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Civil Procedure: Pre-Trial & Trial

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ABSTRACT

This Article identifies, categorizes, and analyzes the most impactful cases in the area of civil procedure decided by the Texas Supreme Court and the Texas Courts of Appeals during the Survey period.

I. SUBJECT MATTER JURISDICTION

During the Survey period, the Texas Supreme Court continued to distinguish a plaintiff's standing to sue from merits-based inquiries, like governmental immunity, that impact a plaintiff's ability to recover. In *Jones v. Turner*, the supreme court reversed the court of appeals' holding that the plaintiffs lacked taxpayer standing, explaining the plaintiffs satisfied the "long-established exception" to the particularized injury requirement for

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taxpayers by alleging that public funds were expended on "illegal activities."[1] Having made the standing determination, the supreme court next addressed the city's governmental immunity plea.[2] According to the court, the city failed to establish that dismissal based on governmental immunity was warranted; the court then remanded the case to the trial court.[3] Similarly, in *Perez v. Turner*, the Texas Supreme Court reversed the court of appeals' dismissal of a suit challenging a drainage fee ordinance for lack of standing.[4] Citing recent jurisprudence on this point, the supreme court clarified that whether the plaintiff had adequately alleged the fee was invalid went to the merits of the governmental immunity question and not her standing to sue.[5] Rather than the "viability of the pleaded claim," the supreme court explained, the standing question focuses on the "nature of the injury alleged" considering "matters such as injury, causation, and redressability."[6] After determining that the plaintiff had taxpayer standing "to seek an injunction against expenditures of allegedly illegal drainage fees,"[7] the supreme court turned to the merits of the city's governmental immunity plea.[8]

In a "parental termination case," the Texas Supreme Court found the mother's voluntary execution of an affidavit relinquishing her rights mooted the controversy on appeal.[9] At the time of the trial court's judgment terminating the mother's parental rights, the mother was a minor who had appeared and testified at a three-day jury trial but was never served with citation of the petition.[10] The minor mother appealed, and the Court of Appeals for the Third District of Texas at Austin reversed the judgment and remanded for a new trial on the ground that the trial court lacked personal jurisdiction over the minor mother.[11] Afterwards, the supreme court granted the department's petition for review.[12] Days before oral argument,

1. Jones v. Turner, 646 S.W.3d 319, 323–25 (Tex. 2022).
2. *See id.* at 328.
3. *See id.*
4. *See* Perez v. Turner, 653 S.W.3d 191, 197–99 (Tex. 2022).
5. *See id.* at 198 (citing Data Foundry, Inc. v. City of Austin, 620 S.W.3d 692, 696 (Tex. 2021)). The Texas Supreme Court also found the court of appeals erred in determining that the plaintiff's claims were not ripe "because no court had finally adjudged [an amendment to the challenged ordinance] invalid at the time [the plaintiff] filed her suit." *Id.* at 197. The supreme court explained that "ripeness asks primarily whether the plaintiff has alleged a past injury or a likely future injury, rather than a speculative, remote injury that may not come to pass." *Id.* Because the plaintiff had been assessed and paid the drainage fee, the supreme court reasoned that the challenged ordinance was "currently injuring the plaintiff" thereby making her claim ripe "whether or not a court has already adjudged the ordinance invalid." *Id.* The supreme court emphasized that the latter inquiry "was an *element of her claims*—not a jurisdictional prerequisite that had to be established before she sued." *Id.* (emphasis in original).
6. *Id.*
7. *Id.* at 201–02 (citing Garcia v. City of Willis, 593 S.W.3d 201, 208 (Tex. 2019)).
8. *See id.* at 202–04.
9. Tex. Dep't of Fam. and Protective Servs. v. N.J., 644 S.W.3d 189, 191–92 (Tex. 2022).
10. *See id.* at 191.
11. *See id.* (noting that the court of appeals held the minor mother "could not waive service or consent to the court's jurisdiction, even through her voluntary appearance, because minors are *non sui juris* . . . .") (emphasis in original).
12. *See id.*

the supreme court learned that the mother, upon reaching majority, had signed an "affidavit agreeing to 'the termination of [her] parental rights.'"[13] Finding no justiciable controversy existed between the department and the mother over her parental rights because of the affidavit, the supreme court dismissed that portion of the appeal for lack of subject matter jurisdiction.[14]

II. PARTIES

In re Trust A and Trust C presented the "rare" case of failure to join an indispensable party—*i.e.*, one whose "absence deprives the court of jurisdiction to adjudicate between the parties already joined."[15] In this case, one co-trustee of a family trust (Glenna) transferred stock owned by the family trust to her personal trust without the consent of her co-trustee (Mark).[16] Glenna's personal trust then sold the stock to her sons the same day.[17] Mark sued Glenna, and the trial court granted summary judgment in Mark's favor after declaring the stock transfer void and ordering Glenna to return it to the family trust.[18] Glenna appealed and raised several issues, including that compliance with the trial court's order to restore the stock to the trust was impossible because it was presently owned by her sons, who were not parties to Mark's lawsuit.[19] Before reaching the merits, however, the Court of Appeals for the Eighth District of Texas at El Paso first addressed an issue neither Mark nor Glenna had raised: "Whether the trial court had jurisdiction to enter an order voiding the stock transfer without making subsequent purchasers of the stock parties to the lawsuit."[20]

The court of appeals began its analysis with the observation that, since the amendment to Texas Rule of Civil Procedure 39 in 1971, the Texas courts "have been loath to treat the failure to join an indispensable party as a jurisdictional defect which would void a judgment rendered in the indispensable party's absence."[21] The court of appeals went on to explain that, while nonjoinder of a jurisdictionally-indispensable party is rare, this was such a case because Glenna's sons, who now claimed ownership of the stock the trial court ordered be returned to the family trust, were not parties to the suit and would not be bound by any judgment that was rendered.[22] The effect of the judgment would thus be to create competing claims to the stock and would not provide a final and complete adjudication

13. *Id.* at 192.

14. *See id.* ("A case is moot when a justiciable controversy no longer exists between the parties or when the parties no longer have a legally cognizable interest in the outcome.").

15. *In re* Trust A and Trust C, 651 S.W.3d 588, 595 (Tex. App.—El Paso 2022, pet. filed) (quoting Cooper v. Texas Gulf Indus., Inc., 513 S.W.2d 200, 203–04 (Tex. 1974)).

16. *See id.* at 590. Both Glenna and Mark were also beneficiaries of the family trust. *See id.*

17. *See id.* at 593.

18. *See id.* at 590.

19. *See id.* at 594.

20. *Id.*

21. *Id.* at 595 (citing Tex. R. Civ. P. 39).

22. *See id.* at 596–97, 600.

of the dispute between the parties before the court, Mark and Glenna.[23] Accordingly, the trial court's order was merely an advisory opinion.[24]

An employer's novel attempt to assert its employee's statute of limitations defense was rejected by the Court of Appeals for the Thirteenth District of Texas at Corpus Christi–Edinburg in *Cavazos v. Stryker Sales Corp*.[25] The plaintiff originally brought this personal injury suit in 2014 against both the employer and its employee but failed to serve the employee, and the trial court dismissed him from the lawsuit prior to the statute of limitations expiring.[26] Subsequently, the employer filed a motion for summary judgment based on the statute of limitations, arguing that its employee could have invoked that defense if the plaintiff served him then and the employer could not, therefore, be derivatively liable either.[27] The court of appeals disagreed, holding that the rule allowing a principal sued in respondeat superior to assert all defenses available to its agent (including the statute of limitations) did not apply to these facts.[28] In this case, the plaintiff had sued the employer within the limitations period, and the court of appeals held it would not adopt a rule that effectively entitled the employer to dismissal of the claims against it simply because the plaintiff ultimately did not pursue its suit against the employee.[29]

III. SERVICE OF PROCESS

Mitchell v. MAP Resources, Inc. arose out of a 1999 default judgment foreclosing a tax lien on mineral interests owned by Elizabeth Mitchell, who subsequently died in 2009.[30] In the tax foreclosure suit, Mitchell and almost 500 other owners of interests were served by posting citation on the courthouse door.[31] Mitchell's heirs brought suit against the current owners of the mineral interests, seeking a declaration that the foreclosure judgment was void as to Mitchell because she had not been properly served and her due process rights were violated.[32] The heirs alleged that the taxing authority's affidavit in support of substituted service, which stated that Mitchell's address could not be determined after a diligent search, was false because there were eight warranty deeds on file in the public records that reflected her ownership interests and her address.[33] The current owners argued that the heirs' claims were barred by the Texas Tax Code's one-year statute of limitations for challenging tax sales.[34] The owners also

23. *See id.* at 600.
24. *See id.*
25. *See* 658 S.W.3d 749, 750 (Tex. App.—Corpus Christi–Edinburg 2022, no pet.).
26. *See id.* at 750 n.1.
27. *See id.* at 751.
28. *See id.* at 752–53.
29. *See id.* at 753.
30. *See* Mitchell v. MAP Resources, Inc., 649 S.W.3d 180, 183 (Tex. 2022).
31. *See id.* at 184.
32. *See id.* at 186.
33. *See id.*
34. *See id.* (citing Tex. Tax Code Ann. § 33.54(a)).

asserted that the judgment could not be collaterally attacked on the basis of extrinsic evidence derived from information contained in the warranty deeds.[35] The trial court granted summary judgment in favor of the current owners and the Court of Appeals for the Eighth District of Texas at El Paso affirmed.[36]

The Texas Supreme Court reversed.[37] Relying on settled principles of due process, the supreme court noted that "citation by publication or posting violates due process when the address of a known defendant is readily ascertainable from public records that someone who actually wants to find the defendant would search."[38] Further, the supreme court also explained that the rule that generally precludes consideration of extrinsic evidence when a judgment is collaterally attacked does not extend to cases over which the court lacks jurisdiction as a result of a constitutional violation.[39] The opinion went on to hold that the Tax Code's statute of limitations must yield to the requirements of constitutional due process, and such a statute cannot impose a time limit on challenges to a void judgment filed by a defendant who did not receive the constitutionally required notice of the suit.[40]

In contrast to the due process-based holding in *Mitchell*[41]—in *In re Fairley*, the Texas Supreme Court rejected the argument that a judgment was void due to a service defect.[42] The petitioner there asked that all orders entered in a guardianship proceeding be declared void because the ward, the petitioner's deceased father, was personally served by a private process server.[43] The supreme court agreed with the petitioner's argument that her father had not been personally served by a sheriff, constable, or other person authorized to make service under the Texas Estates Code.[44] However, because her father was in fact personally served and entered a general appearance in the proceeding through his attorney *ad litem*, he consented to the personal jurisdiction of the probate court and waived any technical defects regarding service.[45] The probate court's orders were not, therefore, void for lack of jurisdiction.[46]

IV. SPECIAL APPEARANCES

The appropriate scope of jurisdictional discovery was at issue in *Christianson Air Conditioning & Plumbing, LLC*.[47] The Texas plaintiffs in

35. *See id.* at 186–87.
36. *See id.* at 187.
37. *See id.* at 197.
38. *Id.* at 190.
39. *See id*. at 190–91.
40. *See id.* at 194.
41. *See generally id.*
42. *See* 650 S.W.3d 372, 375 (Tex. 2022).
43. *See id.*
44. *See id.* at 382–85.
45. *See id.* at 385–87.
46. *See id.* at 389.
47. 639 S.W.3d 671 (Tex. 2022).

this case sued an Indiana pipe manufacturer and Canadian engineering firm.[48] The latter filed a special appearance and agreed to make two of its executives available for corporate representative depositions related to personal jurisdiction.[49] The parties could not completely agree, however, on what that entailed.[50] Over the engineering firm's objection that some of the requested deposition topics impermissibly touched on the merits of the case, the trial court ordered the depositions go forward on all topics requested by the plaintiffs.[51] The Court of Appeals for the Third District of Texas at Austin granted mandamus relief on eight of the nine topics the engineering firm objected to, holding that "jurisdictional discovery 'must relate exclusively to the jurisdictional question.'"[52] The plaintiffs then filed their own mandamus petition in the Texas Supreme Court.[53]

The supreme court began its analysis by noting that, if a party opposing a special appearance lacks "facts essential" to its opposition, Texas Rule of Civil Procedure 120a(3) expressly authorizes a trial court to order a continuance in order to allow for jurisdictional discovery.[54] Discovery permissible under this standard "must target evidence that would make a disputed fact 'of consequence in determining' the jurisdictional issue 'more or less probable.'"[55] The supreme court acknowledged that merits discovery not related to personal jurisdiction should wait until the special appearance has been decided.[56] Importantly, however, the supreme court held that "[n]othing in Rule 120a or our cases suggests that jurisdictional discovery must relate *exclusively* to the jurisdictional question."[57] To the contrary, Rule 120a itself expressly recognizes the possibility that facts decided on special appearance may also be relevant to the merits and provides that, under such circumstances, those issues are open for redetermination on the merits.[58]

The supreme court further explained that trial judges must apply this standard with a focus on what "essential facts" relate to the special appearance.[59] Thus, for example, a plaintiff may not take discovery on issues that are not in dispute, as they are not essential to its opposition.[60] Moreover, the general principles governing the scope of discovery remain applicable.[61] Like merits discovery, therefore, jurisdictional discovery

48. *See id.* at 674–75.
49. *See id.* at 675.
50. *See id.*
51. *See id.*
52. *Id.* (quoting *In re* JANA Corp., 628 S.W.3d 526, 528, 530 (Tex. App.—Austin 2020, orig. proceeding)).
53. *See id.*
54. *See id.* at 676 (citing TEX. R. CIV. P. 120a(3)).
55. *Id.* (quoting TEX. R. EVID. 401).
56. *See id.*
57. *Id.* (emphasis in original).
58. *See id.* at 677 (citing TEX. R. CIV. P. 120a(2)).
59. *Id.* at 678.
60. *See id.*
61. *See id.*

should not be duplicative or cumulative, but rather must be reasonably tailored and proportional to the case.[62]

V. PLEADINGS

Most practitioners are familiar with the general rule that pleadings are not summary judgment evidence, even if they are sworn to or verified.[63] In *Weekley Homes, LLC v. Paniagua*, the Texas Supreme Court had to once again explain the meaning and limits of that principle.[64] The Court of Appeals for the Fifth District in Texas at Dallas in *Paniagua* reversed a take-nothing summary judgment because the defendant relied in part on allegations in the plaintiffs' pleadings to satisfy its summary judgment burden.[65] The supreme court reversed, explaining that a summary-judgment movant may rely on the allegations in the opposing party's pleadings as judicial admissions.[66] Those admissions can define the issues and, if they establish the movant's defense, will support a summary judgment.[67]

Texas Construction Specialists, LLC v. Ski Team VIP, LLC, arose out of a construction contract dispute.[68] After the contractor filed suit and the project owner counterclaimed, the contractor's attorneys moved to withdraw as counsel.[69] The trial court (1) granted the motions; (2) reset the case for trial; and (3) advised the contractor's corporate representative that he could not represent the company in litigation because he was not an attorney, and thus, the contractor needed to obtain new counsel.[70] The contractor did not retain new counsel, and the owner filed a motion to strike its pleadings because it was unrepresented.[71] When the case was called to trial, the contractor's corporate representative appeared and tried to argue for a continuance, which the trial court would not allow.[72] The trial court then (1) granted the motion to strike the contractor's pleadings because the contractor was unrepresented on the day of trial; and (2) granted a default judgment dismissing all its claims.[73] The case then proceeded to trial on damages and attorneys' fees with respect to the owner's counterclaims.[74]

On appeal, the Court of Appeals for the Fourteenth District of Texas at Houston held that the trial court erred in striking the contractor's pleading,

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62. *See id.*

63. *See, e.g.*, Regency Field Servs., LLC v. Swift Energy Operating, LLC, 622 S.W.3d 807, 818 (Tex. 2021).

64. *See* Weekley Homes, LLC v. Paniagua, 646 S.W.3d 821, 824 (Tex. 2022) (per curiam).

65. *See id.*

66. *See id.* at 827.

67. *See id.* at 828.

68. *See* Tex. Constr. Specialists, LLC v. Ski Team VIP, LLC, 659 S.W.3d 67, 70 (Tex. App.—Houston [14th Dist.] 2022, no pet. h.).

69. *See id.* at 71.

70. *See id.* at 71–72.

71. *See id.* at 72.

72. *See id.*

73. *See id.* at 72–73.

74. *See id.* at 73.

which had been filed by counsel while it was still represented.[75] Although the trial court was correct that the limited liability company could not represent itself at trial, the court of appeals explained that no authority authorizes striking a pleading that was properly filed because the filing party's counsel subsequently withdraws.[76] Ultimately, however, the court of appeals held the trial court's error was harmless because the contractor failed to properly appear when the case was called to trial, and "striking [the contractor's] pleadings and then dismissing [the contractor's] claims had the same result as if the trial court had used the proper remedy and dismissed [the contractor's] claims for want of prosecution."[77]

VI. MOTIONS TO DISMISS

When a motion to dismiss is filed under the Texas Citizens Participation Act (TCPA), the hearing on the motion must be held within sixty days.[78] The TCPA also requires the trial court to rule on the motion within thirty days of the hearing, and if it fails to do so, the motion is deemed to have been denied by operation of law.[79] In *Lakeway Psychiatry & Behavioral Health, PLLC v. Brite*, the Court of Appeals for the Eighth District of Texas at El Paso was faced with the question of what effect the Texas Supreme Court's emergency orders regarding the COVID-19 pandemic had on the statutory deadline for ruling on a TCPA motion to dismiss.[80] In this case, the hearing on the TCPA motion was held on March 4, 2020; nine days later the supreme court issued its first emergency order, which allowed courts to modify any statutory deadlines in response to the COVID-19 pandemic.[81] The trial court did not enter its order granting the motion to dismiss until April 13, 2020.[82] Although the trial court did not mention the emergency order in its ruling, it subsequently made clear that the pandemic had disrupted the court's operations and it never intended to deny the motion by failing to timely rule.[83] In upholding the order granting the motion, the court of appeals (1) rejected the plaintiff's argument that the trial court had retroactively extended the deadline after it had already passed; and (2)

75. *See id.* at 74–75.

76. *See id.* at 74.

77. *Id*. at 75.

78. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.004(a). A trial court may extend this deadline for ninety days if docket conditions require it, good cause exists, or the parties agree. *See id.* § 27.004(a), (b). The trial court may also extend the deadline for 120 days, so long as the court allows discovery. *See id.* § 27.004(c).

79. *See id.* §§ 27.005(a), 27.008(a).

80. *See* Lakeway Psychiatry & Behav. Health, PLLC v. Brite, 656 S.W.3d 621, 629 (Tex. App.—El Paso 2022, no pet.).

81. *See id.* at 633 (citing Supreme Court of Texas, First Emergency Order Regarding the COVID-19 State of Disaster, Misc. Docket 20-9042, 596 S.W.3d 265 (Tex. 2020)).

82. *See id.*

83. *See id.*

held that the trial court properly relied on the emergency order to extend the TCPA ruling deadline.[84]

VII. DISCOVERY

The propriety of a motion to compel neuropsychological examinations of the plaintiffs was the subject of *In re Auburn Creek Limited. Partnership*.[85] The plaintiff-renters sued the defendant-landlord for exposing them to carbon monoxide in their apartment, and the landlord's expert contended he could not ethically opine on the plaintiffs' psychological conditions based solely on their medical records.[86] The landlord moved under Texas Rule of Civil Procedure 204.1 to conduct neuropsychological examinations of the plaintiffs, with the specific tests to be run on each plaintiff to be determined after the expert had conducted his initial interview of each.[87] The trial court denied the motion, and in its motion for reconsideration, the landlord reduced the number of potential tests to be run.[88] The trial court denied that motion as well.[89] In explaining its denial, the trial court (1) noted that the testing would occur after the expiration of the discovery deadline; and (2) concluded that listing potential tests did not satisfy Rule 204.1(d)'s requirement that the order specify the "scope of the examination."[90] The trial court then struck the landlord's expert based on his admission he could not offer his opinions without examining the plaintiffs,[91] and the Court of Appeals for the Fourth District of Texas at San Antonio denied the landlord's request for mandamus relief.[92]

The landlord then sought and obtained mandamus relief from the Texas Supreme Court.[93] With respect to timeliness, the supreme court found that the landlord complied with Rule 204.1(a) by filing both its motion to compel and its motion for reconsideration over thirty days before the discovery deadline and was not responsible for the delays that resulted in the motion for reconsideration being heard a mere four days before that deadline.[94] After noting that the trial court had determined the plaintiffs' neuropsychological conditions were in controversy, the supreme court next turned to whether the landlord demonstrated good cause for the examinations.[95] The court explained that a showing of good cause requires

84. *See id.*
85. *See* 655 S.W.3d 837, 842–43 (Tex. 2022) (per curiam).
86. *See id.* at 839–40.
87. *See id.* at 840.
88. *See id.*
89. *See id.*
90. *Id.*
91. *See id.*
92. *See In re* Auburn Creek Ltd. P'ship, No. 04-21-00389-CV, 2021 WL 4556062, at *1 (Tex. App.—San Antonio Oct. 6, 2021, orig. proceeding) (mem. op., not designated for publication).
93. *See Auburn Creek*, 655 S.W.3d at 843.
94. *See id.* at 841.
95. *See id.* at 841.

that "(1) the examination is relevant to the issue in controversy and is likely to lead to relevant evidence, (2) there is a reasonable nexus between the examination and the condition in controversy, and (3) the desired information cannot be obtained by less intrusive means."[96] The supreme court concluded that the landlord made the required showing and that the trial court abused its discretion in denying the landlord's motions.[97] Finally, the supreme court found the landlord lacked an adequate remedy by appeal after determining that the trial would largely turn on the testimony of the parties' experts.[98]

In *In re LCS SP, LLC*, the Texas Supreme Court addressed the discovery of a nursing facility's policies and procedures prior to service of the expert report required by the Texas Medical Liability Act (TMLA).[99] Under the TMLA, all discovery, except for that seeking information "related to the patient's health care," is stayed pending service of the required expert report.[100] Even though care facilities are required by law to make some policies and procedures publicly available, the plaintiff sought to discover the defendant facility's general operating policies and procedures for the preceding five years.[101] The facility invoked the stay in § 74.351(s), and the trial court denied the plaintiff's motion to compel that discovery.[102] The plaintiff sought mandamus relief from the Court of Appeals for the Fifth District of Texas at Dallas.[103] The court of appeals subsequently (1) stayed the deadline for filing the expert report; and then (2) found that the facility's policies and procedures were "relevant to assessing the appropriate standard of care" and were thus discoverable.[104]

The facility turned to the Texas Supreme Court, which granted mandamus relief from the court of appeals' ruling.[105] First, the supreme court rejected the plaintiff's argument that discovery was warranted because the facility was statutorily required to make some policies and procedures publicly available; rather, the court reasoned that such availability meant it was incumbent on the plaintiff to avail himself of that opportunity, instead of burdening the facility with discovery requests.[106] Second, the supreme

96. *Id.* (citing *In re* H.E.B. Grocery Co., 492 S.W.3d 300, 303 (Tex. 2016)).

97. *See id.* at 843.

98. *See id.*

99. *See In re* LCS SP, LLC, 640 S.W.3d 848, 856 (Tex. 2022); *see also* Tex. Civ. Prac. & Rem. Code Ann. § 74.351.

100. Tex. Civ. Prac. & Rem. Code § 74.351(s) (providing that, "[u]ntil a claimant has served the expert report and curriculum vitae as required by Subsection (a), all discovery in a health care liability claim is stayed except for the acquisition by the claimant of information, including medical or hospital records or other documents or tangible things, related to the patient's health care").

101. *See In re LCS SP*, 640 S.W.3d at 851.

102. *See id.*

103. *In re* Smith on Behalf of Smith, 634 S.W.3d 108, 111, 113–14 (Tex. App.—Dallas 2020, orig. proceeding).

104. *See id.*

105. *See In re LCS SP*, 640 S.W.3d at 856.

106. *See id.* at 852–53 (citing Tex. R. Civ. P. 192.4(a)).

court concluded that the discovery limitations in § 74.351(s) argued against a broad reading of "related to the patient's health care" and that a facility's policies and procedures were not sufficiently patient-specific to be discoverable.[107] Finally, the supreme court rejected the facility's challenge to the court of appeals' stay of the expert-report deadline, finding that such stay was an appropriate exercise of such court's power under Texas Rule of Appellate Procedure 52.10(b) to enter temporary "just relief."[108]

In *In re UPS Ground Freight, Inc.*, the Texas Supreme Court weighed in on the propriety of discovery into the drug and alcohol testing results of current and former drivers of the defendant delivery company who were not involved in the fatal accident at issue.[109] The decedent's mother filed a wrongful-death action against the other driver and the delivery company that employed him.[110] She subsequently sought discovery into the drug and alcohol testing that the delivery company conducted on all of the employees at the facility at which the driver worked.[111] The trial court overruled the delivery company's objections to the production of that testing information.[112] The delivery company sought mandamus relief from the Court of Appeals for the Twelfth District of Texas at Tyler, which found that the requests should have been quashed on the ground they were overly broad with respect to time.[113]

The case returned to the trial court, which again ordered the delivery company to produce the requested testing information (albeit for only limited time periods).[114] The delivery company filed another mandamus proceeding, and the Court of Appeals for the Twelfth District of Texas at Tyler rejected the bulk of the delivery company's challenges but found that the trial court erred in ordering the production of unredacted test results that invaded the privacy rights of the non-party drivers.[115]

The delivery company sought mandamus relief from the Texas Supreme Court, which found that the court of appeals had failed to sufficiently narrow the trial court's overly broad order.[116] According to the supreme court, discovery into the testing on other drivers was "tantamount to a fishing expedition" because the results did not impact whether the driver

107. *Id.* at 853–54 (citing Tex. Civ. Prac. & Rem. Code § 74.351).

108. *Id.* at 855 (citing Tex. R. App. P. 52.10(b)).

109. *See In re* UPS Ground Freight, Inc., 646 S.W.3d 828, 832–33 (Tex. 2022) (per curiam).

110. *See id.* at 830.

111. *See id.*

112. *See id.* at 830–31.

113. *See In re* UPS Ground Freight, Inc., No. 12-19-00412-CV, 2020 WL 975357, at *2, *4 (Tex. App.—Tyler Feb. 28, 2020, orig. proceeding) (mem. op., not designated for publication).

114. *See In re UPS Ground Freight, Inc.*, 646 S.W.3d at 831.

115. *See In re* UPS Ground Freight, Inc., 629 S.W.3d 441, 451–52 (Tex. App.—Tyler 2020, no pet.).

116. *See In re UPS Ground Freight, Inc.*, 646 S.W.3d at 831.

was negligent or whether the delivery company erred in entrusting him with a vehicle.[117]

The availability of discovery at the special appearance stage was the subject of *Christianson Air Conditioning & Plumbing, LLC*.[118] The plaintiff plumbing installer sued both a domestic pipe manufacturer and a Canadian engineering firm for damages arising out of the leaks in plastic pipe the installer used in thousands of homes.[119] The engineering firm filed a special appearance under Texas Rule of Civil Procedure 120a, and the parties were unable to agree on the scope of two corporate representative depositions.[120] The trial court rejected the engineering firm's contention that some of the plaintiff's thirty deposition topics improperly addressed the merits.[121] The engineering firm sought mandamus relief, which the Court of Appeals for the Third District of Texas at Austin granted with respect to eight of the nine challenged topics after determining that jurisdictional discovery "must relate exclusively to the jurisdictional question."[122]

The plaintiff sought mandamus relief from the Texas Supreme Court on six of the challenged topics, contending that jurisdictional discovery is not improper merely because it may overlap with the merits.[123] The supreme court noted that, as detailed in its prior decision in *In re Doe*, discovery must focus on "matters directly relevant" to jurisdiction and does not extend to matters "reasonably calculated to lead to the discovery of admissible evidence" as set forth in Texas Rule of Civil Procedure 192.3(a).[124] The supreme court nonetheless found that neither its prior rulings nor Texas Rule of Civil Procedure 120a required jurisdictional discovery focus exclusively on jurisdiction.[125] Thus, the court explained some overlap with the merits is permissible so long as the discovery relates to "facts essential" to the plaintiff's opposition to the special appearance.[126] After observing that the general limitations on discovery—such as proportionality, overbreadth, and unreasonably cumulative or duplicative—also apply in the context of jurisdictional discovery, the supreme court (1) awarded mandamus relief; (2) directed the court of appeals to vacate its order; and (3) instructed the trial court to address the six topics in dispute.[127]

In other discovery-related decisions during the Survey period, the Court of Appeals for the Fifth District of Texas at Dallas ruled that the defendant hospital, which was seeking metadata regarding the dates

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117. *Id.* at 832. In light of this ruling, the supreme court did not reach the delivery company's other objections. *See id.* at 831.

118. *See* 639 S.W.3d 671, 681–82 (Tex. 2022).

119. *See id.* at 674–75.

120. *See id.* at 675 (citing Tex. R. Civ. P. 120a).

121. *See id.*

122. *In re* JANA Corp., 628 S.W.3d 526, 528, 529–30 (Tex. App.—Austin 2020, orig. proceeding) (citing *In re* Doe, 444 S.W.3d 603, 608–09 (Tex. 2014) (orig. proceeding)).

123. *See Christianson Air Conditioning & Plumbing, LLC*, 639 S.W.3d at 675.

124. *Id.* at 676 (citing *Doe*, 444 S.W.3d at 608).

125. *Id.* at 676–77.

126. *Id.*

127. *See id.* at 678, 681.

certain photographs of the plaintiff's injuries were taken, had not made the requisite showing to be entitled to inspect the electronic devices that were used to take the photographs at issue.[128] The Court of Appeals for the Fifth District of Texas at Dallas also found in an underinsured/uninsured motorist action that, where the defendant insurer had produced over 1,200 pages of its file materials on the underlying automobile accident, a corporate representative deposition violated the proportionality requirement in Texas Rule of Civil Procedure 192.3(b).[129]

VIII. MOTIONS FOR SUMMARY JUDGMENT

In two cases this Survey period, the Texas Supreme Court addressed summary judgment evidentiary issues.[130] In the first, the supreme court held that a trial court's oral, on the record ruling "sustaining an objection to summary judgment evidence" was enough to strike that evidence from the record.[131] The evidence at issue was an expert report offered by the school district suing the turf installer and manufacturer for an allegedly defective football field.[132] In response to the installer's traditional and no-evidence motions for summary judgment, the district submitted the expert report showing the field failed to comply with contract specifications in various respects.[133] The installer objected to the report in its reply, and both sides presented argument to the trial court on the objections at the summary judgment hearing.[134] Afterwards, the trial judge stated: "I'm . . . going to sustain [the installer's] objection[,] and [the installer's] motion for summary judgment is granted."[135] The district appealed the summary judgment in favor of the installer on the breach of express warranty claim.[136] The Court of Appeals for the Sixth District of Texas at Texarkana subsequently reversed after finding the report created a fact issue on that claim.[137] The court of appeals reasoned that, because the trial court's oral ruling sustaining the objections to the report were not "reduced to writing, signed by the trial court, and entered of record," the report was still part of the summary judgment record.[138] The supreme court granted the installer's petition

128. *See In re* Cooley, No. 05-21-00445-CV, 2022 WL 304706, at *3 (Tex. App.—Dallas Feb. 2, 2022, orig. proceeding) (mem. op., not designated for publication).

129. *See In re* Home State Cnty. Mut. Ins. Co., No. 05-21-00873-CV, 2022 WL 1467984, at *4 (Tex. App.—Dallas May 10, 2022, orig. proceeding) (mem. op., not designated for publication).

130. *See* Fieldturf USA, Inc. v. Pleasant Grove Indep. School Dist., 642 S.W.3d 829, 830–31 (Tex. 2022); Weekley Homes, LLC v. Paniagua, 646 S.W.3d 821, 824 (Tex. 2022) (per curiam).

131. *Fieldturf USA, Inc.*, 642 S.W.3d at 831.

132. *See id.* at 831–33.

133. *See id.* at 834.

134. *See id.*

135. *Id.*

136. *See id.* at 834–35.

137. *See id.*

138. *Id.* at 835.

for review, reversed the court of appeals on this point, and reinstated the summary judgment in favor of the installer.[139]

The supreme court reiterated that the "same evidentiary standards" and "rules of error preservation" apply to summary judgment proceedings and trials.[140] Accordingly, "a party must both timely object and secure a ruling from the trial court on the objection" for the evidence to be stricken from the summary judgment record.[141] The supreme court readily concluded that the "trial court's on-the-record, unequivocal oral ruling on an objection" was sufficient to strike the report from the summary judgment record and held the court of appeals therefore erred in considering the report on appeal.[142] The supreme court explained that rulings on objections to summary judgment evidence in the reporter's record need not separately be reduced to writing.[143] However, the court then cautioned practitioners that "best practice" remains "to secure a written order on the objection from the trial court."[144]

In the second case, the Texas Supreme Court addressed the use of an opposing party's pleadings in summary judgment proceedings.[145] The Court of Appeals for the Fifth District of Texas at Dallas reversed the trial court's grant of summary judgment to the builder under Chapter 95 of the Texas Civil Practice and Remedies Code[146] in a suit over a fatal construction site accident.[147] To establish Chapter 95's applicability in its summary judgment motion, the builder relied on the allegations in the plaintiffs' petition—claiming that "they 'were working' at the driveway and 'working at' the townhome construction site when the accident occurred."[148] Reasoning that "pleadings do not constitute summary judgment evidence," the court of appeals held that the builder had not satisfied its burden to adduce evidence demonstrating that Chapter 95 applied.[149] While acknowledging the "general proposition" that "pleadings are not competent summary judgment evidence," the supreme court criticized the court of appeals' "categorical" approach and explained that an opposing party's pleadings may be used in summary judgment proceedings.[150] Specifically, the supreme court noted that trial courts may grant summary judgments based on issues outlined by, deficiencies in, and "truthful judicial admissions" made

139. *See id.* at 836–40.
140. *Id.* at 837.
141. *Id.* at 837 (citing Tex. R. Civ. P. 166a(f)).
142. *Id.* at 838–39.
143. *Id.* at 839.
144. *Id.*
145. *See* Weekley Homes, LLC v. Paniagua, 646 S.W.3d 821, 824 (Tex. 2022) (per curiam)
146. *See* Tex. Civ. Prac. & Rem. Code § 95.001 *et seq.* Chapter 95 generally "limits a real property owner's liability for common-law negligence claims that arise out of a contractor's or subcontractor's work on an improvement to the property." *Weekley Homes, LLC*, 646 S.W.3d at 825 (citation and internal quotation omitted).
147. *See Weekley Homes, LLC*, 646 S.W.3d at 824–25.
148. *Id.* at 825.
149. *Id.* at 824–26.
150. *Id.* at 827–28.

within the opposing party's pleadings.[151] Consistent with this opinion, the supreme court reversed and remanded the case to the court of appeals for a determination of "whether allegations in the plaintiffs' pleadings constitute judicial admissions of material facts."[152]

In *Balmorhea Ranches, Inc.*, the Court of Appeals for the Eighth District of Texas at El Paso also addressed what record evidence a trial court may consider in granting summary judgment during the Survey period.[153] In this trespass to try title case, the opposing parties filed competing motions for summary judgment.[154] After full briefing, the trial court held a hearing on the motions and took them under advisement.[155] In advance of the trial setting, the parties filed joint stipulations of facts, along with proposed findings of fact and conclusions of law.[156] Weeks after the pretrial filings, the trial court announced its decision on the competing motions for summary judgment by letter.[157] A few weeks later, the trial court entered a "formal order and final judgment" memorializing its summary judgment decision;[158] and the same day, entered "Findings of Fact and Conclusions of Law" in the form, with modification, previously proposed by the party prevailing on summary judgment.[159] On appeal, the losing party claimed the trial court erred both in considering material "outside the summary judgment record" and in rendering findings and conclusions on summary judgment.[160]

The court of appeals rejected each argument in turn.[161] While acknowledging the "general rule" that "the trial court only considers the record as it properly appears when the motion for summary judgments are heard," the court of appeals noted that trial courts have discretion (under Texas Rule of Civil Procedure 166a(c))[162] to permit and consider later filings when ruling on summary judgment.[163] Because the pretrial stipulations were permitted filings during the period the trial court had the competing motions under advisement and "stipulations are one of the items explicitly

151. *Id.* (citing Regency Field Servs., LLC v. Swift Energy Operating, LLC, 622 S.W.3d 807, 818 (Tex. 2021); Energen Res. Corp. v. Wallace, 642 S.W.3d 502, 512 n.9 (Tex. 2022)).

152. *Id.* at 828.

153. *See* Balmorhea Ranches, Inc. v. Heymann, 656 S.W.3d 441 (Tex. App.—El Paso 2022, no pet.).

154. *See id.* at 444.

155. *See id.* at 445.

156. *See id.*

157. *See id.*

158. The trial court's summary judgment order recited that, whilst ruling on the competing motions, it considered the parties' pretrial stipulations of fact submitted after the summary judgment hearing. *See id.*

159. *Id.*

160. *Id.*

161. *See id.*

162. *Id.* at 446 ("The [summary] judgment sought shall be rendered forthwith if . . . the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before judgment with permission of the court, show that . . . there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion." (quoting TEX. R. CIV. P. 166a(c)) (alterations in original)).

163. *See id.*

mentioned in Rule 166a(c)," the court of appeals determined the trial court did not abuse its discretion by considering the parties' factual stipulations when deciding summary judgment.[164] With respect to the trial court's "Findings of Fact and Conclusions of Law," the court of appeals held that any error was harmless.[165] Regardless the title of the document, the court of appeals determined that "the trial court did not resolve any disputed facts as none were in dispute."[166]

IX. JURY CHARGES

The Texas Supreme Court addressed challenges to the trial court's jury charge in *In re Poe*.[167] Richard Poe (Dick) owned and operated three car dealerships and other businesses through a corporation that served as the general partner of those businesses.[168] At the time of its creation, the corporation issued 1,000 of the 10,000 authorized shares to Dick's eldest son, Richard Poe, II (Richard), who believed himself to be Dick's heir apparent.[169] Richard nonetheless gave control of the corporation to Dick through (1) a proxy giving Dick the right to vote the shares; and (2) the appointment of Dick as the corporation's sole director.[170] A few weeks before he died, Dick authorized the corporation to issue 1,100 new shares, which he bought for $3.2 million.[171] Richard did not learn of the share issuance until after Dick's death.[172] He then filed direct and derivative claims in the probate court wherein he contended that the issuance of the new shares breached fiduciary duties Dick owed to both the corporation and to Richard.[173] Richard also alleged that the co-executors named in Dick's will and Dick's long-time attorney, in their individual capacities, breached their fiduciary duties to the corporation and conspired with Dick to breach his duties.[174] In turn, the defendants contended Dick's duties ran to the corporation, not to Richard and that, since the share issuance was fair to the corporation, it fit within the safe harbor in § 21.418(b)(2) of the Texas Business Organizations Code.[175]

The probate court bifurcated the trial—with the first trial addressing the validity of the share issuance and the second focusing on Richard's

164. *Id.* at 446–47.

165. *Id.* at 447.

166. *Id.* (emphasizing that "summary judgment is only proper when there are no facts to find and the legal conclusions have already been stated in the motion and response").

167. *See* 648 S.W.3d 277, 289, 291–92 (Tex. 2022).

168. *See id.* at 280–81.

169. *See id.* at 281. Dick's other son, Troy, had cerebral palsy and required around-the-clock care. *See id.* at 281 n.2.

170. *See id.* at 281.

171. *See id.*

172. *See id.*

173. *See id.* Richard also alleged that Dick lacked the requisite mental capacity to issue and purchase the additional shares, but the probate court ruled against him on that issue. *See id.* at 281, 282.

174. *See id.* at 281.

175. *See id.* at 281–82.

conspiracy and damages claims.[176] In the first trial, the defendants objected to all four of the jury issues that the probate court submitted, and the jury found in Richard's favor.[177] In the second trial, the probate court directed a verdict in favor of the defendants in their individual capacities and declared the share issuance invalid, which necessitated a refund to the estate of the $3.2 million Dick had paid for the shares.[178] Both sides appealed, and the Court of Appeals for the Eighth District of Texas at El Paso affirmed in part and reversed and remanded in part.[179] The court of appeals found that any error in the submission of Question 4, which related to the statutory safe harbor, was harmless and obviated the need to address the other three questions, which related to the informal-fiduciary-duty theory.[180]

Both the estate and Dick's long-time attorney sought review from the Texas Supreme Court, which found error in the probate court's submission of all four questions.[181] According to the supreme court, the erroneous submission of an immaterial jury question can constitute harmful error when it confuses or misleads the jury in answering material questions.[182] The supreme court thus found that the submission of Question 1—which inquired whether a relationship of trust and confidence existed between Dick and Richard—was erroneous because Dick's duties ran solely to the corporation and could not by definition run to Richard as well.[183] The supreme court also found error in the probate court's inclusion of all three distinct conditions in § 21.418(b) of the Texas Business Organizations Code.[184] Two of those conditions (approval by a majority of the disinterested directors and approval through a shareholder vote) could not apply because (1) Dick was the only director; and (2) Richard (as the sole shareholder) was unaware of the transaction and thus never voted on it—meaning there was no evidence to support the submission of those two conditions.[185] Finally, the supreme court concluded that these charge errors were harmful; the submission of the questions on whether an informal fiduciary duty existed, coupled with the inclusion of inapplicable safe-harbor conditions, "probably caused the rendition of an improper judgment" as required by Texas Rule of Appellate Procedure 61.1(a).[186]

176. *See id.* at 282, 284.
177. *See id.* at 283–84.
178. *See id.* at 284.
179. *See In re* Poe, 591 S.W.3d 607, 653 (Tex. App.—El Paso 2019), *rev'd in part*, *aff'd in part*, 648 S.W.3d 277, 284 (Tex. 2022).
180. *See id.* at 632, 635. The court of appeals also reversed some aspects of the probate court's dismissal of the claims against the defendants in their individual capacities. *See id.* at 643–44, 648.
181. *See In re Poe*, 648 S.W.3d at 292–93.
182. *See id.* at 286 (citing City of Brownsville v. Alvarado, 897 S.W.2d 750, 752 (Tex. 1995)).
183. *See id.* at 288–89.
184. *See id.* at 290–91 (citing Tex. Bus. Org. Code Ann. § 21.418(b)).
185. *See id.* at 290–91.
186. *Id.* at 291–92 (citing Tex. R. App. P. 61.1(a)).

X. JURY PRACTICE

In *Patriot Contracting, LLC v. Shelter Products, Inc.*,[187] the Court of Appeals for the First District of Texas at Houston addressed whether improper jury argument warranted a new trial.[188] In this construction dispute, the defendant general contractor contended that the plaintiff subcontractor's questioning of the general contractor's president regarding whether he had been characterized as "acting like a bully" constituted improper jury argument that should have resulted in a mistrial.[189] The general contractor objected to this line of questioning on relevance grounds.[190] The subcontractor responded that there was no basis for a breach-of-contract claim against the subcontractor; however, the president had nonetheless instructed the general contractor's counsel to file such a claim "as a punitive measure."[191] The trial court overruled this objection, and the subcontractor's questioning of the president continued.[192]

On appeal, the general contractor argued that the questioning of its president was highly prejudicial and should have been excluded under Texas Rule of Evidence 403.[193] However, the court of appeals disagreed; instead, the court found that the general contractor had waived this complaint because its objection below was based on Texas Rule of Evidence 402—rather than Texas Rule of Evidence 403.[194] The court of appeals also found the general contractor waived its relevance objection through the admission, without objection, of other evidence of the president's disdain of others.[195]

A trial judge's alleged bias against the plaintiff's counsel before the jury was one of many subjects discussed in *Arreola v. Union Pacific R.R.*[196] *Arreola* was a wrongful-death action arising out of the death of the plaintiff's minor son, who was hit by a train while walking on railroad tracks.[197] The jury found the minor was 90% at fault for the accident, and the trial court entered a take-nothing judgment in favor of the defendant railroad.[198] Among other arguments on appeal, the plaintiff contended that the trial judge's comments and rulings before the jury evidenced sufficient bias to warrant a new trial.[199]

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187. 650 S.W.3d 627 (Tex. App.—Houston [1st Dist.] 2022, pet. denied).
188. *See id.* at 649.
189. *Id.* at 649–50.
190. *See id.*
191. *Id.* at 650.
192. *See id.*
193. *See id.* (citing TEX. R. EVID. 403).
194. *See id.* (citing TEX. R. EVID. 402-03; TEX. R. APP. 33.1(a)). The court of appeals also observed that the general contractor had failed to request the trial court to instruct the jury to disregard the complained-of statements and had not included this complaint in its motion for new trial. *See id.* at 650 n.26.
195. *See id.* at 650 n.25.
196. *See* 657 S.W.3d 789, 825–29 (Tex. App.—El Paso 2022, no pet.).
197. *See id.* at 797–98.
198. *See id.* at 798.
199. *See id.* at 825.

The Court of Appeals for the Eighth District of Texas at El Paso disagreed and affirmed.[200] At the outset of its analysis, the court of appeals noted that (1) adverse rulings—in and of themselves—rarely evidence bias; (2) such rulings can typically be resolved through an appeal; (3) trial judges have broad discretion in conducting jury trials; and (4) such discretion extends to making comments that may be critical of or hostile to one party.[201] In order to find improper judicial bias, the trial judge's comments must evince "a deep-seated favoritism or antagonism that would make fair judgment impossible."[202] The court of appeals concluded that the plaintiff failed to make the required showing, since (1) the trial judge affirmed the rulings the plaintiff challenged; and (2) the plaintiff did not assert timely objections to the complained-of comments or seek a curative instruction for them.[203] Finally, the court of appeals addressed the specific instances of misconduct alleged by the plaintiff.[204] The court found that the trial judge's actions and comments were consistent with her discretion in conducting the trial.[205]

XI. MOTIONS FOR NEW TRIAL

Whether a misfiled motion for new trial was sufficient to extend a trial court's plenary power and the deadline for filing a notice of appeal was at issue in *Mitschke v. Borromeo*.[206] Two of the defendants in this wrongful death suit were granted summary judgment.[207] On the plaintiff's motion, the trial court severed those claims to allow for an immediate appeal.[208] "The severance order was issued under the original cause number" but included within it language creating the new cause number for the severed claims that had been dismissed.[209] The plaintiff then filed a motion for new trial based on the summary judgment order.[210] The motion was served on all parties, including the severed defendants; however, the motion was filed under the *original* cause number.[211] Believing his motion extended the trial court's plenary power and his appellate deadlines, the plaintiff thereafter filed a notice of appeal in both cause numbers three days before the extended deadline would have expired.[212] The plaintiff's appeal was transferred to the Court of Appeals for the Seventh District of Texas at Amarillo, which concluded that it was bound by the most recent precedent

200. *See id.* at 829.
201. *See id.* at 826.
202. *Id.* (quoting Dow Chem. Co. v. Francis, 46 S.W.3d 237, 240 (Tex. 2001) (per curiam)).
203. *See id.* at 827.
204. *See id.*
205. *See id.* at 827–29.
206. *See* 645 S.W.3d 251, 253 (Tex. 2022).
207. *See id.* at 254.
208. *See id.* at 254.
209. *Id.*
210. *See id.*
211. *See id.*
212. *See id.*

from the transferor court to dismiss the appeal as untimely because no motion for new trial had been filed in the severed action.[213]

The Texas Supreme Court reversed and remanded.[214] Agreeing that the court of appeals was required to look to the transferor court's precedent in deciding the case, the supreme court's opinion contains a lengthy discussion of the manner in which principles of stare decisis should be applied, not only by the intermediate appellate courts but also in its own jurisprudence.[215] After conducting that analysis with respect to the issue before it, the supreme court overruled one of its own prior decisions, *Philbrook v. Berry*,[216] and held that appellate jurisdiction should not be defeated by minor, non-prejudicial defects in a party's attempt to invoke that jurisdiction.[217]

In re Marriage of Williams presented the question of whether a defendant who fails to answer must file a motion for new trial satisfying *Craddock v. Sunshine Bus Lines, Inc.*[218] to challenge the sufficiency of the evidence supporting a default judgment.[219] The wife in this divorce case filed a motion for new trial wherein she admitted she had been served but failed to file an answer because she hoped to reach a settlement with her husband.[220] On appeal, the wife argued "the trial court abused its discretion in [dividing] the property" in the default judgment because "there was no evidence that certain assets were [the husband's] separate property and no evidence the division was just and right."[221] In response to the husband's argument that the wife's motion failed to satisfy the *Craddock* elements, the Texas Supreme Court held that the failure to meet the *Craddock* standard, or indeed to file any motion for new trial at all, does not foreclose a defaulting party's ability to raise sufficiency of the evidence on appeal.[222]

XII. MISCELLANEOUS

In *In re Whataburger Restaurants LLC*, the Texas Supreme Court held that a party who, "because of the trial court's clerk's error," did not receive notice of an order denying a motion to compel arbitration in time to appeal was entitled to mandamus relief.[223] When an employee sued her employer for a personal injury she allegedly sustained while at work, Whataburger moved to compel arbitration.[224] The trial court denied Whataburger's

213. *See id.* at 254–55.
214. *See id.* at 254.
215. *See id.* at 255–60, 263–66.
216. 683 S.W.2d 378 (Tex. 1985) (per curiam).
217. *See Mitschke*, 645 S.W.3d at 266.
218. 133 S.W.2d 124 (Tex. 1939).
219. *See In re* Marriage of Williams, 646 S.W.3d 542, 543 (Tex. 2022).
220. *See id.* at 543–44.
221. *Id.* at 544.
222. *See id.* at 544–45.
223. *In re* Whataburger Restaurant LLC, 645 S.W.3d 188, 190–91 (Tex. 2022).
224. *See id.* at 191. The supreme court noted Whataburger's "mandatory" arbitration policy (1) was "detailed"; (2) spanned "two single-spaced pages"; and (3) was accepted by

motion to compel, but stated "only" that the arbitration provision was unconscionable.[225] On Whataburger's appeal of the denial, the Court of Appeals for the Eighth District of Texas at El Paso reversed and remanded the case to the trial court with instructions to order arbitration.[226] Because the court of appeals did not address the employee's cross-appeal points, the supreme court granted her petition for review and remanded the case to the court of appeals to do so.[227] On remand, the court of appeals considered—but declined to decide—whether Whataburger's arbitration policy was illusory as the employee claimed and remanded that question to the trial court.[228] Whataburger filed a supplemental motion to compel "addressing [the employee's] illusoriness argument" before the trial court, which took it under advisement at the conclusion of a hearing on the motion.[229] A month later, the trial court entered "a one-sentence order" denying the supplemental motion to compel arbitration.[230] However, the clerk failed to notify the employee or Whataburger of the order.[231] Whataburger did not receive notice until 153 days later.[232] Within eight days of discovery, Whataburger moved for reconsideration and for a determination of the date it received the order.[233] After the trial court denied the motion for reconsideration and issued an order establishing Whataburger "had not received notice of its order denying the supplemental motion to compel within [ninety] days of its issuance,"[234] Whataburger sought mandamus relief in the court of appeals.[235] A divided court of appeals denied the petition, and Whataburger timely requested mandamus relief in the supreme court.[236]

The Texas Supreme Court held that Whataburger had shown it lacked an adequate appellate remedy because of the clerk's failure to give "the required notice" of the order followed by the trial court's "refusal to vacate the August 2018 order and decide [the employee's] illusoriness challenge

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employees when they "accept[ed] employment or by continuing [their] employment." *Id.*

225. *Id.* at 192. According to the supreme court, the trial court also issued findings "regarding the costs and expenses associated with arbitration without evidence in the record to support them" and conclusions "that were mostly impertinent, personal disparagements of arbitration in general." *Id.*

226. *See id.*

227. *See id.*

228. *See id.*

229. *Id.*

230. *Id.* at 192–93.

231. *See id.* at 192–93.

232. *See id.* at 193.

233. *See id.*

234. As explained by the supreme court, under Texas Rule of Civil Procedure 306a, if a party "fails to receive formal notice or acquire actual notice of an appealable order within 20 days of the order's being signed, the appellate deadline[s] can be extended, but to no more than 90 days after the order was signed." *Id.* at 193 (citing Tex. R. Civ. P. 306a(3)–(5)). The trial court's delay in providing notice of the order therefore "cost Whataburger its right to appeal." *Id.*

235. *Id.*

236. *See id.*

anew."[237] In doing so, the supreme court rejected the employee's argument that Whataburger should have "checked in" with the trial court after the hearing, reasoning that practitioners should be able to rely on "the clerk's duty to give notice of trial court orders."[238] Further, the supreme court noted (1) that denying Whataburger mandamus relief under the circumstances may encourage gamesmanship; and (2) that Whataburger "acted promptly to protect its right to appellate review immediately upon learning of the . . . order."[239] Having made this determination, the supreme court next considered whether the trial court abused its discretion by refusing to compel arbitration of the employee's claims.[240] After reviewing the terms of Whataburger's arbitration policy with provisions of its handbook, the supreme court held that the trial court abused its discretion because the policy was not illusory.[241] The supreme court therefore conditionally granted mandamus directing the trial court to "promptly issue an order compelling arbitration."[242]

237. *Id.* at 193–94. The supreme court emphasized: "An appeal cannot be adequate when the court prevents a party from taking it." *Id.* at 193.

238. *Id.* at 194.

239. *Id.*

240. *See id.* at 194–98.

241. *See id.* at 198.

242. *Id.* Whataburger filed its original motion to compel arbitration of the employee's claim in February 2013, over nine years before the supreme court's decision. *See id.* at 191, 198.