SMU | Dedman School of Law

SMU Law Review

Volume 64 | Issue 1 Article 7

January 2011

Civil Evidence

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CIVIL EVIDENCE

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I. INTRODUCTION

As with past Survey periods, federal and state courts in Texas continued to discuss issues relating to expert qualification and reliability under *Daubert* and *Robinson* in different factual scenarios. Texas courts during this Survey period also resolved disputes involving expert report requirements under chapter 74 of the Texas Civil Practice and Remedies Code. Despite the Texas Legislature's attempts to streamline (and perhaps limit) the filing of healthcare liability claims, courts continue to struggle with chapter 74's enhanced expert report requirements. Separately, Texas courts continued to address issues regarding the assertion and waiver of attorney-client and work product privileges. Finally, additional cases during this period discussed rules relating to hearsay, relevance, authentication, and witness credibility.

II. ADMISSIBILITY OF EXPERT TESTIMONY

A. CASES INVOLVING TEXAS RULE OF EVIDENCE 702, *ROBINSON*,[1] and *GAMMILL*[2] Continue to Dominate Civil Evidence Issues

It almost goes without saying that in any Survey period, the vast majority of cases involve disputes over qualification of experts and reliability of their reports. This Survey period is no exception.

1. Several Courts in Texas, Including the Texas Supreme Court, Have Expanded and Clarified the Requirements of Robinson and Gammill

Several Texas cases addressed expert reliability standards under Texas Rule of Evidence 702, including a Texas Supreme Court decision that analyzed "whether expert medical causation testimony from a treating physician relying on a differential diagnosis [was] reliable and, therefore, legally sufficient evidence to support the jury's verdict."[3] In *Transcontinental Insurance*, "Charles Crump received a kidney transplant in 1975 and began a lifelong regimen of immunosuppressant drug therapy to ensure his body would not reject the new kidney."[4] In May 2000, he "struck his right knee on a piece of machinery" while working with Frito Lay that

1. E. I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549 (Tex. 1995).
2. Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713 (Tex. 1998).
3. Transcontinental Ins. Co. v. Crump, 330 S.W.3d 211, 213 (Tex. 2010).
4. *Id.* at 214.

caused a contusion and a hematoma.[5] "He applied for and received workers' compensation benefits for the work-related injury," and "[a]fter a series of increasingly serious health complications . . . [and] lengthy hospitalizations, [he] died in January 2001 at age forty-three. His wife, Joyce Crump, applied for workers' compensation death benefits, alleging that the May 2000 injury was a producing cause of her husband's death."[6] At the administrative trial, "Crump's expert and treating physician, Daller, testified that the wound site of the May 2000 work-related injury became infected, the infection caused Crump's already-weakened organs to fail, and his organ failure in turn caused his death."[7] "A [workers' compensation] officer found that the May 2000 injury resulted in Crump's death and awarded death benefits," and "the workers' compensation appeals panel affirmed the hearing officer's benefits award."[8] "Frito-Lay's workers' compensation carrier, Transcontinental Insurance Company, sought judicial review of the administrative award of death benefits."[9]

The Texas Supreme Court looked at the "reliability of a treating physician's opinion based on . . . differential diagnosis"—a diagnostic method where a "physician form[s] a hypothesis as to likely causes of a patient's presented symptoms and eliminates unlikely causes by a deductive process of elimination."[10] The critical and interesting issue involved an argument by Crump that because differential diagnosis was an established medical technique, courts should use a "less strict" application of the *Robinson* factors to assess the reliability of expert testimony.[11] Indeed, the court of appeals below did not even apply the *Robinson* factors on the basis that the technique was reliable and used by the treating physician.[12] However, the supreme court, setting a high bar for even accepted scientific techniques, disagreed. "The mere fact that differential diagnosis was used does not exempt the foundation of a treating physician's expert opinion from scrutiny—it is to be evaluated for reliability as carefully as any other expert's testimony. Both the *Robinson* and *Gammill* analyses are appropriate in this context."[13]

The supreme court then turned to the specific *Robinson* and *Gammill* factors. First, the court noted that despite the fact that differential diagnosis is generally accepted by the medical community and subjected to use, peer review, and testing, this did not necessarily mean that technique was automatically reliable "in every case in which a treating physician bases his opinion on differential diagnosis."[14] However, the court determined this factor weighed in favor of Daller's differential diagnosis be-

5. *Id.*
6. *Id.*
7. *Id.* at 215.
8. *Id.* at 214.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 217.
14. *Id.*

cause Transcontinental's expert agreed with the treatment methodology Daller used.[15]

Second, the supreme court considered whether "a physician's differential diagnosis may be too dependent upon the physician's subjective guesswork or produce too great a rate of error—for example, when there are several consistent, possible causes for a particular set of symptoms."[16] The court held "Daller's testimony adequately excluded . . . the other plausible causes raised by the evidence."[17] The court noted "objective evidence of Crump's good health before his injury, his contraction of an infection at the site shortly afterward, and the . . . effect of the infection on his health."[18] The court also stated the evidence with respect to other potential causes did not have to be conclusive but only required "reasonable medical certainty."[19]

The supreme court then addressed *Gammill*, which requires an analysis of whether there is "an analytical gap between the data" or of expert observations and the ultimate opinion offered.[20] In this case, the supreme court concluded there was no analytical gap because Daller "directly treated or oversaw Crump's treatment on repeated occasions after Crump's work-related knee injury."[21] This suggests that a treating physician makes a good testifying expert.

In *U.S. Renal Care, Inc. v. Jaafar*, the court of appeals assessed the reliability of an expert report involving the valuation of accounts receivable. In that case, Bob Ehl, Laura Jaafar, and Lisa Lewis (Sellers) sold their company Rencare, Ltd. to U.S. Renal Care.[22] "The Sale Agreement . . . stated Renal Care would acquire 100% of the stock in Rencare, but Sellers would retain all accounts receivable for services rendered by Rencare prior to the closing date."[23] After the sale, a dispute "arose over the accounting for the pre-sale receivables."[24] "Sellers relied on the expert testimony of Gene Trevino to support their damage award," while Renal Care argued that "Trevino's testimony was inadmissible based on his lack of qualifications and his unreliable damage model."[25] The court of appeals concluded the methodology and assumptions used by Trevino were unreliable under Texas Rule of Evidence 702.[26]

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15. *Id.* (citing E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 557 (Tex. 1995)) ("noting that the *Robinson* reliability inquiry focuses 'solely on the underlying principles and methodology, not on the conclusions they generate'")).

16. *Id.*

17. *Id.* at 218.

18. *Id.*

19. *Id.*

20. *Id.* at 219 (citing Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 727 (Tex. 1998)).

21. *Id.*

22. U.S. Renal Care, Inc. v. Jaafar, No. 04-09-00043-CV, 2011 WL 1158032, at *1 (Tex. App.—San Antonio Mar. 30, 2011, no pet. h.).

23. *Id.*

24. *Id.*

25. *Id.* at *4.

26. *Id.*

Rule 702 allows a witness "who is 'qualified as an expert by knowledge, skill, experience, training, or education' to 'testify . . . in the form of an opinion or otherwise' when 'scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.'"[27] "A two-prong test governs whether expert testimony is admissible: (1) the expert must be qualified, and (2) the testimony must be relevant and based on a reliable foundation."[28] "Expert testimony is unreliable if it is based on unreliable data, or 'if the expert draws conclusions from [his underlying] data based on flawed methodology.'"[29] "Expert testimony is also unreliable if 'there is simply too great an analytical gap between the data and the opinion proffered.'"[30] The court of appeals noted, however, that courts may apply the less rigorous *Robinson* factors, rather than the stricter *Gammill* analytical gap test in certain circumstances. For example, in *Whirlpool Corp. v. Camacho*, the Texas Supreme Court in 2009 held that:

> In determining whether expert testimony is reliable, a court may consider the factors set out by the Court in *Robinson* and the expert's experience. However, in very few cases will the evidence be such that the trial court's reliability determination can properly be based only on the experience of a qualified expert to the exclusion of factors such as those set out in *Robinson*, or, on the other hand, properly be based only on factors such as those set out in *Robinson* to the exclusion of considerations based on a qualified expert's experience.[31]

The court of appeals initially analyzed Trevino's qualifications to testify regarding the value of accounts receivable. Renal Care argued that Trevino was not qualified because:

> (1) [A]lthough [he] ha[d] his bachelor's and master's degrees, they [were] in the field of finance, not accounting, and his Ph.D. [was] from an online university; (2) although he [was] a Certified Financial Analyst, . . . he [was] not certified as a Certified Public Accountant; (3) he ha[d] published no peer reviewed articles and his non-peer reviewed articles deal[t] with being an expert witness; and (4) he ha[d] no training or experience concerning insurance practices or healthcare billing [which impacted the valuation of receivables.][32]

Somewhat surprisingly, the court of appeals concluded the trial court did not abuse its discretion by holding that Trevino was qualified.[33] The court noted particularly that "Trevino testified to extensive experience in

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27. *Id.* (quoting TEX. R. EVID. 702).
28. *Id.* (citing E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 554 (Tex. 1995)).
29. *Id.* (quoting Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 713 (Tex. 1997)).
30. *Id.* (quoting Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 726 (Tex. 1998)).
31. *Id.* at *6 (quoting Whirlpool Corp. v. Camacho, 298 S.W.3d 631, 638 (Tex. 2009)).
32. *Id.* at *5.
33. *Id.*

valuing businesses over the preceding twenty years," including experience in valuing the accounts receivable of "several physician practices, clinics, ambulatory surgery centers, home health care agencies, nursing agencies, and physical therapy businesses."[34] "He [was] also accredited as a 'credit senior appraiser' . . . by the American Society of Appraisers and had taught courses on their behalf."[35]

The court of appeals reached a different conclusion, however, with respect to the second *Robinson* prong that "requires courts to assess whether the expert's methodology is relevant and based on a reliable foundation."[36] Trevino used what he termed a "Balance Sheet Approach" in which he "took a percentage of what's been paid on the amount billed in the past and applied that percentage to the amounts outstanding."[37] In terms of the data underlying the analysis, Trevino testified he relied on two reports that identified the patients receiving services from January 2005 to the date of sale February 23, 2006.[38] "The two reports split the accounts receivable into patients with Medicare (the 77-page report) and patients who were private pay (the 44-page report)."[39] "Trevino applied the same methodology to both" reports regardless that the accounts were subject to different types of payment from Medicare and private payors.[40] Moreover, he did not review any of the underlying documents upon which the reports were based.[41] For example, "[h]e never examined the underlying explanation of patient benefits (EOBs) from the insurers or Medicare to determine the reasons for non-payment or reduced payment."[42] Likewise, Trevino did not age any outstanding receivable or conduct any "independent analysis or testing to determine if aging had affected Rencare's accounts receivable."[43]

The court of appeals concluded Trevino's opinion was unreliable under either the analytical gap approach or against the *Robinson* factors.[44] The court held that his analysis "was subjective, his assumptions were unfounded, his opinion ha[d] not been subjected to peer review, and his technique ha[d] an unknown rate of error."[45] The court also criticized the fact that Trevino did not "look at the data behind the numbers" on the reports and "assumed that aging the accounts would not be necessary."[46] Moreover, Trevino "did not do any analysis to determine if the zero entries in the reports were due to lapse of coverage, improper bill-

34. *Id.*
35. *Id.*
36. *Id.* at *6.
37. *Id.*
38. *Id.* at *7.
39. *Id.*
40. *Id.*
41. *Id.* at *9.
42. *Id.*
43. *Id.*
44. *Id.* at *10.
45. *Id.* (E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 557 (Tex. 1995)).
46. *Id.*

ing, reduced coverage, or other insurance problems."[47] The court thus concluded that "there [was] simply too great an analytical gap between the data and Trevino's testimony."[48]

In *Fitzpatrick v. Watson*, the court of appeals addressed the *Gammill* requirement that the expert report did not have an analytical gap between the data relied on by the expert and the expert's ultimate conclusions.[49] In *Fitzpatrick*, Thomas Lee Fitzpatrick and his wife sued an emergency room physician, David Watson, alleging he failed to order an x-ray after Mr. Fitzpatrick was injured that revealed the presence of a glass shard in his arm.[50] As a result of the physician's negligence, the plaintiffs claimed Mr. Fitzpatrick suffered "permanent loss of use in his hand."[51] The critical aspects stem from the plaintiffs' allegation that Watson was potentially impaired in light of evidence that he used cocaine on prior occasions.[52] The plaintiffs did not have any direct evidence that Watson was impaired at the time he performed the surgery.[53] Instead, the plaintiffs offered an expert report from a board-certified psychiatrist opining that "Watson was experiencing cocaine induced impairment at the time he treated [Mr.] Fitzpatrick."[54] The opinion was "based upon an extrapolation from admission by Watson that he had been abusing cocaine regularly" for over a year, and the frequency of his usage was "eight times per month" and "two times per week."[55] Thus, the expert concluded that Watson "could have been high" or in withdrawal at the time of the procedure.[56] The expert acknowledged, however, that he never conducted a urinalysis or blood test, did not disclose the methodology he used for his extrapolation and admitted he was unaware of the amount of cocaine used or Watson's "rate of consumption."[57] The court of appeals concluded there was an "analytical gap" in the expert's analysis in light of his failure to describe his methodology for extrapolating cocaine use.[58]

B. The Ongoing Struggle of Chapter 74 Continues

Courts in Texas also addressed the more detailed requirements under chapter 74 of the Texas Civil Practice and Remedies Code, which gener-

47. *Id.*
48. *Id.* (citing Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 726 (Tex. 1998)).
49. Fitzpatrick v. Watson, No. 12-08-00084-CV, 2010 WL 337330, at *2 (Tex. App.—Tyler Jan. 29, 2010, no pet.).
50. *Id.* at *1.
51. *Id.* As an aside, it is difficult to understand why the claim was not subject to chapter 74 because it involved a medical liability claim. Moreover, the court of appeals did not discuss the expert report requirements of chapter 74, which might have imposed a higher standard with respect to the reliability of the report.
52. *Id.*
53. *See id.* at *1–2.
54. *Id.* at *2.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*

ally govern the submission of expert reports in the context of healthcare liability actions. Over the last decade, parties have enthusiastically argued whether a physician is "qualified" to give opinions under chapter 74 and this year was no exception.

1. General Standards

In *TTHR, L.P. v. Guyden*, defendant Presbyterian Hospital unsuccessfully moved to dismiss a medical malpractice lawsuit on the basis the expert report failed to meet the requirements of section 74.351 of the Texas Civil Practice and Remedies Code.[59] Under that section, an expert report must: (1) "be authored by a qualified 'expert'" and (2) set forth the expert's opinions regarding the "standard of care, breach, and causation."[60] "A report that merely states the expert's conclusions as to the standard of care, breach, and causation" is inadequate.[61] Moreover, an "expert must explain the basis for his statements and link his conclusions to the facts."[62]

On appeal, the defendant argued the expert was not qualified "to opine on causation because he [was] not licensed to practice medicine in Texas."[63] The hospital relied on the fact the term "physician" is not defined in the expert report provisions but is defined elsewhere in section 74.001(a)(23) of the Texas Civil Practice and Remedies Code as "an individual licensed to practice medicine in [Texas]."[64] The court of appeals disagreed, noting that "neither section 74.351(r)(5)(c) nor the Texas Rules of Evidence explicitly require a physician to be licensed in Texas."[65] The court of appeals also analyzed the legislative history of chapter 74 and concluded the statute was intended to define the type of defendant entitled to protection under the state's medical malpractice statute, not what type of expert could provide a report.[66]

The court of appeals then analyzed the expert's qualifications and concluded they were sufficient to permit the expert to opine on the proper treatment for chronically ill patients with urinary tract infections noting that: (1) the expert was licensed and in good standing in Pennsylvania and Missouri; (2) he had practiced medicine since 1977; (3) he was a board certified internist with subspecialties in Critical Care Medicine and Pulmonary Disease; (4) he "managed and/or directed the management of hundreds of patients with similar medical conditions" as the deceased; and (5) he had both experience regarding the transfer of critically ill patients and the documentation required for such transfers—two issues in

59. TTHR, L.P. v. Guyden, 326 S.W.3d 316, 318–19 (Tex. App.—Houston [1st Dist.] 2010, no pet.).
60. *Id.* at 319 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (West 2011)).
61. *Id.*
62. *Id.*
63. *Id.* at 320.
64. *Id.*
65. *Id.*; TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(23) (West 2011).
66. *TTHR, L.P.*, 326 S.W.3d at 320–21.

dispute in the case.[67]

In *Tenet Hospitals Ltd. v. Boada*, the El Paso Court of Appeals reached the same conclusion using tools of statutory construction.[68] The court began with a detailed analysis of the statutory scheme in chapter 74. In subchapter A titled "General Provisions," "Physician" is defined as "an individual licensed to practice medicine in [Texas]."[69] However, in subchapter H (the portion of the statute specifically governing expert reports), the term "Expert" is defined as follows:

> [W]ith respect to a person giving opinion testimony about the causal relationship between the injury, harm, or damages claimed and the alleged departure from the applicable standard of care in any health care liability claim, a physician who is otherwise qualified to render opinions on such causal relationship under the Texas Rules of Evidence.[70]

Finally, in subchapter I titled "Expert Witnesses," the term "physician" is defined as "a person who is: licensed to practice medicine in one or more states in the United States."[71] The court of appeals concluded that the more specific statutory definition of "physician" in subchapter I, which dealt specifically with expert witness qualification, controlled over the general definition of physician in chapter 74.[72]

Other cases in Texas have addressed whether an expert in one field could opine on causation in another. For example, *Anderson v. Gonzalez* is one of a long line of cases focusing on the extent of knowledge and education of a physician proffering an expert report, even if the physician practices in a *different* area of medicine.[73] In *Anderson*, the Eastland Court of Appeals addressed a challenge to an expert report filed pursuant to chapter 74 of the Civil Practice and Remedies Code. The defendant doctor argued the expert was not qualified because he was a radiologist who was testifying on the cause of a premature infant's cardiac arrest that resulted in a child's death.[74] The injuries allegedly occurred as a result of an improperly placed PICC line that the expert asserted should have been discovered in a chest X-ray.[75]

The court began its discussion by summarizing the requirements of an expert report under chapter 74. Section 74.351 sets forth the procedural requirements for submitting an expert report in a medical malpractice

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67. *Id.* at 320.

68. Tenet Hosp. Ltd. v. Boada, 304 S.W.3d 528, 538–39 (Tex. App.—El Paso 2010, pet. denied).

69. *Id.* at 536 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(23)(A) (West 2011)).

70. *Id.* (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(r)(5)(C) (West 2011)).

71. *Id.* (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 74.401(g)(1)).

72. *Id.* at 538.

73. Anderson v. Gonzales, 315 S.W.3d 582, 587-88 (Tex. App.—Eastland 2010, no pet.).

74. *Id.*

75. *Id.* at 584.

claim.[76] An expert report must be dismissed if it "does not represent an objective good faith effort to comply with the definitions of the expert report," which is further defined to mean a written report that contains "a fair summary of the expert's opinions . . . regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed."[77]

To comprise "a good faith effort, the report must discuss the standard of care, breach, and causation with sufficient specificity to inform the defendant of the conduct the plaintiff has called into question and to provide a basis for the trial court to conclude that the claims have merit."[78] An expert must also be qualified to give expert testimony regarding "the causal relationship between the damages . . . and the alleged departure from the applicable standard of care;" to do this "an expert must have knowledge, skill, experience, training or education regarding the specific issue before the court that would qualify the expert to give an opinion."[79] "A physician who is not of the same school of medicine could still be qualified to testify as an expert if he has practical knowledge of what is usually and customarily done by a practitioner under circumstances similar to those confronting the defendant."[80]

The court concluded the expert witness in *Anderson* did not have to be an expert in cardiology.[81] Instead, the fact that the expert regularly performed this type of procedure—specifically the review of chest X-rays—in his practice on a daily basis sufficed, because he had the experience, knowledge, and training to opine regarding the proper placement of a PICC line.[82] Reviewing the expert's curriculum vitae, the court concluded that he was an experienced radiologist, authored numerous articles, taught in the field of radiology, and performed the same type of X-rays analysis at issue in the case on a daily basis.[83]

2. *Does Chapter 74 Require an Expert to be a Physician?*

Another related issue is whether an expert, in order to be "qualified," must be a "physician." Courts looking at this issue concluded, based on the plain language of sections 74.351(r)(5)(C) and (D), that an expert

76. *Id.* at 585.
77. *Id.*
78. *Id.*
79. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(r)(5)(C) (West 2011)).
80. *Id.* (citing Broders v. Heise, 924 S.W.2d 148, 152 (Tex. 1996). In *Broders*, the court rejected an argument that a medical doctor was able to testify about "all medical matters." The court explained further that "given the increasingly specialized and technical nature of medicine, there is no validity, if there ever was, to the notion that every licensed medical doctor should be *automatically* qualified to testify as an expert on every medical question." However, an expert may have a different specialty but still be able to testify if he or she has other knowledge, skill, experience, training, or education that exists in the four corners of the expert report.).
81. *Id.* at 587.
82. *Id.* at 588.
83. *Id.*

testifying on "causation" must be a physician, regardless of a proposed expert's amount of knowledge, skill, experience, training, or education regarding the specific issue before the court.[84] In *College Station Medical Center*, the plaintiff submitted an expert report from a nurse who opined about the cause of plaintiff's injuries sustained from a fall while trying to make her way to her hospital room bathroom.[85] The court relied on the statute's plain language to conclude that a nurse is not a physician and is therefore not qualified to render an expert opinion regarding causation.[86] The Beaumont Court of Appeals reached the same conclusion in *Pangburn v. Anderson*.[87] This does not mean, however, that chapter 74 completely precludes a nurse from submitting an expert report in a healthcare liability case. In *Hayes v. Carroll*, the Austin Court of Appeals concluded a nurse was qualified to give an opinion regarding the standard of care applicable in an intensive care unit (as opposed to causation).[88]

Similar issues arise with respect to psychologists.[89] In *Rusk State Hospital v. Black*, the parents of a psychiatric patient filed a lawsuit after their son asphyxiated himself with a plastic bag.[90] In support of their medical liability claim, the plaintiffs submitted a report from a psychologist alleging the hospital negligently allowed the victim access to the plastic bag, which resulted in his death.[91] The court acknowledged the expert had extensive training and experience in diagnosis and treatment of mental disorders, was a licensed psychologist in the State of Texas, and had a clinical specialty in treatment of schizophrenia and other psychotic disorders.[92] Thus, he could testify regarding applicable standard of care pursuant to section 74.402.[93] However, despite his obviously sterling credentials, the expert could not submit an expert report regarding causation because he was not a "physician" under Texas Civil Practice and Remedies Code section 74.351(r)(5)(C).[94] Despite its holding, the court of appeals seemed palpably uncomfortable with its conclusion noting: "The causal connection between allowing a mental patient access to a plastic bag and his suffocation death from such a bag placed over his head seems too obvious to require explanation."[95]

84. College Station Med. Ctr. LLC v. Todd, No. 10-09-00398-CV, 2010 WL 3434677, at *2 (Tex. App.—Waco Sept. 1, 2010, pet. denied); Pangburn v. Anderson, No. 09-09-00169-CV, 2009 WL 4852211, at *7 (Tex. App.—Beaumont Dec. 17, 2009, no pet.).

85. *College Station Med. Ctr.*, 2010 WL 3434677, at *1.

86. *Id.* at *2–3.

87. *Pangburn*, 2009 WL 4852211, at *6.

88. Hayes v. Carroll, 314 S.W.3d 494, 505 (Tex. App.—Austin 2010, pet. denied).

89. Rusk State Hosp. v. Black, No. 12-09-00206-CV, 2010 WL 2543470, at *5 (Tex. App.—Tyler June 23, 2010, pet. granted). This case was appealed to the Texas Supreme Court on unrelated issues including subject matter jurisdiction and sovereign immunity.

90. *Id.* at *1.

91. *Id.*

92. *Id.* at *7.

93. *Id.*

94. *Id.*

95. *Id.*

The Fort Worth Court of Appeals agreed with *Rusk State Hospital* that a clinical psychologist could submit an expert report regarding the applicable standard of care but could not testify regarding causation.[96] In *Davisson*, the plaintiffs alleged the defendants negligently caused one of the plaintiffs—Mr. Nicholson—to develop an Adderall addiction and psychosis by failing to properly, timely diagnose and monitor him.[97] In support of this claim, the plaintiffs submitted an expert report from a clinical psychologist regarding the use of Adderall and proper treatment, monitoring, and care of adult patients diagnosed with Attention Deficit Disorder.[98] Citing Texas Civil Practice and Remedies Code section 74.402, the court of appeals concluded the expert was qualified to opine regarding the applicable standard of care.[99] However, the expert was not qualified to give an opinion on causation because he was a clinical and forensic psychologist and not a physician.[100] Nevertheless, the court of appeals noted section 74.351(i) explicitly contemplates the use of multiple expert reports in the same case.[101] Thus, one expert can testify regarding the standard of care for issues relating to clinical psychology, while causation is established by a second expert physician.

The critical issue in these cases is the manner in which the term "expert" is defined under chapter 74. For example, under section 74.351(r)(5)(B), an expert is a person qualified under section 74.402 with respect to opinions regarding "a health care provider."[102] Section 74.402 does not reference "physicians," but rather states a person may qualify as an expert witness on whether a "healthcare provider" departed from a standard of care if, for example, the person practices in the same healthcare field.[103] Because this definition does not incorporate the term "physician," it would seemingly govern expert witnesses in non-physician areas of healthcare practice. In contrast, section 74.351(r)(5)(A) specifically requires an expert to be a "physician" when testifying on departures from accepted standards of physician medical care.[104] Thus, the statute contemplates different types of experts depending on the standard of care and breach at issue.

The provisions in sections 74.351(r)(5)(A) and (B) plainly state that different types of experts can opine on the standard of care and its breach. However, causation is another story entirely, and the differences in the courts' opinions can be explained by analyzing sections 74.351(r)(5)(C) through (E). Those provisions govern experts who are opining on "the causal relationship between the injury, harm or damages

96. Davisson v. Nicholson, 310 S.W.3d 543, 550 (Tex. App.—Fort Worth, 2010, no pet.).
97. *Id.* at 547.
98. *Id.* at 548.
99. *Id.* at 551–52.
100. *Id.* at 557–59.
101. *Id.* at 557.
102. TEX. CIV. PRAC. & REM. CODE § 74.351(r)(5)(B) (West 2011).
103. *Id.* § 74.402(b)(1).
104. *Id.* § 74.351(r)(5)(A).

claimed and the alleged departure from the applicable standard of care."[105] Critically, however, these provisions only authorize physicians, dentists, or podiatrists to give opinions regarding causation. There is no similar provision in section 74.351 with respect to "healthcare providers" in general. Thus, the statute appears to create a two-tiered expert system in which non-physician providers—like psychologists and nurses—can testify on the standard of care and any deviations, but cannot testify on the causal link between the alleged breach of the standard of care and resulting harm. Physicians, dentists, and podiatrists are not similarly impaired. Section 74.403(a) provides further clarification:

> [I]n a suit involving a health care liability claim against a physician or health care provider, a person may qualify as an expert witness on the issue of the causal relationship between the alleged departure from accepted standards of care and the injury, harm, or damages claimed only if the person is a physician and is otherwise qualified to render opinions on that causal relationship under the Texas Rules of Evidence.[106]

These cases raise some interesting questions regarding whether expert opinions could or should be submitted by non-physicians in appropriate circumstances. For example, it would seem logical that a licensed psychologist should be able to opine on the manner in which a breach of a standard of care in clinical psychology "caused" a resulting injury, particularly when the injury stems from slipping on a hospital floor or harming oneself in a mental health care facility. But, the plain language of the statute suggests otherwise, and Texas courts are unwilling to supplant the will of the Texas Legislature on an expert's ability to report on causation.

3. *After All This Time, Texas Case Law Interpreting Chapter 74 Continues to Raise New Questions Regarding the Timing of Expert Reports.*

In addition to imposing certain requirements with respect to reliability of expert reports and qualifications of experts in health care liability claims, chapter 74 contains detailed requirements regarding the timing of service of expert reports. Under section 74.351:

> (a) In a health care liability claim, a claimant shall, not later than the 120th day *after the date the original petition was filed*, serve on each party or the party's attorney one or more expert reports, with a curriculum vitae of each expert listed in the report for each physician or health care provider against whom a liability claim is asserted.[107]

Although the statute's text appears clear, a recent case in the Austin Court of Appeals discussed whether the phrase "original petition" refers to the first-filed petition in a lawsuit even if it is subsequently amended to

105. *Id.* § 74.351(r)(5)(C)-(E).
106. *Id.* § 74.403(a).
107. *Id.* § 74.351(a) (emphasis added).

add new parties, or whether the phrase refers to an original petition once it is filed against a particular defendant.[108] In *Hayes*, the defendants argued the term "original petition" refers to the first pleading filed in the lawsuit, and therefore section 74.351 required the plaintiff to file an expert report on every defendant within 120 days regardless whether the defendant was named in the Original Petition or added later by amendment.[109]

Relying on principles of statutory construction, the court of appeals began its analysis by noting the plain language of the statute did not clearly indicate whether the term "original petition" referred to the first pleading filed in the "cause" or the first pleading filed against the particular defendant.[110] Because both constructions were permissible based on the literal language of the statute, the court turned to the legislative history of chapter 74 for guidance.[111] The court cited bill analyses prepared by Texas House and Senate subcommittees handling the 2005 amendment of section 74.351(a), which stated: "It was the intent of H.B. 4 that the report be triggered by the filing of the lawsuit."[112] The court of appeals interpreted this to mean the 120-day period was triggered when a "lawsuit" was filed against a particular defendant (as opposed to when a "cause" is filed with the initial petition).[113] The court also observed that requiring a plaintiff to file an expert report 120 days after the initial pleading would lead to impractical results: the plaintiff never could add new defendants after the expiration of 120 days because he or she would be precluded from filing an expert report against that party.[114] Thus, the court of appeals concluded that "[i]f the pleading is the first pleading naming a defendant, it is the 'original' petition as to that defendant regardless of its title, and the 120-day expert report deadline is triggered by that filing as to that defendant."[115]

4. *Recent Case Law Presents an Interesting Analysis of the Interplay Between the Rule 703 and Chapter 74 Expert Reports.*

Other case law addresses the interplay of chapter 74 expert reports and Texas Rule of Evidence 703, which provides that an expert may consider inadmissible evidence if it is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."[116] In *Gannon v. Wyche*, the Houston Court of Appeals considered an argument that a physician's expert report in a chapter 74 healthcare liability case could not rely on an unsworn, unauthenticated, and undated

108. Hayes v. Carroll, 314 S.W.3d 494, 499–502 (Tex. App.—Austin 2010, pet. denied).
109. *Id.* at 499.
110. *Id.* at 499–500.
111. *Id.* at 500.
112. *Id.*
113. *Id.*
114. *Id.* at 501.
115. *Id.*
116. TEX. R. EVID. 703.

written statement in forming medical opinions.[117] The court of appeals noted that experts in many instances rely on hearsay, privileged communications, and other otherwise inadmissible information.[118] The question, however, was whether a chapter 74 report applied a different rule with respect to facts relied upon by the expert.[119] The court of appeals resolved the issue by focusing on the purpose of expert reports in healthcare liability claims. Chapter 74 does not require such reports to meet the same requirements as evidence offered in a summary judgment proceeding or at trial.[120] Moreover, a trial court's determination of the adequacy of an expert report under chapter 74 is a preliminary proceeding in which the rules of evidence may not apply to the report or to the information reviewed by the expert in preparing the report.[121] The court of appeals also cited persuasive authority stating: "Because Chapter 74 prohibits the introduction of expert reports into evidence, the Legislature likely did not intend that expert reports and the evidence reviewed by experts in preparing the reports must comply with the rules of evidence."[122] This conclusion broadly suggests that none of the Texas Evidence Rules apply to expert reports, and an expert preparing a chapter 74 report could plausibly rely on evidence otherwise inadmissible.

III. PRIVILEGES

A. One Recent Texas Case Clarifies Whether Trial Courts Can Order the Disclosure of Privileged Information on an "Attorney's Eyes Only" Basis (Presumably an Already Settled Issue)

In *In re Energy XXI Gulf Coast, Inc.*, the Houston Court of Appeals, First District considered whether documents protected by the attorney-client privilege and work product doctrine could be shared on an "attorney's eyes only" basis with another party.[123] In this case, which involved an insurance coverage dispute over a well blowout, a party sought documents from Energy XXI Gulf Coast that alleged they were protected by the attorney-client and attorney work product privileges.[124] The relators objected to the disclosure on the basis of the attorney-client and attorney work product privileges, and the trial court ultimately conducted an in-

117. Gannon v. Wyche, 321 S.W.3d 881, 884 (Tex. App.—Houston [14th Dist.] 2010, pet. denied).

118. *Id.* at 889 (citing *In re* Christus Spohn Hosp. Kleberg, 222 S.W.3d 434, 440 (Tex. 2007)).

119. *Id.* at 890.

120. *Id.* at 890–911 (citing Am. Transitional Care Ctrs. v. Palacios, 46 S.W.3d 873, 879 (Tex. 2001)).

121. *Id.* at 890.

122. *Id.* at 889 (citing Hiner v. Gaspard, No. 09-07-240-CV, 2007 WL 2493471, at *7 (Tex. App.—Beaumont Sep. 6, 2007, pet. denied)).

123. *In re* Energy XXI Gulf Coast Inc., No. 01-10-00371-CV, 2010 WL 5187730, at *1 (Tex. App.—Houston [1st Dist.] Dec. 23, 2010) (orig. proceeding).

124. *Id.* at *1.

camera review of the documents.[125] The trial court agreed that the documents were privileged but still ordered the documents's production "subject to the parties' protective order and for review on an attorney's eyes only basis."[126] This puzzling order seemed to conflate assertions of trade secret privilege (in which a remedy might include an "attorney's eyes only" review) with the work product privilege (in which documents are not to be disclosed to the opposing party except under certain limited circumstances). Predictably, the relators filed a mandamus proceeding challenging the trial court's order. The court of appeals conditionally granted the petition for writ of mandamus noting there was no authority to support the proposition that a trial court has discretion to produce privileged documents to an opposing party's attorney even if the documents qualify as attorneys' eyes only.[127]

B. Several Recent Cases Raise Interesting Questions Regarding the Potential Waiver of Privilege in Dual Representation Scenarios

There has been an interesting case during this Survey period regarding whether a corporation's in-house counsel has the right to use privileged documents on a personal basis when he or she obtained the documents while representing the corporation. In *Kennedy v. Gulf Coast Cancer & Diagnostic Center*, Gulf Coast's in-house counsel, Kirk Kennedy, engaged law firm EBGWH to render an opinion regarding the corporation's potential liability as a result of a former executive's alleged misconduct.[128] Kennedy subsequently shared the memorandum with his individual lawyers and threatened to disclose the memorandum to the public, prompting Gulf Coast to seek a temporary injunction to prevent Kennedy from using or disclosing the information in the memorandum.[129] The court of appeals considered whether Kennedy, as an officer of Gulf Coast and an existing client of EBGWH individually, could retain and use the legal memorandum.[130] The court concluded the memorandum was solely intended for Gulf Coast, a legal entity separate and apart from the individuals who composed the company.[131] For example, the memorandum was addressed to Gulf Coast's president, recited that EBGWH was "retained by Gulf Coast," and indicated that EBGWH was asked by Kennedy to apprise Gulf Coast's President and Board of Directors of the company's potential exposure.[132] The memorandum also specifically stated: "EBGWH has been retained only to provide advice to the Company and

125. *Id.* at *1–2.
126. *Id.* at *2.
127. *Id.* at *8.
128. Kennedy v. Gulf Coast Cancer & Diagnostic Ctr., 326 S.W.3d 352, 356 (Tex. App.—Houston [1st Dist.] 2010, no pet.).
129. *Id.* at 355.
130. *Id.* at 357.
131. *Id.* at 358.
132. *Id.* at 356.

is not providing advice or counsel to the Company's owners, officers or directors, who should obtain independent counsel regarding any potential risk to them in their individual capacities."[133] The court discounted Kennedy's argument that he had requested EBGWH to prepare an analysis for the company and its officers.[134] The court noted there was no objective evidence (beyond simply Kennedy's subjective intent) showing EBGWH represented the company and its officers and directors, and the memorandum contained clear disclaimers to the contrary.[135]

In a slightly different factual scenario, the Austin Court of Appeals discussed whether one client in a joint representation has the ability to waive attorney-client privilege with respect to a second client under Texas Rule of Evidence 511.[136] In the underlying case that culminated in the mandamus proceeding, the two parties—Lindig Construction and Trucking and Richard Simmons—were defended by the same trial counsel pursuant to an insurance policy issued by Unitrin.[137] One of the clients, Simmons, signed a written waiver of the attorney-client privilege, and the plaintiffs in the underlying personal injury suit used the waiver to seek discovery of invoices describing the legal services provided by trial counsel in that suit.[138] The plaintiffs argued the signed waiver was sufficient to waive the attorney-client privilege with respect to all invoices, including those involving trial counsel's work on behalf of Lindig.[139] The court of appeals disagreed, noting there was no Texas authority to support the proposition that one client can waive the attorney-client privilege on behalf of the other client.[140] The court took note that under Texas Rule of Evidence 503(5), the privilege does not apply to communications "relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, *when offered in an action between or among any of the clients*."[141] However, because the underlying litigation did not involve a lawsuit between Unitrin's joint clients, Rule 503(5) did not apply.[142]

133. *Id.*
134. *Id.* at 358.
135. *Id.*
136. *In re* Unitrin Cnty. Mut. Ins. Co., No. 03-10-00384-CV, 2010 WL 2867326, at *2 (Tex. App.—Austin July 22, 2010) (orig. proceeding)).
137. *Id.* at *1.
138. *Id.* at *3.
139. *Id.*
140. *Id.*
141. *Id.* (quoting TEX. R. EVID. 503(d)(5)).
142. *Id.*

IV. MISCELLANEOUS DECISIONS OF NOTE

A. One Case in the Survey Period Raised Issues Regarding Authentication of Videos Overlaid by Information Produced by Other Software

At least one case discussing Texas Rule of Evidence 901 provides useful guidance regarding the authentication of documents. In *Henry v. Burlington Northern Santa Fe Corp.*, the Tyler Court of Appeals considered whether the trial court properly admitted into evidence a video of a collision, because the video contained a software-based data overlay called LocoCAM, which displays additional information such as the time, date, speed, and location of the train.[143] The opinion raises interesting questions in light of the evolving sophistication of video capture technologies. The plaintiffs argued the software overlay was not properly authenticated because the Burlington Northern employees testifying about the software "knew nothing about how the software worked or anything at all about the accuracy of the information displayed."[144]

Under Texas Rule of Evidence 901(a), the requirement of authentication is "satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."[145] This evidence could "include testimony by a witness with knowledge that a matter is what it is claimed to be."[146] However, authentication is also established by circumstantial evidence including the appearance, content, substance, internal patterns, and other distinctive characteristics in conjunction with circumstances of the evidence.[147] Critically, however, there is no error to admission or exclusion of evidence if there is independent corroboration.[148] Regrettably, because other evidence of the time, date, speed, and location of the train at the time of the accident existed, the court of appeals ducked the question of whether the LocoCAM overlay itself was authentic.[149] However, the case emphasizes that careful counsel should either take steps to authenticate additional software and video elements integrated with a video or audio display, or corroborate the additional overlay information through other evidence.

143. Henry v. Burlington N. Santa Fe Corp., No. 12-08-00423-CV, 2010 WL 3582636, at *1 (Tex. App.—Tyler Sep. 15, 2010, no pet.).
144. *Id.* at *3.
145. Tex. R. Evid. 901(a).
146. *Henry*, 2010 WL 3582636, at *4 (citations omitted).
147. *Id.*
148. *Id.*
149. *Id.*

B. Courts Have Discussed the Scope and Application of the Business Records Exception but, Surprisingly, One Case in the Civil Context Also Discusses the State of Mind Exception to the Hearsay Rule

The only cases identified during the Survey period that addressed the Texas Rules of Evidence on hearsay focused on the business records exception—Texas Rule of Evidence 803(6)—and the state of mind exception—Texas Rule of Evidence 803(3). In *In re Estate of Wren v. Bastinelli*, the plaintiffs Al and Sue Bastinelli sued under a written rental agreement alleging the defendant's gross negligence resulted in the theft and loss of their property after several break-ins.[150] The defendant sought admission of two emails written by the property owner to his daughter stating he had given the Bastinellis' contact information to the police after an earlier break-in and changed the locks on the door.[151] The court of appeals disagreed the emails could fall within Texas Rule of Evidence 803(3): the "state of mind" exception to the hearsay rule.[152] Because the emails were written after the lawsuit was filed, they were not spontaneous statements about the property owner's state of mind during the thefts, but rather his version of past events.[153] For similar reasons, the emails did not fall under Texas Rule of Evidence 803(6): the business records exception to the hearsay rule.[154] The court of appeals noted the emails were prepared in anticipation of litigation and thus could not qualify as business records for evidentiary purposes."[155]

One last interesting note is the appellate court's treatment of the defendant's offer of proof regarding certain proposed testimony that the defendant argued was subject to a hearsay exception. At one point in the trial, the defendant sought to introduce hearsay testimony from the Bastinellis' witness to the effect the property owner told him he changed the

150. *In re* Estate of Wren v. Bastinelli, No. 06-09-00060-CV, 2010 WL 173828, at *1 (Tex. App.—Texarkana Jan. 20, 2010, pet. denied).

151. *Id.* at *2.

152. *Id.* Rule 803(3) provides: "A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will." Tex. R. Evid. 803(3).

153. *Bastinelli*, 2010 WL 173828, at *2.

154. *Id.* at *3. Rule 803(6) provides: "A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by affidavit that complies with Rule 902(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. 'Business' as used in this paragraph includes any and every kind of regular organized activity whether conducted for profit or not." Tex. R. Evid. 803(6).

155. *Bastinelli*, 2010 WL 173828, at *3.

lock and believed police would contact the Bastinellis.[156] A critical problem occurred on appeal, however, because the defendant did not complete a question and answer offer of proof but simply described the testimony.[157] When the Bastinellis objected, arguing that their witness would not testify according to the offer of proof, the court found it very difficult to rule on the hearsay objection.[158]

This Survey period also raised the issue regarding whether one entity could offer records into evidence under the business records exception to the hearsay rule when it did not originally create the records but received them from a second entity.[159] In *Simien v. Unifund CCR Partners*, the plaintiff Unifund CCR Partners sued Michelle D. Simien to recover damages as a result of her failure to repay a credit card account opened with Citibank.[160] Unifund purchased the debt from Citibank and then brought suit to recover damages.[161] During the bench trial, the trial court admitted a business records affidavit offered by Unifund and signed by one of its employees, which attached a Unifund statement, an Assignment from Citibank to Unifund, three Citibank monthly statements, and a Citibank Card Agreement.[162] Simien objected to the evidence on the basis that the business records affidavit failed to show that Unifund verified the accuracy of the records obtained from Citibank.[163] The court of appeals noted:

> A document authored or created by a third party may be admissible as business records of a different business if: (a) the document is incorporated and kept in the course of the testifying witness's business; (b) that business typically relies upon the accuracy of the contents of the document; and (c) the circumstances otherwise indicate the trustworthiness of the document.[164]

Applying these standards, the court of appeals concluded the trial court properly admitted the Citibank records as records of Unifund under the business records exception to the hearsay rule.[165] First, because the evidence showed Unifund kept the records received from Citibank in the ordinary course of Unifund's business "as permanent records of the company," this sufficed to show Unifund's adoption and incorporation of the records.[166] Second, although Unifund did not confirm the accuracy of Citibank's records, Unifund's reasonable reliance on the accuracy of Ci-

156. *Id.* at *1–2.
157. *Id.* at *2.
158. *Id.*
159. Simien v. Unifund CCR Partners, 321 S.W.3d 235, 240 (Tex. App.—Houston [1st Dist.] 2010, no pet.).
160. *Id.* at 239.
161. *Id.*
162. *Id.*
163. *Id.* at 240.
164. *Id.*; *see* TEX. R. EVID. 803(6).
165. *Id.* at 245.
166. *Id.* at 242.

tibank's documents sufficed for the business records exception."[167] Finally, the court of appeals concluded that the third-party documents had a high degree of trustworthiness because they were created by an entity that is ordinarily required to keep careful records of its customers' credit card accounts.[168] Critically, the court of appeals did not agree that Unifund's employees needed personal knowledge of Citibank's record-keeping practices.[169]

The Beaumont Court of Appeals adopted the *Simien* three-part test to determine whether one entity could "adopt" the documents of a second entity for purposes of the business records exception.[170] In *Nice v. Dodeka, L.L.C.*, the plaintiff opened a credit card account with Chase that required repayment based on accounting provided by Chase in monthly credit card statements.[171] The credit card debt was subsequently sold to Unifund (the same party in the *Simien* case) and then sold to Dodeka, L.L.C.[172] The court of appeals considered whether business records created by one entity that later become the primary records of another entity are still admissible as records of regularly conducted activity under Rule 803(6).[173] The court of appeals concluded that the *Simien* three-part test had been met on the basis of several affidavits submitted by the defendant's custodians where the witnesses swore that: (1) they were record custodians; (2) they were personally familiar with how Dodeka prepared and maintained its records; and (3) they had personal knowledge of Unifund's business record practices.[174] Moreover, both custodians vouched for the accuracy of the records initially created by Chase and then subsequently maintained by Unifund.[175] (These statements seem conclusory because Dodeka's custodians were twice-removed from Chase's process of generating the business records and once-removed from Unifund's processes for maintaining the records. But as discussed above in *Simien*, all that is required is reasonable reliance with respect to accuracy of the records.) Finally, the court of appeals took great solace that the two affidavits were in a substantially correct form that complied with Texas Rule of Evidence 902(10)(b).

C. Relevance and Prejudice (Rules 401 and 403)

There were few cases relating to Rules 401 and 403 of the Texas Rules of Evidence, but one in particular deserves mention due to an allegated

167. *Id.* at 243.
168. *Id.* at 244.
169. *Id.*
170. Nice v. Dodeka, L.L.C., No. 09-10-00014-CV, 2010 WL 4514174, at *4 (Tex. App.—Beaumont Nov. 10, 2010, no pet.).
171. *Id.* at *1.
172. *Id.*
173. *Id.* at *4.
174. *Id.*
175. *Id.*

spoliation of evidence by one party.[176] *Brookshire Brothers, Ltd. v. Aldridge* involved a premises liability case in which the plaintiff was injured after slipping on a liquid substance.[177] The defendant, Brookshire Brothers, preserved a store video recording just before the accident but recorded over other portions of the tape that could have shown the source of the spill, who may have seen the spill, or the amount of effort needed to clean the spill.[178] The trial court admitted evidence regarding destruction of the tape and issued a spoliation instruction to the jury.[179] Brookshire Brothers argued during trial that the evidence of the tape's destruction was improperly prejudicial under Texas Rule of Evidence 403.[180] The court of appeals noted, however, that the evidence could be properly submitted to the jury unless the only basis for the spoliation accusation consists of speculation or conjecture, or there is a reasonable explanation for the missing evidence.[181] The court concluded there was insufficient evidence for these elements.[182]

D. Witness Character (Rule 608(b))

It is not often that case law presents a civil evidence issue with respect to Rule 608. However, during the survey period, the Texas Supreme Court addressed this very issue in *TXI Transportation Co. v. Hughes*.[183] In *Hughes*, the supreme court discussed whether it was error for a trial court to admit evidence regarding the immigration status of a commercial truck driver that caused a collision resulting in the deaths of several members of the plaintiffs' family.[184] In a divided decision, the court of appeals concluded the driver's illegal status was relevant impeachment evidence or, alternatively, harmless error.[185] The supreme court reversed the court of appeals's judgment and remanded the case for a new trial.[186]

During trial, the plaintiffs solicited testimony and offered extrinsic evidence regarding the driver's immigration status after he testified he never lied to get a driver's license and did not know if he had a legal right to work in the United States.[187] The supreme court first noted the driver's testimony regarding his immigration status could not be used for impeachment of prior inconsistent statements because it was a collateral matter not relevant to proving a material issue in the case.[188] The supreme court then analyzed Texas Rule of Evidence 608(b), which pro-

176. Brookshire Bros., Ltd. v. Aldridge, No. 12-08-00368-CV, 2010 WL 2982902, at *1 (Tex. App.—Tyler Jul. 30, 2010, pet. filed).
177. *Id.* at *1.
178. *Id.*
179. *Id.*
180. *Id.* at *6, *8.
181. *Id.* at *8.
182. *Id.* at *9.
183. TXI Transp. Co. v. Hughes, 306 S.W.3d 230 (Tex. 2010).
184. *Id.* at 233.
185. *Id.*
186. *Id.*
187. *Id.* at 241.
188. *Id.* at 241–42.

vides: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than the conviction of a crime as provided in Rule 609, may not be inquired into on cross-examination of the witness nor provided by extrinsic evidence."[189] The supreme court concluded that under this rule, a witness's immigration status is not admissible to impugn his character for truthfulness.[190] The supreme court also disagreed that any error associated with the immigration testimony was harmless. The supreme court noted repeated and extensive testimony and extrinsic evidence from several witnesses regarding the driver's immigration problems, including testimony from the driver himself, TXI representatives, and the investigating DPS trooper.[191] This testimony was not "harmless" because of the prejudicial effect such testimony would have on a jury.[192] In a particularly resonant passage, the supreme court observed:

> The record shows that Hughes sought to hedge his theory by calling attention to Rodriguez's illegal immigration status whenever he could. Such appeals to racial and ethnic prejudices, whether "explicit and brazen" or "veiled and subtle," cannot be tolerated because they undermine the very basis of our judicial process."[193]

V. CONCLUSION

The cases discussed above reflect the relative emphasis courts place on expert evidence issues. Not surprisingly, the vast majority of cases discussing civil evidence relate to Texas Rule of Evidence 702 and related concepts in chapter 74 of the Texas Civil Practice and Remedies Code. Courts in civil cases also tend to focus on certain exceptions to the hearsay rule—for example, the business records exception—that are common in such cases. Nevertheless, this Survey period includes several interesting cases that explore concepts of relevance, prejudice, and attacks on a witness's character.

189. *Id.* at 242 (quoting excerpts of TEX. R. EVID. 608(b)).
190. *Id.*
191. *Id.* at 242 (quoting excerpts of TEX. R. EVID. 608(b)).
192. *Id.* at 243.
193. *Id.* at 245.