

2020

Civil Procedure: Pre-Trial & Trial

Amanda Sotak
Figari + Davenport, LLP

Don Colleluori
Figari + Davenport, LLP

Andrew C. Whitaker
Figari + Davenport, LLP

Recommended Citation

Amanda Sotak et al., *Civil Procedure: Pre-Trial & Trial*, 6 SMU ANN. TEX. SURV. 61 (2020)
<https://scholar.smu.edu/smuatxs/vol6/iss1/4>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Annual Texas Survey by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

CIVIL PROCEDURE: PRE-TRIAL & TRIAL

*Amanda Sotak**
*Don Colleluori***
*Andrew C. Whitaker****

TABLE OF CONTENTS

I. INTRODUCTION	61
II. SUBJECT MATTER JURISDICTION	61
III. SERVICE OF PROCESS	68
IV. VENUE	70
V. PLEADINGS	72
VI. DISCOVERY	73
VII. SUMMARY JUDGMENT	78
VIII. JURY CHARGE	81
IX. JUDGMENTS	83
X. MISCELLANEOUS	84

I. INTRODUCTION

The major developments in the field of civil procedure during the Survey period occurred through judicial decisions except for substantial legislative revisions to the Texas Citizens Participation Act (TCPA) discussed below in Section X.

II. SUBJECT MATTER JURISDICTION

During this Survey period, the Texas Supreme Court weighed in on a variety of subject matter jurisdiction issues. To begin, the Texas Supreme Court made clear in *Garcia v. City of Willis* that past injury will not, by itself, support standing to bring claims for prospective relief, holding that a plaintiff instead must demonstrate a particularized, “imminent [future] harm” or injury “for standing that prospective relief requires.”¹ The plaintiff there sought prospective relief related to the city’s red-light camera enforcement scheme in the form of declarations that the regulations were unconstitutional and “ultra vires” enactments, along with an injunction against future enforcement.² While acknowledging the plaintiff’s

* B.A., Texas A&M University; J.D., Southern Methodist University Dedman School of Law. Partner, Figari + Davenport, LLP, Dallas, Texas.

** B.A., Dickinson College; J.D., New York University School of Law. Partner, Figari + Davenport, LLP, Dallas, Texas.

*** B.A., Southern Methodist University; J.D., The University of Texas School of Law. Partner, Figari + Davenport, LLP, Dallas, Texas.

1. *Garcia v. City of Willis*, 593 S.W.3d 201, 207–08 (Tex. 2019).

2. *Id.* at 207.

standing to assert claims seeking retrospective relief,³ the supreme court held that he lacked standing to bring prospective claims because he “paid the requisite civil fine,” “has not pleaded that he is subject to any outstanding violation notices that would cause him imminent harm,” and “has not argued he plans to violate red-light laws in the future.”⁴ Without showing an imminent injury that would be redressed by the prospective relief sought, the supreme court reasoned that the plaintiff had no more interest in the city’s enforcement scheme than the “public at large.”⁵ That general, unparticularized interest was not enough to confer standing to seek prospective relief, and those claims were thus dismissed for lack of subject matter jurisdiction.⁶

In two other cases, the Texas Supreme Court reaffirmed the presumption against finding that mandatory statutory deadlines are jurisdictional and recognized due process limitations on strict enforcement of even jurisdictional deadlines. In *Texas Mutual Insurance Co. v. Chicas*, the supreme court held that the forty-five day deadline to seek judicial review of a workers’ compensation appeals panel decision is mandatory, but not jurisdictional.⁷ In doing so, the supreme court reaffirmed its *Dubai Petroleum Co. v. Kazi*⁸ and *In re United Services Auto Ass’n*⁹ holdings, reiterated that courts’ focus should be to “reduce the vulnerability of final judgments to attack on the ground that the tribunal lacked subject matter jurisdiction,”¹⁰ and overruled a number of courts of appeals that had held otherwise.¹¹

3. *Id.* In addition to prospective relief, the plaintiff also sought “retrospective relief through a claim for reimbursement of the civil penalty he paid” and an alternative takings claim. *Id.*

4. *Id.*

5. *Id.* Specifically, the supreme court reasoned: “[Plaintiff] may earnestly believe that red-light cameras are both unconstitutional and bad public policy. But, having paid his fine without arguing he will potentially break the law in the future, he has no particularized interest in the issue distinguishable from a member of the public at large.” *Id.*

6. *Id.* at 208.

7. *Tex. Mut. Ins. Co. v. Chicas*, 593 S.W.3d 284, 287–91 (Tex. 2019) (discussing the forty-five day deadline to file suit in TEX. LAB. CODE ANN. § 410.252(a) and explaining the factors courts should consider in evaluating whether there is “clear legislative intent to overcome the presumption that the requirement is not jurisdictional”).

8. 12 S.W.3d 71, 76 (Tex. 2000) (overruling *Mingus v. Wadley*, 285 S.W. 1084 (Tex. 1926) “to the extent that it characterized the plaintiff’s failure to establish a statutory prerequisite as jurisdictional”).

9. 307 S.W.3d 299, 306 (Tex. 2010) (explaining that, after *Dubai*, the supreme court has “been ‘reluctant to conclude that a provision is jurisdictional, absent clear legislative intent to that effect.’” (citation omitted)).

10. *Chicas*, 593 S.W.3d at 286.

11. *Id.* at 291 (to the extent of conflict, overruling *Davis v. Am. Cas. Co.*, 408 S.W.3d 1, 6 (Tex. App.—Amarillo 2012, pet. denied); *Fire & Cas. Ins. Co. v. Miranda*, 293 S.W.3d 620, 624–25 (Tex. App.—San Antonio 2009, no pet.); *Tex. Mun. League Intergovernmental Risk Pool v. Burns*, 209 S.W.3d 806, 812 (Tex. App.—Fort Worth 2006, no pet.); *LeBlanc v. Everest Nat’l Ins. Co.*, 98 S.W.3d 786, 787 (Tex. App.—Corpus Christi–Edinburg 2003, no pet.); *Johnson v. United Parcel Serv.*, 36 S.W.3d 918, 921 (Tex. App.—Dallas 2001, pet. denied); *Argonaut Sw. Ins. Co. v. Walker*, 64 S.W.3d 654, 657 (Tex. App.—Texarkana 2001, pet. denied); *DeVore v. Am. Mfr.’s Mut. Ins. Co.*, No. 01-07-00495-CV, 2008 WL 2611886, at *2–3 (Tex. App.—Houston [1st Dist.] June 27, 2008, no pet.) (mem op.)).

In the second statutory deadlines case this Survey period, *Mosley v. Texas Health and Human Services Commission*, the Texas Supreme Court held that “an agency’s misrepresentation of the proper procedures” to satisfy a jurisdictional deadline violated a claimant’s due process rights and required remand to allow her opportunity to fulfill the requirement.¹² While noting that “*Dubai* and its progeny remain the standard for prospective decisions concerning” whether a statutory requirement is jurisdictional,¹³ the supreme court relied on its prior holdings that the Administrative Procedures Act “motion-for-rehearing requirement¹⁴ is a jurisdictional prerequisite to an appeal from contested-case proceedings.”¹⁵ The plaintiff failed to timely move for rehearing after the department of protective services finally decided that she engaged in “reportable conduct” in caring for a group-home resident.¹⁶ In the letter accompanying the final decision, the agency advised the plaintiff the order would become final unless she timely sought “judicial review,” did not mention the motion-for-rehearing requirement, and “incorrectly cited” a regulation that “incorrectly stated the law” on the necessary steps to appeal the order.¹⁷ When plaintiff appealed the order by filing suit as directed in the letter, the agency sought to dismiss for lack of subject matter jurisdiction because she had not moved for rehearing.¹⁸ After the Third Austin Court of Appeals refused to consider the “reportable conduct” finding on the merits for lack of jurisdiction and rejected the plaintiff’s due process argument, the supreme court granted review.¹⁹ With regard to plaintiff’s claim that she was deprived of the ability to

12. *Mosley v. Tex. Health & Human Servs. Comm’n*, 593 S.W.3d 250, 254, 268 (Tex. 2019).

13. *Id.* at 261 n.3. The supreme court cited its *Chicas* decision discussed above but noted: “[n]either party raises the question in this case whether [the statutory requirement at issue] is not jurisdictional in light of more recent case law, so we have no reason to revisit our holdings to that effect.” *Id.*

14. The Administrative Procedures Act (APA) governs proceedings before all Texas agencies. *Id.* at 258. It provides “[a] person initiates judicial review in a contested case by filing a petition not later than the 30th day after the date the decision or order that is the subject of complaint is final and appealable.” *Id.* at 256 (quoting *Mosley v. Tex. Health & Human Servs. Comm’n*, 517 S.W.3d 346 (Tex. App.—Austin 2017), *aff’d in part, rev’d in part* 593 S.W.3d 250 (Tex. 2019) (quoting TEX. GOV’T CODE ANN. § 2001.176(a) (emphasis added))). Further, to appeal an agency decision in a contested case, the APA requires “[a] timely motion for rehearing” as a “prerequisite,” such that an “appealable order” is “one in which a motion for rehearing has been filed and overruled.” *Id.* (citing TEX. GOV’T CODE ANN. § 2001.145(a), (b) (internal citations and quotations omitted)). Taken together, the supreme court found these APA provisions mandate “a motion for rehearing as a jurisdictional prerequisite to judicial review” of an agency finding in contested proceedings. *See id.* at 258–61.

15. *Id.* at 260.

16. *Id.* at 254–55 (discussing TEX. HUM. RES. CODE ANN. §§ 48.001, .403–.406 governing agency investigation and handling of “abuse, neglect, or exploitation of an elderly person or person with a disability” reports). The finding of “reportable conduct” by plaintiff was to be published in a misconduct registry maintained by the licensing agency for care facilities, and plaintiff’s “[p]lacement in the Registry is effectively career-ending.” *See id.*

17. *Id.* at 255 n.1.

18. *Id.* at 257.

19. *Id.* at 262–68.

challenge the order effectively ending her career as a “state-registered nurse aid,”²⁰ the supreme court emphasized that there is always a tension between people’s duty to know the law and “the government’s constitutional obligation to furnish due process.”²¹ Balancing those concerns, the supreme court held that the “misrepresentations in the letter,” coupled with the plaintiff’s showing that she detrimentally relied on them by doing “exactly as the letter and rule directed,” violated her right to due course of law.²² The supreme court therefore directed the agency to reinstate the plaintiff’s case “to afford her an opportunity to seek rehearing of the order” followed by judicial review in due course if rehearing was denied.²³

In addressing the scope of governmental immunity from liability for actions taken “in connection with” specified activities, the Texas Supreme Court construed that phrase and attendant scope of immunity broadly in *Tarrant County v. Bonner*.²⁴ The issue there was whether a county jail could be liable for an inmate’s injury that occurred when the chair he tried to use during his diabetes treatment collapsed.²⁵ Four days earlier, the chair had been damaged and placed in a locked, multipurpose room to await disposal.²⁶ The trial court granted summary judgment to the jail based on two statutes protecting it from liability for negligent actions taken “in connection with” inmates’ medical treatment.²⁷ The Second Fort Worth Court of Appeals found the immunity statutes did not apply because the jail’s allegedly negligent acts of placing the chair in the room without a warning were not connected to the inmate’s medical treatment.²⁸ The supreme court disagreed, explaining the phrase “in connection with” requires nothing more “than a tangential, tenuous, or remote relationship between the connected items.”²⁹ Because the inmate’s claim “rests on the County’s alleged negligent acts and omissions intersecting with his medical treatment,” the supreme court held they were sufficiently connected for the statutes to apply.³⁰ In other words, the supreme court emphasized that these and similar statutes provide immunity for negligent acts or omissions that are “reasonably related to the covered

20. *Id.* at 257.

21. *Id.* at 264.

22. *Id.* at 268.

23. *Id.* at 269.

24. 574 S.W.3d 893, 895 (Tex. 2019).

25. *Id.* at 896.

26. The room was used for storage and occasionally other purposes like “nurses who were brought to the jail to treat diabetic inmates.” *Id.* at 895.

27. *Id.* at 896–97 (citing and quoting TEX. CODE. CRIM. PROC. ANN. art. 42.20 and TEX. GOV’T CODE ANN. § 497.096).

28. *Id.* at 897.

29. *Id.* at 898 (noting it had a “similar view” as other authorities describing “in connection with” as “‘a vague, loose connective’” and a phrase “of ‘intentional breadth’”) (citations omitted)).

30. *Id.* at 899. Further, the supreme court reasoned its broad construction of the “in connection with” language was consistent with its construction and application of the related Texas Torts Claims Act. *Id.* at 899–900.

programs or activities, even when the relationship is indirect.”³¹ Having found the statutes applied, the supreme court turned to whether the inmate raised a fact issue on the jail’s heightened “conscious indifference” liability standard under them.³² Finding the inmate had not, the supreme court reversed the court of appeals and rendered judgment in favor of the jail.³³

Under the Texas Torts Claims Act, the Texas Supreme Court held a governmental worker’s failure to engage a van’s emergency parking break raised a fact issue on waiver of sovereign immunity.³⁴ While a medical helicopter sat on a ground-level landing pad “securing a patient and preparing for takeoff,” a state employee in a fifteen-passenger, state-owned van dropped off two passengers at a hospital, parked “on an incline near the helicopter,” and exited “without setting the emergency break.”³⁵ Shortly afterwards, the van began rolling backwards down the incline and “crashed into the helicopter.”³⁶ The helicopter owner sued the state, which asserted immunity from suit.³⁷ On interlocutory appeal, a divided Second Fort Worth Court of Appeals concluded that the van must have been “in ‘active’ operation or use ‘at the time of the incident’” for the state to waive immunity under the motor-vehicle-use-or-operation waiver³⁸ and rendered a take-nothing judgment against the helicopter owner.³⁹ The supreme court reversed and remanded back to the trial court for further proceedings.⁴⁰

The supreme court framed the dispute as “whether the damage to the helicopter arose from the ‘operation or use’ of the van” in the context of the owner’s claims related to the driver’s failure to engage the emergency brake.⁴¹ As to the “arises from” causation requirement, the supreme court held evidence that an officer investigated the accident and cited the driver’s “failure to deploy the brake [as] a contributing factor in the collision” was sufficient to raise a fact issue on causation and “no more [was] required” at that stage of proceedings.⁴² Next, the supreme court considered whether the driver’s alleged failure to engage the brake “qualifies as

31. *Id.* at 900.

32. *Id.* at 900–03.

33. *Id.* at 903.

34. *PHI, Inc. v. Tex. Juvenile Justice Dep’t*, 593 S.W.3d 296, 306 (Tex. 2019).

35. *Id.* at 300.

36. *Id.*

37. *Id.* at 300–01.

38. *Id.* at 302 (citing and quoting TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(1)(A), specifically the “Operation or Use of a Motor-Driven Vehicle” waiver, which provides a “governmental unit in the state is liable for . . . property damage . . . proximately caused by the wrongful act or omission or negligence of an employee acting within the scope of employment if . . . the property damage . . . arises from the operation or use of a motor-driven vehicle . . .”).

39. *Id.* at 301 (noting the court of appeals cited and relied on *Ryder v. Integrated Logistics, Inc. v. Fayette Cty.*, 453 S.W.3d 922, 927 (Tex. 2015) (per curiam)).

40. *Id.* at 306–07.

41. *Id.* at 302.

42. *Id.* at 303.

‘operation or use’ of the” van.⁴³ On this point, the supreme court had no trouble concluding “this ‘essential’ and ‘final’ aspect” of driving fell “squarely within the textual parameters” of the statutory waiver.⁴⁴ Finally, the supreme court harmonized this “operation and use” holding with its prior decisions on the scope of the motor-vehicle-use-or-operation waiver emphasizing that “[u]nder the unusual facts,” the helicopter owner “has alleged injury arising from operation or use of the vehicle even though the driver was not behind the wheel at the moment the accident happened.”⁴⁵

In another Texas Torts Claims Act case, the Texas Supreme Court discussed the scope of the discretionary function exception⁴⁶ to the premises defect waiver of immunity⁴⁷ in a suit brought by the parents of a pregnant woman who drowned when her footing slipped as she crossed a Trinity River dam in Fort Worth.⁴⁸ The parents alleged a kayak chute and other features made the dam dangerous and the district knew of the danger because there had been prior incidents at the location.⁴⁹ After discussing prior decisions on the “difficult ‘to meaningfully construe and consistently apply’”⁵⁰ exception, the supreme court emphasized that the exception’s “touchstone” is protection of governmental actors’ discretionary policy decisions from “judicial review or interference.”⁵¹ With “these observations in mind,”⁵² the supreme court held the exception applied to the district’s decisions about the dam that the parents complained of,⁵³ found its immunity was therefore not waived, and rendered judgment dismissing the parents’ claims.⁵⁴

The Supreme Court also addressed waiver of governmental immunity

43. *Id.* at 303–04.

44. *Id.* at 304. The supreme court agreed with the dissenting court of appeals judge, explaining in “terms of the everyday experience of driving, we think it self-evident that ensuring your car will not roll away after you leave it, including engagement of the emergency brake when necessary, is an integral part of the ‘operation or use’ of a vehicle.” *Id.*

45. *Id.* at 304–06.

46. TEX. CIV. PRAC. & REM. CODE ANN. § 101.056 (providing an exception to the waivers of immunity otherwise provided by the Texas Tort Claims Act for claims based on “(1) the failure of a governmental unit to perform an act that the unit is not required by law to perform”; or (2) acts in which the governmental unit’s performance or nonperformance is by law left to “the discretion of the governmental unit”).

47. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(2) (waiving governmental immunity for “personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private party, be liable to the claimant according to Texas law”).

48. *Tarrant Reg’l Water Dist. v. Johnson*, 572 S.W.3d 658 (Tex. 2019).

49. *Id.* at 662.

50. *Id.* at 665.

51. *Id.* at 665–68.

52. *Id.* at 668.

53. *Id.* at 670. Specifically, the court reasoned: “the District had discretion to direct its maintenance efforts toward the dam’s intended purposes of river control and kayaking rather than toward protection of those who inadvisably use the damn to cross the river.” *Id.*

54. *Id.*

under Chapter 271 of the Texas Local Government Code,⁵⁵ concluding in two cases this Survey period that there was not a “contract subject to [the statute]” supporting waiver.⁵⁶ In the first case, the supreme court rejected a city employee’s claim that a procedures manual policy defining “an explicit pay schedule for on-call time” constituted a unilateral contract that waived immunity under the statute.⁵⁷ Focusing on the definition of a “contract subject to this subchapter,”⁵⁸ the supreme court held that the policy was “not a valid written contract subject to a waiver.”⁵⁹ The supreme court distinguished a policy within the city’s manual from ordinances it had previously held could create enforceable contracts.⁶⁰ Further, the supreme court reasoned that even if a manual could create an enforceable contract, the manual in this case expressly disclaimed any such contractual intent.⁶¹ Thus, the city’s immunity was not waived and the employee’s claim for breach of the policy was dismissed.⁶²

In the second case, the Texas Supreme Court held that a governmental entity’s promise to “make an effort to agree” to a higher payment in good faith did not contain “the essential terms of a legally enforceable agreement.”⁶³ There, a consulting firm who agreed to a \$50,000.00 cap on its compensation otherwise based on cost-reductions obtained over a three-year contract sought to enforce Dallas-Fort Worth International Airport’s promise to “make a good faith effort to receive board authorization to increase the compensation.”⁶⁴ The firm claimed entitlement to over \$300,000.00 in absence of the cap and requested that the airport board authorize the higher amount. When the board denied the request, the firm sued and the airport asserted immunity.⁶⁵ After determining that the airport entered into the consulting contract as part of its governmental functions,⁶⁶ the supreme court turned to whether the airport’s good-faith

55. TEX. LOC. GOV’T CODE ANN. § 271.152 (authorizing local governmental entities to enter into contracts and waiving “immunity to suit for the purposes of adjudicating a claim [under] the contract”).

56. *City of Denton v. Rushing*, 570 S.W.3d 708, 709–10 (Tex. 2019); *Dallas/Fort Worth Int’l Airport Bd. v. Vizant Techs., LLC*, 576 S.W.3d 362, 368–72 (Tex. 2019).

57. *Rushing*, 570 S.W.3d at 709.

58. *Id.* at 710–11 (citing TEX. LOC. GOV’T CODE ANN. § 271.151(2)). The supreme court requires a contract to satisfy five elements to find waiver: “(1) the contract must be in writing, (2) state the essential terms of the agreement, (3) provide goods or services, (4) to the local governmental entity, and (5) be executed on behalf of the local governmental entity.” *Id.* at 711.

59. *Id.* at 713.

60. *Id.* at 712 (discussing *City of Hous. v. Williams*, 353 S.W.3d 128, 137–39 (Tex. 2011) (holding that city ordinance providing for specific compensation to firefighters for overtime and termination pay could be considered a unilateral contract)).

61. *Id.* at 711. The manual’s disclaimer read: “[t]he contents of this manual do not in any way constitute the terms of a contract of employment.” *Id.*

62. *Id.* at 713.

63. *Dallas/Fort Worth Int’l Airport Bd. v. Vizant Techs., LLC*, 576 S.W.3d 362, 371 (Tex. 2019).

64. *Id.* at 365.

65. *Id.*

66. *Id.* at 366–67 (applying the governmental versus proprietary distinction discussed in *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 434 n.7 (Tex. 2016) (“*Wasson I*”) and *Wasson Interests, Ltd. v. City of Jacksonville*, 559 S.W.3d 142 (Tex. 2018)

efforts promise was a “contract” subject to waiver.⁶⁷ Relying on its prior holdings that “agreements to negotiate toward a future contract are not legally enforceable,” the supreme court held that the promise sued on did “not state the essential terms of a legally enforceable agreement” and thus did not waive the airport’s immunity under the statute.⁶⁸

III. SERVICE OF PROCESS

A number of cases addressed interesting service of process issues this Survey period. In *Latter and Blum of Texas, LLC v. Murphy*,⁶⁹ the Second Fort Worth Court of Appeals set aside a default judgment for failure to strictly comply with service rules even though there was an answer on file for the defaulted party.⁷⁰ The particular service failure was the return for service effected by registered mail had not been signed by the addressee registered agent as required by Texas Rule of Civil Procedure 107.⁷¹ On appeal of the trial court’s denial of the defaulted party’s motion for new trial, the court of appeals noted that the answer filed on its behalf raised “an initial hurdle to” the defaulted party’s service of process complaints.⁷² The defaulted party acknowledged the answer but asserted that the attorney who filed it had no authority to do so and submitted affidavits from the attorney and its registered agent.⁷³ The court of appeals found that those affidavits rebutted the presumption and established the defaulting party did not authorize the attorney “to act on its behalf in any respect in this lawsuit.”⁷⁴ The court of appeals therefore held that the

(“*Wasson II*”). *Wasson I* and *Wasson II* were discussed, respectively, in the 2016 and 2018 Survey periods. See Amanda Sotak et al., *Civil Procedure: Pre-Trial & Trial*, 5 SMU ANN. TEX. SURV. 81 (2019), available at <https://scholar.smu.edu/cgi/viewcontent.cgi?article=1075&context=smuatxs> [<https://perma.cc/J8NZ-3UNT>]; Amanda Sotak et al., *Civil Procedure: Pre-Trial & Trial*, 3 SMU ANN. TEX. SURV. 69 (2017), available at <https://scholar.smu.edu/cgi/viewcontent.cgi?article=1038&context=smuatxs>. [<https://perma.cc/Z4BD-W4EC>].

67. *Vizant Techs.*, 576 S.W.3d at 368–71 (analyzing the “subject to this subchapter” contract definition found in TEX. LOC. GOV’T CODE ANN. § 271.151(2) discussed above).

68. *Id.* at 371.

69. No. 02-17-00463-CV, 2019 WL 3755765 (Tex. App.—Fort Worth Aug. 8, 2019, pet. denied) (mem op.).

70. *Id.* at *9.

71. See TEX. R. CIV. P. 107(c), which provides: “When the citation was served by registered or certified mail as authorized by Rule 106, the return by the officer or authorized person must also contain the return receipt with the addressee’s signature.” In *Murphy*, although process was mailed to the defendant’s registered agent, Peter Merritt, the “return receipt was signed by someone whose first name is Amanda.” *Murphy*, 2019 WL 3755765, at *1, *9.

72. *Murphy*, 2019 WL 3755765, at *8 (citing and quoting TEX. R. CIV. P. 121 (providing that “[a]n answer shall constitute an appearance . . . so as to dispense with the necessity for the issuance or service of citation upon him”)).

73. In the affidavits, the attorney stated he had never had any contact with the defaulted party, only intended to answer on behalf of another party he represented, the statement in the answer that it was on behalf of the defaulted party was “an error,” and he had no authority to act for the defaulted party; and the registered agent stated that he was the person authorized to accept service at all relevant times and had never received the certified mail addressed to him, and if another person received it, that person was not authorized to do so and also did not forward it to him. *Id.* at *4.

74. *Id.* at *8.

defaulting party was not precluded from complaining about improper service by the unauthorized answer and reversed the default judgment.⁷⁵

Two bill of review petitioners did not fare as well in *Maree v. Zuniga*.⁷⁶ In that case, the petitioners sought to set aside a judgment rendered against them when they failed to appear for trial after an unauthorized attorney answered for them and then withdrew without notice.⁷⁷ The judgment creditor moved for summary judgment on the petitioners' bill of review claim, which the trial court granted.⁷⁸ On appeal, the Fourteenth Houston Court of Appeals held that petitioners failed to raise a fact issue on lack of proper service of process and thus affirmed the summary judgment.⁷⁹ The court of appeals rejected the entity petitioner's argument that the return certificate for service effected through the Texas Secretary of State's office by certified mail was required to show that process was sent to its "most recent address on file."⁸⁰ While the statute required service to be sent to the most recent address, the court of appeals held it plainly did not require "either the citation or the certificate issued by the Secretary of State" to reflect it had been sent to that address.⁸¹ Further, the court of appeals reasoned that absent fraud or mistake, which the petitioners had not alleged or shown, the certificate was "conclusive evidence that the Secretary of State, as agent of [entity petitioner] received service of process for [entity petitioner] and forwarded the service as required by the statute."⁸² With respect to the individual petitioner, petitioners asserted that fourteen documents they claimed were "the record" in the underlying case showed no return of service on file for him.⁸³ The court of appeals held those documents were completely unauthenticated by affidavit or otherwise and thus were not competent summary judgment evidence.⁸⁴ The court of appeals also rejected

75. *Id.*

76. 577 S.W.3d 595, 601–05 (Tex. App.—Houston [14th Dist.] 2019, no pet.).

77. Like the defaulting party in *Murphy*, the petitioners claimed the attorney who filed an answer on their behalf was not authorized to do so and that they never received proper service of process. *Id.* at 598. However, unlike in *Murphy*, the petitioners did not discover the adverse judgment until nearly a year after entry and after all post-trial motion and appeal deadlines passed, leaving them only equitable bill of review proceedings to challenge the judgment. *Id.* at 600.

78. *Id.* at 599–600.

79. *Id.* at 601. The court of appeals "presume[d], without deciding," that the attorney was unauthorized and thus the petitioners were not bound by the answer, and the *Caldwell v. Barnes*, 154 S.W.3d 93 (Tex. 2004) line of no-answer default judgment cases applied. *Id.* "Under these presumptions," the court of appeals reasoned that the trial court properly granted summary judgment on petitioners' bill of review unless they "carried the burden of raising a genuine fact issue that each of them was not properly served with process." *Id.*

80. The entity petitioner relied on TEX. BUS. & COM. CODE ANN. § 5.253(b), which provided that "[t]he notice must be . . . addressed to the most recent address of [entity petitioner] on file with the secretary of state." *Id.* at 602.

81. *Id.*

82. *Id.* (citing and quoting *Capitol Brick, Inc. v. Fleming Mfg. Co.*, 722 S.W.2d 399, 401 (Tex. 1986)).

83. *Id.* at 603.

84. *Id.* (reasoning that "the complete absence of authentication of the Purported Court Documents amounts to a substantive defect that is not waived by the failure to object and obtain a ruling in the trial court").

the argument that the individual petitioner's testimony that "no one" ever personally served him and he never received anything by mail raised a fact issue because "valid service of process properly could be effected on" him without either occurrence.⁸⁵

Finally, a \$13 million default judgment was set aside based on a return of service that did not comply with Texas Rule of Civil Procedure 107⁸⁶ in *Propel Financial Services, LLC v. Conquer Land Utilities, LLC*.⁸⁷ At the time the default judgment was entered, the return on file was a "digital return receipt from the United States Postal Service"⁸⁸ that was "not signed by the person who served the citation," "was not attached to any documents," and failed to "identify the court in which the case was filed and a description of what was served."⁸⁹ The Thirteenth Corpus Christi–Edinburg Court of Appeals noted that even if the clerk's file stamp on the receipt was considered the serving officer's signature, Rule 107 distinguished between and required both a "certificate of return" and "return receipt" for service effected by certified mail.⁹⁰ Accordingly, the court of appeals held that the defective return receipt showed on the face of the record that the service attempt was invalid⁹¹ and reversed the default judgment.⁹²

IV. VENUE

Two cases in this Survey period raised due order of pleadings issues under Texas Rule of Civil Procedure 87.⁹³ In *In re Good Shepherd Hospital, Inc.*, the Sixth Texarkana Court of Appeals held the trial court abused its discretion by setting a summary judgment motion for hearing "immediately after hearing and ruling" on a venue transfer motion because Rule 87 required it to rule on venue "a reasonable time prior to commencement of the trial on the merits."⁹⁴ The relator there sought mandamus relief when the trial court set the opposing party's motion for partial sum-

85. *Id.* at 605 (citing TEX. R. CIV. P. 106(b), which allows, upon motion, service by any manner that is shown "will be reasonably effective to give the defendant notice of the suit").

86. TEX. R. CIV. P. 107 (providing requirements for returns of service).

87. 579 S.W.3d 485, 491–93 (Tex. App.—Corpus Christi–Edinburg 2019, pet. denied).

88. *Id.* at 488 (referring to an image of the defective return).

89. *Id.* at 492 (noting the "return receipt does not comply with Rule 107 in many respects" and citing TEX. R. CIV. P. 107(b), (e)).

90. *Id.* at 492 (quoting TEX. R. CIV. P. 107(c)).

91. *Id.* at 493. The court of appeals refused to consider an amended, compliant return of service submitted after the trial court's plenary power had expired because the order amending the defective return under TEX. R. CIV. P. 118 was void and ineffective. *Id.* at 491.

92. *Id.* at 493.

93. Rule 87(1) provides that "[t]he determination of a motion to transfer venue shall be made promptly by the court," "must be made in a reasonable time prior to commencement of the trial on the merits," the movant "has a duty to" request a setting on the transfer motion, and "each party is entitled to at least 45 days notice" of any hearing. TEX. R. CIV. P. 87(1).

94. *In re Good Shepherd Hosp., Inc.*, 572 S.W.3d 315, 322 (Tex. App.—Texarkana 2019, orig. proceeding).

mary judgment for hearing at the same time and date as relator's motion to transfer venue, albeit "after (i) the Court ha[d] held a hearing on and signed an order deciding" the venue motion.⁹⁵ The court of appeals first discussed the interplay between Rule 87(1) and Texas Rule of Civil Procedure 84,⁹⁶ concluding the clear intent of Rule 84 was to prevent proceedings on the merits before a court determined "whether venue was properly before it."⁹⁷ Next, the court of appeals considered whether hearing a partial motion for summary judgment was "*commencement* of a trial on the merits" within the meaning of Rule 87(1).⁹⁸ Finding the trial court would necessarily "reach one of the substantive claims" of the live petition, the court of appeals held that the trial court "starts," "begins," or "has commenced with the trial on the merits for purposes of Rule 87(1)" when it takes up a motion for partial summary judgment.⁹⁹ Because the court of appeals did not "consider the trial court's determination of venue made immediately prior to conducting a hearing on the merits" as "a reasonable time prior" required by Rule 87(1), it granted mandamus relief directing the trial court to reset the summary judgment motion for hearing a reasonable time after ruling on venue.¹⁰⁰

The Thirteenth Corpus Christi–Edinburg Court of Appeals reversed a judgment in one case and a turnover order in another based on the trial court's failure to rule on the defendant's motion to transfer venue "prior to proceeding with any other motions."¹⁰¹ After passing an initial hearing on the venue motion to allow time for settlement negotiations, the defendant repeatedly asked that the motion to transfer be set for hearing "as soon as practicable and, at the very latest," prior to the hearing set on the plaintiff's summary judgment motion.¹⁰² In response to the summary judgment motion, the defendant re-urged his motion to transfer venue before addressing the merits of the summary judgment and asked at the summary judgment hearing to be heard on venue before the trial court proceeded on the merits.¹⁰³ Without addressing venue, the trial court granted the summary judgment motion and entered final judgment and later a turnover order accordingly.¹⁰⁴ On appeal, the court of appeals

95. *Id.* at 318.

96. *Id.* at 319 (quoting TEX. R. CIV. P. 84, which states: "The defendant in his answer may plead as many several matters as, whether of law or fact, as he may think necessary for his defense . . . and such matters shall be heard in such order as may be directed by the court, special appearance and *motion to transfer venue*, and the practice thereunder being excepted herefrom").

97. *Id.*

98. *Id.* at 320.

99. *Id.* at 321.

100. *Id.* at 322.

101. *ASI Aviation, LLC v. Arnold & Itkin, LLP*, Nos. 13-16-00612-CV & 13-17-00122-CV, 2018 WL 6217699, at *3–4 (Tex. App.—Corpus Christi–Edinburg Nov. 29, 2018, no pet.) (mem. op.).

102. *Id.* at *1.

103. *Id.* at *1–2.

104. *Id.* at *2.

considered Rule 87(1), Rule 84, and Texas Rule of Civil Procedure 86,¹⁰⁵ emphasizing that all three consistently “demand[] a due order of pleading to prevent the court from proceeding on ‘matters related to the merits’ before determining whether venue is proper.”¹⁰⁶ Reviewing the defendant’s efforts to have the venue motion heard, the court of appeals held that “he adequately and properly met the procedural requirement of [R]ule 87.”¹⁰⁷ Because the trial court “was required to hear and determine” the venue motion “prior to ruling on the summary judgment and proceeding with any other motions,” the court of appeals reversed the judgment and turnover order and remanded the case back to the trial court.¹⁰⁸

V. PLEADINGS

In *Godoy v. Wells Fargo Bank*, the Texas Supreme Court addressed the adequacy of the defendant’s pleading of a limitations defense in response to a suit on a guaranty.¹⁰⁹ The defendant guarantor alleged that the plaintiff bank’s suit was barred by the two-year statute of limitations, and the bank moved for summary judgment arguing that the guarantor had waived that defense in the guaranty agreement.¹¹⁰ The trial court granted summary judgment and the Fourteenth Houston Court of Appeals affirmed, finding that the guarantor waived his argument that the contractual waiver was void as against public policy by failing to affirmatively plead it under Texas Rule of Civil Procedure 94.¹¹¹ The supreme court disagreed, reasoning that the guarantor’s public-policy argument was not itself an affirmative defense, but was instead a legal argument in support of his statute-of-limitations defense.¹¹² Moreover, the supreme court turned the tables on the bank, holding that even if Rule 94 had required the guarantor to plead his public-policy argument when the bank moved for summary judgment, the bank waived its complaint about the guarantor’s pleadings by failing to raise the issue with the trial court prior to judgment.¹¹³

Two cases during the Survey period raised interesting issues regarding the relation back of pleadings. In *Cooke v. Karlseng*, the Fifth Dallas Court of Appeals held that the plaintiff shareholder’s derivative claims

105. See TEX. R. CIV. P. 86(1) (providing “[a]n objection to improper venue is waived if not made by written motion filed prior to or concurrently with any other plea, pleading or motion . . .”).

106. *Arnold & Itkin*, 2018 WL 6217699, at *3 (citation omitted).

107. *Id.*

108. *Id.* at *3–4.

109. *Godoy v. Wells Fargo Bank, N.A.*, 575 S.W.3d 531, 533 (Tex. 2019).

110. *Id.* at 534.

111. TEX. R. CIV. P. 94; *Godoy v. Wells Fargo Bank, N.A.*, 542 S.W.3d 50, 54 (Tex. App.—Houston [14th Dist.] 2017), *aff’d*, 575 S.W.3d 531 (Tex. 2019).

112. *Godoy*, 575 S.W.3d at 536–37.

113. *Id.* at 537. Unfortunately for the guarantor, however, the bank got the last word on the merits. Specifically, the supreme court held that while portions of the contractual waiver were unenforceable, those parts that were enforceable were sufficient to defeat the limitations defense, and the judgment against the guarantor was thus affirmed. *Id.* at 533.

asserted in an amended pleading did not relate back for limitations purposes to the date of the original petition, which asserted only individual claims.¹¹⁴ In doing so, the court of appeals first held that the plaintiff lacked standing to assert his individual claims, and the trial court should have therefore dismissed those claims for lack of jurisdiction.¹¹⁵ The court of appeals rejected the plaintiff's argument that Section 21.563(c)(1) of the Texas Business Organizations Code¹¹⁶ gave him standing because it allows a trial court to treat a derivative proceeding brought by a shareholder in a closely held corporation as a direct action for the shareholder's own benefit.¹¹⁷ The court of appeals explained that the statute does not "turn a derivative claim into an individual claim," and the fact that the plaintiff could have asserted a derivative claim for his own benefit thereunder was not the same as having actually done so.¹¹⁸ Turning to the issue of limitations, the court of appeals then held the derivative claims did not relate back, as the plaintiff could not simply "change hats" and create jurisdiction after limitations had run.¹¹⁹

The plaintiffs' invocation of the relation back doctrine fared better in *American Bank, N.A. v. Moorehead Oil & Gas, Inc.*¹²⁰ There, suit was originally filed naming three trusts as plaintiffs.¹²¹ Some months later, after limitations had expired, an amended petition was filed that properly designated the trustees as the plaintiffs rather than the trusts.¹²² The defendant moved for summary judgment, arguing the trustees' claims were time-barred.¹²³ The Thirteenth Corpus Christi–Edinburg Court of Appeals disagreed, holding that the amended petition related back.¹²⁴ The court of appeals reasoned that this type of misidentification of the plaintiff did not raise the same kinds of policy concerns as those that accompany a misidentification of the defendant.¹²⁵ Because the defendant was not misled, or otherwise prejudiced or disadvantaged by the initial erroneous designation of the trusts as plaintiffs, the statute of limitations did not bar the trustees' suit.¹²⁶

VI. DISCOVERY

In *In re City of Dickinson*, the Texas Supreme Court addressed the intersection of the expert disclosure rules and the attorney–client privi-

114. *Cooke v. Karlseng*, No. 05-18-00206-CV, 2019 WL 3812060, at *7 (Tex. App.—Dallas Aug. 14, 2019, pet. filed) (mem. op.).

115. *Id.* at *4–5.

116. TEX. BUS. ORGS. CODE ANN. § 21.563(c)(1).

117. *Id.*; *Cooke*, 2019 WL 3812060, at *4.

118. *Cooke*, 2019 WL 3812060, at *4.

119. *Id.* at *7.

120. No. 13-17-00641-CV, 2018 WL 6219635 (Tex. App.—Corpus Christi–Edinburg Nov. 29, 2018, no pet.).

121. *Id.* at *2.

122. *Id.*

123. *Id.*

124. *Id.* at *4.

125. *Id.*

126. *Id.*

lege.¹²⁷ The plaintiff city complained of the defendant insurer's underpayment of a property-damage claim, and in its response to the city's motion for summary judgment, the insurer attached an affidavit from its senior claims examiner and corporate representative that included factual and expert testimony.¹²⁸ During the affiant's deposition, the city learned that his affidavit had been revised through an email exchange with the insurer's counsel.¹²⁹ In response to the city's motion to compel the production of those emails and related communications, the insurer asserted the attorney-client privilege and, presumably inadvertently, filed many of the emails with the trial court.¹³⁰ The next day, the insurer invoked the "snap-back" provision in Texas Rule of Civil Procedure 193.3(d) to have the city delete or destroy the emails.¹³¹ The trial court granted the city's motion to compel and denied the insurer's motion to withdraw its filing of the emails, but the Fourteenth Houston Court of Appeals conditionally granted mandamus relief directing that both orders be set aside, finding that the emails and related communications were privileged, notwithstanding the affiant's status as a testifying expert.¹³²

The city sought mandamus relief from the supreme court, contending that Texas Civil Procedure Rules 192.3(e)(6) and 194.2(f)(4)(A) applied and required the production of everything the affiant reviewed in anticipation of his expert testimony.¹³³ In response, the insurer pointed to the comment to Texas Rule of Civil Procedure 194, which contemplated the waiver of the work product exemption (but not other privileges), and argued that a privilege waiver should not ensue each time a party wants to elicit expert testimony from one of its employees.¹³⁴ The Texas Supreme

127. *In re City of Dickinson*, 568 S.W.3d 642, 643 (Tex. 2019).

128. *Id.* at 644.

129. *Id.*

130. *Id.*

131. *Id.* Rule 193.3(d) provides:

Privilege Not Waived by Production. A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if—within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made—the producing party amends the response, identifying the material or information produced and stating the privilege asserted. If the producing party thus amends the response to assert a privilege, the requesting party must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege.

TEX. R. CIV. P. 193.3(d). In *In re Fedd Wireless LLC*, another "snap-back" case this Survey period, the Fourteenth Houston Court of Appeals held that a party's request for privileged material submitted with its traditional motion for summary judgment was untimely because its attorney in charge certified pursuant to Texas Rule of Civil Procedure 13 that he had read the motion nearly a month before, making the request well outside the ten-day period from "actual[] discover[y]" allowed to "invoke the [] snap-back provision." *In re Fedd Wireless, LLC*, 567 S.W.3d 470, 476–80 (Tex. App.—Houston [14th Dist.] 2019, orig. proceeding).

132. *In re Tex. Windstorm Ins. Ass'n*, 549 S.W.3d 592, 598, 600 (Tex. App.—Houston [14th Dist.] 2016, orig. proceeding) (mem. op.).

133. *In re City of Dickinson*, 568 S.W.3d at 645.

134. *Id.*

Court denied mandamus relief, finding that the court of appeals had properly found that the emails and related communications were exempted from disclosure by the attorney–client privilege.¹³⁵ According to the supreme court, although Rule 192.3(e)(6) permits discovery of the documents provided to or reviewed by a testifying expert, nothing in that Subsection overcomes Rule 192.3(a), which authorizes the discovery of relevant information “that is not privileged.”¹³⁶

The supreme court then turned its attention to Rule 194.2, which permits a party to request the disclosure of documents that “have been provided to, reviewed by, or prepared by or for” a testifying expert.¹³⁷ Somewhat amazingly, the supreme court found that this rule permits a party to *request* disclosure but does not *require* disclosure.¹³⁸ As such, Rule 194.2 did not obligate the insurer to turn over any testifying expert materials.¹³⁹ To further buttress its decision, the supreme court pointed to Rule 194.3(b), which requires disclosure “unless otherwise ordered by the court,” and the official comments to Rule 194, which allow privilege assertions except for work product.¹⁴⁰

The propriety of death-penalty sanctions was the subject of *McKeithan v. Condit*.¹⁴¹ The plaintiff attorney sued his former client for breach of contract and fraud, and she counterclaimed for breach of fiduciary duty and fraud.¹⁴² The attorney added a declaratory-judgment claim, in which he alleged that the client’s real property was not her homestead, and the trial court severed his other claims into a separate action.¹⁴³ The attorney sought sanctions in the declaratory-judgment action for the client’s discovery misconduct, and the trial court granted the motion, struck her pleadings, and barred her from testifying on the issue at trial.¹⁴⁴

The client appealed and challenged the sanctions award on three grounds: (1) the trial court did not first impose lesser sanctions; (2) the sanctions were not proportional; and (3) the sanctions were excessive.¹⁴⁵ The Thirteenth Corpus Christi–Edinburg Court of Appeals reversed, finding that notwithstanding the trial court’s lengthy recitation of the client’s discovery misconduct, there was no indication, in either the record

135. *Id.* at 649–50. The supreme court also held that the “snap-back” provision in Rule 193.3(d) warranted the return to the insurer of the documents it filed in error. *Id.* at 649.

136. *Id.* at 646 (“Because [Rule 192.3(e)(6)] does not otherwise waive the attorney–client privilege to withhold testifying expert materials from discovery, we conclude that these attorney–client communications remain privileged under this rule.”).

137. *Id.* (quoting TEX. R. CIV. P. 194.2(f)(4)(A)).

138. *Id.*

139. *Id.* at 647.

140. *Id.* (The supreme court distinguishing its decision in *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d 434 (Tex. 2007), on the ground that the internal investigative report in that case was work product, not an attorney–client communication). *Id.* at 648.

141. No. 13-16-00348-CV, 2018 WL 6219624 (Tex. App.—Corpus Christi–Edinburg Nov. 29, 2018, no pet.) (mem. op.).

142. *Id.* at *1.

143. *Id.*

144. *Id.*

145. *Id.* at *2.

or the recitation, that the trial court had imposed, or even considered, lesser sanctions.¹⁴⁶ The trial court also failed to explain why lesser sanctions could not have ameliorated the alleged discovery abuse or that such abuse justified a presumption that her claims were meritless.¹⁴⁷

In *Medina v. Zuniga*, the Texas Supreme Court addressed the propriety of sanctions following a defendant's decision to concede liability at trial in derogation of his denial of liability-related requests for admissions.¹⁴⁸ The defendant denied all of the plaintiff's requests for admissions regarding his alleged negligence, but during opening statement, his counsel stated, for the first time, that he was conceding his negligence.¹⁴⁹ The plaintiff moved post-trial under Texas Rule of Civil Procedure 215.4 to recover the attorneys' fees and expenses she had incurred in establishing the defendant's negligence.¹⁵⁰ In response, the defendant asserted that, at the time he denied the requests at issue, he had a reasonable basis to believe he might prevail on liability,¹⁵¹ and he also argued that the plaintiff was not prejudiced because she would have had to put on the same evidence for her negligence claim as she did for her gross-negligence claim.¹⁵²

The Fourth San Antonio Court of Appeals affirmed the trial court's granting of the plaintiff's motion,¹⁵³ but the supreme court reversed and rendered judgment that the plaintiff take nothing on her motion.¹⁵⁴ As part of its analysis, the supreme court reiterated its longstanding objection to the use of requests for admissions to have a party admit that it did not have a cause of action or a defense¹⁵⁵ and noted its more recent concern that merits-preclusive deemed admissions can have due process im-

146. *Id.* at *3–5. The court of appeals rejected the lawyer's claim that the trial court had issued a lesser sanction by ordering the client to appear for her deposition. *Id.* at *6.

147. *Id.* at *5. In contrast, the Eleventh Eastland Court of Appeals upheld the trial court's imposition of death-penalty sanctions where the trial court had imposed lesser sanctions to no avail and the withheld documents were critical to the calculation of the amount of the plaintiff's losses. *See Trishe Res., Inc. v. Hilliard Energy, Ltd.*, No. 11-18-00086-CV, 2019 WL 4232226, at *5 (Tex. App.—Eastland Sept. 6, 2019, pet. denied) (mem. op.).

148. *Medina v. Zuniga*, 593 S.W.3d 238, 241 (Tex. 2019).

149. *Id.*

150. *Id.* at 243. Rule 215.4(b) provides:

Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 198 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 193, or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had a reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

TEX. R. CIV. P. 215.4(b).

151. *Medina*, 593 S.W.3d at 244 (citing TEX. R. CIV. P. 215.4(b)).

152. *Id.*

153. *Zuniga v. Medina*, 565 S.W.3d 61, 69 (Tex. App.—San Antonio 2017) (mem. op.), *rev'd*, 593 S.W.3d 238, 250 (Tex. 2019).

154. *Medina*, 593 S.W.3d at 250.

155. *Id.* at 244 (citing *Sanders v. Harder*, 227 S.W.2d 206, 208 (Tex. 1950)).

plications.¹⁵⁶ According to the supreme court, the trial court's order essentially presented the defendant with two unpalatable options: either admit away his case at the outset or face sanctions later.¹⁵⁷ Even though the payment of a sanctions award was lighter than merits-preclusive deemed admissions, the supreme court held that, just as a party can file a general denial regarding the claims against him, he can deny in good faith a merits-preclusive request for admission on which the plaintiff bears the burden of proof.¹⁵⁸

Deemed admissions were also at issue in *Romero v. D.R. Kidd Company, Inc.*¹⁵⁹ After the plaintiff filed a notice of deemed admissions, the defendant belatedly served responses denying all of the requests.¹⁶⁰ The plaintiff moved for summary judgment based in part on the deemed admissions, and the defendant filed his response to that motion and a motion to strike the deemed admissions, which he did not reference in his response.¹⁶¹ The trial court entered summary judgment in the plaintiff's favor without specifying the grounds, and in his motion for new trial, the defendant alluded to, but did not seek a ruling on, his motion to strike.¹⁶² The trial court denied the motion for new trial, and the defendant appealed.¹⁶³

The Fourteenth Houston Court of Appeals reversed, finding that the trial court abused its discretion in denying the motion for new trial and allowing the merits-preclusive admissions to remain in place.¹⁶⁴ Initially, the court of appeals rejected the plaintiff's waiver claim finding that even though the defendant did not set his motion to strike for hearing and did not raise the issue at the summary-judgment hearing, the argument could be raised for the first time in a motion for new trial.¹⁶⁵

Next, the court of appeals addressed whether the defendant had actually received the requests for admissions. Even though the plaintiff's law firm had requested its process server to serve the requests for admissions, they were not listed among the served documents on the citation, and the defendant denied receiving them.¹⁶⁶ Moreover, the defendant answered the requests for admissions within hours of receiving the notice of deemed admissions, and he did so over a month before the plaintiff filed its motion for summary judgment.¹⁶⁷ Finally, since the admissions at issue were merits-preclusive, the plaintiff had the burden of showing that the

156. *Id.* at 245 (citing *Marino v. King*, 355 S.W.3d 629, 632 (Tex. 2011)).

157. *Id.*

158. *Id.* at 245–46.

159. No. 14-18-00057-CV, 2019 WL 2939253 (Tex. App.—Houston [14th Dist.] July 9, 2019, no pet.) (mem. op.).

160. *Id.* at *1.

161. *Id.* at *1–2.

162. *Id.* at *2.

163. *Id.* at *2–3.

164. *Id.* at *8.

165. *Id.* at *4 (citing *Wheeler v. Green*, 157 S.W.3d 439, 442–43 (Tex. 2005)).

166. *Id.*

167. *Id.* at *5.

defendant's failure to respond resulted from flagrant bad faith or a callous disregard of the rules.¹⁶⁸ The court of appeals held that the plaintiff had failed to make the required showing and that the trial court had abused its discretion in its rulings.¹⁶⁹

The Fourteenth Houston Court of Appeals reached a comparable result in *PEM Offshore Inc. v. Index Brook Ltd.*¹⁷⁰ In his disclosure responses, the individual defendant (who was then pro se) provided an address that the plaintiff used to serve the defendant with requests for admissions. The plaintiff moved for summary judgment based on the deemed admissions, and its supporting evidence included the envelope from its mailing of the requests for admissions, which was unclaimed and marked "return to sender."¹⁷¹ The defendant served responses to the requests for admissions and a motion to strike the deemed admissions, which was based on its failure to receive the requests.¹⁷² In their response to the motion for summary judgment, defendant argued the plaintiff had failed to show defendant acted with the requisite "bad faith or callous disregard" necessary to warrant the entry of summary judgment based on merits-preclusive deemed admissions.¹⁷³ The trial court denied the motion to strike and entered summary judgment in the plaintiff's favor,¹⁷⁴ but the court of appeals reversed, finding that the undisputed evidence showing the defendant had not received the requests for admissions prevented the plaintiff from establishing the defendant's bad faith or callous disregard.¹⁷⁵

VII. SUMMARY JUDGMENT

The Texas Courts of Appeals grappled with several noteworthy summary judgment issues this Survey period. In *Tri-Stem, Ltd. v. City of Houston*, the Fourteenth Houston Court of Appeals held that the trial court abused its discretion in granting the city's motion for summary judgment "before [the opposing party contractor] had sufficient opportunity to obtain material discovery, and in spite of [contractor's] diligence in seeking it."¹⁷⁶ On appeal, the contractor argued that the trial court should have granted its motion and supplemental motion for continuance under Texas Rule of Civil Procedure 166a(g).¹⁷⁷ The court of appeals

168. *Id.* at *6 (citing *Marino v. King*, 355 S.W.3d 629, 633 (Tex. 2011)).

169. *Id.*

170. No. 14-17-00990-CV, 2019 WL 386319 (Tex. App.—Houston [14th Dist.] Jan. 31, 2019, no pet.) (mem. op.).

171. *Id.* at *1.

172. *Id.*

173. *Id.* at *2.

174. *Id.*

175. *Id.* at *4.

176. *Tri-Stem, Ltd. v. City of Hous.*, 566 S.W.3d 789, 798–801 (Tex. App.—Houston [14th Dist.] 2019, pet. denied).

177. Rule 166a(g) provides "[s]hould it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or

agreed, noting the city filed its motion for summary judgment “six weeks after the trial court signed the parties’ agreed docket control order, two weeks after [contractor’s] counsel noticed the deposition of the City’s designated representative,”¹⁷⁸ “three days after the city served its objections and responses” to the contractor’s written discovery, and when “eleven months remained in the discovery period.”¹⁷⁹ The court of appeals emphasized that the contractor “promptly moved” for the continuance and to compel more complete discovery responses by the city and explained what discovery was necessary and why.¹⁸⁰ The trial court heard the contractor’s motion for continuance and the city’s summary judgment motion and objections to the contractor’s summary judgment evidence “at the same time,” denied the continuance, sustained the evidentiary objections, and granted the city summary judgment.¹⁸¹ The court of appeals explained the “harm from the denial of the motion for continuance is shown” by the order sustaining the city’s objections to the contractor’s summary judgment evidence insofar as the contractor had “no opportunity to substitute sworn testimony for the unauthenticated” materials to overcome hearsay objections.¹⁸² The summary judgment was reversed and the case remanded “to allow [the contractor] to conduct further discovery.”¹⁸³

In another case, the Fourteenth Houston Court of Appeals addressed a number of evidentiary issues in summary judgment practice.¹⁸⁴ First, the court of appeals rejected the non-movant’s argument that because the trial court sustained its objections to pleadings contained in two exhibits, an included affidavit was also excluded.¹⁸⁵ The court of appeals explained that “[p]leadings and affidavits have distinct meanings” and determined the affidavit “included specific, detailed facts concerning the parties’ contract and interactions,” was thus “‘more than’ a pleading,” and was therefore within the “scope of review” on appeal.¹⁸⁶ Next, the court of appeals considered the non-movant’s authentication objections to materials submitted pursuant to Texas Rule of Civil Procedure 166a(d).¹⁸⁷ The court of appeals agreed that movant could not simply “authenticate a document

make such other further order as is just.” TEX. R. CIV. P. 166a(g). *See also Tri-Stem*, 566 S.W.3d at 799 (citing TEX. R. CIV. P. 251 and TEX. R. CIV. P. 252 as other available avenues for a “party requiring discovery to justify its opposition to a summary-judgment motion” to seek a continuance).

178. *Tri-Stem*, 566 S.W.3d at 799. The city moved to quash the deposition within three days of the notice and moved for summary judgment before the motion to quash was heard. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 799–800.

182. *Id.* at 800.

183. *Id.* at 801.

184. *Tex. Black Iron, Inc. v. Arwak Energy Int’l Ltd.*, 566 S.W.3d 801, 811–13, 824 (Tex. App.—Houston [14th Dist.] 2019, pet. denied).

185. *Id.*

186. *Id.* at 811–12.

187. *Id.* at 812 (noting TEX. R. CIV. P. 166a(d) allows parties to “to use discovery products not on file with the clerk as summary-judgment evidence” upon timely notice).

for use in its own favor by merely producing it in response to a discovery request” and considered whether the movant’s objected-to exhibits were properly authenticated summary judgment evidence.¹⁸⁸ The court of appeals found exhibits also attached to the non-movant’s response and exhibits containing emails discussed in deposition were adequately authenticated while other emails were not, and excluded the unauthenticated emails from its review.¹⁸⁹ Finally, the court of appeals held the movant had not offered any evidence of presentment as required to obtain summary judgment on its claim for attorney’s fees under Chapter 38 of the Texas Civil Practice and Remedies Code¹⁹⁰ because (1) its demand letter offered as an exhibit was not authenticated and thus was not competent evidence; and (2) even if it were, “evidence showing presentment of only a portion (here, less than half) of a party’s contract claim” cannot “conclusively establish[]” presentment of “attorney’s fees on the party’s whole contract claim for purposes of summary judgment.”¹⁹¹

In *Gonzales v. Thorndale Cooperative Gin and Grain Co.*, the Fourteenth Houston Court of Appeals addressed whether a letter from a trial judge identifying the ground on which summary judgment was granted was “incorporated into” the final judgment and held, “[o]n the facts of this appeal,” it was not.¹⁹² In this “slip and fall” case, the premises owner moved for summary judgment on two distinct grounds: no duty to warn about open and obvious hazards and the *ferae naturae* doctrine.¹⁹³ The trial court’s final judgment granting the motion did not specify the summary judgment ground or grounds it was based on.¹⁹⁴ The plaintiff on appeal only raised error with regard to the duty to warn issue without “challenging the independent, alternative *ferae naturae* basis for the trial court’s decision.”¹⁹⁵ The court of appeals recognized that plaintiff’s omission was likely based on the trial judge’s letter, stating he “had ‘concluded that the alleged hazards on [owner’s] property were open, obvious and known to [plaintiff], and as such, [owner] had no duty to [plaintiff] with respect to those hazards. . . .’”¹⁹⁶ Nonetheless, the court of appeals held that plaintiff’s failure to challenge the alternative basis doomed his ap-

188. *Id.* at 812–813.

189. *Id.* at 813.

190. *Id.* at 824 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 38.002(2) and noting a “prerequisite to recovering attorney’s fees under chapter 38 is presentment of the underlying claim to the opposing party or her agent”).

191. *Id.*

192. *Gonzales v. Thorndale Coop. Gin & Grain Co.*, 578 S.W.3d 655, 656 (Tex. App.—Houston [14th Dist.] 2019, no pet.).

193. *Id.* at 656–57 (quoting *Union Pac. R.R. v. Nami*, 498 S.W.3d 890, 897 (Tex. 2016) (explaining the doctrine provides “a property owner owes an invitee no duty of care to protect him from wild animals indigenous to the area unless” the owner has domesticated the animals, attracted them to the property, or “knows of an unreasonable risk and neither mitigates the risk nor warns the invitee”)).

194. *Id.* at 657.

195. *Id.*

196. *Id.* The court of appeals noted the owner’s brief on appeal reflected it “also may have been operating under the misimpression that the trial court” did not rule on the *ferae naturae* ground of its summary judgment motion. *Id.*

peal.¹⁹⁷ While acknowledging the rule “may seem harsh,” the court of appeals reasoned that it furthered “clarity and simplicity” in summary judgment practice.¹⁹⁸ Further, the court of appeals emphasized that plaintiff could have filed “a timely motion for reconsideration” asking the trial court to specify the basis of its summary judgment ruling to limit the final judgment.¹⁹⁹ Having failed to do so, plaintiff was required to negate all potential grounds supporting the trial court’s “general order.”²⁰⁰

Finally, the Ninth Beaumont Court of Appeals held that a statement made in a debtor’s reply constituted a judicial admission precluding the trial court from granting the debtor summary judgment on a limitations affirmative defense.²⁰¹ The debtor filed a cross-motion to the bank’s motion for summary judgment on the debt, claiming the bank’s claim was barred by limitations.²⁰² The bank filed an untimely response to the cross-motion three days before the hearing to which the debtor replied the day before the summary judgment hearing.²⁰³ At that hearing, the trial court found the bank failed to submit any summary judgment evidence it could consider and granted the debtor’s cross-motion.²⁰⁴ On appeal, the bank argued that there was a fact issue on limitations based on the debtor’s concession in the reply while the debtor asserted the reply was “a nullity” because the trial court sustained the objections to the bank’s late-filed response.²⁰⁵ The court of appeals rejected the debtor’s argument, found the reply was filed “and made [] part of the [summary judgment] record,” and contained “unequivocal” statements that constituted judicial admissions.²⁰⁶

VIII. JURY CHARGE

In *Pathfinder Oil & Gas Inc. v. Great Western Drilling, Ltd.*, the Texas Supreme Court addressed the impact of the parties’ stipulation on the need to include elements in the jury charge.²⁰⁷ The parties were disputing the enforceability of a letter agreement, and the day before trial, they entered into a stipulation providing that the only issues to be submitted to the jury were: (1) whether the letter agreement was enforceable; (2) whether one or both of the parties breached the agreement; and (3) the

197. *Id.* at 658.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Bank of N.Y. Mellon v. Riley*, No. 09-18-00403-CV, 2019 WL 5075866, at *6 (Tex. App.—Beaumont Apr. 15, 2019, pet. denied) (mem. op.).

202. *Id.* at *2.

203. *Id.* The debtor’s reply contained statements about the bank’s actions that “conceded a fact undermining” the debtor’s limitations defense. *Id.* at *6.

204. *Id.* at *3.

205. *Id.* at *5 n.5.

206. *Id.* at *5 (citing and quoting *Tex. Dep’t of Corr. v. Herring*, 513 S.W.2d 6, 9 (Tex. 1974) (“In that case, pleadings may be used as summary judgment evidence when they contain statements rising to the level of judicially admitting a fact or conclusion which is directly adverse to that party’s theory or defense of recovery.”)).

207. *Pathfinder Oil & Gas Inc. v. Great W. Drilling, Ltd.*, 574 S.W.3d 882 (Tex. 2019).

applicability of various affirmative defenses.²⁰⁸ The parties also stipulated that, if the jury found that the agreement was enforceable and had been breached by the plaintiff, then the defendant, which had agreed to waive its claim for money damages, was entitled to specific performance.²⁰⁹ The proposed charge tracked the stipulation, but at the charge conference, the plaintiff requested the inclusion of a question regarding whether the defendant had at all times been ready, willing, and able to perform its obligations, which is one of the traditional elements of a claim for specific performance.²¹⁰ The trial court declined to submit this question in light of the stipulation, and after the jury found in favor of the defendant on the first three questions, the trial court ordered specific performance.²¹¹

The Eleventh Eastland Court of Appeals reversed and rendered judgment for the plaintiff, finding that the stipulation limited the defendant's recovery to specific performance but did not excuse the defendant from having to establish its entitlement to that relief.²¹² The Texas Supreme Court disagreed and reversed, finding that the stipulation was a litigation-related contract through which the plaintiff waived or eliminated the defendant's burden of demonstrating its entitlement to specific performance.²¹³ Because the defendant was not required to secure a jury finding on its entitlement to specific performance, the supreme court remanded the case so that the court of appeals could consider the unaddressed appellate issues.²¹⁴

The trial court's refusal to submit requested instructions was at issue in *Estate of Durrill*.²¹⁵ In that case, the testator's children sought a declaration under Section 123.102 of the Texas Estates Code that he had lacked the mental capacity to marry his purported spouse.²¹⁶ The purported spouse requested jury instructions on (1) the statutory presumption that every marriage is valid, and (2) the effect of filing a declaration of informal marriage.²¹⁷ The trial court voided the marriage, and on appeal, the purported spouse complained of its failure to include her proposed jury instructions.²¹⁸ The Thirteenth Corpus Christi–Edinburg Court of Appeals affirmed, finding that the requested instructions did not further the goal of determining the decedent's mental capacity and constituted im-

208. *Id.* at 885.

209. *Id.* at 885–86.

210. *Id.* at 886 (citing *DiGuissepe v. Lawler*, 269 S.W.3d 588, 593 (Tex. 2008)).

211. *Id.*

212. *Great W. Drilling, Ltd. v. Pathfinder Oil & Gas, Inc.*, 568 S.W.3d 148, 154–56 (Tex. App.—Eastland 2017) (mem. op.), *rev'd*, 574 S.W.3d 882, 892 (Tex. 2019).

213. *Pathfinder Oil & Gas*, 574 S.W.3d at 890–92.

214. *Id.* at 893.

215. 570 S.W.3d 945 (Tex. App.—Corpus Christi–Edinburg 2019, pet. denied).

216. *Id.* at 948. This Section permits an interested person to request the court to void the decedent's marriage based on the lack of mental capacity where the decedent was married on the date of his death and the marriage had commenced not earlier than three years before his death. TEX. EST. CODE ANN. § 123.102(a).

217. *Estate of Durrill*, 570 S.W.3d at 962.

218. *Id.* at 947, 963.

proper comments on the weight of the evidence.²¹⁹

In *Getty v. Perryman*, the Fourteenth Houston Court of Appeals addressed the potential waiver of a jury question on lack of consideration.²²⁰ The plaintiff filed suit to recover the \$125,000.00 he lost in a failed investment plus an additional \$25,000.00 he contended the defendant had agreed to pay him.²²¹ The jury found that an agreement existed and that the plaintiff was entitled to recover \$150,000.00 in actual damages plus an additional \$80,000.00 in attorney's fees.²²² After the trial court entered a final judgment that was consistent with the jury's findings, the defendant appealed, and his appellate complaints included an argument that the parties' agreement was void due to lack of consideration.²²³ Because the defendant had neither pled nor secured a jury finding on lack of consideration, the court of appeals easily found he had waived this issue.²²⁴

IX. JUDGMENTS

In *Harris County Hospital District v. Public Utility Commission*, the Third Austin Court of Appeals rejected a collateral attack on a twenty-year-old judgment that was entered in connection with a class action settlement, consistent with the "modern trend favoring finality and certainty."²²⁵ There, a hospital district filed a complaint over telephone charges with the Public Utility Commission (PUC).²²⁶ After "more than three years of litigation" before the PUC, the PUC dismissed the district's complaint on the grounds it was precluded by a 2000 class action settlement judgment resolving excessive telephone charges claims in Texas.²²⁷ A reviewing district court reversed the PUC, holding the hospital district was not bound by the prior judgment, and all interested parties appealed.²²⁸ The court of appeals began by noting the hospital district "collaterally challenges a twenty-year-old class-action settlement decree resolving tens of thousands of claims filed over two decades ago."²²⁹ In considering whether the judgment was subject to collateral attack,²³⁰ the court of appeals weighed the factors "militating for and against upholding

219. *Id.* at 963 (citing TEX. R. CIV. P. 277).

220. *Getty v. Perryman*, No. 14-17-00887-CV, 2019 WL 1768604 (Tex. App.—Houston [14th Dist.] Apr. 23, 2019, no pet.) (mem. op.).

221. *Id.* at *1.

222. *Id.* at *2–3.

223. *Id.* at *3, *5.

224. *Id.* at *5.

225. *Harris Cty. Hosp. Dist. v. Pub. Util. Comm'n of Tex.*, 577 S.W.3d 370, 378 (Tex. App.—Austin 2019, pet. filed) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 12 (AM. LAW INST. 1982)).

226. *Id.* at 374.

227. *Id.* at 376.

228. *Id.* at 377.

229. *Id.*

230. *Id.* (explaining "collateral challenge is proper" only if the judgment is void, and a "judgment is void only if 'the court rendering judgment had no jurisdiction of the parties or property, no jurisdiction of the subject matter, no jurisdiction to enter the particular judgment, or no capacity to act'") (citation omitted).

the validity of the challenged judgment” and found “every relevant factor” in this case weighed in favor of finality.²³¹ The court of appeals therefore held that the district, which “had ample opportunity to litigate its jurisdictional challenge,” could not challenge the final class action judgment.²³²

X. MISCELLANEOUS

The Texas Supreme Court addressed the arbitrability of disputes in two significant cases during the Survey period. In the supreme court’s words, *Robinson v. Home Owners Management Enterprises, Inc.*²³³ presented not only the ultimate issue of “whether the parties agreed to arbitrate class-action claims,” but also the “threshold issue [of] whether a court or arbitrator is empowered to make that determination.”²³⁴ The supreme court noted that it had answered the threshold “who decides” question fifteen years before, holding then that where the parties’ contract committed all disputes arising out of an agreement to the arbitration, that delegation of authority included the issue of class arbitrability.²³⁵ In *Robinson*, the Second Fort Worth Court of Appeals concluded that the subsequent federal case authorities had effectively abrogated the legal premise on which *Wood* rested and therefore declined to follow it, holding instead that where the agreement did not contain a “clear and unmistakable delegation” of such authority to the arbitrator, the availability of class arbitration is a gateway issue for the court to decide.²³⁶

The supreme court agreed that the time had come to overrule *Wood*, reasoning that since it was issued, “the jurisprudential landscape has evolved to provide a clearer, and distinctly different, perspective.”²³⁷ The supreme court noted that class arbitrations are fundamentally different from bilateral arbitrations, involving the rights of absent class members and a multiplicity of claims.²³⁸ The issue of class arbitration is thus “more akin to what type of controversy shall be arbitrated—a question for the courts—not a procedural question presumptively for the arbitrator.”²³⁹ Although the parties may override that presumption by contractually del-

231. *Id.* at 378 (reasoning the “challenged judgment is nearly two decades old, binds tens of thousands of class members, was rendered by a court of general jurisdiction, and includes a statement indicating that the court found jurisdiction over ‘all claims’ and ‘all parties’”).

232. *Id.* at 378–79.

233. 590 S.W.3d 518 (Tex. 2019).

234. *Id.* at 521–22.

235. *Id.* at 526–27 (citing *In re Wood*, 140 S.W.3d 367, 368–69, 368–69 n.1 (Tex. 2004) (per curiam)).

236. *Robinson v. Home Owners Mgmt. Enters., Inc.*, 549 S.W.3d 226, 232–40 (Tex. App.—Fort Worth 2018), *aff’d*, 590 S.W.3d 518 (Tex. 2019).

237. *Robinson*, 590 S.W.3d at 527–28. Although the supreme court agreed with the court of appeals’ conclusion and “thoughtful and well-written opinion,” it gently chided the lower court for failing to recognize that it was nevertheless bound to follow *Wood* until the supreme court itself overruled that decision. *Id.* at 528.

238. *Id.* at 529–30.

239. *Id.* at 531.

egating the arbitrability of class actions to the arbitrator, they must do so with unmistakable clarity and such intent cannot be inferred where their contract is silent on the issue.²⁴⁰ Turning then to the ultimate issue of whether the parties before it had agreed to arbitrate class disputes, the supreme court had no difficulty in concluding the parties had not where the arbitration provision in question did not refer to class claims at all.²⁴¹

RSL Funding, LLC v. Newsome raised the arbitrability issue in the context of a contract to purchase a party's right to payments under a structured settlement.²⁴² Newsome had sold his structured settlement rights to RSL Funding and its related entities and, pursuant to the requirements of the Structured Settlement Protection Act,²⁴³ the district court entered an order approving the transfer.²⁴⁴ When a dispute over the court's order subsequently arose, the parties agreed to modify its terms and the district court entered a corrected order nunc pro tunc.²⁴⁵ Several months later, Newsome filed a bill of review alleging one or both of the orders was void.²⁴⁶ RSL Funding moved to compel arbitration pursuant to the terms of the purchase contract, which specifically delegated the question of arbitrability to the arbitrator.²⁴⁷ The district court denied the motion to compel arbitration and a divided Fifth Dallas Court of Appeals affirmed, reasoning that the approval of the transfer of a structured settlement was a "purely judicial function" under the statute.²⁴⁸

The Texas Supreme Court reversed and remanded the case to the district court with instructions to grant the motion to compel arbitration.²⁴⁹ The supreme court first rejected the argument that the district court's exclusive jurisdiction of challenges to its orders by bill of review meant that the parties could not agree to arbitrate that dispute instead.²⁵⁰ Finding no inconsistency between the statute's requirement of court approval for the transfer and the arbitration of disputes related to such transfer, the supreme court concluded that the dispute had to be sent to arbitration to allow the arbitrator to determine the issue of arbitrability.²⁵¹

240. *Id.* at 531–33.

241. *Id.* at 534.

242. *RSL Funding, LLC v. Newsome*, 569 S.W.3d 116 (Tex. 2019).

243. TEX. CIV. PRAC. & REM. CODE ANN. § 141.004.

244. *Newsome*, 569 S.W.3d at 118.

245. *Id.*

246. *Id.* at 119–20.

247. *Id.*

248. *Id.* at 120.

249. *Id.* at 126.

250. *Id.* at 122.

251. *Id.* at 122–23. The supreme court went on to reject Newsome's argument that no enforceable arbitration agreement existed because the purchase contract never came into existence or was void without a valid order approving the transfer under the Structured Settlement Protection Act. *Id.* at 124–25. The supreme court explained that to the extent Newsome was asserting a defense to the contract as a whole that did not involve the issue of contract formation, that defense would have to be decided by the arbitrator. *Id.* at 125. And to the extent Newsome was claiming the statute created a condition precedent to formation of the contract, he had waived that argument by failing to brief it on appeal. *Id.* at 125–26.

Over the last several years, the Texas Supreme Court has clarified and made more exacting the evidentiary burden a party must meet when it seeks to recover attorney's fees from another party in litigation.²⁵² In *Nath v. Children's Hospital*, the supreme court announced that these requirements apply to attorneys' fees awarded as sanctions as well, because "all fee-shifting situations require reasonableness."²⁵³ The supreme court disapproved of the courts of appeals' opinions that had reached the contrary conclusion,²⁵⁴ stating that the court of appeals had misinterpreted *Brantley v. Etter*, which held that an award of attorney's fees as sanctions was not a jury issue, but was instead solely within the sound discretion of the trial court.²⁵⁵ *Nath* explains that before a trial court may exercise that discretion, there must be evidence of the reasonableness of the requested fees or there will be no way for the court to "determine that the sanction is 'no more severe than necessary' to fairly compensate the prevailing party."²⁵⁶

In re Vinson involved a non-party insurance adjuster's challenge to an order compelling her to appear at the mediation of a suit involving one of her employer's insureds.²⁵⁷ The Eighth El Paso Court of Appeals conditionally granted mandamus relief, noting that the trial court's authority to refer a dispute to mediation includes the power to order parties and their representatives to attend with full settlement authority.²⁵⁸ Where necessary, this also includes the power to require an insurance company representative with authority to attend.²⁵⁹ The court of appeals explained that does not mean, however, that the trial court may require a particular representative of the insurer to attend, even if that representative is the most familiar with the case.²⁶⁰

Finally, perhaps the most significant development to trial practitioners during the Survey period was the Texas Legislature's substantial revisions to the TCPA.²⁶¹ In the years since Texas first enacted this "anti-SLAPP" statute, many came to conclude that it had been loosened from its moorings as it was broadly interpreted and applied by the Texas courts to garden-variety civil disputes. A thorough examination of the TCPA amendments is beyond the scope of this article.²⁶² Some of the most significant changes, however, include: (1) narrowing the scope of the TCPA's protections by revising the definition of a "matter of public con-

252. See, e.g., *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 475 (Tex. 2019).

253. *Nath v. Tex. Children's Hosp.*, 576 S.W.3d 707, 710 (Tex. 2019) (per curiam).

254. *Id.* at 709 (citing cases).

255. *Brantley v. Etter*, 677 S.W.2d 503, 504 (Tex. 1984) (per curiam).

256. *Nath*, 576 S.W.3d at 709.

257. *In re Vinson*, No. 08-18-00207-CV, 2019 WL 2417441 (Tex. App.—El Paso June 10, 2019, orig. proceeding).

258. *Id.* at *1–2.

259. *Id.* at *2.

260. *Id.* at *3.

261. TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–.011.

262. A summary of all of the revisions to the TCPA may be found at Amy Bresnen & Steve Bresnen, *The 2019 Anti-SLAPP Reform Legislation*, 82 TEX. B.J. 622 (2019).

cern”;²⁶³ (2) exempting multiple new categories of cases from the statute’s reach, including actions involving non-compete agreements or misappropriation of trade secrets;²⁶⁴ and (3) the elimination of mandatory sanctions when a party prevails on a motion to dismiss under the TCPA.²⁶⁵

263. TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(7).

264. *Id.* § 27.010(a).

265. *Id.* § 27.009(a)(2).

