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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 and a handful of legislative enactments.

II. SUBJECT MATTER JURISDICTION

Governmental immunity cases continued to dominate the field of subject matter jurisdiction during the Survey period. In *Texas Parks & Wildlife Department v. Sawyer Trust*, the Texas Supreme Court held that the trust's declaratory-judgment action was barred by sovereign immunity.[1] The genesis of this dispute is the rule that "[t]he State of Texas owns the

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1. Tex. Parks & Wildlife Dep't v. Sawyer Trust, 354 S.W.3d 384, 386 (Tex. 2011).

soil underlying navigable streams."[2] The trust wished to sell sand and gravel from a portion of a riverbed that crossed property it owned. Fearing that the State would claim ownership and interfere with the sale, the trust sought a declaratory judgment that the river was not navigable. When the State's surveyor later determined that the river was in fact navigable, the trust amended its pleadings to allege a takings claim as well.[3]

The supreme court rejected all of the trust's claims.[4] The supreme court first held that the declaratory judgment action was, in reality, a request to adjudicate title to the disputed riverbed, a claim from which the State is immune.[5] Moreover, because the trust sought only declaratory and injunctive relief, not compensation, it failed to state a takings claim.[6] Nevertheless, the supreme court remanded the case to allow the trust to further amend its pleadings to assert an ultra vires claim against the officials who the trust asserted wrongfully laid claim to the riverbed on behalf of the State.[7]

The Texas Supreme Court has previously held that if a governmental entity asserts a claim for affirmative relief, it is not immune from claims asserted back against it as an offset that are connected with, and properly defensive to, the government's claim.[8] The novel question in *City of Dallas v. Albert* was what happens when the governmental entity asserts, but then nonsuits, such a claim for affirmative relief.[9] *Albert* involved a pay dispute between the City of Dallas and its police officers and firefighters. Based on competing constructions of a pay ordinance passed by referendum, the officers asserted claims that they had been underpaid, while the city filed a counterclaim seeking reimbursement for amounts it alleged had been overpaid. The city subsequently nonsuited its affirmative claim and argued that it was therefore immune from the officers' claims.[10]

In what can only be described as a hollow victory for the plaintiffs, the Texas Supreme Court rejected the city's immunity argument.[11] In this regard, the majority opinion held that a nonsuit did not "reinstate" or "create" immunity from the officers' claims; however, the nonsuit did mean that the officers could no longer recover on their claims because there was nothing to offset.[12] Justice Hecht dissented, describing the ma-

2. *Id.*
3. *Id.* at 387.
4. *Id.* at 386.
5. *Id.* at 389–90.
6. *Id.* at 391–92.
7. *Id.* at 386, 394. The dissent objected to this part of the decision, reasoning that the majority was effectively "abolish[ing] the State's immunity from suit[s] to determine title." *Id.* at 397 (Hecht, J., dissenting). According to Justice Hecht, "[a]ll a plaintiff must do [now] is name [a governmental] official as the defendant," as this has the same practical effect as a suit against the State itself and binds the State to the resulting judgment. *Id.*
8. Reata Constr. Corp. v. City of Dallas, 197 S.W.3d 371, 376–77 (Tex. 2006).
9. City of Dallas v. Albert, 354 S.W.3d 368, 371 (Tex. 2011).
10. *Id.* at 370–71.
11. *Id.* at 371.
12. *Id.* at 376.

jority's holding as "extremely convoluted."[13] And Justice Willett complained that the entire majority opinion was advisory, since the case was being remanded to determine whether a new provision of the Local Government Code waived the city's immunity anyway.[14]

The Texas Supreme Court, in *Texas A&M University-Kingsville v. Yarbrough*, was sharply divided on whether a university professor's claim was moot after she was granted tenure.[15] The professor claimed that her tenure application had been undermined by a department chair's negative summary of her performance evaluations. Even though she received tenure, she argued that the summary remained in her file and could be used against her in future personnel decisions. A bare majority of the supreme court rejected this argument, concluding that the professor's claim did not present a "substantial controversy . . . *of sufficient immediacy and reality*."[16] The dissent disagreed, noting that the supreme court has previously held that allegations of this type of "stigmatic injury . . . [can be] sufficient to demonstrate a live controversy."[17]

When a plea to the jurisdiction disputes the jurisdictional facts alleged by the plaintiff, a trial court must utilize a procedure similar to that applicable to summary judgment motions.[18] *Unifund CCR Partners v. Watson* serves as a reminder that it is the traditional summary-judgment-motion procedure, not the no-evidence procedure, that must be followed.[19] As the Amarillo Court of Appeals explained, the defendant must present evidence that conclusively negates subject matter jurisdiction in order to impose an evidentiary burden on the plaintiff to establish that a fact issue exists.[20] The defendant cannot merely deny the existence of the jurisdictional facts and thereby shift the burden to the plaintiff, as is the case with a no-evidence summary judgment motion.[21]

III. SPECIAL APPEARANCE

During the Survey period, Texas courts continued to grapple with the effect of a party's Internet presence on personal jurisdiction. In *BenMac's Arrowheads Dot Com, LLC v. Williams*, the Eastland Court of Appeals relied exclusively on the out-of-state defendants' ownership of a website, which included advertising banners for twelve Texas companies (out of a total of fifty-three advertisers), to support a finding of general

13. *Id.* at 381 (Hecht, J., dissenting).
14. *Id.* at 383 (Willett, J., dissenting) (citing TEX LOC. GOV'T CODE ANN. § 271.152 (West 2012)).
15. Tex. A&M Univ.-Kingsville v. Yarbrough, 347 S.W.3d 289, 289–290 (Tex. 2011).
16. *Id.* at 291 (quoting Md. Cas. Co. v. Pac. Coal & Oil Co., 312 U.S. 270, 273 (1941)) (emphasis added by Texas Supreme Court).
17. *Id.* at 292–93 (Willett, J., dissenting) (citing Carillo v. State, 480 S.W.2d 612, 616–17 (Tex. 1972)).
18. Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 228 (Tex. 2004).
19. Unifund CCR Partners v. Watson, 337 S.W.3d 922, 926-27 (Tex. App.—Amarillo 2011, no pet.).
20. *Id.* at 926.
21. *Id.*

jurisdiction.[22] The court of appeals brushed aside the defendants' argument that their website was "passive"[23] and was not, therefore, sufficient to establish minimum contacts with Texas.[24] The court reasoned that it was unnecessary to analyze the degree of interactivity because the question was not whether the website itself created sufficient contacts, but whether it was evidence of the continuous and systematic contacts with Texas necessary to establish general jurisdiction.[25] It is questionable, however, if this distinction should make any difference to the jurisdictional analysis. More importantly, the court of appeals's ultimate conclusion—that twelve Texas companies advertising on the defendants' website was sufficient to support general jurisdiction[26]—appears to be unprecedented. Indeed, both the United States Supreme Court and Texas Supreme Court have previously rejected assertions of general jurisdiction in cases involving far more extensive business activity in Texas than simply selling advertising space on a website to Texas companies.[27]

In contrast to the opinion in *BenMac's*, the Texas First District Court of Appeals conducted a thorough analysis of the nature and extent of the defendants' Texas contacts, including the interactivity of their websites, in ruling on the special appearances in *Waterman Steamship Corp. v. Ruiz*.[28] In this maritime-negligence case, the court of appeals held that general jurisdiction over one shipping company was lacking, despite its regular calls upon Texas ports, purchases from Texas vendors, employment of 200 Texas residents over the years, payment of Texas franchise taxes, and maintenance of a passive website accessible in Texas.[29] While the other

22. BenMac's Arrowheads Dot Com, L.L.C. v. Williams, 357 S.W.3d 390, 391, 394–95 (Tex. App.—Eastland 2011, no pet.). General jurisdiction refers to the assertion of personal jurisdiction when the plaintiff's claims against the defendant are unrelated to the latter's contacts with the forum state. *See, e.g.*, PHC-Minden, L.P. v. Kimberly-Clark Corp., 235 S.W.3d 163, 167 (Tex. 2007). Because general jurisdiction means the nonresident could be required to defend any lawsuit in the forum, it "involves a 'more demanding minimum contacts analysis.'" *Id.* at 168 (quoting CSR, Ltd. v. Link, 925 S.W.2d 591, 595 (Tex. 1996)).

23. A number of Texas courts have adopted the "sliding scale" analysis of personal jurisdiction based on website presence in the state, which was first articulated in Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997). *See, e.g.*, Jackson v. Hoffman, 312 S.W.3d 146, 154 (Tex. App.—Houston [14th Dist.] 2010, no pet.); Reiff v. Roy, 115 S.W.3d 700, 705–06 (Tex. App.—Dallas 2003 pet. denied). This analysis examines the degree to which the defendant's website is interactive, with one end of the spectrum being a "passive" website that is used only for advertising and providing information, while on the opposite end of the spectrum a nonresident may actually be doing business in the forum by, for example, entering into a contract with a forum resident over the Internet. *Zippo Mfg. Co.*, 952 F. Supp. at 1124.

24. *BenMac's*, 357 S.W.3d at 394–95.

25. *Id.*

26. *Id.*

27. *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 418–19 (1984) (foreign defendant regularly purchased helicopters and related equipment from Texas vendors and sent pilots and personnel to Texas for training); *PHC-Minden*, 235 S.W.3d at 170–71 (out-of-state defendant's trips to Texas, payments to multiple Texas vendors, and contracts with three Texas entities were insufficient for general jurisdiction).

28. *Cf.* Waterman S.S. Corp. v. Ruiz, 355 S.W.3d 387, 411–12, 417–18 (Tex. App.—Houston [1st Dist.] 2011, pet. denied), *with BenMac's*, 357 S.W.3d at 394–95.

29. *Ruiz*, 355 S.W.3d at 408, 413.

shipping company's contacts with Texas were similar, the additional facts that it was "registered to do business in Texas, . . . maintained a registered agent for service of process in Texas, and . . . [had] a full-time employee" in Texas were sufficient to tip the scale in favor of a finding of general jurisdiction.[30]

Finally, *Wilkerson v. RSL Funding, L.L.C.* raised the more unusual question of whether an out-of-state defendant's mere use of a commercial website could subject him to jurisdiction in Texas.[31] In this defamation case, a California resident posted negative online reviews of the plaintiff, a financial-services company, which is headquartered in Houston. Although the defendant apparently thought he was posting his comments on the plaintiff's own website, the reviews were actually on two third-party websites, Yahoo! and Yelp. In response to his special appearance, the plaintiff argued that the defendant specifically directed his actions at Texas because the websites used plaintiff's geographic location as a key component in their search options.[32]

In reversing the trial court's denial of the special appearance, the Texas First District Court of Appeals first concluded that a sliding-scale analysis based on the websites' interactivity was inappropriate in deciding whether an individual user of someone else's website is subject to personal jurisdiction.[33] The court of appeals then went on to analyze whether, in posting his reviews, the defendant was purposefully directing his activities at the State of Texas. Although the Yahoo! and Yelp web pages contained address listings and other information related to the plaintiff's business location in Houston, the court of appeals concluded this did not prove that the defendant's comments were posted in a way specifically directed at Texas.[34]

IV. VENUE

During the Survey period, the Dallas Court of Appeals issued two opinions demonstrating a strong disposition to enforce forum-selection clauses. In *In re Cornerstone Healthcare Holding Group, Inc.*, the court of appeals found that a nonsignatory to a forum-selection clause was entitled to enforce the clause under a theory of equitable estoppel.[35] The court recognized that equitable estoppel is typically used against "a nonsignatory plaintiff who seeks the benefits of a contract [but] simultane-

30. *Id.* at 424–25.

31. Wilkerson v. RSL Funding, L.L.C., No. 01-10-01001-CV, 2011 Tex. App. LEXIS 6282, at *14 (Tex. App.—Houston [1st Dist.] Aug. 11, 2011, pet. filed).

32. *Id.* at *7.

33. *Id.* at *14–15.

34. *Id.* at * 29–30. Characterizing the case as one of the first impressions, the dissenting justice would have held that the defendant subjected himself to jurisdiction in Texas because he used "the interactive local Yahoo! website for Houston and the interactive Yelp website for Houston to post allegedly defamatory comments about a local Houston, Texas business." *Id.* at *38 (Keyes, J., dissenting).

35. *In re* Cornerstone Healthcare Holding Grp., Inc., 348 S.W.3d 538, 544–45 (Tex. App.—Dallas 2011, orig. proceeding).

ously attempt[s] to avoid the contract's" forum-selection clause.[36] This case was different because the plaintiff was a signatory to the note that contained the forum-selection clause, but the defendant seeking to enforce the clause was not. Nonetheless, the court held that although the plaintiff had not expressly filed suit to enforce the note, the plaintiff's claims were a veiled attempt to gain the benefits of the note by asserting "intertwined claims" against several parties.[37]

In *In re FC Stone, LLC*, the Dallas Court of Appeals rejected the plaintiff's arguments that a forum-selection clause should not be enforced.[38] First, the court held that although the plaintiff had pled that there was some evidence of fraud in procuring the contract at issue, those allegations were insufficient to avoid enforcement of the forum-selection clause.[39] Rather, similar to the rule regarding arbitration clauses, a party cannot avoid the enforcement of a forum-selection clause unless it pleads that "the specific clause [itself] was the product of fraud or coercion."[40] Second, the court recognized that "[f]orum-selection clauses can be avoided if the chosen forum is so inconvenient that enforcing the clause would produce an unjust result."[41] This standard was not satisfied, however, merely by the presence of parties to the lawsuit who were not independently subject to the clause or by the fact that litigation might have to proceed in two separate forums.[42]

V. PARTIES

For a number of years, the Texas Civil Practice and Remedies Code allowed a plaintiff to assert a claim against a person designated as a responsible third party by the defendant, even if the claim would otherwise have been barred by limitations, so long as the plaintiff brought the claim within sixty days of the responsible third-party designation.[43] The legislature closed this perceived (by some) loophole during the Survey period by repealing this provision.[44] In its place, the statute now provides that "a defendant may not designate . . . a responsible third party . . . after the [statute of limitations] . . . has expired" on the plaintiff's claim unless the

36. *Id.* at 544.

37. *Id.* at 543 (quoting Deep Water Slender Wells, Ltd. v. Shell Int'l Exploration and Prod., Inc., 234 S.W.3d 679, 694 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) ("Courts should apply equitable estoppel when a signatory to the contract containing the forum-selection clause raises allegations of substantially interdependent and concerted misconduct by both nonsignatories and one or more signatories to the contract.")).

38. *In re* FC Stone, LLC, 348 S.W.3d 548, 550 (Tex. App.—Dallas 2011, orig. proceeding).

39. *Id.* at 551.

40. *Id.*

41. *Id.* at 552.

42. *Id.*

43. Act of May 18, 1995, 74th Leg., R.S., ch. 136, § 1, 1995 Tex. Gen. Laws 971, *repealed by* Act of May 30, 2011, 82d Leg., R.S., ch. 203, § 5.02, 2011 Tex. Gen. Laws 757.

44. Act of May 30, 2011, 82d Leg., R.S., ch. 203, § 5.02, 2011 Tex. Gen. Laws 757.

defendant has "timely" disclosed that person in its discovery responses.[45] These amendments eliminate the possibility of a plaintiff colluding with a named defendant to have the defendant designate a responsible third party in order to allow the plaintiff to revive a time-barred claim. And while the statute tries to prevent defendants from delaying the designation of responsible third parties so as to prejudice the plaintiff (*e.g.*, where the limitations period expires during the time a defendant delays), there will undoubtedly be many instances in which plaintiffs will file suit shortly before limitations runs, and any claim against responsible third parties will be too late, even if they are designated promptly. In these situations, plaintiffs will simply have to face a trial in which the defendant points to the "empty chair" that previously would have been occupied by a responsible third party.

During the Survey period, several cases addressed the differences between misidentification and misnomer. As a general rule, "misidentification arises when two separate legal entities actually exist and a plaintiff mistakenly sues the entity with a name similar to that of the correct entity."[46] "Misnomer [, however,] arises when a plaintiff sues the correct entity but misnames it."[47]

In *Barth v. Bank of America, N.A.*, the plaintiff sued "Bank of America Corporation."[48] "Bank of America, N.A. answered, asserting that it had been . . . 'incorrectly named.'"[49] "At trial, the witnesses referred [to the defendant] simply" as "Bank of America," except on one occasion when "Bank of America, N.A.'s corporate representative testified" that the "actual entity [involved in the dispute]" was "Bank of America National Association."[50] Notably, Bank of America Corporation, the named defendant, was never mentioned in the presentation of the evidence at trial. "During the . . . charge conference . . . , the trial court granted [the plaintiff] a trial amendment to correct the [name of the defendant], but the liability [issues] submitted to the jury and answered in [the plaintiff's] favor all [still] referred to Bank of America Corporation. The trial court rendered judgment against Bank of America, N.A.," but the Corpus Christi Court of Appeals reversed, "holding that the verdict [did] not support the judgment."[51]

In the Texas Supreme Court, "Bank of America, N.A. argue[d] that this [was] a case of misidentification, not misnomer."[52] The supreme court first noted that the consequences of misidentification "are generally harsh," compared to that of misnomer, as courts typically "allow parties

45. TEX. CIV. PRAC. & REM CODE ANN. § 33.004(d) (West Supp. 2011); *see* TEX. R. CIV. P. 194.2(l) (requiring disclosure of "name, address, and telephone number of any person who may be designated as a responsible third party").
46. Chilkewitz v. Hyson, 22 S.W.3d 825, 828 (Tex. 1999).
47. *Id.*
48. Barth v. Bank of Am., N.A., 351 S.W.3d 875, 876 (Tex. 2011) (per curiam).
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*

to correct a misnomer so long as it was not misleading."[53] In this case, the supreme court found that the situation was a "clear case of misnomer," that Bank of America, N.A. had not been misled, and that the jury was not confused about the entity actually involved in the dispute.[54]

In *Nolan v. Hughes*, the Dallas Court of Appeals analyzed the misnomer-versus-misidentification issue in connection with the effect of an amended pleading on a statute-of-limitations defense.[55] The plaintiff initially filed suit against "Rolando Lopez and Linda Lopez, owner/operators of 'Rolando's Mexican Restaurant' a/k/a 'Rolando's Mexican Restaurant and Club.'" Factually, the plaintiff alleged that: (1) she was injured at a restaurant in Farmersville commonly known as "Rolando's Mexican Restaurant"; (2) at the time of her injury, the Lopezes owned "Rolando's Mexican Restaurant"; (3) the Lopezes had subsequently sold the restaurant to another individual; and (4) "at the time [plaintiff] filed suit, the Lopezes owned and operated 'another . . . restaurant' called 'Rolando's Mexican Restaurant' a/k/a 'Rolando's Mexican Restaurant and Club,' [located] in Bonham."[56]

The plaintiff later amended her petition to also name Dennis Hughes "as an 'alternative/additional' defendant . . . , operating under the assumed name "'Rolando's Mexican Grill" a/k/a "Rolando's Mexican Restaurant."'"[57] In this pleading, the plaintiff alleged that "she was injured at 'Rolando's Mexican Restaurant' a/k/a "Rolando's Mexican Grill,'" which was owned and operated by the Lopezes when she was injured. Alternatively, the plaintiff "alleged that on the date she was injured Hughes operated the restaurant under the assumed names of 'Rolando's Mexican Restaurant a/k/a Rolando's Mexican Grill.'"[58] In response, Hughes filed a motion for summary judgment arguing that the plaintiff's claims were barred by limitations. Hughes admitted that he operated Rolando's Mexican Grill in Farmersville at the time of the accident, but claimed that the amended petition did not relate back to the original petition because this was a matter of misidentification and not misnomer. The trial court granted Hughes' motion for summary judgment, and the plaintiff appealed.[59]

The Dallas Court of Appeals first noted that misnomer and, in more limited circumstances, misidentification were exceptions to the general rule that "'an amended pleading adding a new party does not relate back to the original pleading' to determine whether it is timely to avoid limitations."[60] In particular, in misidentification cases, limitations are only

53. *Id.* at 876–877 (citing *In re* Greater Hous. Orthopedic Specialists, Inc., 295 S.W.3d 323, 325 (Tex. 2009) (per curiam)).
54. *Id.* at 877.
55. Nolan v. Hughes, 349 S.W.3d 209, 210 (Tex. App.—Dallas 2011, no pet.).
56. *Id.* at 211.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 212 (quoting Univ. of Tex. Health Sci. Ctr. at San Antonio v. Bailey, 332 S.W.3d 395, 400 (Tex. 2011)).

tolled when "the correct entity had notice of the suit and was not misled or disadvantaged by the mistake."[61] The court of appeals held that "Hughes' summary judgment evidence . . . conclusively [established] that he, not the Lopezes, owned and operated the restaurant . . . named as 'Rolando's Mexican Grill' on the day [the plaintiff] was injured, and that there were two separate legal entities, [owned by] Hughes and the Lopezes [respectively, with] similar sounding [names] but there was no business relationship between them."[62] The court found that under these circumstances, the case involved misidentification (*i.e.*, two separate legal entities using a similar trade name) and not misnomer.[63] Accordingly, the court affirmed the summary judgment because the plaintiff had not demonstrated that the correct entity had notice of the suit and was not misled or disadvantaged by the mistake.[64]

VI. PLEADINGS

In re Spooner considered the propriety of a finding that the defendants had made judicial admissions in their summary judgment motions.[65] In this medical-negligence action, the defendants moved for summary judgment on the ground that the plaintiff's "claims were barred by the . . . two-year statute of limitations."[66] The trial court granted the motions, but the Texas Supreme Court subsequently reversed and remanded the case.[67] Once back in the trial court, the plaintiff argued that the following language, which was contained in the defendants' previously filed summary judgment motions, constituted judicial admissions:

> Since [Walters] began experiencing the pelvic abdominal pain immediately following the tubal ligation and continued to experience chronic pelvic abdominal pain over the course of nine to ten years prior to the removal of the sponge, plaintiff could have and should have known that her condition was related to the tubal ligation surgery in 1995.
>
> * * *
>
> It is clear based on the medical records and Ms[sic] Walters' own testimony that she has had chronic pelvic pain, with recurring urinary complaints ever since the tubal ligation in 1995 and her persistent symptoms, and worsening condition (the chronic pain caused anxiety and depression) were clear signs that something was wrong with Ms. Walters, which should have and could have been identified as the retained sponge.[68]

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61. *Id.*
62. *Id.*
63. *Id.* at 214.
64. *Id.*
65. *In re* Spooner, 333 S.W.3d 759, 761 (Tex. App.—Houston [1st Dist.] 2010, orig. proceeding).
66. *Id.*
67. *Id.* at 762.
68. *Id.*

The trial court agreed and entered an order that the defendants had judicially admitted that the sponge had been retained after the surgery and was the cause of the plaintiff's chronic pain.[69]

The Texas First District Court of Appeals disagreed, holding that a judicial admission must be clear, deliberate, and unequivocal.[70] The court noted that in the context of the prior summary judgment proceeding, the record reflected that the defendants had offered the statements at issue solely for the purposes of advancing their limitations argument. Thus, the record did not support the finding that the defendants had "clearly, deliberately and unequivocally stated that the sponge was retained" and was the actual cause of the plaintiff's injury.[71]

More surprisingly, the court of appeals also held that the defendants did not have an adequate remedy on appeal and were therefore entitled to a writ of mandamus.[72] Although the Texas Supreme Court has in recent years opened the door to a more liberal use of mandamus as a means to correct certain trial court errors before final judgment, the court of appeals's holding in *Spooner* raises the prospect of requests for mandamus review of many other pretrial evidentiary rulings, such as the exclusion of an expert witness.[73] Indeed, the court of appeals here clearly recognized that the trial court's order could be reviewed after a final judgment if necessary and that the additional time and expense associated with a regular appeal did not, by itself, "justify the issuance of a writ of mandamus."[74] Nevertheless, the court came to the dubious conclusion that this particular order would "skew" the trial process "in ways that [were] unlikely to be apparent in the appellate record" and that mandamus was therefore appropriate.[75]

VII. DISCOVERY

Several cases during the Survey period articulated limits on a party's ability to obtain pre-suit depositions under Rule 202 of the Texas Rules of Civil Procedure.[76] For example, the Texas Supreme Court rejected the request of the Harris County Department of Education and four of its trustees to take pre-suit discovery to investigate grounds for removal of a county official.[77] Because individual citizens cannot maintain an ouster suit without the joinder of an appropriate state official, they likewise cannot use Rule 202 to obtain discovery they would have no right to take if

69. *Id.* at 763.
70. *Id.* at 764.
71. *Id.* at 765.
72. *Id.* at 767.
73. *See id.* at 765–66 (citing *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 136 (Tex. 2004)).
74. *Id.* at 766.
75. *Id.*
76. *See* TEX. R. CIV. P. 202.
77. *In re* Wolf, 341 S.W.3d 932, 932 (Tex. 2011) (per curiam).

the anticipated suit were filed by the proper party.[78]

The Texas Supreme Court also refused the requested pre-suit discovery in *In re Does 1 & 2*.[79] There, a party alleged it had been defamed by two anonymous bloggers and sought pre-suit discovery into their identity from Google. Upon being served, Google agreed to respond to the subpoena *duces tecum*, and no hearing was held on the Rule 202 petition. When the bloggers then moved to quash the subpoena, the trial court denied their motion. The supreme court granted mandamus relief, explaining that a Rule 202 petition can be granted only if certain findings are made by the trial court, which did not occur.[80] Moreover, the opinion went on to explain that Rule 202 requires that all potential adverse parties be served with the petition and given notice of the hearing, and the trial court's failure to make the required findings could not, therefore, be excused by an agreement—between the party seeking the discovery and Google—that did not include the bloggers.[81] Unfortunately, the supreme court's analysis begs the question of how the Rule 202 petitioner was supposed to serve the anonymous bloggers whose identity he was trying to discover from Google.[82]

In re Rockafellow presented a question of the interplay between Rule 202 and the privilege for trade secrets.[83] In this mandamus proceeding, the real party in interest sought pre-suit discovery of the relators as potential defendants in an anticipated suit regarding the unauthorized distribution of hair-care products. The Amarillo Court of Appeals held that the relators provided sufficient proof that the requested information constituted trade secrets.[84] Because the real party in interest failed to present any evidence that the trade secret information was essential to the fair adjudication of its anticipated claims, the Rule 202 petition should have been denied.[85]

Finally, the sanction of exclusion of witnesses was at issue in two notable cases during the Survey period. In *PopCap Games, Inc. v. MumboJumbo, LLC*, the trial court denied the plaintiff leave to supplement its disclosures to designate a new damages expert after its original expert's opinions were excluded as unreliable.[86] The Dallas Court of Appeals agreed, holding that the plaintiff had not demonstrated good cause or a lack of prejudice or surprise to the defendant.[87] In *Dyer v. Cotton*,

78. *Id.* at 932–333; *see also* City of Dallas v. Dallas Black Firefighters Ass'n, 353 S.W.3d 547, 557-58 (Tex. App.—Dallas 2011, no pet.) (Rule 202 deposition is unavailable where there would be governmental immunity for the potential claim being investigated).

79. *In re* Does 1 & 2, 337 S.W.3d 862, 863 (Tex. 2011) (per curiam).

80. *Id.* at 864–65.

81. *Id.*

82. *See id.* at 863–65.

83. *In re* Rockafellow, No. 07-11-00066-CV, 2011 Tex. App. LEXIS 5495, at *1–4 (Tex. App.—Amarillo July 19, 2011, orig. proceeding).

84. *Id.* at * 9.

85. *Id.* at *12–14.

86. PopCap Games, Inc. v. MumboJumbo, LLC, 350 S.W.3d 699, 717 (Tex. App.—Dallas 2011, pet. filed).

87. *Id.* at 719.

on the other hand, the Texas First District Court of Appeals held that it was not an abuse of discretion to allow one of defendant's witnesses to testify, where the defendant had identified the witness as a person with knowledge of relevant facts, but had listed his address and phone number as "unknown."[88] The court of appeals relied on evidence from the defendant regarding his unsuccessful efforts to locate the witness, as well as the witness's own testimony that he had been out of Texas for work for several years and had only returned shortly before the trial.[89]

VIII. SUMMARY JUDGMENTS

Although a trial court generally may not grant summary judgment on a claim that is not the subject of that motion, in *G & H Towing Co. v. Magee*, the Texas Supreme Court held that where such a claim "[was] precluded as a matter of law" on other grounds that were advanced in the summary judgment motion, the error was harmless.[90] In this personal-injury suit, the trial court granted summary judgment for an individual defendant, who the plaintiff claimed was negligent. The trial court also granted summary judgment for that defendant's employer, who was alleged to be vicariously liable for the acts of its employee. Even though the employer had not moved for summary judgment on that ground, the supreme court held that because the employee was not negligent, his employer was likewise not vicariously liable as a matter of law for any alleged negligence, and any error in granting the summary judgment was, therefore, harmless.[91]

The trial court in *Webb v. Maldonado* faced the unusual juxtaposition of a party who first asserted his Fifth Amendment right against self incrimination in a deposition and then filed a "no evidence" summary judgment motion.[92] In response to that motion, the plaintiff attached only the defendant's deposition, in which the defendant refused to answer any questions based upon the assertion of his Fifth Amendment rights. The trial court granted the defendant's no-evidence summary judgment motion, and the Dallas Court of Appeals affirmed.[93] While the court of appeals noted that a fact finder may draw a negative inference against a party in a civil suit who asserts his Fifth Amendment rights, in the absence of some other evidence that was probative of the elements of the plaintiff's claims, the defendant's invocation of the privilege alone was insufficient to raise a fact question.[94]

In re Guardianship of Patlan held that the time period during which prior suits had been on file against the same defendant, based on the

88. Dyer v. Cotton, 333 S.W.3d 703, 717–18 (Tex. App.—Houston [1st Dist.] 2010, no pet.).
89. *Id.*
90. G & H Towing Co. v. Magee, 347 S.W.3d 293, 297–98 (Tex. 2011).
91. *Id.* at 298.
92. Webb v. Maldonado, 331 S.W.3d 879, 881 (Tex. App.—Dallas 2011, pet. denied).
93. *Id.* at 880.
94. *Id.* at 883.

same facts and asserting the same claims, could be considered in deciding whether an adequate time for discovery had passed before a no-evidence summary judgment motion could properly be considered.[95] In this case, the plaintiff filed two suits against the defendant that were dismissed without prejudice for want of prosecution. Seventeen days after the plaintiff filed her third suit, the defendant filed a traditional and no-evidence summary judgment motion. In response to that motion, the plaintiff moved for a continuance to conduct discovery. The trial court denied the continuance and granted the summary judgment motion.[96] The San Antonio Court of Appeals affirmed, holding that the time period during which the prior suits were on file should have been included in deciding whether there had been adequate time for discovery to be conducted.[97]

IX. DISMISSAL

During the Survey period, the legislature amended the Texas Government Code to direct the Texas Supreme Court to "adopt rules to provide for the dismissal of causes of action that have no basis in law or fact on motion and without evidence."[98] The new rules will require that such a motion to dismiss must be granted or denied within forty-five days after it is filed.[99] The amended statute also requires the supreme court to adopt rules "to promote the prompt, efficient, and cost-effective resolution of civil actions" in which the amount in controversy is less than $100,000.[100]

As of this writing, these new rules have not yet been promulgated. Once they are in place, it will remain to be seen whether the motion-to-dismiss procedure, foreign to state court practice, will merely be a tool for weeding out frivolous lawsuits or whether it will develop into a more exacting examination of the merits of the plaintiffs' claims, similar to the standards articulated in the recent case law under federal Rule 12(b)(6).[101] Practitioners on both sides of the bar will have a keen interest in the answer to this question because a companion amendment to the Texas Civil Practice and Remedies Code enacted in the last legislative session requires trial courts to award attorneys' fees to the prevailing party on a motion to dismiss.[102]

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95. *In re* Guardianship of Patlan, 350 S.W.3d 189, 196–97 (Tex. App.—San Antonio 2011, no pet.)

96. *Id.* at 194.

97. *Id.* at 196–97.

98. TEX. GOV'T CODE ANN. § 22.004(g) (West Supp. 2011).

99. *Id.*

100. *Id.* § 22.004(h).

101. FED. R. CIV. P. 12(b)(6); *see e.g.*, Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (stating that adequate pleading requires more than "labels and conclusions"; instead, it "must contain sufficient factual [allegations that, if] accepted as true, to state a claim to relief that is plausible on its face.").

102. TEX. CIV. PRAC. & REM. CODE ANN. § 30.021 (West Supp. 2011). This fee-shifting provision is all that survived of the controversial "loser pays" proposals that were introduced during the 2011 legislative session.

The Texas Supreme Court in *Epps v. Fowler* addressed the effect of the plaintiffs' non-suit without prejudice on the defendants' claim that they were entitled to attorneys' fees as the prevailing parties.[103] In this real estate dispute, the plaintiffs sued the sellers of their home, claiming the home had undisclosed defects. In response, the defendants sought to recover their attorney's fees both as a sanction and under the parties' earnest-money contract, which contained a prevailing-party-attorneys'-fee provision. The plaintiffs subsequently filed a notice of nonsuit without prejudice. The trial court then awarded the defendants their attorneys' fees, and the plaintiffs appealed.[104]

The supreme court first noted that if a plaintiff nonsuits a case with prejudice, res judicata alters the legal relationship between the parties, and the defendant would therefore be deemed the prevailing party and entitled to recover attorneys's fees if a contractual or statutory basis exists for claiming such an award.[105] However, where a plaintiff nonsuits its claims without prejudice, the legal relationship between the parties is not altered, since the plaintiff would be allowed to refile suit.[106] The supreme court, therefore, rejected a rule that the defendant has prevailed whenever the plaintiff nonsuits without prejudice, which would discourage plaintiffs from abandoning claims that they determined lacked sufficient merit to prosecute and incentivize them instead "to roll the dice and hope for a favorable judgment rather than accept an inevitable judgment for attorney's fees."[107] Rather, the supreme court held that the defendant may be considered the prevailing party only if, on the defendant's motion, the trial court determines that "the nonsuit was taken to avoid an unfavorable ruling on the merits."[108] In making this determination, trial courts should rely, as much as possible, on the existing record and affidavit testimony, considering live testimony only on rare occasions.[109] The opinion listed several scenarios that might show that a plaintiff's intent in dismissing the suit without prejudice was to avoid an adverse finding.[110] Conversely, evidence that the suit seemed meritorious when filed, and only later were flaws uncovered, may indicate that the defendant is not entitled to recover fees as the prevailing party.[111]

Chapter 150 of the Texas Civil Practice & Remedies Code requires a plaintiff in a suit against certain licensed or registered professionals to file a certificate of merit in connection with pursuing a claim against a covered professional.[112] In *CTL/Thompson Texas, LLC v. Starwood Homeowner's Ass'n*, the plaintiff failed to file the requisite certificate, and the

103. Epps v. Fowler, 351 S.W.3d 862, 864 (Tex. 2011).
104. *Id.* at 865.
105. *Id.* at 868–869.
106. *Id.* at 869.
107. *Id.* at 869.
108. *Id.* at 870.
109. *Id.*
110. *Id.* at 870–871.
111. *Id.* at 871.
112. TEX. CIV. PRAC. & REM. CODE § 150.002(a) (West 2011).

defendant therefore moved to dismiss the suit with prejudice.[113] The plaintiff subsequently nonsuited all of its claims against all parties. The Fort Worth Court of Appeals rejected the defendant's argument that its prior motion for a dismissal with prejudice under Chapter 150 constituted a claim for affirmative relief that survived the plaintiff's absolute right to take a nonsuit under Rule 162.[114]

X. JURY PRACTICE

Austin v. Weems addressed the issue of defense counsel's use of a hand gesture, rubbing his fingers against his thumb during closing arguments, allegedly to signify that a witness had been bribed to change his testimony.[115] The plaintiff's counsel did not object to the gesture when it was made, and the reporter's record did not reflect that it had occurred. Instead, the issue was first raised in the plaintiff's post-judgment motion for new trial. The Texas First District Court of Appeals concluded that, because the plaintiff did not object to the gesture at the time, it could only be a reversible error if it was incurably harmful.[116] The court of appeals held that the gesture, even if it was made, did not rise to this level.[117] The court noted that there was no direct allegation of bribery, and the accompanying statements in the argument were "not so extreme" that they would have caused a reasonable juror to render a verdict contrary to what she otherwise would have rendered.[118]

XI. JUDGMENTS

In *Lucas v. Clark*, the Austin Court of Appeals reversed a no-answer default judgment to the extent it awarded unliquidated damages for lost profits based solely upon unanswered requests for admissions "embedded" within the body of the petition.[119] The court of appeals held that the requests, which sought the admission of ultimate fact issues, were not a proper use of this discovery tool and would not, therefore, support the lost-profits award.[120] The court also held that the defendant did not waive the error by failing to object to the requests as improper in the trial court.[121] Absent any other evidence in the record beyond the unanswered requests for admissions, the court concluded that the plaintiff had not sufficiently proven its alleged damages.[122]

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113. CTL/Thompson Tex. LLC v. Starwood Homeowner's Ass'n, 352 S.W.3d 854, 855 (Tex. App.—Fort Worth 2011, pet. filed).
114. *Id.* at 856–57; TEX. R. CIV. P. 162.
115. Austin v. Weems, 337 S.W.3d 415, 427-28 (Tex. App.—Houston [1st Dist.] 2011, no pet.).
116. *Id.* at 428.
117. *Id.* at 429.
118. *Id.*
119. Lucas v. Clark, 347 S.W.3d 800, 804–05 (Tex. App.—Austin 2011, pet. denied).
120. *Id.* at 804–06.
121. *Id.* at 805.
122. *Id.*

XII. MOTIONS FOR NEW TRIAL

In *In re Smith*, the Texarkana Court of Appeals held that mandamus is not an appropriate mechanism to review a trial court's entry of an order granting a new trial when the trial court has articulated the reasons for its order.[123] In this car accident case, the trial court originally entered a take-nothing judgment based on the jury's verdict.[124] The trial court then granted the plaintiff's motion for new trial, stating that the jury's finding was "so contrary to the great weight and preponderance of the evidence [so] as to be clearly wrong and manifestly unjust."[125] After the trial court refused to vacate its order granting the motion for new trial, the defendant sought a writ of mandamus.[126] The court of appeals denied the requested relief, holding that the Texas Supreme Court has required only that trial courts specify their grounds for granting a motion for new trial.[127] Once the trial court has satisfied this obligation to articulate the basis for its decision, mandamus is not proper to review the merits of that decision.[128]

XIII. DISQUALIFICATION OF JUDGES

In *In re Thompson*, the Austin Court of Appeals held that a district attorney had standing to move to recuse the trial judge in a proceeding, filed by relatives of a man convicted of murder, that requested the judge to convene a court of inquiry regarding the alleged unlawful circumstances of his conviction.[129] The relatives complained that Rule 18a[130] only permits a "party" to file a recusal motion, and the district attorney was not a party to the case.[131] The court of appeals rejected this argument, noting that part of the relief they sought was a declaration that their relative had been wrongfully convicted.[132] Because the State of Texas had an interest in this requested judicial declaration, which would have been inconsistent with the judgment of conviction it had previously obtained, the district attorney was the appropriate person to represent the State's interest in connection with the requested court of inquiry.[133]

123. *In re* Smith, 332 S.W.3d 704, 709 (Tex. App.—Texarkana 2011, orig. proceeding).
124. *Id.* at 706.
125. *Id.*
126. *Id.*
127. *Id.* at 709 (citing *In re* Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P., 290 S.W.3d 204 (Tex. 2009)).
128. *Id.* at 709.
129. *In re* Thompson, 330 S.W.3d 411, 416 (Tex. App.—Austin 2010, orig. proceeding). A "court of inquiry" is a proceeding to determine whether "illegal activity has occurred." *Id.* at 420 (Puryear, J., dissenting). Now governed by Chapter 52 of the Texas Code of Criminal Procedure, "[c]ourts of inquiry have a long and troubled history in Texas jurisprudence." *Id.*
130. TEX. R. CIV. P. 18a.
131. *Thompson*, 330 S.W.3d at 416.
132. *Id.*
133. *Id.*

XIV. DISQUALIFICATION OF COUNSEL

In re Guaranty Insurance Services, Inc. addressed the propriety of the disqualification of a law firm that had tried, but failed, to prevent one of its recently hired legal assistants from working on a case that he had worked on two years before, while employed with the opposing law firm.[134] In *In re Columbia Valley Healthcare System, L.P.*, a case discussed in the 2011 Survey,[135] the Texas Supreme Court held that a nonlawyer's work on both sides of a case disqualified the second law firm when it had failed to take reasonable steps to effectively screen the nonlawyer from working on or having contact with the case.[136] In *Guaranty Insurance*, however, the Texas Supreme Court held that "disqualification was not warranted."[137] Unlike the situation in *Columbia*, the supreme court noted that the second law firm's screening procedures in this case were "exemplary."[138] The mere fact that those procedures failed in this instance to prevent the legal assistant from working on the case was not determinative.[139] Instead, the supreme court clarified that, if the nonlawyer has actually worked on the matter, the presumption that he has shared confidential information with his new employer cannot be rebutted "*unless* the assigning lawyer should *not* have known of the conflict."[140]

XV. MISCELLANEOUS

In *In re Reece*, the Texas Supreme Court decided, as a matter of first impression, that a trial court may not hold a litigant in contempt for perjury committed during a deposition unless the perjury obstructs the operation of the court.[141] The supreme court began its analysis by discussing the different types of contempt, noting that "[c]ontempt may occur in the

134. *In re* Guar. Ins. Servs., Inc., 343 S.W.3d 130, 131–32 (Tex. 2011).

135. Donald Colleluori et al., *Civil Procedure: Pre-Trial & Trial*, 64 SMU L. REV. 137, 150–51 (2011).

136. *In re* Columbia Valley Healthcare Sys., L.P., 320 S.W.3d 819, 828 (Tex. 2010).

137. *Guar. Ins.*, 343 S.W.3d at 132.

138. *Id.* at 133. These procedures included the firm: running its own conflicts check; requiring the prospective employee to identify potential conflicts from his prior employment; restricting the employee's access to documents related to the matters that had been identified; and instructing the employee, during his orientation and through an employee handbook and confidentiality agreement, not to disclose confidential information gained through previous employment and requiring him to notify his supervising attorney immediately if he became aware of a matter he had previously worked on. *Id.* at 132.

139. *Id.* at 135.

140. *Id.* (emphasis in original).

141. *In re* Reece, 341 S.W.3d 360, 362–63, 369 (Tex. 2011). "The relator [had first] challenged his confinement by seeking a writ of habeas corpus in the Court of Criminal Appeals, but that court declined to exercise its jurisdiction . . . [because] of the civil nature of the case." *Id.* at 363. As a result, a large part of the majority's opinion, and all of Justice Willett's dissent, was devoted to a separate jurisdictional question: "whether [the supreme court] should exercise [its] mandamus jurisdiction to provide a forum for a civil litigant who is deprived of liberty pursuant to a court's contempt order, and the Court of Criminal Appeals has declined to exercise its habeas jurisdiction." *Id.* at 362; *see also id.* at 378–402 (Willett, J. dissenting).

presence of a court," which is referred to as direct contempt, or "outside the court's presence," which is referred to as constructive contempt.[142] In addition, contempt is further divided into classifications of either civil or criminal. "[C]ivil contempt is 'remedial and coercive in nature,' [and the party] carries the keys to the jail cell in his or her pocket since the confinement is conditioned on obedience with the court's order."[143] "[C]riminal contempt[, however,] is punitive in nature—'the contemnor is being punished for some completed act which affronted the dignity and authority of the court.'"[144]

Here, the relator "admitted to lying outside the trial court's presence during a deposition, and the purpose of the contempt judgment was to punish him for this misdeed rather than to coerce him into complying with an order."[145] Thus, the trial court found the relator in constructive, criminal contempt. The supreme court held, however, that where an alleged constructive contempt does not involve the violation of a court order, it must actually "obstruct the court in the performance of its duties."[146] In this case, the supreme court found that the relator's misstatements during his deposition did not rise to this level.[147] Rather, although the supreme court agreed that the behavior was "reprehensible" and did cause the opposing litigant additional difficulty, delay, and expense in the discovery process, there was no evidence that the perjury actually obstructed the court itself.[148]

Moreover, the supreme court cautioned that in the context of a deposition, the standard for constructive contempt should be very narrow for several reasons.[149] First, the supreme court was concerned about creating a system where litigants and their attorneys "scour transcripts, searching for any misstatement for the sole purpose of accusing the opponent of contempt and ultimately securing the opponent's confinement."[150] Second, a trial court has several other options to discourage perjury during a deposition without resorting to restraining a person's liberty in a contempt proceeding. Namely, because "a deposition is a discovery tool," the Texas Rules of Civil Procedure contemplate "a range of [possible] sanctions for discovery abuse."[151] In this case, the trial court could have "imposed sanctions ranging from payment [of the opposing litigant's] expenses . . . , including attorney's fees, to rendering a default judgment."[152] Finally, the supreme court explained that the trial court also had "the option of referring a perjury allegation to the district attorney for crimi-

142. *Id.* at 365.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at 366–67.
147. *Id.* at 367.
148. *Id.*
149. *Id.* at 368.
150. *Id.*
151. *Id.* (citing TEX. R. CIV. P. 215).
152. *Id.*

nal prosecution."[153]

In *Cunningham v. Zurich American Insurance Co.*, the Fort Worth Court of Appeals considered, among other things, whether an e-mail constituted a binding Rule 11 agreement.[154] Zurich argued in a summary judgment motion that the e-mail was not enforceable because it was not signed, as required by Rule 11. The court of appeals first noted that "[t]he fact that the email [was] an electronic document [did not, by itself,] prevent it from being enforceable under Rule 11 because . . . under the uniform electronic transactions act, a contract may be enforceable despite the use of an electronic record in its formation, and '[i]f a law requires a signature, an electronic signature satisfies the law.'"[155] The statute defines an electronic signature as "an electronic sound, symbol, or process attached to . . . a record and executed or adopted by a person with the intent to sign the record."[156] To satisfy this requirement, the electronic signature must in fact be "the act of the person," which is determined by "the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law."[157]

In this case, the e-mail that constituted the alleged Rule 11 agreement did not "contain a graphical representation of [the attorney's] signature, an 's/' followed by [the attorney's] typed name, or any other symbol or mark that unequivocally indicated a signature."[158] The e-mail did include the attorney's name and contact information at the bottom.[159] However, the court of appeals found no evidence that this "signature block was typed by [the attorney as opposed to being] generated automatically by [the] email [program]."[160] "If [the attorney] did personally type the signature block at the bottom of the email, nothing in the email suggest[ed] that she did so with the intention that [it was to] be her signature."[161] Accordingly, the court held that the e-mail was not an enforceable Rule 11 agreement.[162]

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153. *Id.*

154. Cunningham v. Zurich Am. Ins. Co., 352 S.W.3d 519, 524 (Tex. App.—Fort Worth 2011, pet. filed). *See* TEX. R. CIV. P. 11:

> Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record.

155. *Cunningham*, 352 S.W.3d at 529 (quoting TEX. BUS. & COM. CODE ANN. § 322.007 (West 2009)).

156. TEX. BUS & COM. CODE ANN. § 322.002(8) (West 2009).

157. *Id.* § 322.009(a)–(b).

158. *Cunningham*, 352 S.W.3d at 530.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

XVI. CONCLUSION

The Texas Legislature has directed the Texas Supreme Court to continue efforts to streamline the litigation process with the goal of increasing efficiency and cost-effectiveness. How these efforts will fare remains to be seen. In the meantime, the Texas Supreme Court and intermediate courts of appeals continue to create an expanding body of precedent to guide Texas trial courts in properly managing their dockets under the existing procedural rules.