacked jurisdiction to consider the unsealing request.⁵⁸

III. SERVICE OF PROCESS

In *Jeanes v. Dallas County*,⁵⁹ an ad valorem tax case, the Dallas Court of Appeals upheld the entry of a default judgment against an entity defendant and its general partner, despite the entity having been misnamed in the citation.⁶⁰ The plaintiff taxing units initially named "Charles Jeanes Wesley, Individually and Doing Business as Sierra Investment Associates" as the sole defendant. After Jeanes answered, corrected his name, denied that he individually owned the relevant properties, and counterclaimed for a declaration to that effect,⁶¹ the taxing units filed three amended petitions without revising the original caption. In the body of the third amended petition, the taxing units identified the defendants as "Charles Wesley Jeanes, Individually As General Partner of Sierra Investment Associates" and "Sierra Investment Associates, a Texas *General* Partnership."⁶² The citation to the entity was, however, directed to "Sierra Investment Associates, A Texas *Limited* Partnership, upon whom service may be obtained by serving its Partner, Charles Wesley Jeanes"⁶³ and was served on Jeanes.⁶⁴ Neither Jeanes nor the entity appeared for the scheduled trial on the merits, and the trial court entered judgment against them.⁶⁵ Jeanes's motion for new trial was overruled by operation of law,⁶⁶ and Jeanes and the entity appealed.⁶⁷

Jeanes and the entity argued that the entity citation was invalid because it (1) did not correctly name and identify the entity as required by Rule

54. *Biederman v. Brown*, 563 S.W.3d 291, 294 (Tex. App.—Houston [1st Dist.] 2018, no pet.).

55. *Id.*

56. *Id.* at 301–02; see TEX. R. CIV. P. 76a(2)(a)(1) (defining "court records" as "all documents of any nature filed in connection with any matter before any civil court, except: [] documents filed with the court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents.>").

57. *Biederman*, 563 S.W.3d at 299.

58. *Id.* at 301–04 (citing TEX. R. CIV. P. 76a(2)(a)(1)).

59. No. 05-17-01269-CV, 2018 WL 5725326, at *1 (Tex. App.—Dallas Oct. 31, 2018, no pet.) (mem. op.).

60. *Id.* at *1, *6.

61. *Id.*

62. *Id.* at *2 (emphasis added).

63. *Id.* (emphasis added).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

99(b)(7)⁶⁸ and (2) was not directed to the correct entity as required by Rule 99(b)(8).⁶⁹ Further, they argued that the judgment against Jeanes as the entity's general partner was invalid because there was no valid judgment against the entity due to ineffective service.⁷⁰ The court of appeals began its review by noting that Jeanes and the entity had the opportunity to present evidence for the trial court's consideration about why they did not appear because they challenged the default judgment via a motion for new trial rather than by restricted appeal.⁷¹ They failed to offer any evidence, however, and nothing in the record showed any entity other than the one identified in the third amended petition was served.⁷² Accordingly, the court of appeals held that Jeanes and the entity had failed to prove the *Craddock* elements required for reversal of the trial court's judgment.⁷³ Specifically, the court of appeals reasoned that Jeanes's pleadings admitted a general partnership owned the subject properties and the entity did not adduce evidence to negate its knowledge of the suit or to excuse its failure to answer.⁷⁴ Further, the court of appeals found that neither had demonstrated the existence of a meritorious defense to the suit; to the contrary, neither denied that the entity owned the properties or the taxes were delinquent.⁷⁵

In *Macs v. Lenahan*, the San Antonio Court of Appeals concluded that service on the defendants' attorney in accordance with an agreement made pursuant to Rule 11 of the Texas Rules of Civil Procedure⁷⁶ was invalid under Rule 119⁷⁷ because the attorney's agreement to accept service of process was unsworn.⁷⁸ The defendants' attorney agreed to accept service on their behalf through a signed Rule 11 agreement.⁷⁹ When the defendants failed to answer, the plaintiff moved for default judgment, re-

68. See TEX. R. CIV. P. 99(b)(7).

69. *Jeanes*, 2018 WL 5725326, at *3; see TEX. R. CIV. P. 99(b)(8).

70. *Jeanes*, 2018 WL 5725326, at *3.

71. *Id.* at *5.

72. *Id.*

73. *Id.* at *5–6 (citing *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126 (Comm'n App. 1939) (holding “[a] default judgment should be set aside and a new trial ordered in any case in which the failure of the defendant to answer before judgment was not intentional, or the result of conscious indifference on his part, but was due to a mistake or an accident; provided the motion for a new trial sets up a meritorious defense and is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff.”)).

74. *Id.* at *6.

75. *Id.*

76. TEX. R. CIV. P. 11 (providing “[u]nless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record.”) (emphasis added).

77. TEX. R. CIV. P. 119 (providing a “defendant may accept service of process . . . by written memorandum signed by him, or by his duly authorized agent or attorney, after suit is brought, *sworn to before a proper officer other than an attorney in the case*, and filed among the papers in the cause”) (emphasis added).

78. *Macs v. Lenahan*, No. 04-17-00033-CV, 2018 WL 280469, at *3 (Tex. App.—San Antonio 2018, pet. denied) (mem. op.).

79. *Id.* at *1.

lying on the signed Rule 11 agreement to prove service.⁸⁰ The trial court granted the motion for default judgment the same day it was filed, awarding the plaintiff almost \$3.1 million in damages and attorneys' fees.⁸¹ After the judgment became final and unappealable, the defendants filed a bill of review, "asserting that fraud by [their attorney] caused the default judgment" to be entered and it should be set aside.⁸² The defendants moved for summary judgment on their bill of review, arguing that the judgment "was rendered against them without effective service of process,⁸³ without being provided notice of the default judgment, and without [plaintiff] filing proof of service at least 10 days before moving for a default judgment."⁸⁴ The plaintiff filed a cross-motion.⁸⁵ The trial court granted the plaintiff's motion and dismissed the bill of review with prejudice.⁸⁶

The court of appeals reversed the trial court's summary judgment order and rendered judgment granting the bill of review and setting aside the default judgment.⁸⁷ Noting that "there must be strict compliance with the appropriate service rules" before default judgment may properly be granted, the court of appeals held that the "unsworn Rule 11 agreement . . . was not in strict compliance with Rule 119 and could not serve as a valid waiver of citation or cure the defects in" service.⁸⁸ Given the lack of effective service,⁸⁹ the court of appeals concluded that the trial court had not acquired *in personam* jurisdiction over the defendants, and the default judgment was thus void.⁹⁰

IV. SPECIAL APPEARANCE

In an appeal "aris[ing] from a modern-day cattle rustling scheme," the Fort Worth Court of Appeals affirmed in part and reversed in part a trial court's determination that it did not have personal jurisdiction over two individual defendants in *Northwest Cattle Feeders, LLC v. O'Connell*.⁹¹ In that case, a Nebraska cattle broker, through its chief financial officer and

80. *Id.*

81. *Id.*

82. *Id.*

83. The defendants explicitly argued that service on their attorney under the Rule 11 agreement was not effective under Rule 119. *Id.* at *2.

84. *Id.* at *1.

85. *Id.*

86. *Id.*

87. *Id.* at *3.

88. *Id.* at *2–3.

89. *Id.* at *3. The court of appeals explained that a proponent, upon showing it was not served with notice of the suit, is "relieved from" the ordinary bill of relief requirements because the underlying judgment is "constitutionally infirm." *Id.* at *2.

90. *Id.* at *3. The court of appeals noted that the trial court's entry of the default judgment was also improper under Rule 107 of the Texas Rules of Civil Procedure because the Rule 11 agreement was filed "the very same day" that judgment was entered. *Id.* at *3 n.1 (citing TEX. R. CIV. P. 107(h), which "provides that no default judgment may be granted unless the citation with the officer's return shall have been on file with the clerk for ten days.").

91. 554 S.W.3d 711, 715–16 (Tex. App.—Fort Worth 2018, pet. denied).

president, entered into an agency relationship with a Texas resident to allow him to buy and sell cattle on the broker's behalf.⁹² The broker provided the Texas agent with "one of its checkbooks along with a stamp of [its chief financial officer's] signature to endorse the checks."⁹³ The broker sold 554 steers to a buyer for \$798,351.19, and advised the buyer that the steers were located on the Texas agent's farm. After paying for the steers in full, the buyer decided to leave them under the Texas agent's care "to graze before sending them to another location."⁹⁴ A few months later, the broker learned its bank account was overdrawn by \$1 million and it was likely that the Texas agent had orchestrated a "check-kiting" scheme causing the deficiency.⁹⁵ The broker's chief financial officer and president met in Nebraska about the overdraft, after which the president "drove all night to reach Texas" to confront the agent.⁹⁶ On the way down, the president contacted the buyer to advise "there was a 'problem in Texas,'" and asked him to come to the agent's farm.⁹⁷ Upon the president's arrival in Texas, the agent admitted his fraud; and the president seized about 900 cattle located on the agent's farm. The buyer's 554 steers "were not among" them, however, because the agent already had sold them to a third party.⁹⁸ The broker's president was able to sell most of the seized cattle to pay down the overdraft and transferred only 41 of them to the buyer.⁹⁹

The buyer sued the broker, its Texas agent, and the broker's chief financial officer and president in Texas, asserting among others, fraud claims based on the president's representations to the buyer after discovery of the agent's scheme.¹⁰⁰ The president and chief financial officer filed special appearances in response, arguing that their sole contact with Texas had been in their capacity as officers of the broker and not as individuals.¹⁰¹ The trial court granted the special appearances and dismissed the claims against them for lack of personal jurisdiction.¹⁰²

92. *Id.*

93. *Id.* at 716. The court of appeals' opinion noted here that the Texas resident agent "had a criminal history: in 2001, he was convicted and imprisoned for bank fraud." *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 717.

99. *Id.*

100. *Id.* Specifically, the buyer alleged that the broker's president represented that collection efforts were underway and that "the cattle collected would be used to help try to make all those impacted by [the agent's] fraudulent scheme whole, including [the buyer]". *Id.* at 718. Further, the buyer alleged that in reliance on the belief the broker's president was acting for the "team," the buyer did not take "any direct action to take possession of cattle found" and "accepted shipment of approximately 41 head of cattle . . . for feeding and care." *Id.* The buyer alleged that contrary to the president's representations, the broker was acting solely for the broker's benefit because the proceeds from sale of the seized cattle were not shared with the broker's customers "victimized by the scheme," resulting in further harm to the buyer. *Id.* at 719.

101. *Id.* at 719-20.

102. *Id.* at 720.

On appeal, the court of appeals concluded that the pleadings and evidence established sufficient minimum contacts between the broker's president and Texas to support the court's exercise of specific personal jurisdiction over him.¹⁰³ The court of appeals emphasized that the claims against the president "principally focus on his alleged misrepresentation, an event that occurred in Texas."¹⁰⁴ The court of appeals reasoned that even if the president was acting for the broker, Texas law is clear that "an agent who knowingly participates in a tortious or fraudulent act may be held individually liable to third persons even though he performed the act as an agent of the corporation."¹⁰⁵ Further, the court of appeals concluded that exercising specific personal jurisdiction over the president did not offend notions of fair play and substantial justice because the buyer's interest in adjudicating claims against all of the defendants in one forum outweighed any burden on the president to respond in Texas.¹⁰⁶ With regard to the chief financial officer, however, the court of appeals affirmed the trial court's grant of his special appearance,¹⁰⁷ reasoning that the buyer-investor "did not plead facts specifying how [the chief financial officer] encouraged, knew about, or was involved in the alleged misrepresentation in Texas" by the president.¹⁰⁸

V. PARTIES

In *Williamson v. Howard*, the El Paso Court of Appeals concluded that a party designated as a responsible third party pursuant to Chapter 33 of the Texas Civil Practice and Remedies Code does not have a justiciable interest in the suit permitting intervention under Texas Rule of Civil Procedure 60.¹⁰⁹ "In this pro se eviction case," a tenant under a "month-to-month oral lease" of a trailer park lot sued the executive director of an orphanage that inherited ownership of the trailer park upon the death of its prior owner.¹¹⁰ The orphanage did not want to operate the trailer park and tasked a management company with closing the park and transition-

103. *Id.* at 724.

104. *Id.*

105. *Id.* at 725.

106. *Id.* at 727. In this regard, the court of appeals noted that the president had already traveled to Texas to testify in the broker's separate suit against the Texas agent, which was tried to a jury, showing that any burden on the president of participating in Texas litigation was not "onerous." *Id.* at 727.

107. *Id.* at 728. The court of appeals affirmed the lack of personal jurisdiction over the chief financial officer "except to the extent of [the buyer's] derivative denuding claims" against him. *Id.* (explaining that "[t]he 'denuding' theory allows for a defendant's personal liability for the obligations of a corporation when the defendant has stripped the corporation of its assets that the corporation could have used to pay a creditor or a claimant."). *Id.* at 729. The court of appeals concluded that the trial court could exercise jurisdiction over the buyer's denuding claim against the broker, which could result in the president and chief financial officer being held derivatively liable for the broker's liability, because no party asserted on appeal that the broker lacked sufficient contacts with Texas to support the trial court's exercise of personal jurisdiction over it. *Id.* at 729-30.

108. *Id.* at 728.

109. *Williamson v. Howard*, 554 S.W.3d 59, 67 (Tex. App.—El Paso 2018, no pet.).

110. *Id.* at 63-64.

ing the tenants. In that process, the tenant alleged she was promised moving assistance and \$200 for her storage unit by the orphanage's director, which never materialized.¹¹¹ About a year after the park's closure, the plaintiff-tenant sued the orphanage director "in his personal and professional capacity" in justice court, alleging violations of the Texas Deceptive Trade Practices Act, violations of the Texas Property Code, and fraud.¹¹² The director moved to designate the management company as a responsible third party, which the justice court allowed.¹¹³ The management company then moved to intervene, and the justice court denied the director's motion to strike the intervention.¹¹⁴ After several pleading amendments and a jury trial, the justice court granted a directed verdict in favor of the director, management company, and several other parties, and plaintiff appealed to county court.¹¹⁵ The county court granted the director's renewed motion to strike the management company's intervention, and ultimately dismissed all of the tenant's claims on pleas to the jurisdiction or directed verdict.¹¹⁶

On appeal, the tenant complained that the county court granted the motion to strike the management company's intervention.¹¹⁷ In addressing the propriety of the order, the court of appeals quoted Rule 60,¹¹⁸ observing that once the director moved to strike the intervention, the management company bore the burden "to show a justiciable interest in the litigation."¹¹⁹ In response to the motion to strike, the management company's only asserted justiciable interest was its designation as a responsible third party, and the tenant relied on the same alleged interest on appeal.¹²⁰ Because designation as a responsible third party under Chapter 33 did not impose any liability on the management company,¹²¹ however, the court of appeals held its designation alone did not give the management company a justiciable interest in the suit.¹²² Accordingly, the court of appeals concluded that the county court did not abuse its

111. *Id.*

112. *Id.* at 64.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 65.

118. *Id.* at 66 (quoting TEX. R. CIV. P. 60, which provides "[a]ny party may intervene by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party").

119. *Id.*

120. *Id.* at 65. The situation presented in this case is unlikely to arise again because it is surprising the management company sought to intervene in the first place. Moreover, the tenant could have simply joined the management company as a party defendant if she thought its participation was desirable. *Id.*

121. *Id.* at 67. (citing and quoting TEX. CIV. PRAC. & REM. CODE ANN. § 33.004(i), which states: "The filing or granting of a motion for leave to designate a person as a responsible third party or a finding of fault against the person: (1) does not itself impose liability on the person; and (2) may not be used in any other proceeding, on the basis of res judicata, collateral estoppel, or any other legal theory, to impose liability on the person.").

122. *Id.*

discretion in striking the intervention.¹²³

VI. PLEADINGS

The Texas Supreme Court concluded that allegations within a section of a petition entitled “Avoidance of Defendants’ Limitations Defense” were sufficient under Rule 47(a) of the Texas Rules of Civil Procedure¹²⁴ to provide notice of a trust’s affirmative claim for “acknowledgment of a debt” in *Deroeck v. DHM Ventures, LLC*.¹²⁵ In this case, a trust acquired an \$8.5 million company debt guaranteed by two of the company’s principals.¹²⁶ After the company stopped making payments, the trust sued the debtor company and guarantors.¹²⁷ The parties filed cross motions for summary judgment. In their motion, the debtors argued that the trust’s claims were barred by limitations.¹²⁸ In response, the trust argued and submitted evidence demonstrating that the company and guarantors had acknowledged the “original debt” on multiple occasions within four years of the suit¹²⁹ and, contemporaneously with its summary judgment response, the trust filed an amended petition making similar allegations regarding acknowledgment of the debt in an “avoidance” section of the pleading.¹³⁰ Even though the trust’s summary judgment response argued that acknowledgment “of the old debt gives rise to a new claim separate from the old debt,” its amended petition, like its original, did not explicitly assert acknowledgment in the section of the pleading entitled “Causes of Action.”¹³¹ The debtors countered in reply that the trust had not properly pleaded acknowledgment.¹³² Without explaining its reasoning, the trial court denied the trust’s motion and granted the debtors’ cross motion.¹³³ The court of appeals affirmed, holding that the trust “had failed to plead acknowledgment as a cause of action because it had not done so ‘specifically and clearly’ and in ‘plain and emphatic terms.’”¹³⁴

Granting the trust’s petition for review, the supreme court reversed.¹³⁵ Initially, the supreme court noted that the court of appeals’ holding that a claim for “acknowledgment of a debt must be ‘specifically and clearly’

123. *Id.*

124. TEX. R. CIV. P. 47(a) (providing a pleading setting forth “a claim for relief” shall contain: “a short statement of the cause of action sufficient to give fair notice of the claim involved.”).

125. 556 S.W.3d 831, 833 (Tex. 2018) (per curiam).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 833–34.

130. *Id.* at 834. The supreme court noted this “section of the [trust’s] amended petition concluded: ‘For purposes of this avoidance pleading, the effect of these numerous acknowledgements is to create a new promise to pay the old debt evidenced by the Note and the loan documents.’” *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 836.

pleaded ‘in plain and emphatic terms’” conflicted with Rule 47(a). Specifically, the supreme court emphasized that Rule 47(a) requires only a statement sufficient to “give fair notice of the claim involved.”¹³⁶ The “key inquiry,” according to the supreme court, was “whether the opposing party ‘can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant.’”¹³⁷ The supreme court held that the trust’s amended petition, including the word “acknowledgment[]”¹³⁸ and factual allegations relied on to demonstrate it, satisfied the requirements of Rule 47 because it provided fair notice to the debtors of the trust’s claim.¹³⁹ The supreme court rejected the debtors’ arguments that the placement of the allegations in the pleading affected the analysis, reasoning that regardless of the caption or location of the trust’s allegations, the amended petition provided notice to the debtors that the trust was asserting a claim based on their acknowledgement of the debt.¹⁴⁰ Holding that is all that Rule 47 required¹⁴¹ and the court of appeals erred in requiring more, the supreme court reversed and remanded to the court of appeals to consider the parties’ other arguments.¹⁴²

In *Wendt v. Sheth*, the First Houston Court of Appeals affirmed a trial court’s determination that a supplemental petition did not relate back to a timely filed original petition because plaintiffs had not identified the correct defendant before limitations expired.¹⁴³ This wrongful death case was filed by the decedent’s estate and two daughters against a hospital, cardiologist, and two treating anesthesiologists.¹⁴⁴ The plaintiffs timely filed suit, naming “Dr. Smith” as one of the anesthesiologists.¹⁴⁵ After discovering a Dr. Milan Sheth rather than “Dr. Smith” was the proper party, plaintiffs filed a supplemental petition naming Sheth as a defendant about ten months after the two-year limitations period ran.¹⁴⁶ Sheth

136. *Id.* at 835.

137. *Id.*

138. *Id.* The supreme court discussed *Hanley v. Oil Capital*, 171 S.W.2d 864, 866 (Tex. 1943), in which it held a plaintiff that never used the word “acknowledgment” in his petition nevertheless provided “sufficient notice to the respondents that Hanley intended to rely on the letters as a new promise in order to avoid the . . . statute of limitations and that no further allegation in that regard was necessary.” *Id.* (noting it said then that “any other holding would be contrary to both the letter and the spirit of Rule No. 47, Texas Rules of Civil Procedure.”).

139. *Id.*

140. *Id.* at 835–36.

141. *Id.* at 836 (emphasizing its prior holdings that “pleading facts sufficient to put an opponent on notice of a claim is sufficient, even if the claim is never actually named”).

142. *Id.*

143. *Wendt v. Sheth*, 556 S.W.3d 444, 446 (Tex. App.—Houston [1st Dist.] 2018, no pet.).

144. *Id.*

145. *Id.*

146. *Id.* at 447. The plaintiffs provided the notice required by Chapter 74 to the hospital and “Dr. Smith” in December 2013. *Id.* at 447 n.1 (citing and quoting TEX. CIV. PRAC. & REM. CODE ANN. § 74.051(a)). However, the service address for Sheth in plaintiffs’ supplemental petition was different from the address used for their Chapter 74 pre-suit notice such that Sheth did not receive pre-filing notice of the suit either. *Id.* at 447.

appeared and moved for summary judgment on the ground plaintiffs' claims were time-barred.¹⁴⁷ In response, plaintiffs argued that they had correctly identified Sheth in their timely, original petition but misspelled his name because his handwriting was illegible in the medical records.¹⁴⁸ The trial court granted Sheth summary judgment, and plaintiffs appealed.¹⁴⁹

On appeal, the court of appeals rejected the plaintiffs' misnomer argument,¹⁵⁰ holding that the supplemental petition therefore did not relate back to the date of the original petition.¹⁵¹ The court of appeals reasoned that plaintiffs had not demonstrated a misnomer because there was no evidence Sheth was actually identified and had notice of the suit prior to the expiration of limitations.¹⁵² In other words, plaintiffs had not shown that the correct parties were involved in the suit even though there was a mistake in the name used in the original petition; instead, plaintiffs had presented no evidence that Sheth had actual or constructive notice of the suit before limitations ran.¹⁵³ Further, the court of appeals found "the face of the original petition" demonstrated plaintiffs' investigation of proper parties was incomplete because they alleged, "on information and belief," that "Dr. Smith" was a Texas resident.¹⁵⁴ The court of appeals explained that plaintiffs' filing of the original petition within the limitations period "was not sufficient to preserve all claims against all possible parties" and "may not be sufficient to ensure that all necessary parties are joined in the litigation."¹⁵⁵ Further, the court of appeals warned that "to the extent possible, the investigation of potential parties needs to be *completed* by the expiration of limitations, so that all defendants may be timely named and made part of the lawsuit."¹⁵⁶ The court of appeals therefore affirmed the trial court's judgment dismissing plaintiffs' claims against Sheth.¹⁵⁷

In *Pacheco-Serrant v. Munoz*, the El Paso Court of Appeals addressed the interplay between the requirements of the Texas Medical Liability Act (TMLA) and the "fair notice" pleading standards of the Texas Rules of Civil Procedure.¹⁵⁸ In this medical malpractice case, the plaintiff alleged in her original petition that the doctor "negligently performed" her

147. *Id.*

148. *Id.*

149. *Id.* at 448.

150. *Id.* at 449. For the first time on appeal, plaintiffs also argued that Sheth's illegible handwriting in the medical records fraudulently concealed his identity, thereby tolling limitations. *Id.* at 448. The court of appeals held that plaintiffs waived this argument by not presenting it to the trial court. *Id.*

151. *Id.* at 449.

152. *Id.*

153. *Id.*

154. *Id.* at 450.

155. *Id.*

156. *Id.* (emphasis original).

157. *Id.*

158. *Pacheco-Serrant v. Munoz*, 555 S.W.3d 782, 785 (Tex. App.—El Paso 2018, no pet.).

back surgery.¹⁵⁹ After the trial court sustained the doctor's objection to her first TMLA expert report, plaintiff timely submitted a curative expert report containing opinions that the doctor was negligent both in operating unnecessarily and in performance of the surgery itself.¹⁶⁰ The doctor objected to the curative report and moved to dismiss the action a second time, arguing the unnecessary surgery opinions in the report were outside the scope of the original petition's negligent performance allegations, and those opinions thus should not be considered in evaluating whether the curative report satisfied the TMLA.¹⁶¹ Shortly before the hearing on the doctor's second motion to dismiss, plaintiff amended her petition to add allegations that the doctor "negligently performed" the surgery and his "negligence includes performing surgery which is not medically indicated."¹⁶² At the hearing on the second motion, the doctor objected to the plaintiff's filing of the amended petition, arguing it unfairly raised a completely new and separate cause of action.¹⁶³ In response, plaintiff contended that the allegations in her original petition were broad enough to state both claims and she had filed the amended petition only "out of an 'abundance of caution'" given the doctor's complaints.¹⁶⁴ The trial court denied the motion to dismiss, found the curative report met the TMLA requirements, noted the doctor failed to "present any evidence to support the objection" to the amended petition "as required by Rule 63,"¹⁶⁵ and concluded the amendment did not "present a new cause of action."¹⁶⁶

On the doctor's interlocutory appeal, the court of appeals affirmed the trial court's judgment in all respects.¹⁶⁷ With regard to the pleading dispute, the court of appeals noted that the TMLA did not contain any pleading requirements, but instead provided, to the extent not inconsistent, that the Texas Rules of Civil Procedure supplied the applicable rules.¹⁶⁸ As an initial matter, the court of appeals cited the line of Texas cases providing that allegations a doctor performed an unnecessary surgery fell under the general negligence umbrella rather than the doctrine of informed consent.¹⁶⁹ Further, the court of appeals observed that to the extent a plaintiff alleged more than one claim in a single cause of action, a TMLA expert report "need only address the pleaded liability theory"

159. *Id.*

160. *Id.* at 787.

161. *Id.* at 788.

162. *Id.* at 789.

163. *Id.*

164. *Id.*

165. *Id.*; TEX. R. CIV. P. 63 (allowing amendments of pleadings without leave of court if made more than seven days before trial provided it is "at such time as not to operate as a surprise to the opposite party").

166. *Pacheco-Serrant*, 555 S.W.3d at 790.

167. *Id.* at 796.

168. *Id.* at 793 (citing and quoting TEX. CIV. PRAC. & REM. CODE ANN. § 74.002(a), which provides that in the event of a conflict between the procedural rules and the TMLA in a health care liability claim, the statute controls).

169. *Id.* (citations omitted).

rather than “each act of omission mentioned in the pleadings” supporting that theory.¹⁷⁰ The court of appeals emphasized that the “fair notice” pleading standards required only that the opposing party be able to ascertain from the pleading “the nature, basic issues, and type of evidence that might be relevant to the controversy.”¹⁷¹ Moreover, the court of appeals suggested that in absence of the doctor filing “special exceptions” to resolve any doubt, the plaintiff’s original petition should be “liberally construed” to include both negligence claims.¹⁷² Applying these general principles, finally, the court of appeals held that the trial court did not abuse its discretion in concluding the original petition encompassed both negligence claims, the plaintiff’s “amended petition did not allege a ‘new’ cause of action,” and the curative expert report satisfied the TMLA if it supported either negligence theory.¹⁷³

VII. DISCOVERY

Addressing an issue of first impression, the Dallas Court of Appeals analyzed whether a discovery subpoena constituted a “legal action” subject to the Texas Citizens Participation Act (TCPA) in *Dow Jones & Co. v. Highland Capital Management*.¹⁷⁴ In this case, Highland Capital served a subpoena for deposition on written questions on Dow Jones to discover whether Highland Capital’s former funds manager violated an injunction by sourcing Highland Capital’s confidential information published in a Wall Street Journal article.¹⁷⁵ Dow Jones moved to dismiss the subpoena under the TCPA, and filed an interlocutory appeal of the trial court’s denial of the motion.¹⁷⁶ The threshold issue, according to the court of appeals, was whether a subpoena constitutes a “legal action” as defined by the TCPA.¹⁷⁷ Dow Jones urged the court of appeals to find the subpoena fell within the catch-all portion of the definition under the reasoning applied by its sister courts of appeals in holding a petition under Rule 202 of the Texas Rules of Civil Procedure qualified as a “legal action” under the TCPA.¹⁷⁸ The court of appeals rejected Dow Jones’ argument, holding that the TCPA did not apply to third-party discovery subpoenas

170. *Id.* The court of appeals also noted that the “TMLA does not define the term ‘cause of action,’ [but] the generally accepted meaning of that phrase in civil cases refers to the ‘fact or facts entitling one to institute and maintain an action, which must be alleged and proved in order to obtain relief.’” *Id.* at 794.

171. *Id.* at 793.

172. *Id.* at 794 (discussing *Roark v. Allen*, 633 S.W.2d 804, 809–10 (Tex. 1982)).

173. *Id.*

174. 564 S.W.3d 852, 853 (Tex. App.—Dallas 2018, pet. denied).

175. *Id.* at 854.

176. *Id.*; see TEX. CIV. PRAC. & REM. CODE ANN. § 27.008 (providing for expedited appeals of denials of motions to dismiss under section 27.003 of the TCPA).

177. *Dow Jones*, 564 S.W.3d at 855 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a) definition of “legal action” as “a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief”) (emphasis original).

178. *Id.* at 856 (citing *DeAngelis v. Protective Parents Coalition*, 556 S.W.3d 836 (Tex. App.—Fort Worth 2018, no pet.) (addressed elsewhere in this Survey); *In re Elliot*, 504 S.W.3d 455 (2016)). These cases address Rule 202 petitions under the TCPA. *Id.*

for several reasons.¹⁷⁹

First, the court of appeals noted that unlike Rule 202, which “functions as a precursor and potential gateway to plenary merits litigation,” the subpoena at issue did not anticipate a potential suit against Dow Jones. Instead, the subpoena involved “post-judgment, third-party discovery” that plainly did not fit within the definition’s first part of “lawsuit, cause of action, petition, complaint, cross-claim or counterclaim.”¹⁸⁰ Second, the court of appeals observed that a subpoena is issued, not filed, and does not seek legal or equitable relief in the traditional sense such that it also does not fall within the catch-all portion of the legal claim definition.¹⁸¹ Third, the court of appeals found the TCPA’s burden-shifting motion to dismiss framework could not be applied to a subpoena because it was not a “substantive claim” subject to viability testing.¹⁸² Fourth, the court of appeals applied the *ejusdem generis* doctrine, reasoning that the “catch-all portion” must be limited to “procedural vehicle[s] for the *vindication of a legal claim*” like those specified in the definition’s first part, and third-party discovery subpoenas could not be so characterized.¹⁸³ Finally, the court of appeals concluded that construing the TCPA to apply to subpoenas, thereby allowing a “free standing dismissal procedure with its attendant stay, appeal, and an award of attorney’s fees every time discovery implicates” third-party speech, “would cause the judicial system to grind to a halt” contrary to the TCPA’s intended purpose to “reduce meritless litigation.”¹⁸⁴

The discoverability of an independent certified court reporter’s audio recording of a telephonic hearing, which contained unheard conversations that were not part of the transcribed record, was at issue in *In re Daugherty*.¹⁸⁵ In this multifaceted dispute between an employee and his former employer, the employee’s counsel engaged a court reporter to transcribe the hearing from its office after the trial court requested a telephonic hearing on the former employer’s emergency motion and advised the official reporter may not be available to make a record.¹⁸⁶ After learning that employee’s counsel had engaged the court reporter, the employer requested and obtained a certified transcript of the hearing from the court reporter, but also “requested a copy of the entire audio recording made in connection with the telephonic hearing to check the accuracy of the transcript.”¹⁸⁷ The employee’s attorneys apparently did not realize

179. *Id.*

180. *Id.*

181. *Id.* (discussing the dictionary definition of “relief” and reasoning that “granting relief changes the relationship between the parties, and the court is required to enforce the relief granted” but “[a]llowing third-party discovery does not change the relationship between the parties and is not relief as used in this context”).

182. *Id.* at 857 (citing and quoting TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.002, .005(a), .006(a)).

183. *Id.* at 857–58.

184. *Id.* at 858.

185. 558 S.W.3d 272, 276 (Tex. App.—Dallas 2018, no pet.).

186. *Id.* at 275–76.

187. *Id.* at 275.

the court reporter's stenographic program began recording audio several minutes before the hearing started, which likely captured "unheard statements" by employee's counsel.¹⁸⁸ When the employer subpoenaed the audio recording from the court reporter, the employee moved to quash and for protection, arguing that the recording contained core work product conversations between counsel before, during, and after the hearing that were, in any event, irrelevant to any of the pending actions.¹⁸⁹ After the court reporter's unsworn testimony at the hearing on the employee's motion to quash, the trial court ordered the court reporting firm to produce the portion of the recording "from the moment that the . . . other side basically gets on the phone to the moment they get off."¹⁹⁰ The employee sought mandamus relief from the trial court's order.¹⁹¹

On mandamus, the court of appeals began by considering the employer's stated need for the audio recording "(1) to verify the accuracy of the certified transcript and (2) to obtain other relevant information" augmenting the official hearing record or for general discovery purposes.¹⁹² The court of appeals rejected the former justification out of hand, noting that the employer had not shown there was any inaccuracy in the transcript or "otherwise establish[ed] circumstances justifying compelling the production of any audio recording that may exist."¹⁹³ With regard to the latter justification, the court of appeals considered whether the "unheard statements" were "nevertheless part of the 'hearing' or subject to discovery on account of their being overheard by a court reporter or captured by her recording device."¹⁹⁴ First, the court of appeals held that the "unheard statements" were not part of the official trial court record of the hearing because they were not heard by the trial court judge and, thus, "could not possibly serve as the basis for any decisions he made."¹⁹⁵ Accordingly, nothing on the audio recording could or would augment the official record of the hearing, and the court of appeals next turned to the question of the recording's general discoverability.¹⁹⁶

In considering the question, the court of appeals noted that the presid-

188. *Id.* These statements were not heard by the trial court judge or the employer's counsel either because they were made by employee's counsel before the hearing began or while the telephone in employee's counsel's office was muted during the hearing. *Id.* at 275-76. These statements, which the court of appeals defined as "unheard statements," were also not included in the court reporter's certified transcript of the hearing. *Id.* at 276.

189. *Id.* at 275.

190. *Id.* at 276.

191. *Id.*

192. *Id.*

193. *Id.* at 276-77 (noting that "[a]udiotapes that back up the court reporter's stenographic record are not judicial records, and thus parties have no right to access them, unless some reason is shown to distrust the accuracy of the completed stenographic transcript").

194. *Id.* at 276.

195. *Id.* at 277 (reasoning that "the purpose of the reporter's record is to preserve the basis for the judge's decision").

196. *Id.* at 278 (citing TEX. R. CIV. P. 192.3(a) for the general scope of discovery).

ing judge may not testify at trial,¹⁹⁷ and like the presiding judge, the court reporter serves as “an integral part of the judicial process, recording a proceeding involving the parties and the judge.”¹⁹⁸ Accordingly, the court of appeals reasoned that court reporters “should be afforded the same protections from inquiry that a juror whose deliberations—outside of suspicion of corrupting outside influence—are afforded, or the protections afforded a law clerk who discusses the bases of a trial judge’s decisions with him.”¹⁹⁹ Given this, the court of appeals concluded that subjecting court reporters, which “by necessity, frequently . . . overhear[] statements from lawyers and judges alike,” to discovery processes to obtain such statements “would inexorably invade the judicial process.”²⁰⁰ Further, the court of appeals noted that subjecting court reporters to discovery may result in violations of their ethical obligations.²⁰¹ For all these reasons, the court of appeals held that the audio recording was not discoverable,²⁰² the trial court therefore abused its discretion in ordering production, and mandamus relief was appropriate.²⁰³

VIII. DISMISSAL

In *Deangelis v. Protective Parents Coalition*,²⁰⁴ the Fort Worth Court of Appeals followed several other courts of appeals in holding that the TCPA²⁰⁵ applies to a petition for pre-suit depositions under Rule 202 of the Texas Rules of Civil Procedure.²⁰⁶ The court of appeals then addressed how the TCPA’s burden-shifting motion to dismiss framework applied in the Rule 202 context.²⁰⁷ In particular, the court of appeals considered what the non-moving party was required to establish to show a prima facie case for “each essential element of the claim in question” to avoid dismissal under the TCPA.²⁰⁸ With respect to a Rule 202 petition, the question was whether the non-movant was required to establish facts that would allow pre-suit discovery under Rule 202 or facts regarding the

197. *Id.* (citing TEX. R. EVID. 605 and noting a presiding judge testifying as a witness has been held to violate “due process rights by creating a constitutionally intolerable appearance of partiality”).

198. *Id.* (citing and discussing *Halsey v. Dallas Cty.*, 68 S.W.3d 81, 85 (Tex. App.—Dallas 2001), *rev’d on other grounds* 87 S.W.3d 552 (Tex. 2002)).

199. *Id.* at 278–79 (citing TEX. R. CIV. P. 327(b); TEX. R. EVID. 606(b)).

200. *Id.* at 279.

201. *Id.* (citing *An Attorney Requests a Copy of a Reporter’s Backup Audio Media*, NCRA COPE—Op. (2014), “cautioning court reporters that complying with order to produce audio backup tapes may violate National Court Reporters Association’s code of professional ethics, which requires reporter to preserve confidentiality and ensure security of information entrusted to reporter”).

202. *Id.* (the court of appeals noted its analysis may change if the audio recording had not been made by a “licensed court reporter”).

203. *Id.* at 279–80.

204. 556 S.W.3d 836, 848 (Tex. App.—Fort Worth 2018, no pet.).

205. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–011.

206. *Deangelis*, 556 S.W.3d at 849.

207. *Id.* at 853–58.

208. *Id.* at 853 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c)).

potential claim or claims the discovery sought to investigate.²⁰⁹ Relying on the plain language of Rule 202, the court of appeals held that since a Rule 202 petitioner often seeks to investigate a potential claim or suit because it is unclear if a viable cause of action exists, a non-movant must establish the elements for obtaining a pre-suit deposition in order to avoid a dismissal.²¹⁰ Further, the court of appeals held that the Rule 202 petitioners had not established “by clear and specific evidence” that they were entitled to pre-suit discovery²¹¹ and therefore affirmed dismissal of their case.²¹²

Another court of appeals addressed an issue of first impression under the TCPA in *Roach v. Ingram*, considering whether government officials sued in their official capacity were entitled to invoke the TCPA in response to a lawsuit involving *ultra vires* claims.²¹³ In this case, the non-moving party did not dispute that the government officials satisfied the requirements of the TCPA, but rather argued on public policy grounds that the application of the TCPA to *ultra vires* claims would inhibit suits seeking to make public officials perform their duties.²¹⁴ In support of the argument, the non-movant noted that California had a statute similar to the TCPA, which exempted certain lawsuits brought in the public interest from its application.²¹⁵ The court of appeals rejected the argument, holding the TCPA did not contain such an exemption, and pursuant to its clear terms was applicable.²¹⁶ Thus, the court of appeals held that the trial court “was required to dismiss” the non-movants’ claims against the government officials.²¹⁷

In another TCPA case in this Survey period, the Dallas Court of Appeals held that a trial court “had no authority to grant the TCPA motion to dismiss outside the time allowed by statute,”²¹⁸ reversed the operation of law denial of the motion, rendered judgment dismissing the plaintiff’s claims under the TCPA, and remanded to the trial court for consideration of the fee award to the defendant.²¹⁹ The case involved a suit against a defendant for statements she posted on a website, “*Real/scam.com – Is it or isn’t it? You decide,*” about the plaintiff’s youth sports services busi-

209. *Id.*

210. *Id.* at 854.

211. *Id.*

212. *Id.* at 860.

213. *Roach v. Ingram*, 557 S.W.3d 203, 218 (Tex. App.—Houston [14th Dist.] 2018, pet. denied).

214. *Id.* at 220.

215. *Id.*

216. *Id.*

217. *Id.* at 221.

218. TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(a) (providing the “court must rule on a motion under Section 27.003 not later than the 30th day following the date of the hearing on the motion”).

219. *Dobrott v. Jevin, Inc.*, No. 05-17-01472-CV, 2018 WL 6273411, at *1, *8 (Tex. App.—Dallas Nov. 30, 2018, no pet.) (mem. op.). An award of “court costs, attorney’s fees, expenses, and sanctions” to the party prevailing on a TCPA motion to dismiss is mandatory. *Id.* at *8 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 27.009(a)).

ness.²²⁰ The defendant moved to dismiss the petition under the TCPA. On the day of the hearing, plaintiff filed a second amended petition, asserting claims for conspiracy, tortious interference with contract and prospective contract based on the nearly identical factual allegations and, at the hearing, “nonsuit[ed] or dismiss[ed]” the claims for “defamation, libel, and slander” subject to the motion to dismiss.²²¹ The defendant filed a second TCPA motion to dismiss the second amended petition. Although the trial court held a hearing on the second motion, it did not rule within thirty days afterwards resulting in denial of the motion by operation of law. The defendant appealed the denial, and over thirty days later, the “trial court signed an order granting” the second motion.²²²

On review, the court of appeals followed prior panel decisions holding that a trial court cannot grant a “TCPA motion to dismiss not later than the 30th day following the date of the hearing”²²³ even if the ruling is made before expiration of the trial court’s plenary power.²²⁴ Accordingly, the court of appeals held that the trial court’s order granting the second motion was ineffective.²²⁵ Further, the court of appeals held that the trial court erred by denying the second motion to dismiss by operation of law because (1) the defendant’s statements were protected speech about the plaintiff’s goods and services in the marketplace,²²⁶ and (2) defendant failed to establish “by clear and convincing evidence a prima facie case for each essential element of” the claims in his second amended petition.²²⁷ The court of appeals thus dismissed plaintiff’s claims under the TCPA and remanded to the trial court for an award of attorneys’ fees and costs to the defendant.²²⁸

Another court of appeals addressed several issues of first impression under Chapter 128 of the Civil Practice and Remedies Code relating to the timely provision of an expert report in a suit against a sport shooting range.²²⁹ First, the Fort Worth Court of Appeals determined that, like several other statutes requiring an early expert report, Section 128.053

220. *Id.* at *1.

221. *Id.*

222. *Id.* at *2.

223. *Id.* (citing *Dallas Morning News v. Mapp*, No. 05-14-00848-CV, 2015 WL 3932868, at *3 (Tex. App.—Dallas June 26, 2015, no pet.); *Kim v. Manchac*, No. 05-17-00406-CV, 2018 WL 564004, at *1 (Tex. App.—Dallas Jan. 26, 2018, no pet.)).

224. *Id.*

225. *Id.*

226. *Id.* at *4 (determining whether the claim involved exercise of free speech and discussing TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001, 27.003(a), 27.005(b) in concluding that defendant’s statements “concerning [plaintiff’s] services in the marketplace” qualified).

227. *Id.* at *5 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c) and finding plaintiff failed to “prove all essential elements of his claims by clear and convincing evidence” after review of each).

228. *Id.* at *8.

229. *Alpine Indust., Inc. v. Whitlock*, 554 S.W.3d 174, 177 (Tex. App.—Fort Worth 2018, pet. filed). Chapter 128 provides for various limitations on rights to bring actions and recover damages against sport shooting ranges and firearms or ammunition manufacturers, trade associations, or sellers. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 128.001–011.

required the plaintiff to provide an expert report ninety days after the date the original petition was filed, and that a generic docket control order setting an expert deadline could not extend that date.²³⁰ Rather, only a specific order extending the time for the report was sufficient.²³¹ Second, the court of appeals determined that the requirement of a timely expert report did not apply to the employee defendants since they did not fall within the definition of “sport shooting range” in Chapter 128.²³² Specifically, since “owners and operators” of the range or “owners of the real property” on which the range sits did not include “employees,” the court of appeals held that Section 128.053 did not require an expert report for claims against the employees.²³³

The Dallas Court of Appeals affirmed the trial court’s order striking a homeowners association’s pleadings based on its attorney’s lack of authority under Rule 12 of the Texas Rules of Civil Procedure in *Candle Meadow Homeowners Association v. Jackson*.²³⁴ In this case, an attorney hired by a new board of the homeowners association filed suit against several former board members suspected of misusing association funds.²³⁵ The former board members filed a Rule 12 motion, supported with evidence that the association could only act through its board, and the board had not voted to authorize the lawsuit.²³⁶ At the hearing on the motion, there was conflicting live and deposition testimony about whether the board had voted for the attorney it hired to investigate potential claims to actually file the lawsuit; while the chairman testified that such a vote occurred, other board members testified that they did not vote, and there were no meeting agendas or minutes reflecting any vote on the issue took place.²³⁷ There was also evidence that after the attorney filed suit, the board received a copy of the petition and status updates, but “did not complain” about the lack of an authorizing vote or direct the attorney to dismiss the case.²³⁸ The trial court granted the former members’ Rule 12 motion and struck the association’s pleadings, and the association appealed.²³⁹

On appeal, the court of appeals began by outlining the procedure under Rule 12, noting after a motion is filed, the “challenged attorney has the burden of proof” to show his or her authority to represent the cli-

230. *Alpine*, 554 S.W.3d at 185–87.

231. *Id.*

232. *Id.* at 188 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 128.001(b)(2)).

233. *Id.* at 187–88.

234. No. 05-17-01227, 2018 WL 6187616, at *1 (Tex. App.—Dallas Nov. 27, 2018, no pet.). Rule 12 provides that any “party in a suit or proceeding pending in a court of this state may, by sworn written motion stating that he believes the suit or proceeding is being prosecuted or defended without authority, cause the attorney to be cited to appear before the court and show his authority to act.” TEX. R. CIV. P. 12.

235. *Candle*, 2018 WL 6187616, at *1–2.

236. *Id.* at *2.

237. *Id.*

238. *Id.*

239. *Id.*

ent.²⁴⁰ If the attorney's proof falls short, "the trial court is required to (1) bar the challenged attorney from appearing in the case and (2) strike the pleadings if an authorized person does not appear."²⁴¹ The association argued the trial court erred by granting the motion because the chairman's testimony and email directing the attorney to file the lawsuit established the attorney's authority. The court of appeals disagreed, noting there was no evidence that the board delegated the decision to the chairman, and a majority of the members testified the board did not vote, which evidence the trial court necessarily credited in granting the motion.²⁴² The court of appeals, therefore, found no abuse of discretion in the trial court's ruling that the attorney had not met his burden to show his initial authority to file suit.²⁴³ The court of appeals also rejected the association's claim that the board ratified the chairman's conduct in authorizing the attorney to file suit, reasoning that the only means of board ratification would be by vote and there was also no evidence of a vote expressly ratifying the chairman's conduct.²⁴⁴ Accordingly, the court of appeals affirmed the trial court's judgment striking the association's pleadings under Rule 12.²⁴⁵

IX. SUMMARY JUDGMENT

The Texas Supreme Court addressed several issues regarding summary judgment practice in this Survey period. In *Lujan v. Navistar*, the supreme court agreed with federal courts and most Texas appellate courts in holding that the sham affidavit rule is consistent with Texas Rule of Civil Procedure 166a.²⁴⁶ The sham affidavit rule provides that if a party submits an affidavit that, without explanation, conflicts with the affiant's prior sworn testimony or statement, a trial court may disregard the affidavit when ruling on a motion for summary judgment.²⁴⁷ In adopting the sham affidavit rule, the supreme court observed that Rule 166a(c) provides that summary judgment may be granted only when "no 'genuine' fact issue exists."²⁴⁸ Focusing on the word "genuine," the supreme court reasoned that the rule is consistent with a trial court's authority to determine whether a fact set forth in an affidavit is genuine if it conflicts with prior testimony and there is no adequate explanation for the conflict.²⁴⁹

240. *Id.* at *3 (citing *Angelina Cty. v. McFarland*, 374 S.W.2d 417, 423 (Tex. 1964)). The trial court must hold a hearing on the motion to show authority and "consider[] and weigh[] the evidence presented" bearing on the attorney's authority, and its factual determinations made in determining a Rule 12 motion are entitled to deference on appeal. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at *4.

244. *Id.* at *5 (the court of appeals noted further there was no evidence that the board had been "apprised of all the material facts pertaining to the lawsuit" to establish a viable ratification theory).

245. *Id.*

246. *Lujan v. Navistar*, 55 S.W.3d 79, 91 (Tex. 2018).

247. *Id.* at 82.

248. *Id.* at 86 (citing TEX. R. CIV. P. 166a(c)).

249. *Id.*

The supreme court rejected the argument that the Texas and federal summary judgment rules differed such that adopting the federal sham affidavit rule was inappropriate. Acknowledging that Rule 166a(h) provides that if an affidavit is made in bad faith the trial court may sanction the affiant, while Rule 56(f) of the Federal Rules of Civil Procedure provides for other, different sanctions,²⁵⁰ the supreme court held this difference was not meaningful because the basis for the sham affidavit rule is whether an affidavit creates a “genuine” fact issue for summary judgment purposes, and not what sanctions may flow from a bad faith affidavit.²⁵¹ Finally, the supreme court held that while the granting of summary judgment is generally reviewed de novo, review of a trial court’s decision to ignore an affidavit under the sham affidavit rule is reviewed for an abuse of discretion.²⁵² The supreme court reasoned the more deferential standard is warranted because of the discretion given to the trial court to analyze the differences between the affidavit and other sworn testimony and evaluate any explanation given by the affiant for discrepancies.²⁵³

In *Seim v. Allstate Texas Lloyds*, the Texas Supreme Court addressed the difference between an evidentiary defect as to form and substance, resolved a split among the courts of appeals,²⁵⁴ and held that parties must obtain a ruling on the record for form objections or they are waived.²⁵⁵ In the trial court, the plaintiff submitted a summary judgment response affidavit referring to unattached expert reports that attested only to the truth of the statements in the affidavit rather than the statements in the reports.²⁵⁶ The defendant objected to the affidavit on that basis and others, but failed to obtain a ruling on its objections. The trial court granted the defendant’s motion for summary judgment,²⁵⁷ and the court of appeals affirmed, explicitly holding in a substitute opinion that the defendant preserved its objections to the affidavit by “complaining [of] hearsay, requesting that it be stricken, and challenging” the lack of notary signature.²⁵⁸

The supreme court reversed.²⁵⁹ Initially, the supreme court noted the

250. *Id.* at 88–89.

251. *Id.* at 89.

252. *Id.* at 84.

253. *Id.* at 85.

254. *Seim v. Allstate Tex. Lloyds*, 551 S.W.3d 161, 164–66 (Tex. 2018). The supreme court noted the Second Court of Appeals, on the one hand, and the Fourth and Fourteenth Court of Appeals, on the other, had split on whether trial courts must expressly rule on a form objection to preserve error. *Id.* at 164–65 (citing *Blum v. Julian*, 977 S.W.2d 819 (Tex. App.—Fort Worth 1998, no pet.); *Frazier v. Yu*, 987 S.W.2d 607 (Tex. App.—Fort Worth 1999, pet. denied) (both Second Court of Appeals cases held no express ruling required); *Bates v. Pecos Cty.*, 546 S.W.3d 277, 286 (Tex. App.—El Paso 2017, no pet.); *Well Sols., Inc. v. Stafford*, 32 S.W.3d 313, 316 (Tex. App.—San Antonio 2000, no pet.) (both Fourth and Fourteenth Court of Appeals cases holding the opposite)). The supreme court held that “the Fourth and Fourteenth courts have it right.” *Id.* at 166.

255. *Id.* at 166.

256. *Id.* at 163.

257. *Id.*

258. *Id.*

259. *Id.* at 166.

same evidentiary rules applied at trial and summary judgment proceedings, as do “the rules of error preservation.”²⁶⁰ For summary judgment evidence in particular, the supreme court held that form objections alone were not enough to preserve error, and any evidence defective in form “remains part of the summary[-]judgment proof unless an order sustaining the objection is reduced to writing, signed, and entered of record.”²⁶¹ Further, the supreme court explained that language in the trial court’s summary judgment order stating it “reviewed all competent summary-judgment evidence” could not be construed as an explicit or implicit ruling on the defendant’s objections.²⁶² Accordingly, the court of appeals’ decision that the summary judgment evidence was incompetent could only stand if the disputed evidence contained substantive rather than form defects.²⁶³ Addressing that question, the supreme court held that the complained of defects in the plaintiff’s summary judgment evidence were defects in form, citing its prior decision addressing the “distinction between substantive and formal defects.”²⁶⁴ Accordingly, the supreme court held that the court of appeals erred in disregarding the plaintiff’s evidence and remanded the case to the court of appeals for reconsideration of the summary judgment.²⁶⁵

In *Tabé v. Texas Inpatient Consultants, LLLP*, the First Houston Court of Appeals addressed whether the filing of an affidavit alone is a sufficient response to a motion for summary judgment under Rule 166a.²⁶⁶ In this case, a medical service provider sued a physician claiming the physician had breached an employment contract by refusing to provide services.²⁶⁷ The medical service provider moved for summary judgment. In response, the physician submitted an affidavit stating a condition precedent to the contract’s enforceability had not occurred because he had not received credentialing at the hospitals.²⁶⁸ The trial court granted summary judgment, and the physician appealed.²⁶⁹ The court of appeals reversed, rejecting the medical service provider’s argument that the physician’s affidavit should not be considered without a separate written response to the summary judgment motion.²⁷⁰ In reversing the trial

260. *Id.* at 163–64.

261. *Id.* at 164 (quoting *Mitchell v. Baylor Univ. Med. Ctr.*, 109 S.W.3d 838, 842 (Tex. App.—Dallas 2003, no pet.) (alteration in original)).

262. *Id.* at 165 (alteration in original) (criticizing *Frazier v. Yu*, 987 S.W.2d 607 (Tex. App.—Fort Worth 1999, pet. denied), which held that such language was a ruling on the objections to the summary judgment evidence).

263. *Id.* at 166.

264. *Id.* (citing *Mansions in the Forest, L.P. v. Montgomery Cty.*, 365 S.W.3d 314, 318 (Tex. 2012), in which the supreme court held that an affidavit’s defects, including lack or a jurat or other showing it was sworn, making it “no affidavit it all,” were form rather than substantive defects).

265. *Id.*

266. *Tabé v. Texas Inpatient Consultants, LLLP*, 555 S.W.3d 382, 387 (Tex. App.—Houston [1st Dist.] 2018, pet. denied).

267. *Id.* at 383.

268. *Id.* at 387.

269. *Id.* at 383–34.

270. *Id.* at 387.

court's judgment, the court of appeals noted that Rule 166a(c) allows a party to file either an affidavit or a written response but does not require both.²⁷¹ Further, the court of appeals reasoned that the physician's affidavit, once considered, raised the failure of a condition precedent and thus defeated the medical service provider's summary judgment motion.²⁷²

X. JURY CHARGE

The Texas Supreme Court addressed whether failure to object to a jury question waived a party's ability to challenge the jury's answer in *Musallam v. Ali*,²⁷³ holding that neither the failure to object nor the request to submit a jury question forfeits a party's right to "later challenge submission of the question or the jury's answer to it."²⁷⁴ This case involved a dispute over the sale of a wholesale candy and tobacco distributorship. The day after closing of the sales agreement, the seller sued the buyer claiming the sales agreement was an unenforceable agreement-to-agree. The buyer in turn counterclaimed for damages resulting from the seller's breach of the agreement.²⁷⁵ The trial court, at the seller's request and over the buyer's objection, submitted questions and instructions to the jury asking whether the buyer and seller had reached an agreement for sale of the business.²⁷⁶ The jury answered "yes," found the seller had breached the sales agreement, and awarded the buyer \$904,924 in lost profit damages.²⁷⁷ After the trial court rendered judgment on the verdict, the seller filed a "Motion for New Trial and a Motion for Judgment Notwithstanding the Verdict, or in the Alternative, Motion to Disregard," arguing that the jury's answer to Question 1 should be disregarded because (1) the enforceability of the sales agreement was a question of law, and (2) the evidence showed material terms, such as the purchase price,

271. *Id.* (citing TEX. R. CIV. P. 166a(c) providing the non-movant "not later than seven days prior to the day of the hearing may file and serve opposing affidavits or other written response").

272. *Id.* at 389.

273. 560 S.W.3d 636, 639 (Tex. 2018).

274. *Id.* at 640.

275. *Id.* at 638.

276. *Id.* The trial court submitted the following:
Question No. 1

Did [seller and buyer] agree to the sale and transfer of [business] in [the sales agreement]?

In deciding whether the parties reached an agreement, you may consider what they said and did in light of the surrounding circumstances, including any earlier course of dealing. You may not consider the parties' unexpressed thoughts or intentions.

If [seller and buyer] agreed to other essential terms but failed to specify price, it is presumed a reasonable price was intended.

Answer "Yes" or "No"

Id.

277. *Id.*

were not agreed on.²⁷⁸ The trial court denied the seller's motions.²⁷⁹

On appeal, the court of appeals framed the seller's argument as: "[The jury's] finding [on Question No. 1] should be disregarded as immaterial because whether a particular agreement is an enforceable contract is a question of law."²⁸⁰ The court of appeals refused to address this argument, instead agreeing with the buyer that the seller failed to preserve any error in the trial court's submission of Question 1 by failing to object.²⁸¹ The supreme court reversed, holding the seller's failure to object "did not preclude him from later arguing either that the jury's finding was not supported by the evidence, or that as a matter of law the [sales agreement] was an unenforceable agreement to agree."²⁸²

Quoting Texas Rule of Civil Procedure 279,²⁸³ the supreme court first explained that while a no evidence issue may be preserved by objecting to submission of the question, "a motion for judgment notwithstanding the verdict or motion to disregard the jury's answer will also preserve error."²⁸⁴ Thus, the supreme court held the seller did not forfeit the right to challenge the sufficiency of the evidence supporting Question 1 by requesting it.²⁸⁵ Second, the supreme court observed that trial courts may always "disregard a jury finding if the finding is immaterial," and a complaint about materiality "is not a jury charge complaint."²⁸⁶ Accordingly, the supreme court held that the seller did not waive his right to challenge the materiality of Question 1 by failing to object to its submission.²⁸⁷ For both reasons, the supreme court remanded to the court of appeals to address the seller's challenges to Question 1.²⁸⁸

XI. DISQUALIFICATION OF COUNSEL

The Dallas Court of Appeals again directed the trial court to address whether Bickel & Brewer should be disqualified under the *In re Meador*²⁸⁹ standard over three years after the Texas Supreme Court's opin-

278. *Id.* at 638–39.

279. *Id.* at 639.

280. *Id.* (quotation of court of appeals with punctuation original).

281. *Id.*

282. *Id.*

283. *Id.* (citing TEX. R. CIV. P. 279, providing that "[a] claim that the evidence was legally or factually insufficient to warrant the submission of any question may be made for the first time after verdict, regardless of whether the submission of such question was made by the complainant").

284. *Id.*

285. *Id.* (citing *Simon v. Henrichson*, 394 S.W.2d 249, 257 (Tex. Civ. App.—Corpus Christi 1965, writ ref'd n.r.e.)).

286. *Id.* at 640 (citing *BP Am. Prod. Co. v. Red Deer Res., LLC*, 526 S.W.3d 389, 402 (Tex. 2017)).

287. *Id.*

288. *Id.*

289. 968 S.W.2d 346, 351–52 (Tex. 1998) (listing factors to be considered when disqualification issue involves attorney's receipt of adversary's privileged and confidential information from a former employee fact witness).

ion²⁹⁰ vacating the trial court's original disqualification order for applying the incorrect standard.²⁹¹ After describing the prior mandamus proceedings on the disqualification issue, the court of appeals addressed whether the trial court abused its discretion in denying the relator's motion to reconsider Bickel & Brewer's disqualification under *In re Meador* "as untimely, dilatory in nature, and/or waived."²⁹² The court of appeals held that the trial court had abused its discretion and ordered it to determine the *In re Meador*-based disqualification motion on the merits within thirty days of the opinion.²⁹³

With regard to waiver, first, the court of appeals reasoned that the relator could not have waived its earlier *In re Meador* disqualification argument by not reasserting it until after the supreme court's *In re RSR* opinion because the trial court had granted disqualification under *In re American Home Products*²⁹⁴ without addressing *In re Meador*, and "even the [court of appeals] thought *Meador* was inapplicable until the supreme court found otherwise."²⁹⁵ Second, the court of appeals found that the record did not show the reconsideration motion was untimely or otherwise "dilatory in nature."²⁹⁶ Instead, the court of appeals noted that the relator timely moved for reconsideration under *In re Meador*, but the trial court refused to address the merits of the motion.²⁹⁷ Further, the court of appeals observed that the relator's reconsideration motion was pending for eighteen months without action by the trial court, suggesting that the "purported delay lies with the trial court" not the relator.²⁹⁸ Finally, the court of appeals explained the trial court's failure to address *In re Meador* disqualification after the supreme court's *In re RSR* opinion, coupled with "deeming the motion for reconsideration untimely, dilatory, and waived," constituted an abuse of discretion for which mandamus should issue.²⁹⁹

290. *In re RSR Corp.*, 475 S.W.3d 775, 782 (Tex. 2015) (holding that *In re American Home Prods.*, 985 S.W.2d 68, 74–75 (Tex. 1998), rule for non-lawyers directly supervised by attorneys retained to assist in litigation did not apply to Bickel & Brewer's conduct in obtaining discovery from fact witness that was adversary's former employee).

291. *In re Inppamet, Ltd.*, 566 S.W.3d 1, 6 (Tex. App.—Dallas 2018) (mem. op.), *mand. granted sub nom.*, *In re RSR Corp.*, 568 S.W.3d 663 (Tex. 2019) (per curiam).

292. *Id.* at 3.

293. *Id.* at 6.

294. *In re Am. Home Prods. Corp.*, 985 S.W.2d 68, 71 (holding law firm that hired its opposing counsel's former legal assistant must be disqualified unless hiring law firm has screening measures in place because of presumption paralegals and legal assistants who have worked on case have received confidences and will share those confidences with new employer).

295. *Inppamet*, 566 S.W.3d at 5.

296. *Id.*

297. *Id.* (noting that the trial court vacated the prior disqualification order on January 11, 2016; and by February 5, 2016, the relator had moved to compel discovery relevant to the *In re Meador* analysis and filed the reconsideration motion on March 25, 2016; further, the court of appeals noted that the trial court's finding the request for additional discovery was untimely "does not mean the motion for reconsideration under *Meador* was also untimely").

298. *Id.*

299. *Id.*

XII. JUDGE DISQUALIFICATION

In *AVPM Corp. v. Childers*, the Dallas Court of Appeals reaffirmed in emphatic fashion that a Texas judge's "mere receipt of campaign funds, in and of itself, without an indication of communication about, or coordination of, the handling of a case, is not a basis for recusal."³⁰⁰ In this case, the court of appeals held that the plaintiff appellant's motion to recuse two justices on the panel³⁰¹ based on campaign contributions publicly disclosed seven months prior to the recusal request was not only untimely, but substantively frivolous, and merited referral of attorney John L. "Lin" McCraw III to the State Bar's Office of the General Counsel for possible disciplinary action.³⁰²

First, the court of appeals noted that the justices had disclosed the complained of contributions well before the case was submitted to the panel, the panel issued its opinion, and plaintiff appellant sought and failed to obtain a rehearing. Thus, the court of appeals held the recusal motion was untimely, observing that failure to seek recusal "until a judgment is rendered is indicative of judge shopping, with a litigant waiting to see if he is to prevail and only after failing, declaring a mulligan."³⁰³ Second, the court of appeals found that "stripped to its essentials, McCraw seeks to exploit the very existence of an elected judiciary as a basis for recusal."³⁰⁴ The appellate court noted that, regardless of judges' preferences,³⁰⁵ Texas has for over 100 years selected its judiciary by popular election, which necessarily requires judges to finance their campaigns. Given this reality, the court of appeals noted settled law that a judge's acceptance of campaign contributions, without more, is not a basis for recusal and does not "create even the appearance of impropriety."³⁰⁶ On this point, the court of appeals made clear that McCraw had not even asserted the campaign contributions "had any input on the outcome of this case" and rejected any implication that contributions in the amounts involved,³⁰⁷ "which

300. *AVPM Corp. v. Childers*, No. 05-17-00372, 2018 WL 4870931, at *2 (Tex. App.—Dallas Oct. 9, 2018, pet. filed).

301. *Id.* at *1. The court of appeals based its decision on Rule of Appellate Procedure 16, but noted the governing standards were essentially the same as Texas Rule of Civil Procedure 18b regarding recusal of trial judges. *Id.* The recusal motion was decided by all members of the Dallas Court of Appeals, with "Justice Frances removing herself from consideration of the motion with respect to herself and Justice Stoddart removing himself from consideration with respect to himself." *Id.*

302. *Id.* at *1–2.

303. *Id.* at *2.

304. *Id.*

305. *Id.* at *2 n.2 (citing interviews of former Texas justices "lamenting popular election and concomitant fund-raising requirement").

306. *Id.* at *2.

307. *Id.* The opinion is silent on the amounts at issue, but other sources report that the recusal motion cited each justice's receipt of "a \$2,000 donation from the tort reform group Texans for Lawsuit Reform PAC, and a \$1,000 donation from the Apartment Association of Greater Dallas PAC." John Council, *Complaining About Justices' Campaign Contributions Gets Lawyer Referred for Bar Discipline*, TEX. L. (Oct. 10, 2018), www.law.com/texas-lawyer/2018/10/10/complaining-about-justices-campaign-contributions-gets-lawyer-referred-for-bar-discipline/ [<https://perma.cc/L8L5-78ZT>]. It is unlikely such *de minimus*

were well in line with amounts received from all the other contributors, and constituted only a small percentage of the total amounts received,” could have impacted the justices’ decision on the merits.³⁰⁸ Accordingly, the court of appeals found the recusal motion “substantively frivolous” and denied it.³⁰⁹

With respect to the disciplinary referral, the court of appeals found that McCraw took “his disappointment with the outcome of this case to an inappropriate level by attacking the integrity of this Court.”³¹⁰ Specifically, the court of appeals cited statements in McCraw’s recusal motion³¹¹ manifesting his “intention to accuse this Court of a corrupt purpose in assigning and deciding this case,” including assertions that (1) only the two justices received “coordinated [PAC] gifts”; (2) case assignment for the court of appeals, which is “supposed to be random,” “occurs behind a veil of secrecy”; and (3) the other judges “[un]sullied by the smell of a decision of a single three judge panel” must hear the case “to restore the credibility of this court in the face of a long string of statistically impossible coincidences in the process of overturning a \$1,000,000 plus jury verdict.”³¹² According to the court of appeals, McCraw’s recusal motion went beyond “zealous representation,” degraded the court of appeals specifically and the judicial process generally, and potentially violated McCraw’s professional responsibilities.³¹³ Finally, the court of appeals noted that McCraw’s “extrajudicial statements made after the opinion issued and again after he filed his motion for recusal” may also subject McCraw to discipline by the State Bar.³¹⁴

amounts could not possibly have a “significant and disproportionate influence” on a judge’s election. *See Childers*, 2018 WL 4870931, at *2 (distinguishing case from *Caperton v. Massey*, 556 U.S. 868, 873 (2009), in which “the defendant made a \$3 million donation to the judge’s election campaign, which was more than the total received from all of the judge’s other contributors and three times the amount spent by the judge’s own campaign committee”).

308. *Id.*

309. *Id.* at *2–3.

310. *Id.* at *3.

311. *Id.* The court of appeals assigned ownership of the recusal motion to McCraw specifically, noting that plaintiff appellant’s case previously had been handled by appellate counsel until McCraw, who was plaintiff appellant’s trial counsel, appeared for the first and only time to file the motion to recuse. *Id.*

312. *Id.*

313. *Id.* at *3–4. The court of appeals quoted the preamble to the Texas Disciplinary Rules of Professional Conduct and Rule 8.02(a) (quoting TEX. DISCIPLINARY R. PROF’L CONDUCT, preamble 4, stating attorneys “should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials” and TEX. DISCIPLINARY R. PROF’L CONDUCT 8.02(a), which provides: “A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge . . .”). *Id.* at *4.

314. *Id.* (ordering the clerk to forward a copy of the opinion and order, along with the amended motion for recusal McCraw submitted on September 25, 2018, to the Office of the General Counsel of the State Bar of Texas).

XIII. MISCELLANEOUS

For only the second time,³¹⁵ the Texas Supreme Court addressed in this Survey period responsible third party practice under Chapter 33 of the Texas Civil Practice and Remedies Code.³¹⁶ This time the supreme court granted mandamus relief to a plaintiff from a trial court's order allowing a defendant that failed to satisfy its disclosure requirements under Texas Rule of Civil Procedure 194³¹⁷ to designate a responsible third party after the statute of limitations had expired.³¹⁸

In this personal injury case, the plaintiff was injured when a television fell from a wall while she sat at a table in the defendant bar and restaurant.³¹⁹ The plaintiff later sued and served the defendant with requests for disclosures, interrogatories, and requests for production, responses to which were due several months before the two-year statute of limitations expired.³²⁰ After an agreed extension of time, the defendant restaurant responded to plaintiff's written discovery within two months of limitations, disclosing under Rule 194 that (1) there were no other potential parties; (2) its defenses included plaintiff's "injuries . . . were caused by persons or entities beyond [the restaurant's] control or employ" and "proportionate responsibility [or] comparative fault"; and (3) it "will supplement" with regard to any persons to be named as responsible third parties and stating in response to an interrogatory that: "The television in question was installed by Michael Graciano."³²¹

About two weeks after limitations expired, the defendant moved for leave to designate the television installer as a responsible third party and supplemented its Rule 194 disclosure responses to identify the installer as a potential party, a person with knowledge of relevant facts, and a person who may be designated as a responsible third party.³²² The plaintiff opposed the motion for leave, arguing that the defendant's failure to supplement its disclosures before limitations expired precluded the designation of the installer.³²³ The trial court granted the defendant leave to designate, the court of appeals denied plaintiff mandamus relief, and plaintiff

315. The first time was during the last Survey period in *In re Coppola*, 535 S.W.3d 506, 507 (Tex. 2017).

316. *In re Dawson*, 550 S.W.3d 625, 628 (Tex. 2018) (per curiam).

317. See TEX. R. CIV. P. 194.2(l) (requiring disclosure of "the name, address, and telephone number of any person who may be designated as a responsible third party").

318. *In re Dawson*, 550 S.W.3d at 631 (discussing *In re Coppola*, 535 S.W.3d at 510, in which the supreme court granted a defendant mandamus relief when a trial court did not allow a responsible third party designation, reasoning that "it seems equitable and right—at least under these facts—that a plaintiff get the same relief when a trial court erroneously grants a defendant leave to so designate").

319. *Id.* at 627.

320. *Id.*

321. *Id.*

322. *Id.* at 627–28.

323. *Id.* at 628 (citing and quoting TEX. CIV. PRAC. & REM. CODE ANN. § 33.004(d), providing that "a defendant may not designate a responsible third party after limitations has expired 'if the defendant has failed to comply with its obligations, if any, to timely disclose that the person may be designated as a responsible third party'").

sought review by the Texas Supreme Court.³²⁴

The supreme court reviewed Chapter 33 of the Civil Practice and Remedies Code, noting its proportionate responsibility scheme allowed defendants “to designate responsible third parties”³²⁵ and introduce evidence about their fault so that the jury may apportion responsibility between them and the named parties to “affect ‘the amount of recovery available to a plaintiff from the named parties.’”³²⁶ Under the scheme, plaintiffs have the “option to counter the impact of” responsible third party designations by joining those designated as party defendants.³²⁷ “[A]n imbalance in the proportionate[-]responsibility framework” arises when a plaintiff’s joinder of a designated responsible third party is barred by limitations,³²⁸ and according to the supreme court, restrictions on defendants’ ability to designate were designed to prevent this imbalance.³²⁹ The supreme court discussed two such restrictions in Chapter 33: (1) motions for leave to designate responsible third parties must be filed at least sixty days before trial; and (2) a defendant may not designate a responsible third party after the applicable limitations period has expired “if the defendant has failed to comply with its obligations, if any, to timely disclose that the person may be designated”³³⁰ “With these principals and provisions in mind,” the supreme court reviewed whether the trial court abused its discretion in allowing the installer’s designation after limitations for plaintiff’s claim against him expired.³³¹

In finding the trial court abused its discretion, the supreme court rejected the defendant’s contention that its initial disclosure response, coupled with its interrogatory answer, were sufficient to put plaintiff on notice that the installer may be designated thereby satisfying its disclosure obligation.³³² Specifically, the supreme court held that the defendant’s initial discovery responses did not comply with its obligations under Rule 194.2(1) or Section 33.004(d) to timely provide notice of persons it intended to designate, reasoning that “mentioning [the installer’s] name in one place, including boilerplate language about un-named ‘persons or entities’ . . . in another, and answering ‘will supplement’ to a direct inquiry” were not enough and did not require plaintiff to undertake

324. *Id.*

325. *Id.* (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 33.011(6), which defines “responsible third parties” “as persons who are alleged to have caused or contributed to causing . . . the harm for which recovery of damages is sought, whether by negligent act or omission, . . . by other conduct or activity that violates an applicable legal standard, or by any combination of these.”).

326. *Id.* (quoting *In re CVR Energy, Inc.*, 500 S.W.3d 67, 77 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding [mand. denied]).

327. *Id.*

328. *Id.* (quoting *Molinet v. Kimbrell*, 356 S.W.3d 407, 416 (Tex. 2011)).

329. *Id.* at 629 (citing *In re CVR Energy*, 500 S.W.3d at 73).

330. *Id.* (citing and quoting, in part, TEX. CIV. PRAC. & REM. CODE ANN. § 33.004(a), (d)).

331. *Id.*

332. *Id.* (also rejecting defendant’s argument that the initial responses “put the onus on [plaintiff] to consider [the installer’s] potential liability, including whether he was an employee, agent, or independent contractor”).

an “independent investigation” after having served the Rule 194 request.³³³ The supreme court therefore found the trial court should not have allowed the defendant’s out of time designation of the installer as a responsible third party, and granted plaintiff mandamus relief to “protect her right, prescribed in Section 33.004(d) of the Texas Civil Practice and Remedies Code, to not have to try her case against an empty chair.”³³⁴

XIV. CONCLUSION

In this Survey period, the Texas Supreme Court and intermediate courts of appeal addressed several important issues involving the interplay between statutory directives under the TCPA, TMLA, and Chapter 33 of the Civil Practice and Remedies Code and the more general pleading and discovery practices provided by the Texas Rules of Civil Procedure.

333. *Id.* at 630.

334. *Id.* 630–31.