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## Civil Procedure: Pretrial & Trial

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# CIVIL PROCEDURE: PRETRIAL & TRIAL

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## I. INTRODUCTION

The major developments in the field of civil procedure during the Survey period occurred through judicial decisions, except for significant amendments to the Texas Rules of Civil Procedure discussed below in Section V.

## II. SUBJECT MATTER JURISDICTION

During the Survey period, the Texas Supreme Court weighed in on a variety of subject matter jurisdiction issues. To begin, the Texas Supreme Court reaffirmed its prior decision<sup>1</sup> and held in *Farmers Texas County Mutual Insurance Co. v. Beasley* that a plaintiff’s allegation that his insurer paid the negotiated rate rather than the medical provider’s “list rate” did not establish “actual or threatened harm” sufficient to support

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1. *Allstate Indem. Co. v. Forth*, 204 S.W.3d 795, 795–96 (Tex. 2006) (per curiam) (holding uninjured plaintiff lacked standing to sue personal-injury-protection insurer that paid negotiated rather than billed rates for medical expenses where she “d[id] not claim that she ha[d] any unreimbursed, out-of-pocket medical expenses” or that her “providers withheld medical treatment as a result of [insurer] reducing their bills”).

standing to sue.<sup>2</sup> The plaintiff there sued his personal-injury-protection insurer after it paid him \$1,068.90 to resolve his claim for \$2,662.54 in billed medical charges previously paid at the negotiated rate by his health insurer.<sup>3</sup> After the personal-injury-protection insurer refused to pay the difference between the negotiated and billed rates up to the policy maximum, the plaintiff sued, claiming the insurer “arbitrarily reduced [his] benefits because of health benefits paid under [his] independently obtained health insurance.”<sup>4</sup> The trial court granted the insurer’s plea to the jurisdiction, but the Twelfth Tyler Court of Appeals reversed, holding the allegation that “*he* was personally aggrieved” by the inadequate benefit payment was enough to confer standing on the plaintiff.<sup>5</sup> The supreme court disagreed with the court of appeals, reasoning that its prior holding in *Forth* was controlling.<sup>6</sup> According to the supreme court, the “only meaningful difference between the facts” in the two cases was the type of relief sought,<sup>7</sup> but the standing question remained the same: “Did the litigant plead an injury sufficient to invoke the trial court’s jurisdiction?”<sup>8</sup> Answering “no” as it had in *Forth*, the supreme court emphasized that the plaintiff had not incurred any out-of-pocket costs, been denied treatment, or otherwise demonstrated any injury.<sup>9</sup> The supreme court therefore dismissed the plaintiff’s suit for lack of subject matter jurisdiction.<sup>10</sup>

In a case “arising out of the breakup of a limited partnership,” the Texas Supreme Court made clear that challenges to a partner’s ability to recover damages for impairment of its partnership interest or to assert a claim belonging to a partnership are questions of capacity to sue, rather than standing, and thus do not implicate subject matter jurisdiction.<sup>11</sup> When a limited partner’s ability to recover damages individually for an injury allegedly suffered by the partnership was challenged on appeal, the supreme court questioned whether the statutes and other substantive law governing business organizations and “which claims and remedies may be pursued by the organization and which by its stakeholders individually”

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2. *Farmers Tex. Cnty. Mut. Ins. Co. v. Beasley*, 598 S.W.3d 237, 238 (Tex. 2020).

3. *Id.* at 239.

4. *Id.*

5. *Id.* at 240.

6. *Id.* at 243.

7. *Id.* at 242. The *Forth* plaintiff sought injunctive and declaratory relief to require her insurer “to use ‘an independent and fair evaluation to determine what amount of [her] medical expenses were reasonable’” while the *Beasley* plaintiff sought “monetary damages” representing the difference between the negotiated and list rates up to the insurance maximum. *Id.* Regardless, the supreme court concluded that both plaintiffs’ “ultimate aim” was the same: “they both claimed that a PIP insurer who paid negotiated rates to satisfy all of the plaintiff’s financial obligations to medical providers did not pay reasonable expenses that the plaintiffs incurred.” *Id.*

8. *Id.*

9. *Id.* The supreme court rejected the plaintiff’s claim that the collateral source rule should apply to determine the amount of personal-injury-protection reimbursement, noting it had previously held that health insurers’ negotiated discounts “do not constitute a collateral source of benefits to the insured in this context.” *Id.* (citing *Haygood v. De Escabedo*, 356 S.W.3d 390, 394 (Tex. 2011)).

10. *Id.* at 243.

11. *Pike v. Tex. EMC Mgmt. LLC*, 610 S.W.3d 763, 769 (Tex. 2020).

were matters “of constitutional standing that affects a court’s subject matter jurisdiction.”<sup>12</sup> Following its “approach to jurisdictional questions designed to strengthen finality and reduce the possibility of delayed attacks on judgments,” the supreme court held that partners or other stakeholders in business organizations have “constitutional standing to sue for an alleged loss in the value of [their] interest in the organization.”<sup>13</sup> Further, the supreme court explained that substantive law governing “a stakeholder’s ability to recover certain measures of damages” or to assert a claim that belongs to the organization are capacity or merits-based questions that do not deprive the courts of jurisdiction to adjudicate the disputes.<sup>14</sup>

In *Morath v. Lewis*, the Texas Supreme Court confirmed that a plaintiff’s nonsuit under Texas Rule of Civil Procedure 162 moots the case and “extinguishes” subject matter jurisdiction regardless of where or when the notice of nonsuit is filed.<sup>15</sup> There, the plaintiffs (parents of school students) abandoned their claims against the Texas Education Agency’s commissioner regarding administration of the State of Texas Assessments of Academic Readiness (STAAR) exam by filing their “Notice of Nonsuit Without Prejudice” in the supreme court after it had asked for and received opening briefing on the commissioner’s petition for review of the lower courts’ denial of his jurisdictional plea.<sup>16</sup> The commissioner opposed the nonsuit, claimed it was procedurally ineffective, and asked the supreme court to nonetheless address the plaintiffs’ complaints because the case “involve[d] ‘a matter of public concern.’”<sup>17</sup> The supreme court declined the commissioner’s invitation, holding that: (1) a plaintiff has an “absolute right” to take a nonsuit; (2) Rule 162 “remains the appropriate procedural mechanism” to effectuate nonsuits even on appeal; and (3) a nonsuit, “[h]owever it is achieved procedurally,” moots the case and deprives the court of subject matter jurisdiction.<sup>18</sup> The supreme court further held there is no recognized “matter-of-public-concern exception to mootness,” and it therefore lacked the power to do anything but dismiss for want of jurisdiction.<sup>19</sup>

In *San Antonio River Authority v. Austin Bridge & Road, LP*, the Texas Supreme Court addressed the interplay between the goods-and-services contracts waiver of immunity under Chapter 271 of the Texas Local Government Code<sup>20</sup> and the enforceability of agreements to arbitrate within

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12. *Id.* at 776.

13. *Id.* at 778.

14. *Id.*

15. *Morath v. Lewis*, 601 S.W.3d 785, 788 (Tex. 2020) (per curiam).

16. *Id.* at 787.

17. *Id.*

18. *Id.* at 788.

19. *Id.* at 789.

20. See TEX. LOC. GOV’T CODE ANN. §§ 271.151–271.152 (waiving a local governmental entity’s immunity from breach of contract actions based on “written contract[s] stating the essential terms of the agreement for providing goods or services to the local governmental entity that is properly executed” by that entity).

such goods-and-services contracts.<sup>21</sup> In this case, the local governmental entity and its general contractor for a dam repair project disagreed about the “scope of work and payment” provisions of their contract.<sup>22</sup> The contractor invoked the contract’s arbitration provisions, and the local entity participated until the arbitrator denied its governmental immunity plea.<sup>23</sup> Afterwards, the local entity objected to the arbitration, asserted it lacked authority to agree to arbitrate, and sued the contractor.<sup>24</sup> Following mixed results in the lower courts,<sup>25</sup> the supreme court granted review to address: “(1) whether [the] agreement to arbitrate is enforceable[;] (2) if so, whether the courts must decide matters of governmental immunity, notwithstanding the agreement of the parties[;] and (3) whether immunity bars this breach-of-contract claim against the” local entity.<sup>26</sup>

Addressing each question in turn, the supreme court first concluded that Chapter 271 of the Texas Local Government Code “unmistakably authorized” a local governmental entity to agree to arbitrate disputes arising out of goods-and-services contracts for which immunity was waived.<sup>27</sup> Next, the supreme court held that courts, rather than arbitrators, had the “non-delegable role” to “determine whether governmental immunity exists, whether such immunity has been waived, and to what extent.”<sup>28</sup> Finally, the supreme court addressed whether the contractor provided “services”<sup>29</sup> to the local entity and sought recoverable damages, thereby bringing the repair contract within the scope of Chapter 271’s immunity waiver.<sup>30</sup> The supreme court noted that the contractor had undertaken to fulfill some of the local entity’s “management obligations” for the repair project, including providing it with insurance certificates, “itemized ‘cost breakdown together with supporting data,’” and “payroll transcripts and payment applications.”<sup>31</sup> Those “services,” while not the “primary purpose” of the repair contract, were enough for the supreme court to conclude it was a goods-and-services contract subject to Chapter 271.<sup>32</sup> The supreme court rejected the local entity’s argument that the

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21. San Antonio River Auth. v. Austin Bridge & Road., LP, 601 S.W.3d 616, 618 (Tex. 2020).

22. *Id.*

23. *Id.*

24. *Id.*

25. *See id.* at 620.

26. *Id.*

27. *Id.* at 622–25 (citing and analyzing TEX. LOC. GOV’T CODE ANN. §§ 271.151–271.154).

28. *Id.* at 626–28 (reasoning that “[b]ecause immunity bears on the trial court’s jurisdiction to stay or compel arbitration, and to enforce an arbitration award in a judgment against a local government, . . . [a]n agreement to arbitrate is unenforceable against a local government to the extent it purports to submit immunity questions to an arbitrator.”).

29. *Id.* at 628–29 (noting that “services” under Section 271.151(2)(A) of the Texas Local Government Code is “broad enough to encompass a wide array of activities . . . performed for the benefit of another” but that “[C]hapter 271 does not apply to a contract that provides only an indirect, attenuated benefit to the local government.”) (internal quotations and citations omitted).

30. *Id.* at 630–31.

31. *Id.* at 629–30.

32. *Id.* at 630.

contractor impermissibly sought consequential damages,<sup>33</sup> reasoning that the contractor's claims could reasonably be characterized as "direct damages for amounts it alleges are 'due and owed by the local governmental entity under the contract,'" and thus held the local entity's immunity was waived for the contractor's claims under Chapter 271.<sup>34</sup>

The Texas Supreme Court addressed extensions of immunity to private actors in two cases this Survey period. In *Nettles v. GTECH Corp.*, the Texas Supreme Court applied, but did not explicitly adopt, a "derivative sovereign immunity" doctrine allowing a private contractor to claim immunity to the extent its complained-of conduct was controlled by a governmental entity.<sup>35</sup> The plaintiffs there sued a contractor for the Texas Lottery Commission for fraud, as well as for conspiring with and aiding and abetting the commission's fraud, relating to an allegedly misleading scratch-off game.<sup>36</sup> Applying a "control-based standard,"<sup>37</sup> the supreme court concluded that the contractor did not qualify for "derivative immunity" with respect to the fraud claim but was immune from the conspiracy and aiding and abetting claims.<sup>38</sup> As to the fraud claim, the supreme court emphasized that the contractor was "contractually obligated to design the tickets," including the "game specifications and instructions," and the commission did not instruct the contractor regarding the allegedly misleading wording of those instructions.<sup>39</sup> In contrast, the supreme court found the conspiracy and aiding and abetting claims were "wholly derivative of an alleged underlying fraud by the Commission alone" in printing and distributing the game tickets.<sup>40</sup> According to the supreme court, "[t]he record show[ed] that the Commission specified the manner in which [the contractor] was to print and distribute the tickets . . . including packaging, delivery vehicles, and delivery location," and the contractor was obligated to strictly conform to the commission's specifications.<sup>41</sup> Because the plaintiffs' derivative claims against the contractor necessarily

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33. See TEX. LOC. GOV'T CODE ANN. § 271.153 (limiting recovery under Chapter 271 to specified elements of direct damages, "reasonable and necessary attorneys' fees," and "interest as allowed by law").

34. *San Antonio River Auth.*, 601 S.W.3d at 631.

35. *Nettles v. GTECH Corp.*, 606 S.W.3d 726, 732 (Tex. 2020); compare *id.* (noting the parties did not brief, and the supreme court was not deciding, "whether we should recognize a doctrine of derivative sovereign immunity for contractors, or if so, what standard we should adopt for determining the scope of that immunity"), with *id.* at 740 (Boyd, J., concurring in part and dissenting in part) (criticizing the majority for its avoidance of these questions and arguing the supreme court should "eliminate the uncertainty and decide" them "[f]or the sake of other government contractors and those with claims against them—not to mention the trial and appellate courts that must resolve those claims").

36. *Nettles*, 606 S.W.3d at 729.

37. *Id.* at 732 n.3 (explaining that this "control-based standard is similar to the test for distinguishing between independent contractors and employees[,] which asks: "(1) did the government tell the contractor what to do and how to do it (as opposed to the contractor having 'some discretion in performing the contract'); and if so, (2) did the contractor do as it was told?").

38. *Id.* at 739.

39. *Id.* at 736–37.

40. *Id.* at 738.

41. *Id.* at 739.

implicated the commission's "underlying decisions," the supreme court held the contractor was entitled to immunity.<sup>42</sup>

In the second case, *University of the Incarnate Word v. Redus*, the Texas Supreme Court refused to extend sovereign immunity to a private university employing a campus peace officer that fatally shot a student "following a traffic stop."<sup>43</sup> When the student's parents sued the university for wrongful death, claiming it negligently hired, trained, supervised, and retained the officer, the university asserted sovereign immunity for its law-enforcement activities undertaken pursuant to authorization under the Texas Education Code.<sup>44</sup> As framed by the supreme court, the question presented was "whether sovereign immunity extends to a private university because the legislature has authorized it to enforce state and local law through commissioned peace officers."<sup>45</sup> The supreme court concluded it did not for two reasons.<sup>46</sup> First, considering the governmental control-based test, the supreme court found "[t]hat [state] control is absent" with regard to the university's police force.<sup>47</sup> Specifically, the state "d[id] not fund the University's police department," "set the department's policies, procedures, or protocols," hire or fire its officers, or otherwise exercise any responsibility for its "day-to-day operations and decision making."<sup>48</sup> Second, the supreme court found that extending immunity to the university would not serve the "modern-day" purposes of the doctrine, namely preserving separation of power and avoiding depletion of the public treasury.<sup>49</sup>

### III. SERVICE OF PROCESS

*Spanton v. Bellah* involved a restricted appeal following the entry of a default judgment.<sup>50</sup> The trial court granted a motion to authorize "substitute service by first class and certified mail," along with "attaching a copy of the citation and petition to the gate" of a "specified house number on 'Heathers Hill.'"<sup>51</sup> The petition, citation, return of service, and motion for default judgment, however, all identified the defendants' address as on "Heather Hills."<sup>52</sup> The Third Austin Court of Appeals held this minor discrepancy did not invalidate service and upheld the default judgment.<sup>53</sup>

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42. *Id.*

43. *Univ. of the Incarnate Word v. Redus*, 602 S.W.3d 398, 401–02 (Tex. 2020).

44. *Id.* at 402. In particular, the supreme court noted that legislature authorized "private universities to commission and employ peace officers," which have "official immunity . . . from which the University may derivatively benefit." *Id.* at 401–02 (citing TEX. EDUC. CODE § 51.212(b) among other authorities).

45. *Id.* at 404.

46. *Id.* at 406–11.

47. *Id.* at 408.

48. *Id.* at 407.

49. *Id.* at 409.

50. *Spanton v. Bellah*, 612 S.W.3d 314, 315 (Tex. 2020) (per curiam).

51. *Id.*

52. *Id.* at 315–16.

53. *Id.* at 315.

The Texas Supreme Court disagreed.<sup>54</sup> The supreme court noted that it has long held that upholding a no-answer default judgment requires “strict compliance” with the applicable requirements.<sup>55</sup> Although a discrepancy of this nature may be overlooked where a substituted service order authorizes service upon the defendant wherever she may be found and personal service is actually effectuated, “discrepancies in the defendant’s name or address” are not otherwise trivial and preclude any “presumption of proper substitute service.”<sup>56</sup> Accordingly, the supreme court vacated the default judgment and remanded the case to the trial court.<sup>57</sup>

#### IV. VENUE

The Texas Supreme Court took on the “recurrent and perplexing procedural issue” of how to reconcile “conflicting mandatory venue provisions” in *In re Fox River Real Estate Holdings, Inc.*<sup>58</sup> The conflicting provisions of the Texas Civil Practice and Remedies Code in question were § 15.020, which allows parties to a “major transaction” to contractually agree to a venue for disputes,<sup>59</sup> and § 65.023(a), which provides for mandatory venue in the county where the defendant resides in injunction cases.<sup>60</sup> While the venue-selection clause in the parties’ contract specified Harris County, the plaintiff sued in the county where the defendants were domiciled.<sup>61</sup> The trial court granted a motion to transfer to Harris County, and the Fourteenth Houston Court of Appeals denied a petition for writ of mandamus.<sup>62</sup>

The supreme court noted that § 15.020 specifically provides that a contractual venue agreement falling within its scope must be enforced regardless of any other provision of Title II of the Texas Civil Practice and Remedies Code.<sup>63</sup> Because § 65.023(a) is not found in Title II, however, § 15.020 does not supersede the mandatory venue provision for injunction suits.<sup>64</sup> The supreme court thus turned to an analysis of whether venue was proper in the original county of suit based on the latter statute. The supreme court explained that “[S]ection 65.023(a) is operative only when a plaintiff’s pleadings in the underlying suit establish the relief sought is ‘purely or primarily injunctive.’”<sup>65</sup> After examining the substance of the plaintiff’s claims for relief, the supreme court concluded that

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54. *Id.*

55. *Id.* at 316.

56. *Id.* at 317.

57. *Id.* at 318.

58. 596 S.W.3d 759, 761 (Tex. 2020) (orig. proceeding).

59. See TEX. CIV. PRAC. & REM. CODE ANN. § 15.020.

60. *In re Fox River*, 596 S.W.3d at 761; see TEX. CIV. PRAC. & REM. CODE ANN. § 65.023(a).

61. *In re Fox River*, 596 S.W.3d at 761–62.

62. *Id.* at 762.

63. *Id.* at 763–64.

64. *Id.* at 764. As the supreme court put it, § 15.020 is not a “super mandatory” venue provision that controls beyond the express language of its provisions. *Id.*

65. *Id.* at 765 (quoting *In re Cont’l Airlines, Inc.*, 988 S.W.2d 733, 736 (Tex. 1998)).



injunctive relief was “not the dominant purpose or central focus” of the case.<sup>66</sup> Accordingly, the parties’ venue selection clause controlled, and the trial court did not abuse its discretion in transferring the case to Harris County.<sup>67</sup>

## V. DISCOVERY

On December 23, 2020, the Texas Supreme Court approved amendments to Rules of Civil Procedure 47, 99, 169, 190, 192, 193, 194, 195, 196, 197, and 198.<sup>68</sup> These amendments apply to cases filed on or after January 1, 2021, except for those cases filed in justice court.<sup>69</sup>

Rule 169 governs expedited actions, and the amendments to this rule increased the amount-in-controversy limits for such actions from \$100,000.00 to \$250,000.00, excluding interest, statutory or punitive damages and penalties, and attorney’s fees and costs.<sup>70</sup> Correspondingly, Rule 190 was amended to provide that in Level 1 actions, which include expedited actions and divorces involving \$250,000.00 or less, the discovery period begins when the first initial disclosures are due and continues for 180 days thereafter, and the total deposition time for each party is increased from six hours to twenty hours.<sup>71</sup> Likewise, in Level 2 actions, the discovery period is now triggered by the first due date for initial disclosures, not the filing of suit.<sup>72</sup>

Several amendments were made to the Rule 194 disclosure process to bring it more in line with the automatic disclosure requirements in Federal Rule of Civil Procedure 26(a). Now the parties must, in the absence of an agreement or court order to the contrary, automatically disclose certain information and documents without awaiting a request for disclosures.<sup>73</sup> For example, within thirty days after the filing of the first answer or general appearance, a party must disclose the information required by Rule 194.2(b),<sup>74</sup> which includes all of the information required in the pre-amendment version of this rule except for information regarding testify-

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66. *Id.*

67. *Id.* at 768.

68. Tex. Sup. Ct. Misc. Docket No. 20-9153 (Dec. 23, 2020). Section 22.004(h-1) of the Texas Government Code charged the supreme court with adopting “rules to promote the prompt, efficient, and cost-effective resolution of civil actions filed in county courts at law in which the amount in controversy does not exceed \$250,000.” TEX. GOV’T CODE ANN. § 22.004(h-1). The comment to the amendment of Rule 169, however, provides that such rule is not limited to actions filed in county courts at law. TEX. R. CIV. P. 169 cmt. to 2021 amendment.

69. Tex. Sup. Misc. Docket No. 20-9153.

70. TEX. R. CIV. P. 169.

71. *Id.* at 190.2(b)(1)–(2).

72. *Id.* at 190.3(b)(1).

73. *Id.* at 194.1(a). These requirements do not apply to: (1) actions for review on an administrative record; (2) forfeiture actions arising from a state statute; (3) a petition for habeas corpus; (4) selected actions under the Family Code; (5) other actions involving domestic violence; or (6) appeals from a justice court. *Id.* at 194.2(a), (d).

74. *Id.* at 194.2(b). Rule 194.2(c) details the information that must be disclosed in certain actions under the Family Code. *Id.* at 194.2(c).

ing experts.<sup>75</sup> Rule 194.2(b)(6) includes a new requirement requiring a party to produce or describe by category and location “all documents, electronically stored information, and tangible things” that the party “may use to support its claims or defenses, unless the use would be solely for impeachment.”<sup>76</sup>

In turn, the amendments to Rule 193.3 permit privilege assertions regarding information that would otherwise be subject to required disclosure,<sup>77</sup> although objections or assertions of work product still are not permitted.<sup>78</sup> Moreover, Rule 192.2 prohibits, in the absence of an agreement by the parties or a court order, the service of discovery on a party until after such party’s initial disclosures are due.<sup>79</sup>

Akin to the requirements for pretrial disclosures set forth in Federal Rule of Civil Procedure 26(a)(3), Rule 194.4 requires a party to disclose, at least thirty days before trial, a list of the names and contact information for the witnesses the party expects to present at trial, as well as those it may call if the need arises, along with a list of each document or other exhibit (including summaries) the party expects to offer and may offer if the need arises.<sup>80</sup>

Rule 195 governs discovery regarding testifying experts, and it requires the automatic disclosure of the information formerly listed in Rule 194.2(f), along with additional information regarding the expert’s qualifications (including a listing of all publications authored in the last ten years, a listing of the cases in which the expert has testified in the last four years, and a statement of the compensation to be paid to the expert).<sup>81</sup> The disclosures regarding testifying experts are due ninety days before the end of the discovery period for parties seeking affirmative relief and sixty days before the end of the discovery period for all other experts.<sup>82</sup> Rule 195 also includes new provisions, which were borrowed from Federal Rule of Civil Procedure 26(b)(4)(B) and (C), exempting from discovery certain communications between a party’s attorney and its testifying experts, draft expert reports, and draft expert disclosures.<sup>83</sup>

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75. *See id.* at 194.2(a)–(b). The amendment to Rule 99(b) requires that citations “notify the defendant that the defendant may be required to make initial disclosures.” *Id.* at 99(b).

76. *Id.* at 194.2(b)(6). If a party does not produce its documents and other materials with its response, the response must include a reasonable time and method for the party’s production of those items. *Id.* at 194.1(b).

77. *Id.* at 193.3(a).

78. *Id.* at 194.5.

79. *Id.* at 192.2(a). In light of this change, Rules 196.2(a), 196.7(c)(1), 197.2(a), and 198.2(a) were all amended to delete the provisions giving a defendant fifty days to respond to discovery requests that the plaintiff served prior to the due date for the defendant’s answer. *See id.* at 196.2(a), 196.7(c)(1), 197.2(a), 198.2(a).

80. *Id.* at 194.4(a)–(b). These requirements do not apply to certain actions under the Family Code, although a court may order the parties in such actions to make these disclosures. *Id.* at 194.4(c).

81. *Id.* at 195.5(a)(4). These three new requirements are based on Federal Rule of Civil Procedure 26(a)(2)(B). *Id.* at 195.5 cmt. to 2021 amendment.

82. *Id.* at 195.2.

83. *Id.* at 195.5(c)–(d).

Beyond the foregoing rule amendments, the Texas Supreme Court addressed other discovery issues in the Survey period. The intersection of the statutory requirements for the delivery of an expert report and the deadline in the scheduling order for the service of expert reports was at issue in *Shinogle v. Whitlock*.<sup>84</sup> The plaintiff customer presented his rifle to the defendant safety officer for a pre-entrance safety inspection at the defendant gun range, and while the gun was in the safety officer's possession, the gun discharged, resulting in injuries to the customer.<sup>85</sup> The trial court entered an agreed Level 3 scheduling order that established a deadline for the designation of affirmative relief experts.<sup>86</sup> Over ninety days after the filing of suit, the defendants moved to dismiss the action based on the customer's failure to comply with § 128.053 of the Texas Civil Practice and Remedies Code, which requires a plaintiff suing a gun range to serve an expert report on each party within ninety days of the filing of suit unless that deadline is "extended by written agreement of the affected parties."<sup>87</sup> The trial court agreed with the customer that the agreed scheduling order constituted the requisite "written agreement" but also granted the defendants' request for a permissive interlocutory appeal.<sup>88</sup>

The Second Fort Worth Court of Appeals accepted the appeal and reversed, finding that the agreed scheduling order, which did not specifically reference § 128.053, did not serve to extend the statutory deadline.<sup>89</sup> The customer sought review from the Texas Supreme Court, which affirmed the appellate court's ruling on this issue.<sup>90</sup> Although it had not previously addressed the contours of § 128.053, the supreme court noted that it had addressed comparable expert-report requirements in § 74.351 and § 150.002 of the Texas Civil Practice and Remedies Code, and each time it found that the written agreement had to specifically reference and agree to extend the applicable statutory deadline.<sup>91</sup> The agreed scheduling order at issue neither referenced § 128.053 nor provided for an extension of the ninety-day deadline, so the supreme court affirmed the dismissal of the customer's claims against the range.<sup>92</sup>

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84. 596 S.W.3d 772, 774 (Tex. 2020) (per curiam).

85. *Id.*

86. *Id.*

87. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 128.053).

88. *Id.* at 775 (citing TEX. CIV. PRAC. & REM. CODE § 51.014(d)).

89. *Alpine Indus., Inc. v. Whitlock*, 554 S.W.3d 174, 187 (Tex. App.—Fort Worth 2018, pet. granted), *aff'd in part, rev'd in part*, 596 S.W.3d 772, 778 (Tex. 2020). The court of appeals thus dismissed all of the customer's claims against the range but allowed the claims against the safety officer to proceed based on its determination that Section 128.053(b)(2) did not apply to a range's employees. *Id.* at 187–88.

90. *Shinogle*, 596 S.W.3d at 775.

91. *See id.* at 776 (citing *Crosstex Energy Servs., LP v. Pro Plus, Inc.*, 430 S.W.3d 384, 395 (Tex. 2014); *Spectrum Healthcare Res., Inc., v. McDaniel*, 306 S.W.3d 249, 249 (Tex. 2010)).

92. *Id.* The supreme court then found that the safety officer was, as an implicated defendant in the customer's action against the range, entitled to dismissal due to the customer's failure to serve him with an expert report within ninety days of the filing of suit. *Id.* at 777–78.

In *In re Turner*, the Texas Supreme Court addressed the availability of discovery from a nonparty medical provider who had not yet been served with an expert report.<sup>93</sup> The plaintiff filed suit on her child's behalf against the hospital where the child was born, and the hospital did not challenge the sufficiency of the expert report she submitted.<sup>94</sup> Discovery proceeded and included the depositions of some of the nurse-employees who were present at the delivery.<sup>95</sup> The plaintiff also sought to depose her treating physician, who was not an employee of the hospital, but he refused to be deposed unless she agreed not to sue him.<sup>96</sup> The trial court denied the doctor's motion to quash and ordered him to produce the bulk of the documents the plaintiff sought,<sup>97</sup> but the Fifth Dallas Court of Appeals conditionally granted mandamus relief prohibiting his deposition until he had been served with an expert report.<sup>98</sup>

The plaintiff sought mandamus relief from the supreme court, which ruled that the deposition of the doctor could proceed.<sup>99</sup> As part of its analysis, the supreme court addressed in some detail its *In re Jorden* decision, in which it held that the discovery stay in the Medical Liability Act applied to pre-suit depositions sought under Texas Rule of Civil Procedure 202.<sup>100</sup> The supreme court found that even though the nonparty exception in § 74.351(s)(3) did not apply when discovery was sought from a potential healthcare liability provider defendant who had not received an expert report,<sup>101</sup> the plaintiff was nonetheless entitled to depose the treating physician because she had a pending claim against the hospital provider, which she had served with an appropriate expert report.<sup>102</sup> As such, there was no need to address the exceptions in § 74.351(s) because discovery "in" the plaintiff's claim against the hospital was not stayed.<sup>103</sup> The supreme court noted that the deposition of the treating physician would likely reveal relevant information regarding the plaintiff's claim against the hospital, but it prohibited her counsel from engaging in a "fishing expedition" by seeking information that did not focus on what

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93. *In re Turner*, 591 S.W.3d 121, 122 (Tex. 2019) (orig. proceeding).

94. *Id.*

95. *Id.*

96. *Id.* at 123. At the same time, the hospital opposed the plaintiff's motion to extend the joinder deadline on the ground that the depositions of nonparty providers who had not yet been served with an expert report constituted pre-suit depositions that are prohibited under the Texas Medical Liability Act. *Id.* at 122–23; see TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(s) (providing that, pending service of the required expert report, "all discovery in a health care liability claim is stayed," except for "written discovery as defined in Rule 192.7," "depositions on written questions under Rule 200," and "discovery from nonparties under Rule 205").

97. *In re Turner*, 591 S.W.3d at 123–24.

98. *In re Sandate*, 544 S.W.3d 9, 14 (Tex. App.—Dallas 2017, orig. proceeding), *mand. granted sub nom.*

99. *In re Turner*, 591 S.W.3d at 127.

100. *Id.* at 125–26 (citing *In re Jorden*, 249 S.W.3d 416, 418 (Tex. 2008)).

101. Because the plaintiff's treating physician was "directly threatened" by a potential healthcare liability suit, discovery was stayed on any claim against him without an expert report under the general rule and he was not a nonparty falling within the exception. *Id.*

102. *Id.* at 126.

103. *Id.*

the hospital's employees did and why they did it.<sup>104</sup>

## VI. DISMISSAL

In *Bethel v. Quilling*, the Texas Supreme Court faced the issue of whether an affirmative defense may serve as the basis for a motion to dismiss under Texas Rule of Civil Procedure 91(a).<sup>105</sup> The attorney defendants in that case had represented the defendant in a wrongful death case and were later sued by the plaintiff, who alleged they had intentionally destroyed key evidence in the original case.<sup>106</sup> The lawyers moved to dismiss under Rule 91(a), arguing they were entitled to attorney immunity.<sup>107</sup> The trial court granted the motion and the Fifth Dallas Court of Appeals affirmed.<sup>108</sup> The plaintiff argued this was error because, in ruling on a Rule 91(a) motion, a trial court is limited to the allegations of the plaintiff's petition and may not, therefore, consider the defendant's pleading of an affirmative defense.<sup>109</sup>

The supreme court disagreed.<sup>110</sup> Although Rule 91(a) states the motion must be decided "based solely on the pleading of the cause of action,"<sup>111</sup> the supreme court recognized that does not mean, as the plaintiff argued, that a trial court is prohibited "from considering *anything* other than the plaintiff's pleading."<sup>112</sup> For example, the trial court may of course consider the motion itself, as well as the response and the arguments of counsel at any hearing on the motion.<sup>113</sup> The rule could not, therefore, be read as literally as the plaintiff urged. Instead, the supreme court concluded that "Rule 91(a) limits the scope of a court's factual, but not legal, inquiry."<sup>114</sup> The trial court must take the plaintiff's factual allegations as true, but is not prohibited from considering any legal arguments the defendant may advance to demonstrate the plaintiff cannot recover based upon those allegations.<sup>115</sup> Thus, a Rule 91(a) motion may be granted based on an affirmative defense if that defense is conclusively established by the facts as alleged in the plaintiff's petition.<sup>116</sup> Taking the plaintiff's allegations in *Bethel* as true, the supreme court held that the trial court could properly determine that attorney immunity barred the

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104. *Id.* at 126–27. The supreme court left it to the trial court to decide, based on the supreme court's guidance, disagreements over the questions posed at the deposition and the scope of the treating physician's document production. *Id.* at 127.

105. *Bethel v. Quilling*, 595 S.W.3d 651, 653 (Tex. 2020).

106. *Id.* at 653–54.

107. *Id.* at 654.

108. *Id.*

109. *Id.*

110. *Id.*

111. TEX. R. CIV. P. 91(a).

112. *See Bethel*, 595 S.W.3d at 655.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 656.

suit.<sup>117</sup>

*In re Panchakarla* raised the question of whether a trial court can vacate a prior order granting a motion to dismiss under the Texas Citizens Participation Act (TCPA).<sup>118</sup> The TCPA establishes a deadline of thirty days from the hearing date for a trial court to rule on a motion to dismiss, after which it will be considered to have been denied by operation of law.<sup>119</sup> In this case, the trial court first granted the TCPA motion and then vacated the dismissal order during the period it retained plenary power but did so more than thirty days after the hearing on the motion.<sup>120</sup> The Texas Supreme Court rejected the defendant's argument that the trial judge was prohibited from entering this latter order, noting that nothing in the text of the TCPA restrained the authority of trial courts "to reconsider either a timely issued ruling granting a TCPA motion to dismiss or a timely order denying such a motion when no interlocutory appeal is pending."<sup>121</sup> Thus, the supreme court would not "judicially amend" the statute to add language not contained therein.<sup>122</sup>

## VII. SUMMARY JUDGMENT

In *Fleming v. Wilson*, the Texas Supreme Court held a trial court did not abuse its discretion in considering uncertified court records as competent evidence in deciding a summary judgment motion.<sup>123</sup> The documents at issue were the uncertified verdict and final judgment from a test trial of six of the 4,000 client-plaintiffs' claims against their former attorney and law firm for alleged overcharges in the "fen-phen" products liability litigation.<sup>124</sup> After the client-plaintiffs lost the test trial, the attorneys moved for traditional summary judgment on the remaining client-plaintiffs' claims on issue preclusion, release, and waiver grounds, attaching as evidence copies of the test-trial verdict and judgment. The attorneys did not submit an affidavit or otherwise "aver that the copies were 'true and correct,'" but the documents bore an "Unofficial Copy" watermark and "the clerk's typical file stamp."<sup>125</sup> The trial court judge, who had also presided over the test trial, overruled the client-plaintiffs' objections to the documents and granted the attorneys' summary judgment.<sup>126</sup> The Fourteenth Houston Court of Appeals reversed, holding the uncertified test-trial

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117. *Id.*; cf. *S. Cal. Sunbelt Devs., Inc. v. Grammer*, No. 03-19-00192-CV, 2019 WL 7342249, at \*16 (Tex. App.—Austin Dec. 31, 2019, pet. denied) (mem. op.) (plaintiffs' amended petition did not establish affirmative defenses of statute of limitations and release for purposes of Rule 91(a) motion).

118. *In re Panchakarla*, 602 S.W.3d 536, 538 (Tex. 2020) (per curiam) (orig. proceeding).

119. TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.005(a), 27.008(a).

120. *In re Panchakarla*, 602 S.W.3d at 538–39.

121. *Id.* at 540.

122. *Id.* at 540–41.

123. *Fleming v. Wilson*, 610 S.W.3d 18, 22 (Tex. 2020) (per curiam).

124. *Id.* at 19.

125. *Id.*

126. *Id.*

records were not competent summary judgment evidence.<sup>127</sup> The supreme court disagreed and held the trial court properly could have found the test-trial records authenticated under Texas Rules of Evidence 901(b)(4)<sup>128</sup> or 901(b)(7),<sup>129</sup> thereby making them competent summary judgment evidence under Texas Rule of Civil Procedure 166(a)(c).<sup>130</sup> The supreme court emphasized that authentication under Rule 901 is not “open-and-shut,” and trial courts should “evaluate the evidence that supports the item’s authenticity—whether found within the item itself or provided by an extrinsic source,” to evaluate whether the item is what the proponent claims.<sup>131</sup>

In *B.C. v. Steak N Shake Operations, Inc.*, the Texas Supreme Court addressed whether a summary judgment order recital that the trial court had considered “the pleadings, evidence, and arguments of counsel” was sufficient to overcome the presumption that a late-filed response and evidence was not considered.<sup>132</sup> In this employee’s sexual assault case against her employer, the employer moved for traditional and no-evidence summary judgment, which the trial court granted in a summary judgment order containing the foregoing recital. On appeal, the issue presented was whether the trial court had considered the employee’s untimely response and evidence in granting the employer’s motion.<sup>133</sup> The supreme court began with Rule 166(a)(c)<sup>134</sup> and explained if the record does not indicate the trial court granted leave for the late filing, the presumption is the untimely response or evidence was not considered.<sup>135</sup> The supreme court counseled that courts “should examine whether the record ‘affirmatively indicates’ the late-filed response was ‘accepted or consid-

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127. *Id.*

128. *Id.* at 20–21. According to the supreme court, subsection (b)(4) does not require extrinsic evidence to authenticate a document; instead, a proponent may rely on “the ‘appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances’ may ‘satisf[y] the [authentication] requirement.” *Id.* at 20 (quoting TEX. R. EVID. 901(b)(4)). With respect to the test-trial records, the supreme court had no trouble concluding the trial judge was well within his discretion to find the documents authentic considering that he “had himself received and signed [them in the test trial] case.” *Id.*

129. *Id.* The supreme court concluded that the watermark and file stamp on the test-trial records were enough to authenticate the documents under subsection (b)(7), which provides “public documents may be authenticated by evidence that they were ‘recorded or filed in a public office as authorized by law’ or are ‘from the office where items of this kind are kept.’” *Id.* (quoting TEX. R. EVID. 901(b)(7)).

130. *Id.* at 21. The supreme court reasoned the attorneys submitted the test-trial records as copies of public records that must only be “authenticated or certified.” *Id.* at 22 (citing and quoting TEX. R. CIV. P. 166(a)(c)). Because the trial court found the records authentic, Rule 166(a)(c) “permitted the court to consider the documents in deciding the summary judgment motion.” *Id.*

131. *Id.*

132. *B.C. v. Steak N Shake Operations, Inc.*, 598 S.W.3d 256, 257 (Tex. 2020) (per curiam).

133. *Id.* at 259.

134. TEX. R. CIV. P. 166(a)(c) provides “[e]xcept on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response.”

135. *Steak N Shake*, 598 S.W.3d at 259.

ered,”<sup>136</sup> which indication may be “a separate order, a recital in the summary judgment, or an oral ruling contained in the reporter’s record.”<sup>137</sup> Considering the recital at issue, the supreme court held the trial court’s unqualified, general statement it considered the “evidence and arguments of counsel” constituted an “affirmative indication” that the employee’s response and evidence was considered.<sup>138</sup> This recital was enough to overcome the presumption otherwise, especially when, as here, the employer had objected to the timeliness of the employee’s evidence but “neither sought nor obtained a ruling on that objection before or after” the summary judgment order.<sup>139</sup>

Finally, in *Town of Shady Shores v. Swanson*, the Texas Supreme Court disagreed with numerous courts of appeals and held that a no-evidence motion for summary judgment may be used to raise immunity challenges to subject matter jurisdiction.<sup>140</sup> In doing so, the supreme court reasoned that it had long held jurisdictional challenges based on immunity could be made by a traditional summary judgment motion under Rule 166(a)(c).<sup>141</sup> The supreme court could “see no reason” to foreclose the same challenges “via no-evidence motions” under Rule 166(a)(i).<sup>142</sup> While the “two vehicles place different initial burdens on the movant,” the supreme court rejected lower courts’ characterization of the nonmovant’s burden under the no-evidence procedure.<sup>143</sup> Rather than requiring the nonmovant to “marshal” its evidence or “prove up its case” to defeat the motion, the nonmovant needed only “to produce enough evidence . . . to create a genuine issue of material fact as to the challenged element.”<sup>144</sup> The supreme court emphasized that no-evidence motions could only be brought “[a]fter adequate time for discovery.”<sup>145</sup> That timing difference, according to the supreme court, provided nonmovants responding to a no-evidence motion “an important degree of protection.”<sup>146</sup> The supreme court concluded that the Second Fort Worth Court of Appeals therefore “erred in refusing to review the trial court’s denial” of a no-evidence motion “challenging jurisdiction on the basis of governmental immunity.”<sup>147</sup>

## VIII. JURY CHARGE

The need for unanimity in a jury verdict in a civil-commitment pro-

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136. *Id.* at 260 (quoting *Stephens v. Dolcefino*, 126 S.W.3d 120, 133 (Tex. App.—Houston [1st Dist.] 2003, pet. denied)).

137. *Id.* at 259–60 (quoting *Alphaville Ventures, Inc. v. First Bank*, 429 S.W.3d 150, 154 (Tex. App.—Houston [14th Dist.] 2014, no pet.)).

138. *Id.* at 261.

139. *Id.* at 262.

140. *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 550 (Tex. 2019).

141. *Id.* (citing *State v. Lueck*, 290 S.W.3d 876, 884 (Tex. 2009)).

142. *Id.* at 551.

143. *Id.*

144. *Id.* at 551–52.

145. *Id.* at 552.

146. *Id.*

147. *Id.*



ceeding was the subject of *In re Commitment of Jones*.<sup>148</sup> The State filed suit to designate the defendant as a sexually violent predator under Chapter 841 of the Texas Health and Safety Code, which requires a unanimous jury verdict for such a designation.<sup>149</sup> The code also provides, however, that civil-commitment trials under Chapter 841 are generally governed by the Texas Rules of Civil Procedure, which permit verdicts based on the agreement of ten of the twelve jurors,<sup>150</sup> with the code controlling in the event of a conflict.<sup>151</sup> The defendant requested an instruction that a unanimous verdict was required to find him a sexually violent predator but that only ten of the twelve votes were required to find he was not. The trial court did not submit that instruction and instead told the jury that unanimity was required for either answer.<sup>152</sup> The jury unanimously found in the State's favor,<sup>153</sup> but the Second Fort Worth Court of Appeals reversed, finding error in the trial court's refusal to submit the defendant's requested instruction.<sup>154</sup>

The State sought review from the Texas Supreme Court and contended it would be "unprecedented" to require varying numbers of jurors on each side of the same issue.<sup>155</sup> The supreme court disagreed, noting that asymmetry existed with respect to an award of exemplary damages, which requires unanimity for a finding of malice or gross negligence but only ten jurors to make the opposite finding.<sup>156</sup> The supreme court thus found the trial court erred in not submitting the defendant's proposed instruction.<sup>157</sup>

The supreme court then addressed whether the trial court's refusal to include this instruction was harmful under Texas Rule of Appellate Procedure 44.1(a), which requires that the complained-of error either "probably caused the rendition of an improper judgment" or "probably prevented the appellant from properly presenting the case to the court of appeals."<sup>158</sup> Although the supreme court was unclear on which standard the court of appeals and the parties were invoking, it concluded that the jury's unanimous verdict meant that the trial court's failure to submit the requested instruction did not affect the verdict.<sup>159</sup> The supreme court thus reversed and remanded the case to the court of appeals for consideration of the defendant's other appellate complaints.<sup>160</sup>

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148. *In re Commitment of Jones*, 602 S.W.3d 908, 910 (Tex. 2020) (per curiam).

149. *Id.* at 910, 912 (citing TEX. HEALTH & SAFETY CODE ANN. § 841.062(b)).

150. *Id.* at 911–12 (citing TEX. R. CIV. P. 292(a)).

151. *Id.* at 911 (citing TEX. HEALTH & SAFETY CODE § 841.146(b)).

152. *Id.*

153. *Id.*

154. *In re Commitment of Jones*, 571 S.W.3d 880, 881 (Tex. App.—Fort Worth 2019, pet. granted), *rev'd*, 602 S.W.3d 908, 910 (Tex. 2020).

155. *In re Commitment of Jones*, 602 S.W.3d at 912.

156. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(d)–(e), TEX. R. CIV. P. 226(a)).

157. *Id.* at 913.

158. *Id.* (quoting TEX. R. APP. P. 44.1(a)).

159. *Id.* at 913–15.

160. *Id.* at 915.

In contrast, the Texas Supreme Court found harmful charge error in *Glenn v. Leal*.<sup>161</sup> In this healthcare liability case, the defendant-doctor contended that the “willful and wanton negligence” standard in § 74.153 of the Texas Civil Practice and Remedies Code applied to the provision of “emergency medical care . . . in a hospital’s obstetrical unit,” even though the patient had not been previously treated in the emergency department.<sup>162</sup> The trial court declined to submit the doctor’s requested jury questions on whether he provided “emergency medical care” and whether his “willful and wanton negligence” proximately caused the baby’s injury. Ultimately, the jury found he was negligent and awarded the plaintiffs \$2.7 million.<sup>163</sup> The trial court denied the doctor’s motions for directed verdict and judgment notwithstanding the verdict,<sup>164</sup> and the First Houston Court of Appeals affirmed.<sup>165</sup> The supreme court, however, reversed and remanded, finding that the lower courts’ interpretation of § 74.153 was incorrect, and the resulting harmful error in the jury charge required a new trial.<sup>166</sup>

## IX. JURY PRACTICE

The propriety of the trial court’s *Batson*<sup>167</sup> rulings was the subject of the majority and dissenting opinions in *United Rentals North America, Inc. v. Evans*.<sup>168</sup> In *Evans*, a tractor-trailer truck carrying an oversized load ran into a bridge, and a beam from the bridge landed on another car and killed the driver.<sup>169</sup> The driver’s mother and son filed suit and all of the defendants, except the rental company that owned the equipment being transported, either settled or were dismissed.<sup>170</sup> During voir dire, the trial court sustained the plaintiffs’ *Batson* challenge to the defendant’s striking of two black women and rejected the defendant’s challenges to the plaintiffs’ striking of five panelists, four of whom were white males.<sup>171</sup> After the trial court entered judgment in the plaintiffs’ favor based on the jury’s verdict, the defendant appealed and, among other complaints, challenged the trial court’s *Batson* rulings.<sup>172</sup>

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161. 596 S.W.3d 769, 772 (Tex. 2020) (per curiam).

162. *Id.* at 770.

163. *Id.* at 771.

164. *Id.*

165. *Glenn v. Leal*, 546 S.W.3d 807, 816 (Tex. App.—Houston [1st Dist.] 2018, pet. granted), *rev’d*, 596 S.W.3d 769, 770 (Tex. 2020).

166. *Glenn*, 596 S.W.3d at 772.

167. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (finding that a criminal defendant is denied equal protection when panelists are excluded solely on the basis that they are of the same race as the defendant); *see also Powers v. Palacios*, 813 S.W.2d 489, 491 (Tex. 1991) (per curiam) (holding “that equal protection is denied when race is a factor in counsel’s exercise of a peremptory challenge to a prospective juror”).

168. *See generally* 608 S.W.3d 449, 456 (Tex. App.—Dallas 2020, pet. filed).

169. *Id.*

170. *Id.*

171. *Id.* at 460.

172. *Id.* at 456.

According to the Fifth Dallas Court of Appeals, after strikes for cause and by agreement were taken into account, the panelists in the “strike zone” included twelve men and fourteen women, and consisted of seven African-Americans, nine Hispanics, one Asian-American, and nine whites.<sup>173</sup> The plaintiffs struck five men, four of whom were white; whereas, the defendants, who collectively had nine strikes, struck five black women, one of whom was outside the “strike zone.”<sup>174</sup> The plaintiffs accepted the explanation for one of the strikes but challenged the other four, and when the trial court ordered defendants to turn over their jury notes, they challenged the plaintiffs’ strikes as motivated by race and gender discrimination.<sup>175</sup> The trial court made copies of both sides’ jury notes but did not consider them; instead, it heard the parties’ evidence and granted only two of the plaintiffs’ challenges (to Juror Number 14, who joined the verdict, and to Juror Number 9, who did not).<sup>176</sup>

The court of appeals affirmed, finding that the trial court did not err in rejecting the explanation for the defense’s striking of Juror Number 9, which was based on her body language and other nonverbal conduct but was not supported by her on-the-record questioning.<sup>177</sup> The court of appeals also found that any error regarding the inclusion of Juror Number 9 was harmless under Rule of Appellate Procedure 44.1 because she did not join the verdict in the plaintiffs’ favor.<sup>178</sup> Then, the court of appeals rejected the defendant’s challenges, finding that a comparative analysis established that the trial court did not abuse its discretion in accepting the explanations offered by the plaintiffs for each of their strikes.<sup>179</sup>

As part of its analysis, the court of appeals found that plaintiffs’ counsel’s statement that they “know from our focus groups that the African-American female is the most favorable juror for this case for whatever reason” was not evidence of discriminatory animus because the statement was made in the context of rebutting the defendant’s explanation for one of its strikes.<sup>180</sup> In a lengthy dissent from the appellate court’s denial of en banc reconsideration, Justice Evans found that this statement indicated that the plaintiffs’ strikes of non-black males were motivated in large part by a desire to have as many black females on the panel as possible.<sup>181</sup>

The trial court’s striking of two potential jurors was at issue in *Wheeler v. San Miguel Electric Cooperative, Inc.*,<sup>182</sup> which arose out of disputes regarding the validity of a lease. During voir dire, one juror stated that her friendship with the plaintiffs would not impact her decision but that

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173. *Id.* at 475.

174. *Id.*

175. *Id.* at 475–76.

176. *Id.* at 476.

177. *Id.* at 478–79.

178. *Id.* at 479.

179. *See id.* at 481–85.

180. *Id.* at 480.

181. *Id.* at 485–87 (Evans, J., dissenting).

182. 610 S.W.3d 60, 70 (Tex. App.—San Antonio 2020, pet. denied).

her business relationship with one of the defendant's employees would affect her impartiality, although she would try to be impartial.<sup>183</sup> Another juror stated that she could decide the case based only on the evidence but admitted that she "got pretty angry and bitter" with, and had a bias against, the defendant.<sup>184</sup> Even though neither side requested it to do so, the trial court struck both potential jurors, and on appeal, the plaintiffs contended that they were improperly deprived of the opportunity to rehabilitate them.<sup>185</sup>

The Fourth San Antonio Court of Appeals disagreed and affirmed.<sup>186</sup> First, the court of appeals found that the plaintiffs had waived any complaint by failing to object at the time to the trial court's striking of the two jurors.<sup>187</sup> Second, the plaintiffs did not cite any authority prohibiting the trial court from sua sponte dismissing unqualified jurors, and the court of appeals noted that trial courts are obligated to dismiss them.<sup>188</sup> Third, even though there was some evidence the jurors could be fair, the court of appeals deferred to the trial court's determination and did not find an abuse of discretion in striking them.<sup>189</sup>

Allegations of improper jury argument were at issue in *Witt v. Michelin North America, Inc.*<sup>190</sup> This products liability action arose out of a fatal automobile accident, and during closing argument, counsel for the defendant-tire-manufacturer stated that one of the plaintiffs' arguments was "dishonest as the day is long."<sup>191</sup> The plaintiffs did not object to this statement when it was made, but they alleged in their motion for new trial, which the trial court denied, that it was "improper and incurable."<sup>192</sup> On appeal, the Second Fort Worth Court of Appeals noted the general rule that a complaint about improper jury argument requires a "timely objection," a "request for an instruction" that the jury disregard the challenged statement, and the securing of a "ruling on the objection."<sup>193</sup> The court of appeals also noted that these steps are not required if the improper argument is incurable, which entails a showing, on the record viewed as a whole, that the statement "was so extreme that a juror of ordinary intelligence could have been persuaded" to agree to a verdict to which he would not have otherwise agreed.<sup>194</sup> After analyzing several cases addressing whether jury argument was or was not incurable, the court of appeals found that in the context of a hotly contested two-week trial, the comment from the defendant's counsel was "not to be applauded" but

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183. *Id.*

184. *Id.*

185. *Id.* at 71.

186. *Id.*

187. *Id.* (citing TEX. R. APP. P. 33.1(a)(1)).

188. *Id.*

189. *Id.*

190. No. 02-18-00390-CV, 2020 WL 5415228, at \*7 (Tex. App.—Fort Worth Sept. 10, 2020, no pet. h.) (mem. op.).

191. *Id.* at \*7.

192. *Id.*

193. *Id.* (citing *Phillips v. Bramlett*, 288 S.W.3d 876, 883 (Tex. 2009)).

194. *Id.* (citing *Phillips*, 288 S.W.3d at 883).

did not cause incurable harm.<sup>195</sup>

## X. JUDGMENTS

Determining when a final judgment has been entered was once again at issue during the Survey period. *In re R.R.K.* arose out of a father's motion to modify a prior order establishing the possession and support obligations for a child.<sup>196</sup> Following a bench trial, the trial court issued a "memorandum" that contained bullet points setting out certain modifications to the prior order.<sup>197</sup> The memorandum also included "Mother Hubbard" language that any relief not expressly granted was denied.<sup>198</sup> Two days later, however, the father and mother entered into a Rule 11 agreement that noted an order was being drafted, and both subsequently submitted proposed orders to the trial court that incorporated the rulings set out in the memorandum, as well as other provisions required by the Texas Family Code.<sup>199</sup> Following a hearing, the trial court then entered a comprehensive fifty-one page order.<sup>200</sup> When the mother appealed that order, the Fifth Dallas Court of Appeals sua sponte raised the question of its jurisdiction and ultimately dismissed the appeal, holding that the trial judge's memorandum substantially complied with the requirements of a final judgment, and the mother's notice of appeal was thus untimely.<sup>201</sup>

The Texas Supreme Court reversed.<sup>202</sup> The supreme court first pointed out that the memorandum failed to include various provisions that the Family Code requires in final orders entered in suits affecting a parent-child relationship.<sup>203</sup> While those deficiencies were not dispositive as to finality,<sup>204</sup> the supreme court further explained the memorandum was insufficient under its own finality-of-judgments jurisprudence.<sup>205</sup> Specifically, the memorandum did not contain clear and unequivocal language demonstrating that it disposed of all claims and parties and was final.<sup>206</sup> And while a Mother Hubbard clause included in an order entered after a conventional trial on the merits may be indicative of finality, if there is any doubt about that issue, then an appellate court should review the entire record to determine if, in fact, a final order was intended.<sup>207</sup> In this case, the supreme court concluded the terms of the memorandum belied any argument that it was intended to be a final judgment because, in addition to the statutory requirements that were missing, the memorandum

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195. *See id.* at \*8.

196. *In re R.R.K.*, 590 S.W.3d 535, 538 (Tex. 2019).

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 544.

203. *Id.* at 542.

204. *Id.*

205. *See id.* at 543.

206. *Id.*

207. *Id.* at 541.

failed to fully address the issues of possession and support of the child.<sup>208</sup> Based on the entire record, therefore, the court of appeals erred in dismissing the mother's appeal as untimely.<sup>209</sup>

The distinction between setting the amount of a supersedeas bond when a judgment is for something other than money or an interest in property and calculating the loss or damage recoverable from a supersedeas bond was at issue in *Haedge v. Central Texas Cattlemen's Ass'n*.<sup>210</sup> There, a nonprofit corporation comprised of landowners, who enjoyed grazing rights on government property, cancelled the shares of a group of its members, who brought suit to challenge their ouster.<sup>211</sup> The members lost in the trial court and, after initially posting a \$2,500.00 supersedeas bond, were required by the Seventh Amarillo Court of Appeals to increase the bond to \$132,400.00, a sum that represented the cost to the members to secure alternative grazing rights for the anticipated two-year duration of the appeal.<sup>212</sup> The members' appeal was unsuccessful, and, on the association's motion for release of the supersedeas bond, the trial court held it was entitled to recover only \$7,000.00, which was the amount of dues one member failed to pay while the appeal was pending.<sup>213</sup> The court of appeals reversed, holding that, based upon its prior order establishing the amount of the supersedeas bond, the association should recover more than \$100,000.00.<sup>214</sup>

The Texas Supreme Court reversed and reinstated the trial court's order, explaining that the manner in which a supersedeas bond is calculated is different from, and insufficient by itself to prove, the actual loss or damage sustained by the appellee.<sup>215</sup> Specifically, in ordering that the association should recover based on the "estimated cost" to the members "to lease alternative grazing pastures," the court of appeals calculated the loss on what the members would have incurred if the judgment had not been superseded, not what "damage [the association] *actually* incurred."<sup>216</sup> The evidence was undisputed that the association could not have leased the members' grazing rights to others if the ouster had taken immediate effect, so the most it could have expected to gain would have been the payment of dues from replacement members.<sup>217</sup> Thus, the association failed to establish any damages beyond the \$7,000.00 awarded by the trial court based on the failure of one of the members to pay those dues during the course of the appeal.<sup>218</sup>

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208. *Id.*

209. *Id.* at 544.

210. 603 S.W.3d 824, 825 (Tex. 2020) (per curiam).

211. *Id.* at 825–26.

212. *Id.* at 826.

213. *Id.*

214. *Id.* at 826–27.

215. *Id.* at 828.

216. *Id.*

217. *Id.*

218. *Id.*

## XI. ATTORNEY DISQUALIFICATION

The Texas Supreme Court addressed important issues regarding the standards for attorney disqualification in shareholder litigation in *In re Murrin Bros. 1885, Ltd.*<sup>219</sup> That case involved a dispute between two “warring ownership factions” that each claimed the right to control the management of “the iconic Fort Worth establishment[:] Billy Bob’s.”<sup>220</sup> One side, the Murrin Group, moved to disqualify the lawyers for the other side, the Hickman Group, complaining that their representation of both the Hickman Group individually and the corporate entity itself constituted an impermissible conflict of interest.<sup>221</sup> Specifically, the Murrin Group pointed out that the lawyers were representing the individual members of the Hickman Group as defendants with respect to the Murrin Group’s derivative claims on behalf of the corporation, while simultaneously representing the corporation at the direction of the Hickman Group.<sup>222</sup> The trial court denied the motion to disqualify, and both the Second Fort Worth Court of Appeals and the supreme court denied mandamus relief.<sup>223</sup>

The Murrin Group argued that in light of their assertion of derivative claims on behalf of the corporation against the Hickman Group, the lawyers were in the position of representing both the plaintiff and defendants in the same case, an “axiomatic conflict of interest.”<sup>224</sup> To the supreme court, however, “[t]he battle lines [were] not so clear.”<sup>225</sup> The supreme court explained that while shareholder derivative actions allow minority shareholders to sue for injuries to a corporation, the corporation is often resistant to such claims and commonly named as a defendant itself.<sup>226</sup> Merely labeling the corporation as a plaintiff based on the derivative claim is not controlling because then no lawyer could ever represent the corporate entity without being subject to the same charge of representing both sides of the case.<sup>227</sup> Rather than party labels, the supreme court reasoned “the proper inquiry is to look to whether the substance of the challenged representation requires the lawyer to take conflicting positions or to take a position that risks harming one of his clients.”<sup>228</sup>

The supreme court declined to announce a blanket rule governing dual representation in all shareholder lawsuits.<sup>229</sup> In the case before it, however, the supreme court had little difficulty concluding the trial court had not abused its discretion in refusing to disqualify the Hickman Group’s

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219. 603 S.W.3d 53, 54 (Tex. 2019) (orig. proceeding).

220. *Id.*

221. *Id.* at 56.

222. *Id.*

223. *Id.*

224. *Id.* at 58.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 59.

lawyers.<sup>230</sup> The opinion explains that both sides claimed to be acting in the best interest of the corporation, and, at its core, the case was about who should control its management.<sup>231</sup> “That question could be vigorously and fairly litigated by the parties and counsel currently before the court, and the resolution of it would resolve the nagging question of [the corporation’s] alignment.”<sup>232</sup> Moreover, it was unlikely that a jury would be confused about the lawyers’ roles or the fact that there were two separate ownership groups vying for control of the entity.<sup>233</sup>

## XII. MISCELLANEOUS

The Texas Supreme Court weighed in on other important procedural issues this Survey period. Once again, the Texas Supreme Court cautioned plaintiffs against waiting until “days before limitations expire to file suit” to avoid adverse consequences of that delay under Chapter 33 of the Texas Civil Practice and Remedies Code.<sup>234</sup> In this case, the injured plaintiff sued the owner-lessor of a construction trailer and a contractor for the trailer-lessee nineteen days before expiration of the statute of limitations.<sup>235</sup> The owner-lessor answered, timely responded to disclosure requests served with the original petition, and identified the trailer-lessee as a potential responsible third party.<sup>236</sup> Days later, the plaintiff amended his petition to add the trailer-lessee as a defendant, and the owner-lessor then moved to designate the trailer-lessee as a responsible third party.<sup>237</sup> No party opposed the trailer-lessee’s designation, and the responsible third-party motion “sat dormant for nearly two years.”<sup>238</sup> In the meantime, the trial court granted the trailer-lessee summary judgment on limitations grounds and dismissed the plaintiff’s tort claims with prejudice.<sup>239</sup> Afterwards, the plaintiff and trailer-lessee filed objections to the owner-lessor’s responsible third-party motion, asserting the trailer-lessee could not be a responsible third party because the limitations had expired.<sup>240</sup> Later, after all claims against the trailer-lessee were dismissed and it was no longer a party, the trial court denied the owner-lessor’s designation motion.<sup>241</sup>

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230. *Id.* at 61.

231. *Id.* at 60.

232. *Id.* Indeed, the supreme court noted that for suits involving closely held entities, the legislature has actually provided a statutory authorization for the courts to treat the derivative claim as a direct action by an owner brought for her own benefit. *Id.* (quoting TEX. BUS. ORGS. CODE ANN. § 101.463(c)).

233. *Id.*

234. *In re Mobile Mini, Inc.*, 596 S.W.3d 781, 785 (Tex. 2020) (per curiam) (orig. proceeding).

235. *Id.* at 783.

236. *Id.* Of course, by the time the owner-lessor responded to the disclosure request, limitations on the plaintiff’s claims against the trailer-lessee had already expired. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*



The Thirteenth Corpus Christi–Edinburg Court of Appeals denied the owner-lessor mandamus relief, but the supreme court granted its petition, holding that the trial court was required to grant the responsible third-party motion because: (1) it was “filed more than sixty days before a trial setting,” and (2) the trailer-lessee was “timely disclosed” in response to the plaintiff’s requests for disclosure.<sup>242</sup> The supreme court rejected the plaintiff’s argument that the owner-lessor was required to disclose the trailer-lessor as a potential responsible third party before the statute of limitations expired under Chapter 33, even though the owner-lessor’s disclosure responses were not yet due under the Texas Rules of Civil Procedure.<sup>243</sup> The supreme court reasoned that it was the plaintiff, not the owner-lessor, that caused the trailer-lessee not to be disclosed before limitations expired, and this “was the natural consequence of [plaintiff’s] decision to wait to file suit until limitations were nearing terminus.”<sup>244</sup> Further, the supreme court found that § 33.004(d) of the Texas Civil Practice and Remedies Code required only that defendants timely disclose potentially responsible third parties such that plaintiff’s proposed earlier disclosure rule “is repugnant to the statutory language, unfairly burdens defendants, and skews the legislatively determined balance of interests.”<sup>245</sup> Finally, the supreme court quickly disposed of the plaintiff’s other arguments against the trailer-lessee’s designation as a responsible third party, emphasizing the trailer-lessee (1) was not still a party at the time the trial court improperly denied the owner-lessor’s motion, and (2) the trailer-lessee’s substantive defenses to liability were irrelevant under Chapter 33’s proportionate-responsibility scheme because “‘responsibility’ is not equated with ‘liability.’”<sup>246</sup> The supreme court, therefore, granted mandamus relief and directed the trial court to grant the owner-lessor’s motion to designate the trailer-lessee as a responsible third party.<sup>247</sup>

The Texas Supreme Court held that a finding of bad faith was required to support sanctions imposed against an attorney (Brewer) under a trial court’s inherent authority where no “rule, statute, order, or any other authority proscribed or conscribed” the conduct at issue.<sup>248</sup> That conduct was Brewer’s commissioning of a pretrial survey<sup>249</sup> in the county-of-suit about a month before a scheduled jury trial in a products liability case.<sup>250</sup>

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242. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.002, 33.004(a), 33.004(d)).

243. *Id.* at 784.

244. *Id.* at 785.

245. *Id.* at 786–87.

246. *Id.* at 787 (quoting *Galbraith Eng’g Consultants, Inc. v. Pochuca*, 290 S.W.3d 863, 868–69 (Tex. 2009)).

247. *Id.* at 788.

248. *Brewer v. Lennox Hearth Prods., LLC*, 601 S.W.3d 704, 716 (Tex. 2020).

249. *Id.* A copy of the survey itself is attached to the supreme court’s opinion. *Id.* at 731–38.

250. *Id.* at 708–709. The product was “yellow-jacketed corrugated stainless steel tubing (CSST).” *Id.* at 709. The suit was brought after a residential house with CSST piping caught fire in a lightning storm resulting in fatal and other significant personal injury and damages. Afterwards Lubbock issued moratoriums on use of CSST pipe for construction in the

Brewer “did not inform the [trial] court or other parties about the survey before, during, or after”<sup>251</sup> it was conducted, but upon learning of it days later, plaintiffs’ counsel “immediately requested a protective order and sought sanctions against [the defendant manufacturer], Brewer, and Brewer’s law firm.”<sup>252</sup> The “case settled the weekend before trial,” and, months later, the trial court held seven days of evidentiary hearings on amended sanctions motions against only Brewer and the firm.<sup>253</sup> Over a year later, the trial court ordered Brewer to complete ten hours of ethics education and pay “a total of \$133,415.27 in attorney[']s fees and expenses, plus \$43,590.00 in contingent fees and expenses.”<sup>254</sup> Brewer appealed, and the Seventh Amarillo Court of Appeals affirmed the sanctions order, reasoning that “the record supported the trial court’s ‘perce[ption] that Brewer’s “intentional and bad faith conduct” in connection with the telephone survey’ imperiled the court’s core judicial functions.”<sup>255</sup>

The supreme court reversed, holding that (1) “bad faith is required to impose sanctions under the court’s inherent authority,” and (2) there was insufficient evidence of Brewer’s bad faith in developing or employing the survey to support the sanctions order.<sup>256</sup> After explaining that courts’ “inherent power to sanction necessitates a finding of bad faith,”<sup>257</sup> the supreme court’s discussion focused on delineating the conduct justifying a bad-faith finding, concluding that: “[i]mproper motive, not perfection, is the touchstone.”<sup>258</sup> Turning to Brewer’s conduct specifically, the supreme court found “[t]he record bears no direct, or even circumstantial, evidence of bad faith.”<sup>259</sup> While noting the “trial court’s concerns about the survey were reasonable,” the supreme court emphasized that pretrial surveys, even in the district of trial, “are not necessarily unfair or improper,” and Brewer’s survey reflected “[n]ot perfect, but reasonable”

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city and plaintiffs’ counsel participated in local news coverage about the moratoriums and engaged in community outreach about the “dangers of CSST piping.” *Id.* at 709–10. According to Brewer, one of the CSST manufacturer’s trial attorneys, these circumstances “impelled the law firm to commission a pretrial survey to gauge community attitudes toward [manufacturer’s] legal position and defensive theories.” *Id.* at 710.

251. *Id.* at 710–11. Brewer apparently also did not inform his client. The CSST manufacturer “discharged Brewer days before the trial setting” claiming it “was in the dark about the survey” thereby creating a conflict of interest with the continued representation. *Id.* at 711.

252. *Id.* at 710.

253. *Id.* at 711.

254. *Id.* at 714.

255. *Id.* at 715 (quoting and citing *Brewer v. Lennox Hearth Prods., LLC*, 546 S.W.3d 866, 881, 885–86 (Tex. App.—Amarillo 2018, pet. granted), *rev’d*, 601 S.W.3d 704, 730 (Tex. 2020) (alteration in original)).

256. *Id.* at 717.

257. *Id.* at 718.

258. *Id.* at 719 (noting that “[b]ad faith’ includes ‘conscious doing of a wrong for a dishonest, discriminatory, or malicious purpose’ Errors in judgment, lack of diligence, unreasonableness, negligence, or even gross negligence—without more—do not equate to bad faith.”) (internal citations omitted).

259. *Id.* at 723.

efforts at balance and “other markers of good faith.”<sup>260</sup> With respect to the trial court’s complaints about Brewer’s demeanor during “one full day when [he] was in the hot seat under questioning from lawyers for five adverse parties,”<sup>261</sup> the supreme court held that Brewer’s “attitude or courtroom behavior,” either standing alone or in combination with the survey, was not the kind of “bad faith, unprofessional and unethical” conduct that would support the sanctions order.<sup>262</sup>

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260. *Id.* at 724–26. According to the supreme court, those “markers” included: (1) qualified third-party experts; (2) proper relevant universe and randomly drawn representative sample; (3) adherence to generally accepted standards; and (4) randomized favorable and unfavorable message-testing questions. *Id.* at 726–29.

261. *Id.* at 711.

262. *Id.* at 730.