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Civil Procedure: Pre-Trial & Trial

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I. INTRODUCTION

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

II. SUBJECT MATTER JURISDICTION

During the Survey period, the Texas Supreme Court continued in three cases to distinguish a plaintiff's standing to sue from other merits based inquiries impacting a plaintiff's ability to recover, reaffirming last year's *Pike v. Texas EMC Management*[1] decision. In one of them, the supreme court found the Court of Appeals for the Fifth District of Texas at Dallas's holding that a limited partner lacked individual standing to bring claims for harm to the partnership was "in direct conflict with *Pike*," reversed the court of appeals' judgment, and remanded for reconsideration

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"of the other issues" impacted by the "incorrect" standing holding.[2]

In the second, the issue before the Texas Supreme Court was whether a city resident had standing to challenge the rates charged by a municipally owned electric utility.[3] The plaintiff internet service provider purchased electricity from the City and asserted the rates it was charged were "'unjust, unreasonable, [and] excessive[.]'"[4] "The City filed a [Texas Rule of Civil Procedure 91a] motion[,]" and "[t]he trial court granted the . . . motion and dismissed the suit[ ] . . . on the ground that [the plaintiff] lacked standing . . ."[5] The Court of Appeals for the Fourteenth District at Houston determined that the plaintiff's payment of the charges "was a concrete and particularized injury" but, nonetheless, affirmed the dismissal of plaintiff's claims on the basis they fell within the City's exclusive jurisdiction under the applicable regulatory scheme.[6] After setting out the standing requirements,[7] the supreme court focused on the particularized injury component challenged by the City. The supreme court had no trouble concluding the plaintiff, which "suffers financial harm because it must pay [the City] a particular sum of money that exceeds what [plaintiff] contends it should have to pay[,]" established particularized injury sufficient to support standing.[8] That other city ratepayers "may suffer"

2. 610 S.W.3d 763, 777, 778 (Tex. 2020) (citation omitted) ("[H]old[ing] that a partner or other stakeholder in a business organization has constitutional standing to sue for an alleged loss in the value of [their] interest in the organization[ ]" and emphasizing "that whether a party can prove the merits of its claim or satisfy the requirements of a particular statute does not affect the court's subject-matter jurisdiction.").

3. Cooke v. Karlseng, 615 S.W.3d 911, 913–14 (Tex. 2021). Specifically, the supreme court noted the "incorrect" standing holding led the court of appeals to find that the limited partner's later-added derivative claim was barred by limitations because it did not relate back to his originally filed claims. *See id.* at 913 (citation omitted) ("Based on its holding that [the limited partner] lacked standing to assert his individual claims, and therefore the trial court never obtained jurisdiction over them, the court held that the doctrine of relation back could not create jurisdiction where none existed.").

4. Data Foundry, Inc. v. City of Austin, 620 S.W.3d 692, 693 (Tex. 2021).

5. *Id.* at 694.

6. *Id.*

7. *Id.* at 695. While the parties' briefs on appeal focused on standing, the supreme court noted that amici curiae asserted that the plaintiff's rate complaints raised issues governed by the Public Utility Regulatory Act (PURA), which vested exclusive jurisdiction of certain decisions in the City. *Id.* at 694. After the panel asked questions about exclusive jurisdiction during oral argument, the parties had only submitted letter briefs on the PURA issues before the court of appeals affirmed the trial court's dismissal of the plaintiff's claim on that basis. *Id.* at 695. The supreme court characterized the latter holding as a premature adjudication of the "exclusive-jurisdiction issue" that the court of appeals should have avoided. *Id.* at 699–700 ("But, at this early stage of the litigation and in the context of a Rule 91a motion, the court of appeals should have considered only the standing issue on which the trial court ruled and not reached an issue neither ruled on by the trial court nor adequately developed in the trial court or . . . the court of appeals."). The supreme court emphasized that the PURA exclusive-jurisdiction question was distinct from the standing inquiry, required "at least some factual development" to inform a decision, and remanded that "sub-category" of the plaintiff's claims "to the trial court for such further proceedings." *Id.* at 700.

8. In particular, "a plaintiff must show: (1) an injury in fact that is both concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) that the injury is fairly traceable to the defendant's challenged action; and (3) that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 696

the same injury did not change that the plaintiff had suffered a peculiar injury conferring standing to sue.[9]

In the third standing case, the Texas Supreme Court held that the Texas Propane Gas Association (TPGA) had standing to challenge hundreds of Houston city ordinances regulating the liquified petroleum gas industry it claimed were beyond the City's authority to enact.[10] The City asserted the TPGA lacked standing to bring its categorical preemption claim "without showing injury to a TPGA member for each discrete regulation challenged."[11] "[E]mphasizing that the merits of TPGA's preemption claims [were] not at issue[,]" the supreme court held that TPGA's pleading of "imminent injury to its members" arising from the "inconsistent, hodgepodge" of city regulations the uniform state rules were designed to prevent, coupled with allegations of "five instances in which the City ha[d] enforced" those conflicting regulations, were sufficient to demonstrate the TPGA's standing.[12] The supreme court concluded that whether the TPGA could prevail on its preemption claim were "issues going to the merits, not standing[,] . . . reversed the court of appeals' judgment[,] and remand[ed] to the trial court for" further proceedings.[13]

In two related petitions, the Texas Supreme Court addressed whether the disputes between a power company and the Electric Reliability Council of Texas (ERCOT) were rendered moot by the trial court's entry of final judgment in the underlying suit.[14] In that suit, the power company "sued ERCOT . . . for fraud, negligent misrepresentation, and breach of fiduciary duty[ ]" after ERCOT revised electricity capacity and demand forecasts on which the power company had relied to invest $2.2 billion constructing new power plants.[15] The trial court denied ERCOT's plea to the jurisdiction based on exclusive agency jurisdiction, and ERCOT filed

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(citing Heckman v. Williamson Cnty., 369 S.W.3d 137, 154–55 (Tex. 2012) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992))).

9. *Id.* at 696–97.

10. *Id.* at 697–98 (distinguishing cases relied on by the City and disapproving Tuck v. Texas Power & Light Co., 543 S.W.2d 214, 215 (Tex. App.—Austin 1976, writ ref'd n.r.e.) and Schenker v. City of San Antonio, 369 S.W.2d 626, 630 (Tex. App.—San Antonio 1963, writ ref'd n.r.e.) "or any other decision . . . [that] may be read as holding that a utility ratepayer cannot establish standing to sue unless it alleges an injury different from that of other ratepayers, beyond its personal obligation to pay a rate that it claims is improper . . .").

11. Tex. Propane Gas Ass'n v. City of Houston, 622 S.W.3d 791, 800 (Tex. 2021). In particular, the TPGA asserted the city's ordinances were preempted by the LP-Gas Safety Rules. *Id.* at 793. *See* 16 Tex. Admin. Code Ann. ch. 9 (promulgating comprehensive regulations pursuant to Tex. Nat. Res. Code Ann. § 113.003(a)(1)); Tex. Nat. Res. Code Ann. § 113.054 (providing that the LP-Gas Safety Rules "preempt and supersede any ordinance, order, or rule adopted by a political subdivision . . . relating to any aspect or phase of the liquified petroleum gas industry").

12. *Id.* at 796. Although the trial court had denied the City's plea to the jurisdiction, the court of appeals found the TPGA lacked standing "and remanded the case to the trial court" to give the TPGA a chance to replead. *Id.* at 795–96.

13. *Id.* at 796, 800.

14. *Id.* at 800–01 (citing Pike v. Tex. EMC Mgmt., LLC, 610 S.W.3d 763, 777 (Tex. 2020)).

15. Elec. Reliability Council of Tex., Inc. v. Panda Power Generation Infrastructure Fund, LLC, 619 S.W.3d 628, 641 (Tex. 2021).

an amended plea asserting sovereign immunity, which the trial court also denied.[16] ERCOT, claiming "governmental unit" status, brought an interlocutory appeal of the denial of the amended plea and petitioned for mandamus in the court of appeals, asserting the power company's claims were barred by sovereign immunity "even if ERCOT [were] not a governmental unit."[17] "After consolidating the two cases, the court of appeals . . . dismissed [the] interlocutory appeal" based on a finding ERCOT was not a governmental unit and granted ERCOT mandamus relief holding sovereign immunity applied.[18] "The court of appeals entered judgment ordering the trial court to dismiss" the power company's sovereign immunity barred claims "within thirty days."[19] Eight days later,[20] "the trial court entered a final judgment dismissing [the power company's] claims . . ."[21] Months after, the power company filed a petition for writ with the supreme court challenging the court of appeals' sovereign immunity holding, and ERCOT conditionally petitioned for review of the court of appeals' governmental unit holding.[22] After the court of appeals denied the power company's motion to set aside the trial court's final judgment, the power company appealed it, and the court of appeals abated that appeal while it awaited the supreme court's decision on the power company's writ and ERCOT's conditional petition.[23]

The supreme court held that the "trial court's entry of a final judgment rendered" the power company and ERCOT's challenges to the interlocutory jurisdictional orders moot.[24] Under "mootness doctrine" principles, the supreme court noted that "a trial court's entry of a final judgment will often moot an interlocutory appeal or mandamus petition that challenges a prior trial-court order."[25] While the supreme court acknowledged that "the parties' controversy over the substantive jurisdictional issues . . . remains live, and the parties have a legally cognizable interest in the resolution of th[e] issues[,]" the supreme court lacked the ability to grant the parties' requested relief[26] "because the trial court has already entered a final judgment to comply with the court of appeals' order, and

16. *Id.* at 632.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. The power generator asserted the final judgment was entered unexpectedly "while the parties were discussing an agreement to stay the court of appeals' order[,]" while ERCOT claimed it had agreed to the stay but the power generator "failed to act expeditiously to obtain the stay before the trial court acted on the court of appeals' order." *Id.* at 633 n.7.
22. *Id.* at 633.
23. *Id.*
24. *Id.* at 633–34.
25. *Id.* at 637. The supreme court explained: "A case becomes moot when (1) a justiciable controversy no longer exists between the parties, (2) the parties no longer have a legally cognizable interest in the case's outcome, (3) the court can no longer grant the requested relief or otherwise affect the parties' rights or interests, or (4) any decision would constitute an impermissible advisory opinion." *Id.* at 634–35.
26. *Id.* at 634–35.

that judgment is pending on appeal in a separate appellate proceeding."[27] The supreme court "conclude[ed] that the trial court's entry of a final judgment rendered these causes procedurally moot, and the parties must seek . . . resolution of their pending controversies by appeal from the trial court's final judgment."[28] The supreme court declined the parties' and the dissent's invitation "to decide whether ERCOT has sovereign immunity from suit"[29] because that issue, regardless of its importance to the parties or the public at large, was squarely before the court of appeals such that any opinion the supreme court issued would be impermissibly advisory.[30]

III. PARTIES

Kenneth D. Eichner, P.C. v. Dominguez stands for the proposition that a person who intervenes in a lawsuit before a final judgment is entered is a "party" to the judgment, even if the trial court strikes the intervention.[31] In *Eichner*, after "the trial court struck [the] intervention . . . and [entered] final judgment[,]" the intervenor "timely filed a motion for new trial[,]" as well as "a notice of appeal eighty-seven days after . . . judgment."[32] The Court of Appeals for the Fourteenth District of Texas at Houston dismissed the appeal, holding that the intervenor was not a "party" to the judgment whose motion for new trial could extend the deadline for a notice of appeal.[33] The Texas Supreme Court disagreed, reasoning that "[t]he order striking the intervention merged into the final judgment," and the intervenor was thus "a 'party' to the judg-

27. *Id.* at 637. The supreme court emphasized that it could not order "the court of appeals to set aside its 'order mandating dismissal[.]'" *Id.* Nor could the appellate court "order the trial court to reinstate its earlier order denying ERCOT's plea to the jurisdiction" as the power company requested "because that order no longer exists as a separate order." *Id.* ("The order has been superseded by and has merged into the trial court's final judgment[.]").

28. *Id.*

29. *Id.*

30. *Id.* at 643 (Hecht, C.J., dissenting). The four dissenting justices would have decided the issues presented and disagreed that the supreme court was unable to grant the parties' requested relief. *Id.* at 644 ("The Court is simply wrong. If the Court were to conclude that ERCOT is not immune from [the power company's] suit, contrary to the court of appeals' prior ruling, the Court would direct the court of appeals to withdraw that ruling, and the Court would also require the court of appeals to reverse the dismissal it erroneously ordered."). Asserting that neither "procedural mootness" nor lack of power to afford relief justified the majority's refusal to address the issues properly before the supreme court for decision, the dissent noted:

> "The immunity issue has been important to [the parties] since the case was first filed in the trial court more than five years ago. Now it happens that the public stakes are high too. After Winter Storm Uri last month, the public also wants to know whether ERCOT can be sued . . .The parties want to know. The public wants to know. The Court refuses to answer."

Id. at 643.

31. *Id.* at 639.

32. Kenneth D. Eichner, P.C. v. Dominguez, 623 S.W.3d 358, 362–63 (Tex. 2021).

33. *Id.* at 360.

ment" for purposes of extending the appellate deadline.[34]

IV. SERVICE OF PROCESS

The Texas Supreme Court once again emphasized that "strict compliance with the rules" regarding service of process is required "in order for a default judgment to withstand direct attack" in *WWLC Investment, L.P. v. Miraki*.[35] In that case, a limited partnership filed a bill of review to vacate a default judgment, asserting "that it was not properly served with" the petition and citation.[36] "The evidence establishe[d] that" the plaintiff in the underlying suit had served Wendy Chen, who was "described as [the limited partnership's] 'owner,' 'president,' and 'CEO.'"[37] No effort was made to serve the limited partnership's registered agent, a corporate entity that was also identified as the limited partnership's general partner in its filings with the Texas Secretary of State.[38] Although those filings were signed by Chen as an "authorized" person, "[t]he record d[id] not reflect what" position she held, if any, with the corporate general partner and registered agent.[39]

The trial court concluded service on Chen was sufficient as the evidence showed "'she was the only person' involved" in the limited partnership and had also signed the lease agreements in dispute.[40] The Court of Appeals for the Fifth District at Dallas affirmed, "[n]oting that [the corporation's] charter had been forfeited."[41] The supreme court reversed the default judgment and remanded to the trial court.[42] The supreme court explained that a limited partnership may be served with process by serving its general partner or registered agent, and the evidence showed Chen was neither.[43] The fact that Chen may have held the title of "president" or "CEO" of the partnership was irrelevant because, unlike a corporation, the Texas Business Organizations Code does not authorize service on officers of a limited partnership.[44] Moreover, Chen's designation as the limited partnership's "owner" did not reveal whether she was a general partner, on whom service would be authorized, or a limited partner, on whom it would not be.[45] Finally, the supreme court rejected the argument that service on "Chen was proper because the [corporate general partner] [had] forfeited . . . its charter."[46] In this regard, the su-

34. Kenneth D. Eichner, P.C. v. Dominguez, No. 14-18-00399-CV, 2020 WL 1026430, at *1–2 (Tex. App.—Houston [14th Dist.] Mar. 3, 2020) (mem. op., not designated for publication), *rev'd*, 623 S.W.3d 358, 358 (Tex. 2021).
35. *Eichner*, 623 S.W.3d at 362–63.
36. WWLC Inv., L.P. v. Miraki, 624 S.W.3d 796, 799 (Tex. 2021) (per curiam).
37. *Id.* at 798.
38. *Id.*
39. *Id.* at 799.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 798.
44. *Id.* (citing Tex. Bus. Orgs. Code Ann. §§ 5.201(b)(1), 5.255(2)).
45. *Id.* at 800.
46. *Id.*

preme court explained that the attempts to serve Chen all came before the charter was forfeited and, "[m]oreover, a corporate general partner that" forfeits its charter "remains a . . . general partner for at least 90 days" thereafter under the provisions of the Texas Business Organizations Code.[47]

V. SPECIAL APPEARANCE

The Texas Supreme Court confirmed during the Survey period that the framework for evaluating personal jurisdiction challenges in product liability cases has changed following recent decisions of the United States Supreme Court. *Luciano v. SprayFoamPolymers.com, LLC* was a personal injury suit by homeowners against an out-of-state manufacturer of the insulation that was used in the plaintiffs' home.[48] The Texas Supreme Court first held that the manufacturer had "purposefully availed itself" of the privilege of doing business in Texas by "[p]lacing its product into the stream of commerce" and engaging in conduct that evidenced its intent to serve the Texas market.[49]

Even where a defendant has sufficient purposeful contacts with the state, however, due process requires "'the suit' . . . 'aris[e] out of or relat[e] to . . . [such] contacts'" in order to establish specific jurisdiction.[50] In *Luciano*, the supreme court noted that when it originally granted review, the parties vigorously debated whether this relatedness inquiry required proof of a direct causal connection, as there was no evidence the plaintiffs specifically selected the manufacturer's product or had any awareness of from where it originated or was distributed.[51] In the interim, however, the United States Supreme Court decided *Ford Motor Co. v. Montana Eighth Judicial District Court*.[52] Consequently, the supreme court explained that under *Ford* it is now clear that a direct causation is not required.[53] Because the homeowners suffered their injuries in Texas and the manufacturer regularly sold the product in Texas, the relatedness requirement was satisfied.[54]

Special appearance procedure was at issue in *Steward Health Care System LLC v. Saidara*.[55] There, the trial court granted an individual California resident's special appearance, and the Court of Appeals for the Fifth District at Dallas affirmed.[56] In doing so, the court of appeals had to first decide whether the plaintiffs could meet their burden of pleading suffi-

47. *Id.*
48. *Id.* (citing Tex. Bus. Orgs. Code Ann. § 153.155(a)(10)(B)).
49. Luciano v. SprayFoamPolymers.com, LLC, 625 S.W.3d 1, 6 (Tex. 2021).
50. *Id.* at 14.
51. *Id.* at 14 (quoting Bristol-Myers Squibb Co. v. Superior Ct. of Cal., 137 S. Ct. 1773, 1780 (2017) (alteration in original)).
52. *Id.*
53. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S.Ct. 1017, 1017 (2021).
54. *Luciano*, 625 S.W.3d at 15–16.
55. *Id.* at 16–17.
56. Steward Health Care Sys. LLC v. Saidara, 633 S.W.3d 120, 123 (Tex. App.—Dallas Aug. 20, 2021, no pet.).

cient jurisdictional facts based on allegations contained not in the petition, but in their response to the defendant's special appearance.[57] The court of appeals noted that several of its prior opinions, as well as those issued by other intermediate appellate courts, had held that facts alleged in the special appearance response could be considered.[58] The court of appeals concluded that practice was "contrary to the Texas Rules of Civil Procedure and precedent from the Texas Supreme Court[,]" however, and overruled its prior cases that had allowed it.[59] Instead, the court of appeals held "the plaintiff must meet its initial burden on a special appearance by pleading, *in its petition*, sufficient allegations to invoke jurisdiction under the Texas long-arm statute."[60]

VI. VENUE

Whether non-signatories to a contract may enforce or be bound by a forum selection clause contained therein was at issue in *In re Killick Aerospace Ltd.*[61] In that case, "Learjet, a company owned . . . by Bombardier[,]" "entered into two distribution agreements" with Killick Aerospace Limited.[62] When Learjet and Bombardier subsequently sued that entity and its affiliate, Killick Aerospace LLC, the Killick parties sought dismissal on the ground that the forum selection clause in the distribution agreements required all suits arising out of, or connected with, the contact to be brought in Kansas.[63] The trial court denied the motion to dismiss, but the Fort Worth Court of Appeals disagreed and granted mandamus relief.[64]

The court of appeals first held that the claims asserted by Learjet and Bombardier were within the scope of the forum selection clause.[65] Moreover, the court held that the forum selection clause could be enforced by Killick LLC and against Bombardier, neither of which signed the distribution agreement, under the "transaction-participant" theory.[66] Although the transaction-participant enforcement theory has not yet been endorsed or rejected by the Texas Supreme Court, the *Killick* court held it could be applied so as to allow one non-signatory to enforce a forum selection clause against another non-signatory where such enforcement was foreseeable.[67] "Based on the totality of [the]evidence" regarding the relationship between Learjet and Bombardier, on one hand, and Killick

57. *Id.*
58. *Id.* at 126.
59. *Id.* at 127 (citations omitted).
60. *Id.* at 127–29.
61. *Id.* at 129.
62. *In re* Killick Aerospace Ltd., No. 02-20-00280-CV, 2020 WL 7639575, at *3 (Tex. App.—Fort Worth Dec. 23, 2020, orig. proceeding) (mem. op., not designated for publication).
63. *Id.* at *1.
64. *Id.* at *1–2.
65. *Id.* at *1
66. *Id.* at *4.
67. *Id.* at *5–6.

Limited and Killick LLC, on the other, the foreseeability test was met in this case.[68]

VII. PLEADINGS

In *Brumley v. McDuff*, the Texas Supreme Court held that a petition seeking to "quiet title" to real property was in "fundamental substance" an "inartfully" named trespass-to-try-title action.[69] In this dispute between neighbors, the Brumleys' live petition at the time of trial alleged that they had exclusively, openly, and "hostile to the claims of all others," possessed the property for over ten years but "described their cause of action as one to 'quiet title,' brought to 'remove the cloud on their title and to quiet title to the Property in their name.'"[70] The neighbors answered, pleading "the statutory trespass-to-try-title defense of 'not guilty,' provided for in [the Texas] Rules of Civil Procedure."[71] Both sides "requested an adverse-possession charge," and "[t]he sole question submitted to the jury" asked if the Brumleys held the property "in peaceable and adverse possession" for the ten-year statutory period.[72] After the trial court entered judgment in favor of the Brumleys based on the jury's verdict, the neighbors appealed.[73] On appeal, "the court of appeals reversed, holding that" because the Brumleys had only pleaded "the wrong cause of action," "the trial court erred in submitting [the] adverse possession [question] to the jury."[74] The supreme court granted the Brumleys' petition for review.[75]

The supreme court held "the Brumleys' pleadings supported the submission of [the] adverse possession [question] to the jury."[76] The supreme court reasoned that "[a] plaintiff sufficiently pleads a cause of action when the elements of the claim and the relief sought may be discerned from the pleadings alone."[77] While "[a] claim for adverse possession requires specific pleadings[,]" the supreme court noted that the neighbors had not challenged the Brumleys' pleadings by special exceptions[78] and reasoned that the "unobjected-to complaints" about the Brumleys' "characterization of their adverse-possession claim as one to 'quiet title[ ]'" did

68. *Id.* at *5.

69. *Id.* *5–6.

70. Brumley v. McDuff, 616 S.W.3d 826, 831, 836 (Tex. 2021).

71. *Id.* at 828.

72. *Id.* at 829. As noted by the supreme court, "Special pleading requirements govern trespass-to-try-title actions." *Id.* at 832 (generally describing the pleading requirements); *see id.* at 829 n.4 (first citing and quoting TEX. R. CIV. P. 788; and then citing TEX. R. CIV. P. 790).

73. *Id.* at 829.

74. *Id.* at 829–30.

75. *Id.* at 830.

76. *Id.*

77. *Id.* at 831.

78. *Id.*

not change the "fundamental substance" of the allegations.[79] The substance of the petition, according to the supreme court, "states a claim for trespass to try title by adverse possession."[80] Although the supreme court acknowledged "it would have been better to use the statutory 'trespass to try title' name[,] . . . there is no doubt that the Brumleys sought ownership of the property through adverse possession in their pleadings, not merely to 'adjudicate the supremacy of their "title[ ]"'" as the court of appeals erroneously concluded.[81] The supreme court emphasized: "[a] suit that seeks to resolve a title dispute is, in effect, an action in trespass to try title, whatever its form[,]" and "a party does not forfeit its trespass-to-try title action by inartfully naming it."[82]

VIII. MOTIONS TO DISMISS

Montelongo v. Abrea resolved an issue of first impression: whether an amended pleading resets the sixty-day deadline for the opposing party to file a motion to dismiss under the Texas Citizens Participation Act (TCPA).[83] The Texas Supreme Court held that "an amended or supplemental pleading that asserts the same legal claims . . . against the same parties and based on the same essential facts" would constitute "the same 'legal action'" for purposes of the TCPA and does not, therefore, restart the clock for purposes of filing a TCPA motion to dismiss.[84] An amended or supplemental pleading will trigger a new sixty-day deadline for such motions, however, where the amended pleading: "(1) adds a new party or parties; (2) alleges new essential facts to support previously asserted claims; or (3) asserts new legal claims . . . involving different elements than the claims . . . previously asserted."[85]

The Court of Appeals for the Sixth District of Texas at Texarkana addressed the standards governing motions to dismiss under Texas Rule of Civil Procedure 91a in *In re Shire PLC*.[86] The plaintiff there "brought a *qui tam* action under the Texas Medicaid Fraud Prevention Act[,]" and the defendants moved to dismiss under Rule 91a.[87] Specifically, the defendants argued "the 'public disclosure bar'" doomed the plaintiff's claim as being based on allegations that they were already publicly known, and that the plaintiff failed to allege sufficient facts to show illegal actively occurred or that the defendants acted with the requisite scienter.[88] "The

79. *Id.* (explaining "[t]he proper response to a legally or factually infirm pleading is to file special exceptions objecting to the pleading. Special exemptions notify the parties and the court that legal or factual uncertainty exists[.]").
80. *Id.*
81. *Id.* at 834.
82. *Id.* at 835.
83. *Id.* at 836.
84. Montelongo v. Abrea, 622 S.W.3d 290, 293 (Tex. 2021).
85. *Id.*
86. *Id.* at 293–94.
87. 633 S.W.3d 1, 1 (Tex. App.—Texarkana 2021, orig. proceeding).
88. *Id.* at 8.

trial court denied [the]motion to dismiss."[89]

The court of appeals granted mandamus relief in an opinion that will be of interest to trial practitioners. The appellate court first traced the evolution of the rules for challenging pleadings in Texas, noting that when Rule 91a was added in 2011, "the Texas Supreme Court did not repeal" Texas Rules of Civil Procedure 90 or 91 relating to special exception practice.[90] The court of appeals went on to explain that the Texas Supreme Court cases that have granted mandamus relief from the denial of a Rule 91a motion have required that the movant demonstrate that "either (1) the causes of action . . . [alleged] are not recognized by Texas law, or (2) . . . the plaintiff has alleged facts that defeat[ed] th[e] claim" on the face of its pleadings—"i.e., the plaintiff has pleaded itself out of court."[91] Moreover, the court of appeals broke with its sister courts of appeals that have looked to federal cases interpreting Federal Rule of Civil Procedure 12(b)(6)[92] in evaluating Rule 91a motions.[93] The court of appeals explained that Rule 91a motions provide a procedure for dismissal somewhere between special exceptions based on the insufficiency of the plaintiff's factual allegations and a summary judgment motion.[94] When the plaintiff asserted a viable legal theory and had not alleged facts that make success of that claim impossible, the court of appeals held that the failure to allege sufficient factual support for the claim does not justify dismissal under Rule 91a, even if it would under federal Rule 12(b)(6).[95]

IX. DISCOVERY

The availability of an apex deposition was the subject of *In re American Airlines, Inc*.[96] The plaintiff contended one of the defendant airline's gate agents had "harass[ed] him via text, email, and phone messages" through improperly obtained personal information.[97] On the eve of the discovery deadline, the plaintiff sought to depose an executive vice president of the airline's parent company.[98] The airline filed a motion to quash and for protective order, arguing the vice president was an apex level executive who did not have any "unique or superior personal knowledge of" the matters at issue.[99] The plaintiff rejected the airline's offer for a corporate representative deposition and contended the vice president had the requisite personal knowledge through her managerial responsibilities.[100] The trial court denied the motion for protective order and ordered the plain-

89. *Id.* at 10.
90. *Id.*
91. *Id.* at 13
92. *Id.* at 18.
93. Fed. R. Civ. P. 12(b)(6).
94. *Shire*, 633 S.W.3d at 22–25.
95. *Id.* at 25.
96. *Id.* at 19, 23.
97. 634 S.W.3d 38, 40 (Tex. 2021).
98. *Id.* at 40.
99. *Id.*
100. *Id.*

tiff to prepare a corporate representative-like notice detailing the topics for the vice president's deposition.[101]

For some unknown reason, the parties did not receive notice "of this order for four months[,]" and the plaintiff did not serve the required notice in the eight months thereafter.[102] The airline sought mandamus relief, which the Court of Appeals for the Fifth Circuit of Texas at Dallas denied because it was requested over a year after the trial court signed its order.[103]

The airline then sought and obtained mandamus relief from the Texas Supreme Court.[104] The supreme court readily found the vice president qualified as an "*other high[-]level corporate official*" to whom the rules for apex depositions applied.[105] In light of her affidavit stating she did not have "knowledge of relevant facts[,]" her deposition was appropriate only if the plaintiff could "show[ ] that she possesse[d] unique or superior personal knowledge or" that the plaintiff had "made a good-faith" effort "to obtain" the requested information "through less intrusive means."[106] The supreme court found her general knowledge of company policies did not satisfy the first requirement, and the record was bereft of evidence the plaintiff had sought this information from other sources.[107] Finally, the supreme court rejected the plaintiff's timeliness argument, finding the airline had adequately explained its delay, some of which resulted from the plaintiff's failure to serve the topic listing required by the trial court.[108]

In *In re Millwork*,[109] the Texas Supreme Court addressed whether a witness was employed by or subject to the control of a party such that he did not need to be served with a subpoena. The survivors of a deceased employee, who was crushed by two large granite slabs that fell off a truck, sued his employer and the truck owner.[110] The survivors obtained a default judgment against the truck owner and then added claims against the cabinet maker who had hired the truck owner.[111] The cabinet maker obtained a sworn statement from the truck owner and sought summary judgment on the ground the truck owner was an independent contrac-

101. *Id.*

102. *Id.* at 40–41.

103. *Id.* at 41.

104. *In re* Am. Airlines, Inc., No. 05-20-00832-CV, 2020 WL 5651658, at *1 (Tex. App.—Dallas Sept. 23, 2020, orig. proceeding) (mem. op., not designated for publication).

105. *In re Am. Airlines*, 634 S.W.3d at 43.

106. *Id.* at 41 (alteration in original) (quoting Crown Cent. Petroleum Corp. v. Garcia, 904 S.W.2d 125, 128 (Tex. 1995)).

107. *Id.*

108. *Id.* The supreme court also found the airline's entitlement to mandamus relief was not vitiated by its failure to attach the vice president's affidavit to its initial motion for protective order or the fact her affidavit was filed after the expiration of the discovery deadline. *Id.* at 42.

109. *Id.* at 43.

110. 631 S.W.3d 706, 709 (Tex. 2021) (per curiam).

111. *Id.*

tor.[112] The survivors were unable to serve the truck owner with a deposition notice, so they sent the cabinet maker a letter identifying the truck owner as its employee and then filed a motion to compel the cabinet maker to produce the truck owner under Texas Rule of Civil Procedure 199.3.[113] Even though the cabinet maker denied the truck owner was its employee and asserted it did not know where he was, the trial court ordered the cabinet maker to produce the truck owner for deposition,[114] and the Court of Appeals for the Fourteenth District of Texas at Houston denied mandamus relief.[115]

The supreme court, however, found that mandamus relief was appropriate.[116] Initially, the supreme court found that Rule 199.3 by its terms required that the party "retain, employ, or control the witness at the time" the deposition is requested or required.[117] According to the supreme court, any other interpretation would mean a party could be subject to sanctions for its failure to produce a witness over which it once, but no longer has, control.[118] In light of the fact the cabinet maker had not worked with the truck owner for several months or recently communicated with him, the supreme court concluded the cabinet maker did not have to produce him.[119]

The scope of a corporate representative deposition notice was at issue in *In re USAA General Indemnity Co.*.[120] In this underinsured motorist (UIM) case, the plaintiff settled with the other driver and then sued his own insurer under his policy's UIM provisions.[121] The insured sought a corporate representative deposition on nineteen topics, which he subsequently limited to nine topics, and also requested the deponent to produce any reports he had prepared regarding the plaintiff's claim.[122] The insurer moved to quash the deposition, arguing the insured was indisputably covered under the policy at issue and that its evaluation of his claim was irrelevant to whether the other driver caused the accident and the amount of damages the insured sustained.[123] The insurer also contended that its deposition was not proper until after the parties had deposed "the witnesses with first-hand knowledge of the accident" and that the re-

112. *Id.*
113. *Id.*
114. *Id.* at 709–10. Rule 199.3 requires a deposition-seeking party to serve a witness "with a subpoena under Rule 176" but provides that, "[i]f [a] witness is a party or is retained by, employed by, or otherwise subject to the control of a party, however, service of the notice of oral deposition upon the party's attorney has the same effect as a subpoena served on the witness." TEX. R. CIV. P. 199.3.
115. *Millwork*, 631 S.W.3d at 710.
116. *In re* Millwork, No. 14-20-00276-CV, 2020 WL 4689294, at *2 (Tex. App.—Houston [14th Dist.] Aug. 13, 2020, orig. proceeding) (per curiam) (mem. op., not designated for publication).
117. *In re Millwork*, 631 S.W.3d at 715.
118. *Id.* at 711.
119. *Id.* at 713.
120. *Id.* at 713–14.
121. 624 S.W.3d 782, 785 (Tex. 2021).
122. *Id.*
123. *Id.* at 786.

quested information could be obtained from others.[124] The trial court denied the motion to quash,[125] and the Court of Appeals for the Thirteenth District of Texas at Corpus Christi and Edinburg denied the insurer's petition for mandamus relief.[126]

After addressing some of the intermediate appellate decisions arising out of corporate representative depositions in UIM cases, the Texas Supreme Court turned to the insurer's specific objections.[127] First, the supreme court rejected the insurer's relevance challenge, finding a party is generally allowed to depose the other party and that personal knowledge is not a prerequisite to a deposition.[128] Since the insurer was disputing both the other driver's liability and the insured's damages, its corporate representative could be deposed regarding whatever knowledge the insurer had on those issues.[129]

Second, with respect to the insurer's proportionality arguments, the supreme court found the insurer's alleged lack of personal knowledge did not absolve it from having to participate in a deposition about whatever information it did possess, especially where the insurer had acknowledged the propriety of written discovery, which the supreme court noted was not inherently less burdensome than a deposition.[130] The supreme court also observed that the insurer could have done a better job below of disclosing, perhaps through its disclosures, the information it did possess, which might have been useful in showing a deposition would not be worth the effort.[131]

Third, the supreme court addressed the scope of the deposition, finding that discovery into the other driver's liability and the insurer's claims and defenses was proper but that other topics were foreclosed by the insurer's concessions regarding the existence and scope of the policy.[132]

In *In re Copart, Inc.*,[133] the Texas Supreme Court addressed the propriety of pre-arbitration discovery. The employer "moved to compel arbitration pursuant" to an arbitration agreement in its employee handbook, and the employer proved up the agreement and its related allegations through a declaration from one of its human resources employees.[134] The employee denied she had an enforceable arbitration agreement and

124. *Id.* at 787.
125. *Id.*
126. *Id.*
127. *In re* USAA General Indemnity Co., No. 13-19-00487-CV, 2020 WL 1452939, at *1 (Tex. App.—Corpus Christi–Edinburg Mar. 24, 2020, orig. proceeding) (mem. op., not designated for publication).
128. *In re* USAA General Indemnity, 624 S.W.3d at 789–90.
129. *Id.* at 790.
130. *Id.* at 791. The supreme court noted, however, that discovery was not allowable on an as-yet unasserted claim for bad faith. *Id.*
131. *Id.* at 792.
132. *Id.* at 792–93.
133. *Id.* at 793–94. The supreme court also found that inquiry into the offsets to which the insurer was entitled and its claims handling was improper until the insured's entitlement to UIM benefits had been established. *Id.* at 794.
134. 619 S.W.3d 710, 712 (Tex. 2021) (per curiam).

sought to depose the declarant.[135] The trial court allowed the discovery to proceed, but the Court of Appeals for the Eighth District of Texas at El Paso granted mandamus relief, finding the employee had not established a "colorable basis" for the requested discovery, and it gave her thirty days to file a motion establishing her entitlement to such discovery.[136] The employee then filed a new motion, to which she attached her affidavit denying a valid arbitration agreement existed and challenging the declarant's personal knowledge.[137] The trial court granted the motion, and the court of appeals denied the employer's petition for writ of mandamus.[138]

The employer then sought mandamus relief from the supreme court, which found the employee had failed to demonstrate its entitlement to take the deposition.[139] According to the supreme court, it was incumbent on the employee to present a colorable basis or reason to believe the requested deposition would be material in resolving arbitrability.[140] In response to the employer's submission of a signed, authenticated agreement, the employee's affidavit did not contain any specific factual assertions supporting the notion she did not have an enforceable arbitration agreement and did not challenge the authenticity of the documents the employer introduced.[141]

The Court of Appeals for the Eighth District of Texas at El Paso found *In re Copart* controlling in *In re OneMain Financial Group, LLC*.[142] In this case, the employer supported its motion to compel arbitration with two affidavits, one of which authenticated the arbitration agreement at issue.[143] The employee sought discovery based on his own affidavit, in which he denied the existence of a valid arbitration agreement and challenged the personal knowledge of the employer's affiants.[144] The trial court granted the employee's motion for discovery, and the employer sought mandamus relief based on *In re Copart*.[145] The court of appeals granted the requested relief, finding the employee had failed to include specific factual allegations in support of his claim that there was not a valid arbitration agreement, and he did not dispute the authenticity of the agreement proven up by the employer.[146]

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135. *Id.*

136. *Id.*

137. *Id.* (citing In re Copart, Inc., 563 S.W.3d 427, 432–33 (Tex. App.—El Paso 2018, orig. proceeding)).

138. *Id.*

139. *Id.* at 712–13 (citing In re Copart, Inc., No. 08-18-00204-CV, 2019 WL 3940955, at *1 (Tex. App.—El Paso Aug. 21, 2019, orig. proceeding) (mem. op., not designated for publication)).

140. *Id.* at 716.

141. *Id.*

142. *Id.* at 715–16.

143. *In re* OneMain Financial Group, LLC, 627 S.W.3d 374, 376 (Tex. App.—El Paso 2021, orig. proceeding).

144. *Id.*

145. *Id.*

146. *Id.* at 377.

X. SUMMARY JUDGMENT

In *Draughon v. Johnson*, the Texas Supreme Court addressed the movant's burden to obtain traditional summary judgment on a statute of limitations defense when the plaintiff pleads "unsound-mind tolling" applies.[147] "In this quiet title action," a nephew sought to "prevent his aunt from evicting him from property he inherited," asserting the deed for the property he had given her "years earlier [was] void due to his lack of capacity."[148] The aunt moved for traditional summary judgment asserting the nephew's claim to set aside the deed was time-barred because he had not brought it within four years of signing the deed.[149] In response, the nephew argued the aunt had the burden to adduce evidence raising a fact issue that he had the "mental capacity to sign a binding warranty deed" and introduced evidence in the form of affidavits "from a licensed psychological associate" and "laypeople who knew him" that he had observable, obvious "diminished capacity" before and at the time he signed the deed.[150] The aunt objected to the affidavits, and the trial court struck them and granted the aunt's motion after the summary judgment hearing.[151] The court of appeals affirmed, holding the nephew had the burden to raise a fact issue on his capacity once the aunt established the case was not brought within limitations.[152]

The supreme court granted the nephew's petition for review, reversed the court of appeals' judgment, and reaffirmed its long-standing precedent that a traditional summary judgment movant on limitations grounds has the burden to "conclusively negate . . . tolling doctrines" like "unsound mind."[153] Regardless of the parties' ultimate burdens at trial, the supreme court emphasized that on traditional summary judgment: (1) "the defendant has the burden regarding any issues that affect which days count toward the running of limitations—such as accrual, the discovery rule, and tolling[;]" and (2) "if that . . . burden" is satisfied, the burden shifts to the plaintiff to raise a fact issue on "any equitable defense . . . such as fraudulent concealment, estoppel, or diligent service"[154] "even though the limitations period has run" to avoid summary judgment.[155] After reaffirming the general rule, the supreme court had no

147. *Id.* at 379–80.

148. Draughon v. Johnson, 631 S.W.3d 81, 97 (Tex. 2021).

149. *Id.* at 85. Specifically, the nephew alleged "that he did not have the mental capacity to sign the warranty deed and [his aunt] was aware of his incapacity, so her claim to the property was invalid." *Id.* at 86.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 85, 94 (citing and quoting Tex. Civ. Prac. & Rem. Code Ann. § 16.001(a), (b) ("'[i]f a person entitled to bring a personal action is under a legal disability'—defined as under 18 years old or 'of unsound mind'—'when the cause of action accrues, the time of the disability is not included in a limitations period.'") (alterations in original).

155. *Id.* at 88–89. The supreme court noted that "[m]any of the defensive issues that avoid limitations even though it has run are equitable in nature and appear in [Texas Rules of Civil Procedure] 93 and 94[,]" such as fraud and estoppel. *Id.* at 92–93.

trouble concluding that "unsound-mind tolling" fell within the rule such that the aunt bore the burden to "conclusively negate" the nephew's claim of mental incapacity to obtain summary judgment.[156] Because the aunt did not meet that burden, the supreme court reversed the order affirming the aunt's summary judgment, and remanded to the trial court for further proceedings.[157] While affirming this "wing of . . . precedent on limitations and traditional summary judgment[,]" the supreme court noted that defendants could use the "no-evidence motion for summary judgment" procedure to require plaintiffs to raise a fact issue on tolling doctrines.[158] The supreme court explained that once a burden-bearing plaintiff invokes a tolling doctrine, "the defendant urging limitations is free to file a hybrid motion for summary judgment that asserts a no-evidence ground as to that element, thus requiring the plaintiff to come forward with evidence raising a genuine issue of material fact."[159]

A case out of the Court of Appeals for the Eighth District of Texas at El Paso provides a benchmark for how long is too long to wait for a trial court's summary judgment ruling.[160] In this trespass-to-try-title suit, the parties stipulated that there were only two disputed issues between them and agreed those disputes "should be disposed [of] by summary judgment."[161] Cross-motions for summary judgment were filed and heard by the trial court. At the summary judgment hearing, the parties requested and the trial court promised a ruling "far in advance of the . . . trial setting."[162] On numerous occasions after the hearing, the parties individually and jointly requested a ruling on the cross-motions and submitted "proposed final summary judgments."[163] By the time of the court of appeals' opinion on one party's mandamus petition, the appellate court noted: "It has now been nearly 14 months since the last summary judgment motion was filed and over 13 months since the hearing, and the trial court has not yet ruled on any of the motions."[164] The court of appeals explained that the "trial court had a ministerial duty to rule on the parties' summary-judgment motions within a reasonable amount of time."[165] Because there was no question the parties had asked the trial court for a ruling, the only remaining issue before the court of appeals was what was "a reasonable time[,]" considering

> a myriad of criteria, including the seriousness and complexity of the pending motion, the court's actual knowledge of the motion, the

156. *Id.* at 88–94 (citing and discussing cases illustrating the respective traditional summary judgment burdens on limitations defenses).
157. *Id.* at 95, 97.
158. *Id.* at 97.
159. *Id.* at 96.
160. *Id.*
161. *In re* UpCurve Energy Partners, LLC, 632 S.W.3d 254, 258 (Tex. App.—El Paso 2021, orig. proceeding).
162. *Id.* at 256.
163. *Id.*
164. *Id.*
165. *Id.*

> length of time the motion has been pending, the imminence of any trial setting, the court's overt refusal to act, the state of the trial court's docket, the existence of judicial and administrative matters which the trial court must first address, and the court's inherent power to control its own docket.[166]

After considering each of these factors and "that the alleged delay falls within the time limiting in-court proceedings in the Texas court system due to the COVID-19 pandemic[,]" the court of appeals held "that over 13 months after the hearing [was] a reasonable period of time in which to rule" and the trial court had abused its discretion in refusing to rule on the cross-motions for summary judgment.[167] The court of appeals therefore directed the trial court to rule on the motions within thirty days of its opinion.[168]

XI. JURY CHARGE

The Texas Supreme Court addressed challenges to the trial court's jury charge in *Emerson Electric Co. v. Johnson*.[169] The defendant sustained injuries in connection with his inspection of a recently installed compressor, and he alleged that both the seller and the designer of the compressor had "defectively designed and marketed" it.[170] In *American Tobacco Co. v. Grinnell*, the Texas Supreme Court had found that five types of evidence were admissible in design-defect cases,[171] but the trial court did not include those factors in the design defect liability question in the jury charge.[172] The jury found in the plaintiff's favor, and the court of appeals affirmed.[173]

The supreme court affirmed, finding that the trial court did not err in failing to list the *Grinnell* factors.[174] When a complaint is based on the exclusion of a requested instruction, appellate courts must ascertain "'whether the request was reasonably necessary'" to facilitate the jury's rendition of a correct verdict.[175] The supreme court concluded that the trial court's instruction, which was "based on the Texas Pattern Jury Charge" and tracked the requirements of Section 82.005 of the Texas Civil Practice and Remedies Code, did not include harmful error through its omission of the "first *Grinnell* factor: 'utility . . . to the user and to the public as a whole[,]'" as the utility of the compressor was manifest.[176]

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166. *Id.* at 257.
167. *Id.*
168. *Id.* at 258.
169. *Id.*
170. Emerson Elec. Co. v. Johnson, 627 S.W.3d 197, 200–01 (Tex. 2021).
171. *Id.* at 201–02.
172. Am. Tobacco Co. v. Grinnell, 951 S.W.2d 420, 432 (Tex. 1997).
173. *Emerson Elec. Co.*, 627 S.W.3d at 208.
174. *Id.* at 203 (citing Emerson Elec. Co. v. Johnson, 601 S.W.3d 813, 848 (Tex. App.—Fort Worth 2018) (mem. op.)).
175. *Id.* at 210–11.
176. *Id.* at 209 (quoting Gunn v. McCoy, 554 S.W.3d 645, 675 (Tex. 2018)).

Alleged *Casteel* error[177] was the subject of several decisions during the Survey period. For example, *Kansas City Southern Railway Co. v. Horton*[178] arose out of a fatal accident at a railroad crossing, and the plaintiff survivors contended the defendant was negligent in both failing to eliminate a hump at the crossing and not maintaining adequate yield signs.[179] The trial court never expressly ruled on the defendant's contention that federal preemption applied to the plaintiffs' complaints about the hump; and at the charge conference, the defendant objected to the plaintiffs' broad-form question and proposed a question that separated the two theories.[180] The trial court submitted a single liability question that included both theories, and after the jury found in the plaintiffs' favor, the defendant appealed.[181]

After determining that the plaintiffs' complaints about the hump were preempted and that there was sufficient evidence the absence of the yield signs proximately caused the accident,[182] the Court of Appeals for the Fifth District of Texas at Dallas turned to the defendants' contention that the commingling of valid and invalid liability theories was reversible error under *Casteel*.[183] The plaintiffs sought to distinguish *Casteel*, in which the challenged question included claims under the Texas Deceptive Trade Practices Act and for negligence and breach of fiduciary duty, on the ground that this case involved only one cause of action.[184] The court of appeals disagreed, finding that *Casteel* and its progeny prohibited the use of broad-form submission of invalid theories that prevented appellate courts from determining whether the jury's verdict was based on a valid or invalid theory.[185] The court of appeals found that conclusion especially appropriate in light of the fact the two theories were "completely distinct" from one another.[186]

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177. *Id.* at 209.

178. Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378, 388 (Tex. 2000) ("Accordingly, we hold that when a trial court submits a single broad-form liability question incorporating multiple theories of liability, the error is harmful and a new trial is required when the appellate court cannot determine whether the jury based its verdict on an improperly submitted invalid theory.").

179. No. 05-19-00856-CV, 2021 WL 926281, at *1 (Tex. App.—Dallas Mar. 11, 2021, pet. filed) (mem. op., not designated for publication).

180. *Id.*

181. *Id.* at *1, *10. In contrast, the Court of Appeals for the Eighth District of Texas at El Paso found that the defendants waived their challenge to a broad-form question by failing to timely object to the question at trial. Press Energy Services, LLC v. Ruiz, No. 08-19-00179-CV, 2021 WL 3013313, at *24 (Tex. App.—El Paso July 16, 2021, no pet.) (not designated for publication).

182. *Kansas City S. Ry. Co.*, 2021 WL 926281, at *1.

183. *Id.* at *1–10.

184. *Id.* at *10.

185. *Id.*

186. *Id.* at *11. On the other hand, the Court of Appeals for the Second District of Texas at Fort Worth concluded that the trial court did not abuse its discretion by submitting multiple contractual liability questions in a single broad-form question. Upshaw v. Lacado, LLC, No. 02-20-00031-CV, 2021 WL 3085757, at *13 (Tex. App.—Fort Worth July 22, 2021, pet. denied), reh'g denied (Oct. 7, 2021).

XII. JURY PRACTICE

In *In re Munsch*,[187] the Court of Appeals for the Fourteenth District of Texas at Houston addressed whether improper jury argument warranted a new trial. During the trial of this car wreck case, the defendant's counsel asked the plaintiff when his license was suspended.[188] The plaintiff's counsel objected to this question, and the trial court instructed the jury to disregard it.[189] Even though the plaintiff's counsel promptly asked for a mistrial, after consulting with his client, he withdrew that request, which the trial court said it would have granted.[190] The jury found the defendant's negligence did not cause the accident, and the plaintiff moved for a new trial after the trial court entered a "take-nothing" judgment.[191] The trial court granted the plaintiff's motion, finding that "the jury's [answer] was against the great weight and preponderance of the evidence" and that the defendant's counsel had violated the court's in limine rulings, "including . . . accusing [the] [p]laintiff of driving with a suspended license at the time of the crash."[192]

The defendant sought mandamus relief regarding the new trial order, which the court of appeals declined to grant.[193] The court of appeals found that the question about the plaintiff's suspended license caused harm that could not be cured, as the jury could have believed his lost wages resulted from his suspended license rather than the injuries he sustained in the accident.[194]

The propriety of the trial court's *Batson*[195] rulings was the subject of *Gomez v. City of Austin*.[196] In this employment discrimination action, the Hispanic plaintiff challenged the defendant's use of a peremptory strike against one of the three jurors of Hispanic descent at the front of the jury panel.[197] The trial court upheld the striking of this juror, and following the jury's finding in the defendant's favor, the plaintiff appealed based solely on the trial court's rejection of his *Batson* challenge.[198] According to the plaintiff, the juror at issue had provided some answers during voir dire suggesting she was pro-defense, favored a heightened burden of proof for mental anguish damages, and anticipated difficulty in awarding such damages, whereas the defendant's counsel contended he struck her

187. *Kansas City S. Ry. Co.*, 2021 WL 926281, at *12.
188. 614 S.W.3d 397, 400 (Tex. App.—Houston [14th Dist.] 2020, orig. proceeding).
189. *Id.*
190. *Id.* at 400–01.
191. *Id.* at 401.
192. *Id.* at 399.
193. *Id.*
194. *Id.* at 400, 402.
195. *Id.* at 402. Chief Justice Frost dissented, asserting that the question from the defendant's counsel was not jury argument, the plaintiff had failed to make a timely objection, and the argument was not truly incurable. *Id.* at 407–10 (Frost, C.J., dissenting).
196. 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).
197. Gomez v. City of Austin, 626 S.W.3d 67, 70 (Tex. App.—El Paso 2021, no pet.).
198. *Id.*

because she disagreed with a question regarding "whether some discrimination lawsuits are frivolous."[199]

As the United States Supreme Court has recognized, a *Batson* challenge entails a three-step process: (1) the complaining party must establish "a prima facia case of racial discrimination[;]" (2) the striking party must then provide "a race-neutral explanation[;]" and (3) the challenging party must then establish "'purposeful racial discrimination'" in view of the "'relevant circumstances,'"[200] which include review of statistical data, a comparative juror analysis, whether a jury shuffle was used, "the number and quality of voir dire questions[,]" and the striking party's history.[201]

The Court of Appeals for the Eighth District of Texas at El Paso upheld the trial court's rejection of the plaintiff's *Batson* challenge.[202] According to the court of appeals, the statistical data indicated that, with respect to the three Hispanic jurors at the front of the panel, one was stricken by the plaintiff, and the other was placed on the jury.[203] The comparative juror analysis indicated that, even though the prospective juror answered some questions in support of the plaintiff's position, several other jurors gave similar answers and were not stricken.[204] The jury shuffle factor favored the defendant, as the plaintiff was the only party to request a jury shuffle.[205] The quantity and quality of questions factor was also in the defendant's favor, as the voir dire questioning by the defendant did not show purposeful discrimination.[206] Finally, the plaintiff did not introduce any evidence of the defendant having a history of striking minority jurors.[207] Since only one of the five factors could be viewed as discriminatory, the court of appeals affirmed the trial court's ruling.[208]

In contrast, the Court of Appeals for the Fifth District of Texas at Dallas upheld the trial court's granting of the plaintiff's *Batson* challenge to two Hispanic jurors in *Murphy v. Arcos*.[209] The defendant struck three Hispanic jurors, one of whom because she had suffered injuries from a car accident and two of whom because they spoke Spanish (and would thus listen to the plaintiff rather than the translator) and did not speak "English well enough."[210] The trial court found that the striking of the first juror was race neutral but sustained the plaintiff's challenge to the striking of the other two jurors.[211] After the jury found in the plaintiff's

199. *Id.*
200. *Id.*
201. *Id.* at 71 (citing Batson, 476 U.S. at 97–98).
202. *Id.* at 72 (citing Davis v. Fisk Elec. Co., 268 S.W.3d 508, 511–14 (Tex. 2008)).
203. *Id.* at 75.
204. *Id.* at 73.
205. *Id.* at 73–74.
206. *Id.* at 74.
207. *Id.* at 74–75.
208. *Id.* at 75.
209. *Id.*
210. Murphy v. Acros, 615 S.W.3d 676, 699 (Tex. App.—Dallas 2020, pet. denied).
211. *Id.* at 684.

favor and awarded him over $1 million in damages, the defendant appealed the trial court's *Batson* rulings regarding the two jurors.[212] The court of appeals affirmed, finding that, even though the trial court erred in sustaining the plaintiff's objection without examining "all relevant circumstances" as required by the third step of a *Batson* review, the plaintiff ultimately met his burden of proving the defendant's striking of the two jurors was purposeful racial discrimination.[213]

XIII. MOTIONS FOR NEW TRIAL

In *Matter of Marriage of Sandoval*, the Texas Supreme Court held that the trial court abused its discretion in denying a husband's motion for new trial to set aside a divorce decree granted by default.[214] The Court of Appeals for the Tenth District of Texas at Waco previously held the husband's affidavit in support of the motion was insufficient because the certification of the officer administering the oath was in Spanish and no translation was provided to the trial court.[215] However, the supreme court held that this defect in the jurat was one of "form, not substance," and the wife's failure to object to the affidavit on that basis meant that the defect was waived.[216] The supreme court also held that the husband's testimony that he was "unaware that his separate property would be affected" by a divorce decree was sufficient to demonstrate that "his failure to respond was not intentional or the result of conscious indifference."[217]

The sufficiency of a plaintiff's evidence in support of a motion for new trial was also at issue in *Hunter v. Ramirez*.[218] The motion in that case was supported by an affidavit from the plaintiff's attorney, attesting that she was unaware the defendants had filed a summary judgment motion because the motion and notice of hearing went to her email spam folder.[219] The Court of Appeals for the Fourteenth District of Texas at Houston held that, while the attorney "may have had constructive notice of the . . . motion and hearing[,]" her affidavit was sufficient to negate an inference that her failure to respond was intentional or the result of conscious indifference.[220]

XIV. MISCELLANEOUS

The proprietary of an order sealing exhibits after a trade secret misappropriation trial was addressed by the Texas Supreme Court in *HouseCa-*

212. *Id.*
213. *Id.* at 685.
214. *Id.* at 691–96.
215. *In re* Marriage of Sandoval, 619 S.W.3d 716, 719–20 (Tex. 2021) (per curiam).
216. *In re* Marriage of Sandoval, 589 S.W.3d 267, 273 (Tex. App.—Waco 2019), *rev'd*, 619 S.W.3d 716, 724 (Tex. 2021).
217. *Sandoval*, 619 S.W.3d at 722.
218. *Id.* at 723.
219. Hunter v. Ramirez, 637 S.W.3d 858, 860 (Tex. App.—Houston [14th Dist.] 2021, no pet.).
220. *Id.* at 861.

nary, Inc. v. Title Source, Inc.[221] As framed by the supreme court, the issue presented was "whether the Texas Uniform Trade Secrets Act (TUTSA) provides a separate pathway for sealing court records to which Texas Rule of Civil Procedure 76a does not apply."[222] The supreme court held that TUTSA was not an independent basis for sealing court records containing trade secret information.[223] The case arose out of disagreement over the scope of a licensing agreement for HouseCanary's appraisal technology to Title Source.[224] Seven weeks after a jury found Title Source had misappropriated HouseCanary's trade secrets, "HouseCanary filed a Rule 76a motion to seal thirty trial exhibits[.]"[225] Title Source, and later two intervening media organizations, opposed the sealing motion arguing, among other things, that the trial exhibits "had been freely discussed in open court—including by HouseCanary itself[.]"[226] After a hearing, the trial court denied the motion to seal.[227] HouseCanary moved for reconsideration of the denial as to eight exhibits, "this time . . . raising TUTSA as the sole basis for sealing."[228] The trial court granted the motion for reconsideration and entered the sealing order HouseCanary submitted.[229] On Title Source's appeal, the court of appeals reversed the sealing order under a plurality of rationales, and the supreme court granted HouseCanary's petition for review.[230]

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221. *Id.* at 862.

222. HouseCanary, Inc. v. Title Source, Inc., 622 S.W.3d 254, 256 (Tex. 2021).

223. *Id.*

224. *Id.* at 267.

225. Title Source sued for breach of contract and HouseCanary counterclaimed for misappropriation of trade secrets, asserting "Title Source used HouseCanary's technology to build derivative products in violation of the licensing agreement." *Id.* at 256. The parties stipulated to a protective order, which "was issued under [Texas] Rule of Civil Procedure 192.6(b) and TUTSA section 134A.006." *Id.* (citing and quoting Tex. Civ. Prac. & Rem. Code Ann. § 134A.006(a) ("'There is a presumption in favor of granting protective orders to preserve the secrecy of trade secrets . . . [, which] may include provisions limiting access to confidential information . . . , sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.'") (alterations original). While the stipulated "protective order . . . operated as a temporary sealing order under Rule 76a(5)[,]" it required the party seeking to maintain that protection to file a permanent Rule 76a sealing motion "within five business days." *Id.* at 257. Title Source argued that HouseCanary waived any protection for trial exhibits containing trade secret information by failing to satisfy the five-day requirement. *Id.* at 265. The supreme court suggested that this failure could be considered as part of the "fact-intensive determination" of whether secrecy of a trade secret "has been lost." *Id.* at 266–67 (noting beyond "inclusion of a document containing trade secret information in a court's public records[,]" "[o]ther relevant considerations include whether and when subsequent measures were taken to preserve the document's secrecy, whether a competitor could readily ascertain the information, and whether the document was further published or disseminated outside court records.").

226. *Id.* at 257.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* HouseCanary added six exhibits to the sealing order that "it had not moved to seal" and Title Source "objected to this addition, but the trial court signed the order as drafted." *Id.* The supreme court held that the trial court abused its discretion in including the six exhibits in the sealing order over Title Source's timely objection because HouseCa-

The supreme court first recounted the "key procedural facts" informing its analysis, including that HouseCanary's motion for reconsideration of the sealing denial as to eight of the thirty trial exhibits it claimed were trade secrets was based "solely" on TUTSA "[b]ecause Rule 76a(7) prohibits motions for reconsideration 'without first showing changed circumstances materially affecting the order.'"[231] In considering what standards should apply to stealing trade secrets, the supreme court began by reviewing the relevant provisions of Rule 76a and TUTSA, finding generally that TUTSA, unlike Rule 76a, did not "tell[ ] parties or trial courts what procedures to follow in moving for or issuing orders to seal court records."[232] Given this, the supreme court reasoned there was no conflict between Rule 76a and TUTSA with respect to the procedures for parties to raise, and courts to resolve requests for, sealing trade secret records.[233] The "key conflict" between the two is "Rule 76a(1)(a)'s presumption that court records are open to the public" and TUTSA's presumption that "trade secrets, including those in court records[,]" should be protected from disclosure.[234] According to the supreme court, TUTSA's "presumption controls" and presumptively satisfies Rule 76a(1)(a)'s standard to allow sealing of court records containing trade secrets.[235] Beyond that, however, the supreme court held that TUTSA did not supplant or displace any of the other Rule 76a sealing requirements.[236] The supreme court explained that neither Rule 76a's public notice requirement nor its "bar on motions to reconsider absent changed circumstances" were incompatible with TUTSA, and Rule 76a(8)'s "right to appeal orders relating to sealing or unsealing court records" was consistent with TUTSA's protective presumption because "an immediate appeal helps ensure that interest is not lost due to trial court error."[237] In sum, the supreme court concluded that nothing about TUTSA's "presumption in favor of protective orders" required abandoning "our fundamental commitment to open courts" embodied within Rule 76a's sealing requirements.[238]

Turning to the sealing order at issue, the supreme court held that the trial court abused its discretion in granting HouseCanary's motion for reconsideration by incorrectly using the "TUTSA to avoid applying the

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nary indisputably failed to comply with "Rule 76a's procedures as to these six exhibits." *Id.* at 265.

231. *Id.* at 257.
232. *Id.* at 258.
233. *Id.* at 259–61.
234. *Id.* at 262.
235. *Id.* at 261.
236. *Id.*
237. *Id.* at 264.
238. *Id.* at 262. The supreme court also rejected HouseCanary's argument that TUTSA conflicted with Rule 76a(1)(b)'s requirement "that a movant show no less restrictive means will adequately and effectively protect its interest in secrecy[,]" explaining that sealing was "only one of several means of preserving a trade secret" under TUTSA and there was no inconsistency as "courts have construed Rule 76a(1)(b) to ensure that the movant's interest in secrecy is fully protected while recognizing that less restrictive means than sealing entire records—such as redaction—may effectively achieve that goal in some cases." *Id.* at 262–63.

non-displaced provisions of Rule 76a."[239] The supreme court noted that Title Source and the media companies "offered a collection of reasons for denying the motion to seal on grounds that were not displaced by TUTSA[,]" and for those reasons, affirmed the portion of the court of appeals' judgment reversing "the trial court's sealing order on reconsideration."[240] The supreme court reversed the portion of the court of appeals' judgment denying sealing and remanded to the trial court for further proceedings and an "opportunity to exercise its discretion" under the correct legal standards.[241]

In *In re Gonzales*, the Texas Supreme Court addressed the requirements to designate an "unknown person" as a responsible party under Chapter 33 of the Texas Civil Practice and Remedies Code.[242] In this car wreck case, the plaintiff sued a trucking company claiming its driver rear-ended a vehicle behind plaintiff, causing that vehicle to rear-end the plaintiff's and the plaintiff to "rear-end[ ]the car in front of him."[243] Over four months after filing its original answer, the trucking company moved for leave to designate "John Doe" as a responsible third party, alleging he negligently caused the accident.[244] Within fifteen days of the motion, the plaintiff objected and moved to strike the John Doe designation.[245] The trial court granted the trucking company's motion without ruling on plaintiff's objections. Two years later, the trucking company filed an amended answer, "which still did not include allegations that John Doe or any other 'unknown person' was responsible for causing the accident."[246] In response to plaintiff's traditional and no-evidence summary judgment motion "as to John Doe's alleged negligence," the trucking company amended its answer, alleging "for the first time:" (1) "an 'unknown third

239. *Id.* at 263–64.

240. *Id.* at 264. The supreme court explained: "We recognize, of course, that a party can raise TUTSA's presumption . . . as part of its Rule 76a motion. What a party cannot do is rely only on that presumption to disregard the requirements of Rule 76a that TUTSA does not displace. Nor can a party rely on TUTSA to avoid the prohibition against reconsideration absent changed circumstances under Rule 76a(7), as HouseCanary did here." *Id.* at 264–65.

241. *Id.* at 266.

242. *Id.* The supreme court rejected Title Source's and the media companies' argument that it should render judgment denying the sealing of the eight trial exhibits outright. *Id.* at 264. In doing so, the supreme court explained that HouseCanary's use of the exhibits at trial "without obtaining an order to protect their secrecy (as the protective order required)" did "not conclusively establish a waiver of HouseCanary's trade secrets." *Id.* at 266. According to the supreme court, whether HouseCanary took "reasonable measures" to keep the information secret was a fact-intensive inquiry that the trial court was in the best position to conduct on remand. *Id.* at 266–67.

243. *In re* Gonzales, 619 S.W.3d 259, 262 (Tex. 2021) (per curiam).

244. *Id.* at 260.

245. *Id.* (citing and quoting Tex. Civ. Prac. & Rem. Code Ann. § 33.004(k) ("An unknown person designated as a responsible third party under Subsection (j) is denominated as 'Jane Doe' or 'John Doe' until the person's identity is known.")). The trucking company's allegations about John Doe's responsibility for the accident were unclear, but the supreme court noted that "confusion over [the trucking company's] allegations regarding John Doe's conduct . . . is irrelevant to our decision in this mandamus proceeding." *Id.* at 261 n.3.

246. *Id.* at 260–61.

party-John Doe, was a proximate and/or contributing cause to Plaintiff's injuries and/or damages[;]'" and (2) "'John Doe cut in front of the truck, thereby causing [trucking company's driver] to strike' the second vehicle, which 'then struck Plaintiff's vehicle.'"[247] The trial court denied the plaintiff's summary judgment motion, the court of appeals "summarily denied" the plaintiff's mandamus petition, and the supreme court granted review of the orders granting "leave to designate John Doe as an unknown responsible third party" and "denying summary judgment as to John Doe's alleged negligence."[248]

The supreme court held the trial court abused its discretion by improperly applying Chapter 33.[249] It began the analysis by comparing the requirements for designating "a [named] person" to those governing "designation of an '*unknown* person as a responsible third party'"[250] and held that subsection (j) is "the exclusive means by which defendants can designate unknown persons as responsible third parties."[251] The supreme court reasoned that these restrictions on designating unknown responsible third parties "prevent[ ] . . . imbalances in the proportionate-responsibility framework" because "defendants can reduce their liability by blaming an unknown third party, but plaintiffs cannot recover from that party."[252] To designate an unknown person, the plain language of subsection (j) requires: (1) a defendant to file, within sixty days of the original answer, an answer alleging "that an unknown person committed a criminal act that was the cause of the loss or injury that is the subject of the lawsuit[;]" and (2) once that requirement is satisfied, courts "shall grant amotion" if "the defendant meets three additional requirements:" (a) pleading sufficient facts "for the court to determine there is a reasonable probability" the unknown person's acts were criminal; (b) the defendant states "all [known] identifying characteristics of the unknown person" in the answer; and (c) "the allegation satisfies the pleading requirements of the Texas Rules of Civil Procedure."[253] Because the trucking company "did not timely or adequately satisfy subsection (j)'s . . . requirements," the supreme court determined the trial court abused its discretion in granting the motion for leave and granted plaintiff mandamus relief.[254]

247. *Id.* at 261.
248. *Id.*
249. *Id.*
250. *Id.* at 261–62 (citing Tex. Civ. Prac. & Rem. Code Ann. § 33.004(a)-(l)).
251. *Id.* at 262–63 (emphasis original).
252. *Id.* at 264. "To hold otherwise 'would render the pleading deadlines imposed in subsection (j) meaningless' because a 'defendant would never have an incentive to comply with the pleading requirement in subsection (j) when it could simply wait to designate the unknown person sixty days before trial, and obtain a strategic advantage.'" *Id.* at 263 (citation omitted).
253. *Id.* at 264.
254. *Id.* at 262.